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Symmetry of Price Modification Clauses and Valorisation Clauses as a Safeguard of Consumer Rights

Symetryczność klauzul modyfikacyjnych cenę i klauzul waloryzacyjnych jako zabezpieczenie praw konsumenta

ABSTRACT

The subject of the study (scientific and research) is the answer to the question – on the example of price modification and valorisation clauses – whether the abusive nature of contractual provision is influenced by symmetry, i.e. identical regulation of a specific issue from the point of view of both parties to the agreement (including a loan agreement linked to a foreign currency). This is an extremely important issue from the point of view of the weaker party to the contract, i.e. the consumer, in relation to the entrepreneur. While in a significant number of cases the introduction of symmetrical contractual provisions into a contract sufficiently safeguards the interest of the consumer, constituting one of the solutions eliminating the abusiveness of a non-negotiable provision, in the case of the discussed provisions they may be considered abusive, even if the requirement of symmetry is met. In such a case, it is necessary to use other instruments to protect consumer interests. It is not sufficient to reserve the right of withdrawal from the contract in favour of the consumer (as adopted by the legislator), because in the case of monopolistic markets it is impossible to say that the consumer's right is secured in this situation, as in the case of certain types of contracts, such as credit agreements. In order to protect consumer rights, in addition to the right of withdrawal and symmetry, in the event of price and cost changes, the following should be regulated: frequency of changes, postponement of change, or maximum limit for change. Such an analysis has not yet been carried out, including taking into account the case law of the Court of Justice of the European Union.

Keywords: abusive clause; symmetry; modification clause; valorisation clause; consumer

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INTRODUCTION

The institution of prohibited (abusive) contractual provisions is experiencing a kind of renaissance due to the problem of the so-called franc credits, and more broadly, credits linked to a foreign currency (indexed and denominated). In such agreements, which will constitute the example used in the study, indexation and exchange rate risk clauses, recognised in case law as abusive, were used.

The subject of the study is to answer the question – using the example of modification clauses (giving the right to one of the parties to amend the contract) price and valorisation clauses (where the amendment of the contract takes place "automatically", after fulfilment of certain conditions) – whether the prohibited nature of the contractual provision is affected by symmetry, i.e. identical regulation of a specific issue from the point of view of both parties to the contract (including a loan agreement linked to a foreign currency). In other words, since in a business-to-consumer relationship the latter is the weaker party to the contract, the question is whether the symmetry of such contractual clauses relating to price or other costs constitutes a mechanism that allows one to conclude that a specific contractual provision, even though it has not been subject to negotiation, cannot be deemed abusive, since it introduces analogous rights and obligations for both parties to a consumer contract.

At this point, it can be hypothesised that in many cases symmetry excludes the abusiveness of a contractual provision. In a significant number of cases, the introduction of symmetrical contractual provisions into the contract sufficiently protects the consumer's interest, being one of the solutions eliminating the abusiveness of the non-negotiable provision. In the case of price modification and valorisation clauses, the institution provided for in Article 385[1] ff. of the Polish Civil Code[1] may apply even if the symmetry requirement is met. It's then necessary to use other instruments to protect the consumer's interest. An analysis of the legislation and case law leads to such conclusions – which are extremely important for the vast majority of the public.

THE NATURE OF ABUSIVE CLAUSES

In order to consider the impact of the symmetrical nature of contractual provisions on the possibility of their being deemed permissible or prohibited, it is first necessary to briefly define the prerequisites that determine whether a particular contractual clause can be defined as "abusive".

[1] Act of 23 April 1964 – Civil Code (consolidated text, Journal of Laws 2025, item 1071, as amended).

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Having regard to Article 385[1] § 1 of the Civil Code and Article 3 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts,[2] the following prerequisites for the abusiveness of contractual provisions (which must be met cumulatively) can be distinguished:[3]

- the provision has not been individually negotiated with the consumer, and therefore has not been subject to negotiation;
- the rights and obligations of the consumer shaped in this way are contrary to good practice;
- the rights and obligations thus formed grossly infringe the interests of the consumer; and
- the provision of the agreement does not relate to the unambiguously formulated main benefits of the parties, including the price or remuneration.[4]

It is for the national court to make a concrete qualification of the contractual provision in question on the basis of those criteria.

It follows from Article 385[1] §§ 3 and 4 of the Civil Code and Article 3 (2) of Directive 93/13 that there is a presumption that, if a trader uses a model contract from which he adopts provisions, those provisions are not individually negotiated with the consumer, with the burden of proof to rebut this presumption resting on the trader using the specific model. It is impossible to equate individual negotiation with the fact that the borrower has chosen a particular bank, having previously reviewed the offers of other banks as well, and chosen the most advantageous – in his opinion – offer. This is in fact a rational action of a potential borrower.[5] The decisive factor is whether the consumer had a choice to include the provision in question in the contract at all, as well as to give it a specific content.[6] The possibility of negotiating one contractual term does not prejudge the inability to find another term abusive.

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[2] OJ L 95/29, 21.4.1993.

[3] See also, e.g., B. Gnela, *Umowa konsumencka w polskim prawie cywilnym i prywatnym międzynarodowym*, Warszawa 2013, p. 202 ff.; W. Madej, *Klauzule abuzywne w polskim prawie cywilnym*, "Kortowski Przegląd Prawniczy" 2017, no. 2, pp. 35 ff. The doctrine also points out (wrongly) only two premises: shaping the rights and obligations of the consumer in a manner contrary to good practice and gross infringement of the consumer's interests. For example, see E. Łętowska, *Ochrona niektórych praw konsumentów. Komentarz*, Warszawa 2001, p. 104; P. Mikłaszewicz, *Komentarz do art. 385[1]*, [in:] *Kodeks cywilny. Komentarz*, eds. K. Osajda, W. Borysiak, Legalis 2024, thesis number 8.

[4] Unambiguously worded provisions defining the main performance of the parties under Article 385[1] of the Civil Code are subject to assessment in terms of the sanction of defectiveness of a legal transaction under general rules. For example, see K. Skubisz-Kępka, *Komentarz do art. 385[1]*, [in:] *Kodeks cywilny. Komentarz*, vol. 3: *Zobowiązania. Część ogólna (art. 353–534)*, eds. M. Fras, M. Habdas, Warszawa 2018, thesis number 9.

[5] See judgment of the Supreme Court of 7 November 2019, IV CSK 13/19, Legalis.

[6] See B. Gliniecki, *Komentarz do art. 385[1]*, [in:] *Kodeks cywilny. Komentarz aktualizowany*, ed. M. Balwicka-Szczyrba, LEX/el. 2023, thesis number 5.

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In order to determine whether a clause gives rise, to the detriment of the consumer, to a "significant imbalance" in the parties' rights and obligations under the contract, it is necessary, in particular, to take into account the rules which apply – under national law – in the absence of an agreement between the parties to that effect. In carrying out such a comparative analysis, it must be assessed whether and to what extent that contract places the consumer in a worse situation than that provided for under the applicable national rules. In assessing under what circumstances such an inequality arises "contrary to the requirements of good faith", it must be ascertained whether a trader treating the consumer in a fair and equitable manner could reasonably expect that the consumer would have accepted such a term through individual negotiations.[7] It must not be forgotten that, according to Article 4 (1) of Directive 93/13, the unfair nature of contractual terms is to be determined taking into account the nature of the goods or services to which the contract relates and with reference, at the time of performance, to all the circumstances relating to the performance of the contract. It follows that, from this perspective, the effects which a contractual term may have under the law applicable to that contract must also be assessed, which requires an examination of the national legal order.[8] The examination of the existence of such a significant imbalance cannot be reduced to an economic assessment of a quantitative nature, based on a comparison between the total amount of the transaction subject to the contract and the costs charged to the consumer by means of the provision in question. On the contrary, a significant imbalance may arise from the mere fact of a sufficiently serious breach of the legal position in which the consumer, as a party to the contract in question, finds himself under the relevant national rules, whether in the form of a limitation on the content of the rights to which he is entitled under those rules, an impediment to the exercise of those rights, or the imposition on him of an additional obligation not provided for by national rules.[9] Unilateral[10] and asymmetrical provisions, e.g., are contrary to good morals, as they are unfair and disadvantage the consumer.[11]

In relation to Article 5 of Directive 93/13, pre-contractual information on the contractual terms and the consequences of the conclusion of the contract is of

[7] See judgment of the CJEU of 14 March 2013, C-415/11, *Aziz*, EU:C:2013:164, paras 68–69; judgment of the CJEU of 26 January 2017, C-421/14, *Banco Primus*, EU:C:2017:60, paras 59–61.

[8] See judgment of the CJEU of 1 April 2004, C-237/02, *Freiburger Kommunalbauten*, ECLI:EU:C:2004:209, para. 21; order of the CJEU of 16 November 2010, C-76/10, *Pohotovosť*, ECLI:EU:C:2010:685, para. 59.

[9] Judgment of the CJEU of 16 January 2014, C-226/12, *Constructora Principado*, EU:C:2014:10, paras 22–23.

[10] See resolution of the Supreme Court of 28 April 2022, III CZP 40/22, OSNC 2022, no. 11, item 109.

[11] For example, see judgment of the Court of Competition and Consumer Protection of 27 November 2017, XVII AmC 1541/15, LEX no. 2421075.

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fundamental importance for the consumer. In particular, it is on the basis of this information that the latter decides whether he intends to be bound by the terms and conditions formulated in advance by the trader.[12] As far as foreign currency-linked loans are concerned, the borrower must be clearly informed that, by signing such a contract, he bears a certain exchange rate risk which, from an economic point of view, may prove difficult for him to bear in the event of a fall in the value of the currency in which he is paid in relation to the foreign currency in which the loan was granted, and, in addition, the entrepreneur (here: banking institution) has to outline the possible exchange rate fluctuations and risks involved in taking out a loan in a foreign currency, especially when the consumer borrower does not earn income in that currency.[13]

Pursuant to Article 4 (2) of Directive 93/13, the unfair nature of terms which relate to the definition of the main subject-matter of the contract or to the relationship between the price and remuneration and the goods or services supplied in exchange, which fall within the scope of the Directive, is not to be assessed only if the competent national court considers, as a result of its examination of the specific case, that those terms have been expressed in plain, intelligible language,[14] which is an expression of the legislator's preference for protecting consumers by ensuring the transparency of the model.[15] If such a provision is clear and understandable, it is impossible to find a criterion to assess it as prohibited.

The Polish legislator has put this premise in such a way that the control of abusiveness has been excluded with respect to contractual provisions defining the main benefits of the parties, including price or remuneration.[16] In the doctrine, the concept of "main performance of the parties" is questionable as ambiguous.[17] It may refer to the essential negotiating elements, i.e., the material elements (typifying the contract in question) or the elements necessary for the contract to come into

[12] For example, see judgment of the CJEU of 21 March 2013, C-92/11, *RWE Vertrieb*, ECLI:EU:C:2013:180, para. 44; judgment of the CJEU of 20 September 2018, C-51/17, *OTP Bank and OTP Faktoring*, EU:C:2018:750, para. 76.

[13] See judgment of the CJEU of 20 September 2017, C-186/16, *Andriciuc and others*, ECLI:EU:C:2017:703, para. 50; judgment of the CJEU of 20 September 2018, C-51/17, *OTP Bank and OTP Faktoring*, para. 75.

[14] See judgment of the CJEU of 30 April 2014, C-26/13, *Kásler and Káslerné Rábai*, EU:C:2014:282, para. 41; judgment of the CJEU of 9 July 2015, C-348/14, *Bucura*, EU:C:2015:447, para. 50.

[15] See E. Łętowska, *op. cit.*, p. 105.

[16] The formulation of the condition in Article 385^1 (1), second sentence, of the Civil Code seems to be narrower than in Article 4 (2) of Directive 93/13, however, since the directive sets a minimum standard of protection, national law may provide for more far-reaching consumer, including a narrower application of the exception.

[17] For example, see M. Bednarek, [in:] *System Prawa Prywatnego*, vol. 5: *Prawo zobowiązań – część ogólna*, ed. E. Łętowska, Warszawa 2012, p. 757; W. Popiołek, *Komentarz do art. 385^1*, [in:] *Kodeks cywilny. Komentarz*, vol. 1: *Art. 1–449^{10}*, ed. K. Pietrzykowski, Warszawa 2020, side no. 12.

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effect. The prevailing view in the case law is that this concept should be interpreted narrowly, with reference to the material elements of the contract, as evidenced by the wording of the provision cited above.[18] It is therefore not a question of provisions that are merely incidental (ancillary) to those defining the very essence of the contractual relationship. This is in line with the view of the Court of Justice of the European Union (CJEU), which stated that since Article 4 (2) of Directive 93/13 establishes an exception to the mechanism for the control of the content of unfair terms provided for under the consumer protection regime established by that directive, that provision must be interpreted narrowly.[19] However, this exclusion does not include the contractual provision concerning the rules for changing the fees for the service provided to the consumer;[20] such provisions (and thus also the provisions at issue in this study) can be tested for abusiveness.

This is important from the point of view of foreign currency-linked loans as well, since Article 4 (2) of Directive 93/13 must be interpreted as meaning that the requirement that a contractual term must be expressed in plain and intelligible language must be understood as dictating not only that the term in question must be comprehensible to the consumer from a grammatical point of view, but also that the contract must clearly illustrate the specific operation of the foreign exchange mechanism to which that condition refers, and the relationship between that mechanism and the mechanism envisaged by the other terms and conditions governing the mobilisation of the credit, so that the consumer is in a position to assess, on the basis of criteria which are clear and comprehensible to him, the economic consequences flowing from that agreement.[21] Even if the consumer makes a declaration (e.g. on a standard form) that he has understood the content of the terms presented to him, this is not sufficient to reverse the burden of proof.[22] Consumer protection would not be realised if the consumer had to prove a negative circumstance, i.e. that the trader has not provided him with all the necessary information for there to be clarity and transparency in the model contract.

[18] For example, see judgment of the Supreme Court of 8 June 2004, I CK 635/03, Legalis.

[19] For example, see judgment of the CJEU of 30 April 2014, C-26/13, *Kásler and Káslerné Rábai*, paras 42, 49, 50; judgment of the CJEU of 26 February 2015, C-143/13, *Matei*, EU:C:2015:127, para. 49.

[20] For example, see judgment of the CJEU of 26 April 2012, C-472/10, *Invitel*, EU:C:2012:242, para. 23; judgment of the Supreme Court of 2 April 2015, I CSK 257/14, Legalis.

[21] See judgment of the CJEU of 30 April 2014, C-26/13, *Kásler and Káslerné Rábai*, para. 75.

[22] See judgment of the CJEU of 10 June 2021, joined cases C-776/19 to C-782/19, *BNP Paribas Personal Finance SA, Procureur de la République*, ECLI:EU:C:2021:470, paras 84, 85, 89.

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ABUSIVENESS VS. NULLITY

The relationship between invalidity and abusiveness cannot be overlooked. Initially, the jurisprudence allowed for the possibility of declaring a provision of a model contract to be abusive also if it was incompatible with the law. In doing so, it was pointed out that a provision that was void by operation of law clearly infringed the consumer's interest as referred to in Article 385[1] of the Civil Code.[23] However, in the resolution of 13 January 2011,[24] the Supreme Court assumed that a provision of a model contract which is contrary to a mandatory provision of the Act cannot be deemed an illicit contractual provision within the meaning of this provision. This is because such a provision cannot have legal effect (Article 58 § 1 of the Civil Code) and cannot shape the rights and obligations of the consumer, and is not capable of grossly infringing his interests. Consequently, it cannot also be assessed from the point of view of its compliance with good practice.[25] Indeed, the absolute invalidity of a legal act takes precedence over other types of defectiveness of such acts, including defectiveness resulting from the prohibited nature of a contractual provision (Article 385[1] § 1 of the Civil Code).[26] If, therefore, the insertion of asymmetrical clauses into a contract would result in its invalidity (or at least the invalidity of such clauses), there would be no need to consider whether such contractual provisions are abusive.

However, German doctrine has developed the concept of "double effect" in law, according to which considerations of equity may support the possibility of triggering a sanction other than absolute nullity also in situations where the act is incompatible with the law.[27] The CJEU's case law seems to be moving in this direction as regards the effect of abusive clauses in foreign currency-linked credit agreements. As the Court points out, where a contract between a consumer and a trader is rescinded because one of its terms is unfair, it is for the Member States to regulate, by means of their national law, the effects of that rescission, respecting the protection afforded to the consumer by Directive 93/13, in particular by ensur-

[23] For example, see judgment of the Supreme Court of 23 March 2005, I CK 586/04, OSNC 2006, no. 3, item 51; judgment of the Supreme Court of 25 May 2007, I CSK 484/06, OSNC-ZD 2008, no. B, item 34.

[24] III CZP 119/10, OSNC 2011, no. 9, item 95.

[25] That view has been confirmed by subsequent case law. For example, see judgment of the Supreme Court of 20 January 2011, I CSK 218/10, MoP 2011, no. 18, item 99; judgment of the Court of Appeal in Warsaw of 21 November 2012, VI ACa 824/12, Legalis; judgment of the Court of Appeal in Warsaw of 26 March 2014, VI ACa 1086/13, Legalis.

[26] For example, see E. Łętowska, K. Osajda, [in:] *System Prawa Prywatnego*, vol. 1: *Prawo cywilne – część ogólna*, ed. M. Safjan, Warszawa 2012, p. 648; resolution of the Supreme Court of 15 September 2020, III CZP 87/19, OSNC 2021, no. 2, item 11.

[27] An example is the confluence of norms providing for the invalidity and evasion of legal effects of a declaration of intent. See more A. Ohanowicz, *Zbieg norm w polskim prawie cywilnym*, Warszawa 1963, p. 207 ff.

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ing the restoration of the legal and factual situation that would have existed in the absence of that unfair term.[28] It is possible to "save" the contract, i.e. to declare it not invalid, but only if the consequence of excluding the abusive provisions from the contract is that it is invalid, which is not in the consumer's interest, i.e. if it were to expose him to adverse consequences and thus penalise him, e.g. by making the outstanding amount of the loan immediately payable.[29]

If the sanction of Article 385[1] § 1 of the Civil Code is applied, the parties are bound by the contract to the remaining extent (Article 385[1] § 2 of the Civil Code), not only when it follows from the circumstances that the contract would not have been concluded without the abusive clauses (as is the case with Article 58 § 3 of the Civil Code), but when this is objectively possible after the exclusion of the prohibited provision from the contract. The criterion is the interest of the consumer (not the interest of the trader).

SYMMETRY OF CONTRACTUAL CLAUSES VS. INVALIDITY

It does not follow from any provision of the Act that symmetrical clauses are to be inserted in contracts, i.e. that the rights and/or obligations of one party are to be matched by exactly the same rights and/or obligations of the other party. Accordingly, a contract containing asymmetrical clauses cannot be said to be invalid under Article 58 § 1 of the Civil Code, nor can it be said to be invalid in part, i.e. as to those provisions (Article 58 § 1 and 3 of the Civil Code).

This situation may be assessed differently on the basis of Article 58 § 2 of the Civil Code. Asymmetry may (although not necessarily) lead to non-equivalence of benefits and, as is accepted in case law, an agreement which violates the principle of equivalence of benefits (gross disproportion of benefits) of the parties may be assessed in the light of this provision, especially when all the prerequisites of exploitation provided for in Article 388 § 1 of the Civil Code have not arisen.[30] This does not imply automatism, so that such a contract may or may not be declared void. While a contract that violates the principles of fair dealing and loyalty to the counterparty may be considered contrary to the principles of comity, as actions that violate the principles

[28] See judgment of the CJEU of 16 March 2023, C-6/22, *M.B. and others*, ECLI:EU:C:2023:216, paras 22, 33. On the subject of the adopted suspended invalidity, see W. Gontarski, I. Parchimowicz-Gontarska, *Apelacja w sprawach kredytów w walutach obcych. Wybrane zagadnienia sporne*, "Europejski Przegląd Prawa i Stosunków Międzynarodowych" 2023, no. 4, p. 84 ff.

[29] For example, see judgment of the CJEU of 21 January 2015, joined cases C-482/13, C-485/13 and C-487/13, *Unicaja Banco SA*, ECLI:EU:C:2015:21, para. 33; judgment of the CJEU of 3 March 2020, C-125/18, *Bankia SA*, ECLI:EU:C:2020:128, para. 61 and the case law cited therein.

[30] For example, see judgment of the Supreme Court of 14 January 2010, IV CSK 432/09, OSP 2011, no. 3, item 30.

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of fair dealing, and equality of parties in a bonded relationship cannot gain social and legal approval,[31] the principle of freedom of contract expressed in Article 353[1] of the Civil Code also includes consent to actual inequality between the parties to a contract. The inequivalence of the legal situation of the contractual parties does not, therefore, in principle require the existence of circumstances that would justify it, as it is an expression of the parties' will. The objectively unfavourable content of a contract for one of the parties will merit a negative moral assessment, and as a consequence lead to considering the contract as contrary to the principles of social co-existence, in the situation, when such shaping of the contractual relations, which is visibly unfavourable for that party, took place with a conscious or only negligent taking advantage of the other party of its stronger position.[32]

Thus, if the asymmetrical nature of the contractual clauses results in the non-equivalence of the parties' benefits, in the realities of a particular case (especially where there is a contractual imbalance, the contract or its individual provisions have not been subject to real negotiations, the distribution of rights and obligations deviates significantly from accepted standards, etc.) such a contract or part of it may be deemed invalid pursuant to Article 58 §§ 2 and 3 of the Civil Code. The examination of such provisions for abusiveness will then be excluded. If, on the other hand, the asymmetrical nature of the contractual clauses does not lead to a breach of the principle of equivalence of benefits (especially when it comes to rights and obligations of the parties that are ancillary – in relation to the main benefits – to them), it is not excluded to examine them in the light of the prerequisites of Article 385[1] § 1 of the Civil Code.

In practice, perfect symmetry of all clauses is not encountered in consumer contracts. However, if it were to be assumed that in a particular contract the rights and obligations of the trader would be matched by analogous rights and obligations of the consumer (apart, of course, from the main objects of the performance), it would not seem possible to declare such a contract, as well as its individual provisions, void.

SYMMETRY OF MODIFICATION AND VALORISATION CLAUSES AND ABUSIVENESS

1. Modification and valorisation clauses in any contract

Article 385[3] of the Civil Code contains a list of provisions which, if they have not been individually agreed with the consumer and have been subjected to the so-called abusiveness test (Article 385[1] of the Civil Code), shall, in case of doubt, be deemed to be prohibited (the so-called "grey list"). This provision is therefore

[31] See judgment of the Supreme Court of 14 June 2005, II CK 692/04, Legalis.
[32] See judgment of the Supreme Court of 25 May 2011, II CSK 528/10, Legalis.

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interpretative in nature, and is based on the list of unfair contract terms in the Annex to Directive 93/13 (conditions referred to in Article 3 (3) therof), which is indicative in nature, meaning that the conditions listed therein should not automatically be considered unfair, but that the competent national authority must be free to assess their nature in the light of the general criteria set out in Article 3 (1) and Article 4 thereof.[33] Both the list in Article 385^3 of the Civil Code and the list in the Annex are relevant considerations for a court assessing the unfairness of such a provision, although the view has been expressed in the doctrine that a presumption of abusiveness must be adopted under Directive 93/13 in respect of the provisions included in the list.[34]

This is only an illustrative and non-exhaustive list of terms that may be considered unfair.[35] Among the provisions are modification and valorisation clauses, which:

- entitle the consumer's counterparty to unilaterally modify the contract without a valid reason indicated in the contract (Article 385^3 (10) of the Civil Code);
- provide exclusively for the consumer's counterparty to unilaterally amend, without valid reasons, the essential features of the performance (Article 385^3 (19) of the Civil Code);
- provide for the power of the consumer's counterparty to determine or increase the price or remuneration after the conclusion of the contract without granting the consumer the right to withdraw from the contract (Article 385^3 (20) of the Civil Code).

According to the position of the President of the Office of Competition and Consumer Protection, if an entrepreneur wishes to introduce increases, as well as new, hitherto unforeseen, fees (only in term contracts), the scope of possible changes and the situations in which they may occur must be sufficiently specified, allowing the criteria for such actions to be verified. The rationale cannot include general wording and an open-ended catalogue of circumstances such as, e.g., "an increase in public charges", "an increase in costs or expenses related to the service provided", "a significant extension or improvement in the functionality of the service provided", "the creation of opportunities for new products, services, applications or functionalities". The effect of such measures may be to shift all responsibility for the changing economic situation onto consumers. Also, inflation clauses, if they

[33] See judgment of the CJEU of 7 May 2002, C-478/99, *Kingdom of Sweden*, EU:C:2002:281, para. 11.

[34] See more I. Klauer, *General Clauses in European Private Law and 'Stricter' National Standards: The Unfair Terms Directive*, "European Review of Private Law" 2000, vol. 8(1), p. 191.

[35] For example, see judgment of the CJEU of 4 June 2009, C-243/08, *Pannon GSM*, ECLI:EU:C:2009:350, paras 37–38; order of the CJEU of 16 November 2010, C-76/10, *Pohotovost'*, paras 56, 58.

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are to be introduced into contracts, should safeguard both parties and must not be used only for the benefit of traders. At the same time, consumers should have the right to cancel in such situations without incurring additional financial burdens. Fixed-term contracts should not at all be subject to unilateral changes by the trader to their essential elements, e.g. price.[36] The point, therefore, is that a modification (or valorisation) clause should provide not only for the possibility of an increase in price or costs, but also for a decrease.

Similarly, point 1 (j) of the Annex to Directive 93/13 refers to a contractual term the purpose or effect of which is to enable the seller or supplier at its own discretion to unilaterally alter the terms without a valid reason mentioned in the contract. It should be emphasised that, in the light of point 1 (l) and point 2 (b) and (d) of that Annex, it is necessary, in particular, to indicate the reasons for or the manner in which such a variation is to be made, and the consumer should be entitled to terminate the contract. Pursuant to Article 4 (2) of Directive 93/13, the assessment of the unfairness of contract terms does not concern either the definition of the main subject matter of the contract or the relationship between the price and remuneration and the goods or services supplied in exchange, in so far as those terms have been clearly and comprehensibly expressed,[37] and, as indicated, this does not apply to a clause regulating changes in the fees for a service provided to the consumer.

Undoubtedly, the consumer should have a real opportunity to become acquainted with all the provisions contained in the model contract and with the effects of those provisions, while the terms must always be drafted in plain and intelligible language and any doubts as to the content of the term must be interpreted in favour of the consumer (Article 5, first and second sentences, of Directive 93/13, Article 385 §§ 1 and 2 of the Civil Code). As emphasised by the CJEU, in the case of modification clauses, it is important, i.a., to determine whether the reasons for or manner of changing the fees related to the service provided are specified, and whether the consumer had the right to terminate the contract. It is essential that the consumer is able to foresee, on the basis of clear and comprehensible criteria, the modifications that the trader may make to the model contract in relation to the charges relating to the service provided. In particular, it is for the national court to determine whether, having regard to all the provisions of the standard consumer contract and having regard to the national provisions establishing rights and obligations which may supplement those set out in the model in question, the reasons for, or the manner in which, the charges relating to the service provided have been

[36] See Urząd Ochrony Konkurencji i Konsumentów, *Vectra i klauzule inflacyjne – zarzuty Prezesa UOKiK*, 31.1.2024, https://uokik.gov.pl/vectra-i-klauzule-inflacyjne-zarzuty-prezesa-uokik (access: 28.5.2026).

[37] See judgment of the CJEU of 26 April 2012, C-472/10, *Invitel*, para. 23.

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varied are set out in a clear and comprehensible manner and, where appropriate, whether the consumer is entitled to terminate the contract.[38]

As can be seen, it is possible to introduce a modification clause (as well as an indexation clause) into a contract as well as into a model contract, including as to price, if certain requirements are met. It is rightly pointed out that it is not permissible for one of the parties to a contract to decide on the concretisation of the consideration if it were to take these decisions by virtue of its free and uncontrolled discretion.[39] The consumer must know what the terms of service under the contract are and what price he will pay in connection with it. This is because these are the basic factors determining conclusion of a contract with a trader, regardless of whether it is a contract for a definite or indefinite term (contrary to the position of the President of the Office of Competition and Consumer Protection, it is possible to modify the price also in contracts concluded for a definite term). If one were to speak of the symmetry of such clauses, a mechanism would need to be provided in the contract (model contract) to change its terms in favour of both the entrepreneur and the consumer, while retaining the right to terminate a continuous contract or withdraw from a contract in the case of a contract with a one-off performance. This applies to both the modification of the price (remuneration) and charges of any kind, as well as to other situations involving specific rights and obligations of the parties. In the case of a modification of the price and/or fees, the consumer would be entitled to terminate or withdraw from the contract if there is an increase, whereas otherwise the trader would be entitled to do so. As indicated, in such a situation, it is not possible to speak of the invalidity of a contractual provision, but an examination of its abusiveness is not excluded.

Indeed, doubt arises as to whether such symmetry actually effectively protects the consumer. The CJEU has accepted that if the indexation is based on a clear, precise and publicly available indexation method and results from decisions and mechanisms belonging to the public sphere, the price change does not entitle the subscriber to withdraw from the contract without penalty.[40] However, if the price falls, the consumer may be interested in continuing the contract. In practice, this will not happen as a result of a modification clause, but it could happen with a symmetrical valorisation clause, which provides for a change in price on the basis of a change in indicators (e.g. the level of inflation). However, the reduction of the price (given these indicators) can really be considered as a theoretical issue – inflation is far more likely to occur than deflation, and even when the latter occurs, the problem of, e.g., the interest rate in the case of a loan agreement will arise. In such a situation, the symmetrical application

[38] *Ibidem*, paras 26, 28, 30–31.

[39] Z. Radwański, *Teoria umów*, Warszawa 1977, p. 75.

[40] Judgment of the CJEU of 26 November 2015, C-326/14, *A1 Telekom Austria AG*, ECLI:EU:C:2015:782, paras 27, 29.

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of a valorisation clause, which provides for an automatic change in the price (fees) if certain circumstances arise, means that there is a far greater chance of a price increase than a price decrease. Even if the valorisation clause is linked to the right to terminate or withdraw from the contract, the consumer is in a much less favourable position than the trader, which means that such a provision may be considered abusive. The assessment of whether a contractual provision is abusive is made according to the state at the time of the conclusion of the contract (Article 385^2 of the Civil Code),[41] and therefore the circumstances under which the contract was concluded – not only between the trader and the consumer – cannot be disregarded, but the economic and social environment must also be taken into account. Such shaping of these contractual provisions violates the consumer's rights and obligations in terms of good morals, grossly infringing the consumer's interests.

Moreover, if the change of price (fees) results from a modification clause, i.e. a clause entitling the trader to unilaterally amend the contract, the basic issue is – as it was mentioned – whether the consumer's right to terminate the contract was linked to this clause (if not, such a provision meets the prerequisites of abusiveness or even invalidity). The symmetry of such a clause would have to be that the trader and the consumer would be entitled to unilaterally amend (modify) the content of the contract, including e.g. as to price or fees, subject to the right of the other party to terminate or withdraw from the contract. In the case of a non-negotiable model contract, such a solution does not occur in practice. Therefore, if such a clause is reserved only for the benefit of the trader, then, as mentioned above, the situations in which the trader may change the terms of the contract, including the price, should be clearly and unambiguously defined. However, it is impossible not to notice that, ultimately, the decision to exercise this power depends solely on the trader, so the consumer has no influence on it.

Such a clause can be said to be abusive even if it is symmetrically drafted. If the (mutual) reasons for withdrawal (termination) from the agreement (termination) were shaped in such a way that they could not, in principle, occur to the benefit of the consumer (and, in this case, consequently cause a reduction in price), the prerequisites of Article 385^1 § 1 of the Civil Code would also be met.

2. Foreign currency-linked loans

Reference may also be made to foreign currency-linked loans, where financial institutions must provide borrowers with sufficient information to enable them to make informed and prudent decisions and should explain, at a minimum, how instalments would be affected by a strong depreciation of the legal tender of the

[41] See resolution of the panel of seven judges of the Supreme Court of 20 June 2018, III CZP 29/17, OSNC 2019, no. 1, item 2.

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Member State in which the borrower is resident and an increase in the foreign interest rate.[42] The first issue is the introduction of a so-called "circuit breaker", i.e. a certain level of PLN/CHF at which the sum of the loan and loan instalments (after conversion into Polish currency) would stop growing,[43] which would have the effect of reducing the exchange rate risk. However, the question arises whether the introduction of a symmetrical breaker means per se that a contractual clause changing these amounts cannot be found abusive. During the period when the so-called franking credits were granted (especially the years 2006–2009), the exchange rate of the Swiss franc was at the level of approximately PLN 2 per CHF 1. In the case of granting a loan at such a low exchange rate of the Swiss franc, the risk on the part of the bank was reduced to less than PLN 2 per CHF if the value of the Swiss franc fell to 0 (only in theory, as such a possibility did not exist), while the exchange rate risk on the part of the borrower was unlimited. Introducing a circuit breaker in such a situation at the same level (e.g. +/– 2 PLN) would only partially eliminate the abusiveness, as the situation of the bank would in principle not change (further depreciation of the currency was a theory), while the situation of the consumer would improve to the extent that the risk on his side would not be limited; however, one could only speak of theoretical symmetry. A different assessment could be made of such a clause at a significantly higher exchange rate in relation to the Polish zloty, if, of course, the clause did not contain a reference to the bank's exchange rate table, but, e.g., to the average exchange rate of the National Bank of Poland – a provision with a +/– 2 PLN breaker at a currency exchange rate of, say, 4.5 PLN per 1 CHF would be much less asymmetrical than the one described in the preceding sentence, and thus could be regarded as non-abusive.

In addition, the possibility, raised in the case law, of currency conversion, which has been held to be an important factor in balancing the exchange rate risk, if the consumer had the right to convert the loan unilaterally (the bank had no grounds for refusal) or had a claim to such conversion, and the fact that the consumer did not seek to convert the loan after the conclusion of the credit agreement is irrelevant to the assessment of the abnormality of the currency risk clause, since the circumstances at the time of the conclusion of the agreement are decisive in this regard.[44] Although the assessment of abusiveness is made according to the state of affairs at the time of the conclusion of the contract, it can hardly be assumed that the possibility of currency conversion eliminates the exchange rate risk, i.e. the

[42] For example, see judgment of the CJEU of 20 September 2017, C-186/16, *Andriciuc and others*, para. 49.

[43] See more T. Szanciło, *Ustalenie nieważności umowy o kredyt frankowy a niedozwolony mechanizm klauzul przeliczeniowych i ryzyko kursowe*, [in:] *Upadłość i restrukturyzacja kredytobiorcy lub banku przy umowach o kredyt frankowy*, eds. A. Hrycaj, T. Szanciło, Warszawa 2024, pp. 75–76.

[44] See judgment of the Supreme Court of 13 May 2022, II CSKP 464/22, "Monitor Prawa Bankowego" 2023, no. 2, p. 34.

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change in both the amount of the loan and the loan instalment, even if such a clause was reserved exclusively for the consumer. If the borrower had wished to take out a loan unlinked to a foreign currency, he would have done so, and the possibility of currency conversion at the date of the agreement was of no relevance from the consumer's point of view (provided it was included in the agreement). Currency conversion is only relevant when such a contract is executed and the exchange rate fluctuates. Since, as indicated, loans were granted when the CHF exchange rate was very low, a currency conversion clause reserved in favour of the consumer, even unconditional, did not protect the consumer's interests. Only its linkage to the circuit breaker could change this assessment.

CONCLUSIONS

The study shows that the symmetrical nature of contractual clauses does not in itself exclude the possibility of finding them abusive, which is precisely the case for price modification clauses and valorisation clauses. This is because it depends on the subject matter regulated in the contractual provision in question, as well as the situation in which the contract was concluded. In the case of a significant number of contractual clauses, symmetry will exclude abusiveness, e.g. as regards clauses listed in Article 385^3 (2), (3) or (5) of the Civil Code, some clauses are inherently difficult to imagine as symmetrical (e.g. Article 385^3 (1) – where the trader is not a natural person, (6) or (7) of the Civil Code). With regard to the clauses in question, prima facie it could be said that they would not be abusive if they were symmetrical. A deeper analysis of them from the point of view of the prerequisites of abusiveness shows that a finding of their illicit nature is not excluded.

This is all the more important as the legislator in the case of price (remuneration) changes referred only to the reservation of the right of withdrawal in favour of the consumer. It appears that this type of regulation is not sufficient. Since the price and its relation to the subject matter of the contract determines the decision to choose the offer of a given trader and then to continue the contract (after its conclusion), and the symmetry of the clauses is in many cases apparent, it is only in a competitive market (when the consumer has the possibility to choose from among the offers of many traders) that the right of withdrawal (termination) protects the interests of the consumer. In the case of monopolistic markets, it is impossible to speak of such protection, as the consumer does not have the possibility to change the counterparty anyway;[45] the same applies to certain types of contracts, such as credit agreements, since the exercise of the right of withdrawal or termination

[45] As an example, one can point to a situation where a given television operator holds (as the only one) the rights to certain sporting events – a symmetrical modification or valorisation clause is

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would mean that the consumer would have to repay the outstanding credit once. In order to protect the consumer's rights, in addition to the right of withdrawal and symmetry, in the case of price and cost changes, there should be rules on, e.g., the frequency of changes ("not more often than…"), the postponement of the change ("the increase shall take effect … months after the price change"), or a maximum limit for the change.

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then not possible, as it is known that the costs of such events only increase, while at the same time the consumer, exercising his right to terminate the contract, loses the possibility to watch these events.

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ABSTRAKT

Przedmiotem opracowania (naukowo-badawczego) jest odpowiedź na pytanie – na przykładzie klauzul modyfikacyjnych cenę i waloryzacyjnych – czy symetryczność, tj. identyczne uregulowanie określonej kwestii z punktu widzenia obu stron umowy (w tym umowy kredytu powiązanego z walutą obcą) ma wpływ na niedozwolony charakter postanowienia umownego. Jest to niezwykle istotne zagadnienie z punktu widzenia słabszej strony umowy, tj. konsumenta, w stosunku do przedsiębiorcy. O ile w znacznej części przypadków wprowadzenie do umowy symetrycznych postanowień umownych w wystarczający sposób zabezpiecza interes konsumenta, stanowiąc jedno z rozwiązań eliminujących abuzywność nienegocjowalnego postanowienia, o tyle w przypadku omawianych postanowień mogą one zostać uznane za abuzywne, nawet jeżeli zostanie spełniony wymóg symetryczności. Niezbędne jest wówczas zastosowanie innych instrumentów chroniących interes konsumenta. Nie jest wystarczające zastrzeżenie na rzecz konsumenta prawa odstąpienia od umowy (jak przyjął ustawodawca), gdyż w przypadku rynków monopolistycznych nie sposób mówić o zabezpieczeniu prawa konsumenta w tej sytuacji, podobnie jak w przypadku pewnych rodzajów umów, np. umowy kredytu. Aby chronić prawa konsumenta, oprócz prawa odstąpienia od umowy i symetryczności, w przypadku zmian ceny i kosztów powinny zostać uregulowane: częstotliwość zmian, odroczenie zmiany, maksymalny pułap zmiany. Takiej analizy dotychczas nie przeprowadzono, w tym z uwzględnieniem orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej.

Słowa kluczowe: klauzula abuzywna; symetryczność; klauzula modyfikacyjna; klauzula waloryzacyjna; konsument