DROIT POLONAIS CONTEMPORAIN
POLISH CONTEMPORARY LAW
1999 № 1-4 (121-124)
PL ISSN 0070-7325

CONSUMER PROTECTION AS *PUBLIC INTEREST LAW*

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1. Introduction

The need to protect the consumer with legal means, as a general legal and political postulate, was not realized until relatively recent times: it started in the Sixties. Since then, innumerable institutions were created with the objective of providing such protection, both in numerous national legal orders and at international level (European law, where several dozens of directives dealing with various aspects of consumer protection are overtly referred to as the corpus of consumer law). Yet, there have been different ways of discovering the legal relevance of consumer protection. Similarly, there have been different axiological traditions to motivate the legal and political steps taken in this field.

The very act of formulating and asking the question "why should the consumer be protected in the law" requires overcoming many difficulties. Indeed, why the consumer? Understood as an individual or a representative of a group? How far should the postulated protection go? Who, and according to what criteria, should decide whether the proposed level of protection is adequate? Everything depends on the perspective from which one views the problem. Those who want to put it exclusively in the perspective of the law of contract encounter the greatest difficulties. Because when consent, in the formal meaning, was considered as a sufficient prerequisite for concluding a valid contract *(volenti non fit iniuria* and *coactus tarnen voluisti),* it meant questioning the very possibility of formulating an assumption that the consumer could be harmed in any way. The fact of concluding a contract entailed that there was the intention of doing so, and that intention was sufficient to draw the conclusion that nobody could be harmed. However, this approach is not the only one possible. The U.S. was the first country to formulate the need to protect customers and to regard it as a political problem. The crucial date was 15 March 1962, the date of President Kennedy's address to the Congress concerning the protection of consumers' interests. Traditionally, consumer protection is to be perceived as a public law matter, a constitutional one. It is understood as protection of the interests of a certain minority, which, being dispersed and, consequently, having no access to representative

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bodies, cannot articulate their interests using the already existing institutional channels. In other words, consumers are classified here as an example of a disadvantaged minority (as they are deprived of representation) due to the weakness of their position and not due to their number, and, being a minority, they must be protected. In this way, the problem here is put in terms of giving more importance to individuals constituting a minority, and this is, by all means, a public law matter.

In Europe, this approach was regarded as ideologizing the problem too much and criticized[1] for setting the problem on a too high axiological pedestal.

In countries of real socialism there occurred some very particular and peculiar axiological obstacles to planting the banner of consumer protection both in times of planned economy and when the state organization transformations were started.

This study aims at presenting those axiological perspectives, which seem useful for several reasons. Firstly, because the approach which emphasizes elements of public law in the axiology of consumer protection (it has for years been close to the author,[2] and this is already a purely subjective reason) is nowadays, in post-Maastricht times, exposed much more distinctly in European law as well. The perspective of a harmonization of laws forces us to review the opinions on consumer protection presented sometimes in our country. Secondly, because this approach is now present in the new Polish Constitution (Article 76), whereby public authorities are obliged to protect consumers against activities threatening their health, privacy and safety, as well as against dishonest market practices. Thirdly, because public law perspective on consumer protection means that those problems belong to the competence of the ombudsman (Commissioner for Citizens' Rights).

2. Consumer Protection in the U.S. - *Public Interest Law*

"Public interest law is the name given to efforts to provide legal representation to interests that historically have been unrepresented or underrepresented in the legal process. Philosophically, *public interest law* rests on the assumption that many significant segments of society are not adequately represented in the courts, Congress, or the administrative agencies, because they are either too poor or too diffuse to obtain legal representation in the marketplace".[3] "Public interest law attempts to fill the gaps in our legal system. These days, the lawyers practising this very trend are building on the foundations of the earlier successful fight for citizens' rights and freedoms, discovering new domains of their activity. Before courts, organs of administration, in legislative processes, their activity leads to guaranteeing representation to wide strata of minori-

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[1] M. B e r n i t z:, "Schwedisches Verbraucherschutzrecht", *Rabeiszeitschrift für ausländisches und internationales Privatrecht* 1976, no. 3-4, p. 596.

[2] See E. Ł ę t o w s k a: "Ochrona konsumenta z punktu widzenia polityki prawa "[Consumer Protection from the Point of View of Legal Policy], *Państwo i Prawo* 1978, no. 4, p. 17.

[3] N. A r o n: *Liberty and Justice for All. Public Interest Law in the 1980s and Beyond,* Westview Press 1989, p. 3.

ties, relatively powerless, such as the mentally ill persons, children, the poor of all races. Those lawyers strive to represent the neglected interests, which are commonly present on a large scale, with the majority of us, when we act as consumers, employees, individuals threatened in their privacy or need for a clean environment".[4] The two quotations presented above precisely explain the notion of *public interest law*,[5] a term which is not very familiar in Poland, and indicate that, in the American tradition, the problems of consumer protection belong to this trend of "practising the law". *Public interest law* does not denote a branch or fragment of positive law. What it does signify is a specific direction of strategy of actions within using the law. The point of departure is the assumption that, in a democratic state, all social groups should be granted, in various ways and at various levels, representation enabling them to articulate the interests of individuals associated in them. However, if such representation is missing or if it is, for various reasons, insufficient in (or before) any of the powers (legislative, executive or judiciary), members of the group characterized by deficient representation must be regarded as a minority and, consequently, as being disadvantaged in comparison to the rest of society. This situation calls for actions directed towards compensating for the deficiency of representation. Actions within the framework of *public interest law* are not concerned with the representation and protection of particular, individual interest, but of particularly understood public interest, identified with the interest of many individuals constituting a given social group. If that group is too weak to organize itself, and in this way to obtain adequate representation of the individuals it comprises before the legislative, executive and courts, it must receive support. Since all groups should have the chance of obtaining their representation to act on their behalf, any legal means that helps to articulate, organize and represent those "weak groups" is included in the notion of *public interest law.* Striving to provide representation, before all three powers, of the interests of individuals belonging to socially weak groups equals, as a matter of fact, strengthening democracy and either directly fighting for citizens' rights and freedoms (e.g. in the case of *public interest law* relating to representation of the interests of women or ethnic minorities) or particularly extending such a fight, no longer under the banner of representing a citizen as such, but granting to the latter official representation of one of his specific social roles (as in the case of consumers[6]).

The fact that the notion of "representation" becomes the key element of *public interest law* has two consequences. Firstly, as we have already mentioned, the fight for inadequately interests is placed within the framework of protection of citizens' rights

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[4] T. M a r s h a l l: *Financing Public Interest Law: The Role of the Organised Bar,* speech given by T. M a r s h a 1 1, Justice of the Supreme Court of the U.S.A., at the American Bar Association on 10 August 1975 [retranslation].

[5] See also C. H a r 1 o w, R. R a w 1 i n g s: *Pressure through Law,* London Routledge 1992, ch. 7; J. C o o p e r, R. D h a v a n (eds.): *Public Interest Law,* Oxford, Basil Blackwell, 1986, ch. I; R. T h o m a s: "The Consumer and Public Interest Law", p. 311-332; Ch. R. H a 1 p e r s: "Public Interest Law: Its Past and Future", *Judicature* 1974, vol. 58, no. 3, p. 118-127; M. R o g o v i n: "Public Interest Law. A Response to Societal Problems" [in:] R. L. E l l i s (ed.): *Taking Ideas Seriously: The Case for a Lawyer Public Interest Movement,* Washington DC, Equal Justice Foundation, 1981.

[6] The famous "we all are consumers" in the above-mentioned address to the Congress.

and freedoms, which, to some extent, constitutionalizes such interests and social roles as *public interest law* strives to expose. In this way, even though the notion of *public interest law* itself was only conceived in the 1960s, it becomes part of a much longer tradition of the fight for citizens' rights and freedoms.[7] Secondly, this particular strategy emphasizes the role of legal, procedural and professional means, and not purely political aims in the pursuit of increasing representativity of the interests of individuals[8] constituting the group. What matters here are all the existing means and procedures thanks to which one can receive attention and protection. Informing and educating individuals also come into play, as they increase the ability to get heard and a readiness to apply the already existing means to protect their interests, to articulate more forcefully their interests and to implement their individual rights. Familiarity with, and creativity in using the existing possibilities play a very important role: it is not enough to want, one must know how. Even in the case of representation before the legislative, when the issue in question is changing the obtaining positive law, something we usually perceive as belonging to the domain of politics, *public interest law* stresses more active participation of the representation or pressure groups in work preceding the preparation of amendments and works on amendments, that is broadly understood "representation": in preparatory procedures and not exclusively in the Parliament. Again, what is important here is to use all possibilities created by the already existing parliamentary mechanisms (which entails a certain skill and creativity), and not just the postulate of achieving a legal and political objective.

It is also mistaken to limit the notion of representation within the framework of *public interest law* solely to the question of litigation, i.e. to representation before the court (either by supporting a well-chosen "strategic" individual complaint with the intention of creating a precedent through adequate publicity or by admitting a public interest group as such). Litigation is only one of the methods (a very valuable one,[9] let us add) within the framework of *public interest law,* but it also comprises parliamentary lobbying or, as we would put it, "social consultation", and many other actions before administrative authorities, sponsorship and educational activities (addressed to individuals and aiming at persuading them to make more determined use of the already existing possibilities in order to obtain better representativity, or addressed to those in power, in order to make them more sensitive towards the protection of inadequately represented groups: to notice and articulate it in the actions of a given power).

[7] See: L. B r a n d e i s: "The Opportunity in the Law", *American Law Review* 1905, vol. 39, p. 559.

[8] We want to emphasise that we have in mind interest of individuals constituting the group and not interest of the group, as eventually the actions undertaken within public interest law should lead to better implementation of the subjective rights (broadly understood) of the individuals constituting such a group, and not to the autonomy of the interest of the group.

[9] See: A. H o m b u r g e r: "Private Suits in the Public Interest in the United States of America", *Buffalo Law Review* 1974, vol. 23, p. 343-409; M. C a p p e l l e t t i, B. G a r t h (eds.): *Access to Justice: The World Wide Movement to Make Right Effective, a General Report,* vol. I, p. 5-124 and vol. III, *Emerging Issues and Perspectives,* Milan, Giuffre, 1978, 1979; M. C a p p e 1 1 e 1 l i: "Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study", p. 769-903; D. F e 1 d m a n: "Public Interest Litigation and Constitutional Theory in Comparative Perspective", *The Modern Law Review* 1992, vol. 55 (January), p. 44-72.

Another well-marked element of *public interest law* is fighting for "representation with legal means", which exposes the professional legal aspect of representation through procedure. In the search for such representation and its strengthening, legal assistance,[10] i.e. advocates, various *amici curiae,* and specialized organizations, plays a vital role. It must be emphasized that "public interest groups", that is, social organizations and pressure groups are not established to represent their own interests, but to act as an instrument increasing the efficiency of an individual and his interest. A group helps and replaces an individual instead of being an autonomous subject of interest and action. An individual seeks better representation of his interests, due to a specified social role: a group, an organization helps or even enables an individual to obtain it, but the interest of the group does not become autonomous. All the time we are dealing with the interests (rights and freedoms) of an individual.

Consumer protection, understood as a manifestation of *public interest law,* provides a particular solution to the question: against what should the consumer be protected? It is the task of the customers to take this decision when, thanks to increased representation, they are able to freely articulate their interests.

3. Axiological Motivation of Consumer Protection in European Law

3.1. In European law, the awareness of the need to protect customers appeared as a question of legal policy at roughly the same time as in the U. S., that is in the 1960s. However, whereas in the U. S. the problem was immediately judicialized by the "invention" of *public interest law* (both as the term and as the strategy of actions covered by the concept), in Europe the question of giving more importance to customers was not treated holistically, at the level of their deficient representation as a social group "before authorities". This approach was criticized (as we have already mentioned) for placing too much emphasis on ideology. The preferred approach was to see pro-consumer policy as a legislative policy (whose formation depends on the authorities and is not determined by anybody's claims, giving the impression of the State granting certain actions) and not as implementing claims, already legitimized by public law, of individuals demanding, in a specific social role, representation before authorities. The latter axiological motivation was, and still is, missing in European "consumer" literature. Naturally, there have been publications where the notion of *public interest law* was adopted, but only while describing the American experiences or in the context of a proposed covering of consumer protection with a similar strategy, the broad concept of "representation", a key term in public law axiology of *public interest law,* was limited to representing an individual before the court.[11]

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[10] See report of the group of Yale students: "The New Public Interest Lawyers", *Yale Law Journal* 1970, vol. 79, no. 6, p. 1069-1152.

[11] See: H. G a d i n g: "Litigation by Public-interest Groups in European Law", *German Yearbook of International Law* 1996, vol. 39, p. 361.

The motivation which judicialized consumer protection policy, and, consequently, saw in its adoption the need to satisfy legitimate claims by individuals or groups representing them, being a result of a broader, public-law understanding of "representation" of consumers as a group of individuals, never had any influence and, moreover, disappeared. In such circumstances, it was by no means obvious not only how to answer, but simply how to ask the question "why indeed should we carry out the policy of consumer protection"?

3.2. Putting the question in terms of "representation before authorities", which is characteristic of the *public interest law* trend, significantly facilitates legal articulation of the need to protect consumers. Part of the difficulties in such articulation result from a false understanding of the ideology of civil law, detached from its history: it is believed to be reluctant towards the idea of protecting the consumer as a subject deserving a privileged position within the law of contract.

Can such reluctance really be ascribed to the ideology of civil law (much newer than the law itself, shaped at the turn of the 18th century as a product of the French Revolution and Kantian philosophy)?[12]

In those times, having been made the centre of the distribution of forces obtaining in society, the individual was intended to have the freedom of pursuit of his own ambitions: "by his labour to gain property, by exchange to satisfy his wants, by upward mobility to achieve a place commensurate with his talents. It was assumed that individuals will differ in their natural endowments, in their energy, drive and motivation, in their conception of what is desirable and that the institutions of society should establish procedures for regulating fairly the competition and exchange necessary to fulfill those individually diverse desires and competences. [...] The social structure of modem society - in its bourgeois form as the universalism of money, in its Romantic form as the thrust of ambition, in its intellectual form as the priority of knowledge is based on this principle".[13] The civil codifications created in the nineteenth century, reflecting those ideas, assumed parties to contracts to be equal. Those codifications based on the assumption of freedom of contract, manifested for instance in contractual co-operation, that is in negotiations between the parties until reaching an approved, "wanted" compromise. That is why those instruments were non-casuistic and their provisions discretionary, leaving much freedom to parties negotiating. The customers here are independent within the offer and the money at their disposition. They are bound by contracts because they express their own will. A customer buying a piece of bread for his last money and a customer taking a fancy to buy an unnecessary gadget are treated identically in the light of law. The legislator was not to take into consideration such circumstances as the social weakness of an individual - this belongs to the realm of moralists. This attitude, present in the Napoleonic Code (and generally in the civil law of those times), became later (especially in the literature inspired by Marxist ideology) the cause

[12] I repeat this fragment after my earlier study: "Umowy - mitologia równości" [Contracts - the Mythology of Equality] [in:] S. W r o n k o w s k a, M. Z i e l i ń s k i (eds.): *Szkice z teorii prawa i szczegółowych nauk prawnych* [Studies in the Theory of Law and Special Legal Sciences], Poznan 1990, p. 47-62.

[13] D. B e 1 1: *The Coming of Post-industrial Society,* New York 1973, p. 425—426.

of accusing their authors of hypocrisy, of consciously obliterating social inequalities. Whereas there are no doubts that the intended social neutrality of the law of that period objectively justified such evaluation, it would be all too simplistic to charge the creators of Napoleon's Code with conscious hypocrisy (such charges can be heard sometimes).

Our forefathers were neither dishonest nor naive. Yet, their conscience was shaped by their times. Equality, as a banner of the French Revolution, meant an equal start. The State and the law were to create conditions and procedures for just competition further in the life race, and "just" meant that everybody should be provided with identical formal chances, that is, free from precedence of birth or class. The notion of equality in the nineteenth century was built in opposition to the programmatic inequality of people before the law, resulting from the feudal precedence of birth. What is important, the demand for equality was not addressed to the legislator, but to the organs applying the law. That what is now taken for granted: that the law should be applied equally to everyone, was not obvious then. For this reason, the fact that the legislator did not take into account social inequalities cannot be used as a basis for accusing the authors of Napoleon's Code of a violation of the principle of equality, the way it was understood in those times. If we were to accuse them of anything, we could only say that they were shortsighted and did not foresee the further course of events. Even if in that instrument the equality of parties was reduced to its purely formal understanding, this is by no means proof that, in those times, the problem of real economic inequality was not believed to deserve any attention. However, it was thought that guaranteeing formal equality of parties, belonging to the domain of law, combined with the principles of free competition, would compensate for other inequalities, even those social or economic. Where the substantial inequality of chances could not be compensated for by non-legal mechanisms, the legislator took care (in such case) to give the weaker party more importance. It is untenable to claim that the ideological substance of the principle of the equality of parties was ever reduced to its purely formal understanding. It was, however, believed, and this conviction was not blatantly inconsistent with reality, at least not in the nineteenth century, that providing for formal equality of rights in addition to the principles of the functioning of the economy was enough to ensure actual equality of chances of the participants in trade. Yet this assumption proved more and more delusive as the economy was developing, technology was progressing, trade was becoming a mass phenomenon, and especially as the economy was becoming monopolized and providers of goods and services professionalized.[14] And this exactly what happened to the consumers. The fact that in the 1960s, in Europe and America, objections were raised as to the consumers' position on the market and the level of protection was a consequence of noticing that economic changes lead to a significant weakening of the consumers' position as "partners on the market". The consumer became a representative of a group whose disadvantage in relation to its professional partners was already typical. In other words, ensuring balance by guaranteeing the consumers formal free-

[14] E. Ł ę t o w s k a: "Umowy...", *op. cit.,* p. 49-51.

dom of contract correlated with the conditions of competition was becoming impossible as the latter had changed. Possible remedies could be either exercising non-legal influence on those changed conditions on the market in order to strengthen the consumers' position or (and) giving the consumer, as a party to the contract, more importance with the help of legal means. In any case, it was a mistake, in the changed situation, to draw the conclusion that there was no need to act, as the principle of the law of contract is the purely formal equality of parties. Such a conclusion was based on a very shallow, one-sided and detached from the history understanding of that principle (which did not prevent some less far-sighted lawyers from arriving at that conclusion).

3.3. With the problem not being seen from the perspective of public law, as in the U.S., and, at the same time, the instrumental formalism of the law of contract being assigned the importance of a universal axiological principle, the articulation of consumer protection in law was not easy. Besides, in the 1960s and 1970s, the intensification of processes of the unification of law in Europe and the development of European law clearly began to be concerned with consumer matters, and it is worth observing under what banners they did so.

In 1975, the Council of the Communities adopted a preliminary programme for a consumer protection and information policy,[15] based on the assumption of five fundamental rights of consumers: the right to protection of health and safety,[16] the right to protection of economic interest,[17] the right of redress, the right to information and education, and the right of representation of their interests. In the period of operation of the programme many concrete steps were taken in order to eliminate economic and technical barriers connected with requirements as to product safety, mainly through the harmonization of the provisions specifying safety requirements (administrative provisions). The crown of those actions was the adoption of Directive 92/59 on general product safety, laying down the general and subsidiary duties of Member States in relation to ensuring safety of products on the market, and Directive 87/357 concerning products which, appearing to be other than they are, endanger the health or safety of consumers. The second five-year programme for consumer protection was adopted in 1981,[18] the third in 1985.[19] The following programmes lasted three years each: 1990-1992, 1993-1995.[20] They remain unchanged as to the sphere of consumer protection (fundamental consumer rights). The subsequent programmes are characterised by more specific re-

[15] Polish translation published in *Ustawodawstwo konsumenckie Unii Europejskiej* [Consumer Legislation of the European Union], Urząd Antymonopolowy, Warszawa 1996, p. 17 and following. The programme was annexed to the Council Resolution of 14 April 1975.

[16] It was especially concerned (the programme was very specific in this respect) with foodstuffs, cosmetics, detergents, utensils and consumer durables, cars, textiles, toys, dangerous substances, materials coming into contact with foodstuffs, medicines, fertilisers, pesticides and herbicides, veterinary products and animal fodder - all those major sources of danger were listed casuistically.

[17] It clearly indicated the need of protection in respect of conditions of consumer credit and false, misleading advertising, as well as abusive commercial practices, such as terms of contracts, guarantees, door-to-door sales, unsolicited goods, information given on labels and packaging.

[18] The programme was annexed to the Council Resolution of 19 May 1981.

[19] A New Impetus for Consumer Protection Policy, 27 June 1985.

[20] Published in Polish in the volume quoted in footnote 15.

quirements and a rising standard of protection; they contain also a critical account of the work undertaken so far. The main emphasis is on a great number of specific implementing actions, undertaken in order to carry out those programmes. Work is not being done "from one programme to another", but mainly "in between" the programmes, and each subsequent programme, having a similar object, is concerned with a new qualitative phase, thereby raising the standard of protection. The accumulation of quantitative changes gradually leads to the transformation of "consumer protection", understood literally, into the pro-consumer attitude pervading in EC economic policy. This, in turn, results in broadening the very notion of "consumer law" so as to include subsequent scopes of harmonization.

In Western Europe, or, more precisely, in the European Union, it took more than twenty years to arrive at the present level of awareness as to what the consumer should be protected against and how it should be done, as well as to work out adequate instruments of law and the practice of application of such law. What matters here is not just the passage of time, but also filling it with conscious, intensive, planned and co-ordinated actions on a large scale. The developing "consumer law" has already become a stable (and substantial) element of European law.[21] However, until recently (more precisely - until the changes introduced as a result of Maastricht agreements) consumer protection was not a strategic objective, but only a tactical objective of the Community. For instance, the question of the standardization of quality belonged, of course, to matters of consumer protection, especially the protection of consumers' life and health, but from the point of view of achieving the objectives of the Union, the main question was to harmonize economic conditions facilitating free movement of goods and services, to guarantee competitivity and to equalize economic conditions among individual Member States. According to the catalogue of the objectives of the Community, this was the main strategic objective. Consumer protection was perceived as a means for achieving this aim.[22] After the Maastricht Treaty, advanced consumer protection, articulated as such, was added to the catalogue of the policies of the Community (Article 3, letter (s) and Article 129, letter (a) of the Treaty). Whereas in 1972, when the need to protect consumers was confirmed, it was seen as one of the means of achieving the objectives set by the Treaty of Rome, as specified in Article 2 thereof, in 1992 the Maastricht Treaty included the postulate of advanced consumer protection as an independent element of the catalogue of the common policies of the Union - Article 100 of the Treaty. This qualitative change expressly placed the individual "as" a consumer in the centre of the problem. Having given the consumer an independent position, the European approach became - axiologically - similar to the American tradition. It lacks, however,

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[21] See M. A. D a u s e s, M. S t u r m: "Prawne podstawy ochrony konsumenta na wewnętrznym rynku Unii Europejskiej" [Legal Bases of Consumer Protection on the Internal Market of the European Union], *Kwartalnik Prawa Prywatnego* 1997, no. 1, p. 32-57 with a presentation of the scopes and objects of EU legislative initiatives.

[22] See: D. H o f f m a n n: "Analyse der europäischen Rechtsetzungstechniken in Bereich der Vertragesrecht aus der Sicht der Europäischen Kommission" [in:] *Le nouveau droit des contrats et la protection des consommateurs*, Bruxelles 1997, p. 11.

the question of representation in the typical understanding of *public interest law,* which causes the initiatives undertaken on the behalf of the consumer to be much more formalized, understood as actions initiated either by the state or - as harmonizing actions - at an international level, but in any case as actions guided "from above". Within the framework of *public interest law,* on the other hand, it is not decided in advance where the strengthening of consumers' representation should lead: it is for the consumers themselves to decide after they have obtained better possibilities of "being represented" in places where the fight for a better protection of their interest is being conducted.

Also, the appearance of a new "field" of consumer protection: the protection of a consumer's privacy, may be interpreted as a confirmation of the observation that European consumer protection law has discovered connections with the protection of the rights and freedoms of the individual. This question deserves a more detailed discussion as it is not very well known.

3.4. One of the new dangerous areas, until recently unnoticed in European law, is the privacy of the consumer, understood as freedom from being pestered by the *animus contrahendi* (the intention of concluding the contract) on the part of the entrepreneur. In market economy goods follow money, and the entrepreneur and trader become the more active part; their activity is sometimes manifested by an aggressive attitude towards the customer, and this results in a violation of the privacy of the latter. The consumer should be protected (this is one of the elements of his privacy) against unwanted "commercial harassment "and should have, at the time of every contact, a chance to discover its nature (commercial or, for example, social, private) and make a transaction being aware of doing so and under such conditions as to ensure its correctness (e.g. the possibility of comparing the received offer to other offers). It is important that respect be shown for the awareness of one's own social role, and such awareness and decision on making use of that role be considered as elements of the privacy of an individual under protection. Two European directives included in the consumer law of contract clearly refer to the matters of privacy. Above all, one of the first directives concerning consumer contracts (No. 85/577 - to protect the consumer in respect of contracts negotiated away from business premises) had its origin in the idea of protecting privacy. An unusual place of concluding a contract, away from the "normal" one, poses a special threat to the consumer, who is "attacked by surprise" and has no chance of making a comparative analysis of the offer. Frequently, contracts are concluded at consumer's home, as door-to-door sales. Here, we can also indicate the element of embarrassment at receiving a visit at home. The seller of goods or services becomes at the same time the customer's guest, and the customer may feel obliged to show special consideration instead of treating the seller as neutrally as in a shop.

The directive concerning transactions away from the premises of an enterprise envisages protection, giving the consumer the right to renounce a contract concluded in such circumstances, without indicating or evaluating the reasons for doing so, within seven days from its conclusion. Also, the consumer must be informed in writing of this right, as well as of the place where he may make complaints, should he have any. The latter duty is connected with weaker possibilities of identifying the contractor by the

consumer, in comparison to contracts concluded at premises where trade or services are carried on normally. The directive attempts to make up for it by imposing adequate duties on the professional. Thus, if the unusual place of concluding a transaction is the consumer's home, protection of the latter is, at the same time, protection of his privacy.

However, the motive of the protection of the consumer's private life is exposed much more decisively in the latest directive No. 97/7, adopted in 1997 and concerned with distance contracts. We will return to this directive later: for the time being we will only indicate the provisions that relate directly to the protection of privacy. The use of the consumer's telephone, fax or automatic calling machine by a supplier who wishes to establish commercial contact with the consumer requires prior consent of the latter. In other words, if the consumer does not want to be called and offered various goods and services by means of his communications devices, thereby violating his privacy, he may demand such pestering to stop. This is feasible insofar as the directive also states clearly that any contact (including contacts made with the use of other means of distance communication than those listed here), established in order to reveal *animus contrahendi* by the entrepreneur, requires this purpose to be immediately communicated to the consumer. It is important that the consumer be clearly informed about the nature of the contact in which he engages, and that he refrain from making any decisions without being able to judge the whole situation. Secondly, the directive obliges the supplier to give the consumer a chance to make such judgement by obliging him to provide information on the commercial nature of the contact. If the supplier uses private devices of the consumer (telephone, fax, calling machines) against the will of the latter, such action displays all the features of an unlawful violation of the right to privacy, which enables the consumer to apply legal means of the protection of this sphere, even without the necessity to prove the violator's unlawfulness.

The preamble to Directive 97/7 expressly refers to the Convention on the Protection of Human Rights and Fundamental Freedoms, quoting, in point 17 of the preamble, Article 8 (protection of privacy) and Article 10 (freedom of information) thereof as values subject to protection from the point of view of the fundamental rights of an individual and, moreover, conflicting values. Therefore, the need must be recognized to protect the consumer against certain aggressive and intrusive techniques of distance communication.

In this way, Directive 97/7 clearly indicates systemic links between its purpose and content and the conception of the protection of human rights. In other words, in the light of the directive there is no doubt that the protection of an individual as a consumer is a fragment, or more precisely, one of the aspects of the protection of the individual within the framework of human rights. This is interesting insofar as for many years, even in countries with advanced systems of consumer protection (like Sweden), strong objections were made against so-called excessive ideologization of consumer law by emphasizing its links with the protection of human rights. The opposite view was more characteristic of the American tradition, where consumer protection was recognized as giving greater importance to one of the groups of citizens, which was socially "weak" in some respects. In that tradition, consumer law gained a clearly constitutional aspect.

The European consumer law, after the amendments following the Maastricht Treaty, which stressed more forcefully the independence of the purposes of consumer protection as creating better living conditions for the individual, emphasizes more clearly its "human rights" dimension. And the preamble to Directive 97/7, with its links with human rights, is indisputable proof for that.

Those links concern not only the necessity to respect the consumer's privacy, on the one hand, and, on the other hand, freedom of communication, also because of the need to conclude distance contracts and the need to achieve a reasonable compromise in this respect. The preamble to Directive 97/7 makes express reference to European regulations concerning personal data. Let us remember that the latter comprises, above all, Convention No. 108/1981 for the Protection of Individuals with Regard to Automatic Processing of Personal Data. The consumer is also protected due to the fact that the Convention applies to both public and private sectors. Recommendation R/85/20 on the protection of personal data used for the purposes of direct marketing applies, in the first place, to consumers. In particular, it sets forth restrictions as to sources of surnames and addresses of potential customers. There are no restrictions on the use of generally available registers, lists and publications (such as telephone directories). But it is only admissible to collect privately surnames and addresses as long as adequate guarantees are given that the privacy of the person concerned will be protected. National legislations can, therefore, introduce a complete ban or serious restriction on such practices. Making the collected data available to third parties for marketing purposes is only possible on the condition that the person concerned is, at the moment of data collection, informed thereof and expresses no objections. National legislations should provide solutions which ensure that this right of the concerned persons will be enforceable.

3.5. As for methods of action, the formation of European consumer law displays certain specific features, which are also worth a closer examination.

Work on particular European directives (except for questions of the standardization of the quality of the "strategic" groups of goods as indicated above) was initially conducted rather slowly. This was due to the characteristic, slow, dialogic procedure that had been adopted. The first directive in the field of the rights of consumers, concerning the protection of the consumer in respect of contracts negotiated away from business premises (85/577)[23] was adopted as late as 1985. Directive 85/374[24] concerning liability for defective products was adopted in the same year. The year before, Directive 84/450[25] on misleading advertising was adopted. Next came directives on consumer credit (87/107, amended by Directive 90/88[26]), on package travel, package holidays and package tours

[23] For Polish translation, see *Ustawodawstwo konsumenckie*, p. 153 and the translation of the directive with an introduction by E. Ł ę t o w s k a : *Kwartalnik Prawa Prywatnego* 1996, no. 2, p. 383 and following.

[24] Polish text: *Ustawodawstwo konsumenckie*, p. 104 and translation with an introduction by J. S k ą p s k i, *Kwartalnik Prawa Prywatnego* 1995, no. 4, p. 583 and following.

[25] Polish text in: *Kwartalnik Prawa Prywatnego* 1996, no. 1, p. 161 and following; E. T r a p 1 e, J. P r e u s s n e r - Z a m o r s k a: "Interes konsumenta oraz instrumenty jego ochrony w dziedzinie reklamy" [Consumer Interest and Instruments of its Protection in the Field of Advertising], *Kwartalnik Prawa Prywatnego* 1996, no. 1, p. 5 and following.

[26] Polish text in: *Ustawodawstwo konsumenckie*, p. 283 and following.

(90/314[27]), on unfair terms in consumer contracts (93/13[28]), on contracts relating to the purchase of the right to use immovable property on a timeshare basis (94/47[29]), and on distance contracts (97/7[30]). Directives of 1990 concerning liability of service-providers, guarantees on consumer goods (96 C/307/09), cross-border transactions 94/C 360/11) and sanctions connected with the protection of consumer interests (COM 95/712) are in the draft phase and preparatory work is still conducted. Irrespective of the binding instruments of Community law, numerous instruments, having the nature of a report or information, constitute an important implementing element, obliging individual Member States to harmonize the level of protection. By way of example, one can indicate: the Council resolution of 1995 on products presented as healthy, the Council resolution of 1987 on pursuing claims by customers, a preliminary report (COM 93/576) on consumers' access to jurisdiction and resolving consumer disputes on common market, information (COM 93/456) submitted by the Commission to the Council and European Parliament concerning the language used in information for consumers in the Community, the resolution of the Council and Ministers of Education of 1986 on consumer education in elementary and secondary schools and a report (on the same subject) of the Commission COM 98/17 of 1989, information from the Commission on the information and awareness campaign concerning safety of children (COM 87/211).

Regardless of the system of legal instruments of the European Union - the most comprehensive ones, comprising the most advanced system of such instruments,[31] as we have already mentioned - pro-consumer instruments of the Council of Europe also play a very important role. We should enumerate here especially European Convention No. 41 on the Liability of Hotel-keepers concerning the Property of their Guests,[32]

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[27] Polish text in: *Ustawodawstwo konsumenckie,* p. 313 and following, and *Kwartalnik Prawa Prywatnego* 1996, no. 3, p. 603 and following; M. N e s t e r o w i c z: *Dyrektywa Rady Wspólnot Europejskich o podróżach turystycznych a prawo polskie* [Directive of the Council of European Communities on Tourist Travel and Polish Law], *Kwartalnik Prawa Prywatnego* 1996, no. 1, p. 435 and following.

[28] Polish text: *Ustawodawstwo konsumenckie,* p. 137 and following, and *Kwartalnik Prawa Prywatnego* 1993, no. 2 with an introduction by F. Zoll, p. 191 and following.

[29] A Polish translation has not been published. Discussion in: B. F u c h s: "Timesharing", *Rejent* 1997, no. 4, p. 80-101.

[30] There is no Polish translation of the final text. One of the draft versions is published in *Ustawodawstwo konsumenckie,* p. 166 and following.

[31] It is extremely difficult to compile an exhaustive list of EC instruments concerning consumer matters. (This was attempted in *Ustawodawstwo konsumenckie,* p. 335.) It is much easier to indicate the instruments envisaging the harmonisation of national legislations of Member States of EC concerning the rights asserted by consumers by way of claims or obliging individual states to undertake actions directly in the interest of consumers (quality requirements and supervision, system for gathering information on accidents, duties relating to marking goods and informing). However, more and more often, as a result of pro-consumer actions having been made one of the main objectives of the integration of economies of the Communities, we are dealing with actions (instruments) which affect the consumers' situation indirectly. For example, since one of the assumptions of the common internal market is the promotion of the mutual overlap of national markets, including a continuous development of consumers' habits, it is, therefore, concluded that consumers are discriminated by being deprived of the possibility of learning about products manufactured in the traditional way in other Member States (M. A. D a u s e s, M. S t u r m, see above, p. 53).

[32] Published in *Standardy prawne Rady Europy* [Legal Standards of the European Council], vol. II, M. S a f j a n (ed.), p. 12, together with its discussion by M. N e s t e r o w i c z: "Konwencja (41) o odpowiedzialności

European Convention No. 91 on Products Liability in regard to Personal Injury and Death,[33] resolution 76/47 on inadmissible terms in contracts for the sale of goods and provision of services and appropriate methods of control[34] and recommendation R 81/2 on the legal protection of common consumer interests by consumer organizations.[35] Those instruments, as for their content and scope, are not harmonized with the EU system in details. Yet, unmistakably, they are inspired by a similar strategic thought as to their object and techniques of protection.

The first conclusion, when reading European instruments (and European law in force, various manifestations of soft law,[36] as well as different official statements) concerning questions of consumer protection (nowadays, more often concerning pro-consumer objectives of integration), is that we are dealing with a flood of initiatives ("multiplying beings") and that it would require a great effort to group them and establish mutual relations and interdependencies between them. What strikes the reader is also the length and elaborateness (as compared to the main text) of all preambles, explanations and "self-comments". It would be extremely difficult to illustrate the quality of being economical in creating "normative beings" with the example of European consumer law. Yet, on second thought, one begins to see sense in this method. The lengthy discussions in the preparatory stage, the verbal richness of every instrument, intended to explain the motives and work out common assumptions, are nothing but the implementation process itself (more precisely, the basic assumptions of those instruments). Long, comprehensive, meticulous discussions, patiently returning to apparently settled matters foster internalization, "absorption", getting accustomed to the new consumer axiology and strategy. And since this occurs in a circle of persons, who have strong influence on opinions concerning legislation (both European and national of individual Member States), their familiarity with the subject is decisive for the actual implementation of pro-consumer axiology. Another important factor is real education and information addressed to various groups of consumers (e.g. school education).

It seems curious that within the framework of Polish transformation this aspect does not generate profound interest: traditionally, we are more interested in the "text"

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za rzeczy wniesione przez gości hotelowych a stan prawny obowiązujący w Polsce" [Convention No. 41 on the Liability of Hotel-keepers Concerning the Property of their Guests and the Legal State Binding in Poland], p. 19 and following thereof.

[33] Published in the book referred to in the previous footnote, p. 66, together with a discussion by J. K r a u s s: "Europejska Konwencja (nr 91) o odpowiedzialności za szkody na osobie lub śmierć wyrządzone przez produkt a regulacje prawa polskiego" [European Convention No. 91 on Products Liability in Regard to Personal Injury and Death and the Regulations in Polish Law], p. 98.

[34] Published in the book indicated in footnote 29, p. 202 and following.

[35] In the same source, p. 206. See also: Cz. Ż u ł a w s k a: "Rezolucja Nr (76)47 w sprawie klauzul niedozwolonych w umowach sprzedaży towarów i świadczenia usług oraz odpowiednich metod kontroli oraz Rekomendacja Nr R (81)2 w sprawie ochrony interesów wspólnych konsumentów przez organizacje konsumenckie a prawo polskie" [Resolution 76/47 on Inadmissible Terms in Contracts for the Sale of Goods and Provision of Services and Appropriate Methods of Control and Recommendation R 81/2 on Legal Protection of Common Consumer Interests by Consumer Organizations], in the same source, p. 223 and following.

[36] That is instruments of various origins, which are not obligatory in a given State. Their force consists, for instance, in the self-obligation of certain professional groups N. R e i c h, J. L e s 1 e y (eds.): "Implementing the Consumer Supplier Dialogue through Soft Law?", *Journal of Consumer Policy* 1984, no. 2.

than in "how it was invented" and "how it was made generally known and understood". However, successful harmonization of law is, to a great extent, dependent on the latter. That is why the experiences of the formation of European consumer law should be, at least, of equal interest to us: not only from the point of view of achievements, measured in texts, but also how approval for a given strategy and its axiology was obtained. The presented programmes and projects of approximation to the EU law in general, intended to raise the standard of consumer protection in particular,[37] do not devote enough attention to the question "how" it was made, and instead they concentrate on "what" is in force in the countries of the EC, so to say, on the "final product", underestimating the implementation of European law, its methods and internalization of pro-consumer axiology by wide groups of decision-makers and lawyers. That explains also why in our country so little importance is attached to consumer education and representation: they are not concerned with producing "texts", but with undertaking organizing activities in order to raise "self-service" consumer skills. In this aspect, European law shows similarities to *public interest law* as regards consumer protection strategy. They differ in that such strategies, as we have already mentioned, if we envisage consumer protection as *public interest law,* comprise a much wider scope of activities.

4. Difficulties in Settling the Question of Consumer Protection in Conditions of Planned Economy and Its Transformation Towards Market Economy

Unfortunately, consumer protection in our country has always had bad luck: it has been underestimated to the extent of courts not noticing the need for such protection and judges being both insensitive and reluctant to squeeze anything out of legal provisions by way of interpretation. Before 1988 there were, and there still are, people (in the lawyers' environment) who negate the very need to protect consumers, even if their arguments are different. This causes the discussion on more advanced phases of con-

[37] However, in our country, programmes and studies, sometimes truly valuable and interesting, are prepared for a small audience; the same applies to publishing their results. This happened to the studies in *Biala Księga* [White Book], completely unavailable to ordinary readers and unknown even to courts - a series of studies and analyses concerning consumer law, published by URM [Office of the Council of Ministers] in 1996, in particular, vol. 13 *(Standaryzacja umów w obrocie gospodarczym* [Standardization of Contracts in Economic Trade] by W. J. Kätner, M. Pyziak-Szafnicka), vol. 17 *(Polskie prawo postępowania cywilnego a prawo WE* [Polish Law of Civil Procedure and EC Law] by A. Miączyński), vol. 18 *(Jakość wyrobów* [Product Quality] by I. Duda, Z. Cichoń, B. Gnela, A. Ożóg, M. Seweryn), vol. 26 *(Publicznoprawne instrumenty ochrony konsumenta* [Public Law Instruments of Consumer Protection] by R. Szostak), to the already quoted collection *Ustawodawstwo konsumenckie Unii Europejskiej,* and *Model prawnej ochrony konsumenta* [A Model for Legal Consumer Protection] in the series *Harmonizacja Polskiego Prawa Konsumenckiego z Regułami Unii Europejskiej,* vol. VI: *Ochrona konsumentów* [Protection of Consumers], Urząd Antymonopolowy, Warszawa 1996, or, finally, to *Program ochrona konsumenta w Polsce - stan obecny, kierunki zmian i działań dostosowawczych (w aspekcie stowarzyszenia z Unią Europejską)* [Programme Consumer Protection in Poland - Present State, Changes and Adjustment Measures (in the Context of Unification with the European Union] a study by the Ministry of Industry and Commerce, 1995, unpublished. Besides, text-centredness is also characteristic of studies having the nature of programmes: they do not devote sufficient attention to questions of implementation sociotechnology or at least implementation alone.

sumer protection to slow down and their implementation to be delayed. We are still at the initial stage: wide circles of practising lawyers are not convinced that consumer protection is necessary, and have to be continuously persuaded that modem mass trade is something different from its nineteenth-century version.

In the previous period, objections stemmed also from the fact that the consumers' partners were state enterprises. "You can never win with the railways (bank, insurance establishment, etc.)" common wisdom said. And this was true insofar as the courts, in many cases, were reluctant to recognize the individual interests of a consumer as deserving protection in a dispute with units of state economy. The underlying reason was the holistic attitude of socialist doctrine,[38] in the conviction that what is good for a state enterprise must automatically be good for the society, and, consequently, for the individual. When, in the Eighties, about a decade later, the belief that, even in socialism, the problem of consumer protection deserved attention (although the dangers and ways of averting them were in some respects different[39]) started to spread, the economic system changed. Naturally, the freshly approved consumer protection strategies turned out to be outdated or, at least, suspicious. What was even worse, we were again at the point of departure as regards accepting the need for consumer protection. The change in the economic system was followed by a new phenomenon, posing an equal obstacle to the birth of pro-consumer sensitivity. Soon, it became generally accepted that, firstly, an invisible hand of the market (competition) resolves, by itself, problems concerning principles. And that the consumers have to bear various inconveniences that they encounter, since the latter are unavoidable economic inconveniences this time not within socialized, but market economy. Secondly, another equally mistaken and equally widespread belief maintains that "marketized" economy, assuming the elimination of privileges for, let us say, state enterprises, does not tolerate special privileges for consumers. This image of market economy and the place of consumers in it, completely incompat-

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[38] In 1983 I wrote the following on the difficulties with accepting the idea of consumer protection: "Such reasoning caused doubts whether insufficient consumer protection really deserved criticism, as it could be seen as unavoidable concession towards a common good. Noticing that the alternative: interest of the society *vs.* interest of an individual, does not exhaust all the possibilities, and that apart from those two types one may also indicate group interests of enterprises, not always compatible with the interest of the society, but sometimes mistakenly identifying and identified with it, made it easier to overcome the objections in this respect and, at the same time, opened the possibility of formulating the banner of the necessity of consumer protection. It was also rendered easier by growing criticism against a too publicist image of interest of the society. Since neither all claims to express such interest, nor each interest of the society (the problem of cost and time horizon!) must automatically prove more important than the interest of an individual. If one understands this regularity, one is free from pseudo-ideological doubts concerning the postulate of consumer protection, even if such doubts have not been expressed formally, but on many occasions formulated indirectly. A certain visible reserve towards adopting the banner of consumer protection might have also resulted from uncertainty as to the boundary between the interest of the consumer, deserving support and protection, and egoistic, exaggerated pretences of the latter". E. Ł ę t o w s k a: "Kształtowanie się odrębności obrotu mieszanego" [Formation of Autonomous Mixed Trade] [in:] E. Ł ę t o w s k a (ed.), *Tendencje rozwoju prawa cywilnego* [Trends in Development of Civil Law], Ossolineum 1983, p. 401. See also W. W a s i a k: *Determinanty i podstawy prawne ochrony interesów konsumenta w Polsce* [Determinants and Legal Bases of the Protection of Consumer Interests in Poland], Prace Naukowe Akademii Ekonomicznej, Wrocław 1985, no. 298.

[39] See: C. Ż u ł a w s k a: "Ochrona konsumenta w reformowanej gospodarce" [Consumer Protection during Economic Reform], *Spółdzielczy Kwartalnik Naukowy* 1985, no. 3, p. 41—49.

ible with contemporary reality, was characterized by a somewhat neophyte enthusiasm for returning to the roots, as the market economy, to which it turned, was its old version, from the period when, for reasons of the political system, the links with Western economies were broken, and Polish law and legal thought, for the same reasons, no longer kept up with the latest European achievements.

A closer examination of Western laws, especially the European laws, demonstrates both those assumptions to be completely false. Though the invisible hand of the market ensures in itself freedom of the market, but this alone does not automatically cause the market to be transparent or market relationships to be fair. And thus it is the consumers - a group[40] which uses the market in a dispersed, individualized (both personally and materially) way - who are most affected by the results of the lack of transparency and decent treatment, since the consumers' partners, being well organized, specialized and professional, can profit from a deficit in those values. In the West nobody would deny this statement now, and it is only within the last three decades that statements in this field have become familiar, accepted, even commonplace and have been made the foundation of political and legal strategic programmes of consumer protection. It is, therefore, obvious that if we treat the economy of the earlier period, for example, that of the Thirties (which is sometimes viewed in this way in our country) as the model of market economy and its legal instruments, then the necessity of protecting consumers was not even mentioned.

The above mentioned bad luck of problems of consumer protection in Poland consists in the fact that twice, within a short period of time, it had to fight for its axiological recognition, and that the last stage (the fight for judges' awareness) has by no means been completed. That explains also the somewhat shocking ascertainment that the change in economic system was marked by a regressing legal standard of protection.[41]

Meanwhile, we witness significant moves on the map of dangers, which does not make it easier for the judges to become convinced that consumers face real dangers. When, a few years ago, a group of specialists from "here" and "there" were discussing consumer protection matters, it was striking how assessments of dangers differed. We, from "here", continually turned to the subtleties of warranties and guarantees, since on a market far from abundant, where money followed goods, the main problem was still how to find a seller of goods or a provider of services. Since what they offered was usually of poor quality, how could one force them to repair or replace what one managed to get? The perspective of withdrawal from the contract (that is, refund of money) was by no means satisfying, because it meant being "thrown back on the market" and again joining those who were still seeking goods or services. Our colleagues from the West were concerned about completely different issues: unfair terms of contracts, consumers being deceitfully persuaded to buy unnecessary goods or services, practices connected with concluding contracts in unusual places (especially in consumers' homes), and we

[40] The last reservation is essential: we mean a typical and not an individualised position on the market.

[41] B. Kordasiewicz: "Der Verbraucherschutz in der Übergangsperiode zur Marktwirtschaft" [in:] J. Aregger, J. Poczobut, M. Wyrzykowski (eds.), *Rechtsfragen der Transformation in Polen*, Wydawnictwo Baran i Suszczyński, Kraków 1995, p. 243 and following.

thought such problems to be very exotic, distant and almost imaginary. But times have changed and exotica became everyday life. In the past, the most important problem was protection against the unsatisfactory quality of goods. That is why warranty and guarantee, legal instruments serving to protect the quality of performance on the market (of course, not only in respect of consumers), seemed to be the main instruments protecting the consumer. The interpretation of the statutory provisions concerning warranty and guarantee was stimulated by the needs of consumer protection. The image of consumer protection was determined by the conditions of the economy where demand surpassed supply: other dangers, connected, for example, with aggressive techniques of attracting customers by entrepreneurs, did not exist or seemed unimportant in comparison to the key problem: how to provide customers with the very possibility of "entering" into a contract and ensuring its performance. That was an image of typical dangers in the situation of money following goods and, consequently, the consumer being a much more active subject on the market, the supplier being always able to clear the goods on a "thirsty" market. Now, it is the goods that follow the money, which is typical for a glutted market. In those circumstances, the active part of the one who seeks partners is played the entrepreneur, prompting them to "hunt" consumers in various, sometimes dubious, ways. This fact changes diametrically the picture of dangers to which the consumer is exposed. That effect was amplified by the appearance of private capital, a sharp increase in the number of economic subjects and their dispersion and the opening of frontiers. There appeared new forms of dangers to consumers: aggressive offers, skilfully set traps, such as games connected with premium sales, new commercial and marketing techniques,which tried to take consumers by surprise (door-to-door sales, sales away from the business premises), the growing importance of credit and its new forms. The dangerous field is, thus, moving, in the direction of what consumers in other European countries are protected against: in the direction of unfair terms of contracts, the use of surprising or unusual offers, the lack of clarity of the terms of transactions, as well as deficient information as to performance, its conditions, and the conditions of the whole transaction. With the sole difference that, again, in our country those phenomena are new and unknown, both from the point of view of their blameworthiness (the boundary beyond which they become blameworthy) and the available remedies, existing within legal institutions and provisions which are otherwise present in the Polish legal system, but either not being used as all (due to the different nature of the previous economy[42]) or not being used for the purpose of protecting consumers. Even the courts are unaware of possibilities within the law. Similarly to the Polish public prosecutors, who have difficulties forming opinions about new criminal phenomena and forms of criminality, our courts are not sufficiently sensitive to evaluate the phenomenon, and not skilful enough to find their place in the new circumstances.

[42] Some time ago I wrote on the inaptness of consumer protection in the field of door-to-door sales and aggressive offers in Poland, considering that such features are characteristic for economies where the supply exceeds the demand; in Poland, when the demand was much higher that the supply, consumer protection was effected mainly by warranty and guarantee, since the institutions which ensured were "not being deprived" of performance in kind - E. Ł ę t o w s k a: "Gwarancja i rękojmia. Główne tendencje orzecznictwa Sądu Najwyższego" [Warranty and Guarantee. Main Trends in the Judgments of the Supreme Court], *N. Pr.* 1987, no. 4, p. 35-36. The

Open frontiers and accelerated exchange, of a more universal nature as far as the offer is concerned, brought upon an enormous richness of goods on the market. Now money no longer follows goods, but this happens to the detriment of clarity concerning the features of the goods, the indentity of those introducing the goods on the market, and as regards both legal and purely factual obstacles in executing liability. This started with the appearance on the market of specifically "anonymous" goods (as regards the manufacturer and the importer), distributed with information and labels in exotic, or just foreign, languages. Such goods were often new, unknown, sometimes even dangerous, and they were introduced onto the market without any special information or warnings. Administrative polices (concerned with quality or simply health) are logistically inefficient in the changing market structure and organization, with great numbers of economic subjects whose organizational forms are loose and unstable, with sales effected by a seller without business premises who cannot be found for purposes of submitting a complaint, with an increasing number of distance transactions (such as mail order), skilful combinations of sales and credit, premium sales, lotteries, and new forms of aggressive offers. Openness to the world brings new forms of services such as travel services, and not only those sold as packages. In Poland, time-sharing[43] is beginning to appear as well. All these are new phenomena,[44] both for consumers and for courts. As for the latter, the judges themselves are consumers. When they meet with skilfully intricate terms of contracts, with requests for additional payments for performances already paid for, with contracts stipulating asymmetric rights of the parties in the future, to consumers' detriment, they are already accustomed to all that (as consumers). Therefore, they do not perceive such situations as objectionable, even if this time they act in a different social role: as judges. Nothing strikes them as attention-worthy in the situation they are to judge, they do not search through the instruments and well-known, routine interpretations for remedies against something they accept themselves, as consumers, and something which in their opinion other consumers should bear too. Certainly, according to how consumer protection is nowadays understood in Europe, we tend to demand more from the customers as regards their knowledge, common sense and far-sightedness, and, consequently, we are more indulgent towards the suppliers and their obligations regarding information and fair play. This follows from an anachronic image

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same applied to advertising: in the western world it is used to increase sales of normal goods. In a deficit economy advertising was not necessary for that purpose. This tool was resorted to in order to sell worse goods, for which there was no demand; normal goods sold without it. All this caused distrust towards advertising as such (now a thing of the past).

[43] It is a kind of co-ownership divided in time, guaranteeing co-owners exclusive use of the same real estate at different times. Time-sharing is used mainly in respect of real estate in localities attractive for tourists. Unfortunately, in Poland this form of co-ownership has already appeared in a not very honest form.

[44] It is not by chance that in many new democracies there appear para-banks which prey on their clients' credulity, pyramid transactions, which are prohibited elsewhere, etc. As examples we can mention the case of Albania, Russian swindles or the fate of the Grobelny bank. Credulity and lack of experience (not only of the customers, but even of investigative organs and the courts) make the new markets very attractive for frauds of all sorts.

of trade (in our country held by specialists in both civil and criminal law), where the market risk incurred by the consumers is very high. In the past, when marketing techniques were less sophisticated and mass trade, as a matter of fact, did not exist, one could tell a consumer "if you concluded the contract, then you wanted it" and "one who wants cannot be harmed". However, nowadays this kind of reasoning would mean accepting very sophisticated uses of market socio-techniques, to which the customer is prey. That is why, in Polish practice, the consumer does not receive the protection he is granted in civil or criminal law, even if it were possible. Polish courts and public prosecutors persistently resort to the argument of the customer's free-will participation in trade in general, and in a specific contract in particular, drawing the conclusion of the absence of a negative evaluation (according to the letter of the law) of the phenomenon they are dealing with. The same applies to persons who decide upon the legislative, or generally legal, policy. In an official statement from the Minister of Justice to the Marshal of the Sejm concerning a deputy's enquiry about the so-called "pyramid",[45] we find that "it is impossible to justify the statement that consumers were deceived, especially as they all were adult persons of a certain (what sort? - E. Ł.) intellectual level, whose ability to understand properly the actions they undertook could not be questioned". Even if the "pyramid", which, just like the *perpetuum mobile* can never work, is not, according to the Minister of Justice, a fraud, but simply actions taken at one's own risk where legal protection is unnecessary, it becomes clear why ordinary lawyers also treat the new phenomena, however dangerous to consumers they may appear, as taking actions at one's own risk: *volenti non fit iniuria* and thus one is free to participate in trade or not. The view about participation in trade presented above is distant from the pro-consumer axiology, whose fruit are European directives in this field. They set much higher requirements as to professionals honesty and, in their light, the risk to be incurred by a consumer is much lower.

Let us consider one more interesting issue. Systemic changes have made the countries whose economies are evolving in the direction of market economy an ideal place for importing not only all what is new and unknown, and, consequently, desirable, but also all sorts of techniques, behaviours or routines, which elsewhere, in more developed conditions, are regarded as blameworthy, even punishable, and against which consumers are protected. Besides, abundant supply and weak, ineffective or even inactive supervisory and protective services results in the market being packed with fakes or goods being sold after the date of expiry. The "new markets" also withess the appearance of offers, services, advertisements and contractual techniques that are not allowed in the West as violations of consumers' interests.[46] Such practices enter new markets owing to a lack of experience, even of the investigative organs and the administration of justice, and pretend to be the forefront of progress and forms characteristic for market economy. Frequently, they manage to evoke such evaluations.

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[45] Statement of 28 October 1996.

[46] It suffices to familiarise oneself with the French consumer code of 1993, a comprehensive instrument which unifies many laws protecting the consumer and includes also detailed penal provisions in this field.

To sum up: the obstacles to implementing consumer protection in countries which are transforming their economies towards market economy are caused by anachronic views as regards the nature of consumer protection in modem, market-economy countries, how it is motivated, what is its level, and what views in this field are already considered to be historically played out.

5. Consumer Protection and Ombudsmans Competence

Traditionally, the domain of ombudsman's activity is protecting the individual against "vertical" violations of rights, that is, protection from the authorities and abuse of power. In most cases, the issue in question involves "bad administrative practices". It is always difficult to define the scope of ombudsman's competences, especially as regards his possibility to dissent with, or to influence, the legislative policy,[47] since, in such cases, we are always forced to ask how competitive the Commissioner for Citizens' Rights can become for the legislator.

Another problem connected with the ombudsman's scope of activity is setting the boundaries of his competence as regards contacts between the individual and banks, insurance firms, carriers, and providers of services, where the legal basis for such contacts with customers is private law. There, it seems that we are no longer within the sphere of vertical relationships and "bad administration". This problem becomes more acute in countries going through the transitional period. As a result of the advancing privatization of various branches of economy, that what, in the beginnings of the institution of the ombudsman was "obviously" within his competence (especially as regards complaints against banks, insurance institutions or other monopolists) is now beginning to slip out of his hands. First of all, the potentially controlled subjects begin to refer to their private law status (which before was not fully regulated by private law) as an obstacle, and refuse to undergo control by the ombudsman. Secondly, the ombudsman himself encounters problems when trying to justify his intervention exclusively on the grounds of private law. If things continue to develop in this direction, it seems that the competence of the Commissioner for Citizens' Rights in the field of consumer protection will inevitably be questioned.

Objections may be raised as to the ombudsman's authorization to act in spheres regulated by private law or justified with the argument that a given matter belongs to the policy of law, over which the Commissioner for Citizens' Rights does not have direct influence. The question can be reduced to the axiological motivation of the Commissioner's competence. If we go in the direction indicated by *public interest law* and see the actions by the ombudsman in spheres which give rise to doubts (and this is precisely the case of consumer protection) as acting for the public interest through reinforcing representation (in legislative processes, before the administration or the courts) of individuals trying to satisfy their needs and aspirations as consumers, hen we

[47] The attitudes of the Polish Commissioners for Citizens' Rights of first and second term of office differed significantly in this respect.

remain faithful to the conception of ombudsman's competence in the sphere of vertical relationships. Even if we are dealing with the protection of a consumer-client remaining in private law relationships with, for example, a bank, the motivation for the ombudsman's intervention has a public law nature, such as the deficient representation of consumers at the time of the bank creating standard forms of contracts, which causes a consumer to be disadvantaged in a specific contract. In this way, even with recourse to litigation, entering into a particular court dispute (to which he has a right) and supporting a particular person, the ombudsman can easily refer to constitutional motivation, reinforcing thereby his position in the dispute and making it easier to establish a precedent. It is also significant that if we see the ombudsman as a spokesman for *public interest law*, we make it easier for him to decide what kind of cases are to be dealt with, and to defend such decisions in front of other persons, who also wanted him to defend their cases and whom he refused. The fact that *public interest law* signifies many different techniques of action, united by the strategic aim: to strengthen the representation, in society and before all authorities, of individuals whose interests cannot "get through", and that this requires a high level of professional creativity and purely legal professionalism, makes this direction very attractive for an ombudsman who seeks legible axiological motivation for his own actions in general. For an ombudsman of the transitional period it becomes a clear signpost showing his place between that what is public and that what is private, without loosing his "consumer clients".