ZWIĄZEK BANKÓW POLSKICH

Warsaw, 21 December 2021

POLISH BANK ASSOCIATION'S SECTORAL POSITION

in case C-570/21

I. Subject matter and questions referred for a preliminary ruling

1. The reference for a preliminary ruling was made in a dispute concerning a loan agreement. Two borrowers (married) sued the Bank for the return of performances they had provided under what they claimed was a defective loan agreement. The issue referred by the referring court is related to the mixed nature of this agreement. In case of one claimant, the concluded agreement had a connection with her business activity, whereas no such connection (at least directly) exists in respect of the other claimant.

2. The question was asked based on the following facts. On 21 March 2006 the parties concluded a mortgage loan agreement indexed to CHF. The Bank undertook to disburse PLN 198.996,73 for purposes specified in the agreement. Under the agreement, the parties agreed that PLN 70.000 would be used for the repayment of overdraft (claimant's business account), and the remainder of the loan – for any consumption purposes, as well as insurance and loan-related fees. The claimant confirmed in the course of the proceedings that the amount of PLN 70.000 was used for the repayment of debt related to her business activity. The claimant further indicated that the repayment of debt on the business account was a necessary condition for the Bank to grant the loan.

3. Pursuant to the agreement, the amount of funds disbursed in PLN was converted into CHF based on the currency purchase rate resulting from the exchange rate table in force at the Bank[1]. The borrowers were repaying the instalments in PLN, the amount of which was determined by converting the repayment expressed in foreign currency into domestic currency at the selling rate from the Bank's exchange rate table[2]. When entering into the agreement, the borrowers declared that they were aware

[1] § 2 sec. 2 of the agreement
[2] § 4 sec. 2 and 3 of the agreement

of the exchange rate risk related to the change of the exchange rate of the indexation currency in relation to PLN throughout the loan period and accepted that risk. According to the terms and conditions applicable to this agreement[3], the Bank's exchange rate table is prepared by Bank's relevant unit on the basis of exchange rates in force on the interbank market at the time the table is prepared and after the average exchange rates are announced by the NBP. The table is prepared at 4 p.m. on each business day and is valid for the whole next business day.

4. In their claim, claimants invoked the prohibited nature of the provisions of the agreement regarding indexation of the loan based on the rates from Bank's table. They stated that they entered into the agreement as consumers and therefore demand protection. Bank filed for dismissal of their claim, stating, inter alia, that the agreement was concluded for business purposes.

5. Claimants decided to take out a loan indexed to CHF because of the significantly lower interest rate on that loan, despite the currency risk associated with that loan. When the exchange rate increased, they went to court challenging the agreement. They claimed that the agreement was unfair due to the arrangement that the loan would be converted based on the currency exchange rates set by the Bank.

6. The referring court asks whether the borrowers in these circumstances may be regarded as consumers under provisions implementing Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (hereinafter referred to as **"Directive 93/13"**).

7. The referring court seeks answers to the following questions:

    a. Can a person engaged in business activity be regarded as a consumer in a situation when he or she concludes a contract in which the non-business element is predominant? In particular, in a situation in which the business use is not marginal and is not negligible in the overall context of the agreement in question, and the agreement is a trilateral one – it has been concluded with the entrepreneur also by another natural person for whom the agreement under examination is not related to trade, business or profession.

    b. If the answer to the first question is in the affirmative, can a person who concludes a loan agreement of a mixed nature, with characteristics described in the first question, be regarded as a consumer because a condition for concluding the agreement was that the loan principal be used for a business purpose?

[3] § 2 of the terms and conditions

II. The position of the Court of Justice so far

8. The referring court noticed that the Court of Justice has previously answered a similar question on the status of consumer. It was held that a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the protection afforded to consumers. Consumer protection in respect of mixed contracts is available only exceptionally where the trade or professional purpose would be so limited as to be negligible in the overall context of a given contract. The Court also indicated that the fact that the private element is predominant is irrelevant as regards covering the contract with consumer protection (CJEU judgment of 20 January 2005, C-464/01 Gruber).

9. In its reference, the referring court did not take into account all the judgments concerning the issue under review. The Court expressed an even more categorical position in a later judgment of 3 October 2019, C-208/18 (Petruchova). The CJEU pointed out that the special privileges arising from the system of legal provisions defining consumer protection depend on whether the contract was concluded: "*solely for the purpose of satisfying an individual's own needs in terms of private consumption",* and at the same time – ***"outside and independently of any trade or professional activity or purpose"***. Furthermore, the goods obtained under the contract may not be used even in the future, even in the framework of a professional or business activity not yet established at the date of the conclusion of the contract.

III. Position of national courts

10. In its question for reference, the national court supports the application of a broad interpretation of the definition of consumer. The questions referred for a preliminary ruling are based on the facts of this particular case. Their rationale was based on the strong suggestion that the current interpretation of a consumer contract may be harmful to persons seeking protection.

11. However, this is an isolated position. The case law of national courts based on the judgments of the Court in Gruber (C-464/01) and Petruchova (C-208/18) cases is well established. Courts accept that the concept of a consumer contract should be interpreted narrowly. In order to properly identify the reasons for this state of affairs, attention should be paid to the facts of the cases in which these judgments were handed down.

12. In a case heard by the Court of Appeal in Poznań[4], three borrowers bound by a common agreement with a bank stopped to repay a loan. They claimed that the agreement contained

[4] Judgment of the Sąd Apelacyjny w Poznaniu (Court of Appeal in Poznań) of 20 February 2019 (I ACa 409/18), unpublished.

prohibited contractual clauses and was therefore invalid. The agreement was concluded by a married couple and a family member, and funds from the loan were used to repay a loan taken out to purchase a steam mill and to repay the remaining consumer obligations of the borrowers. After the agreement was concluded, one of the borrowers formed a capital company conducting real estate development activities, to which he contributed a real estate financed by the loan (the other borrower was a limited partner in this company). Subsequently, the steam mill was restored, and premises were separated in the real estate, which were sold as separate properties. The court did not agree to cover the loan agreement with consumer protection. It did not share borrowers' arguments that the consumer nature of the agreement was demonstrated by the fact that two of the three borrowers were not conducting business activity at all. The attempt to abuse consumer protection by a person active in the development industry, who expected extraordinary privileges, did not merit protection.

13. In another case, the Court of Appeal in Warsaw[5] denied consumer protection to a borrower who had bought a tenement house with funds obtained from the bank. The claimant in the case applied to the court for invalidation of the agreement, invoking the prohibited nature of the provisions of the agreement. The court disagreed with claimant's position, finding that in the said tenement house the borrower had separated premises, which he then rented out. The court did not share claimant's arguments, who indicated that at the date of conclusion of the loan agreement he was not conducting gainful activity in the lease of premises and that he initially planned to live in the tenement house (which he ultimately did not do). Again, the court did not agree on the attempted abuse of consumer protection.

14. There have been many similar cases in the case law of national courts. They were recalled in the question for reference (paragraph 14 of question's rationale, p. 13). On the other hand, courts apply CJEU's recommendations in a balanced way, without harming consumers. There is a well-established line of case law in which national courts accept the consumer nature of many contracts concluded by persons engaged in sole business activity. This is the case where such persons live in premises financed by the loan, the address of which has been entered in the business register merely for registration purposes, without actually conducting business activity there[6]. It is also necessary that the consumer does not include the premises in fixed assets of his business activity, nor does he include burdens related to loan repayment in deductible costs, thus reducing tax burdens.

[5] Judgment of the Sąd Apelacyjny w Warszawie (Court of Appeal in Warsaw) of 7 October 2020 (V ACa 783/19), unpublished.
[6] Instead of many - so held e.g. by the Sąd Apelacyjny w Warszawie (Court of Appeal in Warsaw) in its judgment of 2 March 2020 (I ACa 199/18).

15. The approach of national courts to a restrictive interpretation of the definition of a consumer, supported by the CJEU case law to date, is not unreflective. Consumer protection is available in duly justified situations, but it is not available, in particular, when there are attempts of abuse. At the same time, the fact that a contract is not covered by consumer protection does not mean that its parties do not have any protection, as will be explained in detail later in this position.

16. The view that there are no grounds for a broad interpretation of the concept of a consumer is also supported by legal scholarship. So, for example, K. Weitz[7]: *"The view of the ECJ expressed in the judgment in question refers directly to the rules of jurisdiction in consumer matters, i.e. the rules of consumer law belonging to the European civil procedural law. A separate question arises as to whether this view may also be applied to conflict-of-law and substantive law rules of European consumer law. (...) the need to ensure uniformity in the autonomous interpretation of the concept of consumer may prompt a positive answer to this question"*.

17. In conclusion, K. Weitz points out that *"in the case of mixed contracts, one can speak of a consumer case only if the purpose related to a person's professional or business activity, accompanying the private purpose of a contract, is completely irrelevant, insignificant from the point of view of the overall assessment of the transaction"*.

IV. Exceptions cannot be interpreted broadly

18. The referring court noted that the interpretation of the consumer nature of the contract presented by the Court of Justice in the Gruber case (C-464/01) has not been considered under Article 2(b) of Council Directive 93/13. That case was considered on the basis of procedural provisions laying down rules of jurisdiction in consumer matters. They concerned the status of consumer under the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters („**Convention on jurisdiction**").

19. The referring court stated that the rules of jurisdiction in consumer contracts are an exception to the general jurisdiction rules and must therefore be interpreted strictly. That explains, in referring court's view, the position expressed in the Court's case law to date that the non-negligible link of a contract with a gainful activity precludes its consumer nature. Meanwhile, the provisions of Directive 93/13 must, in referring court's view, be interpreted broadly, in order to ensure the broadest possible consumer protection for borrowers.

20. The referring court's position is, however, erroneous and the abovementioned argument misguided. The concept of consumer should not be interpreted broadly also in terms of national provisions implementing Directive 93/13. There is no merit to the argument that a restrictive

[7] "Jurysdykcja krajowa w sprawach konsumenckich - problem umów mieszanych. Glosa do wyroku TS z dnia 20 stycznia 2005 r., C-464/01", LEX.

interpretation supported by the Court's position in the Gruber case (C-464/01) is justified only in procedural matters because *"consumer jurisdiction **derogates from the general rule** that the court of the Member State where the defendant has his habitual residence has jurisdiction to hear the case".*

21. Substantive consumer law is also a derogation from the general rules of civil law. As it is indicated in legal textbooks, *"**the special legal regime of consumer contracts introduces many modifications to the general rules** of contract conclusion and performance, and sometimes to their content"*[8]. Substantive legal norms, like procedural norms (in accordance with interpretation from Gruber and Petruchova cases), should not be interpreted broadly.

22. The special regime of consumer protection grants extraordinary rights and privileges to a strictly defined group of participants of legal turnover, which are a derogation from the general rules of civil law. Thus, substantive consumer law is also subject to the principle of *exceptiones non sunt extendendae*.

23. The deviations of consumer law from the general rules are considerable. Note, for example, a deviation from one of the basic rules of trading, i.e. the principle of *pacta sunt servanda*, through the right to withdraw from a contract without stating a reason in certain cases. When it comes to prohibited contractual provisions, penalties are particularly severe when compared to the general provisions of law. Regarding these contracts, the rules of interpretation of declarations of intent and their explanation are significantly limited, and the co-shaping of contract's content by supplementary norms is sometimes considered inadmissible (cf. CJEU judgment of 3 October 2019, C-260/18, Dziubak). Consumer protection is available even in situations where the consumer has not performed basic acts of diligence and has not read the contract at all before concluding it (CJEU order of 10 June 2021,C-198/20).

V. General rules of protection applicable to all market participants

24. Contrary to the suggestion contained in the reference for a preliminary ruling, the fact that a contract is not covered by consumer protection does not mean lack of protection for borrowers. It only means that general protective norms will apply in this regard, ensuring a balance within all contracts on the market.

25. Such are the foundations of law. In academic textbooks on the general part of civil law it is indicated that *"in every legal system – also in such a system in which the principle of freedom of shaping the content of legal act applies – the scope of their admissible content is always limited*

[8] Z. Radwański, A. Olejniczak, "Zobowiązania – część ogólna", 13 ed., 2018, p. 168.

by rules of a general type". These limitations can be systematized and include: mandatory norms, prohibition of circumventing the statute and principles of community life or similar general clauses[9]. The emanation of these rules in the Polish legal order is Article 353[1] of the Civil Code, which presents the limitations of the principle of freedom of contract. Pursuant to this article, parties may arrange the legal relationship as they deem proper on the condition that its contents or purpose are not contrary to the nature of the relationship, with statutory law, and with the principles of community life.

26. In academic textbooks it is indicated that mandatory and semi-mandatory norms protect certain values and moral norms, which include e.g. supporting the weaker party and the security of trade. In turn, from general clauses, in particular the principles of community life, it follows that an action is inadmissible if its content or purpose is contrary to commonly recognized values and moral rules relating to interpersonal relations[10]. There is an extensive case law on principles such as equality of the parties and equity of contracting. These include the gross non-equivalence of parties' performances as a result of distortion of the parties' autonomy when concluding the contract (e.g. due to circumstances or personal qualities of one of the parties), good faith and fairness of trading (the question of loyalty to the contractual partner) or violation of the position of a person in a weaker contractual position[11]. The freedom of contract is also delimited by the condition of compliance with the nature of the obligation. It is a question of examining whether the content of a contract is compliant with certain basic features of models of proper distribution of rights and obligations of the parties, distinguished and accepted by the legal system[12]. The sanction for violating the limits of freedom of contract is absolute nullity of the legal act.

27. In the legal system there is a number of other legal institutions that limit the parties' contractual freedom and prevent harm to one of the parties. Such institutions include e.g. exploitation (Article 388 of the Civil Code) or the general prohibition of abuse of right (Article 5 of the Civil Code). Moreover, the wording of the contract (reflecting parties' declarations of intent) determines the content of the civil law relationship only in a basic form. The content of this relationship is also shaped by laws, principles of community life and established customs (Article 56 of the Civil Code). These indicators perform normative functions, i.e. they determine how the parties should behave[13].

28. There are also other, numerous instruments allowing to restore the balance of the parties, even in a situation where the contract does not violate any of the rules mentioned above. Their

[9] Z. Radwański, "Prawo cywilne – część ogólna", 8 ed., 2005, p. 279.
[10] Z. Radwański, op.cit., p. 282.
[11] Case law mentioned in M. Gutowski (ed.), "Komentarz do art. 353[1] k.c. ", 2019, Legalis.
[12] Z. Radwański, A. Olejniczak, "Zobowiązania – część ogólna", 13 ed. (2018), p. 137-139.
[13] Z. Radwański, op.cit., p. 277.

application should be examined within the circumstances of each case. Consideration of their application in the case in which the analyzed question was posed should not be discussed in the proceedings before the CJEU. This issue goes beyond the scope of questions and belongs to the sole assessment of the national court. Those legal remedies are, however, worth mentioning, since the very fact of variety of instruments that may be considered by the referring court indicates a lack of need for applying a broad interpretation of the definition of consumer and refutes the thesis that the only avenue of protection is a broad interpretation of Directive 93/13.

29. In this respect, the *rebus sic stantibus* clause (Article 357[1] of the Civil Code) may be mentioned. If, due to an extraordinary change in circumstances, a performance entails excessive difficulties or exposes one of the parties to a serious loss which the parties did not foresee when concluding the contract, the court may, having considered the parties' interests, in accordance with the principles of community life, designate the manner of performing the obligation, the value of the performance or even decide that the contract be dissolved. When dissolving the contract, the court may, as needed, decide how accounts will be settled between the parties. Moreover, in the event of a significant change in the purchasing power of money after the obligation arises, the court may valorize the performance. Pursuant to Article 358[1] § 3 of the Civil Code, the court may, having considered the parties' interests and in accordance with the principles of community life, change the amount of the monetary performance or the manner of making it even if the same were set in a court decision or contract.

30. Thus, one cannot use the argument that a party to a contract who is not covered by the consumer rights system is unable to seek legal protection due to absence of other means. The validity of the presented thesis is not altered by the fact that national courts generally take the view that an indexed loan agreement, such as the one at issue in the question referred for a preliminary ruling, does not as such contravene the restrictions on freedom of contract and is not, for that reason, absolutely void[14]. This position has also been confirmed in the recent case law: *"Objections concerning the contradiction of the construction of a loan agreement referring to a foreign currency, including the one providing for granting a loan denominated in a foreign currency, with Article 69(1) of the Banking Law, are misguided. A loan agreement which links the amount of the loan granted and the amount of its repayments with the exchange rate of a foreign currency, e.g. Swiss franc, does not contradict the general construction of a loan agreement provided for in Article 69(1) of the Banking Law. The case law of the Supreme Court is well established in this respect"*[15].

[14] Instead of many – so recently adopted by the Supreme Court in its judgment of 2 June 2021 (I CSKP 55/21) and in other judgments, cited in its reasoning.
[15] Supreme Court judgment of 2 June 2021 in case I CSKP 55/21.

31. However, failure to meet the conditions for the invalidity of a contract under general rules, or finding that the conditions for obtaining protection under other legal remedies were not met, cannot be a justification for applying a broad interpretation of the consumer nature of a contract.

VI. A systemic interpretation of Directive 93/13 justifies a negative answer

32. The referring court bases the need for a broad interpretation of consumer contract also on the content of other acts of EU law which define the concept of consumer more broadly than in Directive 93/13.

33. This is the content of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (recital 17) (hereinafter referred to as **"Directive 2011/83"**) and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes (recital 13) (hereinafter referred to as **"Regulation 524/2013"**). These acts of law expressly regulate mixed contracts ("of dual nature") – indicating that the business purpose need not be "marginal" (as in the judgment in the Gruber case). It is sufficient for the link to be so "limited" as not to be predominant in the overall context of the contract. In the referring court's view this means that the EU legislature requires a much broader interpretation of the concept of consumer than that which follows from the judgment in case C-464/01.

34. In order to fully grasp the differences in the content of the cited acts it is necessary to quote their content *in extenso*.

35. The Convention on jurisdiction, on which the Court ruled in Gruber and Petruchova cases, does not contain definitions of consumer and consumer contract.

36. Directive 93/13 (Article 2(b)) defines consumer as *"any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession".*

37. In turn, Directive 2011/83/EU (recital 17) indicates that *"The definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession. However**, in the case of dual purpose contracts**, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer*".

38. Regulation 524/2013 (recital 13) puts it similarly: *"The definition of 'consumer' should cover natural persons who are acting outside their trade, business, craft or profession. However, if the contract is concluded for purposes partly within and partly outside the person's trade (dual*

purpose contracts) and the trade purpose is so limited as not to be predominant in the overall context of the supply, that person should also be considered as a consumer".

39. On the other hand, the referring court notes that Directive 93/13 *"does not have a definition of 'mixed contract' specified in its recitals. In addition, the date on which the parties entered into the agreement in question (21 March 2006), that is to say, before the entry into force of the provisions of Directive 2011/83/EU and of Regulation No 524/2013, as well as the* ***principle of legal certainty and the criteria of systemic interpretation which require identical concepts to be interpreted uniformly throughout the legal system****, militate in favour of adopting a definition of 'consumer' based on Directive 93/13/EEC in the same manner as the Court of Justice did in its judgment of 20 January 2005 C-464/01 in the Gruber case"* (paragraph 16 of the rationale of the request for a preliminary ruling).

40. The referring court's position pushing for a broad interpretation of consumer contract is unfounded. The system of legal protection of consumers does not have a uniform nature. Various aspects of this system are regulated by separate acts of EU law. The purpose of Regulation 524/2013 and Directive 2011/83 is to stimulate the cross-border potential of distance selling, which should be one of the main tangible achievements of the internal market, and to increase consumer confidence in this type of transactions. In turn, the purpose of Directive 93/13 is to eliminate unfair terms from these contracts. Their purpose and nature are different.

41. The lack of introduction of the concept of dual purpose contract in Directive 93/13, while introducing this concept in Regulation 524/2013 and Directive 2011/83, should be interpreted as a conscious decision-making act of the EU legislator.

42. A telling confirmation of this is the fact that Directive 93/13 and Directive 2011/83 have recently been updated (in accordance with the title, "modernized") and by a single piece of legislation. Despite the amendments to Directive 93/13, dual purpose contract was not added to its content. No changes were made to the definition of consumer and consumer contract. It is about the Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernization of Union consumer protection rules (**"Directive 2019/2161"**).

43. In the recitals of Directive 2019/2161 it was explained, insofar as Directive 93/13 is concerned, that *"Member States should also take account of other* ***general principles of law applicable to the imposition of penalties****, such as the principle of non bis in idem"* (recital 8). Taking into account the above and the preventive nature of provisions of Directive 93/13[16] highlighted in the

[16] CJEU judgment of 21 December 2016 in joined cases C-154/15, C-307/15 and C-308/15, paragraph 63.

case law (which is not the case of Regulation 524/2013 and Directive 2011/83), attention should be drawn to one of the main principles of law regarding the imposition of penalties. This principle is the prohibition of broad interpretation (*lex stricta*)[17].

44. Therefore, the doubts raised by the referring court in the question referred for a preliminary ruling, that a systemic interpretation is contrary to the answer proposed by that court, are justified. The fact that Regulation 524/2013 and Directive 2011/83 entered into force after the conclusion of the contract in question is a further argument supporting that thesis, which is based on the general principles of applying penalties (prohibition of retroactivity) and on the principle of legal certainty.

45. The EU consumer protection system does not operate in isolation from the fundamental principles of the legal order (both EU and national), which also include inter alia the principles of proportionality, equality and legal certainty. These principles set limits to the principle of effectiveness of the EU law[18]. In its judgment of 13 January 2004 (C-453/00), the Court of Justice indicated that *"legal certainty is one of a number of general principles recognised by Community law"*.

VII. The issue of the status of the other borrower

46. The referring court attempts to determine how does the fact that one of the borrowers was not conducting gainful activity that could be related to the concluded contract affect the possibility of covering the mixed contract with consumer protection.

47. The court's doubts are unfounded. The link with gainful activity should not be considered subjectively, but objectively. In other words, if a contract cannot be objectively qualified as a consumer contract, the protection resulting from Directive 93/13 does not apply to any of the parties. If the link with the gainful activity is non-negligible for any of the borrowers, then it is not possible to classify any part of the relationship as a consumer contract. The contract is not divisible in its legal classification. This is for both practical and legal reasons.

48. It is the content of the contract and its purpose, and not the characteristics of an individual person, that determine whether a contract qualifies as a consumer one. The same person may, in the context of different contractual relations, be qualified as either an entrepreneur or a consumer, depending on the purpose and content of those contracts. What is not possible is a situation in

[17] Lech Gardocki, "Prawo karne", Warszawa 2000, p. 18.
[18] The principle of proportionality in relation to consumer protection cases was directly addressed by the Court of Justice of the European Union in its judgment of 9 November 2016 (C-42/15), indicating that: *"while the choice of penalties remains within the discretion of the Member States, such penalties must be effective, proportionate and dissuasive."*

which the same contract has a different content in relation to its individual parties. Such a situation would arise if it were to be assumed that individual provisions of a contract are effective as regards one party and ineffective as regards another. Such an interpretation would be contrary to the previously cited principle of legal certainty.

49. It should also be noted that natural persons, when entering into such mixed contracts, are guided by specific, usually specified, objectives. In the present case, the borrower, who in the view of the referring court could be regarded as a consumer, is the spouse of the person who took out the loan for business purposes. Under Article 31 of the Family and Guardianship Code, the borrowers are subject to a joint property regime. Pursuant to Article 41 § 1 of the Family and Guardianship Code, in such a situation the creditor may also demand satisfaction from the joint property of the spouses. Therefore, the borrower not conducting business activity had a property interest in having the debt related to the spouse's business activity repaid.

50. It must be assumed that the parties to a contract entering into it are aware of the objectives of other natural persons who are parties to the contract. Thus, if the contract has a non-negligible link with the gainful activity of any of the parties, this effect affects the nature of the contract as far as all parties to the contract are concerned and determines its nature in its entirety, i.e. it precludes it from being considered a consumer contract in any respect.

VIII. No basis for an affirmative answer to the second question

51. Due to lack of basis for answering the first question in the affirmative, the second question is pointless. On a side note, a possible error of fact should be pointed out. It follows from the context of the facts set out in the referral question that the use of part of the funds obtained with the loan in question to repay business debts was not a condition for the conclusion of the agreement. The need to repay the debt was most likely part of the creditworthiness assessment. The borrowers, probably having no spare funds to repay this loan, decided to consolidate their debts and this was their autonomous decision. Accordingly, this is not a circumstance which could have a significant effect on answering to the question referred.

IX. Answer proposal

52. In the opinion of the Polish Bank Association, the following answers to the questions posed by the referring court are appropriate:

    (i) **as regards first question** – Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding the inclusion in the definition of "consumer" of a person engaged in business activity who entered into an agreement concerning a loan together with a joint-borrower

who is not engaged in business activity, which loan is intended to be used partly for the business purposes of one of the borrowers and partly for purposes unconnected with his or her business activity, in each case when business use is greater than marginal, i.e. it cannot be considered negligible in the overall context of the agreement in question;

(ii) **as regards second question** – in view of the fact that the first question is answered in the negative, the Court should decline to answer on the ground that this question is pointless.

53. If the Court of Justice did not agree with the abovementioned answer proposal and, despite all the arguments put forward, would intend to give a judgment in accordance with the referring court's suggestion, the Court should apply the general principle of legal certainty underlying the EU legal order and therefore limit in time the effects of the Court's answers to the questions referred for a preliminary ruling. The conditions for applying such a limitation were met, in particular there is a risk of serious difficulties (see in particular the judgments cited above: in case C-402/03 Skov and Bilka, paragraph 51; in case C-313/05 Brzeziński, paragraph 56; in case C-2/09 Kalinczew, paragraph 50; in case C-263/11 Rēdlihs, paragraph 59). Entrepreneurs, relying on the principle of legal certainty, in planning their activities could not assume that the CJEU would depart from the interpretation set out in its judgment of 20 January 2005, C-464/01 (Gruber), upheld in its judgment of 3 October 2019, C-208/18 (Petruchova). As regards agreements, such as the agreement in the present case, concluded in 2006, entrepreneurs also could not assume that in 2011 and 2013 Directive 2011/83 and Regulation 524/2013 would enter into force, the content of which would be taken into account for a systemic interpretation applied retroactively.