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The complaint process and the need to ensure a high level of protection for customers of financial market entities in the light of the Act of August 5, 2015 on complaints handling by financial market entities and on the Financial Ombudsman – practical comments

Since the Insurance Ombudsman was established in Poland, customers of financial institutions, consumers in particular, are being placed under an increasingly broader and more strongly enforced statutory protection in the scope of infringements of their individual rights and interests. Under the previously applicable legal status there were no generally applicable regulations imposing the obligation to consider complaints within a reasonable time on financial market entities. This has changed with the entry into force of the Act of 5th August 2015 concerning the complaint handling process by the entities of financial market and Financial Ombudsman. The existing legislation does not provide full consumer protection, however, legislation in this area is constantly developed and still better enforced. In this article, the authors present the right to consider a complaint as a fundamental consumer right. The authors discuss the scope of application of the Act of 5th August 2015, the course of the complaint procedure, including the form and manner of delivering the response to the customer – at the same time formulating numerous practical comments and de lege ferenda proposals.

Keywords: complaint, Financial Ombudsman, consumer protection, financial institution

1. The need to ensure high level of consumer protection in the EU law

The need to ensure an adequate, high level of consumer protection, widely recognized in developed countries, results from the respect for the principles of human dignity, which arise from international conventions on human rights. The relationship between a consumer and a professionally operating entrepreneur is obviously asymmetric. For this reason, in modern legal systems, the basis for creating pro-consumer regulations is the need to counteract that asymmetry, including, in particular, asymmetry of information – through active interference of the authorities in the content of the legal relationship[1].

The normative grounds for consumer protection on the financial services market in the EU are regulated in the European treaties, in particular in Art. 4 para. 2 letter f and Art. 12, 114 and 169 of the Treaty on the Functioning of the European Union[2] (hereinafter: TFEU) and in Art. 38 of the Charter on Fundamental Rights of the European Union[3] (hereinafter: CFREU). The need to ensure a high level of consumer protection is seen as a guarantee of the efficient functioning of the internal market.

Consumer protection is an area of competence shared between the EU and the Member States, which results from Art. 4 para. 2 letter f TFEU. According to Art. 12 TFEU, consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities. Art. 114 para. 3 TFEU states that the Commission, in its proposals envisaged in para. 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective. According to Art. 169 para. 1 TFEU, in order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests. Finally, Art. 38 CFREU states that Union policies shall ensure a high level of consumer protection.

The right to file a complaint and receive a response from the entrepreneur to the consumer's objections within a reasonable time is a fundamental right of the consumer. It is in the complaint process that the customer may present his objections to the services provided and the products offered, and the entrepreneur must respond to these objections by responding to the consumer. This contributes to the avoidance of costly and troublesome, especially for the consumer, court disputes, which constitute an unnecessary burden for the judiciary, especially when the value of the dispute is modest.

At the time of joining the EU, the Polish legal system lacked a comprehensive regulation that would apply to complaints related to dissatisfaction with services provided on the financial market. As a result, customers of financial market entities were confused and often waited for weeks for a response for their complaints. Financial institutions often ignored customer complaints and

1. A. Jurkowska-Zeidler, *Aktualne problemy ochrony klienta na rynku bankowym z perspektywy działalności rzecznika finansowego,* „Gdańskie Studia Prawnicze" 1/2018, p. 42–43.
2. OJ C 326, 26.10.2012, p. 47–390, hereinafter: TFEU.
3. OJ C 326/391, 26.10.2012, p. 391–407, hereinafter: CFREU.

did not respond to them at all. As a result, customers were forced to pursue their claims in court, because the universally binding law did not impose clear obligations on financial market entities allowing for adequate level of protection of customers.

The first regulation relating to the issue of complaints on the financial services market was Resolution No. 116/11 of the Polish Financial Supervision Authority (hereinafter: PFSA) of May 10, 2011 on guidelines regarding the Rules for handling complaints by financial institutions (hereinafter: Resolution No. 116/11). The appendix to that resolution indicated, for the first time in the Polish legal system, the rules concerning the following:

- the methods of informing the customer about the possibility of submitting a complaint,
- the methods of submitting a complaint by a customer;
- a response to a complaint.

These rules were derived mostly from codes of good conduct developed by the banking sector through self-regulation. In the preamble to Resolution No. 116/11, the PFSA refers precisely to the principles of good conduct developed by financial market entities, in particular to the Canon of Good Practices of the Financial Market. On July 22, 2014, the PFSA adopted Resolution No. 218/2014 on the Principles of Corporate Governance for Supervised Institutions, where customer complaints are regulated in para. 39–42. Subsequently, the PFSA issued Resolution No. 192/2015 of May 26, 2015 on the Principles of Complaints Service by Financial Institutions (hereinafter: Resolution No. 192/2015), which replaced Resolution No. 116/11. The preamble to Resolution No. 192/2015 indicates that the PFSA has developed that document taking into account the principles of good practice developed by financial market participants, the Principles of Corporate Governance for supervised institutions and guidelines published by the European supervisory authorities. These are the Guidelines on Complaints-Handling by Insurance Undertakings[4] and the Guidelines on Complaints-Handling for the Securities (ESMA) and Banking (EBA) Sectors[5]. Those guidelines in practice obligated the Member States to create local regulations regarding customer complaints in national orders, therefore the PFSA issued Resolution No. 192/2015[6].

The complaint procedure has become an increasingly formalized process over the years – it is evolving from soft provisions of an intra-industry self-regulatory nature to generally applicable provisions at the time of complex regulation by the Act of August 5th, 2015 concerning the complaint handling process by the entities of financial market and Financial Ombudsman[7] (hereinafter: Financial Ombudsman Act). In the explanatory statement to the proposal of Financial Ombudsman Act, it was stated that 'in the current legal status, in a number of sectoral acts, which form the legal framework of the financial market, there are no regulations sanctioning complaint procedures and imposing on financial market entities the obligation to contact the customer lodging the complaint. As a result of the lack of such regulations, presented *expressis verbis* in the regulations and covering the financial market, a state of complete discretion has been created as to the terms and principles of responding to customer complaints / requests in the complaint procedure. In the opinion of the proposal movers, the problem is of great practical importance – the level and

4. Published by EIOPA, 16.11.2012.
5. Published by ESA Joint Committee, 25.8.2014.
6. J. Szeląg, *Istota reklamacji w sektorze usług bankowych*, ABC. https://sip.lex.pl/#/publication/469899874/szelag-jaroslaw-istota-reklamacji-w-sektorze-uslug-bankowych?cm=URELATIONS (8.1.2022).
7. Journal of Laws from 2015, item 1348.

quality of the regulation of the matter of complaints significantly influences building citizens' trust in the entire financial market sector (e.g. banking, payment services, insurance)'[8].

2. A complaint procedure – the scope of the application of the Financial Ombudsman Act

The Financial Ombudsman is a state institution that in 2015 replaced the Insurance Ombudsman, operating since 1995. The Insurance Ombudsman used to undertake activities on the insurance and pension market, in particular in the field of insurance, pension funds, occupational pension programs and capital pensions when it was required to protect customers of entities operating on this market[9].

Under the current legal framework, the Ombudsman's competences have been significantly extended by including entities operating on the entire financial market. The Act on the Financial Ombudsman contains a definition of a financial market entity which, apart from entities operating on the insurance and pension market, also includes other entities operating on the financial market, in particular:

- a payment institution, a small payment institution, an account information service provider, an account information only service provider, a payment service office, an electronic money institution and a branch of a foreign electronic money institution;
- a domestic bank, a foreign bank, a branch of a foreign bank, a branch of a credit institution and a financial institution;
- an investment fund company and an investment fund as well as an ASI management company and an alternative investment company;
- a cooperative savings and credit union (SKOK);
- an investment company;
- a loan institution;
- a credit broker.

The definitions of a financial market entity[10] and a customer of a financial market entity[11]are casuistic and indicate exhaustively the categories of entities considered to be a financial market entity and a customer of a financial market entity – within the meaning of the Act. The list of entities and customers is a closed catalogue. In order to provide adequate protection to customers of financial market entities, including, in particular, consumers, the definition of a financial market entity and a customer of a financial market entity should be constantly expanded as the financial market develops and new institutions appear on it.

A customer of a financial market entity within the meaning of the Act is a natural person. This means that the customer within the meaning of the Act is not only a consumer, but also a natural

8. Explanatory statement to the proposal of Financial Ombudsman Act, Sejm paper No. 3430, https://www.sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?nr=3430 (23.2.2022).
9. Explanatory statement to the proposal of Financial Ombudsman Act, Sejm paper No. 3430, https://www.sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?nr=3430 (23.2.2022).
10. Art. 2 point 3 of the Financial Ombudsman Act.
11. Art. 2, point 1 of the Financial Ombudsman Act.

person running a business (sole proprietorship). On the other hand, legal persons, including commercial companies, cannot be classified as customers of a financial market entity. The *ratio legis* of the regulations in question implies a broad understanding of the definition of a customer of a financial market entity. A potential customer should also be considered a customer of a financial market entity as long as they are a natural person. The customer's qualification may also include other cases, e.g. in the banking sector, a beneficiary in the event of death, or the beneficiary of a bank guarantee and a bank's customer's heir should also be considered a bank's customer.

Pursuant to Art. 2 point 2 of the Financial Ombudsman Act, a complaint is an application addressed to a financial market entity by its customer, in which the customer raises reservations about the services provided by the financial market entity. The definition of a complaint is quite complex. There are objective and subjective elements that must be presented in a customer's request in order to consider it a complaint. To test whether a customer's request meets the legal requirements of a 'complaint', a three-step test should be performed by answering the following questions:

- does the customer request refer to services provided by a financial market entity?
- does the customer meet the criteria for being considered a customer of a financial market entity within the meaning of the Act?
- does the request contain any allegation regarding the services provided by the financial market entity?

The objective element of the definition of a complaint contained in Art. 2 point 2 of the Financial Ombudsman Act is the customer's request in which he presents an allegation to the services provided by the financial market entity (including the refusal to provide services)[12]. There is no statutory definition of the term "allegation", therefore it should be commonly understood as criticism, disapproval or dissatisfaction[13]. T. Czech points out that by the "allegations" referred to in Art. 2 point 2 of the Act, one should understand the critical statements regarding non-performance or improper performance of obligations incumbent on the financial institution towards the customer. According to the author, these obligations may result from a legal action, legal act or rules of social coexistence or established customs (Art. 56 of the Civil Code) and may relate to the provision of a financial service to a customer or related activities[14].The author distinguishes activities at the pre-contractual stage (e.g. as to the provision of specific information) or post-contract phase (e.g. as to the return of a bill of exchange)[15].

In the opinion of the authors, any customer letter containing objections regarding the services should always be treated as a complaint, even if it bears different title, such as 'motion' or 'claim'.

12. What has been confirmed by the organization associating entities of the banking market: ZBP, *Interpretacje dotyczące wybranych aspektów ustawy z dnia 5 sierpnia 2015 r. o rozpatrywaniu reklamacji przez podmioty rynku finansowego i o Rzeczniku Finansowym,* 3.12.2019, LEX nr 185098129, pkt II.12.3.
13. M. Chołodecki, M. Strzelbicki, *Ustawa o rozpatrywaniu reklamacji przez podmioty rynku finansowego i o Rzeczniku Finansowym. Komentarz*, Instytut Wydawniczy EuroPrawo 2017, p. 18.
14. However, a complaint not related to financial services, such as the investment policy of a financial market entity or the personnel of its management board, shall not constitute a complaint. B. Bronisz, *Ustawa o rozpatrywaniu reklamacji przez podmioty rynku finansowego i Rzeczniku Finansowym*, „Monitor Prawa Bankowego" 3/2016, p. 69.
15. T. Czech, *Konsekwencje nierozpatrzenia reklamacji klienta instytucji finansowej w wymaganym terminie*, „Monitor Prawa Bankowego", 4/2016, p. 67–78.

The Act does not impose excessive requirements for the recognition of a customer's request as a complaint within the meaning of the Financial Ombudsman Act. The purpose of such approach was certainly the intention to increase the level of protection of people using financial services and to increase citizens' trust in the entire financial market sector by simplifying the complaint submission process as much as possible[16].

In the authors' view, in the practice of the application of the act, it turns out that it is problematic that the customers do not mention their demands, or claims, as it is not an obligatory element of the complaint. When drawing up a complaint, a customer often focuses on the reservations they formulate against a financial market entity and does not articulate their demands towards that entity at the same time or expresses them in a very general manner. In such a situation, conducting an intervention in an individual case by the Financial Ombudsman is difficult and may be limited. It is difficult to demand that a customer's claim be satisfied by a financial market entity if the claim itself has not been specified by the customer. In this case, in a formal sense, it is still a complaint, however, ensuring customer protection under the Financial Ombudsman Act may be difficult.

Pursuant to Art. 3 sec. 1 of the Financial Ombudsman Act, a complaint may be submitted to any unit of the financial market entity that serves customers. A complaint may be submitted in one of the three forms:

- written – delivered in person at a unit of a financial market entity that serves customers, or sent by post or sent to electronic delivery address;
- oral – by phone or in person for the record during the customer's visit to the unit;
- electronic – with the use of electronic means of communication, if such means have been indicated for this purpose by a financial market entity.

The submission of a complaint by the customer in electronic form – using electronic means of communication, will not always be possible. This form of submission of a complaint depends in practice on the decision of the financial market entity, which may decide not to use electronic means of communication for that purpose. In this regard, the postulate of changing the optional nature of the possibility of submitting complaints with the use of electronic communication means to an obligatory nature is justified, in particular taking into account the development of new technologies and the growing popularity of electronic communication channels.

In the authors' point of view a frequent mistake of customers is to submit a complaint in a manner inconsistent with the content of the above-mentioned provision of Art. 3 sec. 1 of the Financial Ombudsman Act. It is not uncommon for a customer's complaint to be directed to the e-mail address of the specific bank employee serving the customer, or to another e-mail address of the entity selected by the customer, which is not the dedicated channel for delivering the complaint. Although usually the complaint delivered by the customer in this way will be forwarded to the appropriate unit responsible for complaints in the financial market entity, this method of delivering a complaint does not meet the instruction indicated in Art. 3 of the Financial Ombudsman Act. At the same time, the customer of a financial market entity should have access to information on the complaint procedure, because, pursuant to Art. 4 sec. 1 of the Financial Ombudsman Act, a financial market

16. Explanatory statement to the proposal of Financial Ombudsman Act, Sejm paper No. 3430, https://www.sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?nr=3430 (23.2.2022).

entity is obliged to include in the contract concluded with the customer a detailed information on the procedure for submitting and considering complaints, such as:

- the place and the form of submitting a complaint;
- the time limit for considering the complaint;
- the method of notification of the complaint consideration.

M. Nowakowski points out that the abovementioned provision should always be considered in conjunction with the relevant sectoral regulations, which may specify the requirements for informing customers about the manner of handling complaints[17]. For example, the author refers to the Ordinance of the Minister of Finance of May 30, 2018 on the procedure and conditions of conduct of investment firms and banks referred to in Art. 70 sec. 2 of the Act on Trading in Financial Instruments and custodian banks (Journal of Laws 2020, item 1922) and Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organizational requirements and operating conditions for investment firms and defined terms for the purposes of this Directive (OJ L 87, 31.3.2017, p. 1–83) which contain specific requirements for investment firms and entities involved in the provision of services on the broadly understood capital market[18].

Pursuant to Art. 4 sec. 2 of the Financial Ombudsman Act, in relation to the customers who have not concluded an agreement with a financial market entity, information on the complaint procedure should be provided within 7 days from the date on which the customer's claims against the financial market entity were submitted. In the case of persons who cannot be assigned the status of a customer of a financial market entity, it is reasonable to refuse to respond to the complaint[19].

3. A response to a complaint – forms and methods of delivery

The provisions contained in Chapter 2 of the Financial Ombudsman Act are intended to ensure that the process of accepting and examining complaints and providing answers to them in the relationship between financial market entities and their customers within the meaning of the general provisions of the Act will be efficient and will take into account the protection of customers of financial market entities as the weaker parties to the contract. It is an important context to read the provisions of Art. 5 sec. 1 and 2 of the Act, regarding the form of responding to the complaint.

The rule provided for by the legislator is to maintain the written form as appropriate to reply to a complaint (Article 5 sec. 1 of the Financial Ombudsman Act). The electronic form, i.e. submitting a declaration of will in the electronic form and affixing it with a qualified electronic signature, should be considered equivalent to the written form, (Art. 78 § 1 and Art. 781 § 1 of the Civil Code, previously: Art. 78 § 1 and 2 of the Civil Code). Providing a response in a form other than that

17. Here the author rightly points to a certain terminological issue, related to the fact that some legal acts use the term "complaints" instead of "complaints", but these terms should be treated synonymously.

18. M. Nowakowski [in:] *Ustawa o rozpatrywaniu reklamacji przez podmioty rynku finansowego i Rzeczniku Finansowym. Komentarz*, LEX/el. 2021, Art. 4. https://sip.lex.pl/#/commentary/587866102/663542?tocHit=1&cm=URELATIONS (26.02.2022).

19. A. Urbańczyk, *Pojęcie reklamacji w ustawie o rozpatrywaniu reklamacji przez podmioty rynku finansowego i o Rzeczniku Finansowym* [in:] *Nowe zasady dystrybucji ubezpieczeń. Zagadnienia prawne*, red. J. Pokrzywniak, Wolters Kluwer Polska 2018, LEX nr 369439466.

resulting from the definition of the written or electronic form, e.g. using the documentary form, should be considered insufficient, which leads to the conclusion that the customer did not receive a response to the complaint in the form required by the legislator. This may have significant effects in the light of Art. 8 of the Financial Ombudsman Act, which will be discussed later in this paper.

A distinction should be made between providing and delivering a response to a complaint (Art. 5 sec. 2 of the Financial Ombudsman Act). A financial market entity, at the customer's request, may provide its response to the complaint by e-mail. This is not equivalent to the possibility of preparing a reply to the complaint in the form of an e-mail, i.e. in the form of a document and not in the written or electronic form, even with the consent of the customer. Such consent may only include the method of delivering the answer, made in written or electronic form using e-mail, e.g. by attaching a document containing a correctly prepared response to the complaint or by providing data enabling the download and reading of such a response, even in the form of a link to the document containing a response to the complaint.

It is worth noting that until October 4, 2021, it was possible to prepare a response to the complaint "on paper or using another durable medium". Changing this provision has significant consequences in terms of carrying out the complaint process. In particular, the legislator removed the possibility of responding to a complaint without the signature (handwritten or qualified electronic) of the person preparing such a reply, indicating only the name and position of that person (Article 9 sec. 3 of the Financial Ombudsman Act).

On the basis of the previous legal framework, the jurisprudence on the concept of 'durable information medium' has developed[20]. Although, due to the change in the content of Art. 5 sec. 1 of the Financial Ombudsman Act, this concept is no longer directly applicable to the method of responding to complaints by financial market entities[21], yet the process of determining the jurisprudence has led to the establishment of a practice that is also relevant today. Namely, some financial market entities used to reply to complaints, communicating it with the use of their own systems, e.g. internet banking systems. This solution allowed a financial market entity to interfere with the content of a complaint already granted and did not guarantee the customer access to the content of such a response after the end of the relationship with the entity or after removing or blocking access to the system. According to the jurisprudence, such conduct of an entrepreneur does not mean the transfer of information or a declaration of will on a durable medium. Numerous financial market entities have introduced tools allowing for the transfer of documents to customers, which remain available also after the termination of the contract, regardless of the customer's access e.g. to the internet banking system, and cannot be changed by the financial market entity.

It is worth noting that the provision of Art. 15a sec. 2 of the Act of 19 August 2011 on Payment Services (Journal of Laws of 2021, item 1907 as amended, hereinafter: the Payment Services Act) introducing certain differences regarding the complaint process in relation to payment services (described hereinafter), has not been amended following the change in the wording of Art. 5 sec. 1 of the Financial Ombudsman Act and still imposes the obligation to respond to a complaint on paper

20. CJEU judgment of 25 January 2017, C-375/15, and numerous decisions and important views of the President of OCCP (collective information: https://www.uokik.gov.pl/aktualnosci.php?news_id=14909, 26.2.2022).

21. Despite this change, the statutory glossary (Art. 2 point 4 of the Financial Ombudsman Act) still defines the term "durable medium of information". The remaining part of the Act does not contain this concept, and therefore leaving this definition is pointless and seems to be a legislator's mistake.

or (after agreeing with the user) on another durable information medium. It is desirable to unify the rules concerning the form of responding to a complaint, and the current differences may result from the legislator's oversight. It is difficult to find a rational explanation why the legislator would consciously resign from the use of the term 'durable information medium' only in relation to services other than payment services.

Nevertheless, the limitation of the requirement to obtain a customer's consent to provide a response to a complaint (Article 5 sec. 2 of the Financial Ombudsman Act) only by e-mail, and not more broadly – with the use of any means of electronic communication, remains problematic. The reason for introducing this restriction was undoubtedly the desire to increase the protection of customers who do not use e-mail, which is the basic method of electronic communication. In particular, among senior customers, it is a common practice to provide – when an e-mail address is required – contact details, e.g. of a child or grandchild of the customer. On the other hand, some customers use electronic communication, including e-mail, only when needed, and not every day. It was therefore justified to introduce the possibility of responding to the complaint by e-mail only at the customer's request. However, taking into account the teleological interpretation of this provision, in the authors' view, it should be interpreted broadly, covering not only e-mail, but also the electronic communication system operated by a financial market entity, e.g. constituting part of the internet banking system. A different interpretation of this provision, preventing the default delivery of a reply to a complaint by e-mail and allowing such a reply to be delivered in another electronic communication system, would lead to an absurd and unacceptable conclusion that the customer of a financial market entity is not obliged to regularly check electronic mailbox that he has set up himself but at the same time they are obliged to read the news received in the system imposed on him by the financial market entity.

The discussed provision of Art. 5 sec. 2 of the Financial Ombudsman Act undoubtedly requires clarification by the legislator. However, also in the current legal situation, the use by financial market entities of a different interpretation of this provision than the pro-consumer (broadening) interpretation constitutes a breach of the obligation to act in the best interest of the customer, as it may lead to the situation when a customer misses the content of the reply to the complaint and the fact of receiving such a reply.

The practice of obtaining top-down consent to respond to future complaints by e-mail, including as part of a declaration that is an element of a standard contract, should be considered unacceptable. Such practice may be an attempt to bypass applicable law and deteriorate the situation of a customer of a financial market entity[22].

22. Due to the different wording of the special provision on payment services, i.e. Art. 15a sec. 2 of the Payment Services Act, there are divergent opinions as to the possibility of agreeing in the contract for the provision of services for sending responses to complaints by e-mail (e.g. J. Byrski, Art. 15a, [in:] J. Byrski, A. Zalcewicz (eds), Act on Payment Services. Commentary, 2nd edition, Wolters Kluwer 2021). The described discrepancy between the provisions of the Payment Services Act and the Financial Ombudsman Act should be removed in order to unify the rules of responding to complaints.

4. A response to a complaint – time limit

Pursuant to Art. 6 of the Financial Ombudsman Act, response to a complaint should be provided without undue delay, not later than within 30 days from the date of receipt of the complaint. To meet the deadline, it is enough to send a reply before its expiry. The provision is clear. Problems with its application relate to a large extent to situations in which customers count the deadline for responding to the complaint from the date of sending the complaint (and not its delivery to the financial market entity) or until receiving the response to the complaint (and not sending it). These problems may result from a different regulation regarding complaints under the statutory warranty (Art. 561^5 of the Civil Code).

Some financial market entities send to their customers responses to complaints by unregistered mail. In the event of loss of such a parcel, it is impossible to determine the date of responding to the complaint, and therefore to prove that the answer was given at all. There is no doubt that due to the pro-customer nature of the provisions of Chapter 2 of the Financial Ombudsman Act, failure to meet the deadline for responding to a complaint should be considered as failure to meet the obligation to provide such a response[23]. Consequently, the results of a business decision of a financial market entity to send a response to a complaint by unregistered mail, caused by organizational or economic reasons, may therefore be imposed only on this entity as the sender, and not on the customer[24]. It is irrelevant that the legislator did not introduce the obligation to reply to the complaint by registered mail. In the authors' point of view, the fact that the financial market entity met the deadline for responding to the complaint should be demonstrated in accordance with the burden of proof under Art. 6 of the Civil Code. The argument for making the shipment within the time limit specified in Art. 6 of the Financial Ombudsman Act may be, in particular, the fact that the customer referred to the fact of receiving this reply in further correspondence (e.g. an appeal) in a manner that did not leave any doubts that the reply was sent within the statutory deadline. On the other hand, the presentation by a financial market entity of a private document in the form of a mailing list maintained by the entity, created by the entity, and not by an independent postal operator, should raise justified doubts as to the truthfulness of the information contained therein.

The provision of Art. 7 of the Financial Ombudsman Act provides for the extension of the time limit for responding to the complaint. Practical problems with the application of this provision by financial market entities include sending of the information referred to in this provision by unregistered mail and incompleteness of the information provided.

The effects of sending the information referred to in the provision in question by unregistered mail should be assessed similarly to the effects of sending a response to a complaint by unregistered mail. Also in this case, it is on the financial market entity to demonstrate that the information has been sent.

Some financial market entities decide to send replies to complaints in a way that allows proving the fact and date of their provision, however, the information referred to in Art. 7 of the Financial Ombudsman Act is sent by the same entities by unregistered mail. Meanwhile, it should

23. T. Czech, *Konsekwencje* …, p. 67.

24. The Supreme Administrative Court presented a similar position in terms of determining the date of posting by ordinary letter in its judgment of 25 September 2019, I OSK 2927/17.

be recognized that the burden of proof regarding the provision of this information is also borne by an entity on the financial market. Failure to comply with this obligation should lead to the recognition that the deadline for responding to a complaint has not been extended. In practice, this will mean that a letter intended to constitute a response to a complaint, sent after 30 days, but within 60 days, does not constitute a response to the complaint due to the ineffective expiry of the deadline for providing it.

The legislator in the provision of Art. 7 of the Financial Ombudsman Act presented three mandatory elements of information that an entity is required to provide to the customer in the event of extending the response to a complaint. Those are:

- explanation of the reason for the delay,
- indication of the circumstances that must be established for consideration of the case,
- specification of the expected time limit for considering the complaint and answering it, which may not exceed 60 days from the date of receipt of the complaint.

In practice, financial market entities often ignore the need to indicate the circumstances that must be established for the consideration of the case, indicating only the reason for the delay (e.g. the complexity of the case) and the time limit for providing a final response. This information is often laconic without referring to the details of the case and prompts the customer's opinion that the financial market entity has not found time to consider the complaint within the standard time limit, despite the lack of circumstances justifying the extension of this limit. A letter of a financial market entity to a customer that does not contain at least one of the obligatory elements of the information referred to in Art. 7 of the Financial Ombudsman Act, does not extend the deadline for responding to the complaint.

Different regulations regarding the deadline for responding to a complaint apply to payment services. Art. 15a sec. 2 and 3 of the Payment Services Act, which are special provisions[25], shorten the time limits contained in Art. 6 of the Financial Ombudsman Act (from 30 days to 15 business days) and in Art. 7 of the Financial Ombudsman Act (from 60 days to 35 business days). The nature of complaints regarding payment services justifies shortening the time limits for responding to complaints, because in practice such complaints are often related to e.g. blocking access to a bank account, authorization of payment transactions or bank transfers.

It can be considered whether other services provided by financial market entities would not require shortening the time limit for responding to a complaint, similar to payment services. The standard 30-day time limit is not used in its entirety only because of the complexity of the case, but often for organizational reasons. For comparison, in the case of a sales contract concluded by an entrepreneur with a consumer, it is required to respond to a complaint under the warranty within 14 days (Art. 561^5 of the Civil Code), regardless of the need to examine the item by an expert. Process optimization and the use of new technologies would allow for the efficient handling of complaints, except for really complicated situations, which would be considered under Art. 7 of the Financial Ombudsman Act. The standardization of the default time limit for responding to a complaint does not seem to significantly hinder the activities of financial market entities, but it would be a significant facilitation for their customers. Additionally, it is desirable to standardize

25. B. Wyżykowski, *Procedury rozpatrywania reklamacji w świetle ustaw o usługach płatniczych*, „Monitor Prawa Bankowego" 12/2019, p. 71–73.

the method of calculating this period (in days or in business days), as the present discrepancy may cause additional complications for both parties to the dispute.

5. Recognition of a complaint as resolved in accordance to a customer's will

Literal interpretation of Art. 8 of the Financial Ombudsman Act leads to the recognition that failure to respond to a complaint by a financial market entity within the statutory deadline leads to significant legal consequences, highly unfavourable for this entity, i.e. recognition that the complaint has been considered in accordance with the customer's will. The prevailing position in the doctrine was that this presumption was rebuttable, and the literal interpretation of the provision under examination would deprive a financial market entity of the right to a court[26]. Discrepancies in the jurisprudence[27] were unified by the resolution of the Supreme Court of June 13, 2018, III CZP 113/17[28]. The Supreme Court found no basis to assume that failure to consider the complaint within the statutory deadline would modify the legal relationship existing between the financial market entity and its customer to such an extent that the entity would be burdened with an absolute obligation to perform the service resulting from the complaint. In the opinion of the Supreme Court, the very fact of departing from the general rules regarding burden of proof is beneficial for customers of financial market entities. As a consequence, the Supreme Court adopted a resolution according to which Art. 8 of the Financial Ombudsman Act does not exclude the possibility of a financial market entity questioning the legitimacy of the claim, and the entity bears the burden of proof that the customer is not entitled to the compensation or is entitled to a lower amount. This resolution, however, does not have the force of a legal principle.

In the justification of the discussed resolution, the Supreme Court stated that its interpretation of Art. 8 of the Financial Ombudsman Act does not mean consent to the disregard of customers, which is manifested in the failure to consider complaints by financial market entities within the statutory time limit. While the mere fact of shifting the burden of proof to the financial market entity as to the legitimacy and amount is a mechanism undoubtedly beneficial for the customer, knowledge of the Polish financial services market, the insurance market in particular, allows one to assume that this mechanism will not be sufficient to encourage customers to pursue claims before common courts. Taking into account the reluctance of natural persons to participate

26. E. Bagińska, *Skutki prawne nieudzielenia w terminie odpowiedzi na reklamację klienta podmiotu rynku finansowego*, „Wiadomości Ubezpieczeniowe" 1/2018, p. 22–24; K. Magoń, *Ochrona klienta usług finansowych w świetle ustawy o rozpatrywaniu reklamacji przez podmioty rynku finansowego i o Rzeczniku Finansowym – zagadnienia wybrane* [in:] E. Rutkowska-Tomaszewska (ed), *Ochrona klienta na rynku usług finansowych w świetle aktualnych problemów i regulacji prawnych*, Legalis 2017. different position was presented, among others, by T. Czech, *KonsekwencjeE*, p. 69–71 and M. Ryskalczyk, *Ustawa o dystrybucji ubezpieczeń. Komentarz*, P. Czublun (ed), Legalis 2018, Art. 99, pkt 10.

27. See e.g. the judgment of the District Court in Konin of 23 December 2016, I C 2299/16, in which the court found the taking of evidence unnecessary in view of the failure to reply to the complaint; similarly, the District Court for Warszawa-Mokotów in Warsaw in its judgment of 30 March 2017, XVI C 7/17; differently, the District Court in Warsaw in its judgment of June 19, 2017, II C 334/16.

28. See also D. Marko, *Milczące rozpatrzenie reklamacji zgodnie z wolą klienta przez podmiot rynku finansowego. Glosa do uchwały SN z dnia 13 czerwca 2018 r., III CZP 113/17*, „Orzecznictwo Sądów Polskich" 7–8/2019, p. 68.

in court proceedings due to the fear of incurring costs and insufficient reimbursement of the costs of professional legal assistance, it may be necessary to consider whether Art. 8 of the Financial Ombudsman Act fulfils completely its protective function towards customers. Otherwise, the legislator could design and introduce a more effective and more accessible protection mechanism, which at the same time would not raise doubts as to the right to court for financial market entities.

6. The obligatory elements of a response to a complaint

The provisions of Art. 9 and 10 of the Financial Ombudsman Act contain a list of obligatory elements of a response to a complaint, which should be divided into two groups. The first of them concerns the elements that must be included in each response to a complaint, regardless of whether or not the financial market entity considered the customer's claim to be justified. Those are as follows:

- comprehensive information on the position of the financial market entity on the objections raised, including the indication of the relevant parts of the standard agreement or contract (Article 9 point 2 of the Act);
- name and surname of the person providing the answer with an indication of their official position (Art. 9 point 3 of the Act).

The second group includes the obligatory elements in the case of a reply to a complaint in which a financial market entity refused to recognize the complaint as justified in part or in whole:

- factual and legal justification (Art. 9 point 1 of the Act);
- instruction on the possibility of appealing against the position contained in the response, if the financial market entity provides for an appeal procedure, as well as on the manner of submitting such an appeal (Art. 10 point 1 of the Act);
- instruction on the possibility of using the institution of mediation or an arbitration court, or another mechanism of alternative dispute resolution, if the financial market entity provides for such a possibility (Art. 10 point 2 of the Act);
- instruction on the possibility of submitting a request for consideration of the case to the Financial Ombudsman (Art. 10 point 3 of the Act);
- instruction on the possibility of bringing an action to a common court with an indication of the entity that should be sued and the court having jurisdiction over the case (Art. 10 point 4 of the Act).

The lack of any obligatory element of the response to the complaint means that the application of the financial market entity to the customer does not constitute a response to the complaint[29], and therefore should lead to the transfer of the burden of proof in civil law proceedings pursuant to Art. 8 of the Financial Ombudsman Act.

The control of compliance by financial market entities can be carried out in two ways: during court proceedings, if a customer indicates that he has not received a reply to their complaint containing all the obligatory elements, and during consideration of a case by the Financial Ombudsman. The Financial Ombudsman is entitled to issue a decision imposing a fine on a financial market entity, including for violation of the provisions of Art. 6–10 of the Financial Ombudsman Act,

29. D. Marko, *Obowiązek udzielenia odpowiedzi na reklamację przez podmioty rynku finansowego i jego cywilnoprawne skutki,* „Przegląd Sądowy" 11–12/2018, p. 107–109.

up to the amount of PLN 100,000.00. The Financial Ombudsman exercises this power, according to the annual report on their activities, and sometimes also by means of press releases[30].

Summary

From the moment of the introduction of the Insurance Ombudsman into legal framework, customers of financial market entities have been gradually covered by broader and more enforceable protection in the field of infringement of their individual interests by these entities. Currently, the principles of this protection provided at the pre-trial stage result mainly from the provisions of the Financial Ombudsman Act. These provisions do not fully guarantee the high level of protection that customers – especially consumers – expect from the legal system in a dispute with a financial market entity which have the possibility of obtaining specialized legal assistance.

Due to the development of new technologies, it is justified to change the optional nature of the possibility of submitting complaints with the use of electronic communication means into obligatory. Financial market entities, including start-ups targeting the offer of fintech services to young users, cannot, however, ignore the need to accept complaints through other traditional channels. Customers less familiar with new technologies may also have problems reading the content of the response to a complaint provided without their consent by electronic means, which is often based on an incorrect and too narrow interpretation of Art. 5 sec. 2 of the Financial Ombudsman Act.

The change regarding the form of responding to a complaint should be considered beneficial for customers, but it caused inconsistency in the content of the Financial Ombudsman Act and between this act and the related provisions of the Payment Services Act.

The discrepancies between those two acts also apply to the method of calculating the time limit for responding to a complaint. Considering this problem, the legislator could consider whether the length of these time limits is justified, or whether it would be possible to shorten and standardise them in the interest of customers of financial market entities.

The interpretation of Art. 8 of the Financial Ombudsman Act, in the light of the actual situation of customers on the financial services market, raises doubts as to whether the breach of a customer's interests in the form of failure to reply to a complaint within the statutory time limit has been sufficiently sanctioned against financial market entities. However, the increased activity of the Financial Ombudsman in the area of initiating proceedings in cases of imposing a fine gives hope that financial market entities will more scrupulously fulfil their obligations regarding the complaint process.

30. In the period from October to December 2020, the Financial Ombudsman initiated 66 administrative proceedings *ex officio* to impose a fine on financial market entities pursuant to Art. 32 of the Financial Ombudsman Act, i.e. due to a breach of obligations under Art. 4 sec. 1, art. 6–10, art. 30 and Art. 31 of the Act. Financial Ombudsman, *Report on the activities of the Financial Ombudsman in 2020 and comments on the state of compliance with the law and interests of clients of financial market entities and a report on activities in 2020 financed by the Financial Education Fund along with information on the use of the Fund's resources*, March 2021, https://rf.gov.pl/wp-content/uploads/2021/04/30.03.2021_Sprawozdanie-Rzecznika-Finansowego-za-2020-rok-wersja-konco...-1.pdf (26.2.2022).

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Proces reklamacyjny a potrzeba zapewnienia wysokiego poziomu ochrony klientów podmiotów rynku finansowego w świetle ustawy z dnia 5 sierpnia 2015 r. o rozpatrywaniu reklamacji przez podmioty rynku finansowego i o Rzeczniku Finansowym – uwagi praktyczne

Od momentu utworzenia instytucji Rzecznika Ubezpieczonych klienci podmiotów rynku finansowego, w szczególności konsumenci, byli stopniowo obejmowani coraz szerszą i silniej egzekwowaną ochroną w zakresie naruszeń ich praw i interesów indywidualnych. W poprzednio obowiązującym stanie prawnym brak było przepisów powszechnie obowiązujących obligujących podmioty rynku finansowego do rozpatrywania reklamacji w rozsądnym terminie. Obecnie kwestie te reguluje ustawa o Rzeczniku Finansowym. Przepisy te nie gwarantują w pełni wysokiego poziomu ochrony, są jednak stale rozbudowywane i coraz lepiej egzekwowane. W niniejszym artykule autorki przedstawiają prawo do rozpatrzenia reklamacji jako fundamentalne prawo konsumenta. Autorki omawiają zakres zastosowania ustawy, przebieg postępowania reklamacyjnego, w tym formę i sposób doręczenia odpowiedzi na reklamację – czynią przy tym liczne uwagi praktyczne i postulaty de lege ferenda.

Słowa kluczowe: reklamacja, Rzecznik Finansowy, ochrona konsumenta, klient podmiotu rynku finansowego.

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