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MISSELLING OF FINANCIAL SERVICES AS A PRACTICE THAT INFRINGES COLLECTIVE CONSUMER INTERESTS

INTRODUCTION

The foundation of consumer law is the principle of consumer protection as a weaker party in relation to the entrepreneur. The consumer protection package is extensive. Beginning with the Constitution of the Republic of Poland¹, through the Civil Code², the Act of 30 May 2014 on consumer rights³, as well as the Act of

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¹ Art. 76 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, No. 78, item 483 as amended Art. 76. Public authorities protect consumers, users and tenants against activities that threaten their health, privacy and security as well as against dishonest market practices. The scope of this protection is specified in the Act.

² E.g. Art. 385, Art. 385¹ of the Act of 23 April 1964 –Civil Code, i.e. Journal of Laws of 2017 item 459 as amended.

³ I.e. Journal of Laws of 2017 item 683. Used abbreviation: Consumer Rights Act.

16 February 2007 on competition and consumer protection⁴. Consumer law also contains more detailed regulations⁵, including the sector-specific regulation related to the services provided to consumers. An example of this is the financial services market⁶, and in particular the regulation of the abovementioned Act on Competition and Consumer Protection. This law is designed to protect free competition on the free market, which indirectly protects the consumer as the last link in the market economy chain. The provisions of this Act expressly contain the prohibition of using practices that violate the collective interests of consumers. One of these practices, introduced by the legislator on the basis of Art. 1 point 3 sub-point c of the Act of 5 August 2015 on the amendment of the act on competition protection and consumers and some other laws⁷, has been – effective since 17 April 2016 – the so called ban on *misselling* of financial services⁸. The introduction of the ban on *misselling* is related to the trend that can currently be observed, consisting in offering products, including financial ones, which are individualized, that is, tailored to the consumer's needs.

SELECTED SCOPE OF CHANGES INTRODUCED BY THE ACT AMENDING THE ACT ON COMPETITION AND CONSUMER PROTECTION (ACCP)

On the basis of the above Art. 1 point 3 sub-point c of the Act amending the ACCP, the legislator made a thorough change of Art. 24 of the ACCP. In the provision of Art. 24 sec. 1 of the ACCP, the legislator has imposed a ban on practices that violate the collective interests of consumers, which are torts or delicts. The practice of infringing collective consumer interests, which consists of two elements, is in turn included in section 2 art. 24. The first is a general clause manifesting itself in an unlawful or contrary to good practice behaviour of an entrepreneur that is detrimental to the collective interests of consumers. On the other hand, the second clause was expressed in the form of four calculations (including one repealed, which will be discussed below) of exemplary groups of practices.

Starting from the first general clause, it should be emphasized that general clauses usually contain phrases that are not specified in the form of, for example, good practices, respecting consumers' legitimate interests or rules of social coex-

⁴ I.e. Journal of Laws of 2017 item 229 as amended. Used abbreviation: The Act on Competition and Consumer Protection, ACCP.

⁵ E.g. The Act of 29 August 1997 on tourist services i.e. Journal of Laws of 2016 item 187, 1334 as amended, the Act of 29 August 1997 –Bank Law, i.e. Journal of Laws of 2016 item 1988 as amended

⁶ E.g. financial services contracts concluded at a distance, regulated in the Consumer Rights Act.

⁷ Journal of Laws 2015, item 1634. Used abbreviations: Act on Amending the Act on Competition and Consumer Protection, AAtheACCP.

⁸ There is also spelling *misselling*.

istence, which are not defined strictly in legal provisions. This accounts for a lot of freedom in their interpretation, within the framework of legal interpretations that exclude completely free interpretation. General clauses are therefore not always subject to the same interpretation, but their feature is a certain flexibility of use depending on the actual situation⁹. The general clause indicated in Art. 24 sec. 2 of the ACCP concerns a situation in which the following conditions are met. First of all, practice is an act or omission of an entrepreneur, thus a manifestation of behaviour towards the consumer. The action manifests itself in undertaking some kind of active behaviour (e.g. concluding a contract), while omission means the lack of a given behaviour (e.g. not included in the contractual provisions). Secondly, the practice is illegal (unlawful). Unlawfulness of action is broadly recognized in the civil law¹⁰. It is understood as non-compliance (contradiction) of the behaviour of the perpetrator (here: entrepreneur) with the national legal order, but also with international treaties¹¹. On the basis of the issues discussed, the contradiction with the legal order may refer to the contradiction with the Act of 16 April 1993 on combating unfair competition¹², as well as the Act of 23 August 2007 on counteracting unfair market practices¹³. Illegality within the meaning of Art. 24 of the ACCP also includes inconsistency with criminal law regulations – however, an act threatened by a criminal sanction can be considered a practice infringing collective consumer interests only if it harms their collective interests¹⁴. Thirdly, the practice is contrary to good practices. The Act amending the Act on competition and consumer protection has distinguished in the definition of practices violating collective consumer interests a feature of contradiction with good practices. The need to add a criterion of violation of good practices was submitted by the Supreme Court¹⁵, which emphasized the need to add this criterion due to the introduction of a new practice in the form of *misselling* of financial services, which will be discussed below. The notion of good practices belongs to the group of unclear notions, whose interpretation raises many controversies. The concept “good practices” should be looked at through the prism of the criterion of morality, justice, honesty, decency, morals. It

⁹ <https://uokik.gov.pl/download.php?plik=2152>

¹⁰ On unlawfulness among others T. Karaś, S. Żółtek, *Bezprawność w prawie cywilnym i karnym*, https://pk.gov.pl/plik/2013_12/30121f8d8c014ca1dc725f5bc3312ba2.doc In addition: Judgment of the Appeal Court in Poznań of 24 June 1992, I ACr 204/92, Case list 1993, no. 2, p. 30.

¹¹ Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna*, Warsaw 2014, p. 192 and following.

¹² I.e. Journal of Laws of 2003 No. 153, item 1503 as amended. Used abbreviations: Act on Combating Unfair Competition, Unlimited Competition, ACUCUC.

¹³ I.e. Journal of Laws of 2016 item 3, 1823. Abbreviations used: Act on Counteracting Unfair Market Practices, ACUMP

¹⁴ C. Banasiński [in:] C. Banasiński, E. Piontek (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warsaw 2009, p. 410 and following.

¹⁵ Comments of the Supreme Court of 29 April 2015 to the draft Act amending the Act on competition and consumer protection and the Act - Code of Civil Procedure, <https://legislacja.rcl.gov.pl/docs//2/12271401/12284097/12284100/dokument161996.pdf>.

is assumed that “good practices” not being legal norms, are norms of conduct, and their content, subjective scope and subject matter need to be specified and defined in the jurisprudence and literature¹⁶. Fourthly, the practice is detrimental to the collective interests of consumers, which should be understood by the denial expressed in Art. 24 section 3 of the ACCP, according to which the sum of consumers’ individual interests is not a collective consumer interest. The Supreme Court of Appeal also expressed the above statement in the justification of the judgment, pointing out that the essence of the action of the President of the Office for Competition and Consumer Protection (hereinafter: the President of UOKiK) in the proceedings concerning practices violating collective consumer interests is to examine the entrepreneur’s actions as a practice towards collectivity, and not towards individual consumers¹⁷. It should also be emphasized that the collective interests of consumers must be referred to current, future, as well as potential consumers¹⁸.

In turn, the second general clause was expressed in the form of listing examples of practices that infringe collective consumer interests. Below there will be only mentioned all exemplary practices that infringe the collective interests of consumers listed in Art. 24 section 2 of the ACCP, and this publication will emphasize one, newly-introduced practice – the so called *misspelling* of financial services. First of all, it should be noted that the legislator deleted point 1 of Art. 24 sec. 2 of the ACCP from the catalogue of these practices, stating that the practice infringing collective consumer interests was the application of the provisions of templates of contracts, which have been entered in the register of provisions of template contracts recognized as unlawful, referred to in Art. 479⁴⁵ of the Act of 17 November 1964 – Code of Civil Procedure¹⁹. The removal of the above practice was a consequence of the introduction of Art. 23 a to the Act on competition and consumer protection, establishing the ban on the use of prohibited clauses in templates of contracts concluded with consumers, while changing the system of abstract control of contractual provisions. At present, the use of prohibited provisions of template contracts is therefore a separate delict, and the register of the provisions of templates of contracts deemed to be unlawful is revoked, however, subject to Art. 8 sec. 1 of the Act on amending the ACCP, on the basis of which the legislator introduces ten years of *vacatio legis* for the repealed provisions of the Code of Civil Procedure in respect of cases brought by the action for recognition of the provisions of a standard contract not

¹⁶ https://repozytorium.amu.edu.pl/bitstream/10593/4938/1/04_Artur_Zurawik_Klouzula%20generalna_dobrych%20obyczaj%C3%B3w_35_51.pdf.

¹⁷ Judgment of the Supreme Court in Warsaw of 28 March 2008, VI ACa 1098/07, unpublished see A. Stawicki and E. Stawicki (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, LEX 2011.

¹⁸ M. Sieradzka, *Komentarz do art. 24 ustawy o ochronie konkurencji i konsumentów*, LEX 2008. [http://orka.sejm.gov.pl/izo7.nsf/www1/i16564o0/\\$File/i16564o0.pdf](http://orka.sejm.gov.pl/izo7.nsf/www1/i16564o0/$File/i16564o0.pdf).

¹⁹ I.e. Journal of Laws of 2016, item 1822, 1823 as later amended. Used abbreviations: Code of Civil Procedure, CCP.

allowed before 17 April 2016. In the light of the above, it was necessary to delete from the catalogue of the discussed practices, the provisions of templates of contracts entered into the register of prohibited clauses based on the court's judgment. Another example of practices infringing collective consumer interests is the breach of the obligation to provide consumers with reliable, genuine and complete information, expressed in point 2 of Art. 24 sec. 2 of the ACCP. The fundamental right of the consumer to obtain information, which is the correlate of the entrepreneur's information obligations, has been included in the Consumer Rights Act. Information and transparency of the market are an instrument of consumer protection. The mechanism of information obligations is the focal point of the consumer protection system in the law of the European Union²⁰. This was also expressed by the Court of Justice of the European Union²¹ in the judgment²², in which it decided that the information is one of the constitutive prerequisites for consumer protection. The contemporary society is an information society. In the present reality, the information and the method of its acquisition, transmission and collection has gained a key meaning. Currently, no one questions the consumer's right to information. On the contrary - the importance of information is more and more appreciated by the legislator, which is expressed, for example, by the above-mentioned Act on Consumer Rights. The legislator puts more and more detailed requirements on information obligations for the entrepreneur. E. Łętowska emphasizes that in providing information, we should not only notice the obligation imposed on the entrepreneur as a moral obligation but also as a financial burden²³. A properly informed consumer is the best guarantor of the protection granted him by the law. The next type of practices violating the collective interests of consumers mentioned in Art. 24 sec. 2 point 3 of the ACCP, constitute unfair market practices or acts of unfair competition. Without going into details, as this issue is not the subject of the analysis in this publication, it should only be pointed out that the market practice applied by entrepreneurs towards consumers is unfair if it is contrary to good practices and significantly distorts or may distort the market behaviour of the average consumer before concluding an agreement concerning a product, during or after its conclusion²⁴. In turn, the action of unfair competition is action contrary to the law or morality, if it threatens or violates the interest of another entrepreneur or client²⁵. The last, introduced in Art. 24 of the ACCP, the amendment constitutes the addition by

²⁰ F. Grzegorzcyk, *Prawo konsumenckie w Unii Europejskiej: aspekty systemowe harmonizacji*, Warsaw 2009, p. 49.

²¹ At the date of the judgment, the European Court of Justice.

²² Quotation after M. Pecyna [in:] S. Włodyka, *Prawo umów handlowych*, tom 5, Warsaw 2014, p. 186, judgment in the case C-362/88 GB Inno BM of 7.3.1990.

²³ E. Łętowska, *Europejskie prawo umów konsumenckich*, Warsaw 2004, p. 128 and following.

²⁴ Art. 4 section 1 of the ACUMP.

²⁵ Art. 3 section 1 of the ACUCUC.

the legislator of point 4 to Art. 24 sec. 2 of the ACCP, which concerns the so-called prohibition of *misselling* of the financial services referred to below.

BAN ON MISSELLING OF FINANCIAL SERVICES

In line with what has been indicated above, based on the provisions of the Act amending the Act on competition and consumer protection²⁶, the legislator introduced to the content of Art. 24 sec. 2 pt. 4 the ACCP a new type of practice infringing collective consumer interests, in the form of the so-called *misselling* of financial services. The regulation defines *misselling* of financial services as an offer to consumers to purchase financial services that do not meet the needs of these consumers, based on the information available to the trader regarding the characteristics of these consumers or suggesting that these services are inadequate to their nature. Therefore, the legislator defined *misselling* as offering and selling the products that do not match the needs of consumers. The phrase *misselling* from English alone means “missed sales”, which also perfectly reflects the whole phenomenon, understood as the sale of services that are not adjusted to the customer’s needs. *Misselling* is becoming more and more widespread and is especially visible on the market of insurance²⁷ and bank services. Life and endowment insurance with an insurance capital fund, mortgage loans denominated in foreign currencies and the so-called “chwilówki” have been indicated as an example of actions in the form of *misselling*, in the justification of the draft act on the protection of competition and consumers²⁸. In addition, in the explanatory memorandum to the draft of the discussed act, it was stressed that withdrawal from agreements on financial products is very difficult and expensive.

By introducing a ban on *misselling* of financial services, the Polish legislator copied the experience of the British Company Financial Conduct Authority, which applies a new approach to financial services. It is characterized by the fact that the majority of products offered to individual consumers is tailored to the needs of specific consumer groups, and the problems appearing on the market do not concern the features of these products, but whether the products are offered to the right group of consumers. The new approach to financial services is aimed at eliminating the situation when an improperly offered product can cause losses on the part of consumers in the situation of mass sales. Actions taken by the Financial Conduct Authority concern the exer-

²⁶ Art. 1 point 3 of the Act amending the Act on competition and consumer protection.

²⁷ On this subject among others P. Kozik, *Misselling w ubezpieczeniach – czyli ochrona konsumentów usług ubezpieczeniowych na gruncie najnowszych zmian prawodawczych*, [in:] M. Jagielska, E. Sługocka-Krupa, K. Podgórski, *Ochrona konsumenta na rynku usług*, Warsaw 2016, p. 155 and following. Moreover, in particular, Art. 21 Acts of 11 September 2015 on insurance and reinsurance activity, i.e. Journal of Laws of 2017, item 1170, 1089, on the subject, among others: M. Szczepańska (ed.), *Ustawa o działalności ubezpieczeniowej i reasekuracyjnej. Komentarz*, Warsaw 2017, E. Bukowska [in:] P. Czubluna (ed.), *Ustawa o działalności ubezpieczeniowej i reasekuracyjnej. Komentarz*, Warsaw 2016, p. 81 and following

²⁸ <https://legislacja.rcl.gov.pl/docs//2/12271401/12284097/12284098/dokument158625.PDF>.

cise of control, and, if necessary, intervention, to protect consumers against a possible threat (hence the own analysis of the institution is sufficient, for example, a consumer complaint is not necessary, i.e. a problem has arisen on the market). These are preventive actions aimed at protecting the consumer against potential threats²⁹.

Commented Art. 24 sec. 2 point 4 of the ACCP introduced two varieties of *mis-selling*, thus two new practices violating collective consumer interests³⁰. The first is to offer consumers the purchase of financial services that do not meet the needs of these consumers, determined with the information available to the entrepreneur in terms of the characteristics of these consumers. In turn, the second concerns the proposal to purchase these services in a manner inadequate to their nature. Both forms have three common features. First of all, both forms concern the behaviour of the entrepreneur, who will usually be an insurer or a bank based on *mis-selling*, depending on the service market. Entrepreneur's behaviour can take the form of both actions (e.g., providing false information) as well as omissions (e.g., concealing certain information from the consumer). Another common feature concerns the contract stage. The introduced ban on *mis-selling* (in both above mentioned forms) already at the pre-contract stage is a positively assessed solution aimed at elimination of entrepreneurs' behaviours which lead to distorting of the process of making decisions by consumers. Thus it concerns already the proposal itself, and strictly speaking, the ban on offering the consumers to purchase financial services before the conclusion of the contract. Thirdly, both varieties of *mis-selling* concern financial services. This common premise raises a lot of doubts which result from the lack of definition of financial services in the competition and consumer protection Act³¹. In connection with the above, it seems helpful to refer to the regulation of Art. 4 section 2 of the Act on consumer rights, according to which the provisions of the Act do not apply to the contracts concerning financial services, especially such as: banking operations, consumer credit agreements, insurance operations, contracts for the purchase or repurchase of participation units of an open-ended investment fund or an open-ended specialized investment fund and acquisition or subscription of investment certificates of a closed-end investment fund, payment services (with one exception of contracts regarding financial services concluded remotely, to which the indicated provisions of chapters 1 and 5 of the Act on consumer rights apply). As can be seen from the above, the legislator also does not define financial services under the Act, and indicates which actions the provisions of the Act on Consumer Rights do not apply to. Nevertheless, an attempt to define

²⁹ A. Wędrychowska-Karpińska, A. Wiercińska-Krużewska [in:] *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, A. Stawicki, E. Stawicki (ed.), Warszawa 2016, p. 686.

³⁰ P. Kozik, *Mis-selling w ubezpieczeniach...*, p. 164 and following.

³¹ J. Sroczyński, *Mis-selling – nowy rodzaj zakazanej praktyki naruszającej zbiorowe interesy konsumentów*, „Przegląd Ustawodawstwa Gospodarczego” 2016, no. 04, p. 27.

financial services was made in the literature indicating that the activities listed in Art. 4 par. 2 of the Act on consumer rights are widely regarded as financial activities, and thus the provisions contained in Chapter 5 of the above act are applicable to them³². In addition, the calculation of financial services is exemplary, which is already indicated by the very phrase “in particular”. In the case of both forms of *misselling*, at the very beginning, some concerns are raised by the word “proposing”, which has not been clarified under the Act on competition and consumer protection. In this situation, it is worth referring to the definition of “product purchase proposal” included in Art. 2 point 6 of the Act on counteracting unfair market practices, which means commercial information defining the product’s characteristics and its price, in a manner appropriate for the means of communication with consumers that directly affects or may affect the consumer’s decision on the contract. From the definition cited, the notion of commercial information should be specified, which has a direct impact on the consumer’s decisions. Commercial information is understood as the entrepreneur’s advertising of various types of goods and services (especially prospectuses, catalogues, invitations to transactions and purchases available to the individual needs of the recipient). In the draft amendment to the Act on Competition and Consumer Protection, it was proposed to use the phrase “offering”, which was eventually replaced by the word “proposing”. The reason for this solution was the argument that “proposing” means exclusion from *misselling* the financial services of general advertising (television or radio), which are only a general presentation of the service by the entrepreneur or initial “incentive” for the consumer to be interested in the proposal of the entrepreneur³³.

In the regulation under point 4 of Art. 24 sec. 2 of the ACCP, the legislator included a postulate of adequacy, that is, matching the needs of the consumer, or taking the opposite, prohibiting the inadequacy of proposing the purchase of financial services as to their nature. The inadequacy of proposing the purchase of financial services as to their nature is manifested as the inadequacy of the content and method of proposing the purchase of financial services, depending on the form of *misselling* mentioned below.

The first form of *misselling* mentioned above, prohibited by the legislator through the regulation of art. 24 sec. 2 point 4 of the ACCP is to propose to consumers purchasing financial services that do not correspond to the needs of these consumers including information available to the entrepreneur regarding the characteristics of these consumers. The phrase that in this form of *misselling* raises reservations is the concept of “need”. The premise in the form of not responding to the needs of the consumer by proposing a financial service makes it that the President of UOKiK has no grounds to challenge the financial service itself, which is fully allowed, but

³² M. Skory [in:] *Ustawa o prawach konsumenta. Kodeks cywilny (wyciąg): Komentarz*, B. Kaczmarek-Templin, P. Stec, D. Szostek ed., Warszawa 2014, p. 202.

³³ A. Wędrychowska-Karpińska, A. Wiercińska-Krużewska [in:] *Ustawa o ochronie konkurencji...*, p. 693.

only its mismatch to the needs of a given group of consumers. Due to the fact that in the situation of using the financial service, the needs of consumers come down to financial needs, and these usually occur, the unfortunate form of “need” should be interpreted as the possibility of using a given financial service³⁴. Another doubt emerging in this form of *misselling* concerns the identification of consumer needs, which the entrepreneur has to make “including information available to the entrepreneur regarding the characteristics of these consumers”. The above raises the question - were additional obligations imposed on the entrepreneur in the area of obtaining and collecting comprehensive data about the consumer?

In the justification of the draft to the Act amending the Act on Competition and Consumer Protection, the legislator rationally stressed that the discussed regulation does not impose an obligation on entrepreneurs to determine the needs of consumers, but only establishes failure to fulfil this obligation as a practice violating collective consumer interests³⁵. It seems reasonable to assume that the entrepreneur will not break the prohibition of *misselling*, who will, at the pre-contractual stage, come out with the initiative to provide all information about a given financial product, relevant terms of the offer and at the same time will provide the consumer with appropriate conditions to get acquainted with them. Thus, the above mentioned inadequacy of the content of the proposal for the purchase of financial services is manifested in the lack of providing the consumer with relevant information on a given financial service or providing it in a vague, misleading or incomplete manner (e.g. unclear informing on the rules for the collection of instalments or misleading as to the investment risk)³⁶. However, it is not the responsibility of the entrepreneur to examine whether the consumer will be able to bear the risk and fulfil the obligations under the contract³⁷.

The second type of *misselling* is proposing the acquisition of financial services in a way that is inadequate to their character. The inadequacy of the method of proposing the purchase of financial services may be expressed in the form of offering highly complicated financial services using a telephone, which often distorts the image of the proposed services. And everyday life still provides examples, that even the very way of presenting the terms of a given financial service and how it affects the consumer has a fundamental impact on his choice. Therefore, in summary, it can be argued that the mismatch of the offer itself or the way it is presented to the specificity of the product and the needs of individual consumer groups is not allowed, which is also considered an unethical behaviour³⁸.

³⁴ M. Namysłowska [in:] *Ustawa o zmianie ustawy o ochronie konkurencji i konsumentów z 5.8.2015 r. Komentarz*, M. Namysłowska, A. Piszcz (ed.), Warsaw 2016, p. 54.

³⁵ Justification for the draft Act amending the Act on competition and consumer protection, p. 12.

³⁶ M. Namysłowska [in:] *Ustawa o zmianie ustawy o ochronie konkurencji ...*, p. 55.

³⁷ A. Wędrychowska-Karpińska, A. Wiercińska-Krużewska [in:] *Ustawa o ochronie konkurencji...*, p. 695.

³⁸ <http://www.biuletyn.bdo.pl/biuletyn/podatki-i-rachunkowosc/bdo-podatki-i-rachunkowosc/Przepisy-prawne-i-orzecznictwo/misselling-czyli-sprzedaz-nieetyczna9290.html>

For breaking the prohibition of *misselling*, the President of UOKiK issues a decision on the recognition of the practice as infringing collective consumer interests and ordering its discontinuation³⁹. In this decision, the President of UOKiK may determine the means to remove the ongoing effects of infringing collective consumer interests, to ensure the execution of the order, in particular may oblige the entrepreneur to submit a single or multiple statement of the content and form specified in the decision⁴⁰. In addition, as in the case of other practices infringing collective consumer interests, also in the event of violation of the prohibition of *misselling* (even unintentionally) the President of UOKiK may impose on the entrepreneur a financial penalty in the amount not exceeding 10% of turnover achieved in the financial year preceding the year of imposing the penalty⁴¹. Therefore, the extension of the list of practices infringing collective consumer interests, expressed in the discussed Article 24 sec. 2 of the Act on competition and consumer protection, about *misselling*, contributed to the increase in the number of situations in which the UOKiK may impose a fine. Financial penalties play a fundamental role in ensuring the effectiveness of competition and consumer protection standards⁴². They constitute the basic sanction for violation of the provisions of the Act on competition and consumer protection, because in principle Polish law (except for the so-called bid-rigging behaviour between tenderers) does not provide for criminal liability for violation of the provisions of the Act.

It should also be added that the President of UOKiK, even before the end of the proceedings regarding the entrepreneur's practices violating collective consumer interests, may issue the so-called provisional decision requiring him to refrain from certain actions⁴³. The reasons justifying the publication of the above mentioned provisional decision should include *prima facie* evidence (which is sufficient, no evidence is necessary) that the continued application of the alleged practice can result in serious and difficult threats to the collective interests of consumers. Both hazard characteristics (serious and difficult to remove) must occur simultaneously.

³⁹ Art. 26 section 1 of the Act on Competition and Consumer Protection.

⁴⁰ Art. 26 section 2 of the Act on Competition and Consumer Protection.

⁴¹ Art. 106 section 1 point 4 of the Act on Competition and Consumer Protection.

⁴² M. Król-Bogomilska, *Kary pieniężne w prawie antymonopolowym*, Warsaw 2001.

⁴³ Art. 101a section 1 sentence 1 of the Act on Competition and Consumer Protection.

CONCLUSION

Consumer protection in the case of financial services is the most justifiable idea. By amending the discussed regulation of Art. 24 of the ACCP, and especially by introducing a ban on *misselling* of financial services, the Polish legislator wanted to create a practical and effective mechanism for consumer protection on the market of these services. It was the financial market that was indicated as carrying the greatest risks for the consumer. However, the regulation of *misselling* is accused of certain imperfections, mainly in the form of using too many indeterminate concepts, with the simultaneous lack of definitions of the concepts used or the transfer of total responsibility to the entrepreneur⁴⁴. It is also debatable to accept *misselling* as a practice that infringes collective consumer interests only on the basis of financial services, since analogous unfair sale practices are also taking place in many other markets, which, however, are not affected by the ban. Thus, the situation of entrepreneurs operating in various sectors and applying similar sale practices was diversified in a controversial manner. Consequently, only those who operate in financial markets are subject to a ban and possible sanctions related to its violation. Taking into account the numerous irregularities in the activities of entrepreneurs whose victims are unaware consumers, one should expect that the regulation of *misselling* will solve the problems of the entire market. However, from the perspective of entrepreneurs operating on financial markets, who were the only ones obliged to comply with the ban on *misselling*, there are doubts about the application of this provision in practice⁴⁵. Nevertheless, the conflict of competence between the President of UOKiK and the Financial Supervision Commission (hereinafter: KNF) is important, i.e. a situation in which one case is subject to two different state bodies. At this point, much depends on the practice of applying the regulation of *misselling* by the President of UOKiK, at the meeting point with the KNF's competences⁴⁶. In addition, in practice there is a fear, how an entrepreneur is to behave so as not to be accused of unethical *misselling*. In practice, it may be problematic for an employee of a given financial institution to assess whether a given service meets the needs of the consumer (it may be assumed in advance that, for example, an elderly person is not interested in a complex financial service - this may be inappropriate)⁴⁷.

Bearing the above doubts in mind, it seems reasonable to interpret Article 24 sec. 2 point 4 of the ACCP on the basis of a proper balance of entrepreneurs' interest

⁴⁴ C. Banasiński, M. Bychowska, *Między efektywnością administracji a pewnością sytuacji prawnej przedsiębiorców*, „Internetowy Kwartalnik Antymonopolowy i Regulacyjny” 2015 no. 5 (4), p. 68 and following: <http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-e47a7115-897e-45c2-bd33-a05fbc1af2f7/c/59.pdf>.

⁴⁵ <http://www.biuletyn.bdo.pl/biuletyn/podatki-i-rachunkowosc/bdo-podatki-i-rachunkowosc/Przepisy-prawne-i-orzecznictwo/misselling-czyli-sprzedaz-nieetyczna9290.html>.

⁴⁶ J. Sroczynski, *Misselling*..., p. 29.

⁴⁷ <http://www.biuletyn.bdo.pl/biuletyn/podatki-i-rachunkowosc/bdo-podatki-i-rachunkowosc/Przepisy-prawne-i-orzecznictwo/misselling-czyli-sprzedaz-nieetyczna9290.html>.

and consumer protection, in such a way that not every offer of financial services is considered as *misselling*⁴⁸.

Bibliography

Literature:

- Banasiński C. [in:] C. Banasiński, E. Piontek (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warsaw 2009.
- Bukowska E. [in:] Czubluna P. (ed.), *Ustawa o działalności ubezpieczeniowej i reasekuracyjnej: komentarz*, Warsaw 2016.
- Grzegorzczak F., *Prawo konsumenckie w Unii Europejskiej: aspekty systemowe harmonizacji*, Warsaw 2009.
- Karaś T., Żółtek S., *Bezprawność w prawie cywilnym i karnym*, https://pk.gov.pl/plik/2013_12/30121f8d8c014ca1dc725f5bc3312ba2.doc
- Kozik P., *Misselling w ubezpieczeniach – czyli ochrona konsumentów usług ubezpieczeniowych na gruncie najnowszych zmian prawodawczych* [in:] M. Jagielska, E. Sługocka-Krupa, K. Podgórski, *Ochrona konsumenta na rynku usług*, Warsaw 2016.
- Król-Bogomilska M., *Kary pieniężne w prawie antymonopolowym*, Warsaw 2001.
- Łętowska E., *Europejskie prawo umów konsumenckich*, Warsaw 2004.
- Namysłowska M. [in:] *Ustawa o zmianie ustawy o ochronie konkurencji i konsumentów z 5.8.2015r. Komentarz*, M. Namysłowska, A. Piszcz (ed.), Warsaw 2016.
- Pecyna M. [in:] S. Włodyka, *Prawo umów handlowych*, volume 5, Warsaw 2014.
- Radwański Z., Olejniczak A., *Zobowiązania- część ogólna*, Warsaw 2014.
- Sieradzka M., *Komentarz do art. 24 ustawy o ochronie konkurencji i konsumentów*, LEX 2008. [http://orka.sejm.gov.pl/izo7.nsf/www1/i16564o0/\\$File/i16564o0.pdf](http://orka.sejm.gov.pl/izo7.nsf/www1/i16564o0/$File/i16564o0.pdf)
- Skory M. [in:] B. Kaczmarek-Templin, P. Stec, D. Szostek (ed.), *Ustawa o prawach konsumenta, Kodeks cywilny (wyciąg): komentarz*, Warsaw 2014.
- Szczepańska M. (ed.), *Ustawa o działalności ubezpieczeniowej i reasekuracyjnej. Komentarz*, Warsaw 2017.
- Wędrychowska-Karpińska A., Wiercińska-Krużewska A. [in:] A. Stawicki, E. Stawicki (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warsaw 2016.

Journals:

- Banasiński C., Bychowska M., *Między efektywnością administracji a pewnością sytuacji prawnej przedsiębiorców*, „Internetowy Kwartalnik Antymonopolowy i Regulacyjny” 2015, no. 5 (4).
- Sroczyński J., *Misselling – nowy rodzaj zakazanej praktyki naruszającej zbiorowe interesy konsumentów*, „Przegląd Ustawodawstwa Gospodarczego” 2016, no. 04.

Internet sources:

- <https://uokik.gov.pl/download.php?plik=2152>.
- <https://legislacja.rcl.gov.pl/docs//2/12271401/12284097/12284100/dokument161996.pdf>.
- https://repozytorium.amu.edu.pl/bitstream/10593/4938/1/04_Artur_Zurawik_Klauzu-

⁴⁸ M. Namysłowska [in:] *Ustawa o zmianie ustawy o ochronie konkurencji ...*, p. 55.

la%20generalna_dobrych%20obyczaj%C3%B3w_35_51.pdf.
[http://orka.sejm.gov.pl/izo7.nsf/www1/i16564o0/\\$File/i16564o0.pdf](http://orka.sejm.gov.pl/izo7.nsf/www1/i16564o0/$File/i16564o0.pdf).
<https://legislacja.rcl.gov.pl/docs//2/12271401/12284097/12284098/dokument158625.PDF>.
<http://www.biuletyn.bdo.pl/biuletyn/podatki-i-rachunkowosc/bdo-podatki-i-rachunkowosc/Przepisy-prawne-i-orzecznictwo/misselling-czyli-sprzedaz-nieetyczna9290.html>.
<http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-e47a7115-897e-45c2-bd33-a05fbc1af2f7/c/59.pdf>.
<http://www.biuletyn.bdo.pl/biuletyn/podatki-i-rachunkowosc/bdo-podatki-i-rachunkowosc/Przepisy-prawne-i-orzecznictwo/misselling-czyli-sprzedaz-nieetyczna9290.html>.
<http://www.biuletyn.bdo.pl/biuletyn/podatki-i-rachunkowosc/bdo-podatki-i-rachunkowosc/Przepisy-prawne-i-orzecznictwo/misselling-czyli-sprzedaz-nieetyczna9290.html>.

List of legal acts:

Basic Law

The Constitution of the Republic of Poland of 2 April 1997, Dz.U. (Journal of Laws) of 1997 No. 78, item 483 as amended.

Acts:

The Act of 23 April 1964 – Civil Code, i.e. Dz.U. (Journal of Laws) of 2017 item 459 with amendments.

The Act of November 17, 1964 – Code of Civil Procedure, i.e. Dz.U. (Journal of Laws) of 2016 item 1822, 1823 with amendments.

The Act of 16 April 1993. on combating unfair competition, i.e. Dz.U. (Journal of Laws) of 2003 No. 153, item 1503 with amendments.

The Act of 29 August 1997. about tourist services Dz.U. (Journal of Laws) of 2016 item 187, 1334 with amendments.

The Act of 29 August 1997 – Banking Law, i.e. Dz.U. (Journal of Laws) of 2016 item 1988 with amendments.

The Act of February 16, 2007 on competition and consumer protection, i.e. Dz.U. (Journal of Laws) of 2017 item 229 with amendments.

The Act of August 23, 2007 on counteracting unfair market practices, i.e. Dz.U. (Journal of Laws) of 2016 item 3, 1823.

The Act of 30 May 2014 on consumer rights, i.e. Dz.U. (Journal of Laws) of 2017 item 683.

The Act of August 5, 2015. on the amendment of the Act on competition and consumer protection and some other acts, Dz.U. (Journal of Laws) 2015, item 1634.

The Act of 11 September 2015 on insurance and reinsurance activity, i.e. Dz.U. (Journal of Laws) of 2017 item 1170, 1089.

Case-law:

Judgment of the Appeal Court in Poznań of 24 June 1992, I ACr 204/92, Case-list 1993, No. 2, p. 30.

Judgment of the Appeal Court in Warsaw of 28 March 2008, VI ACa 1098/07, unpublished see. A. Stawicki and E. Stawicki (ed.) Act on competition and consumer protection. Comment, LEX 2011.

Other:

Comments of the Supreme Court of 29 April 2015 to the draft Act amending the Act on competition and consumer protection and the Act - Code of Civil Procedure, <https://legislacja.rcl.gov.pl/docs//2/12271401/12284097/12284100/dokument161996.pdf>

Summary: Currently, we can observe a trend consisting in offering products, including financial ones, which are individualized, that is, tailored to the consumer's needs. To meet the above, the Polish legislator, following the example of the British regulation, introduced the so-called ban on *misselling* financial services to the Polish legal order. The aim of this publication is to analyse the *misselling* understood as offering and selling products that do not match the needs of consumers.

Keywords: consumer law, consumer, *misselling*, financial services, practices infringing the collective interests of consumers

MISSELLING USŁUG FINANSOWYCH JAKO PRAKTYKA NARUSZAJĄCA ZBIOROWE INTERESY KONSUMENTÓW

Streszczenie: Aktualnie można zaobserwować trend, polegający na oferowaniu produktów, w tym finansowych, które są zindywidualizowane, czyli dopasowane do potrzeb konsumenta. Wychodząc naprzeciw powyższemu, ustawodawca polski, na wzór regulacji brytyjskiej, wprowadził do polskiego porządku prawnego tzw. zakaz *missellingu* usług finansowych. Celem niniejszej publikacji jest analiza *missellingu* rozumianego jako oferowanie i sprzedaż produktów niedopasowanych do potrzeb konsumentów.

Słowa kluczowe: prawo konsumenckie, konsument, *misselling*, usługi finansowe, praktyki naruszające zbiorowe interesy konsumentów