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Title: Pojęcie konsumenta na rynku kapitałowym w prawie polskim i unijnym / Notion of a consumer in capital market in Polish and EU law
Source: Kwartalnik Prawa Prywatnego („Quarterly of Private Law”)
Year: 2018, vol. XXVII, number 2, pages: 457-525
Keywords: consumer, retail investor, capital market law, markets in financial instruments
Discipline: Civil Law, Capital Market Law
Language: Polish
Document type: Article
Publication order reference: Chair of Private Commercial Law, Faculty of Law and Administration, Jagiellonian University

Abstract:

The article presents a theoretical study of a notion of the “consumer” in capital market from a perspective of Polish and EU law. The text explains the methods and legislative history of consumer regulation under the EU capital market laws. Although there is a large body of law, policy documents and literature on various aspects of horizontal consumer protection, relatively little attention has been paid to problem of a legal status of consumer *sensu stricto* within old and new dimensions of the nowadays capital markets. This is surprising given that consumers are indirectly or directly one of main sources of capital on market in financial instruments. An average consumer faces various types and sources of risks while deliberating or making an investment decision in financial instruments. The risks are strongly enhanced by the rapid progress of financial innovation and growing complexity of financial instruments' creation and trading methods. Some of the risks include: purchasing inadequate financial instruments e.g. non-standardized financial instruments or structured financial products, direct electronic access to trading platforms, OTC securities trading, Forex transactions, obtaining inadequate investment advice, abusive practices of investment companies e.g. combined sales, mis-selling or pressure selling of self-placed securities, camouflaging of material risks, conflicts of interests, self-dealing, ill-designed investment advisors' incentive and compensation systems, advising without the license, aggressive or untrue marketing. This catalogue should be complemented by two types of “traditional”, but yet ever changing in form, capital market abuse, i.e. insider trading and market manipulation, as well as issuers' improper disclosure, professional market actors acting in multiple roles in a way undiscerned by consumer (e.g. banks holding consumers' deposits and offering them securities within proprietary trading) or in self-interest (e.g. rating agencies motivated by profit chasing) as well as general lack of legal

equilibrium in legal relations, large imbalance in economic powers, imbalance of experience and expertise, consumers' passivity, inflexible civil procedures, ineffective supervision and poor enforcement.

The main paradigm of investors' protection EU legislation and discussion till now have focused generally either on other sectors of more broadly defined financial market or on issues of retail investor protection in the capital market. If the consumer seemed a bit forgotten actor of the capital market regulation, this was mainly because the scope of notion of retail investor, as defined by MiFID or used by UCITS/AIFMD, is more extensive than consumer *sensu stricto*, including also small and medium enterprises that lack experience and knowledge of professional investors. Furthermore, in a traditional perspective, consumer protection has not been a domain of a capital market regulation and *vice versa*. Most of all, consumer is still rather undefined character in the capital market laws. Who really is an investor understood as a natural person acting for purposes outside his trade, business, craft or profession? How long does such investor retain her status while she invests on a continuous basis? What about the investor's dual status: being the consumer and professional at the same time? Is protection objective or subjective? In what circumstances the consumer ceases to be a consumer for the capital market law purpose?

In the light of above-described jigsaw, this article attempts to define the notion of the consumer for the capital market laws in the light of Polish and EU law. It does so through decoding the consumer related areas and provisions spread in the complex financial instruments' market regulation, and merging them with civil law consumer provisions. The article argues that using the notion of the consumer in the capital market law brings benefits of widening, deepening and multiplying measures of protective instruments, particularly in the area of contractual rights and procedural remedies not granted to other types of retail investors. This approach is particularly valuable when applied to the new dimensions of securities markets, like OTC and distribution of complex non-standardized financial instruments, which currently in EU represents value of investments larger than placed in traditional regulated markets.