

POWERS AND ACTIVITIES OF THE OFFICE OF COMPETITION AND CONSUMER PROTECTION (UOKiK) IN THE TOURISM SECTOR

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Abstract:

The Office of Competition and Consumer Protection is the most important guardian of the customer's rights. Its scope of activities includes the protection of rights of the persons using tourism and travel-related services. The activities of the UOKiK in this area focus primarily on counteracting the practices infringing collective consumer interests and carrying out proceedings for the application of abusive contractual clauses.

The aim of this publication is to present the tasks and powers of the Office of Competition and Consumer Protection and its most important activities for the protection of rights of the customer such as the tourist.

The article begins with the introduction which determines its purpose. Whereas the first part introduces the legal framework of the UOKiK and the most important tasks carried out by the institution, the second part of the article presents selected control activities of the Office of Competition and Consumer Protection and their analysis. The publication ends with a summary outlining the conclusions that emerge in connection with the subject.

In the summary of this publication it was stated that considering the benefit of the users of tourism related services, the Office of Competition and Consumer Protection is an effectively operating institution. It is equipped by law with adequate tools for action. A significant problem, however, is the lack of adequate knowledge of customers of the operational capacities of the Office.

INTRODUCTION

The political transformation initiated in Poland in 1989 brought a lot of changes which were to make foundations for an efficient and modern economy. Political changes and economic changes interrelated. The introduction of a market economy, however, led to many threats to the consumers' interests. That is why the public policy was to seek more effective protection of their rights. To that end there was established such an institution as the Office of Competition and Consumer Protection. It is inscribed not only in the Polish consumer policy but also in that adopted by the European Union [Ozimek 2012: 5,9].

The purpose of this article is to offer an insight into the most important tasks and powers of the Office of Competition and Consumer Protection relating to tourism and to present and analyse selected activities aimed at protecting the interests of a customer using tourism related services.

The essential content of the publication is preceded by the introduction, in which the purpose of the article was presented. The second part presents the most important tasks and responsibilities of the UOKiK. There can also be found the information on the legal basis for

the operation of the analysed institution. Whereas in the second part, there are presented selected activities of the UOKiK and their analysis. The work ends with a summary which presents the conclusions that emerged in connection with the subject.

To achieve the objective set out in the introduction the author used source materials, which included: the statute of the UOKiK and the decisions of the President of the UOKiK taken as the following-up of the carried proceedings. A useful study source was the thematic literature, which included: P. Cybula, *Prawo w praktyce biur podróży* and K. Kaczmarek, *Postanowienia niedozwolone*. An additional important material used for the preparation of this publication was legal acts related to the functioning of the UOKiK. Therefore, the author carried out the analysis of legal acts related to the powers of the UOKiK. The most important of these is: The Act of 16 February 2007 on Competition and Consumer Protection. Online materials including those located on the UOKiK's website were also of some help. The analysis of legal acts, reference literature, along with the analysis and description of the provided information, including the President's decisions, allowed for meeting this paper's objectives and drawing conclusions in the last part of the publication.

1. THE OFFICE OF COMPETITION AND CONSUMER PROTECTION - ITS ROLE AND TASKS

The Office of Competition and Consumer Protection was established in 1990, initially as the Antimonopoly Office. Its main task was to prevent the conclusion of anti-competitive contracts and abuse of dominant market position. Eventually, in 1996, after the reform of the central administration, the name of the institution was changed into the the Office of Competition and Consumer Protection. The Chief Inspector of the Trade Inspection was subordinated to the President of the Office.

The Head of the UOKiK is the President who is is the central authority of the government administration. The scope of his powers is specified in the Act of 16th February 2007 on competition and consumer protection (Journal of Laws of 2007, No. 50, item 331 as amended) Since the Polish entry into the EU, i.e. from 1st May 2004, the Office acts within the European Competition Network (ECN). The President of the Office represents Poland also in the networkConsumer Protection Cooperation (CPC). The aim of the later is to combat fraud against consumers' interests in the cross-border market. It includes institutions of the member states representing the interests of consumers. UOKiK is positively assessed by undertakings. According to the CBOS research it enjoys the trust of 73% of undertakings. The activities of the UOKiK are financed from the state budget [https://uokik.gov.pl/historia_urzedu.php (07/07/2016)]. The main task of the President of the Office is to take action in the interest of consumers and businesses. Therefore, it can be concluded that in the tourism sector the activities of the President refer to both tourists and undertakings which provide tourism related services, the later including: travel agencies, carriers or hotel establishments. The President is appointed for the term of five years by the Prime Minister [Gospodarek 2003: 49-50]. The appointment is preceded by the so-called recruitment. The results are published in the Public Information Bulletin of the Office and in the Public Information Bulletin of the Prime Minister. The Prime Minister appoints the vice-presidents of the Office out of the candidates selected by way of an open and competitive contest. The Prime Minister dismisses Vice-Presidents of the Office at the request of the President of the Office [Art. 30.1 of the Act of 16 February 2007 on competition and consumer protection]. Not only does the Prime Minister appoint the President of the UOKiK, but he/she also acts as the supervisor. The President may be dismissed only for important reasons. He/she performs many tasks and responsibilities. The most important include:

- Actions under the provisions on counteracting unfair competition;

- Approaching other public inspection authorities with the request to carry out inspection related to the observance of the rights of consumers;
- Approaching undertakings and their representative organizations for the protection of consumer rights and interests;
- Consumer products safety oversight;
- Initiating the inspection of goods and services which are carried out by consumer organizations;
- Publications and taking other measures to promote knowledge of consumer rights;
- Collection and disclosure of certification related to the protection of competition and consumers [Gospodarek 2003: 49-50].

The most important competences of the President in the protection of consumers are:

- Carrying out proceedings related to the violation of collective consumer interests. Upon their conclusion the President of the Office orders the abandonment of unlawful activities, the removal of the effects of the infringement, imposes a financial penalty. The President may also issue an interim decision requiring the undertaking to refrain from certain activities affecting the interests of consumers;
- Conducting proceedings for the recognition of illegal contract clauses as prohibited clauses;
- Taking decisions on competition restricting practices;
- Publicizing consumer alerts when there is a reasonable suspicion that an undertaking is involved in the practice infringing collective consumer interests;
- Issuing messages about practices and phenomena that threaten the interests of consumers;
- Expressing opinion in a case concerning the protection of consumers before the ordinary courts;
- The option of ordering the Trade Inspection Authority to carry out inspections or to perform other tasks falling within the scope of its activities;
- Using the instrument of "mystery shopping" to obtain evidence in the pending proceedings [https://uokik.gov.pl/kompetencje_prezesa_uokik.php (13.07.2016)].

The Office comprises its headquarters in Warsaw and 9 Branch Offices (in Bydgoszcz, Gdańsk, Katowice, Kraków, Lublin, Łódź, Poznań, Warszawa, Wrocław). They are headed by directors. The Office also has laboratories overseen directly by the President [Art. 33 of the Act on Competition and Consumer Protection].

The organisation of the Office is set out in the statute established by the Prime Minister by way of an Ordinance No. 146 of 23 December 2008 on the statute of the Office for Competition and Consumer Protection [Polish Monitor No. 97, item. 846]. It contains provisions regarding the legal status of the Office and its organizational structure. According to the document in question the UOKiK is an office of government administration supporting the President of the Office of Competition and Consumer Protection. It works in accordance with his decrees, decisions, guidelines and under its direct management. The Office is managed with the help of vice presidents, director general, directors of organizational units and directors of branch offices. The Head Office consists of: Secretariat of the President, Office of the Director General, ten departments, two independent positions and nine laboratories. The detailed scope of tasks and internal organization of the Office and Branch Offices is determined in the organizational rules issued by the President at the request of the Director General. The powers of the President referred to in the statute also include setting up special teams in the Head Office to perform tasks other than those performed by the organizational units of the Office or the Branch Offices. They are established for a finite duration. Their name, composition, tasks and mode of operation are determined by the

President [Ordinance No. 146 of the Prime Ministers of 23 December 2008 on the statute of the Office for Competition and Consumer Protection].

An important basis for the operation of the Office is the Act on competition and consumer protection. It lays down the framework for development and protection of competition and sets out the principles of actions to protect the interests of undertakings and consumers. The Act prohibits, *inter alia*, concluding agreements whose object or effect is the elimination, restriction or distortion of competition in the goods and services market. These include contracts concluded between undertakings which involve fixing prices, fees, commissions or trade margins. The Act also prohibits applying in the contracts with third parties inconsistent contractual terms and conditions, making the conclusion of a contract subject to acceptance or fulfilment by the other party of supplementary obligations (which are not connected to the subject matter of the agreement), limiting or eliminating the access to market to undertakings which are not included in the content of the agreement [Cybula 2006: 315-316]. The Act on competition and consumer protection also prohibits the abuse of a dominant position in the relevant market by undertakings. It concerns possible imposition of unfair prices, longtime limits for payment, applying onerous or inconsistent contractual terms and conditions, making conclusion of an agreement subject to fulfilment by the other party of supplementary obligations (which are not linked with the subject matter of the agreement), setting onerous conditions for the customers seeking redress, imposition of contractual terms and conditions that yield to the given undertaking unjustified benefits. An example of an illegal activity can be unjustified price undercutting of tourist packages by the operator having a dominant position in the market of tourism services. A conduct that does not comply with current regulations can also be a situation where an undertaking applies excessively high prices, not based on fair calculation. Prohibited are also those activities which infringe the collective interests of consumers, including, but not limited to the application of the contractual provisions listed in the register of prohibited clauses.

As a consequence of unlawful activities of undertakings it may be expedient for the President of the UOKiK to issue a decision declaring the actions taken by an undertaking inadmissible or ordering the discontinuation of such activities. In the cases listed in the Act, the President of UOKiK may impose a financial penalty on the undertaking [Cybula 2006: 317-318].

2. ACTIVITIES OF THE UOKIK IN THE TOURISM SECTOR

The Office of Competition and Consumer Protection exercises the supervision over the provisions of contracts concluded by consumers, so that they will comply with the applicable law. For this purpose, it employs towards the undertakings verification measures and keeps a register of prohibited clauses. A prohibited clause means "a contractual provision in the B2C contract which has not been negotiated individually with the customer, and which shapes his rights and obligations in a way that is contrary to good customs, grossly violating the consumer's interests." Prohibited contract terms are also referred to as unfair clauses, inconvenient or abusive [Kaczmarek 2011: 13]. Detailed records of prohibited clauses are contained in the Act of 23 April 1964 on the Civil Code [Journal of Laws No. 16, item. 93, (Journal of Laws of 2007, No. 16, item 93 as amended) The Civil Code recognises as abusive clauses primarily those provisions which:

- exclude or limit the liability for the consumer's personal injury;
- exclude or significantly limit the liability to the consumer for non-performance or improper performance of an obligation;
- exclude or significantly limit the deduction of the customer's claims against the the claims of the other party;

- provide provisions which the consumer had no opportunity to review before entering into a contract;
- allow the consumer's counterparty to transfer the rights and obligations under the contract without the consumer's consent;
- make the conclusion of a contract subject to the consumer's promise to enter in the future into further contracts of a similar kind;
- authorize the consumer's counterparty to a unilateral change in the contract without valid reason specified in the contract;
- thus depriving only the consumer of the right to terminate the contract or withdraw from it [Art. 385³ of the Civil Code].

Contractual terms and obligations were recognised as prohibited clauses following the judgement of the Court of the UOKiK (Warsaw Regional Court). After the ruling, the clauses were entered into the register maintained by the Office. The court began the proceedings on the basis of the claim (application) submitted by the following entities:

- The President of the UOKiK;
- A consumer who has entered into a contract with the undertaking;
- A potential customer (anyone who could conclude a contract on the basis of the offer);
- A social organization which is involved in the protection of consumer interests;
- District (municipal) consumer ombudsman;
- A foreign organization entered in the list of organizations authorized to act to initiate legal proceedings for abusive clauses in EU countries.

A final judgement was sent to the President of the UOKiK who keeps the register of prohibited clauses. From the moment of the entry in the register everyone can invoke the illegal nature of the clause.

As already mentioned in the article, the President of the UOKiK issues decisions prohibiting practices infringing collective consumer interests. We deal with them when undertakings include in their contracts provisions that have entered the register of prohibited clauses. This step is considered an offence of the Article 138b.1 of the Code of Petty Offences that is punishable by a fine. The President may initiate proceedings that could result in a decision recognizing the practice as infringing collective consumer interests and order its abandonment. In the decision, the President may impose on the undertaking a fine up to 10% of its revenue from the previous year [Kaczmarek 2011: 24-27].

The register of prohibited clauses includes many clauses referring to the tourism related services. These include, inter alia:

- "The change of sightseeing order in the program of the tourist package does not represent the improper performance of a contract as long as the program has been executed in full";
- "In the case of special offers and those purchased at the last minute (especially in peak season), the organizer reserves the right in exceptional circumstances to change the place of accommodation while maintaining the same category of accommodation";
- "The Office reserves the right to introduce minor changes in the program and change the package price due to changes in transportation costs, hotel services, currency prices etc";
- "If you buy a tourist package at a discount, last minute or special price, it is not subject to a complaint (...);"
- "If the customer withdrawing from the contract indicates a person fulfilling the conditions for participation in a tourist package who accepts the obligations of this contract, the customer is obliged to pay the handling charge";

- "The travel agency reserves the right to a 50 day deadline for the complaint consideration";
- "The Travel Services Office stipulates that it will examine the complaints as long as the subject of the complaint was submitted in writing to the tour leader during the package holiday";
- "The complaint should be submitted in writing no later than 14 days after the termination of the package holiday"
- "The complaint will be considered within 45 days from the date of submission."

Since 17th April 2016 contractual provisions can be considered as prohibited clauses by a decision of the President of the UOKiK. In the decision, the President of the Office cites the contents of contract terms deemed to be abusive [Art. 23b. 1 of the Act on Competition and Consumer Protection].

Practices infringing collective consumer interests are also to be found in the event of a breach of the obligation to provide consumers with a true, accurate and complete information. Breach of the duty of information by the undertaking can involve not providing the information required by applicable laws and regulations (e.g. under the Art. 12 and 13 of the Act on tourism services) or the failure to provide information on the warnings issued to tourists by the Ministry of Foreign Affairs. This relates mainly to the information on the threats to life or health. Such information must be provided in a manner that is comprehensible to the customer [Mazur 2015:53]. The obligation to provide information about possible risks and dangers implemented by the Ministry of Foreign Affairs is foreseen under the Constitution of the Republic of Poland of 02 April 1997. [Journal of Laws No. 78, item. 483], under the Act on government administration of 04 September 1997 [Journal of Laws No. 141, item. 943, as amended], or under the Act on Consular Law of 25 June 2015. [Journal of Laws No. 0, item 1274]. Whereas the obligation of the undertakings to inform customers in writing of particular life and health hazards on the visited areas is foreseen under the art. 13. 2 of the Act on tourism services. In the light of that provision, this duty rests on the organizer or contract travel intermediary (Journal of Laws of 2007, No. 133, item 884 as amended)

The results from the control activities carried out by the UOKiK in 2008 show that, contrary to the statutory obligation, travel agencies did not inform the customer about the time, place of departure and planned return. Other such shortcomings included a lack of comprehensive information on the type and scope of tourists insurance and the name and address of the insurance company. This concerns primarily information on medical insurance and accident insurance. Often there was also no information on the date of noticing the customer about the cancellation of a package or tourist service because of insufficient number of participants. Another irregularity found by the UOKiK was precluding the change of the participant of the tourist package or subordinating this to the agreement of the tour operator. The objections related also to the lack of information in the contracts on how to report complaints, or to misleading the customer as to the deadline for submitting complaints, and to irregularities relating to the information contained in the offers. Proceeding for the practices infringing collective consumer interests ends up by the decision of the President of the UOKiK. In the decision the President of the Office may impose upon the undertaking an obligation to release a statement (or statements) of appropriate content and form on one or more occasions, as specified in the decision. Moreover, he may order the publication of the decision in whole or in part at the expense of the undertaking. The President may also impose a financial penalty or prohibit unlawful activities.[Rutkowska-Tomaszewska 2009: 172-175].

The President of the UOKiK issued a few hundreds of decisions relating to the activities of travel agencies. These related primarily to the protection of collective interests of consumers but also to the control of concentration and other matters referred to as auxiliary

[http://decyzje.uokik.gov.pl/bp/dec_prez.nsf (17.07.2016)]. One of these decisions concerned the application of practices infringing collective consumer interests by a travel agency which involved the use of prohibited clauses in the travel agency's offers allowing for the possibility of changing freely the order of the services provided in the package. In the operative part of the decision the undertaking was requested to refrain from such provisions by removing them from the standard contracts and to transmit to the consumers the information on the abandonment of such provisions [Decyzja Prezesa UOKiK RWA-17/2013]. Another example of actions infringing collective consumer interests that led to issuing a decisions by the President of the UOKiK was also the abuse by a travel agency involving the inclusion of provisions inconsistent with applicable law in the sample contracts. The abusive clauses limited the right of the customer to withdraw from the contract in case of changes to the contract proposed by the travel agency, restricted the customer's right to withdraw from the contract during the tourist package in connection with the non-performance of services by the tour operator, and reduced the customer's right to file complaints. For those actions a financial penalty was imposed on the travel agency. In the grounds of the decision the President of the UOKiK stated that as a result of the use of prohibited clauses the travel agency violated the public interest and the prohibition of practices infringing collective consumer interests [Decyzja Prezesa UOKiK RWA-20/2013]. Another example of the decision taken by the President of the Office is a decision on the control of concentrations related to a merger of two travel agencies Dobra Nasza S.A and Alfa Star S.A. In his decision, the President, following an anti-monopoly procedure, consented to the concentration of the businesses involving their merger [Decyzja Prezesa UOKiK DKK-5/2014]. Another decision classified as "auxiliary" is a decision on the discontinuance of the proceedings on the imposition of a financial penalty on the travel agency in connection with the failure to provide the requested information pursuant to Art. 50 of the Act on competition and consumer protection [Decision of the President of the UOKiK RKR-50/2011]. Additional example of this type of decision is also a decision issued on behalf of the President of the UOKiK by the Director of the Branch Office of the UOKiK in Katowice based on which the owner of a travel agency was fined in connection with the failure to reply to the inquiry of the UOKiK in the course of proceedings aimed at eliminating from the market the illegal clauses. This action led to the imposition of a financial penalty in the amount of 880 PLN. [Decision of the President of the UOKiK RKT-33/2002].

CONCLUSION

The Office of Competition and Consumer Protection is the most important institution protecting the rights of the client (consumer). Its activities also cover the tourism sector. The customer having benefit of the tourism related services is often exposed to inconvenience on the part of undertaking providing the services, which often lead to severe loss to the tourist, not only material but also intangible one. The activities of the said Office undoubtedly have an impact on the quality of offered tourism services and thus the safety of their use by customers.

The aim of this publication was to offer an insight into the most important tasks and powers of the Office of Competition and Consumer Protection relating to tourism and to provide a closer look at and analysis of the selected activities aimed at protecting the interests of a customer using tourism services.

The information and analyses presented in the publication allow for drawing the following conclusions:

- The Office of Competition and Consumer Protection is the most important institution in Poland dedicated to protection of the interests of the customers, also those using tourism related services. ;

- The effectiveness of its activities relates to the fact that it was equipped with adequate legal tools to protect the rights of the customer. This gave the Office the powers to effectively punish unfair undertakings. The law provides for financial penalties that can reach up to 10% of the undertaking's annual revenue from the previous year. Another important feature of the Office is entering any illegal contractual provisions into the Register of Prohibited Clauses. As a result they can not be used in contracts with customers and their possible use could cause serious legal and financial consequences for the undertaking. Such action is considered as an offence. The activities of the Office have become even more effective since 17th April 2016 as the President, without the participation of the court, can decide that a given contractual provision represents an abusive clause.
- Numerous contractual clauses concerning the provision of tourism related services have been entered into the register of prohibited clauses. These included but are not limited to the provisions violating the right to file complaints or restricting or excluding the responsibility of the tour operator.
- Many proceedings brought for the practices infringing collective consumer interests related to the provision of tourism services ended with the decision of the President of the UOKiK. These infringements involved not only the use of prohibited clauses in contracts but also the travel agencies' failure to provide information required under the Act on tourism services. They also concerned not granting information on the warnings on the situations threatening the tourists' life and health issued by the Ministry of Foreign Affairs.

Summing up, it can be concluded that the Office of Competition and Consumer Protection is the institution operating effectively also in the tourism sector as it is provided by the law in the accurate tools for action. A major problem, however, seems to be the unawareness of customers of the operational competences of the Office.

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