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Taking Collective Interest of Consumers Seriously:  
A View from Poland

Marek Safjan, Łukasz Gorywoda, Agnieszka Jańczuk



**EUROPEAN UNIVERSITY INSTITUTE  
DEPARTMENT OF LAW**

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## **Abstract**

An increased focus on consumer collective redress marks the shift from substance- to enforcement-oriented perspective in the EU consumer policy. The EU action in this regard is currently at the stage of feasibility study but it seems to be moving towards a mechanism protecting collective rather than individual interests of consumers. In spite of these developments, a comprehensive strategy towards the concept of collective interest of consumers is missing at the EU level. We argue that a relative disregard of the procedural functions which the concept performs, as exemplified also by the already existing EU instruments for consumer redress, may lead to under-enforcement of consumer rights. As a possible remedy we put forward a proposal how to make the concept of consumer collective interest a workable tool. From an evolutionary perspective, we also examine how the concept of public interest was construed by the Polish judiciary during the socialist regime to prove that the way the public interest was conceptualised in the past affects the present understanding of the consumers' collective interest. As Poland represents a New Member State and has experienced economic and political transformation, our case study demonstrates how political and economic conditions shape the concept of collective interest. The overall goal of the paper is to show that clear understanding of the idea of collective interest of consumers, which currently varies from one MS to another, is essential for the creation of the internal market in collective redress

## **Keywords**

European contract law – harmonisation – consumer protection – collective redress – collective interest of consumers – New Member States

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# *Taking Collective Interest of Consumers Seriously: A View from Poland\**

Marek Safjan\*, Łukasz Gorywoda \*\*, Agnieszka Jańczuk \*\*\*

## **1. Introduction**

Over the last decades markets have been developing rapidly. On the one hand, market developments have provided consumers with immense welfare gains; on the other, they also brought about new types of harm, mainly related to mass production and novel types of market practices. Among those new types of negative externalities generated by market transactions, ‘collective harm’ is of particular importance because of its strong adverse effects on the functioning of consumer markets.

Collective harm refers to situations where multiple consumers suffer harm caused by the same or similar detrimental behaviour of a trader or service provider. In situations of collective harm, consumers who have small or scattered claims often refrain from bringing an individual court action because the cost is likely to outweigh the amount of damages claimed. As a policy response to collective harm resulting in under-enforcement of consumer rights, various mechanisms of collective redress have been developed in the Member States (hereinafter: the ‘MS’).

At the European Union (hereinafter: the ‘EU’) level, collective redress has been on the agenda already for some time.<sup>1</sup> Recently, it has received an increased interest from policy-makers, academics and public at large due to the fact that the European Commission (hereinafter: the ‘Commission’) has intensified its work on designing a

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<sup>+</sup> This paper will be published in F Cafaggi and Hans-W Micklitz (eds), *Collective enforcement in consumer law* (Kluwer Law International, forthcoming 2009).

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<sup>1</sup> Already in 1984 it was stressed that ‘[o]ne aspect of the Community’s concern for its citizens is its interest in access to justice, in particular the right to obtain a just and fair settlement of disputes arising out of ordinary consumer transactions.’ European Commission, ‘Discussion paper: Consumer redress. Memorandum from the Commission’ COM(84) 629 final, 12 December 1984, I. In 1998 the European Commission acknowledged that access to justice for consumers in pursuing their complaints is imperfect and it might be useful to consider whether measures are needed to make it easier for consumers to take legal action collectively when they have suffered similar damages; see European Commission, ‘Consumer Policy Action Plan 1999-2001’ (Communication) COM(98) 696 final, 1 December 1998, 18.

strategy concerning collective redress.<sup>2</sup> Collective redress, as part of a more general programme of improving the consumer access to justice, has become one of the priorities of the EU consumer policy. This also marks the shift from the substance-oriented to enforcement-oriented perspective of consumer policy.<sup>3</sup>

It has been recognised that substantial input is needed for any subsequent decision on possible policy action in order to help steering the future work of the Commission in this field.<sup>4</sup> It is beyond doubt that some part of this input should come from the analysis of the existing schemes of collective redress already present at the MS level. This follows from the assumption that disregarding national experiences related to collective redress may undermine the effectiveness of the future EU strategy.

Various forms of collective redress already exist in a number of MS and other are currently considering the options of introducing them. Collective redress systems at the MS level are all rather different.<sup>5</sup> In particular, the balance between public and private enforcement has changed over time in each MS and varies between them.<sup>6</sup> Another characteristic of the current state of play is that in the EU actions for injunctive relief are widespread but collective actions for damages are in the state of infancy.<sup>7</sup> Many of the differences between MS stem also from their different administrative capacities.<sup>8</sup>

Relatively slow developments in the field of collective redress in Europe are partly due to a marked reluctance to and considerable critique of the US model of class action.<sup>9</sup>

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<sup>2</sup> In the Consumer Policy Strategy 2007-2013 the Commission announced that it would consider action on collective redress; see European Commission, 'EU Consumer Policy Strategy 2007-2013 'Empowering consumers, enhancing their welfare, effectively protecting them'' (Communication) COM(2007) 99 final, 13 March 2007, [5.3], 11. Consultation on the consumer collective redress benchmarks was organised by Directorate General for Health and Consumer Protection ('DG SANCO') in the first quarter of 2008.

<sup>3</sup> It goes without saying that ineffective enforcement of consumer rights would undermine the objectives of the EU consumer policy. This principle was already contained in the latin maxim *ubi ius ibi remedium*.

<sup>4</sup> See (Director General for DG SANCO) R Madelin, 'Collective Redress (Remarks)' (Conference on Collective Redress in Lisbon, 9 November 2007) <[http://ec.europa.eu/consumers/redress\\_cons/docs/rm\\_cr\\_ILisbon\\_speak\\_09-%2011-07.pdf](http://ec.europa.eu/consumers/redress_cons/docs/rm_cr_ILisbon_speak_09-%2011-07.pdf)> accessed 15 March 2008.

<sup>5</sup> See The Study Centre for Consumer Law – Centre for European Economic Law, 'An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings. Final report' (Katholieke Universiteit Leuven, Belgium January 17, 2007) <[http://ec.europa.eu/consumers/redress/reports\\_studies/comparative\\_report\\_en.pdf](http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf)> accessed 15 March 2008. The Commission has also launched a study evaluating the effectiveness and efficiency of existing collective redress mechanisms.

<sup>6</sup> It has been observed at the EU level that this balance should be respected as much as possible; see Madelin, 'Collective Redress (Remarks)' (n 4). More on possible constellations between civil and administrative measures see F Cafaggi and H-W Micklitz, 'Collective Enforcement of Consumer Law: A Framework for Comparative Assessment' (2008) 16 *European Review of Private Law* 391.

<sup>7</sup> J Stuyck (Conference on Collective Redress in Leuven, 29 June 2007) <[http://ec.europa.eu/consumers/redress\\_cons/docs/leuven\\_event\\_JSpresentation.pdf](http://ec.europa.eu/consumers/redress_cons/docs/leuven_event_JSpresentation.pdf)> accessed 15 March 2008. For an overview of the various models of consumer collective redress see Cafaggi and Micklitz *ibid*.

<sup>8</sup> See, for example, C Knill, 'European Policies: The Impact of National Administrative Traditions' (1998) 18 *Journal of Public Policy* 1.

<sup>9</sup> In this paper we do not take a stance on the merits of this critique. Another reason for the slow developments concerning collective redress might be the principle of procedural autonomy, as articulated by the European Court of Justice (ECJ) since the 1976 *Rewe* case, has to be recalled; see



The core of this critique boils down to the collective pursuit of non-collective interests which characterises the US-type class action.<sup>10</sup> In contrast to this, the Commission's intention is to develop a form of collective redress which would pursue collective rather than individual interests of consumers.<sup>11</sup>

It seems surprising that despite the Commission's interest in the scheme of collective redress aimed at protecting the 'collective interest(s)' of consumers, no debate on the concept of collective interest, as an essential element of such a scheme, has developed. Moreover, also the existing EU instruments aimed at facilitating consumer redress in cross-border situations, Directive 98/27 and Regulation 2006/2004,<sup>12</sup> employ the concept of collective interest of consumers.<sup>13</sup> However, so far there has not been elaborated any comprehensive strategy towards this concept at the EU level.<sup>14</sup> We argue that the lack of strategy concerning the collective interest, in particular its definition, makes it difficult to designate instruments that would effectively protect it. We also argue that an imprecise notion of collective interest, which does not go further than

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Case 33/76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989 and Case 45/76 *Comet v Produktschap* [1976] ECR 2043. However, some EU measures dealing with procedural law have already been adopted, see European Parliament and Council Directive (EC) 98/27 of 19 May 1998 on Injunctions for the Protection of Consumers' Interests, [1998] OJ L 166/51; European Parliament and Council Regulation (EC) 2006/2004 of the of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, [2004] OJ L 364/1; European Parliament and Council Directive (EC) 2004/48 of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 157/45. On the procedural autonomy and consumer redress see G Betlem, 'Public and Private Transnational Enforcement of EU Consumer Law' (2007) 18 *European Business Law Review* 683.

<sup>10</sup> See Stuyck (n 7).

<sup>11</sup> See Madelin, 'Collective Redress (Remarks)' (n 4) and M Kuneva, 'Healthy markets need effective redress' (Speech at Conference on Collective Redress in Lisbon, 9 November 2007) <[http://ec.europa.eu/consumers/redress\\_cons/docs/mku\\_cr\\_lisbon\\_final.pdf](http://ec.europa.eu/consumers/redress_cons/docs/mku_cr_lisbon_final.pdf)> accessed 15 March 2008. The Economic & Social Committee adopted in 1979 a report requesting the Commission to take action by, inter alia, proposing a directive giving consumer associations the right to bring general interest actions (that is to say, to defend the interests of consumers collectively), even where no direct loss has been suffered. See European Commission, 'Memorandum from the Commission on Consumer Redress 1984' (n 1) VI. Already in 1993 the Commission clarified that '[t]he legal defence of collective interests is not to be confounded with the collective defence of individual interests – hence "class actions" are considered as a separate category'. European Commission, 'Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market' (Green Paper) COM(93) 576 final, 16 November 1993, 15.

<sup>12</sup> Both n 9.

<sup>13</sup> Recital 2 of the Directive 98/27/EC: 'whereas collective interests mean interests which do not include the cumulation of interests of individuals who have been harmed by an infringement.' Art. 3(k) of the Regulation 2006/2004: "'collective interests of consumers' means the interests of a number of consumers that have been harmed or are likely to be harmed by an infringement. Art. 3(b) of the Regulation 2006/2004: "'intra-Community infringement" means any act or omission contrary to the laws that protect consumers' interests, as defined in (a), that harms, or is likely to harm, the collective interests of consumers residing in a Member State or Member States other than the Member State where the act or omission originated or took place; or where the responsible seller or supplier is established; or where evidence or assets pertaining to the act or omission are to be found.'

<sup>14</sup> It could have been deliberately left for the European Court of Justice (hereinafter: the 'ECJ') to fill in the content of the concept. The Polish legislator, for example, intentionally copied out the vague definition from the Directive expecting that the ECJ might decide on the matter (cf text accompanying n 82). So far, however, the ECJ has not delivered any ruling clarifying the meaning of the concept of collective interest of consumers.

stating that it is not a mere sum of individual interests is problematic to apply by the enforcers and consequently may lead to under-enforcement of consumer rights.<sup>15</sup>

A comprehensive strategy towards the collective interest is necessary both from the harmonisation and the accountability viewpoint. As to the former, clarification of the meaning of the concept of 'collective interest of consumers' might contribute to the harmonisation of enforcement practices and cooperation between enforcement bodies governed by the Directive 98/27 and Regulation 2006/2004.<sup>16</sup> As to the latter, a clear notion of consumer collective interest could serve as a benchmark for the accountability of bodies vested with appropriate enforcement functions.

Thus, any EU based reflection on collective redress should include, *inter alia*, a closer look at the concept of consumer collective interest and its application at the MS level.<sup>17</sup> A comprehensive analysis of this concept would require a thorough comparative exercise. Given the limits of this paper, we restrict our analysis only to Poland. As Poland represents a new MS and has experienced transformation from centrally-planned to free market economy, our case study is particularly important for understanding how political and economic conditions shape the concept of collective interest. Accordingly, we show how the notions of public and collective interest pertaining to consumer protection developed and were applied in Poland before and after the transformation in 1989. We also show how the Polish historical legacy has influenced the present practice of application of the collective interest in consumer matters.

This paper is structured as follows. In the next section (2), the procedural functions of the concept of collective interest of consumers will be introduced and possible approaches to building a definition of the concept will be sketched out. A historical overview of the relationship between the public interest and consumer protection in

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<sup>15</sup> In fact, it has been argued that the difficulty in applying the vague concept of collective interest of consumers in practice has led the French jurisprudence to award only very limited compensation in consumers' collective interest cases; G Howells and S Weatherill, *Consumer Protection Law* (2<sup>nd</sup> edn, Markets and the Law, Ashgate, Aldershot 2005) 593-594.

<sup>16</sup> It is worth mentioning that understanding of the concept of collective interest of consumers has already proved to be relevant in the first cross-border case under the Directive 98/27, *Duchesne*. In this case, the Office of Fair Trading took action against a Belgian company that allegedly harmed British consumers. While assessing admissibility of the case, the Brussels Court of Appeal had to decide whether the collective interest of consumers was infringed. It held that because the challenged practice could harm the interests of one or more consumers, the criterion of damaging the collective interests of consumers was met; Cour d'appel de Bruxelles, 8 December 2005, *Duchesne v L'Office of Fair Trading*, unreported, RG: 2005/KR/38, see M Haley, 'Stop Now – Injunction: Protecting the Interests of European Consumers' (Conference on Effective Legal Redress – The Consumer Protection Instruments of Actions for Injunction and Group Damages Actions in Vienna, 24 February 2006) <[http://www.bmsk.gv.at/cms/site/attachments/0/8/3/CH0036/CMS1141717684789/eu-studie\\_teil\\_i.pdf](http://www.bmsk.gv.at/cms/site/attachments/0/8/3/CH0036/CMS1141717684789/eu-studie_teil_i.pdf)> accessed 15 March 2008.

<sup>17</sup> Actions in the collective interest of consumers are available in the following countries: Austria (for cases relating to unlawful or unconscionable terms in standard form contracts and business terms and conditions); Belgium; France (for cases relating to illegal clauses in standard form non-negotiable consumer contracts); Germany (for cases relating to unfair competition or to prevent a breach of certain consumer protection laws); Hungary; Ireland (for cases relating to unfair contract terms); Italy; the Netherlands; Norway; Poland; Switzerland (for cases relating to unfair and deceptive commercial practices); Turkey. See OECD, 'Background Report' (OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace in Washington, 19-20 April 2005) <<http://www.oecd.org/dataoecd/59/21/34699496.pdf>> accessed 15 March 2008.

Poland will be provided and the current state of play concerning protection of the consumers' collective interest in this MS will be described (3). Some preliminary conclusions will follow (4).

## **2. Collective interest of consumers and its functions**

The concept of collective interest of consumers performs an important procedural role in the functioning of the Directive 98/27 and Regulation 2006/2004. It might also be relevant for ensuring the effectiveness of the future EU collective redress mechanism, if the decision to adopt it were taken. Because of its central functions, a clear definition of the concept of collective interest is necessary.

### ***2.1. Collective interest of consumers as a procedural instrument***

The debate on the EU scheme of collective redress is characterised by a relative neglect of a preliminary, and – given the Commission's stance – fundamental issue, i.e., the concept of consumer collective interest. This concept performs a role of a procedural instrument to decide on the admissibility of a legal action. We will therefore approach the collective interest as a procedural instrument to sort out consumer claims which on the basis of a normative point of reference (existence of the collective interest) deserve legal protection in the form of a special procedure (accompanied by special enforcement instruments) from those which are deemed unnecessary to receive such a special treatment.

The individual/collective divide is far from being perfect but it is clear that collective interest is the interest which grasps the attention of a group or public at large. Recognition of the collective interest has pushed legal systems to relax various doctrines, including standing, that were designed to address the issues involving individual interest which once dominated the legal setting.

As introduced above, the policy approach at the EU level seems to move into the direction that any form of European collective redress scheme should aim at protecting the collective interest of consumers.<sup>18</sup> Identification of the collective interest would therefore be a precondition for the availability and initiation of legal proceedings in any future collective redress mechanism. In other words, the collective interest would be a requirement for standing and would define procedural situation of particular consumers or their representatives, either before the court or in relationships with administrative bodies and social organisations. From this perspective, the central claim of this paper is that a procedural notion which is vague, meaning its construction being functionally similar to a general clause, is undesirable as ineffective for the purposes of protecting consumers. Moreover, imprecise formulations of procedural requirements might be also challenged from a constitutional viewpoint.

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<sup>18</sup> As mentioned above, this policy approach constitutes one of the grounds for discarding the idea of transplanting the US-style class action because of its focus on the protection of an aggregate of individual interests.

A procedural precondition for admissibility of a legal action formulated in vague terms is undesirable for two reasons. First, if competences of the bodies representing consumer interests are defined in very general terms, these bodies (decision whether to intervene) as well as courts (assessment whether intervention or non-intervention was justified) are given a wide discretion. This implies a risk of misuse of such discretion in various ways, one of them being an arbitrary practice of consumer protection bodies to dismiss consumers' requests for instituting legal proceedings on their behalf with a justification that no collective interest of consumers could be identified in a given case.<sup>19</sup> This evidently runs counter the primary function of these enforcement institutions which is to facilitate consumer redress. As a result of such practice and given procedural obstacles related to court proceedings consumers remain powerless in those situations.

Second, excessive discretion concerning admissibility of a legal action might effectively preclude consumers' access to justice and as such may give rise to constitutional concerns. This was the case in Poland where the Constitutional Tribunal held that although, as a general rule, the Constitution does not grant a right to cassation, the fact that it is provided for by the Code of Civil Procedure (hereinafter: the 'CCP') means that its construction must meet constitutional requirements of the rule of law and procedural justice. According to the Tribunal, if the conditions for admissibility of a claim (preliminary assessment of a cassation claim) are formulated in imprecise terms, the right to court cannot be exercised effectively because of the risk of arbitrariness of the assessing body.<sup>20</sup>

An important caveat is in order. There is a marked difference between procedural and substantive general clauses, the latter being, for example, traditional concepts of good faith or good morals. The use of substantive open-ended concepts may create net gains, mainly due to the contextualisation of a dispute allowing to incorporate a broader evidence base into the decision and, as a result, to make it better-tailored to the circumstances at hand.<sup>21</sup> At the same time, in the case of traditional substantive general clauses it is possible to refer to the previous case-law to operationalise their meaning which is not the case for the collective interest understood as a procedural instrument. As far as procedural general clauses are concerned, the advantages of contextualisation are dubious and the case-law providing guidance on their application is almost non-existent. Thus, it seems fair to assume that necessity of having a general clause in a procedural situation requires at least a stronger justification than in the substantive law.

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<sup>19</sup> It is also possible to frame the problem of the degree of precision of the content given to the law at the promulgation stage as the problem of how the legislator gathers and disseminates information, see L Kaplow, 'Rules versus Standards: An Economic Analysis' (1992) 42 *Duke Law Journal* 557, 585-586. Framing this issue in terms of the uncertainty of the content of the law, a more precise definition of the collective interest of consumers would provide consumer protection bodies with superior guidance as to when they should take action since the procedural preconditions can be more readily ascertained.

<sup>20</sup> Judgment of the Polish Constitutional Tribunal of 31 March 2005 – SK 26/02, [2004] 11A OTK ZU Item 120.

<sup>21</sup> Of course, contextualisation bears a risk of uncertainty but taking a stance on this issue is outside of the scope of this paper. On the role of general clauses in contract law see S Grundmann and D Mazeaud (eds), *General Clauses and Standards in European Contract Law: Comparative Law, EC Law and Contract Law Codification* (Kluwer Law International, Private Law in European Context Series, The Hague 2006) with a review of F Cafaggi in (2007) 4 *European Review of Contract Law* 491.

The distinction between substantive and procedural general clauses may be derived, for example, from the jurisprudence of the Polish Constitutional Tribunal. In addition to the aforementioned decision concerning the constitutionality of the indeterminate conditions for admissibility of a cassation, the Tribunal was also asked to decide whether an open-ended criterion underlying the institution of abuse of right – a general clause of the ‘principles of community life’<sup>22</sup> – violates the right to court.<sup>23</sup> The Tribunal held that this general clause is a provision of substantive law and as such cannot contravene the right to court granted by the Constitution.<sup>24</sup> Thus, reading these two cases of the Polish Constitutional Tribunal together, the difference between the two concepts is clear-cut: whereas in the case of preliminary assessment of a cassation a general clause was related to the procedural situation of an individual, in the case of abuse of right the assessment concerned the substantive right itself. The first situation was said to violate the constitutional right of access to court, but the second not.<sup>25</sup>

Another reason for our scepticism towards procedural general clauses is the accountability concern. It seems plausible to assume that the way the concept of collective interest – as a precondition for action by bodies representing consumer interests – is defined, i.e. whether in precise or vague terms, has implications for the accountability of these bodies. A precise definition would allow the public to have a clear benchmark for the assessment of their activities, i.e. it would make it possible to check whether on the one hand they reject or take up claims in an arbitrary way; and whether they reject or take up cases with doubtful consumers’ collective interest on the other. A vague concept obviously cannot serve as an accountability benchmark because it does not provide any criteria for evaluation.

All of the above considerations prove that a vague concept of collective interest may run counter the policy of ensuring effective means of consumer collective redress. In order to remedy this situation we provide a proposal how to make the concept of consumer collective interest a workable tool.

## ***2.2. Possible approaches to building a definition of the collective interest of consumers***

It is possible to approach the concept of consumers’ collective interest in various ways. Given that its construction is similar to a general clause, the first step of our analysis concerns the feasibility of its definition. One may adopt either of the two approaches to this issue. The first approach argues futility of defining a general clause, the collective interest in our case, because of the inherent vagueness of the concept precluding its

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<sup>22</sup> Article 5 of the Polish Civil Code (hereinafter: the ‘CC’). The term ‘principles of community life’ (*zasady współżycia społecznego*), which may be also referred to as the ‘principles of social co-existence’, has been adopted from the Soviet Constitution and is a basic general clause commonly found in the Polish law.

<sup>23</sup> Article 45(1) of the Polish Constitution.

<sup>24</sup> Judgment of the Polish Constitutional Tribunal of 17 October 2000 – SK 5/99, [2000] 7 OTK ZU Item 254.

<sup>25</sup> Accordingly, we do not claim that all general clauses are undesirable because of their vagueness and for that reason should be defined more precisely but we draw a line between the functions performed by substantive general clauses and the consumer collective interest being employed as a procedural requirement.

clear and comprehensible description. According to this approach, it is not possible to push the analysis further than a general statement that the consumers' collective interest means any social or public interest related to consumers as a group. It is clear that such a statement leaves the definition open.

The second approach seems to suggest that the only possible way of defining this general clause is to adopt a negative definition. Accordingly, collective interest is deemed not to be a sum of individual interests. This approach was developed by the French jurisprudence<sup>26</sup> and subsequently was adopted by the Community legislator;<sup>27</sup> it was followed also by the Polish implementing legislation.<sup>28</sup> However, in our opinion, this negative definition does not provide adjudicators with much guidance on how to apply the concept in practice. Given the lack of guidance and impossibility of verifying *ex post* the merits of a decision on the admissibility, such an imprecise definition may undermine effectiveness of the enforcement system based on the concept of collective interest.

### **2.3. An attempt to build a definition**

Definition of the collective interest limited to a statement that it is not a sum of individual interests is unlikely to perform its role of improving the procedural position of consumers. However, this negative statement can serve as a starting point for building a positive definition.

#### *2.3.1. Compensation and deterrence perspective*

At first, a statement that collective interest is not a sum of individual interests might make us look at the collective interest through the lens of the compensation/deterrence divide. This perspective would mean that the collective interest does not refer to an amount or a sum of individual harms and corresponding compensations claimed. Because the collective interest pertains to a group as a whole, the instruments employed to protect it should focus primarily on deterrence and prevention rather than on compensation.<sup>29</sup> From the perspective of definition of the consumers' collective interest it implies that one would identify the collective interest whenever the deterrence of particular market behaviour or practice is desired according to an external normative standard.<sup>30</sup>

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<sup>26</sup> See, for example, Cass Crim, 20 May 1985, Bull Crim 485.

<sup>27</sup> Recital 2 of the Directive 98/27/EC (n 9).

<sup>28</sup> Article 24(3) APCC (n 81).

<sup>29</sup> Of course, also compensation might have a deterrence value (see n 33 and 34). What we want to stress is that we focus on deterring wrongdoing and not on a personal right of an individual to have the harm suffered compensated. See also *Office of Fair Trading v MB Designs (Scotland) Ltd and others* 2005 CSOH 85 (Court of Session) [14]. The difficulty of discerning damages in the collective interest litigation and thus its deterrence value has been underlined also in the French literature; see S Carval, *La responsabilité civile dans sa fonction de peine privée* (Bibliothèque de droit privé, LGDJ, Paris 1995). See also G Howells and R James, 'Litigation in the Consumer Interest' (2002) 9 ILSA Journal of International & Comparative Law 1, 43.

<sup>30</sup> Market confidence can, for example, be such a standard; cf Howells and James, 'Litigation in the Consumer Interest' *ibid* 44.

Such a functional approach to the collective interest determines the choice of instruments for its protection. This does not imply, however, that recourse to administrative measures or development of new private law tools is absolutely necessary. The traditional private law instruments like unenforceability and invalidity of contracts, information duties or injunctions, might also be used to protect the collective interest. Invalidity and unenforceability are traditional instruments aimed at preventing contracts detrimental to the public interest. They conventionally concern contracts which, depending on the legal system, violate good morals, are contrary to good faith, unfair or unconscionable.<sup>31</sup> Invalid are also contracts violating the provisions of competition law. Invalidity and unenforceability of such contracts is intended to discourage parties from entering into certain types of contractual relationships and thus to protect the public interest. Information duties, in turn, are supposed to enable parties to the contract to make an informed choice. In this way, proper functioning of the market and consumer satisfaction shall be ensured. Finally, injunctions aim at discontinuation of a practice which adversely affects an individual or the collective interest as well.

It might also be advisable to examine national civil codes and other private law legislations in order to search for other dormant instruments which could be used to protect the collective interest. For example, Article 439 of the Polish Civil Code provides that a person who is threatened by a direct damage resulting from a conduct of another person may demand that person to take measures necessary to prevent the imminent danger and, if needed, to provide appropriate security. Although particularly well suited to protect the collective interest of consumers, this provision has been rarely used by the Polish judiciary.<sup>32</sup>

All the instruments mentioned above are not directed at awarding compensation, thus their major objective is not to protect the individual interest. As already stated, however, it should not be overlooked that also compensation might have a deterrence value, especially if it is set at a high, for instance, punitive level.<sup>33</sup> In particular, the regime of product liability employs compensation as a tool of prevention.

Still, despite being apt to protect public and collective interest, the procedural and institutional aspects undermine the effectiveness of the traditional private law instruments in deterring a particular harmful conduct.<sup>34</sup>

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<sup>31</sup> For a comparative overview see eg K Zweigert and H Kötz, *Introduction to Comparative Law*, translated by T Weir (3<sup>rd</sup> edn OUP, Oxford 1998) 380-387.

<sup>32</sup> On the possible use of Article 439 CC for the sake of consumer protection see B Lewaszkiewicz-Petrykowska, 'Bezpieczeństwo konsumentów w prawie polskim' in G Rokicka (ed) „*Model Prawnej Ochrony Konsumenta*” *Harmonizacja Polskiego Prawa Konsumentckiego z Regulacjami Unii Europejskiej* (Stowarzyszenie Konsumentów Polskich, Warszawa 1996) < <http://www.skp.pl> > accessed 15 March 2008.

<sup>33</sup> In Poland the deterrent and preventive function of compensation was underlined already by W Warkało, *Odpowiedzialność odszkodowawcza: Funkcje, rodzaje, granice* (Państwowe Wydawnictwo Naukowe, Warszawa 1972). More general on the role of market transactions in producing aggregate or social outcomes see N K Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (Chicago University Press, Chicago 1994) Chapter 4.

<sup>34</sup> See, for example, H Collins, *Regulating Contracts* (Oxford University Press, Oxford 1999), discussing regulatory functions of private law; A Ogus, *Regulation: Legal Form and Economic Theory* (Clarendon Press, Oxford 1994) Chapter 12; F Cafaggi 'The making of European private law: governance design' in: F Cafaggi and H Muir-Watt, *Making of European Private Law: Governance Design* (Edward Elgar

### 2.3.2. *The role of individual interest*

To acknowledge that the purpose of introducing the concept of collective interest is to focus on deterring rogue market practices (a forward-looking approach) rather than compensating losses suffered by consumers (a backward-looking approach) is informative, but still does not provide much guidance on its content and consequently does not remove the uncertainty related to its application. Having stated that the collective interest is not a sum of individual interests, the next step shall be to examine the relationship between the collective and individual interest in more detail. Such examination will enable us to answer the question whether consumer protection bodies shall be entitled to act also in the absence of or divergence from the individual interest. In other words, the policy question is to determine whether evidence of the individual interest involved shall be a prerequisite for the activity of consumer protection bodies. For this purpose, three sets of relationships between the collective and individual interest can be identified: the collective and individual interest can (1) overlap; (2) conflict; or (3) be detached from each other, meaning situations in which the individual interest is irrelevant from the collective viewpoint and vice versa.

First, one needs to assess whether the existence of individual interest should be a necessary requirement for bringing a legal action in the collective interest of consumers. Although the negative definition analysed in this paper might suggest that these two concepts are detached from each other, it seems that such interpretation would not be desirable from an institutional and accountability viewpoints. As to the former, a possibility to legitimise action in the collective interest also in the absence of any individual consumer interest might lead to an overlap in terms of allocation of competences between the judicial and regulatory bodies. Traditionally, whereas litigation has been concerned with satisfaction of the claimants' private interests, administrative regulation has been used to foster the public interest.<sup>35</sup> While extending the scope of litigation by including also actions in the public interest may ensure that the law can regulate market failures where individuals lack adequate incentives to act against the harmful trading practices,<sup>36</sup> litigation exclusively in the public interest may lead to an overlap with the activities of the regulatory bodies. Such an overlap is not desirable because due the institutional factors regulatory authorities seem to be better placed to perform activities in the public, including collective, interest than the judiciary.<sup>37</sup> As to the accountability point, a possibility to act without an underlying individual interest would provide consumer protection bodies with an excessive discretion in instituting legal proceedings. Thus, in order to act in the collective interest of consumers the competent bodies should be required to show an infringement of at

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Publishing, Cheltenham 2008). Vagueness of the concept of collective interest of consumers might also undermine the deterrence value of enforcement mechanisms based on it; see J Calais-Auloy and F Steinmetz, *Droit de la consommation* (4th edn, Dalloz-Sirey, Paris 1996) cited in Howells and James, 'Litigation in the Consumer Interest' (n 29) 43.

<sup>35</sup> However, also litigation, via enforcement of private interests, can pursue public interest.

<sup>36</sup> Cf Howells and James, 'Litigation in the Consumer Interest' (n 29) 31.

<sup>37</sup> These factors include expertise, market monitoring capacities, enforcement powers etc. For example, because of these constraints it is more efficient to delegate the task of market surveillance to regulatory authorities than to the judiciary. On limitations of the judiciary in adjudicating in the public interest see Ogus, *Regulation* (n 34).



least one individual consumer interest.<sup>38</sup> This should ensure that there is no overlap with other regulatory policies allocated to sector-specific bodies and improve accountability of the consumer protection bodies.

Second, one needs to examine whether it is possible to identify situations where exercise of an individual interest of a consumer would violate the collective interest of the group and *vice versa*. One possible example concerns a situation where an individual consumer has interest in a particular abusive contract clause because of the lower price he or she can obtain in return. From the point of view of consumers as a group such a clause should be struck down because in general consumers are not in position to defend themselves from abusive clauses, especially in the case of transactions concluded through standard form contracts.<sup>39</sup> Thus, although the use of abusive clauses may incidentally benefit a particular consumer, it violates the collective interest of the group. Accordingly, this case requires an individual interest of a consumer to be sacrificed in order to protect the collective interest of the group.<sup>40</sup> It has been noted in the French jurisprudence that the collective interest goes beyond the individual interest, the community having higher expectations than individuals.<sup>41</sup> It follows that it shall be possible to identify the collective interest of consumers as a procedural requirement also if it is in conflict with some individual interests. It is precisely the possibility of conflict between the two which implies that the collective interest is not a sum of individual interests.

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<sup>38</sup> Too much discretion may lead to over-activity of social organisations and they might be instrumentalised for the purpose of rent-seeking. It is worth noticing that the ECJ denied locus standi to challenge a Community act by an association formed for the protection of the collective interests of a category of persons if its members could not do so individually, ie were not directly and individually concerned by the act in question. See Case C-321/95 P *Stichting Greenpeace Council (Greenpeace International) and Others v Commission* [1998] ECR 1651. See also R Van den Bergh and L Vischer, 'The Preventive Function of Collective Actions for Damages in Consumer Law' (2008) 1 *Erasmus Law Review* 1, 27. In the Italian literature one may find an interesting view that the consumer interest is the combination of an individual and a group interest: an individual interest in the protection of specific interests relating to given situations (health, hygiene, economic benefits, etc.) and a group interest to the extent that it belongs in an identical manner to everybody. Even if the threats to that interest are normally felt at the individual level, in actual fact they affect the group as a whole; see G Ghidini, *Per i consumatori* (Zanichelli, Bologna 1977) cited in 'Memorandum from the Commission on Consumer Redress 1984' (n 1) 33-34.

<sup>39</sup> See, for example, R Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70 *University of Chicago Law Review* 1203. On the other hand, taking a paternalistic approach one would deny that a consumer might have an interest in abusive clauses at all. Paternalists are sceptical about the ability of some groups of people to make decisions in their best interest and are in favour of intervention into their private autonomy when the conditions of full rationality do not hold. See, for instance, D Kennedy, 'Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power' (1982) 41 *Maryland Law Review* 563.

<sup>40</sup> Further examples may be provided. For instance, situations where a consumer is denied an award of credit because of the lack of collateral should be treated in a similar way. See EA Posner, 'Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom of Contract' (1995) 24 *Journal of Legal Studies* 283. Also the issue of rebates may be approached similarly. Moreover, credit reporting illustrates a situation where the collective interest overrides the interests of an individual. See P Blume, 'The Citizens' Data Protection' (1998) 1 *Journal of Information, Law and Technology*, <[http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998\\_1/blume/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998_1/blume/)>, accessed 15 March 2008.

<sup>41</sup> Cass Crim, 10 October 1996, Bull Crim 358.

The fact that the collective interest is not a sum of individual interests follows also from the third possible relationship between the two, i.e., when the individual consumer interest is irrelevant from the collective viewpoint. In such situation members of the public, other than the parties directly concerned, do not receive any benefits or suffer any negative consequences of the transaction. As an example, it is hard to imagine any collective interest in a private purchase of a pre-ordered painting or any other customised item.

In particular situations individual interest may foster the public interest. The procedure of a ‘constitutional complaint’, contained in Article 79 of the Polish Constitution, is a particular tool of initiating the specific review of legal provisions. A natural or legal person, whose case has been finally settled by a court judgment or a decision of an administrative body, may challenge before the Constitutional Tribunal the conformity of the legal provisions forming the basis of this decision with constitutionally guaranteed rights and freedoms. The Constitutional Tribunal’s judgment in such cases has universally binding force (Article 190 of the Constitution), meaning that it will also be applicable in cases other than the one involving the current appellant. In this regard, the review of legal provisions initiated in accordance with the procedure of constitutional complaint does not differ from the abstract review of norms or the review of norms following the referral of questions of law by courts.

A similar *actio popularis* is provided for by the CCP for the abstract control of fairness of clauses in standard form contracts.<sup>42</sup> The control can be initiated by any person that potentially might enter into a contract on the basis of the standard form contract.<sup>43</sup> The abstract examination is performed by the Court for Protection of Competition and Consumers which evaluates a particular clause *in abstracto*, regardless of any circumstances underlying a particular contractual relationship.<sup>44</sup> If the court declares a clause abusive, it is published in the public register of abusive clauses and becomes illegal (Article 479<sup>42</sup>(1) CCP). Such a judgment is effective *erga omnes* (Article 479<sup>43</sup> CCP). It implies that further use of a listed clause in standard form contracts will be regarded as infringing the collective interest of consumers (Article 24(2)(1) APCC). It was long controversial whether the prohibition concerned only the entrepreneur who participated in the court proceedings declaring a clause abusive or all entrepreneurs. The matter was decided recently by the Supreme Court in favour of the latter approach.<sup>45</sup> As a result, within the institution of the abstract control of unfair contract clauses an individual interest may foster the collective interest of consumers.

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<sup>42</sup> The abstract control of abusive clauses was introduced into the CC in 2000 in the course of implementation of the Directive 93/13 (*Ustawa z dnia 2 marca 2000 r. o ochronie niektórych praw konsumentów oraz o odpowiedzialności za szkodę wyrządzoną przez produkt niebezpieczny*, DzU 2000, No 22, Item 271).

<sup>43</sup> In addition, the control can be requested also by a consumer organisation, including a qualified organisation in the meaning of the Directive 98/27, a regional consumers’ spokesman or the President of the Office for Protection of Competition and Consumers (Article 479<sup>38</sup> CCP).

<sup>44</sup> Judgment of the Polish Supreme Court of 19 December 2003 – III CZP 95/2003, (2003) 12 Biuletyn Sądu Najwyższego 11; judgment of the Polish Supreme Court of 13 July 2006 – III SZP 3/2006, (2007) 1-2 OSNP Item 34. In contrast, in the case of individual control of contract clauses the court takes into consideration content of the contract, circumstances underlying the closing of the contract and other contracts related to the contract under examination (Article 385<sup>2</sup> CC).

<sup>45</sup> III SZP 3/2006 *ibid*.

An interesting question concerns the relationship between the collective interest and the public (general) interest. On the one hand it has been claimed that consumers' collective interests are distinct from the general public interests.<sup>46</sup> The report on collective redress prepared by the French Inter-Ministerial Working Group explicitly states that the collective interest should not be confused with the public interest.<sup>47</sup> On the other, in some MS the collective interest is identified with the public interest. Article 3:305a of the Dutch Civil Code, introduced by the Law on Claims by Interest Organisations of 1994 (*Wet vorderingsrecht belangenorganisaties*), grants associations or foundations with full legal capacity the right to sue in courts to protect collective interests which are defined as 'interests similar in kind which are held by other persons'. The preparatory work of the Law of 1994 states explicitly that it does not distinguish between the collective interests of a group of individuals, such as inhabitants of an apartment building or employees, and the general interest, shared by an indefinite number of persons.<sup>48</sup> Polish courts, in turn, consider the collective interest of consumers to be a variant or a part of the public interest.<sup>49</sup> Finally, according to the Commission's examination of the selected legal systems provided in the Green Paper of 1993 the scope of the category of collective interests is wider than that of individual interests (which are defended through the right of individual action) but more limited than that of the general interest (whose defence lies with the Ministry of Public Order).<sup>50</sup>

In general, a more comprehensive study on the possible relationships between the collective interest of consumers on the one hand and on the other an individual and the public interest is needed. As a preliminary conclusion, however, it seems reasonable to demand that in order to pursue the collective interest of consumers, competent bodies shall be required to provide evidence that individual interest of at least one consumer is also present. At the same time, designing institutions where an individual interest would foster the collective interest of consumers might be a valuable additional tool for improving the effectiveness of consumer protection laws.

### *2.3.3. Towards a positive definition*

As stated above, despite not being comprehensive, a negative definition might serve as a starting point for identifying positive elements guiding the application of the concept of collective interest. As regards the collective interest of consumers, we believe that the following factors should be taken into account when building a more precise definition: (1) number of infringements and persistence of a harmful practice; (2) the addressee of a practice; and (3) nature of the interest infringed.

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<sup>46</sup> See, for example, T Bourgoignie, 'Characteristics of consumer law' (1992) 14 *Journal of Consumer Policy* 293.

<sup>47</sup> Groupe de travail présidé par G Cerutti and M Guillaume, 'Rapport sur l'Action de Groupe', 16 December 2005) <[http://www.minefi.gouv.fr/directions\\_services/sircom/protection\\_conso/protection\\_eco/rapport.pdf](http://www.minefi.gouv.fr/directions_services/sircom/protection_conso/protection_eco/rapport.pdf)> accessed 15 March 2008.

<sup>48</sup> See W van Gerven, J Lever and P Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Ius Commune Casebooks, Hart Publishing, Oxford 2000) 270/7.

<sup>49</sup> Judgment of the Polish Supreme Court of 26 February 2004 – III SK 2/2004, (2004) 19 OSNP Item 343; Judgment of the Court of Appeal in Warsaw of 14 February 2007 – VI ACa 980/2006, LexPolonica No 1625352.

<sup>50</sup> Commission, 'Green Paper on Access of Consumers to Justice' 64.

First, a large number of infringements and persistence of certain detrimental practices will, in our opinion, usually be present in cases where the collective interest of consumers might be involved. In its consultation document the UK Department of Trade and Industry (hereinafter: the 'DTI') indicated that a one-off act that harms an individual consumer and which is unlikely to be repeated cannot be viewed as harming the collective interests of consumers.<sup>51</sup> On the other hand, as noted by the DTI in the same document, 'a one-off single breach capable of affecting a large number of consumers (e.g. a misleading advertisement) or which is likely to be repeated would harm the collective interests of consumers because consumers generally would be put at risk'.<sup>52</sup> According to the Polish Office for Protection of Competition and Consumers (hereinafter: the 'OPCC'), a one-off infringement may sometimes be a sign of a large-scale harmful practice.<sup>53</sup> It would therefore be sensible to introduce a rebuttable presumption of the existence of the collective interest if the number of infringements is large or harmful practice persists over time. At the same time, however, evidence for either a large number of infringements or persistence of the breach shall not be a necessary requirement and it should be clear that also small-scale infringements are likely to affect the collective interest of consumers.<sup>54</sup>

Second, the collective interest shall be presumed whenever a particular practice might potentially harm every consumer finding him- or herself in a given situation. In other words, the collective interest is likely to be involved when a practice is directed not at a particular consumer but at every potential consumer. For example, an unfair clause inserted into a contract drafted by business especially for the needs of a particular consumer would not imply an infringement of the collective interest. On the contrary, if the same unfair clause was inserted into a standard form contract to be used in dealings with any consumer willing to enter into a relationship, such a practice would be likely to endanger the collective interest of consumers.

Third, although the Directive 98/27 and the Regulation 2006/2004 concern 'economic interests' of consumers, it might be worth asking whether type of the interest being infringed might be decisive for identifying the collective interest in a given case. In this perspective it would be possible to argue that an infringement of goods that are under special protection of the legal system, for example life or health of a person, would imply an infringement of the collective interest of consumers. Such approach could ensure a coherent regulatory strategy towards the economic and non-economic interests of consumers.

The function of the above presumptions shall be to simplify a procedural situation of a claimant. The presumptions would also add more predictability for both consumers and

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<sup>51</sup> DTI, 'Consultation on implementing the EU Directive on Unfair Commercial Practices and Amending Existing Consumer Legislation' (December 2005, 42) <<http://www.berr.gov.uk/files/file15311.pdf>> accessed 15 March 2008.

<sup>52</sup> *ibid* 42.

<sup>53</sup> See Section 3.3.

<sup>54</sup> In Germany, the former version of the Law Against Unfair Competition required an intentional persistent breach of consumer protection provisions which rendered the possibility of consumer associations to take actions against unfair traders very difficult. For this reason, Germany abolished this requirement. See P Rott, 'The Protection of Consumers' Interests After the Implementation of the EC Injunctions Directive Into German and English Law' (2001) 24 *Journal of Consumer Policy* 401, 425. See also Howells and Weatherill, *Consumer Protection Law* (n 15) 594.

businesses as to the requirements of instituting legal proceedings in the collective interest of consumers.

#### *2.3.4. A proposal of the definition*

Given the above considerations, we propose the following preliminary definition of the consumers' collective interest:

- 1. Collective interest of consumers is not a sum of individual interests.*
- 2.1 Existence of the collective interest of consumers shall be presumed when:*
  - a. A large number of consumers is affected by a particular practice or the breach is persistent; however, a small number of infringements or discontinuation of a practice shall not in itself preclude the existence of the collective interest of consumers; and/or*
  - b. A particular practice affects every potential consumer being in a given situation; and/or*
  - c. A particular practice affects interests which are of special importance for consumers, in particular life and health.*
- 2.2 If one of the aforementioned conditions is met, rejecting a claim for protection of the collective interest of consumers requires appropriate justification.*
- 3. In order to demonstrate the existence of the collective interest of consumers, example(s) of individual consumer interest involved shall be provided as evidence.*

Such a preliminary definition, inserted, for instance, in a soft law EU measure, could guide the application of the concept of collective interest and ensure the achievement of a consistent approach towards the admissibility test of the actions in the collective interest of consumers.

### **3. Public interest and consumer protection in Poland**

In the first part of this section we will examine how the concept of public interest was construed by the Polish judiciary during the socialist regime. In the second part we will investigate whether transformation from the centrally-planned to free market economy in 1989 had any impact on the attitude of the Polish judiciary to consumer protection and whether it affected the notion of consumers' collective interest. In the subsection three we will show that the way the public interest was conceptualised in the past political and legal system – in particular its relationship with individual interest – has an influence on the present understanding of the consumers' collective interest.

### 3.1. *The period of socialism*

The relationship between the public and the individual interest in private law and potential frictions between the two were particularly well observable in Poland during the socialist regime. First, the concept of public interest was distorted as every interest of the State tended to be regarded as the public interest. Second, there was a clear hierarchy of interests and in the case of conflict the public interest prevailed.<sup>55</sup> As an example, in 1950<sup>56</sup> the Polish Supreme Court rejected a claim for eviction of a state-owned company from a private building as it would have infringed the interest of that company. In this judgment the Supreme Court explicitly held that (1) the interest of a state-owned company was equal with the public interest of the State and the society; and (2) private (individual) interest must rank after the interest of the State and the society.

Furthermore, judges tended to link individual interest with the public interest by stating that protection of the latter was indispensable for protection of the former. This practice might be explained in two ways. First, there was an apparent hostility towards the consumers' individual interests viewed as 'exaggerated, egoistic claims' and juxtaposed with the consumers' interests deserving protection<sup>57</sup> (public interest). For that reason, consumers' interests tended to be enforceable only when underlying public interest could be identified.<sup>58</sup> On the other hand, even if somewhat artificial, associating an individual interest with the public interest allowed for the development of consumer protection mechanisms which were not provided for by the statutes.<sup>59</sup> In this way, by

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<sup>55</sup> In particular, the general clause of the socio-economic purpose of right introduced into the Polish Civil Code of 1964 aimed at promoting decisions free 'from the subjective understanding of fairness' and preventing decisions 'extensively or exclusively highlighting an individual interest without taking into account the general interest', Codification Commission in the explanatory memorandum to the project of new Civil Code (Komisja Kodyfikacyjna, *Projekt kodeksu cywilnego* (Warszawa 1962)); see M Safjan, 'Klauzule generalne w prawie cywilnym (przyczynek do dyskusji)' (1990) (11) *Państwo i Prawo* 48, 50. It should be clarified the Civil Code of 1964 is still in force in Poland, though has been many times amended.

<sup>56</sup> Judgment of the Polish Supreme Court of 9 May 1950 – Ł C 495/50, (1951) 3 OSN Item 67.

<sup>57</sup> It was pointed out and criticised by E Łętowska, 'Ochrona konsumenta z punktu widzenia polityki prawa' (1978) (4) *Państwo i Prawo* 16, 20-21.

<sup>58</sup> It should be noted, however, that the concept of consumer was not normatively defined and it was referred to by the judiciary rather freely and interchangeably with the concept of purchasers.

<sup>59</sup> It would, however, be false to say that there were no instruments of consumer protection in the CC. For example, Article 384 CC empowered the Council of Ministers and other administrative bodies to issue general terms of contracts and model contracts to be used by 'units of socialized economy' ('USE'). In 1968 and 1971 the first general terms of contracts for relationships between the USEs and consumers (population) were issued. Later on, a great use was made out of this provision which led to the prevalence of numerous sectoral model contracts. Although the introduction of Article 384 CC was justified in terms of consumer protection, this objective was not achieved, mainly due to lack of any control over the model contracts issued. For a general overview see E Łętowska, *Wzorce umowne: ogólne warunki, wzory, regulaminy* (Zakład Narodowy im. Ossolińskich, Wrocław 1975). There were also many legal acts providing for the administrative and criminal protection of the economic interests of consumers (or purchasers) and many administrative agencies entrusted with the protection of these interests were established. It goes without saying that the protection effectively awarded was illusory. Given the specific characteristics of social economy (price regulation, regulation of production etc) as well as a (resulting) general shortage of supply, the main concerns of the policy of consumer protection were related to the observance of the price regulation and to the quality of products and variances of the two, ie (1) sale of products of lower quality or quantity than required for a given price, (2) collecting higher prices than the regulated prices, (3) improper designation of products. Accordingly, the tasks of

means of creative interpretation, Polish judges often managed to circumvent the official 'commandment' of supremacy of the public interest in private relationships.

As an example, in 1959<sup>60</sup> the Polish Supreme Court ruled that any ambiguities in general terms and conditions applying to an insurance contract should be interpreted *contra proferentem*. According to the Supreme Court, any interpretation imposing negative effects of confusing provisions on the party with no influence on their formulation would violate the principles of community life. It was emphasised that especially when offers are directed at an indefinite number of persons (*ad incertas personas*), the offeror has a duty to declare his or her intent in a way which is understandable and not misleading for the addressees and the effects of the breach of this duty must lie with the offeror. Thus, the Supreme Court effectively granted legal protection to an individual consumer but at the same time indirectly referred to the public interest. Namely, the Supreme Court reasoned that a practice employed by the offeror was likely to harm an indefinite number of persons and as such should be ceased and deterred *pro futuro* by means of civil liability.

Another example of the tendency to associate individual interest with the public interest dates back to 1978<sup>61</sup> when the Polish Supreme Court rendered a decision according to which a court should be allowed to disregard a one-year prescription period for a statutory warranty claim if rejecting a late claim would manifestly harm the purchaser.<sup>62</sup> In the reasoning to this decision the Supreme Court argued that departure from the rigor of one-year prescription period is justified not only by the individual interest of a purchaser but also by the 'general socio-economic interest' involving the protection of consumers as well as the protection of production, both industrial and agrarian (the claimant purchaser was a farmer). The Supreme Court also referred to the general shortage of supply in Poland and argued that the institution of statutory warranty aims at disciplining producers to ensure proper quality of goods. It further emphasised that a considerable loss suffered by a farmer might have had negative economic implications for his farm and thus for the general level of agrarian production. As a result, also in this

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the competent agencies amounted mainly to monitoring whether price, quantity and quality of goods as prescribed by detailed regulations were observed. A key concern was the fight against 'speculation'. Quite often the agencies had also power to enforce particular regulations by means of imposing fines and other penalties. In addition to agencies, there was also a sign of social society organizations empowered with protection of consumer interests: 'Social Committees for Price Control' (so called 'control trios'). They were supposed to monitor prices, quantities and qualities of products at commercial sites. However, due to organizational and human resources problems their role was very limited and they were resolved very quickly. See B Piasna, 'Powstanie i rozwój instytucjonalnych form ochrony interesów konsumentów w Polsce Ludowej' (1971) 4 *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 135, 142. The focus of the consumer protection as described above was primarily on deterrence and the various legal acts were setting an enormous amount of technical, production and organizational standards backed by administrative or even criminal penalties. The role of agencies was to monitor and enforce administrative rules. As it can be seen, consumer protection measures were aimed at interventionist market regulation rather than ensuring consumer satisfaction; see M Skory, *Klauzule abuzywne w polskim prawie ochrony konsumenta* (Zakamycze, Kraków 2005) 60. No special legal protection of individual interests of consumers was provided for.

<sup>60</sup> Judgment of the Polish Supreme Court of 24 July 1959 – 4 CR 1027/58, (1961) 2 *OSP i KA* Item 32.

<sup>61</sup> Resolution of the Civil Chamber of the Supreme Court of 20 May 1978 – III CZP 39/77, (1979) 3 *OSNCP* Item 40.

<sup>62</sup> In this case defects of the good materialized more than one year after the sale took place.

case the Supreme Court awarded protection to an individual consumer but instantaneously considered it to be an instrument of protecting the public interest.

The link between an individual interest and the public interest is also illustrated by the judgment of 1983.<sup>63</sup> In this judgment the Polish Supreme Court held that a commission agent cannot exclude his or her liability for hidden defects of a good by way of posting on the wall a general note containing an exclusion clause. In order for the exclusion of liability to be effective it should be communicated directly to a respective buyer. The Supreme Court argued that such an interpretation is justified by social reasons. Economic positions as well as the possibility to detect hidden defects of a good by a professional on the one hand and by a consumer on the other are considerably different. Hence imposing the risk of acquiring a defective good on consumer can be justified only if the consumer knowingly assumes that risk and this can only be the case if the consumer is warned *ex ante* about the factual possibility of buying a defective good. Only such an interpretation meets requirements of justified consumer protection. As it can be seen, also in this case the Supreme Court implicitly referred to the protection of the collective interests of consumers.

Another judgment linking protection of an individual consumer interest with the collective interest of consumers was delivered in 1986.<sup>64</sup> The case concerned a sale agreement of a washing machine. Having concluded a contract of sale for a fixed administrative price, the parties had to wait for the washing machine to be delivered to the seller. In the meantime the fixed price had increased. The seller argued that the initial agreement was only a preliminary one and required the buyer to make up a difference in prices. The buyer paid the additional charge and, having received the washing machine, claimed it back. The lower courts dismissed the claim and the buyer decided to go up to the Supreme Court. As the revision was filed after the prescribed period, the Supreme Court was to consider whether the decision of the lower court had violated the interest of Poland. Accordingly, it argued that boosting consumers' confidence in undertakings (producers or sellers) is in the interest of Poland. The State and the society are interested in the protection of legitimate interests of citizens and other persons as consumers. The priority of the public (general) over an individual interest does not imply that the former as a rule excludes the protection of legitimate individual interests. In particular, protection of an individual interest may be indispensable for the protection of the social interest. In sum, according to the Supreme Court, protection of an individual interest may be a function of the social interest.

Finally, the regime of product liability was also developed by the Polish jurisprudence with references being made to the need to protect human life and health as well as to warrant the appropriate quality of production. In numerous judgments gradually developing this institution<sup>65</sup> up to the Guidelines of the Supreme Court of 1988,<sup>66</sup> the

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<sup>63</sup> Judgment of the Polish Supreme Court of 18 November 1983 – I CR 336/83, OSNCP 1984, No. 9, Item 159.

<sup>64</sup> Judgment of the Polish Supreme Court of 20 February 1986 – III CRN 443/85, OSNCP 1986, No. 12, Item 211.

<sup>65</sup> Judgment of the Polish Supreme Court of 6 February 1963 – 2 CR 96/62; Judgment of the Polish Supreme Court of 28 April 1964 – II CR 540/63, (1965) 2 OSNCP Item 32; Judgment of the Polish Supreme Court of 28 June 1972 – II CR 218/72, (1972) 12 OSNC Item 228.

<sup>66</sup> Judgment of the Polish Supreme Court of 30 December 1988 – III CZP 48/88, (1989) 3 OSNCP Item 36.



Supreme Court referred to the interest of the society and of the State in protecting justified interests of purchasers. The Supreme Court argued that an individual interest was part of the general interest and that awarding protection to purchasers might have influenced a general quality of products.<sup>67</sup>

The case-law discussed above shows that the practice of linking individual interest with the public interest enabled the Polish judiciary to develop various forms of consumer protection which at that time were not provided for by the statutes.<sup>68</sup> The question which arises is why civil courts in the socialist regime, notwithstanding the official ideology of the supremacy of the public interest, had a propensity to implant the individual interest of consumer into the concept of public interest. This judicial approach followed from two factors. First, centrally-planned economy lacked any regulatory mechanisms ordinarily built into the market system, in particular a price mechanism, which would ensure a proper balance of interests between the supply and demand sides of the market. As a result, the only possible way to steer the behaviour of market participants in order to ensure at least some level of consumer satisfaction was through an external corrective action. Given that administrative provisions were ineffective and focused more on heavy-handed market regulation than on consumer protection, only civil law litigation could serve this function. Second, Polish civil courts were relatively independent from the executive branch (which was, by the way, a peculiarity in the 'socialist camp') and remained strongly influenced by the traditional concepts of private law. Influenced by the private law tradition, Polish judges pushed for a more balanced approach towards the individual and public interest than the official socialist ideology would require.

As a conclusion, the tendency to associate an individual interest with the public interest during the socialist time might render the operationalisation of the collective interest in Poland easier. In particular, Polish jurisprudence has already recognised that a single case might have a deterrence value and thus in certain circumstances evidence of a single infringement will suffice to establish the collective interest of consumers. As it will be demonstrated further, this approach is still present among the Polish judiciary. On the other hand, prevalence of the public interest in conjunction with the absence of an underlying individual interest led to pathology, namely a situation where interest of the State could prevail over the interest of an individual. As the enforcement of consumers' rights necessarily involves an infringement of the conflicting interest of business(es), a possibility that an unclear concept of the collective interest of consumers would override an individual interest of an entrepreneur (or even some consumers) shall be prevented. For this reason, the concept of collective interest of consumers shall be specified in more detail. In addition, as it was claimed above, in order to take a legal

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<sup>67</sup> *ibid.*

<sup>68</sup> Ewa Łętowska identified five trends in the Polish 'pro-consumer' jurisprudence: (1) prevention of the abuse of dominance by undertakings (not to be confused with the concepts used in European competition law); (2) prevention of undesirable conduct by undertakings; (3) intensification of professionals' duties; (4) objectivisation of liability for hazardous products; and (5) preference for specific performance. Given the characteristics of the socialist economy and in particular a general shortage of goods, specific performance was of great importance for consumer protection as a tool allowing consumers to stay in the possession of the good. This was in a marked contrast to the modern approach to consumer protection in the EC where the tendency has been rather to allow an unsatisfied consumer to get out of a contract as easily as possible so that he or she could obtain an alternative good or service on the market. Cf E Łętowska in S Pawela and K Piasecki, 'Sesja Sądu Najwyższego PRL – Sprawozdania' (1985) (5) *Nowe Prawo* 63, 77-79.

action endorsing the collective interest of consumers, consumer protection bodies shall be required to provide evidence for the existence of an individual interest of consumer(s).<sup>69</sup> Finally, the developments in Poland show also the potential conflict between the public interest in general and the collective interest of a class. The implications of such a clash should be studied in more detail.

### 3.2. *After the transformation*

Transformation from a centrally-planned to a free market economy in 1989 marked itself extensively in the field of private law. As regards contract law, private autonomy and freedom of contract came into the foreground. Introduction of Article 353<sup>1</sup> expressly guarantying the freedom of contract into the CC had a somewhat symbolic value.<sup>70</sup> In the legal doctrine, a claim that undistorted market competition is the best way to achieve a high level of consumer satisfaction emerged. Accordingly, any arguments justifying the need to protect the 'weaker' contractual party tended to be rejected and associated with the former socialist system.<sup>71</sup> At the same time, individual and not public (or collective) interest turned to be emphasised as an overriding value in contractual relationships. However, as far as the jurisprudence is concerned, its approach to consumer protection remained ambiguous. On the one hand, one could observe judgments denying any protection and promoting formalistic understanding of the freedom of contract; on the other there were many judicial decisions acknowledging the need to protect the 'weaker' party.

As an example of the *laissez-faire* approach, one can quote decisions concerning the control of unfair clauses in standard form contracts. The amendment of the CC of 1990<sup>72</sup> introduced Article 385<sup>2</sup> which specified that if standard form contracts conferred grossly unjustified benefits on the drafting party, the counterparty was entitled to require a court to declare their unenforceability. This entitlement was vested only with a party who entered into a contract outside his or her economic activity, thus essentially with a consumer. This provision shows that the legislation adopted after 1989 awarded some form of protection from unfair clauses to consumers, but required them to actively enforce their rights, and in particular to bear the burden of proof (Article 6 CC). Polish judiciary approached this provision in a very formalistic way, or even went further by saying that the entitlement awarded by Article 385<sup>2</sup> is exceptional and as such cannot be

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<sup>69</sup> For other justifications for this requirement see Part 2.3.2.

<sup>70</sup> An express provision providing for the freedom of contract was actually brought back into Polish civil law as the former Polish Code of Obligations of 1933 contained it (Article 55). It shall also be recognized that even absent an express provision guarantying the freedom of contract, the legal doctrine derived it from other provisions of the CC. Also courts, though with hesitance, tended to acknowledge it. See, for instance, C Żuławska, 'Wokół zasady wolności umów (art. 353<sup>1</sup> k.c. i wykładnia zwyczajnej)' (1994) 1690 Acta Universitatis Wratislaviensis 173. See also M Safjan, 'Zasada swobody umów. (Uwagi wstępne na tle wykładni art. 353<sup>1</sup> k.c.)' (1993) (4) Państwo i Prawo 12.

<sup>71</sup> It was pointed out and criticised by, for example, E Łętowska, *Prawo umów konsumenckich* (CH Beck, Warszawa 2002) 3. Such voices ignored the fact that certain forms of protection, and in particular 'protection by information', aim at safeguarding and enabling private autonomy of both sides of the contractual relationship.

<sup>72</sup> Act of 28 July 1990 (*Ustawa z dnia 28 lipca 1990 r. o zmianie ustawy – Kodeks cywilny*), DzU 1990, No 55, Item 321.

taken into consideration by a court of its motion.<sup>73</sup> This judgment clearly reveals an anti-consumer stance and is in stark contrast to a subsequent judgment of the ECJ in *Océano* which required an *ex officio* control of unfair clauses in consumer standard form contracts.<sup>74</sup>

In contrast, an example of the protective approach might be drawn from the line of cases regulating the use of general terms and conditions by banks. In general, banks were prohibited from unilaterally changing the interest rates<sup>75</sup> and required to notify any change of general terms and conditions to a consumer and to allow him or her to withdraw from the contract in case of such modifications.<sup>76</sup>

There was also a line of cases concerning liability of commercial agents for the legal defects of products. After the transformation, many persons found themselves buying a second-hand 'western' car from a commercial agent where afterwards the car appeared to be stolen. The unfortunate buyers claimed compensation from the agents arguing that it was their responsibility to properly verify the origin of the car. In numerous judgments, the Polish Supreme Court expressed an opinion that persons who professionally run an agency are bound to adopt a higher measure of diligence<sup>77</sup> and should be conscious of the common phenomenon of placing stolen cars on the market. Although a commercial agent was not obliged to perform a specialist technical examination in order to verify the origin of a car, he or she should, however, make a general inspection of the car and examine its documentation in a way that an experienced driver would be expected to do. If, as a result, a commercial agent became suspicious that the car might have been stolen, he or she should notify about this suspicion a potential buyer in due time.<sup>78</sup> Thus, this line of cases could be described as favouring consumers. At the same time, however, cases concerning liability of agents selling cars which turned out to be stolen, confirm the thesis about judges' ambivalent approach to consumer (or rather purchaser) protection after the transformation. Based on a similar factual situation, the Supreme Court rejected in 1996<sup>79</sup> a claim of a buyer who demanded that an agent repays her the price paid for a car which turned out to be

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<sup>73</sup> Judgment of the Polish Supreme Court of 16 April 1996 – II CRN 48/96, (1996) 6 *Radca Prawny* 32. In the Explanatory Memorandum to the Amendment of the CC of 2000 implementing the Directive 93/13 and entirely modifying the model of control of unfair clauses it was argued that Article 385<sup>2</sup> had remained dormant since the courts tended to require that in order for a clause in a standard form contract to be declared unfair and thus unenforceable, it had to contravene an express provision of law. In addition, long court proceedings (more than three years) had rendered any protection fictitious; *Uzasadnienie rządowego projektu ustawy o umowach zawieranych poza lokalem przedsiębiorstwa lub na odległość oraz o zmianie ustaw: Kodeks cywilny, Kodeks postępowania cywilnego i Kodeks wykroczeń (druk sejmowy nr 945)*, available at <www.sejm.gov.pl>.

<sup>74</sup> Joined cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero and others* [2000] ECR I-4941.

<sup>75</sup> Judgment of the Polish Supreme Court of 3 July 1991 – III CZP 59/91, (1992) 3 OSNCP Item 41; Judgment of the Supreme Court of 19 May 1992 – III CZP 50/92, (1993) 6 OSP Item 119.

<sup>76</sup> Judgment of the Polish Supreme Court of 22 May 1991 – III CZP 15/91, (1992) 1 OSNCP Item 1.

<sup>77</sup> Diligence generally required in the relationships of a given kind is prescribed by Article 355(1) CC. Article 355(2), inserted into CC in 1990, further specifies that diligence of a debtor within the scope of his or her economic activity shall be assessed in view of the professional character of this activity.

<sup>78</sup> Judgment of the Polish Supreme Court of 18 December 1990 – III CZP 67/90, (1991) 5-6 OSNCP Item 65; judgment of the Polish Supreme Court of 24 June 1997 – II CKN 224/97, (1998) 1 OSNC Item 8.

<sup>79</sup> Judgment of the Polish Supreme Court of 30 May 1996 – III CZP 42/96, (1996) 10 OSNC Item 128.

stolen. The Court held that a commercial agent may effectively exclude his or her liability by a unilateral statement made prior to the conclusion of the contract.

As a conclusion, a radical change of the approach to consumer protection after the transformation might have implications also for the understanding of the concept of collective interest of consumers. However, although some authors argue that Polish judiciary has never been ‘consumer-friendly’ and after the transformation even turned back from the pro-consumer track which started to emerge in the 1980s,<sup>80</sup> it seems that the situation after the transformation was not so clear and as such makes it impossible to arrive to any clear-cut conclusion. In addition, since as of the 2000s the case law has been gradually becoming more consumer- and EU-oriented, it seems fair to assume that the ‘after the transformation’ period has not had any significant implications for the current understanding of the concept of collective interest of consumers in Poland.

### 3.3. *The current state of play*

The concept of consumers’ collective interests was introduced into Polish law – the Act for Protection of Competition and Consumers<sup>81</sup> (hereinafter: the ‘APCC’) – in 2002 as an implementation of the Directive 98/27.<sup>82</sup> Polish legislator consciously copied out the definition from the Directive 98/27 expecting that it could be decoded from the future case law of the ECJ. That is why there was no attempt to introduce a statutory definition of the collective interest of consumers as it could have become inconsistent with the interpretation of the ECJ expected to be provided in the future.<sup>83</sup>

The APCC stipulates a general prohibition of unlawful practices infringing the collective interests of consumers (Article 24(1)). The APCC provides an indicative list of such unlawful practices: (1) the use of general terms and condition listed in the public register of abusive clauses;<sup>84</sup> (2) breach of the duty to provide reliable, true and full information to consumers; and (3) unfair commercial practices and acts of unfair competition (Article 24(2)).

A practice can be declared as infringing the collective interest of consumers in the administrative proceedings before the OPCC. Decisions of the OPCC are naturally subject to judicial review. A claim to start proceedings by the OPCC can be filed by (1) the Ombudsman; (2) the spokesman of the insurance policy holders’; (3) a consumers’ spokesman; (4) a consumer organisation; (5) the Financial Supervisory Committee

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<sup>80</sup> See Łętowska, *Prawo umów konsumenckich* (n 71); Skory, *Klauzule abuzywne* (n 59).

<sup>81</sup> *Ustawa z dnia 15 grudnia 2000 o ochronie konkurencji i konsumentów*, DzU 2000, Issue 122, Item 1319. The new draft of the APCC was adopted on 16 February 2007, *Ustawa z dnia 16 lutego 2007 o ochronie konkurencji i konsumentów*, DzU 2007, Issue 50, Item 331 as amended. Its Article 24(3) states that the collective interest of consumers is not a mere sum of individual interests.

<sup>82</sup> Amendment of the APCC introducing the concept of collective interests of consumers of 5 July 2002 (*Ustawa z dnia 5 lipca 2002 o zmianie ustawy o ochronie konkurencji i konsumentów, ustawy – Kodeks postępowania cywilnego oraz ustawy o zwalczaniu nieuczciwej konkurencji*, DzU 2002, Issue 129, Item 1102). It came into force on 15 December 2002.

<sup>83</sup> See Explanatory Memorandum to the Amendment of the APCC introducing the concept of collective interests of consumers (*Uzasadnienie rządowego projektu ustawy o zmianie ustawy o ochronie konkurencji i konsumentów, ustawy o zwalczaniu nieuczciwej konkurencji oraz ustawy – Kodeks postępowania cywilnego (Druk Sejmowy No 366)*) <[www.sejm.gov.pl](http://www.sejm.gov.pl)>, accessed 15 March 2008.

<sup>84</sup> See Part 2.3.3.

(Article 100a(1) APCC); and (6) a qualified consumer organisation in the meaning of the Directive 98/27 (Article 100a(2)). Consumers themselves are not given this power

In the following we will provide an overview on how the collective interest of consumers is interpreted by Polish courts and administrative bodies. We will show that there is a link between the present understanding of the public interest and its conceptualisation in the past. At the same time, we will show that even within one MS the content of the concept of collective interest of consumers can be unclear. We will also demonstrate that the lack of a precise definition of the concept of consumers' collective interest might lead to ambiguities as regards the competence of consumer protection bodies to take action. This supports our claim that a comprehensive strategy towards the concept of collective interest of consumers at the EU level is needed.<sup>85</sup>

In 2004 the Polish Supreme Court decided a case initiated by a regional consumers' spokesman against the OPCC.<sup>86</sup> The case dealt with a dispute between the two authorities concerning the competence of the OPCC to take actions aimed at the protection of consumers' collective interests.

In 2001 the OPCC refused to start proceedings against an energy company 'Energetyka' upon the motion of the regional consumers' spokesman. The OPCC believed that there was no public interest at stake.<sup>87</sup> The spokesman filed a complaint against Energetyka arguing that it was imposing unfavourable terms and conditions upon consumers. In the justification for its motion, the spokesman referred to the example of an individual consumer. The OPCC refused to take action claiming that the spokesman did not provide evidence that a wider group of consumers was affected by the objectionable practices of Energetyka. Accordingly, the case under dispute pertained only to individual and not public interest. The Antimonopoly Court<sup>88</sup> upheld the OPCC's reasoning and argued that the APCC protects the interests of consumers as an institutional phenomenon. According to the Antimonopoly Court, particular practices shall be regarded as infringing the interests of consumers only if they affect a wider group of market participants, thus concern not an individual entrepreneur or consumer but rather market distortions.

The Supreme Court quashed the ruling of the Antimonopoly Court and held that in order for the OPCC to take action there is no need to demonstrate that an undesired practice is of repetitious character and has affected many consumers. The APCC empowers and at the same time obligates competent bodies to take also preventive actions. It follows that a prerequisite for the start of administrative proceedings is met also in the case concerning only an individual consumer if the circumstances of the case demonstrate that undesired business practices might potentially distort the functioning of the market by infringing the interests of consumers (public interest). A reverse interpretation would preclude effective protection of consumers by means of preventive actions. In view of that, the Supreme Court held that although the regional consumers'

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<sup>85</sup> Of course if we move beyond Poland the differences are likely to be even more apparent.

<sup>86</sup> Judgment of the Polish Supreme Court of 26 February 2004 – III SK 1/2004; (2004) 18 OSNP Item 18.

<sup>87</sup> The facts of the case had taken place before the notion of collective interests of consumers was introduced into the APCC. Still, the APCC specified in Article 1 that protection of consumers was to be undertaken in the public interest.

<sup>88</sup> Now: Court for Protection of Competition and Consumers; it is a District Court in Warsaw; Article 32(2)(2) APCC.

spokesman referred to a single infringement, the circumstances of the case demonstrated that the challenged practices could be followed on a wider scale and thus infringe the public interest. Accordingly, starting the administrative procedure by the OPCC was justified.<sup>89</sup>

The case concerned the notion of the public interest and not the collective interests of consumers as the facts of the case had taken place before the latter was introduced into the APCC. Nevertheless, it seems arguable that the conclusions of the decision remain valid also for the concept of collective interest of consumers, especially as both courts and the OPCC consider the collective interest of consumers to be a variant or a part of the public interest.<sup>90</sup>

The case shows that a linkage between the individual and public interest utilised in the socialist Poland might have implications for the present understanding of the concept of public and consumers' collective interest. In the case under consideration, the regional consumers' spokesman explicitly quoted the Polish Supreme Court judgment of 1988<sup>91</sup> to justify its claim that a decision delivered in the individual case might have preventive effects beneficial for the general interest and thus there might be a general interest identified even if a case concerns individual interest only. Although the Supreme Court did not refer to the case quoted by the consumers' spokesman, it followed its argumentation.

The case further illustrates a possible discrepancy between the interpretation of the concept of collective interest of consumers by the OPCC and lower courts on the one hand and the Polish Supreme Court on the other. The OPCC and lower courts read the collective interest of consumers as meaning a situation in which interests of an indefinite group of consumers are affected.<sup>92</sup> The APCC is said to protect consumers as a class and as an institutional phenomenon: in order to establish a breach concerning the collective interest of consumers, it must not be possible to identify all the individual breaches.<sup>93</sup> Accordingly, even if there is a large but closed group of affected consumers, the existence of the collective interest of consumers is precluded. In contrast, the position of the Supreme Court seems to be somewhat different. The Supreme Court holds that infringement of an individual consumer interest does not preclude existence of the collective interest of consumers if the individual infringement might in any way lead to the rise or preservation of monopolistic practices or disturb the market in another way.<sup>94</sup> For this reason, the Supreme Court does not focus on the indefinite number of consumers harmed, but on the potential for market distortions. As demonstrated by the case analysed above, the two approaches might be conflicting.

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<sup>89</sup> The cassation of the regional consumers' spokesman was dismissed on other grounds, though.

<sup>90</sup> III SK 2/2004 (n 49); VI ACa 980/2006 (n 49). Moreover, in the case under discussion the Polish Supreme Court referred also to the collective interest of consumers.

<sup>91</sup> III CZP 48/88 (n 66).

<sup>92</sup> Recently, VI ACa 980/2006 (n 48); Judgment of the Court of Appeal in Warsaw of 21 Decemeber 2006 – VI ACa 543/2006, LexPolonica nr 1428369; Decision of the OPCC of 29 September 2006 *w sprawie stosowania praktyk naruszających zbiorowe interesy konsumentów przez Rossmann Supermarkety Drogerijne Polska Sp. z o.o. w Łodzi* ((Nr RLU-28/2006), DzUrzuOKiK 2006 No 4 Item 56.

<sup>93</sup> *ibid.*

<sup>94</sup> III SK 2/2004 (n 49).

To conclude, on the basis of the Polish example, we demonstrated that lack of a clear definition of the collective interest of consumers might lead to ambiguities concerning the competences of the consumer protection bodies to take action and thus undermine effectiveness of consumer protection.

#### **4. Conclusions**

The existing EU instruments aimed at facilitating consumer redress in cross-border situations, Directive 98/27 and Regulation 2006/2004, employ the concept of collective interest of consumers. Given the Commission's focus on the protection of the collective interest, it will probably also underlie any European mechanism for collective redress elaborated in the future. Despite these developments, there has not been elaborated any comprehensive strategy towards the concept of consumers' collective interest at the EU level so far. We have argued that the lack of a precise definition of the collective interest may lead to under-enforcement of consumer rights due to unclear situation concerning the competence of consumer protection bodies to institute legal proceedings. In order to remedy this situation we have put forward a proposal how to make the concept of consumer collective interest a workable tool.

Definition of the collective interest limited to a statement that it is not a sum of individual interests is unlikely to perform its role of improving the procedural position of consumers. This negative statement can, however, serve as a starting point for building a positive definition. The following factors should be taken into account when building a more precise definition: (1) the number of infringements and persistence of a harmful practice; (2) the addressee of a practice; and (3) nature of the interest infringed. We have proposed to introduce a rebuttable presumption of the existence of the collective interest if the requirements related to any of these factors are met in a given case. The function of such presumption shall be to simplify a procedural situation of a claimant.

We have also examined how the concept of public interest was construed by the Polish judiciary during the socialist regime and shown that the way the public interest was conceptualised in the past political and legal system – in particular its relationship with individual interest – has an influence on the present understanding of the consumers' collective interest.

Finally, the *Duchesne* case<sup>95</sup> and the Polish case of 2004<sup>96</sup> show that interpretation of the concept of the collective interest of consumers might in fact be relevant for the effectiveness of collective redress schemes. Clear understanding of the notion, which currently varies from one MS to another, is thus essential for the creation of the internal market in the collective redress.

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<sup>95</sup> n 16.

<sup>96</sup> III SK 1/2004 (n 86).

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## **Abbreviations**

Bull Crim	Bulletin des arrêts de la chambre criminelle de la Cour de cassation
Cass Crim	Cour de Cassation, Chambre Criminelle
CSOH	Court of Session Other House
DzU	Dziennik Ustaw
DzUrzUOKiK	Dziennik Urzędowy Urzędu Ochrony Konkurencji i Konsumentów
ECR	European Court Reports
OJ	Official Journal
OSN	Orzecznictwo Sądu Najwyższego
OSNC	Orzecznictwo Sądu Najwyższego (Izba Cywilna)
OSNCP	Orzecznictwo Sądu Najwyższego (Izba Cywilna, Pracy i Ubezpieczeń Społecznych)
OSNP	Orzecznictwo Sądu Najwyższego (Izba Pracy)
OSP	Orzecznictwo Sądów Polskich
OSPika	Orzecznictwo Sądów Polskich i Komisji Arbitrażowych
OTK ZU	Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy