

## Unfair Commercial Practices and Unfair Contract Terms in the Slovak Republic and Their Reflection in the Slovak Case Law<sup>1</sup>

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**Abstract:** *The Unfair Contract Terms Directive and the Unfair Commercial Practices Directive as well as their application in the Slovak case law create the topical problem in the Slovak contract law. Both directives have significantly improved the position of the weaker party to contract. The study deals with the question whether the principle-based approach (the general clause) or the list of terms and practices should be preferred form of regulation as well as with their expressions in the case law. The maximum (Unfair Commercial Practices Directive) and the minimum harmonisation (Unfair Contract Terms Directive) approaches implemented by these directives are partly linked to the second question in the relation to the legal nature of the list of unfair contract terms in the Slovak Civil Code. The importance of unfair competition rules in the Slovak Commercial Code may not be overlooked in the future as the important tool to prevent the unfair commercial practices not only between traders but also those targeted against consumers.*

**Key Words:** *Unfair Terms; Unfair Commercial Practices; Contractual Consequences; Unfair Competition; Protection of Consumer; the Slovak Republic.*

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### The Unfair Commercial Practices Directive and Its Impact on the Slovak Law

The Directive 2005/29/EC on Unfair Commercial Practices (hereinafter also referred to as the “UCPD”) adopted on 11 May 2005 directly protects consumer’s economic interests from unfair business-to-consumer commercial practices. The high level of convergence achieved by the approx-

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imation of national provisions through this directive creates a high common level of consumer protection. The UCPD establishes a single general prohibition of those unfair commercial practices distorting consumers' economic behaviour. The principle-based approach proved to be the only effective way to prevent and to remove the use of unfair commercial practices. Its effectivity has been verified by the fact that a) findings of the Commission on Assessment of Terms in Consumer Contracts and of Unfair Commercial Practices established at the Ministry of Justice of the Slovak Republic (hereinafter also referred to as the "Commission on Assessment"), b) decisions of the Slovak Trade Inspection (authorised administrative authority), and c) court decisions clearly indicate that the list of practices will never be exhaustive and complete to cover all misleading or aggressive practices. To sum up, the court decisions and the decisions and findings of administrative authorities tend to use the general clause or directly the black list proportionately. The overview of the relevant decisions shows that the courts tend to prefer the use of the general clauses enabling them to grasp the complexity of the cases where more sophisticated forms of abuse of the trader's position occurred. The reasons for such finding may be that decisions in the presented cases were more complicated and could not be solved out of court (one may argue that when practice is identified as the one of the black list practices, the solution of the case is clear, without court proceedings, therefore, the sanction of administrative authority and other ways of disputes solution are easily available).

The following list contains the examples of cases where the principle-based approach was used:<sup>2</sup>

- ✚ Decision of the Supreme Court of 25 May 2015, No. 5Sžo/32/2014: misleading commercial practice in relation to the price of service and its calculation;
- ✚ Decision of the Regional Court in Bratislava of 14 November 2013, No. 1S/154/2011-113: unfair commercial practice that consisted of unauthorised and misleading ticking the box "for purposes relating to the profession" – in the relevant case the consumer was pensioner;
- ✚ Decision of the Regional Court in Trnava of 4 May 2016, No. 24Co/448/2015: unfair, misleading practice of the trader inducing the con-

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<sup>2</sup> Special gratitude belongs to the doctoral student Marek Maslák for collecting information about the relevant case law.

sumer to acknowledge the debt without real knowledge and understanding of consumer of the effects of such conduct presented in the standard contract form;

- ✚ Decision of the Slovak Trade Inspection of 7 May 2010, No. P/0110/05/2010: misleading practice in relation to the price of the product;
- ✚ Findings of the Commission on Assessment of 11 December 2012, No. 56208636/2011-110.292, 315, 12156/2012-110.20, 23, 24, 25, 26, 28, 30, 36, 41, 46, 60, 71, 91, 142, 172, 178: The trader (the electric energy provider represented by his/her commercial agents) concluded doorstep contracts where he/she falsely informed the consumer that a) he/she represents the former provider, b) the contract is limited only to the change of the former contract, regarding its content;
- ✚ Findings of the Commission on Assessment of 22 April 2016, No. 28052/2015-20.78, 118, 253, 290, 349a, 379, 429, 33083/2016-20.120: misleading commercial practice in relation to the price of service and its calculation.

The everyday practice of the Slovak Trade Inspection – the body authorised to control the trader’s practices shows that the black list of unfair practices implemented by the Act No. 250/2007 Coll. on Consumer Protection as amended (hereinafter also referred to as the “Consumer Protection Act”) represents an important tool for prompt progress in its work. If a commercial practice falls under the black list, it is not necessary to determine whether such practice satisfies the requirements of a general clause. It also strengthens the legal certainty and the uniform decisions of authorised bodies. The black list proves to be useful as the easier way to decide on the concrete case and it may also serve as the educative tool both for traders and consumers. The list clearly indicates the border not to cross for traders and it may help to build up the argumentation in the relevant case for reasonable and well informed consumer.

The following list contains the examples of cases where the black list of unfair commercial practices was applied:

- ✚ Decision of the District Court Bratislava IV of 3 September 2014, No. 5C/64/2009, unfair commercial practices under the Annex I, misleading: No. 7, 17, 20, aggressive: No. 24;
- ✚ Decision of the Slovak Trade Inspection of 19 July 2013, No. P/0076/04/13, unfair commercial practices under the Annex I, misleading: No. 7, aggressive: No. 31;

- ✚ Warning of the Slovak Trade Inspection for the Slovak consumers about unfair commercial practices of the Israeli traders where the Slovak Trade Inspection has no inspection authority, unfair commercial practices under the Annex I, misleading: No. 7, aggressive: No. 31;<sup>3</sup>
- ✚ Findings of the Commission on Assessment of 13 August 2013, No. 02097/2013-110.120, 121, 122, 123, 125, 126, 127, 139, 140, 142, 146, 183, 186, 190, 191, 192, 193, 195, 197, 198, 203, 204, 205, 206, 207, 210, 211, 213, 214, 215, 221, 224, 226, 228, 263, 266, 269, 275, 293, 321, 331: aggressive commercial practices under the Annex I, No. 31.

The way to reach the satisfactory level of the implementation of the UCPD has not been straightforward. In Slovakia, the deficiency of the implementation of the UCPD has been finally removed only by the amendment of the Consumer Protection Act by the Act No. 102/2014 Coll. by which the scope of consumers' protection against unfair commercial practices has been broadened to the products including not only movable things (goods) but also services, immovable property, rights, and obligations. The lack of previous regulation was evident and it restricted the entitlement of the Slovak Trade Inspection to control traders.<sup>4</sup>

As stated in the Recital 18 of the UCPD, it is appropriate to protect all consumers from unfair commercial practices; however, the Slovak Court of Justice has found it necessary in adjudicating on advertising cases since the enactment of the Directive 84/450/EEC to examine the effect on a notional, typical consumer. In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this directive takes as a benchmark the average consumer who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural, and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be as-

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<sup>3</sup> See *Upozornenie pre spotrebiteľov* [online]. 2017. 1 p. [cit. 2017-01-30]. Available at: <http://www.soi.sk/files/documents/rspotreb/spotrebite%C4%BEsk%C3%BD%20prieskum%20nekal%C3%A9%20praktiky.pdf>.

<sup>4</sup> See MACHÚTOVÁ, N. *Nekalé obchodné praktiky a ochrana spotrebiteľov v SR*. 1. vyd. Bratislava: Paneurópska vysoká škola v Bratislave, Fakulta práva, 2013. 67 p.

sessed from the perspective of the average member of that group. The Slovak courts frequently employ the term “average consumer” without taking special regard to the assessment of his/her qualities. In the academic literature, the demand was raised on need to stipulate the objective criteria for average consumer by the law.<sup>5</sup> This plea seems to be rare, as the court praxis does not indicate such need. The District Court in Poprad in its decision 17C/113/2010 of 20 December 2011 held with the reference on decisions of the Court of Justice of the European Union (C-201/96, C-220/98) that the average consumer on the Internet does not materially differ from the average consumer in the “brick and mortar” or “walk-in” shops nowadays, as the great number of consumers use the on-line sales and on-line services without any special education. The court referred to the statistics of [www.telecom.gov.sk](http://www.telecom.gov.sk) as a proof of the extensive use of the Internet in Slovakia that suggests that the average consumer could not be differentiated from the common user of the Internet. The attention should be paid to the fact that the average consumer in the Slovak Republic is highly influenced by the price of the product as the Slovak average income (882 EUR in 2015) is in comparison to the European Union relatively low one.<sup>6</sup> The Supreme Court in its decision of 26 April 2012, No. 8Sžo/40/2011, argued at the same line of reasoning: “*The average consumer gets primary orientation on market by the prices of the products, and it should be stressed that every consumer does not regularly buy the goods in instalments and is not experienced in such a form of sale*”. The Regional Court in Prešov in its decision of 25 February 2013, No. 16 Co 24/2013, argued that the average consumer is not able to assess all circumstances decisive for the case alone and, therefore, the appeal by the consumer organisation as the impleaded party should be admissible also against consumer’s will. This decision has been thoroughly criticised on the grounds of the excessive over-protection of the consumer.<sup>7</sup>

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<sup>5</sup> See GRABAN, A. Priemerný spotrebiteľ z pohľadu objektivizácie súdneho uváženia. In: O. HAMULÁK and L. MADLEŇÁKOVÁ, eds. *Limity práva*. 1. vyd. Praha: Leges, 2012, pp. 200-208. ISBN 978-80-87576-45-8.

<sup>6</sup> See VOZÁR, J. *Právo proti nekalej súťaži*. 1. vyd. Bratislava: Veda, 2013, p. 229. ISBN 978-80-224-1272-8.

<sup>7</sup> See HAVRENT, M. NÁZOR: Ochrana spotrebiteľa napriek jeho nesúhlasu alebo KS Prešov určuje, čo je pre „priemerného spotrebiteľa“ najlepšie. In: *Najpravo.sk* [online]. 2013-07-19 [cit. 2017-01-30]. Available at: <http://www.najpravo.sk/clanky/nazor-ochrana-spotrebiteľa-napriek-jeho-nesuhlasu-alebo-ks-presov-urcuje-co-je-pre-priemerneho-spotrebiteľa-najlepsie.html>.

In some decisions, there is a link created between notions “average consumer” and “vulnerable person, subject” (e.g. decision of the District Court in Nitra of 1 April 2014, No. 15C/55/2013, decision of the Constitutional Court of 18 November 2015, No. PLz. ÚS 5/2015).

The explicit use of the provision on the protection of vulnerable consumers in the decisions of relevant authorities in connection to the UCPD is not frequent but, on the other hand, the judges usually take into account all relevant circumstances of the case and the vulnerability of the concerned person may be one of them, as the person of the average consumer in the relevant circumstances without clear reference to the special regulation.

The District Court Bratislava IV in its decision of 3 September 2014, No. 5C/64/2009, held that defendant was vulnerable because of her age (pensioner), (unfair commercial practice – falsely claiming that a product is able to cure illnesses, dysfunction).

Sector-specific directives (energy sector) have introduced the notions of “energy poverty” and “vulnerable customer”. The sectoral protection of the vulnerable customers seems to be efficient measure (in connection to the generally applied UCPD).

Self- and co-regulation actions may also represent an objective tool in addressing unfair commercial practices. As one of the examples of the quite successful self-regulation action may be considered the activity of the Slovak Advertising Standards Council.<sup>8</sup> The Council is a non-governmental body encompassing various subjects from trade, advertisement, and media. It declares as the main objective of its existence to provide and to promote honest, decent, legal, and truthful advertising in the Slovak Republic. Its Code of Ethics for Advertisement Practices serves as the basis for the decisions of its Arbitration Committee based exclusively on a written suggestion of the complainant. The complaint may be submitted by any legal or natural person, except the members of the Arbitration Committee. The awards of the Arbitration Committee frequently tackle with the aspects of unfair commercial practices and misleading advertisement. The reference to the findings of the Arbitration Committee and their reasoning may be found in the decisions of the state authority (Slovak Trade Inspection). The cooperation between the Slovak Trade In-

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<sup>8</sup> See *Rada pre reklamu* [The Slovak Advertising Standards Council] [online]. 2017 [cit. 2017-01-30]. Available at: <http://www.rpr.sk/en>.

spection and the Slovak Advertising Standards Council works in both directions. Also the advertisement, in accordance with the legal requirements, may be contrary to some ethic requirements envisaged by the above-mentioned Code of Ethics. In such a case, the Slovak Trade Inspection may reassign the complaint to the Slovak Advertising Standards Council for proceeding and the Arbitration Committee may held the advertisement as breaching the Code of Ethics, despite the fact that this advertisement is in accordance with the Consumer Protection Act or with the Act on Advertisement.<sup>9</sup>

Problematic areas for protection of consumers (apart from consumer credits) where the occurrence of unfair practices is highly probable and seems not to be sufficiently covered by the UCPD are contracts negotiated away from business premises and, secondly, the stage of enforcement of consumers' debts.

Concerning the contracts negotiated away from business premises, the traders organise various "presentations and advertisement actions" at the spaces accessible to the public, such as restaurants, hotels, or during excursions. In reality, these actions labelled e.g. as "cookery show", "wine tasting", etc. were very aggressively organised sale actions. The use of unfair commercial practices was so frequent that the Slovak Republic had to introduce special administrative rules for these actions. Under the Article 11 of the Act on Distance and Off-premises Sales and Services, effective from 1 May 2014, the trader is obliged to notify "sale action" in advance (20 days before action takes place) to the Slovak Trade Inspection, particularly to provide the invitation to the action and the contract terms, list of products offered, and prices required. The Slovak Trade Inspection will assess the information provided and if it is in accordance with law it will publish the action on its website. The breach of obligations of the trader at organising the "sale action" has important consequences, particularly the consumer contract concluded in such action is considered as "not concluded". The strict regulation of the rights and obligations of the providers at the "sale actions" leads to the pronounced decrease of the use of unfair commercial practices at the "sale actions", as the control findings of the Slovak Trade Inspection confirm.

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<sup>9</sup> See KRŠKOVÁ, M. and N. PÁNIKOVÁ. *Sexistické reklamy na Slovensku alebo čo má spoločné sťahovanie, prášková lakoviňa a bankové služby*. 1. vyd. Bratislava: Slovenské národné stredisko pre ľudské práva, 2016. 40 p. ISBN 978-80-89016-80-8.

Similarly dangerous for consumers proved to be contracts for supply of gas, electricity, and water negotiated and concluded on the occasion of the unsolicited visit of trader or his/her representative at the consumer's home. These findings have been obtained mainly from decisions of the Slovak Trade Inspection and from findings of the Commission on Assessment of Terms in Consumer Contracts and of Unfair Commercial Practices.

Future regulations or improvement of the UCPD should also concentrate on preserving the dignity of the consumer and on preventing the use of illegal and immoral ways of the enforcement of the consumers' debts at the stage of enforcement, as the use of unfair commercial practices of the traders after the commercial transaction clearly shows. Mortification or defamation of consumers should not belong to the regular practices of traders. In this regard, the Regional Court in Prešov in its decision of 27 October 2011, No. 2Co/116/2011, held that trader is ordered to cease the commercial practice of sending notices to the consumer to pay debts under the threat of publication, sending shame-making notices in the envelopes labelled as "how to get rid of debts" or addressed explicitly to "the debtor" and to cease any advertising of consumer as a debtor (the stage of enforcement is partly covered by the Annex 1, No. 25, 26 of the UCPD).

### Relevance of contractual consequences of unfair commercial practices

The general part of the Slovak Civil Code regulates the general prerequisites for the validity of legal acts and this part of the Civil Code also contains the general provisions on consumer contracts and the regulation of the unfair contract terms in B2C contracts. These provisions create a legal basis for contractual consequences in case of a breach of the UCPD. The Slovak courts often review the category of unfair commercial practices and the category of unfair contract terms together, depending on circumstances of the concrete case.<sup>10</sup>

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<sup>10</sup> See DOBROVODSKÝ, R. Test nekalosti správania sa podnikateľov k spotrebiteľom v slovenskom práve. In: G. URBANSKÁ, ed. *Ingerencia súdov do súkromnoprávných zmlúv: Zásahy súdov do kontraktáčného procesu*. 1. vyd. Pezinok: Justičná akadémia Slovenskej republiky, 2013, pp. 125-151. ISBN 978-80-970207-5-0; and BUDJAČ, M. Nekalé obchodné praktiky ako potenciálny zdroj a akcelerátor sústavného používania neprijateľných zmluvných podmienok a ich vplyv na platnosť spotrebiteľskej zmluvy. In: G. URBANSKÁ, ed. *Ingerencia súdov do súkromnoprávných zmlúv: Zásahy súdov do kontraktáčného proce-*



Unfair commercial practices are regulated in the Consumer Protection Act; this act prohibits unfair commercial practices before, during, and after executing the commercial transaction (Section 7 para 1). Unfair commercial practices usually represent conduct (or omission) which is contrary to good morals (*bonos mores*). This is defined solely for the purposes of the Consumer Protection Act (Section 4 para 8) as a conduct that is contrary to the conventional traditions and includes elements of apparent discrimination or departs from the rules of morality recognised at the sale of product or provision of service or that may cause harm to the consumer for breach of good faith, honesty, usages, and practices, making use of mistake, deceit, threat, significant inequality of parties, and of breach of contractual freedom.

Validity of the contract has to be tested under the general clause for the invalidity of legal acts under the Section 39 of the Civil Code (a legal act is invalid if the content or the purpose thereof violate or evade the law or they are inconsistent with good morals). Taking into regard the above-mentioned provisions (Section 7 para 1 of the Consumer Protection Act, alternatively Section 4 para 8 of the Consumer Protection Act), consumer contracts concluded with usage of unfair commercial practices can be invalid (under the Section 39 of the Civil Code).

The misleading commercial practices may also give arise to a right of the consumer to invoke the invalidity of the contract under the Section 49a of the Civil Code, where a legal act is invalid if a person acted in error arising from a circumstance decisive for its creation and the person to whom the legal act was addressed gave rise to the error or had to be aware of the error. A legal act is also invalid if the error was caused by the other person intentionally. The aggressive commercial practices may create a real threat for the consumer; in such a case, the contract will be invalid *ex offio* under the Section 37 para 1 of the Civil Code, where a legal act has to be made freely and seriously, clearly, and concisely, otherwise it is invalid.

Use of an unfair commercial practice may be a reason for the application of the Section 3 para 1 of the Civil Code, under which exercise of rights and duties following from civil legal relationships must not interfere with rights and legitimate interests of others without legal cause and

must not be in conflict with good manners. In these cases, the court does not provide legal protection to the subject which violates the provision.

Section 53d of the Civil Code expressly states that a consumer contract containing a term already held unfair by a court (issued sooner than the contract was concluded) which was entered into as a result of an unfair commercial practice or usury is invalid. This new provision of the Slovak Civil Code is effective from 1 June 2014 and it has been introduced under the influence of the judgment of the Court of Justice of the European Union in Case Pereničová, Perenič C-453/10.<sup>11</sup> In accordance with new civil procedure legislation (Civil Dispute Procedure Code,<sup>12</sup> effective from 1 July 2016), if a court determines some contract term as invalid for its unfairness then the court explicitly specifies wording of this unfair contract term in the dictum of the judgment (Section 298 para 2). The explicit regulation of usury was introduced in 2014 in the Section 39a of the Civil Code. This provision makes usury invalid provided it is done by a natural person who is not an entrepreneur and misuses the other party's distress, inexperience, mental condition, stress, trustfulness, improvidence, financial dependence, or inability to fulfil the other party's obligations and accepts, either for himself/herself or for another person, a promise or provision of performance the proprietary value of which is grossly disproportionate to their mutual performance.

Under the Section 53c of the Civil Code if the consumer contract is made in writing, the subject-matter and the price must not be written in smaller letters than other parts of the same contract, except for the title of the contract and its parts. The provisions of a consumer contract as well as provisions contained in general commercial terms and conditions or in any other contractual documents related to the consumer contract must not be written in letters that are unreadable for the consumer or smaller than as set out in an implementing regulation. Any contract made contrary to this provision shall be invalid. The breach of this provision may also imply the breach of the requirements of the professional diligence under the Article 5 (2a) of the UCPD, but as the second prerequisite under the Article 5 (2b) of the UCPD shall not be probably fulfilled and the breach of the formal requirements is the sole reason for the inva-

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<sup>11</sup> See BUDJAČ, M. Spotřebitel'ské zmluvy. In: M. ŠTEVČEK, A. DULAK, J. BAJÁNKOVÁ, M. FEČÍK, F. SEDLAČKO, M. TOMAŠOVIČ, et al. *Občiansky zákonník I: § 1 - 450: Komentár*. 1. vyd. Praha: C. H. Beck, 2015, pp. 435-674. ISBN 978-80-7400-597-8.

<sup>12</sup> See the Act No. 160/2015 Coll. *Civil Dispute Procedure Code, as amended*.

lidity of the written contract, this reasoning is not of such a great importance.<sup>13</sup>

Apart from the invalidity of the contract, breach of the UCPD may entitle the consumer to withdraw from the contract under the Section 49 the Civil Code, where a party that concluded a contract in distress under clearly disadvantageous conditions has the right of withdrawal from the contract.

Under the above-mentioned regulation of “sale action”, non-compliance with the requirements of special act leads to the legal non-existence of the contracts concluded at the action.

The following list contains some of the relevant decisions:

- ✚ Decision of the District Court in Prešov of 12 July 2010, No. 17C/56/2010-54: The assignment of the claim by the trader (transfer of the contractual position) to the another subject seated outside the European Union has been regarded as an unfair commercial practice aimed at worsening the consumer’s position in relation to the trader as it creates obstacle for the consumer to claim the unjustified enrichment from the assignee – such transfer violates law and it is contrary *bonos mores*, the assignment is invalid under the Section 39 of the Civil Code;
- ✚ Decision of the Regional Court in Prešov of 28 October 2014, No. 20Co/229/2013: Unfair commercial practices are prohibited. In this regard, it is important to take into account good morals under the Section 4 para 8 of the Consumer Protection Act. The legal act that is contrary to the provisions of law is invalid (Section 39 of the Civil Code). Legal act which is contrary to the Section 4 para 8 of the Consumer Protection Act is invalid for the conflict with the law;
- ✚ Decision of the Regional Court in Trenčín of 26 March 2014, No. 5Co/269/2013: The fraudulent inducement of the consumer to acknowledge the statute barred debt constitutes an unfair commercial practice in the form of misleading omission and such practice is contrary to the requirements of the professional diligence, therefore, the acknowledgement of debt by consumer is an invalid legal act under the Section 39 of the Civil Code (similar problem solved by the deci-

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<sup>13</sup> See ZAVADOVÁ, D. Nekalé obchodné praktiky a ich vplyv na platnosť právnych úkonov vo finančných službách. *Súkromné právo*. 2015, roč. 1, č. 2, pp. 16-20. ISSN 1339-8652.

sion of the Regional Court in Prešov of 7 June 2012, No. 11Co/37/2012);

- ✚ Decision of the Regional Court in Prešov of 14 July 2011, No. 6Co 1/2011: The assignment of the claim against the consumer to the assignee in the bankruptcy proceedings constitutes an unfair commercial practice – this assignment causes material distortion in the commercial relations as the claimant in the bankruptcy is not obliged to pay the court fees. Moreover, the consumer as the debtor will be unwilling to seek professional legal advice if he or she is sued by such assignee because the reimbursement of the costs of the legal counsel for the consumer may prove as problematic if the other party is in bankruptcy and the consumer's claim for reimbursement will not have any priority. The court decided that the assignment (which took place in many similar cases) is invalid under the Section 39 of the Civil Code;
- ✚ Decision of the District Court in Piešťany of 26 January 2012, No. 10C/5/2010: The package travel contract. The measure of damages awarded to the consumer in this decision has been probably influenced also by the misleading commercial practices of the travel agent at the conclusion of the contract.

### **Unfair contract terms, their legal nature and reflection in case-law**

The principle-based approach under the Unfair Contract Terms Directive<sup>14</sup> (hereinafter also referred to as the “UCTD”) proved to be effective in the establishing the high level of consumer protection, but such state has been reached only in the course of last years. To sum up the reasons, it took some time to tune in the legal regulation for the needs of consumers and for the court praxis to take over the active role in the protection of the consumer. The Slovak Republic has adopted the regulation where next to the definition of the unfair terms by the general clause there is a list of unfair terms. The general clause states that the consumer contracts must not contain provisions that cause considerable imbalance between the rights and obligations of the parties to the detriment of the consumer. This shall not apply if these are contract terms that refer to the main subject-matter of performance and reasonability of the price, if such contract terms are expressed distinctly, clearly, and concisely, or if the unfair terms have been agreed individually. Provisions that the con-

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<sup>14</sup> See the *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*. OJ EC L 95, 1993-04-21, pp. 29-34.

sumer had an opportunity to familiarise himself/herself with before the signing of the contract but could not affect the content thereof, shall not be considered as individually agreed contract provisions. Unless the trader can prove the contrary, contract terms agreed between the trader and the consumer shall not be considered individually agreed. The unfairness of contract terms shall be assessed with regard to the nature of the goods or services for which the contract was concluded, to all the circumstances of formation of the contract at the time of concluding the contract, and to all other contract terms or other contracts such are dependent on. The transposition of the UCTD has begun in 2004 (Act No. 150/2004 Coll.) and, in coordination with the European Commission that had invoked deficiencies of transposition in the preceding years, the nowadays regulation (the last fundamental amendments of regulation of unfair terms were executed in 2014) covers the substantial needs of society and the courts have been able to work effectively with the legal regulation. The transposition of the unfair terms in 2004 also positively influenced the legal status of consumers in contracts concluded before 1 April 2004, as under the Section 879f para 3, 4 of the Civil Code consumer contracts concluded prior to this date should be brought into accordance with the provisions of the Civil Code and those contract terms that are not brought into agreement with the provisions of the Sections 53, 54, and 57 of the Civil Code shall become invalid after the lapse of three months from the effective date of this act.

The indicative list in the UCTD served as an inspiration for the Slovak legislator because in the course of the last twelve years it had been transformed with slight amendments to the Civil Code in the form of the list of unfair terms. Slovakia has adopted the list of contract terms in the Section 53 para 4 of the Civil Code. There is almost general consensus among academics that this list constitutes the black list of contract terms,<sup>15</sup> but the hesitations were also expressed as the present wording of the Section 53 para 11 of the Civil Code that requires to assess the unfairness of terms with regard to the nature of the goods or services and to all the circumstances of formation of the contract may favour the idea of “grey

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<sup>15</sup> See BUDJAČ, M. Spotřebitel'ské zmluvy. In: M. ŠTEVČEK, A. DULAK, J. BAJÁNKOVÁ, M. FEČÍK, F. SEDLAČKO, M. TOMAŠOVIČ, et al. *Občiansky zákonník I: § 1 – 450: Komentár*. 1. vyd. Praha: C. H. Beck, 2015, pp. 435-674. ISBN 978-80-7400-597-8; and CSACH, K. *Štandardné zmluvy*. 1. vyd. Plzeň: Aleš Čeněk, 2009, p. 178. ISBN 978-80-7380-199-1.

list”.<sup>16</sup> The preference of the “black list” over the “grey list” has been probably established at the court praxis of recent period where the occurrence of unfair terms from the black list of terms in the contract does not presuppose the further testing of the material imbalance of the interests involved and, therefore, has been favoured by the judges. This position might be strengthened by the overload of consumer cases in the Slovak courts, where the list of unfair terms proved to be very helpful. Nevertheless, the serious arguments raised recently by some authors<sup>17</sup> point out to the legislatively unclear wording of the Section 53 para 4 of the Civil Code that allows also the interpretation that the list in the Section 53 para 4 of the Civil Code is the grey list, the particular term has to be tested by the general clause of unfairness. The indicative list of unfair terms expressly stated in the Civil Code has been the right step supporting the awareness of consumers.<sup>18</sup>

Under the Section 53a para 1 of the Civil Code if the court determined some contract term in the consumer contract concluded in multiple cases (i.e. as a part of standard contract terms) and it is usual that the consumer does not affect the content of the contract in a significant way, or in the standard business terms to be invalid due to the unfairness of such term, or did not award the performance to the trader due to such term, the trader shall refrain from using such term or any term with the same meaning in contracts with all consumers. The trader shall have the same obligation even if the court ordered the trader to render the consumer unjust enrichment, to compensate for damages, or to pay adequate financial compensation on grounds of such term. The legal successor of the trader shall have the same obligation. This provision has been included to the Civil Code as effective from 1 March 2010 in order to secure the full effect to the Article 7 para 1 of the UCTD. The effect of a court decision establishing the unfairness of an unfair term is not limited to the in-

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<sup>16</sup> See LAZÍKOVÁ, J. and M. ŠTEVČEK. Ochrana spotrebiteľa v civilnom procese. *Bulletin slovenskej advokácie*. 2013, roč. 19, č. 6, pp. 20-30. ISSN 1335-1079.

<sup>17</sup> See ZAVADOVÁ, D. Generálne klauzuly v procese aplikácie práva. *Právny obzor*. 2015, roč. 98, č. 4, pp. 338-353. ISSN 0032-6984; and JURČOVÁ, M. and M. NOVOTNÁ. Šedý alebo čierny, to je otázka. In: J. SUCHOŽA, J. HUSÁR and R. HUČKOVÁ, eds. *Právo, obchod, ekonomika VI*. 1. vyd. Košice: Univerzita Pavla Jozefa Šafárika, Právnická fakulta, 2016, pp. 286-294. ISBN 978-80-8152-443-1.

<sup>18</sup> See CÍRÁK, J. Vymožiteľnosť spotrebiteľských práv v kontexte úpravy nekalých klauzúl v spotrebiteľských zmluvách. In: G. URBANSKÁ, ed. *Vymožiteľnosť práva v Slovenskej republike*. 1. vyd. Pezinok: Justičná akadémia Slovenskej republiky, 2009, pp. 31-44. ISBN 978-80-970207-0-5.

dividual relationship between the specific trader and the consumer, but it could be regarded as extended to all contracts concluded with a given trader.<sup>19</sup> Some authors argue that Section 53a of the Civil Code may be understood as an establishment of precedential character of the judicial decisions in consumer matters.<sup>20</sup> Violation of the injunction by trader is considered as a particularly serious breach of his/her obligations (Section 4 para 10 of the Consumer Protection Act). Such breach may lead to the sanctions by the Trade Office and to the suspension of his/her trade licence (Section 58 of the Trades Licencing Act).<sup>21</sup> Under the Section 3 para 5 of the Consumer Protection Act consumers' organisations can sue the trader in cases of collective interests of consumers with the purpose of refrain of violation and eliminate unlawful situation created by the trader.

At the beginning, the effectiveness of the Section 53a para 1 of the Civil Code had been contested by the traders objecting that the various district courts made different judgments concerning the same contract term. These objections have not been well reasoned because the full effect of the Civil Code regulation and the protection of both parties at the court proceeding had been safeguarded by simultaneous amendment of the Civil Procedure Code,<sup>22</sup> effective till 30 June 2016,<sup>23</sup> introducing the admissibility of the appellate review (extra-ordinary legal remedy) under the Section 238 para 3 of the Civil Procedure Code against a judgment of a court of appeals by which a judgment of a court of the first instance has been confirmed, if confirming a judgment of a court of the first instance by which the court of the first instance has declared in the verdict the invalidity of a contract term under the Section 153 para 3 and 4 of the Civil Procedure Code.<sup>24</sup>

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<sup>19</sup> See STRAKA, P. Ustanovenie § 53a nie je o precedensoch. In: M. TURČAN, ed. *Postavenie precedensu v našom právnom prostredí*. 1. vyd. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2013. 143 p. ISBN 978-80-7160-360-3.

<sup>20</sup> See FEKETE, I. *Občiansky zákonník: Veľký komentár: Všeobecná časť: § 1 – § 122: I. zväzok*. 2. aktualiz. a rozšíř. vyd. Bratislava: Eurokódex, 2014, p. 622. ISBN 978-80-8155-039-3.

<sup>21</sup> See the *Act No. 455/1991 Coll. on Trades Licencing, as amended*.

<sup>22</sup> See the *Act No. 99/1963 Coll. Civil Procedure Code*.

<sup>23</sup> See BUDJÁČ, M. *Spotřebitel'ské zmluvy*. In: M. ŠTEVČEK, A. DULAK, J. BAJÁNKOVÁ, M. FEČÍK, F. SEDLAČKO, M. TOMAŠOVIČ, et al. *Občiansky zákonník I: § 1 – 450: Komentár*. 1. vyd. Praha: C. H. Beck, 2015, pp. 435-674. ISBN 978-80-7400-597-8.

<sup>24</sup> "In the judgment regarding disputes arising from or in connection with a consumer contract, the court may state, even without any proposal, that a certain term used in consumer contracts by the supplier is unfair; in such case, the court shall state in the statement of the judgment the wording of such contractual term as agreed in the consumer contract."

The Civil Dispute Procedure Code effective from 1 July 2016 has special provisions on consumer disputes. This new regulation has not only taken over the above-mentioned instruments (determination of the unfair term in the judgment without proposal of participants or admissibility of the extraordinary appeal), but it also explicitly introduced the abstract control of unfair terms in consumer contracts. The final judgments in the proceedings on abstract control of consumer contract will be effective for everybody (Section 306 of the Civil Dispute Procedure Code). The proceedings on abstract review of consumer matters (review of unfair standard terms or unfair commercial practices) is a new type of procedure which is justified by the implementation of the Directive 2009/22/EC on Injunctions for the Protection of Consumers' Interests (Explanatory Report to the Section 301 of the Civil Dispute Procedure Code). The courts of the second instance (concretely the Regional Court in Bratislava, the Regional Court in Banská Bystrica, and the Regional Court in Košice) will decide these cases in the first instance. So, under the Slovak legislation effective from 1 July 2016 it is possible that the court extends effects of court decision to all contracts of trader (in the case inter partes – quasi-precedential character of the court decision), but it is possible to sue the traders in abstract review of unfair contract terms (without necessity of individual dispute). In abstract review, complaint against trader can be filed by the consumer organisation or by the national enforcement authority (e.g. the Slovak Trade Inspection) and violations of injunction in abstract review can be sanctioned by administrative mechanism.

Contractual transparency requirement proved to be one of the most effective measures under the UCTD in connection with the important guiding role of the Court of Justice of the European Union (e.g. C-143/13 Matei, C-26/13 Kásler, Káslerné Rábai). The numerous court decisions and findings of the Commission on Assessment of Terms in Consumer Contracts and of Unfair Commercial Practices have been based on the

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Section 153 para 3 of the *Act No. 99/1963 Coll. Civil Procedure Code*. "If the court has determined any contractual term in a consumer contract or general commercial terms to be invalid due to the unacceptability of such term, has not awarded performance to the supplier because of such term, or the court has imposed an obligation upon the supplier to provide the consumer with unjust enrichment, to compensate a damage, or to pay reasonable financial compensation based on such term, the court shall explicitly state that term in the decision verdict, even without any proposal, in the statement of the judgment the wording of such contractual term as agreed in the consumer contract." Section 153 para 4 of the *Act No. 99/1963 Coll. Civil Procedure Code*.



breach of transparency requirement. In order to strengthen the transparency, one of the recent amendments of the Civil Code employed new measure in the Section 53c of the Civil Code: “If the consumer contract is made in writing, the subject-matter and the price must not be written in smaller letters than other parts of the same contract, except for the title of the contract and its parts. The provisions of a consumer contract as well as provisions contained in general commercial terms and conditions or in any other contractual documents related to the consumer contract must not be written in letters that are unreadable for the consumer or smaller than as set out in an implementing regulation. Any contract made contrary to this provision shall be invalid.” This legislation targeted the frequently applied unfair practice where traders used a very small font size in contracts as well as in general contract terms and conditions. The contract was thus difficult to read, making it hard for consumers to adequately familiarise themselves with the contract.

Invalidity of juridical acts in the Slovak legal order may be absolute (juridical acts are void) or relative (juridical acts are voidable). The regulation of the unfair terms is based on the principle that invalid terms are absolutely invalid (void); such invalidity arises from the statute itself (*ex lege*) and its effects are universal (*erga omnes*), i.e. anyone may claim that a term is void (this rule is in the procedural law restricted by the admissibility to file a claim to the court by the entitled claimant). Absolute invalidity is taken into consideration by courts (or other public authorities) of their own motion (*ex officio*). Absolute invalidity may not be remedied by subsequent approval (ratification) or rendered valid by subsequent termination of invalidity. Performance provided under a void juridical act constitutes unjustified enrichment. Absolute invalidity is not subject to limitation or expiration.<sup>25</sup> On the basis of invalidity of unfair term it may be ordered by the court to restore unjustified enrichment, to pay damages or an adequate pecuniary satisfaction (Section 3 para 5 of the Consumer Protection Act) to the consumer. If the court decides that only part of a contractual term is unfair, this duty applies only with respect to that part. Furthermore, this duty also applies to the supplier’s legal successors.

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<sup>25</sup> See JANČO, M. et al. *Introduction to Slovak Civil Law*. Plzeň: Aleš Čeněk, 2010, p. 36. ISBN 978-80-7380-281-3.

As already mentioned above, the Civil Procedure Code and the newly effective Civil Dispute Procedure Code enhance the determination of the unfair term in the judgment without proposal of participants.

The mostly discussed problem in the relation to the ex officio duty of court to examine the unfair terms used to be connected to the final arbitration awards where the objections with respect to the existence or validity of the arbitration agreement, particularly in the form of an arbitration clause in the consumer contract, has arisen, later only at the stage of its enforcement. The problems were so frequent that the amendment of the Civil Code in 2007 (Act No. 568/2007 Coll.) has also included into the list of unfair terms in the Section 53 para 4 (r) the following term requires from the consumer in the frames of agreed arbitration clause to solve the disputes with the trader solely in the arbitration proceeding.<sup>26</sup> This regulation proved to be insufficient to protect consumers' interests in the arbitration and we can refer to many court decision solving the matters related to the arbitral awards based on the unfair arbitration clauses or if an arbitration clause itself has not proved to be unfair, where the protection of the consumer has been disregarded in the arbitration proceeding. The real choice and protection has been in the arbitration proceeding substantially restricted for the consumer and the personally interconnected circle of suppliers, arbitrators, and solicitors or even judicial executors has proven detrimental for the protection of consumers.<sup>27</sup> Following list contains the extracts from the relevant case-law:

- ✚ Decision of the Regional Court in Prešov of 31 May 2011, No. 14CoE/39/2010 – the arbitration clause as an unfair term;
- ✚ Decision of the Supreme Court of 21 March 2012, No. 6 Cdo 1/2012 – the interpretation of the Section 44 para 2 of the Enforcement Act: the enforcement order that violates law on the grounds of the unfair terms;

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<sup>26</sup> See CSACH, K. *Štandardné zmluvy*. 1. vyd. Plzeň: Aleš Čeněk, 2009, p. 178. ISBN 978-80-7380-199-1; MAGÁL, M. and P. KUBINA. *Rozhodcovské doložky v spotrebiteľských zmluvách*. *Justičná revue*. 2008, roč. 60, č. 4, pp. 616-627. ISSN 1335-6461; and VÝBOCH, J. *Niektoré otázky rozhodcovských doložiek v spotrebiteľských zmluvách z pohľadu posudzovania ich prijateľnosti*. *Právny obzor*. 2013, roč. 96, č. 3, pp. 240-262. ISSN 0032-6984.

<sup>27</sup> See BUDJAČ, M. *Spotrebiteľské zmluvy*. In: M. ŠTEVČEK, A. DULAK, J. BAJÁNKOVÁ, M. FEČÍK, F. SEDLAČKO, M. TOMAŠOVIČ, et al. *Občiansky zákonník I: § 1 – 450: Komentár*. 1. vyd. Praha: C. H. Beck, 2015, pp. 435-674. ISBN 978-80-7400-597-8.

- ✚ Decision of the Regional Court in Trnava of 9 August 2011, No. 10CoE/326/2010 – the arbitration award as a substantially unenforceable order;
- ✚ Decision of the Regional Court in Košice of 15 April 2013, No. 6Co/383/2013 – the admissible period for the abolishment of the arbitration award;
- ✚ Decision of the Regional Court in Banská Bystrica of 26 October 2012, No. 17CoE/175/2012 – substantially unenforceable enforcement order (Section 57 para 1 a) of the Enforcement Order), non-existent jurisdiction of the arbitration court. The court also expressed the idea that the principle *vigilantibus iura scripta sunt* has been overpowered by the need to protect the weaker party in the B2C relations;
- ✚ Decision of the Regional Court in Prešov of 28 September 2012, No. 6CoE/210/2012 – the arbitration clause as an unfair term: sector-specific regulation on bank arbitration does not prevent the obligation of the bank employee to inform the consumer and to enable him/her the possibility of the choice in regard to arbitration.

Perspectives in relation to the arbitral awards have improved only recently, after the enactment of the Act on Consumer Arbitration which provides a new and separate regulation covering alternative dispute resolution methods applicable to contracts involving consumers.<sup>28</sup> The changed situation has been also reflected in the list of unfair terms in the Section 53 para 4 (r) of the Civil Code where the present wording relates to the special requirements set out for the consumer arbitration: "... they enable to solve the dispute between parties in arbitration proceeding without observing the prerequisites set by the special act".

As the administrative remedy is concerned, Section 3 para 3 of the Consumer Protection Act states that the consumer has a right to be protected against the use of unfair contract terms. The administrative authority (e.g. the State Trade Inspection) executes the control of fulfilment of obligations by traders under the Consumer Protection Act. In the frames of this control it may review the standard contract terms, but the court is the sole authority at the level of private law relationships to decide whether the contract term is unfair or not; the protection of consumer by the administrative authority has, therefore, only preliminary

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<sup>28</sup> See MASLÁK, M. Nová právna úprava spotrebiteľského rozhodcovského konania. *Súkrromné právo*. 2015, roč. 1, č. 3, pp. 18-27. ISSN 1339-8652.

character.<sup>29</sup> The Civil Dispute Procedure Code (Section 193) stipulates that court is bound by the decision of the administrative authority that the administrative offence punishable under special regulations has been committed and who has committed it. In this regard, the decision of the administrative authority is definite in relation to respective trader and to relevant contract term in the particular case. Some academics argue that effects of the decisions of the administrative authorities extend beyond the particular case.<sup>30</sup>

Nevertheless, some consumers prefer to notify the administrative authorities of breaches of trader's obligations before taking recourse to a judicial proceeding. The risk of an administrative fine and other sanctions seems to be in some cases a more persuasive compliance mechanism than the risk of a judicial proceeding with its length and costs.<sup>31</sup> The administrative authority is also entitled to order the interim measure on the request of consumer organisation under the Section 21 of the Consumer Protection Act.

The consumers successful in protection of their rights (also by invoking unfairness of contract terms) are entitled to claim financial satisfaction under the Section 3 para 5 of the Consumer Protection Act (e.g. decision of the District Court in Lučenec of 19 May 2014, No. 13Cb/132/2009).

Important role in the assessment of the unfair terms (and unfair commercial practices) plays the Commission on Assessment of Terms in Consumer Contracts and of Unfair Commercial Practices. This authority is part of the Ministry of Justice of the Slovak Republic; its creation was presupposed by the Section 26a of the Consumer Protection Act and its role is to review the standard contract terms. If there is a breach, the Commission on Assessment shall pass its findings to the relevant state authorities or shall contact consumer organisation to give them incentive

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<sup>29</sup> See BUDJAČ, M. Spotrebiteľské zmluvy. In: M. ŠTEVČEK, A. DULAK, J. BAJÁNKOVÁ, M. FEČÍK, F. SEDLAČKO, M. TOMAŠOVIČ, et al. *Občiansky zákonník I: § 1 – 450: Komentár*. 1. vyd. Praha: C. H. Beck, 2015, pp. 435-674. ISBN 978-80-7400-597-8.

<sup>30</sup> See CSACH, K. Nesúdna ingerencia do zmlúv a možnosti jej súdnej korekcie. In: *Ingerencia súdov do súkromnoprávných zmlúv: Zásahy súdov do obsahu súkromnoprávných zmlúv*. 1. vyd. Pezinok: Justičná akadémia Slovenskej republiky, 2014, pp. 52-66. ISBN 978-80-970207-7-4.

<sup>31</sup> See CSACH, K. A Pair of Wings: Air Passenger Rights in the Czech Republic and Slovakia. In: M. BOBEK and J. PRASSL, eds. *Air Passenger Rights: Ten Years on*. 1<sup>st</sup> ed. Oxford: Hart Publishing, 2016, pp. 131-144. ISBN 978-1-84946-824-4.

for a claim at the relevant state authority. Traders are obliged to cooperate with the Commission on Assessment.

Court judgments on unfair terms in consumer contracts are available at the Internet and the most important decisions on consumer matters are also available separately at the Internet pages of the Ministry of Justice of the Slovak Republic, in connection to the work of the Commission on Assessment. These decisions are classified into the groups and this classification proves to be extremely instructive as it significantly shows the most problematic areas in consumer disputes; these are: enforcement against consumers, arbitral awards and their enforcement, transfer of a right for securing the debt of consumer, consumer credit agreements, local competence of the court in consumer matters, maximum permissible consideration and unreasonable contractual fines and fees, exercising of the lien, unfair terms, unfair commercial practices, court fees, and, finally, also decisions of the penal courts in matters dealing with credit and loan agreements.

In Slovakia, there were frequently used unfair practices leading to the incorporation of unfair terms in contract in relation to the representation of the consumer. Traders nominated the person of the representative for consumer in advance and this representative was for future authorised: to create a security in the name of consumer, to represent consumer at the stage of performance and at the stage of enforcement, to acknowledge the debt. Such representative of the consumer was usually a close person to the trader and it could be assumed that there was a conflict of interests between the representative and the principal (consumer). These practices were forbidden and the legal acts arisen out of such representation are invalid. The regulation in the Section 5a of the Consumer Protection Act, however, has its deficiencies because its interpretation may lead to results that the consumer may not use the representative at all. It is also questionable whether the problematic situation could not be solved by the general provisions on the conflict of interests in representation (Section 22 para 2 of the Civil Code).

## **Conclusion**

The Unfair Contract Terms Directive and the Unfair Commercial Practices Directive belong to the most important instruments at the horizontal level of consumer protection. For their future application it will be inevita-

ble to make use of the intertwined regulation of the UCPD and of the Misleading and Comparative Advertising Directive<sup>32</sup> implemented in the Commercial Code within the frame of unfair competition regulation (Section 45 of the Commercial Code). Under this act, the advertisement is misleading also in the cases where it may injure consumers. In this regard, the Slovak implementation provides a higher level of protection as the consumers are also entitled to claim legal protection against unfair competition under the Sections 53 – 55 of the Commercial Code. There is also a strong need for clarification of the interplay between the European Union sector-specific rules and the horizontal European Union consumer law. As the example may serve the case law on the amendments of consumer contracts in the regulated sectors and its applicability on other fields of consumer law; this relation is not clear and the approach of the Court of Justice of the European Union (e.g. C-92/11 RWE Vertrieb or partly also C-359/11, C-400/11) to mix the norms (the UCTD and the sector-specific rules) does not help either.<sup>33</sup>

The implementation both of the UCTD and the UCPD has been a positive step forward. The Slovak economy in the last 25 years has been a typical economy in transition. Consumers, particularly those raised in the socialist era, have not been educated on how to behave in the market economy and the traders tended to interpret the notion “party autonomy” in the most liberal way. Standard contract terms in contracts represented an unknown danger for consumers (and for small and medium-sized enterprises as well). Same applied for the courts. The abuse of the stronger contractual position has been almost tolerated by the courts and the protection of the weaker party at the beginning of the 21<sup>st</sup> Century was disregarded. Outlined situation had created an ideal place for all possible forms of abuse of the traders’ position. Therefore, the implementation of the UCTD may be considered as one of the first positive measures to protect consumers effectively. The protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved significantly after approximately ten years of its ap-

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<sup>32</sup> See the *Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 Concerning Misleading and Comparative Advertising*. OJ EU L 376, 2006-12-27, pp. 21-27.

<sup>33</sup> See CSACH, K. Jednostranná zmena zmluvy (nielen) o finančných službách. *Súkromné právo*. 2015, roč. 1, č. 3, pp. 2-7. ISSN 1339-8652; and CSACH, K. Ochrana dodávateľa obchodných reťazcov prostriedkami súkromného práva. In: *XXIII. Karlovarské právnické dny*. 1. vyd. Praha: Leges, 2015, pp. 425-443. ISBN 978-80-7502-078-9.

plication and it has been improved also by subsequent improvements in the level of implementation.

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