

The scope of consumer protection in the Polish food law: basic issues

Marek Stańko

1.- Introductory issues

Undoubtedly consumer protection is one of the basic objectives of food law. The scope of this protection differs, to a large extent, from traditional principle of the already established consumer law. The areas of legal considerations of this issue may be of various nature – beginning with legal comparative notions and ending with rules of domestic law. Specifying the judicial limits to consumer protection in food law is a complex task. Within the framework of the article it is not possible to carry out a legal analysis of all issues related to consumer protection in the Polish legal system, that is why the attention will be focused on basic notions.

The idea of the article, however, is not exclusively a detailed legal analysis of Polish legal solutions within this subject matter, but mainly an attempt to interpret these regulations which arouse most doubts in the Polish practice, especially from the point of view of their compliance with the Community regulations. Undoubtedly the legal harmonization is of crucial importance in this sphere.

Unquestionably, legal prerequisites for consumer protection should be perceived against the background of food safety since the basic target of legal exertions within food quality is just safety understood as the whole of conditions which must be fulfilled at all stages of food production and turnover, and even more broadly, including, among others, production and turnover of animal feed, in order to protect human life and health. The consequence of such a formulation of the notion is the necessity of taking care of the quality of final foodstuff as well as the safety of the production process.

Taking into account the individual and peculiar character of GMO, this issue is omitted in the article, while its subject matter is limited to 'traditional' methods of food production.

There is no doubt that an achievement of the Community legislation is the focus of legal prerequisites in the sphere of food consumer protection on ensuring the consumer food safety (health aspect) and the right to reliable information (the aspect of the protection of consumer's interests).

More and more often, however, there is put a question about legal instruments with the help of which consumer's protection may be ensured. It can be indicated that permanent broadening of requirements for food producers may in consequence create various barriers for the development of the whole food sector. These barriers may in turn result in limiting, or in extreme cases, in eliminating competition from the market.

The necessity of searching for compromise in this sphere, while ensuring food safety, is a crucial direction for the Community legislation, but also for national legislations, which by their nature are the consequence of prerequisites for the Union law. This legal dilemma must be taken into account in the article considerations.

Special attention will be focused not on legal instruments from the sphere of civil law since they arouse the fewest controversies¹, but, above all, on legal solutions of administrative law character, which often allow public authorities to interfere with food market.

2.- Selected issues

An attempt to mark the range and scope of consumer protection on the ground of food law first of all requires explaining the relation between 'classic' consumer law and food law.

In the Polish doctrine it is clearly indicated that *"food law does not belong to the sphere of consumer law, which refers to rules for the whole commodity market, especially to the regulation within consumer sale, concluding agreements and illicit clauses, so food law is not the law whose basic objective is the protection of the consumer as a weaker party on the product and service market"*².

Such a statement does not mean that consumer law regulations do not apply to the food consumer. It needs underlining, however, that food consumer protection should be perceived in a broader aspect than the one of an "ordinary" consumer, which is just determined by a special nature of the product. In such a formulation food law regulations, especially the ones of public law character, in a particular way, stronger than in typical consumer law, ensure protection for the food consumer. Obviously, provisions of public law character within the scope of consumer protection, also constitute a part of consumer law. Despite this reservation, there may be risked a statement that typical consumer law is, to a large extent, a part of private law, while food law must be 'rooted' to even much larger extent in public law. It is justified by the

⁽¹⁾ See also M. Stańko, *The Liability for Food Product In the Polish Legal System*, in *Agricoltura Istituzioni Mercati*, 2008, No.2.

⁽²⁾ M. Korzycka-Iwanow, *Prawo żywnościowe. Zarys prawa polskiego i wspólnotowego (Food Law. The Outline of Polish and Community Law)*, Warszawa, 2005, p.77.

fact that typical instruments of civil law protection characteristic of consumer law seem to be far insufficient for food consumer protection. It does not exclude the application of civil law instruments, the ones appropriate for consumer law, for food consumer protection. There is no possibility, however, to assume that just the above mentioned relations on the civil law plane mean that food law is a section, although very specific, of consumer law. Seemingly the distinction between the food and consumer law, not only against the above discussed criteria, but also taking into account the over 40-year direction of food law development, should not be questioned.

The consequence of the thesis concerning the distinction between the food and consumer law is the necessity of differentiating the consumer from the food consumer. Already at the beginning it should be pointed out that the Community law does not provide a unified definition of the consumer. In the Polish doctrine, however, it is postulated that in spite of this differentiation and sometimes even definition problems, it can be assumed that within the scope of the notion of the consumer there is positioned a natural person who does not act with an economic or income purpose, but is not limited by consumption development, either.³

It also needs highlighting that the Community law provides a minimal standard in this scope, so there is no reason for excluding *a priori* legal persons. This possibility was not explored in the Polish domestic law. Thus according to the definition included in article 22¹ of the Polish Civil Code⁴ the consumer is a person performing a legal action not related directly to their business or professional activity⁵.

The above solution should be assessed critically since in many real situations legal persons do not appear on the market with earning purposes. Moreover, they happen to be a definitely weaker party of the legal relationship. In the Polish doctrine it is also raised that at least these legal persons who do not perform commercial activities on the market should be included within the scope of the definition of the consumer.⁶ This viewpoint should be entirely acknowledged. Additionally, it is worth mentioning that even a commercial activity in some segment should not exclude a legal person from protection guaranteed to the consumer in the sphere in which a commercial element

⁽³⁾ M.Korzycka-Iwanow, *Prawo żywnościowe... (Food Law...)*, p.71.

⁽⁴⁾ Provision added by the Act of 14 February 2003 amending the Civil Code (Journal of Law No. 49, item 408).

⁽⁵⁾ Also in other domestic acts exclusively a natural person is included into the consumer category – compare, among others, the Act of 27 July 2002 on special conditions of consumer sale (Journal of Law No.141, item 1176 with amendments) or even earlier Act of 20 July on consumer credits (Journal of Law No. 100, item 1081 with amendments).

⁽⁶⁾ See C. Banasiński, *Prawo ochrony konsumenta*, in *Standardy wspólnotowe w polskim prawie ochrony konsumenta*, edited by C. Banasiński, Warszawa 2004, page 15 and subsequent.

does not appear. What is more, it needs highlighting that Polish legislation limiting the notion of consumer only to natural persons is not coherent in this matter with legislations of the European Union's member states. Admittedly, as it was indicated previously, the Community law neither defines the notion of consumer nor imposes any commitments on member states in this sphere. Nevertheless, some tendencies in this matter are clearly noticeable – the purchase of goods and consumption are separated from the process of production and selling, that is from the sphere of economic activity⁷. It should be added that there is no division of consumers into natural and legal persons.

The above mentioned remarks entirely refer to food consumers. However, since there was made a clear distinction between consumer and food law, in consequence it is vital to make a distinction between the consumer and food consumer. The Polish doctrine in this case makes use of the construction of end-consumer, being at the very end of food chain. According to this formulation the end-consumer is the final consumer of foodstuff who does not make use of food within the activity of the subject of food sector. It is also stressed that a fundamental feature distinguishing the food consumer is the fact that he is not only the purchaser of the food product, but also that this product is consumed by him.⁸ In the Polish doctrine, however, the issue of the purpose of food product purchase has not been settled univocally. The dispute refers particularly to the question whether the purchase on the market in the case of consumer category should involve only his private use or also economic purpose. As far as the latter is concerned protection would also cover entrepreneurs, who in a particular sphere, if they do not deal permanently with a particular transaction, undoubtedly appear as a weaker party of the legal relationship and for this reason deserve protection characteristic of consumer law⁹ but food law as well.

Not claiming to settle this dispute, the latter of the presented options seems to be closer to the pro-community interpretation of food law, which is of great importance in the case of countries such as Poland which is still in progress as far as the integration with the European Union is concerned.

As it was already indicated in the introduction, legal requirements in the sphere of food consumers focus on ensuring food safety. This results from a wider context, since the good protected in provisions of food law is consumer's life and health. The protection of goods cannot be limited only to controlling, using also public law measures, the

⁽⁷⁾ This trend was clearly outlined already in the Regulation of the European Court of Justice of 14 March 1991. Case C-361/89 against Patrice di Pinto. The collection of judicial decisions of the European Court of Justice 1991, pp.1-1189.

⁽⁸⁾ M.Korzycka-Iwanow, *Prawo żywnościowe ... (Food Law...)*, p. 74.

⁽⁹⁾ See more: E. Łętowska, *Prawo umów konsumenckich (The Law of Consumer Agreements)*, Warszawa, 2002, p. 40 ss.

process of food turnover itself and its reliability, but there is also the necessity of covering the process of food production with control, including the primary production (the environment of original food production). The latter aspect of protection is essential. It is only recently that food law has included primary food production.

As M. Korzycka-Iwanow emphasizes in the Polish doctrine: *'the beginnings of including primary production into the food chain should be traced in a new approach to food safety. In order to ensure food safety it is necessary to take into account all the aspects of food chain, starting with primary production, with feed production, through food distributions, sale, up to its delivery to the end-consumer'*¹⁰.

It can only be added that justification for such an expression of the matter results directly from point 12 of the Preamble to Regulation (EC) No. 178/2002 of the European Parliament and of the Council 28 January 2002 laying down general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety¹¹. In this point of the Preamble it was stated explicitly that including all the above mentioned aspects of the food production chain might influence food safety.

From the point of view of limits to consumer's protection the analysis of all legal aspects of food safety goes beyond the scope of the article. Referring, however, to the put forward in the introduction thesis resolving the question whether permanent broadening of requirements for food chain members or even excess of the requirements may in consequence create various barriers for the development of the whole food sector, which may in turn result in limiting or eliminating competition from the market, calls for giving an example of latest legal solutions introduced to the Polish legislation and including the above mentioned elements of food chain. The fact that domestic solutions are the consequence of instruments resulting from the Community law should be taken into account. The analysis of legal solutions from the point of view of competition principle is not accidental. Here again the justification for such an approach can be searched in the already cited Preamble to Regulation No 178/2002 of the European Parliament and the Council of 28 January 2002. According to point 3 of the Preamble: *"the free movement of food and feed within the Community can be achieved only if food and feed safety requirements do not differ significantly from Member State to Member State"*. The postulated limitation of free movement of goods in this sphere does not exclude its market fundamentals.

From the point of view of the Polish food law system, such basic issues as official food control, hygienic food requirements and marking food products should be included in order to take them into account in further analysis.

⁽¹⁰⁾ M.Korzycka-Iwanow, *Prawo żywnościowe ... (Food Law...)*, p. 100 ss.

⁽¹¹⁾ OJ L 31, 1.2.2002, p. 1, OJ Special Polish Edition, chap. 15, vol. 6. p. 463, called further 'Regulation No 178/2002'.

The food consumer is protected both in health aspect as well as in his right to reliable information by legal instruments regulating the above mentioned issues. It must be noticed that the issues intermingle in legal regulations. It needs highlighting that in all indicated above spheres Polish legislation complies with the Community law requirements, at least with minimum standards. That is why discussing detailed solutions of domestic law does not seem to be of great importance, while it is crucial to indicate these legal tools with the help of which the domestic legislator undertakes activities aimed to adjust legal solutions to standards higher than minimum.

3.- Domestic legal solutions

Moving on to the exemplification of domestic legal solutions it is worth stressing that for ensuring higher standards of food safety essential seem to be those solutions which introduce new stricter criteria for the assessment of the primary production process. It needs underlining that the majority of legal acts has been passed in 2010.

3.1.- The furthest-going example of such legal solutions is the amended by the Act of 8 January 2010 domestic act on food and feed safety¹². It should be added that the domestic act to a large extent meets Community standards, especially the ones of the already cited Regulation (EC) No. 178/2002, but also standards of other Community legal acts. Nevertheless, since Community acts have reached higher standards¹³, amending the Polish act has become indispensable. In the domestic act the notion of Good Manufacturing Practice – GMP was stated precisely. This notion was obviously used in the act, nevertheless, it was necessary to extend the scope of the notion in relation to materials and articles destined to contact food.

3.2.- The Regulation of the Minister of Agriculture and Rural Development of 18 March 2010 on selected conditions of ecological production is also of compliance

(¹²) Journal of Law 2010 No. 21, item 105. The basic text of the Act of 25 August 2006 on food and feed safety (Journal of Law No. 171, item 1225 with amendments).

(¹³) See e.g. The Commission Regulation (EC) No. 669/2009 of 24 July 2009 on executing Regulation (EC) No. 882/2004 the European Parliament and of the Council on increased official control of imports of some types of feed and food of non-animal origin ... (Journal of Law EC L 194 of 25 July 2009, p.11) or Commission Regulation (EC) No. 901 of 28 September 2009 on long-term coordinated Community program of control for years 2010,2011 and 2012 aimed to ensure compliance with the highest allowed levels of pesticide remains in food of plant and animal origin and on its surface as well as exposing consumer to it (Journal of Law EC L No. 256 of 29 September 2009, p.14).

character within the scope of food primary production¹⁴. The regulation states precisely such issues as farm animal coverage, period necessary to plant recreation on areas designed for fowl-run, which is not shorter than 28 days, as well as conditions of acknowledging freely running breeds and lines of fowl as ecological, despite not achieving slaughter maturity by them.

3.3.- The Regulation of the Minister of Agriculture and Rural Development of 15 February 2010 on veterinary requirements concerning marking the meat from animals slaughtered in case of emergency¹⁵ is of special importance as far as the analysed matter is concerned. It needs pointing out that this regulation, because of its particular character, was previously notified by the European Commission.

3.4.- The Regulation of the Minister of Agriculture and Rural Development of 8 January 2010 amending regulations on marking food with nutritive value¹⁶ is essential as far as consumer protection is concerned. This regulation reflects legal requirements of the Commission Directive 2008/100/EC of 28 October 2008¹⁷. It should be emphasized that the regulation allows foodstuff not meeting the standards to be the object of turnover on the area of Poland up to October 31, 2012. Special protection of food consumer, however, consists in shortening the period in case of earlier minimum consumption usage or expiry date.

4.- Conclusions

The indicated examples do not use up the whole of the analysed subject matter. They seem, however, to reflect the thesis put forward at the very beginning concerning the necessity to search for a compromise between raising standards of consumer protection in the scope of food safety and free movement of goods, including food products. The cost of solutions implemented in the sphere of food safety is not to be neglected, especially in case of member states of low affluence level. The costs are carried not only on food prices but also on economic condition of its producers. That is

⁽¹⁴⁾ Journal of Law No.56, item 348. The regulation was published on the basis of Article 19 part 1 of Act of 25 June 2009 on ecological agriculture (Journal of Law No.116, item 975).

⁽¹⁵⁾ Journal of Law No.29, item 150.

⁽¹⁶⁾ Journal of Law No.9, item 63.

⁽¹⁷⁾ Journal of Law EC L No. 285 of 29 October 2008, p.9. The Directive amended the Council Directive 90/496 EEC on marking nutritive value of foodstuff in relation to the recommended daily consumption, energy coefficients and definitions.

why maintaining high food standards will be connected in many cases with the necessity of state's economic interference. Solving such dilemmas goes beyond the legal sphere. It does not mean, however, that it is necessary to indicate them in a legal publication.

There is no doubt that in the sphere of basic issues, such as the pointed out scope of the notion of consumer, including food consumer, there is a need for extending this scope to legal persons, who may also occur or act as a weaker party of the legal relationship.

Taking into account the fact that the subject matter of food consumer protection belongs to a large extent to the public legal sphere, the view that there is a need for the dominance of administrative law method in the sphere of food law regulations should be approved.

There should also be highlighted that although Poland has not directly introduced to the domestic law order so called right to appropriate food, the constitutional provisions in force allow to enjoy and enforce this right. As an example there can be indicated Article 76 of the Constitution of the Polish People's Republic¹⁸ which obliges public authorities, to mention but a few, to protect the consumer from activities putting his health in danger.

The interpretation of this provision enables to draw conclusions that the right to safe, not putting in danger food is contained in consumer protection.

It is also necessary to underline that the scope of consumer protection in the sphere of food safety is the result of not only activities of legal and organizational-legal character but also economic policy. It seems that in the latter sphere the most essential should be activities of preventive character, which should be followed by controlling ones.

⁽¹⁸⁾ Journal of Law No.78, item 483 as amended.