

Business and human rights – access to remedy

POLAND - Case study

2019

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1. Country where the incident took place	Poland
2. Country where the remedy was sought	Poland
3. Type of remedy used <i>(reasons why this remedy was used)</i>	Judicial Earlier attempts supported by the Municipal Consumers' Ombudsmen to find an amicable solution were unsuccessful.
4. Deciding body - (in original language /and in English)	The Court of Appeal in Warsaw (Sąd Apelacyjny w Warszawie)
5. Date (month/year) when the remedy was initiated Date, if available, of the (final) decision	April 16 th , 2018
6. Reference details, (type and title of court/body; in original language and English [official translation, if available])	Ref. V Aca 1096/17 + Correlated judgment of the Warsaw Regional Court of February 24 th , 2016, Ref. IV C 692/14
7. Web link to the decision/procedure (if available)	http://orzeczenia.waw.sa.gov.pl/details/\$N/15450000002503_V_ACa_001096_2017_Uz_2018-04-16_002
8. Did the incident receive media attention? If so, please provide links	Yes, although rather as one of the examples of the unfair market practices, than an article on this specific case: Rzeczpospolita, Walka o unieważnienie nieuczciwych umów sprzedaży prądu, 23 September 2018 https://www.rp.pl/Konsumenci/309239977-Walka-o-uniewaznienie-nieuczciwych-umow-sprzedazy-pradu.html
9. Legal basis in national/EU /international law of the rights under dispute	The main issues addressed by this judgement were: 1) incorrect application of the article 63 ³ of the Code of the Civil Proceedings and not treating the case as a consumer rights protection case, what resulted in the lack of acceptance of the legal standing of the Municipal Consumers' Ombudsman and its right to represent/act for the individual consumers. 2) incorrect application of the law, and in particular article 232 and article 328 § 2 of the Code of the Civil Proceedings by relying solely on the Civil Code provisions concerning defects of the declaration of will, while ignoring the provisions of the Act on the Prevention of the Unfair Market Practices, what resulted in not applying article 13 thereof, which provides for the reversed burden of proof and thus rejecting the case on basis of the lack of proof; 3) incorrect application of the art. 245 of the Code of the Civil Proceedings by deciding that the documents submitted, in particular the consumers' statements, as private documents are not credible and do not constitute

	evidence in the meaning of that article, whereas those documents constitute a standalone evidence, lack of consideration of which did affect the judgment.
10. Parties	Municipal Consumers' Ombudsman (<i>Miejskiego Rzecznika Konsumentów</i>) (...) W., A. M., T. O., F. M., M. G. (1), F. B., T. J. and Municipal Consumers' Ombudsman (<i>Miejskiego Rzecznika Konsumentów</i>) (...) W. acting for T. K. (1), Z. J., J. Ż. (1), S. D., J. Ż. (2), O. S., A. B. (1), S. K. (1), I. S. (1), H. M. (1), K. D., W. Ł., K. Z., K. M., E. T., T. J., F. Z., J. K. (1), Z. O., A. K. (1), J. K. (2), T. K. (2), A. K. (2), L. K., S. R., D. S., J. W., K. K. (1), M. D. (1), D. J., M. B. (1), T. G., I. K., B. P. (1), A. G., S. K. (2), S. J., A. L., I. P., J. K. (3), H. M. (2), K. J., E. C., D. R., H. S., I. K. (1), A. W. (1), E. W., B. K. (1), W. B., G. L., C. W., J. L., K. B., T. C. (1), E. Ł., M. L. (1), E. R., M. Ś., T. B., I. O., J. G., W. C., R. S., I. K. (2), S. Z., S. G., Z. Ł., J. S., A. B. (2), F. B., R. W., H. G., T. P., B. K. (2), J. K. (4), A. B. (3), D. N., B. P. (2), M. L. (2), B. K. (3), J. B. (1), Z. K., B. N. (1), W. G., J. P., H. F., A. M., G. S., S. W., T. K. (3), A. Ż., T. O., G. W., M. K. (1), T. C. (2), K. S., J. K. (5), S. S., F. M., A. W. (2), M. D. (2), M. K. (2), M. G. (1), D. Ż., M. S. (1), J. B. (2), A. C. (1), M. S. (2), M. G. (2), B. N. (2), A. C. (2), M. B. (2), H. A. i I. S. (2) versus (...)limited liability company (sp. z o.o.)
11. Form of abuse/violation, and rights involved ¹	The company used unfair market practices, which resulted in misleading large number of consumers across Poland, mainly senior people, into signing contracts for the energy provision. Yet in the case also right to fair trial comes into picture.
12. Type of business involved	Energy: Energy and gas supply Country of origin of the company: Poland Form: limited liability company (Spółka z ograniczoną odpowiedzialnością).
13. Profile of the victim(s) - individuals /population affected - can be broader than actual parties to the proceedings <i>(e.g. country of origin, belonging to a particular minority – ex. ethnic, gender, age, occupation, social status, relations with the responsible company)</i>	Individual consumers, mainly senior citizens. Consumers were contacted predominantly in the first place by landline phones (which are at present more frequently used by more senior people, with younger generations relying more on the mobile phones), and usually during the working hours, when most working / younger people are more likely to be at work or education facilities. Thus while the targeted group was not limited to the senior citizens, the mode of operation was targeting them more strongly than other groups.

¹ The rights affected may include the entire spectrum of internationally recognised fundamental rights – civil and political rights, as well as economic, social and cultural rights; for example: the right to non-discrimination, the right to private and family life, freedom of expression, the right to health, the right to protection of life and physical integrity, property rights, consumer rights or environmental rights.

<p>14. Any legal or institutional factors in the Member State that facilitated the abuse of the (fundamental) rights in questions?</p>	<p>No, although some interviewees stressed that judges in general are usually treating consumer cases with disregard, while at the same time their judgments seem to suggest lack of full understanding of the nature of such cases.</p> <p>Low legal awareness (both in terms of understanding of the consequence of signing the contract without reading, as well as ability to pursue remedies available effectively) certainly contributed to the easiness with which consumers were misled. Possibly better legal education as part of the general education, and inclusion of Business & Human Rights/CSR course as an obligatory element of any law and economy-related studies could contribute to higher ethical standard of conduct on the side of the companies.</p>
<p>15. Key facts of the case</p>	<p>The Municipal Consumers' Ombudsman has been approached individually by over 100 people who signed a contract for energy supply with the defendant company. Consumers claimed that they were misled into doing so by representatives of the defendant as to the type of offer, the contractor with whom they had signed the contract and its terms. In the statements made, consumers claimed that representatives of the defendant company provided information that they represent the current electricity supplier, informed that the visit of the defendant's representative concerns an annex to the contract with the current electricity seller, informed that the proposal to conclude the contract concerns the offer, that the purpose of signing documents is to supplement the data on the energy sales contract, they did not provide unambiguous, clear and timely information about the identity of the defendant and its relation to the company (...), they did not give the full name of the entrepreneur, they used the terms "energy, energy company", did not lead consumers out of error as to whom the defendant's representative represents, provided incomplete and ambiguous information about the purpose of the visit, omitted information of importance to consumers, i.e. not informing that conclusion of a contract with the defendant leads to a change of energy supplier and termination of the contract with its current supplier, did not give consumers a model statement on withdrawal from the contract, etc.</p> <p>Often the offer was presented to the consumers during a telephone conversation, after which relevant documents were delivered by courier – in the presence of whom the documents had to be signed. This exerted psychological pressure on the consumers to sign the documents without reading them carefully, including signing the document confirming that they have read the documentation. Most of consumers did not read the signed documents and only after some time, when the new bills started to arrive, they have realized that they had signed contracts with a new energy supplier.</p> <p>As a result they faced a choice of either pre-maturely terminating contract with the existing provider and incurring related fine for doing so, or terminating the contract with the new provider, which turned out to be unfavourable to them, and incurring fine for doing so. While the fines or payments were in the range of 500 zł (approx.. 120 Euro), i.e. while not entirely negligible, not extremely high either, yet for the affected group, which often could rely only on small pension for living, this amount constituted a very substantial part of the monthly income, what in turn could affect their right to adequate standard of living.</p> <p>The Municipal Consumers Ombudsman decided to support the affected customers, and after efforts of finding amicable solution failed, submitted the case to the court claiming that actions of the defendant company violated the Act on the Prevention of Unfair Market Practices and thus the consumers' contracts should be annulled and any payments made to the defendant returned.</p>

	<p>Yet the court of the first instance rejected the case. Relying solely on the article 6 of the Civil Code and Code of Civil Proceedings, while disregarding entirely the Act on the Prevention of Unfair Market Practices, it decided that the case is not a consumer protection case and thus the Ombudsman has no legal standing to represent people who entered into contracts with the defendant company, and demand that their contracts with the new energy provider are annuled without fine being applied. It also decided that documents submitted, mainly the individual consumers' statements, do not constitute evidence as they were written by people who have an interest in the given case. Coupled with lack of taking into consideration of the Act on the Prevention of Unfair Market Practices, on which Ombudsman relied to point to the reversed burden of proof, this led to the case being rejected on the basis of the lack of legal standing of the Ombudsman in the given case, as well as lack of proving that the individual were misled.</p> <p>The Municipal Consumers Ombudsman challenged that ruling in the proceedings before the Court of Appeal in Warsaw.</p>
<p>16. With respect to the case described in this template - <u>what worked well</u> from the standpoint of the complainant/victim? What were the reasons for it?</p>	<p>One of the things that worked well was the fact that the affected consumers were supported by the Municipal Consumers' Ombudsman, who took on the burden of bringing the case into the court. If not for MCOs intervention, majority of the affected consumers (who were mainly senior people, often overwhelmed by the need to go the court to be able to claim the remedy and seek return of the costs incurred) would probably not pursue their claim individually in the court.</p> <p>Also the repeal of the Warsaw Regional Court's judgement by the Court of Appeal (Court of the second instance) indicates that system of instance review works.</p> <p>Finally, other institutions, such as the Office for the Protection of Competition and Consumers, also acted and – independently of the Court – imposed fines.</p>
<p>17. With respect to the case described in this template – <u>what did not work well</u> from the standpoint of the complainant/victim? What were the reasons for this?</p>	<p>One of the elements that did not work well was the time factor. Although the judgment of the Court of Appeal repealed the judgment of the Regional Court and returned it for consideration again, this took place in 2018, whereas the case first made it into the court in 2014 – with the judgment of the court of the first instance being issued after 2 years since the case</p> <p>Additionally, particularly in view of the judgment of the Court of Appeal, the proceedings of the court of the first instance were incorrect in that the court did rely solely on the Civil Code and Code of Civil Proceedings, while completely ignoring legal provisions – Act on the Prevention of Unfair Market Practices – indicated by the Municipal Consumer Ombudsman as the basis on which the claim is made, and by implication not applying the reversed burden of proof.</p>
<p>18. Main reasoning / argumentation (of the parties and the court: key issues /concepts clarified by the case)</p>	<p>In its judgement of 16 April 2018, the Court of Appeal repealed the decision of the court of the first instance and returned the case to that court for reconsideration.</p> <p>The Court of Appeal stated that:</p> <ol style="list-style-type: none"> 1) It is unquestionable that based on the article 63³ of Code of Civil Proceedings the Municipal Consumer Ombudsman has legal standing to represent citizen in all types of consumer cases. Thus it can represent the consumer in every case before the court in which given individual would him/herself have a legal standing. The Court reiterated also the right of consumers to either pursue cases by themselves or be represented by the Ombudsman. It also stressed that the

	<p>Ombudsman has a standalone legal standing under a number of other regulations, which further expand situations in which the Ombudsman has a legal standing. The Court also stressed that Ombudsman is thus not only formal but also material party to the case.</p> <p>Additionally, it pointed out that the Court of first instance dismissed the case due to the lack of legal standing despite the fact that individual consumers who joined the proceedings also constituted parties in that case.</p> <p>2) Art. 233 of the Code of Civil Procedure concerning the principle of a free assessment of evidence was infringed, as contrary to the assessment of the Court of the first instance, private documents also can be used to establish the factual basis of the case. In this particular case the Court of Appeal pointed to the fact that it is crucial to establish the credibility of the documents – which in its opinion in this particular case it was possible to do. The court pointed out that as with other evidence, the court should assess the credibility of such evidence taking into account their characteristics as well as the objective circumstances of their submission. In the opinion of the Court of Appeal, the court of the first instance mistakenly considered consumer statements unreliable only because they are contained in private documents, whereas it is important in this case to take into consideration also the fact that a large part of them was submitted to the Municipal Consumer Ombudsman independently and spontaneously, even before the case made it to the court. In fact, it is exactly the analysis of individual consumer complaints that allows one to determine that there is a uniform pattern of the defendant company’s conduct in acquiring customers. In the opinion of the Court of Appeal, the declarations made by consumers are reliable, as also the only link between them is that they all turned to the same institution for help. The extraordinary convergence of their relations, the fact that they talk about the course of contact with representatives of the defendant in such a similar way, makes them credible. As stated in the judgment, “in the opinion of the Court of Appeal, proof of establishing the circumstances of concluding a contract by a specific consumer is not only its statement, or evidence from the party, but also statements of other persons describing the practice of the entrepreneur’s operation, which from the point of view of an individual consumer should be treated as documents originating from third parties.”\</p> <p>3) The Court of the first instance failed to recognize the merits of the case, in that it failed to investigate the substantive grounds for claims, by failing to apply the provisions of the Act on Counteracting Unfair Market Practices and consider on merits the Ombudsman’s claim for payment of damages and for the annulment of contracts concluded by consumers with the defendant.</p>
<p>19. What was the outcome?</p>	<p>On the basis of the final court decision, the case was returned to the Warsaw Regional Court again for consideration. The case is currently ongoing. No final decision was issued yet.</p>
<p>20. Did the case lead to legislative or policy developments?</p>	<p>No, although the need to tackle unfair market practices is being used as a one of justifications behind the current legislative work on the Bill on the legal responsibility of the legal persons / collective entities. Also Office for the Protection of Competition and Consumers is monitoring situation closer and in a number of cases has imposed fines on entrepreneurs using similar practices to those described in this case.</p>

<i>(including more general measures introduced to stop future incidents)</i>	
21. In case the remedy sought was not of a judicial nature, was there eventually any follow up on the case in the court? Or followed by a different type of procedure?	The Municipal Consumer Ombudsman, acting on behalf of individual consumers requested reimbursement of the payments made to the defendant company as well as interests. On average those amounted to approx. 500 zł per person plus interests.
22. Any other comments relevant to case?	No