

## Case law

### Case Details

**National ID:** III SZP 3/03

**Member State:** Poland

**Common Name:** link

**Decision type:** Other

**Decision date:** 13/07/2006

**Court:** Sąd Najwyższy (Supreme court)

**Subject:**

**Plaintiff:**

**Defendant:**

**Keywords:**

### Directive Articles

Unfair Contract Terms Directive, [Article 7](#) Injunctions Directive, [Article 1, 2.](#) Injunctions Directive, [Annex I](#)

### Headnote

Using clauses which are similar in substance to, or only superficially different from, those which have already (in relation to another trader) been declared unfair by the judgement of the Court for the Protection of Competition and Consumers in Warsaw and inserted into the Register of Unfair Contractual Clauses can be a practice infringing collective interests of consumers

### Facts

The case concerned the legal effect of a judgement of the Court for the Protection of Competition and Consumers declaring a contractual clause unfair, and the resulting insertion of the clause into the Register of Unfair Contractual Clauses. Polish law prescribes a special procedure to be followed in cases involving unfair clauses – the procedure is concluded with the unfair clause being inserted into the Register. An additional method of enforcing unfair contract terms law is the power of the Head of the Office for the Protection of Competition and Consumers to order that the use of the clause which has been inserted into the Register – as a practice infringing collective rights of consumers – be stopped. The law was not, however, clear whether this applied only to the trader who was involved in the case in which the clause was declared unfair (thus, the trader who continued to use the clause he had used before), or whether it applied to all traders. It was also uncertain whether it was possible to use clauses which resembled those in the Register but were not identical with them (for instance because a trader changed the wording slightly).

Towarzystwo Finansowo-Inwestycyjne “TeFi” operated an ‘Argentinean’ system of loans, where people signed up and paid instalments in order to receive the ‘loan’ in future. This system was de-legalised in August 2004. Before the de-legalisation, however, the Head of the Office for the Protection of Competition and Consumers made a decision (20 February 2003) concerning contracts which “TeFi” presented to its customers. “TeFi” used contractual clauses which only superficially differed from clauses already declared unfair by the judgement of the Court for the Protection of Competition and Consumers in Warsaw and inserted into the Register of Unfair Contractual Clauses (in a case concerning another trader).

The Head of the Office declared that such practice infringed collective interests of consumers. According to the Art. 23a para. 2 of the Act of 15 December 2000 on the protection of competition and consumers, using clauses which have been entered into the Register is a practice infringing collective interests of consumers. The Head of the Office has the power to request that practices infringing collective interests of consumers be stopped, and this power was indeed used here.

The Court for the Protection of Competition and Consumers heard the appeal by “TeFi” and held (28 January 2004) that no such practice took place, as the provision in question only applied to the trader who continued to use the clauses which were inserted into the Register following a case involving him. The insertion of a clause into the Register did not automatically render it unfair in other contracts concluded by other traders.

The Supreme Court considered the cassation brought by the Head of the Office for the Protection of Competition and Consumers, and referred the case back to the appeal court to reconsider the appeal (18 November 2004). The latter referred a ‘legal question’ requiring a conclusive response by the Supreme Court before the appeal could be decided. The Court for the Protection of Competition and Consumers pointed out that scholars and judiciary have not so far agreed on the issue. The question concerned the legal effect of insertion of a clause into the Register of Unfair Contractual Clauses. The Court for the Protection of Competition and Consumers inquired whether a clause inserted into the Register is deemed automatically unfair and therefore its use is prohibited in any contract by any trader (thus, whether the legal effect – *res judicata* – of the judgement of the Court for the Protection of Competition and Consumers and of the consequent insertion into the Register reaches beyond the parties to a particular case in which the judgement was given). If this was the case, the Head of the Office for the Protection of Competition and Consumers could use Art. 23a para. 2 of the Act of 15 December 2000 on the protection of competition and consumers and request that the practice be stopped. The question contained another inconclusive issue: does the use by a trader of clauses which are not identical but only similar in content (thus, have the same effect) to those already inserted into the Register of Unfair Contractual Clauses amount to a practice infringing the collective interests of consumers, as established by Art. 23a para. 2 of the Act of 15 December 2000 on the protection of competition and consumers?

The Supreme Court answered both parts of the question in the positive.

### Legal issue

The Supreme Court used the language of effective enforcement when concluding that the Register of Unfair Contractual Clauses contained clauses which were automatically unfair (thus – implying that the Register is a black list). The Court stressed that the legal question asked by the Court for the Protection of Competition and Consumers concerned the enforcement of the unfair contractual terms provisions, which have been supplemented by the provisions implementing the Injunctions Directive (Act of 15 December 2000 on the protection of competition and consumers) – giving the Head of the Office for the Protection of Competition and Consumers the power to issue injunctions to traders using terms inserted into the Register – such practice is considered to be an infringement of collective interests of consumers. The Court held that enforcement of unfair contract terms law would be ineffective if Article 23a para. 2 only referred to traders who continued to use clauses already declared unfair in cases involving them, and did not apply to other traders (if the latter was true, there would be a danger of potentially endless litigation before the Court for the Protection of Competition and Consumers concerning the same clauses), and if it was possible to apply clauses similar to them, with some minor changes to the substance.

The Register of Unfair Contractual Clauses was established by Art. 479.45 para. 2 of the Code of Civil Procedure of 1964, amended by the Act of 2 March 2000 on the protection of certain consumer rights and on liability for damage caused by an unsafe product (implementing, among others, the Unfair Contract Terms Directive 93/13). The Code provides a specific procedure which is to be followed when unfair contract terms are concerned. The Court for the Protection of Competition and Consumers in Warsaw considers claims brought by anyone who could potentially conclude a contract containing the clause in question, as well as by a social organisation which aims to protect consumers, by a local consumer ombudsman, or by the Head of the Office for the Protection of Competition and Consumers. When the Court gives a judgement declaring that the clause is unfair, the judgement is inserted into the Register of Unfair Contractual Clauses (the register is held by the Head of the Office for the Protection of Competition and Consumers; it is available online).

In addition to this remedy exercisable before the Court, Polish law also provides, in the Act of 15 December 2000 on the protection of competition and consumers (implementing the Injunctions Directive 98/27, now replaced by Act of 16 February 2007 on the protection of competition and consumers) another method of enforcing the rules on unfair contractual clauses: Article 23a para. 2 provides that using clauses already inserted into the Register constitutes practice infringing collective interests of consumers. Thus, according to the Act, the Head of the Office for the Protection of Competition and Consumers has the power to investigate the use of such clauses and make decisions requesting that such practices be stopped. In this case the Head of the Office made such a decision against "TeFi," but by doing so applied Article 23a para. 2 in a manner which was not universally accepted in doctrinal writings and in jurisprudence. The Head of the Office argued that Article 23a para. 2 does not only apply to those traders who continue to use clauses which in cases involving them were declared unfair, but also to all other traders using the same or even similar clauses, or clauses only superficially different but producing the same effects. The Supreme Court agreed with this line of argument. It did not follow the approach of the Court for the Protection of Competition and Consumers and some representatives of legal doctrine who argued that insertion of a clause into the Register does not render it automatically unfair, as the fairness of the clause must be asserted in the context of the contract as a whole, and even in the wider context of the type of economic activity the trader is engaged in. According to the Supreme Court, control of fairness of contractual clauses takes place on two levels: (i) incidental, concrete control of a particular clause in a particular contract, and (ii) abstract control of a clause, independent of any specific contract it may be contained in (Article 23a para. 2 refers to the abstract control). In order for abstract control to be effective, the Register must be effective erga omnes.

The Court held that any other approach to the effect of the Register would impair the effective enforcement of the unfair contract terms rules. It emphasised the importance of effective enforcement, which is required by EC law.

#### **Decision**

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#### **Related Cases**

No results available

#### **Legal Literature**

No results available

#### **Result**