

# Legality of so-called “epidemic fees”

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**Abstract**— The article refers to the problem of the so-called “epidemic fees”, collected by the entrepreneurs during the epidemic in order to compensate increased costs of running a business in a sanitary regime. The Author analyzes whether collecting of such fees is acceptable in the light of actual legal status. The problem is examined from the civil law point of view, with particular emphasis on the provisions referring to abusive clauses, exploitation and limitations of the freedom of contract due to the principles of social coexistence. The Author also tries to define the requirements that such fees should meet to be considered acceptable, as well as compliance with legal provisions referring to practicing a certain profession (for example a physician, a dentist), as well as the principles of professional ethics, proper and prior informational obligation and adjustment of the fee amount to the real and reasonable costs of running a business in an increased sanitary regime.

**Index Terms**— “epidemic fee”, epidemic, consumer, entrepreneur, contract

## I. INTRODUCTION

In connection with the coronavirus pandemic on the consumer services market, there is a phenomenon of entrepreneurs charging additional fees for services or increasing their prices. This is to compensate entrepreneurs for the costs of hygiene and personal protection measures (disinfectants, masks, visors, gloves, protective suits, etc.) that they have to bear due to sanitary and epidemiological requirements. Thus, especially in the media, the so-called “epidemic fees (sanitary, covid - the name comes from the disease caused by the coronavirus - COVID-19)”, which usually range from a dozen to even several hundred zlotys (compare uokik.gov.pl; Kowalska 2020). This phenomenon mainly concerns medical facilities, including doctor's and dentist's surgeries, but also other industries whose employees have close contact with the client and thus should apply special protection against infection, e.g. hairdressing and beauty salons, catering facilities or childcare facilities (compare Orlikowski 2020). The collection of “epidemic fees” has become the subject of numerous complaints to consumer protection authorities, so it is worth analysing this new procedure in terms of its compliance with consumer protection standards, all the more so as we are unable

to predict how much longer the epidemic will last and thus how long such fees will be collected. However, consideration of these charges may also be useful in a wider context, namely all kinds of additional benefits that are collected by traders in the wider context of extraordinary business conditions.

## II. ARE “EPIDEMIC FEES” ABUSIVE CLAUSES?

The first of the legal norms that may apply to the so-called “epidemic fees” is Article 385<sup>1</sup> § 1 of the Civil Code (Act of 23.4.1964 - Civil Code, i.e. Journal of Laws of 2019, item 1145), according to which the provisions of a contract concluded with a consumer not individually agreed upon do not bind him/her if they shape his/her rights and obligations in a manner contrary to good practice, grossly infringing his/her interests (prohibited contractual provisions, otherwise called abusive clauses). However, this does not apply to provisions defining the parties' main performances, including price or remuneration, if they are formulated explicitly.

It would therefore appear that since the “epidemic fee” concerns a price or remuneration, it is excluded from the assessment of abusivity. But can the opposite view be defended? It should be remembered that the exclusion contained in Article 385<sup>1</sup> § 1 sentence 2 of the Civil Code is an exception to the principle of control over the content of unfair terms and should therefore be interpreted restrictively (Mikłaszewicz 2020; Legalis, art. 385<sup>1</sup> KC, Nb 25). In the judiciary, there are cases in which the control of abusiveness is extended to elements of a contract which seemingly have the character of the main benefit concerning price or remuneration, but which in fact include some additional benefit, of an extraordinary nature - examples include rulings stating that the so-called “unfairness” is not a problem. liquidation fees charged by insurers (usually in the form of a deduction from the benefit payable to the policyholder) in the case of early termination of a life insurance contract with an insurance capital fund are not the main benefits within the meaning of Article 385<sup>1</sup> § 1 sentence 2 of the Civil Code (cf. e.g. the recent resolution of the Supreme Court of 24.1.2020 on this problem), III CZP 51/19, Legalis). The reference to this problem is important because entrepreneurs also in this case tried to justify charging these fees



with additional costs which arose as a result of premature termination of the contract (compare Romanowski & Romanowski 2014, pp. 34-35; Wiśniewski 2012, pp. 31-32). The view expressed in the jurisprudence should be regarded as correct that in the case of the so-called liquidation fees "the main benefit should be considered at most exclusively the obligation to pay the policyholder the amount resulting from the funds accumulated by him/her. The reduction of this amount by the costs incurred by the insurer is a secondary issue which does not fall within the scope of performance of a benefit under the contract, but serves only to satisfy certain costs of the insurer, i.e. performance of a completely different benefit" (Judgment of the Regional Court in Nowy Sącz of 9.6.2016, III Ca 269/16, [orzeczenia.nowysacz.so.gov.pl](http://orzeczenia.nowysacz.so.gov.pl)). Therefore, the liquidation fee has been treated as an additional benefit, over-programmed and extra-coordinated, and not as the main benefit of the parties.

A similar position could be formulated with regard to the so-called 'epidemic charges', which are also, as it were, intended to be additional compensation for increased costs borne by entrepreneurs, which are at the same time costs of an extraordinary nature, because they are de facto connected with the state of emergency in which society and the economy currently operate (such a state of emergency has not been formally introduced, but there is no doubt that the epidemic is an absolutely exceptional situation). In addition, in a situation of increased demand for hygiene measures in the broad sense of the term, there has been a sharp increase in their prices, which is also an exceptional situation. It is also worth mentioning the unquestionable risk to which people in close contact with the customer are exposed, as well as their potential civil liability for failure to observe proper hygiene standards, resulting in infection of customers or their own employees. The 'epidemic fee' can therefore also be considered as a kind of extra-coordinated service for working under special conditions.

If this point of view were to be taken, it would be acceptable to control the abusive nature of the contractual clauses providing for an 'epidemic fee' as an incidental benefit, but in view of the wording of Article 385(1)(b) of the Civil Code, this may be a controversial view, and it seems to be applicable primarily where the "epidemic fee" can be clearly distinguished from the price as an ancillary service, e.g. a separate item on the bill or invoice, because if it is only an increase in the existing price, it may be much more difficult to prove that we are dealing with a certain ancillary service.

### III. ARE "EPIDEMIC FEES" EXPLOITATIVE?

It may also be questioned whether the collection of 'epidemic charges' constitutes exploitation in the light of Article 388(1) of the Civil Code, according to which if one party, exploiting the other party's forced position, infirmity or inexperience, accepts or reserves for itself or a third party, in return for its performance, a performance whose value at the time of conclusion of the contract is grossly greater than the value of its own performance, the other party may demand a reduction in its performance or an increase in the performance owed to it, and if both would be unduly hindered, it may demand the

cancellation of the contract. It seems that recourse to this provision would be more effective than the provisions on prohibited contractual performances because of the aforementioned inability to control the abusive nature of the provisions defining the parties' main performances, which does not, however, preclude an assessment of the content of the contract in the light of general provisions, and in particular through the prism of exploitation (Ruchała&Sikorski 2019; Legalis, art. 385<sup>1</sup> Civil Code, Nb. 19).

Persons forced to use the services of entrepreneurs charging such fees are sometimes in a forced position, as they have to use e.g. private health care services, which are difficult to access due to the epidemic and thus also the possibility to use the services of competitors is limited - a simple example can be the situation of a person with severe toothache, living in a town where the only active dental office charges "epidemic fees". The doctrine points out that the compulsion to be located within the meaning of Article 388(1) of the Civil Code may concern both financial issues and situations of threat to life, health or honour - it may be, for example, a difficult financial situation or the need to pay for expensive treatment (compare Grebieniow 2020, art. 388 Civil Code, Nb. 24). In practice, therefore, considerations about "epidemic charges" in the context of exploitation may primarily concern services in the field of broadly understood health care, and not, for example, the services of hairdressers or beauticians, because in this case we cannot speak about the forced position of the client. In addition, certain persons in a forced position and in need of urgent medical care, which cannot be provided by the public health service, also fulfil the condition of infirmity within the meaning of Article 388 § 1 of the Civil Code.

The question arises as to whether the costs incurred by the entrepreneurs exceed the limits of normal economic risk, since the provision of Article 388(1) of the Civil Code requires the occurrence of a gross disproportion in the value of mutual benefits of the contracting parties. Undoubtedly, health care facilities, as a rule, operate under an increased sanitary regime and the costs of articles such as protective masks, gloves or disinfectants are within the standard costs incurred by such facilities. It may be slightly different, e.g. with hairdressing and beauty salons, but there, for example, disinfection of instruments is applied as standard, regardless of the sanitary and epidemiological situation, and besides, as already mentioned, it is difficult to talk about exploitation at all in this case. Of course, a commonly known circumstance is the increase in prices of hygiene and personal protection products on the market, which justifies the right of entrepreneurs to increase prices, however, here too, an analogy can be used to the already mentioned problem of liquidation fees in life insurance contracts with an insurance capital fund, which the doctrine and jurisprudence emphasize that an entrepreneur should be able to demonstrate the legitimacy and amount of the costs incurred, which he would like to pass on to his clients in case of a dispute, because not all costs can be charged to persons using the entrepreneur's services (cf. On this subject, e.g. judgment of the District Court for Wrocław-Śródmieście in Wrocław of 27.10.2014, I C 1318/14, unpublished, after: Gadomska-

Orłowska, Kamieński, Orłowski, Więcko 2012; [http://www.rf.gov.pl,s. 32-33](http://www.rf.gov.pl,s.32-33); judgment of the District Court in Gdynia of 29.9.2015r., I C 308/15 [orzeczenia.gdynia.sr.gov.pl](http://orzeczenia.gdynia.sr.gov.pl); Romanowski&Romanowski 2020, p. 42).

The legal basis for questioning the contractual provisions providing for the so-called "epidemic charges" may also be sought in Article 58 § 2 of the Civil Code, according to which a legal act contrary to the principles of social intercourse is invalid. The doctrine rightly draws attention to the not entirely clear relationship between this provision and the already mentioned Article 388 of the Civil Code, which deals with exploitation (compare *Grebienow 2020*; Article 388 of the Civil Code, Nb. 57-65), however, as indicated above, it can undoubtedly be regarded as an infringement of the principles of social coexistence that the charging of abnormally high and insufficiently justified benefits from persons who are in a forced position and have, in conditions of epidemics, limited opportunities to use the services of competitors can also be regarded as an infringement of the principles of social coexistence.

#### IV. CONDITIONS FOR THE ADMISSIBILITY OF COLLECTING "EPIDEMIC FEES"

In view of the existence of the legal bases mentioned above enabling consumers to challenge the legality of "epidemic fees" can any general requirements be formulated which such charges should meet in order to be considered acceptable? Let us use the example of health care services, as it is in this sector that such fees are most common.

In the case of doctors and dentists providing medical assistance within the NFZ, it should be noted that in accordance with § 3.5 of the Regulation of the Minister of Health of 8.9.2015 on general terms and conditions of contracts for the provision of health care services (Journal of Laws of 2015), the provider is obliged to supply itself with medicines, foodstuffs for special nutritional purposes, medical devices and other materials necessary to perform the service under the contract. This means that the public health service has no grounds to pass on the increased costs of necessary funds to patients, all the more so because within the framework of services reimbursed by the NFZ, a patient does not conclude an agreement with a medical institution, and thus the institution has no right to shape the conditions of treatment - the agreement is concluded by the medical institution with the NFZ, and the patient is only a beneficiary of this agreement (compare Józwick 2020; [infodent24.pl](http://infodent24.pl)). The existing jurisprudence has indicated that entities providing healthcare services financed from public funds may only charge fees that are based on the law, while they are not entitled to charge other fees - in particular, these entities are required to provide medicines that are necessary for the overall care of the patient; they also do not have the right to charge patients for the use of the entity's equipment, e.g. TV, wardrobe, kettle (cf. judgment of the Supreme Administrative Court of 28.9.2018, II OSK 1342/18, [Legalis](http://legalis.pl); Józwick 2020). Therefore, the collection of "epidemic fees" in public health care facilities would very likely be considered inadmissible by

the courts.

However, with regard to private establishments, the above principles are obviously not binding, but this does not mean total freedom in setting the price conditions for the provision of services, as the general principle of freedom of contract applies (compare Józwick 2020), also limited by the principles of social coexistence (art. 353<sup>1</sup> Civil Code). In the context of the principles of social coexistence, however, the specific mission of the medical professions should be borne in mind, also regulated by law. According to art. 30 of the Act of 5.12.1996 on the professions of doctor and dentist (i.e. Journal of Laws of 2020, item 514, 567), a doctor is obliged to provide medical assistance in every case when a delay in providing it could result in a risk of loss of life, serious bodily injury or serious health disorder, and in other cases of impatience, and thus even the patient's failure to pay the "epidemic fee" or any fee at all cannot result in refusal to provide assistance (Józwick 2020)- of course, in urgent situations patients will usually go to public health care institutions, but this may be different especially in the case of dental care, which is largely private. Also the Code of Medical Ethics (<http://www.nil.org.pl>) in Article 2, paragraph 2 states that market mechanisms do not exempt a physician from the obligation to be guided by the patient's welfare. Article 66 (1) and (2) of the Code also states that a doctor has the right to agree on the amount of the fee before the commencement of treatment, however, the exception to this rule is emergency assistance, and in the absence of appropriate price lists, the doctor should take into account the value of the service rendered, his own costs incurred, his qualifications and, as far as possible, the patient's financial situation. A doctor providing a private service may therefore, in principle, charge fees corresponding to reasonable operating costs, but charging fees that are too high and are 'extra for work in particular conditions' rather than a real reflection of the increase in the price of hygiene products on the market may be regarded as contrary to the principles of social coexistence, in particular if the medical service in question is relatively simple, is of short duration and does not increase significantly the risk of infection. It also seems that the amount of the "epidemic fees" acceptable from the point of view of social co-existence rules may range from several to several dozen zlotys, but already several hundred zlotys may be considered exaggerated, although the assessment will of course depend on the circumstances of each individual case.

For the collection of "epidemic fees" to be legal, in addition to their compatibility with the principles of social coexistence, another necessary condition must be met. This is to inform the customer, before the service is provided, about the need to pay such a fee and its amount - it is unacceptable to surprise the customer with such a fee after the service has been provided ([uokik.gov.pl](http://uokik.gov.pl)). The price lists used should also take into account the principle of equality and be the same for the same services for all consumers using the services of a given trader and not set arbitrarily, according to a subjective assessment of the degree of wealth of a particular client or the nature of his relationship with the trader (after the so-called "familiarity"), although of course practices such as exempting or reducing

such fees to people in a difficult financial situation, or leaving the possibility to bring them to the goodwill of the clients themselves, on the basis of helping traders affected by the epidemic crisis are laudable.

#### V. CONCLUSION

The situation requires undoubtedly greater cooperation, loyalty and honesty on both sides of the contract than before - consumers need to understand that many businesses have lost or even threatened to become insolvent as a result of the epidemic, and that the costs of operating under a tighter sanitary regime and under conditions of rising prices for hygiene products require significantly increased financial outlays, while businesses - that consumers often find themselves in a forced position, are unable to use the services of their competitors and that many of them have also suffered income losses as a result of the epidemic. However, it should be borne in mind that consumers are the weaker party to the contract, and the legislator should therefore make every effort to provide them with the best possible protection against damage to their interests. It should also be stressed that traders are, after all, able to benefit from the various forms of emergency public aid provided in the wake of an epidemic and should therefore not charge consumers too much. Fixing 'epidemic fees' at a level significantly above the market value of the services provided may give the impression that it is not so much the costs associated with ensuring sanitary safety that are passed on to consumers, but rather the profits lost during the period of forced closures of service premises, and such practices should not take place. The problem of 'epidemic fees' seems so significant that doubts should be expressed as to whether it can be left to market mechanisms alone to resolve it. If the state of the epidemic is prolonged, it might be justified for the legislator to consider additional legal solutions to counteract the infringement of consumers' interests, e.g. by introducing limits on "epidemic fees" on the model of, for example, regulation of the maximum amount of interest and costs of consumer credits or the establishment of specific ethical standards in this respect by professional self-governments, e.g. medical professions.

#### VI. REFERENCES

- Gadomska-Orłowska A., Kamiński W., Orłowski C., Więcko M. (2012), Ubezpieczenia na życie z ubezpieczeniowym funduszem kapitałowym - Raport Rzecznika Ubezpieczonych, Warszawa 2012, <http://www.rf.gov.pl>
- Gutowski M.(red.) (2019), Kodeks cywilny. Komentarz. Tom II, wyd. 2, Warszawa 2019, Legalis
- Jóźwik A. (2020), Koronawirus: czy lekarz dentyista może pobierać opłatę epidemiczną - opinia prawna, <http://www.infodent24.pl>, 1.5.2020r.
- Kowalska K. (2020), O opłacie covidowej pacjent ma wiedzieć wcześniej, Rzeczpospolita 3.6.2020r., LegalisKoronawirus. Dodatkowe opłaty za usługi, <http://www.uokik.gov.pl>, 2.6.2020r.
- Orlikowski P. (2020), Opłata covidowa. Nawet 350 zł od klienta, UOKiK reaguje, <http://www.finanse.wp.pl>, 2.6.2020r.
- Osajda K.(red.), (2020), Kodeks cywilny. Komentarz, wyd. 25, Warszawa 2020, Legalis

Romanowski M., Romanowski G., (2020), Kilka refleksji w sprawie opłaty likwidacyjnej w umowie ubezpieczenia na życie z ubezpieczeniowym funduszem kapitałowym, Wiadomości Ubezpieczeniowe nr 1/2014

Wiśniewski M. (2020), Wartość wykupu polis życiowych z Ubezpieczeniowym Funduszem Kapitałowym, Wiadomości Ubezpieczeniowe nr 2/2012

Wyrok Sądu Rejonowego dla Wrocławia-Śródmieścia we Wrocławiu z dnia 27.10.2014r., I C 1318/14, niepublikowany

Wyrok Sądu Rejonowego w Gdyni z dnia 29.9.2015r., I C 308/15, Portal Orzeczeń Sądu Rejonowego w Gdyni - <http://www.orzeczenia.gdynia.sr.gov.pl>

Wyrok Sądu Okręgowego w Nowym Sączu z dnia 9.6.2016r., III Ca 269/16, Portal Orzeczeń Sądu Okręgowego w Nowym Sączu - <http://www.orzeczenia.nowysacz.so.gov.pl>

Wyrok Naczelnego Sądu Administracyjnego z dnia 28.9.2018r., II OSK 1342/18, Legalis.

Uchwała Sądu Najwyższego z dnia 24.1.2020r., III CZP 51/19, Legalis