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***Proceeding before the President of the Office of Competition and Consumer  
Protection in cases concerning classification of clauses in standard agreement  
as abusive***

***(Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów  
w sprawach o uznanie postanowień wzorca umowy za niedozwolone)***

## **SUMMARY**

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In many areas of life consumers do not have the possibility to negotiate terms of B2C contracts. They are given only two options: either to sign the contract or to reject it. This creates a threat that agreements may contain clauses detrimental to the consumer, known as abusive contract terms, unfair contract terms or unfair clauses in standard contracts. For this reason Polish and European legislator have enacted special laws which aim is to protect consumers against such abusive contract terms. There are also specific procedures that allow to remove terms considered as unfair from consumer standard contracts and from general use.

The subject of this PhD thesis is the proceeding before the President of the Office of Competition and Consumer Protection in cases concerning classification of clauses in standard agreement as abusive, known also as abstract control of unfair contract terms in standard agreement. It is a relatively new model of control, enacted by Polish legislator in 2015, which came into force in 2016. This model of control has not yet been the subject of broader considerations of the procedural and public economic law doctrine.

This paper consists of introduction, six chapters, conclusion, bibliography and list of judgments and acts. The first chapter discusses substantive law concerning standard agreement and unfair contract terms. Main regulations are contained in the Civil Code. The legislator enacted also some special provisions on consumer protection against abusive contract terms in standard agreements. Clauses which have not been negotiated individually are not binding for consumers if they shape their rights and obligations in a way that is contrary to good customs and violates consumer's interests (unfair contract terms). In the Civil Code there is also a list of examples of terms, that may be regarded as unfair, known as the 'grey list of unfair contract terms'. Then, the author outlines two types of control of such terms: incidental and abstract (which is the core subject of the analysis in this thesis). A controversial provision included in a specific contract may be questioned by a consumer who is a party to the contract in a proceeding before the common court and it is called the incidental control. Abstract control applies to B2C contracts, thus first chapter covers also the definition of a consumer and an entrepreneur. The author also analyses new substantive regulations from the Competition and Consumer Protection Act of 16 February 2007 concerning abusive contract terms (Articles 23a-23d).

The second chapter discusses abstract control of unfair contract terms before the amendments introduced on 17 April 2016. Prior to this date it was for the Court of Competition and Consumer Protection (special court which was established to adjudicate competition and consumer cases) to decide, whether a given provision is disallowed. Proceedings could be initiated by anyone who was or could be offered a contract containing



such a clause, consumer organizations, consumer ombudsmen and the President of the Office of Competition and Consumer Protection. It was a judicial model of control of unfair contract terms. It needs to be underlined that rulings in these proceedings were published in the Register of Prohibited Clauses and had expanded limits. It meant that not only parties to particular proceeding were bound to comply with the ruling, but other natural and legal persons were also obliged to act in accordance with the ruling. It had serious practical impact on sellers of goods and suppliers of services. If not followed, application of such clauses could be regarded as an infringement of collective consumer interests and could result in a fine in the amount of up to 10% of the entrepreneur's revenue. In the doctrine and jurisprudence many contradicting opinions had arose as to how the expanded limits should be understood. According to one view, it meant that every seller or supplier was obliged to remove a term considered as unfair from their contracts. Such provision should be removed from general use in order to ensure consumer protection from unfair trading. In accordance to other, contrary opinion, the ruling should bind only a seller or a supplier who has been a party to the proceeding, because consequences of using unfair terms in consumer market were very serious. This dispute lead to diversified judgments and resulted in uncertainty of entrepreneurs. It should be stressed that before the amendment the Supreme Court decided in a resolution of 20 November 2015 that ruling in such cases binds only entrepreneurs who were the party to the proceeding.

The second main problem was commencing proceedings by *quasi*-consumer organizations or attorneys in order to receive legal costs. Due to an exemption from court costs many proceedings were initiated (e.g. for every contract provision or on behalf of many consumers). The author also attempts to evaluate previous regulations and describe main aims of the amendment and the change of the judicial model of control of unfair contract terms. The amendment was very significant. It changed the model of elimination of unfair contract terms and implemented the administrative model of the proceeding.

The next chapter deals with proceeding before The President of the Office of Competition and Consumer Protection in general. The author also describes legal position of The President of the Office of Competition and Consumer Protection. It is a central authority of the state administration. It should be noted that the Competition and Consumer Protection Act of 16 February 2007 contains many referrals to other laws. This chapter investigates consequences of using different regulations in one proceeding. Subsequently, the author outlines the conduct of proceeding before the President of the Office of Competition and Consumer Protection (the proceeding might be conducted as preliminary proceeding or

proceeding concerning classification of clauses in standard agreements as abusive). The President of the Office of Competition and Consumer Protection acts always *ex officio*. Furthermore, this chapter deals with taking of evidence and means of proof. It is also possible to hold a hearing during the procedure, but it is not used by the officers. The procedure ends by issuing a decision (it is also possible to impose a financial penalty) or resolution on discontinuation of the proceeding. A party to the proceeding can file an appeal from the decision of the President of the Office of Competition and Consumer Protection to the Court of Competition and Consumer Protection, which is a civil court.

The fourth chapter analyses the proceeding before the President of the Office of Competition and Consumer Protection in cases concerning classification of clauses in standard agreement as abusive – a new kind of procedure. The President of the Office of Competition and Consumer Protection *ex officio* issues a resolution initiating the proceeding. A consumer, a consumer ombudsman, the Polish Insurance Ombudsman, a consumer organisation or sometimes a foreign consumer organisation may submit, in writing, a notification to the President of the Office of Competition and Consumer Protection that unfair clause is used in standard agreement. What is important, the President of the Office of Competition and Consumer Protection is not bound by such notice. If the proceeding is initiated, none of these persons can be a party to it – in certain situations they can be an interested party only. A party of this kind has limited rights and is not entitled to file an appeal against the decision. Only a person with respect to whom proceeding has been instituted can be a party to this proceeding (a seller or a supplier). The President of the Office of Competition and Consumer Protection has the possibility to rule a decision which is immediately enforceable. Subsequently, the chapter investigates impact of the amendment and new system of control of unfair contract clause on implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. The author expresses doubts if the new law is consistent with EU legislation.

Another issue is the evaluation of administrative model of the proceeding. Because the provisions are relatively new there are two matters that require assessment which is quite difficult for this very reason, i.e. consumer protection and entrepreneurs rights. As it was mentioned above, there were some significant problems which occurred while applying previous regulations. However, due to the Supreme Court's resolution, the amendment can be perceived as enacted too early. There are also doubts whether it increased entrepreneurs legal certainty, because the new regulations does not result in desirable predictability. The author



also points out that consumer rights are reduced and the amendment cannot provide effective protection against abusive contract terms.

The next chapter of the thesis is dedicated to the judicial control of decisions of the President of the Office of Competition and Consumer Protection. The Court of Competition and Consumer Protection is authorized to exercise control over officers' decisions. Many contradicting opinions arose in the doctrine regarding appealing from an administrative decision to a civil court, thus the author outlines history of appealing from decisions of the President of the Office of Competition and Consumer Protection and differences between civil and administrative appeal. Another dispute concerns the legal nature of the procedure before the Court of Competition and Consumer Protection - whether it is a first or second instance. The author also presents different opinions as to this model of judicial control of decisions the President of the Office of Competition and Consumer Protection.

The subject of the last, sixth chapter, is the legal nature of proceeding before the President of the Office of Competition and Consumer Protection in cases concerning classification of clauses in standard agreement as abusive. Because of the abovementioned distinct features of the procedure, there are many different opinions presented in this regards. There are three main views of categorizing this proceeding. Some authors are of the view that procedure before the President of the Office of Competition and Consumer Protection is administrative, as it is conducted before public administration authority and the officer has to apply provisions of the Administrative Procedure Code. On the other hand, because of the possibility to impose significant financial penalties, some lawyers say that this is a kind of criminal procedure. According to third opinion, procedure before the President of the Office of Competition and Consumer Protection is a hybrid procedure. It is a compromise between civil and administrative procedure which fuses together different regulations and assumptions. This view illustrates very well the nature of the procedure. The author presents also models of legal consumer protection which function in Europe and model of eliminating unfair clauses in Poland as well as postulates *de lege ferenda*.

The final part of this PhD thesis contains a summary of the research and conclusions of the analysis.

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