Joasia Luzak[[1]](#footnote-1)

**You too will be judged: *erga omnes* effect of registered unfair contract terms in Poland**

1. A glance at the consequences of unfairness

From the moment of its implementation, the Unfair Contract Terms Directive (the “UCTD”)[[2]](#footnote-2) has been the subject of many preliminary references due to its wide scope of application, as well as general terms used therein. Requests for interpretation of Article 6 UCTD are particularly numerous,[[3]](#footnote-3) as the exact nature of consequences of unfair contract terms meant to be ‘not binding’ on consumers remains contentious. This lack of legal certainty as to the ramifications of unfairness might have hindered the Member States in fulfilling their obligation under Article 7 UCTD, requiring the assurance of adequate and effective consumer protection against a perpetual use of unfair contract terms. Without doubt it has contributed to the variety in procedural and substantive rules as to individual and collective remedies adopted by the Member States to control for unfairness.[[4]](#footnote-4)

 In Poland, the prohibition of the use of unfair contract terms falls within the general prohibition of practices harming consumers’ collective interests.[[5]](#footnote-5) When traders employ such practices, they can expect that not only individual consumers, but also consumer organisations, consumer ombudsmen or the Polish consumer and market authority – the Office of Competition and Consumer Protection (the “UOKiK”)[[6]](#footnote-6) – would challenge them thereon. An individual consumer may raise an issue of unfairness of a particular contract term under the general unfairness’ test of Article 3 UCTD that has been implemented in Article 3851 of the Polish Civil Code (the “KC”).[[7]](#footnote-7) This provision requires national courts to look into specific circumstances of a given case to assess unfairness. However, a so-called review of unfairness *in abstracto* also exists, and may be initiated by individual consumers, consumer organisations, consumer ombudsmen or the President of the UOKiK. Either of these entities may claim that a particular contract term is unfair in all contracts it applies to, pursuant to Article 7(2) UCTD.[[8]](#footnote-8) The possibility to protect consumers’ collective interests through the unfairness review *in abstracto* could be perceived as more efficient than consumers raising their individual claims of unfairness and serves different purposes.[[9]](#footnote-9)

 The protection of collective interests of consumers against unfair contract terms is, therefore, deeply rooted in European consumer law. What has been contested[[10]](#footnote-10) is the *erga omnes* effect of the *in abstracto* unfairness’ assessment of a particular contract term. That is to say, if the content of a particular contract term is considered unfair, the question arises whether the same determination could automatically be made in other cases pertaining to the use of a term with an identical or a similar content. The Court of Justice of the European Union (the “CJEU”) has previously in the case *Invitel*[[11]](#footnote-11) confirmed that consumers who were not part of the judicial proceedings recognizing a particular contract term of a given trader as unfair, but who have concluded a contract with this trader containing the same contract term, could rely on the assessment of its unfairness against this trader.[[12]](#footnote-12) The remaining question, i.e., whether consumer authorities, consumer organisations and consumers concluding contracts with traders, who use terms previously appraised as unfair, could rely on such prior judgments against other traders, was recently answered by the CJEU in the Polish case *Biuro podróży Partner*.[[13]](#footnote-13)

2. Case *Biuro podróży Partner*

2.1. Facts & Polish law

Biuro podróży ‘Partner’ (“Biuro Partner”) is a travel agency in Poland found to provide unfair contract terms to consumers and subsequently fined by the President of the UOKiK during an administrative procedure.[[14]](#footnote-14) Biuro Partner challenged this finding as it has not been made in judicial proceedings assessing the unfairness of its own standard contract terms. Instead, the fine followed from administrative proceedings based on the previous judicial assessment *in abstracto* of unfairness of another travel agency’s standard terms and conditions. Biuro Partner sought, therefore, the annulment of the President of the UOKiK’s decision or, in the alternative, having the financial penalty reduced.

Polish law applicable at the time of deciding the case *Biuro podróży Partner* determined that it is an unlawful practice, harming collective interests of consumers, for a trader to maintain in his standard terms and conditions a clause that has previously been assessed as unfair and registered as such by the District Court in Warsaw XVII Division of Competition and Consumer Protection (the “SOKiK”)[[15]](#footnote-15).[[16]](#footnote-16) The SOKiK has the authority to monitor standard terms and conditions, ensuring the uniformity of the unfairness’ control *in abstracto*. An *in abstracto* review examines the unfairness of a certain clause in trader’s standard terms and conditions in all circumstances, regardless of the individual situation of a given consumer. If the SOKiK decided that a contested term was unfair in all circumstances, it would publish it as such in the register. In practice, the register of unfair contract terms maintained by the SOKiK supplemented the grey list of potentially unfair contract terms, which has been implemented in Article 3853 KC. The SOKiK’s register could also be perceived as a factual black list. Consistently with the CJEU’s judgment in the case *Invitel*, the assessment of unfairness of a given contract term would then apply to all consumers of a given trader, when the assessed term was part of their contract. This fact would be made public by registering the term as unfair. If the trader did not automatically adjust his standard terms and conditions in all consumer contracts upon the entry of the term into the register, this could lead to administrative penalties, as well as a surge of individual consumer claims against this trader, invoking the SOKiK’s decision.

It was, however, contested whether this register could also have and had an *erga omnes* effect towards traders that have not been part of the judicial proceedings.[[17]](#footnote-17) In some judgments[[18]](#footnote-18) the Polish Supreme Court has recognized that an entry into the register of an unfair contract term should have binding effects on all traders using identical or similar clauses, while in other judgments[[19]](#footnote-19) this effect was denied. The President of the UOKiK favoured the *erga omnes* interpretation and issued fines in administrative procedures for traders who used contract terms similar to the ones that have already been registered as unfair.[[20]](#footnote-20) He also claimed that this allowed him to effectively restrict traders’ circumvention of consumer protection against unfairness. It remains a common practice in Poland for traders to slightly modify the language of the contract term that has already been assessed as unfair, in order to present it as a new contract term. Without the possibility of the President of the UOKiK fining the use of contract terms similar to the ones that have already been registered as unfair, in every case of such ‘tweaking’, the unfairness’ assessment would need to occur anew.[[21]](#footnote-21) Considering the controversial nature of this issue, on the appeal of Biuro Partner, the VI Civil Division of the Court of Appeal of Warsaw decided to ask the CJEU, among other things, whether the actions of the President of the UOKiK recognising such an *erga omnes* effect in Polish national law were compliant with Articles 6 and 7 UCTD.

2.2 Fair trial for traders

Interestingly, prior to interpreting provisions of the UCTD and assessing compliance of Polish law therewith, the CJEU compares the adherence of this *in abstracto* unfairness’ review and its *erga omnes* effects to the obligation to provide an effective remedy and a fair trial, as expressed in Article 47 of the Charter[[22]](#footnote-22) of Fundamental Rights of the EU (the “Charter”).[[23]](#footnote-23) If the unlawful effect of a contract term marked as unfair in the SOKiK’s register, based on the outcome of the judicial proceedings against a particular trader, applies also to other traders, who were not part of these judicial proceedings, it might be questioned whether these traders were given an opportunity to be heard and to present arguments about the lack of unfairness of their standard terms and conditions.

 The CJEU has already previously recognised that the unfairness’ control needs to account for the rights of traders and not only of consumers, which include the traders’ right to argue that a contested contract term is not unfair.[[24]](#footnote-24) In the case *Biuro podróży Partner* the CJEU supplements this assessment by explicitly recognising that if such rights are infringed, traders are entitled to an effective judicial remedy.[[25]](#footnote-25) However, it proceeds then to suggest to the national court that in this case the trader’s right to effective judicial protection was not infringed, despite the trader only having an option to contest the assessment of equivalence between his contract term and the already registered as unfair contract term, rather than to question the unfairness’ assessment, in general.[[26]](#footnote-26)

 It is the national court that will need to examine the position of traders under Polish law, however, the CJEU indicates what should be considered in this assessment. The national court will need to examine whether the trader who is fined for using unlawful contract terms, previously entered into the register of unfair contract terms, has the possibility to challenge this sanction, both as to its validity and as to its amount. In Poland, the trader may challenge with the SOKiK the validity of the assessment that the standard term he is using is equivalent to the contract term previously registered as unfair.[[27]](#footnote-27) In this appeal procedure the SOKiK goes beyond a formal comparison of both contract terms and establishes their material identicality in light of all relevant circumstances specific to each case.[[28]](#footnote-28) This, pursuant to the CJEU, should guarantee the trader’s right to fair trial.[[29]](#footnote-29) This is contrary to the view expressed by AG Saugmandsgaard Øe that the right to fair trial guarantees the trader’s possibility to claim that the contract term he is using is not unfair. This remedy is not the same as only being able to question the equivalence of a contract term to the other, already registered as unfair contract term.[[30]](#footnote-30) The CJEU only adds a requirement for national courts to consider whether the Polish legal system gives traders an opportunity to challenge the amount of the fine imposed by the President of the UOKiK, as being disproportionate.[[31]](#footnote-31) If this right is also provided, then the Polish legal system should be deemed compliant with Article 47 of the Charter.

2.3 Conditions for the e*rga omnes* effect

As long as the Polish scheme for registering unfair contract terms accounts for the traders’ right to fair trial and effective judicial protection, the CJEU considers its adoption as compatible with European consumer law. The implementing measures aim then at enhancing the effectiveness of the prohibition to use unfair contract terms.[[32]](#footnote-32) Article 8 UCTD specifically allows the Member States to draft lists of contract terms deemed to be unfair and only requires them to notify the Commission thereof. The Polish register of unfair contract terms could be compared to such lists.[[33]](#footnote-33) However, in its judgment, while considering the functions fulfilled by the register of unfair contract terms, the CJEU identifies certain conditions for such lists and registers in order to grant them with an *erga omnes* effect.

 The first function of the register is to make it publicly known which contract terms have already been declared unfair. This should allow both consumers and traders to easily consult the list of unfair contract terms, and to determine whether in their own contracts identical or similar terms have not been used. The register facilitates, therefore, the “*circulation and reproduction of terms held to be unlawful*”.[[34]](#footnote-34) This function is especially important in the Member States such as Poland, where access to judicial decisions is not facilitated by a comprehensive online database.[[35]](#footnote-35) It could encourage consumers to pursue their own individual claims against traders who use unfair contract terms, by facilitating the recognition thereof. It might also motivate traders to redraft their unfair contract terms, upon finding a similar contract term already registered as unfair. This adjustment should result from traders’ fear of having their contract terms exposed as unfair in the register, which could be perceived as a modern version of ‘name-and-shame’ lists. Therefore, the first condition to grant the register an *erga omnes* effect is for it to be publicly and easily accessible. It should be mentioned here that the Polish register is available online.

 Secondly, the register aims to increase legal certainty by increasing transparency of consumer protection in Poland.[[36]](#footnote-36) Without the register, as mentioned above, judicial decisions on unfairness of contract terms would not be made publicly available. This could weaken the parties’ ability to assess unfairness of their own contractual terms and conditions. Moreover, it could also contribute to varied unfairness’ assessments in individual and collective review, carried out by different national courts in identical or similar circumstances. However, in order for this objective of increasing transparency and legal certainty of consumer protection to be achieved, the register of unfair contract terms would need to be “*structured in a clear manner, irrespective of the number of terms it contains*”.[[37]](#footnote-37) If it is not easy to compare a particular contract term to the ones listed in the register, e.g., because the register: contains hundreds if not thousands of them; provides no search form; does not use keywords; does not classify contract terms per sector and/or a type of a contract term; then, it is unlikely to achieve its desired objectives.[[38]](#footnote-38)

 Another condition that the CJEU introduces for the national registers of unfair contract terms is that they need to be kept up-to-date, with an additional requirement for their keepers to promptly remove from them such contract terms that are no longer needed.[[39]](#footnote-39) While to fulfil both above-mentioned functions the register would need to remain current and new decisions as to unfair contract terms should be published as soon as possible, the last requirement is a bit baffling. Amongst the foreseeable scenarios of when a particular contract term that has been declared unfair should no longer be listed in the register, we can think of a situation when that term has subsequently been, on appeal, after all, deemed lawful or when the law applicable to the contract has changed.[[40]](#footnote-40) Otherwise, even if upon declaring a certain contract term unfair its application in practice has ceased in a given sector, it could be wise to leave that contract term in the register. This could serve as both a precautionary and a deterring measure. Interestingly, the Polish government submitted to the CJEU that once an unfair contract term has been entered into the register, it could neither be removed from nor corrected in the register, which indicates a potential lack of compliance of the Polish registration system with this requirement.[[41]](#footnote-41)

 For completeness sake, the third function of the register mentioned by the CJEU is the strengthening of the national judicial system and its proper functioning. This would be achieved by avoiding multiple judicial proceedings pertaining to the unfairness’ assessment of identical or similar standard terms and conditions.[[42]](#footnote-42) If the registers are properly managed, assuring the existence of a transparent and up-to-date list of unfair contract terms, this could diminish the number of claims brought to national courts on the same matter. This would follow from parties no longer referring to the judge to determine whether their contractual rights and obligations are fair.

Concluding, to give an *erga omnes* effect to standard terms and conditions declared unfair during the *in abstracto* review, the registers listing such unfair contract terms would need to be: publicly and easily accessible; transparent and clearly structured; up-to-date.

3. Change of Polish law – (un)necessary?

The CJEU delivered its judgment in the case *Biuro podróży Partner* after the change of Polish law pertaining to the unfairness’ assessment *in abstracto*. Any case started as of April 17, 2016 invoking an *in abstracto* review of unfairness, will not have its decision automatically published in the register and will not generate an *erga omnes* effects.[[43]](#footnote-43) The change in law codifies the most recent position of the Polish Supreme Court, with the prevailing view that even the unfairness’ control *in abstracto* requires an analysis of unfairness of a contract term in view of the whole contract.[[44]](#footnote-44) Such a thorough analysis is thought to potentially lead to different results for different traders using an identical or a similar clause in their standard terms and conditions, if their remaining terms and conditions vary. Therefore, after the reform, the *erga omnes* effect has been limited only to apply to the unfairness’ assessment for other contracts of the same trader.[[45]](#footnote-45)

The recent modernisation of the Law on competition and consumer protection has given the authority to the President of the UOKiKto conduct the unfairness control *in abstracto* and has, therefore, taken it away from the SOKiK.[[46]](#footnote-46) The procedure is now administrative rather than judicial, more alike the protection of collective consumer interests against the use of unfair commercial practices. Consumers, consumer ombudsmen, ombudsmen of the insured, consumer associations and foreign organisations entitled to start the injunction proceedings, may notify the President of the UOKiK about an infringement regarding a trader using an abusive clause in his contacts.[[47]](#footnote-47) The President of the UOKiK may decide to publish his decision in full or in part at the expense of the trader.[[48]](#footnote-48) The publication is, therefore, no longer a default and a new online database has been created for the decisions of the President of the UOKiK.[[49]](#footnote-49) Since this change in Polish consumer law has only very recently been introduced, it is impossible to evaluate at this point its impact on the effectiveness of consumer protection. However, consumer organisations and authorities are likely to mourn the loss of a possibility to use the *erga omnes* effect of the *in abstracto* unfairness’ review.

Considering the judgment of the CJEU in case *Biuro podróży Partner* it could be asked whether the change in Polish law was necessary. After all, the CJEU explicitly allowed the Member States to grant an *erga omnes* effect to the unfairness’ control *in abstracto*, provided certain conditions have been met. The Polish legislator definitely needed to clarify the uncertainty as to the consequences of the *in abstracto* unfairness’ review, which led to diverging judgments of the Polish Supreme Court.[[50]](#footnote-50) While an explicit recognition by the Polish legislator of the *erga omnes* effect of such unfairness’ control could have benefitted Polish consumers, it would have required the change of the registering system. Bearing in mind the conditions listed by the CJEU, the Polish system seemed to have complied with only one: making the register publicly and easily accessible through an online database. Otherwise, placing of the unfair contract terms in this online register was in no way structured or transparent. The register contained 6.896 entries,[[51]](#footnote-51) which only revealed: the date and signature of the decision; names of parties in the case; the exact content of the unfair clause; the date of entry into the register; the name of the trade sector.[[52]](#footnote-52) These were also the only fields that allowed to selectively peruse the register. It could be argued that the lack of a more comprehensive search function in the register, as well as not indicating any context to the contract terms that have been registered as unfair, depreciated the transparency of the register. Moreover, while it would be difficult to establish whether the register was kept up-to-date, the Polish government admitted that there was no mechanism to remove or correct contract terms already registered as unfair.[[53]](#footnote-53)

From the short-term, procedural and economic point of view it was easier to change the legal effect of the *in abstracto* unfairness’ assessment rather than to invest in updating and modernising the register. The long term effects for the protection of Polish consumers may be, however, quite severe. Unfortunately, due to the general lack of resources of Polish consumer organisations, only a small amount of claims can be raised by them per year. This, while at the same time Polish traders show their inventiveness in tweaking their contract terms so as to adjust them only minimally after the unfairness’ assessment. The AG Saugmandsgaard Øe stated in his opinion that the deterrent function of the finding of unfairness of a particular contract term should continue to influence other traders, even if no *erga omnes* effect was given to such a finding.[[54]](#footnote-54) Such a deterrent function could indeed prevail, but only if the new Polish law upheld the mandatory publication of the decisions on unfairness of contract terms in the *in abstracto* review. The discretionary function of the new online database, as well as including in it all decisions of the President of the UOKiK, not only the ones pertaining to the *in abstracto* unfairness’ assessment, will weaken the deterrent function. It can be expected that these changes will hinder traders from finding out, which terms have previously been declared as unfair. If, upon the evaluation of the new system, the lacks thereof become obvious, the judgment of the CJEU in case *Biuro podróży Partner* opens the way for further legal reform in Poland. We could, however, already lament the CJEU not imposing on the Member States an obligation to assure that an *in abstracto* unfairness’review is given an *erga omnes* effect, as a way of providing effective consumer protection in collective procedures. [[55]](#footnote-55) This would have likely increased the level of consumer protection and harmonised collective procedures in the Member States.

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2. Council Directive (EEC) 93/13 on unfair terms in consumer contracts (Unfair Contract Terms Directive) [1993] OJ L95/29. [↑](#footnote-ref-2)
3. Beginning with the joined cases C-240/98­ until C-244/98 *Océano* ECLI:EU:C:2000:346 the number of requests for a preliminary reference on the interpretation of Article 6 UCTD steadily increased, with two new judgments thereon being delivered in the first three months of 2017: case C-421/14 *Banco Primus* ECLI:EU:C:2017:60 and case C-503/15 *Margarit Panicello* ECLI:EU:C:2017:126. [↑](#footnote-ref-3)
4. See e.g. Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers, ‘EC Consumer Law Compendium – Comparative Analysis’ (April 2007) <http://ec.europa.eu/consumers/archive/cons\_int/safe\_shop/acquis/comp\_analysis\_en.pdf> accessed 24 March 2017, 332-336; Bert Keirsbilck, ‘The *erga omnes* effect of the finding of an unfair contract term: *Nemzeti*’ 50 (2013) Common Market Law Review 1468. [↑](#footnote-ref-4)
5. Articles 23a and 24 of the Law on competition and consumer protection (*Ustawa o ochronie konkurencji I konsumentów*) of 16 February 2007, Dz U No 50 item 331 as amended. [↑](#footnote-ref-5)
6. *Urząd Ochrony Konkurencji i Konsumentów* <https://uokik.gov.pl/> accessed 24 March 2017. [↑](#footnote-ref-6)
7. Polish Civil Code (*Kodeks cywilny*) of 23 April 1964, Dz U No 16 item 93 as amended. [↑](#footnote-ref-7)
8. On the basis of Articles 47936-47945 of the Polish Code of Civil Procedure (*Kodeks postępowania cywilnego*) of 17 November 1964, Dz U No 43 item 296 as amended. [↑](#footnote-ref-8)
9. The different purposes and legal effects of individual and collective consumer actions have recently been confirmed in joined cases C-381/14 and C-385/14 *Sales Sinués* ECLI:EU:C:2016:252, paras 30 and 40. [↑](#footnote-ref-9)
10. See e.g. case C-472/10 *Invitel* ECLI:EU:C:2012:242, Opinion of AG Trstenjak, paras 59-60. [↑](#footnote-ref-10)
11. Case C-472/10 *Invitel* ECLI:EU:C:2012:242. [↑](#footnote-ref-11)
12. Case *Invitel* (n 11) paras. 43-44. [↑](#footnote-ref-12)
13. Case C-119/15 *Biuro podróży Partner* ECLI:EU:C:2016:987. [↑](#footnote-ref-13)
14. The fine was awarded on the basis of Article 106(1)(4) of the Law on competition and consumer protection (n 5). Tourism sector is widely known for using unfair standard contract terms, e.g. in the register of unfair contract terms in Poland 1123 clauses out of 6938 clauses pertain to the tourism sector, see <http://decyzje.uokik.gov.pl/nd\_wz\_um.nsf> accessed 24 March 2017. [↑](#footnote-ref-14)
15. *Sąd Ochrony Konkurencji i Konsumentów* <http://bip.warszawa.so.gov.pl/artykuly/329/xvii-wydzial-sad-ochrony-konkurencji-i-konsumentow> accessed 24 March 2017. [↑](#footnote-ref-15)
16. Article 24 of the Law on competition and consumer protection (n 5). [↑](#footnote-ref-16)
17. The *erga omnes* interpretation was based on the literal reading of Article 47943 of the Code of Civil Procedure (n 8), allowing registered unfair contract terms to have an effect against third parties, and supported by the President of the UOKiK, see case *Biuro podróży Partner* (n 13), Opinion of AG Saugmandsgaard Øe, para 32. [↑](#footnote-ref-17)
18. See e.g. Polish Supreme Court (*Sąd Najwyższy*) (7 October 2008) III CZP 80/08 <http://sn.pl/sites/orzecznictwo/Orzeczenia1/III%20CZP%2080-08.pdf> accessed 24 March 2017. [↑](#footnote-ref-18)
19. See e.g. Polish Supreme Court (*Sąd Najwyższy*) (20 November 2015) III CZP 17/15 <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iii%20czp%2017-15.pdf> accessed 24 March 2017. [↑](#footnote-ref-19)
20. The fine could amount to up to 10% of annual turnover of the trader, which contributed to the effectiveness of consumer protection against unfairness, pursuant to Article 106(1)(4) of the Law on competition and consumer protection (n 5). [↑](#footnote-ref-20)
21. See case *Biuro podróży Partner* (n 13), Opinion of AG Saugmandsgaard Øe, para 40. [↑](#footnote-ref-21)
22. Charter of Fundamental Rights of the European Union [2000] OJ L364/01. [↑](#footnote-ref-22)
23. Case *Biuro podróży Partner* (n 13), para 23. [↑](#footnote-ref-23)
24. On the basis of the *audi alteram partem* principle, see case C-472/11 *Banif Plus Bank* ECLI:EU:C:2013:88, paras 29-36. [↑](#footnote-ref-24)
25. Case *Biuro podróży Partner* (n 13), para 27. [↑](#footnote-ref-25)
26. Case *Biuro podróży Partner* (n 13), paras 40-43. [↑](#footnote-ref-26)
27. Case *Biuro podróży Partner* (n 13), para 41. The appeal may be made on the basis of Article 81 of the Law on competition and consumer protection (n 5) to the President of the UOKiK, who may either change or annul his decision or transfer the case’s files to the SOKiK for further consideration. [↑](#footnote-ref-27)
28. Case *Biuro podróży Partner* (n 13), para 42. [↑](#footnote-ref-28)
29. Case *Biuro podróży Partner* (n 13), para 43. [↑](#footnote-ref-29)
30. See case *Biuro podróży Partner* (n 13), Opinion of AG Saugmandsgaard Øe, para 64. [↑](#footnote-ref-30)
31. Case *Biuro podróży Partner* (n 13), paras 45-46. [↑](#footnote-ref-31)
32. Case *Biuro podróży Partner* (n 13), para 34. This finding is contrary to the assessment of AG Saugmandsgaard Øe, who considered that the unfairness’ assessment, even in the *in abstracto* review, always needs to account for the particular circumstances involved in the case, see case *Biuro podróży Partner* (n 13), Opinion of AG Saugmandsgaard Øe, para 49. [↑](#footnote-ref-32)
33. Although in its opinion AG Saugmandsgaard Øe claims that this provision should apply only to national lists of unfair contract terms as adopted by the legislators, see case *Biuro podróży Partner* (n 13), Opinion of AG Saugmandsgaard Øe, para 54. [↑](#footnote-ref-33)
34. Case *Biuro podróży Partner* (n 13), para 35. [↑](#footnote-ref-34)
35. For the longest time only judgments of the Polish Supreme Court were accessible online, now also some Court of Appeals’ judgments are published online. [↑](#footnote-ref-35)
36. Case *Biuro podróży Partner* (n 13), para 35. [↑](#footnote-ref-36)
37. Case *Biuro podróży Partner* (n 13), para 38. The aim of this requirement is to alleviate the concern of reduced legal certainty in case of the radical increase in the amount of entries in the register, see case *Biuro podróży Partner* (n 13), Opinion of AG Saugmandsgaard Øe, para 57. [↑](#footnote-ref-37)
38. Whether the Polish register fulfilled this function will be further discussed in part 3. [↑](#footnote-ref-38)
39. Case *Biuro podróży Partner* (n 13), para 39. Previously also argued by Keirsbilck (n 4) 1474 and 1476. [↑](#footnote-ref-39)
40. See case *Biuro podróży Partner* (n 13), Opinion of AG Saugmandsgaard Øe, para 46 invoking as an example case C-237/02 *Freiburger Kommunalbauten* ECLI:EU:C:2004:209, para 21. [↑](#footnote-ref-40)
41. See case *Biuro podróży Partner* (n 13), Opinion of AG Saugmandsgaard Øe, paras 27 and 69. [↑](#footnote-ref-41)
42. Case *Biuro podróży Partner* (n 13), para 35. [↑](#footnote-ref-42)
43. A comprehensive overview and analysis of the change in law may be found in: Monika Namysłowska and Anna Piszcz (eds), *Ustawa o zmianie ustawy o ochronie konkurencji i konsumentów z 5.8.2015 r. Komentarz* (Beck 2016). [↑](#footnote-ref-43)
44. See Polish Supreme Court (n 19). [↑](#footnote-ref-44)
45. See new Article 23d of the Law on competition and consumer protection (n 5). [↑](#footnote-ref-45)
46. Article 23b of the Law on competition and consumer protection (n 5). [↑](#footnote-ref-46)
47. Contrary to the prohibition in Article 23a of the Law on competition and consumer protection (n 5), which prohibits traders to conduct practices that harm collective consumer interests, meaning practices that are unlawful or contrary to the principle of good practices. [↑](#footnote-ref-47)
48. Article 23b (3) of the Law on competition and consumer protection (n 5). [↑](#footnote-ref-48)
49. <http://decyzje.uokik.gov.pl/bp/dec\_prez.nsf> accessed 24 March 2017. [↑](#footnote-ref-49)
50. See Polish Supreme Court (n 18 and 19). [↑](#footnote-ref-50)
51. With the last entry from 16 February 2017. See case *Biuro podróży Partner* (n 13), Opinion of AG Saugmandsgaard Øe, n 44 on as much as 300 entries being registered only in the period between July 2015 and the middle of March 2016. [↑](#footnote-ref-51)
52. The register recognises 14 trade sectors: provision of energy, water, gas and central heating; education; e-commerce; real estate; consumer sales; Ponzi schemes; cable and satellite TV services; tourism; bank services; financial services; internet services; telecommunication services; insurance services; other services. [↑](#footnote-ref-52)
53. See n 41. [↑](#footnote-ref-53)
54. See case *Biuro podróży Partner* (n 13), Opinion of AG Saugmandsgaard Øe, para 71. [↑](#footnote-ref-54)
55. Keirsbilck (n 4) 1473 has already argued for such an obligation to be introduced with respect to recognizing the effect of injunction proceedings based on unfair contract terms against other consumers of the same trader, on the basis of the judgment in the case *Invitel* (n 11). [↑](#footnote-ref-55)