

# THE NOTION OF CONSUMER IN THE EU LAW

## POJEM SPOTREBITEĽ V PRÁVE EÚ

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### I. Introduction

The equality of the parties is one of the fundamental principles of private law. The traditional concept of equality is based on formal equality, which lies in the fact that the law does not provide any legal benefits to any party<sup>(1)</sup>. However, formal equality does not provide the same de facto equality to every entity, i.e. the possibility to benefit from this position. Therefore, the law provides a different legal regime for certain entities (groups of entities) and tries to remove the de facto inequality between entities even at a cost of formal equality<sup>(2)</sup>. The historical experience especially confirms that the substantive equality between entities cannot be reached. Thus the question is when the degree of substantive inequality becomes unbearable to such an extent that it is necessary to distort formal equality between entities and to provide certain legal advantages to one group of entities, or when the substantive inequality becomes so unbearable that a group of entities is seen as “weaker” and needs legal protection.

The enumeration of “weaker” entities is not complete in jurisprudence, rather the opposite – there are constantly new groups of entities added into it. The groups of entities have generally included minors, persons with certain disabilities, unborn children. Gradually, the group has extended to employees in relation to employers, lessees in relation to lessors, the insured in relation to insurers and, currently,

there is a predominant trend of protection of consumers against businessmen and patients against doctors. The jurisprudence has created the notion “weaker party” for those groups of persons. Now, another question arises – whether and under what circumstances a businessman especially that involved small- or medium-sized business could be considered a weaker party in relation to large corporate entities<sup>(3)</sup>.

It is not only the range of entities to which the term weaker party should be applied that is constantly expanding. The expansion has occurred in the set of social relations regulated by legal standards which are penetrated by the provisions for the protection of the weaker party. Nevertheless, this trend indicates that it will represent an area that is not systematically regulated, but rather it penetrates into individual legal institutes of the private law based on the current social needs in an isolated manner. Casuistic approach to the legal protection of the weaker party and casuistic identification of the set of entities considered to be a weaker party causes that no universal definition of term weaker party has been offered so far.

Even Zoulik resigns to define the weaker party, as he gradually rejects the considered criteria. In the end of his reflections, he is trying at least to summarize the common features of specific adjustments of the weaker party and to identify its characteristics. According to him, the term includes mostly natural persons that have a disadvantage in relation to the

<sup>(1)</sup> ZOULÍK, F. (2013) *Cesty práva. Výbor statí*. Praha: Wolters Kluwer, 2013. 293 p. ISBN 978-80-7478-039-4.

<sup>(2)</sup> *Ibid.*

<sup>(3)</sup> HONDIUS, E. (2004) *The protection of the Weak Party in a Harmonised European Contract Law: A Synthesis*. In: *Journal of Consumer Policy*, 2004, vol. 27, no. 3, pp. 245–251 ISSN 1573-0700.

#### Abstract (EN)

Consumer protection has been included among the EU policies by the Maastricht Treaty and has become one of the EU dominant policies. A consumer is considered as a weaker party in the private legal relationships and therefore should be protected against a stronger contract party. However, the question “who is a consumer” arises very often. The judicature of the Court of Justice of the EU proves that the notion of consumer is still not clearly defined in the secondary law of the EU. The present paper brings the overview how the notion of consumer has developed in the EU secondary law and in the judicature of the Court of Justice of the EU and it points out actual issues related to the notion of consumer.

#### Keywords (EN)

weaker party, consumer protection, consumer, natural person, legal entity

#### Abstrakt (SK)

Ochrana spotrebiteľa bola medzi európske politiky zaradená Maastrichtskou zmluvou a následne sa stala jednou z dominantných politík EÚ. V súkromno-právnych vzťahoch je spotrebiteľ považovaný za slabšiu stranu, a teda by mal byť chránený voči silnejšej zmluvnej strane. Avšak často vzniká otázka: “Kto je spotrebiteľ?”. Súdny dvor EÚ potvrdzuje, že pojem spotrebiteľ stále nie je v sekundárnom práve EÚ jasne definovaný. Predkladaný príspevok poskytuje prehľad o tom, ako sa pojem spotrebiteľ vyvinul v sekundárnom práve EÚ a v judikatúre Súdneho dvora EÚ, a tiež poukazuje na aktuálne otázky týkajúce sa pojmu spotrebiteľ.

#### Kľúčové slová (SK)

slabšia strana, ochrana spotrebiteľa, spotrebiteľ, fyzická osoba, právnická osoba

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second party, which is reflected in their position in the contractual relationship, the lack of professionalism, limited information, and acting under economic pressure, while it is necessary to admit certain exceptions that can not only extend but also narrow this group of entities<sup>(4)</sup>. Similarly, Barnhizer rejects the status definition of the weaker party in his article titled *Inequality of Bargaining Power* and claims that it is necessary to take into account the fact that the power is an omnipresent, complex and dynamic concept<sup>(5)</sup>.

We assume that it is necessary to examine the issue of the weaker party with regard to the circumstances of a particular case. And not just due to various factual circumstances of the case, but also because of the problems connected with the determination of the status of the weaker party as defined by Barnhizer: (1) over- or under-enforcement of contracts resulting from the fact that courts rely on determination of the status factors and rarely take into account factors such as market position, wealth, business experience and other factors of the particular case in the framework of their discretionary power; (2) secondary economic, social, or psychological impacts upon persons having status of the weaker party and are unable to escape from their status of the weaker party, and it also affects their capability to change their economic and social situation; last but not least the tendency of the court to intervene into the contractual freedom too often can have negative psychological effects on the participants of the contractual relations; (3) "fossilization" of certain groups of persons to the position of the weaker party on the basis of the concept of the status does not allow the court to take into account the dynamic changes of the bargaining power of those groups of persons over time<sup>(6)</sup>.

An example of the last problem is the position of the consumer in society – the consumer is regarded to be the weaker party especially because of his non-professionalism and insufficient informedness on the subject of the contract and conditions of the contract resulting from his non-professionalism in comparison with a businessman who is considered to be an expert in his field. At the time when the consumer protection began to develop in the countries of the European Union in the second half of the 20<sup>th</sup> century, consumers' access to information was limited. They could rely only on information from literary sources and mass media (press, radio, television). At present, at the age of information technologies and with access to the Internet, it is visible that the scope of the consumers' informedness has dramatically changed which is referred to as the dynamics of bargaining power changing over time by Barnhizer<sup>(7)</sup> and perceived as a predominance of consumers over businessmen by Thompson<sup>(8)</sup>. A consumer currently deals with the

opposite extreme – how to find the required information in such a large amount of data, which requires time for their selection and mainly an active approach of the consumer to the protection of his rights. However, the need for the consumers' active approach to the protection of their rights is not condemned even by the Court of Justice of the EU in its case-law<sup>(9)</sup>. Ultimately, the imperfections of the market economy will always cause an information asymmetry in relation to some group of market participants. As stated by Trebilcock<sup>(10)</sup> "market economies depend on significant degrees of inequalities to give effective reign to individual incentives (...)". Elimination of all disparities in bargaining power of its entities is not desirable, because the functioning of the market economy finally depends just on this information asymmetry, otherwise the individual market participants could not achieve their goals at the lowest possible cost in comparison with other market participants<sup>(11)</sup>, which subsequently becomes a driving force for other market participants. On the other hand, it is necessary to consider when these disparities present in bargaining power of market participants exceed a certain admissible limit when an intervention of a third party is needed in order to mitigate the disparities. For these purposes, Zoulík<sup>(12)</sup> defines the weaker party as a natural person having a disadvantage that lies in his position in the contractual relationship, or the lack of professionalism, or the economic pressure exerted on him.

Based on the abovementioned considerations and the views of experts, we suppose that to search for a legal definition of the weaker party is not desirable. It does not mean that its definition in the form of legal principles, rules or presumptions is inadmissible; but it is important to leave sufficient discretionary power for authorities settling disputes, in order for them to judge the existence of the weaker party and its intensity on the basis of the specific aspects of a relevant case. For instance, the Czech Republic introduced a new Civil Code (Act No. 89/2012 Coll.; hereinafter referred to as NCC) that enshrined the principle of the protection of the weaker party into the basic principles, on which the codex is built. The principle of the protection of the weaker party is reflected in many legal standards of the new Civil Code beginning with § 3 NCC. However, it is the provision § 433 par. 2 NCC that defines the weaker party in the form of a rebuttable legal presumption, according to which "it is presumed that the person who, in economic transactions, acts with respect to the entrepreneur in a manner unrelated to his own business activities is always the weaker party". However, this

edition. New Jersey: Prentice Hall, 2001. 432 p. ISBN 978-0-1325-4386-6.

<sup>(4)</sup> ZOULÍK, F. (2013) *Cesty práva. Výbor statí*. Praha: Wolters Kluwer, 2013. 293 p. ISBN 978-80-7478-039-4.

<sup>(5)</sup> BARNHIZER, D. D. (2005) *Inequality of Bargaining Power*. In: University of Colorado Law Review, 2005, vol. 76, pp. 139 – 241 ISSN 0041-9516.

<sup>(6)</sup> *Ibid.*

<sup>(7)</sup> BARNHIZER, D. D. (2005) *Inequality of Bargaining Power*. In: University of Colorado Law Review, 2005, vol. 76, pp. 139 – 241 ISSN 0041-9516.

<sup>(8)</sup> THOMPSON, L. (2001) *The Mind and heart of the negotiator*. 2<sup>nd</sup>

<sup>(9)</sup> For instance the Judgment of the Court of 6 October 2009 in case C-40/08 Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira, par. 47.

<sup>(10)</sup> TREBILCOCK, M. J. (1997) *The limits of freedom of contract*. Massachusetts: Harvard University Press, 1997. 310 p. ISBN 978-0-6745-3430-8.

<sup>(11)</sup> BARNHIZER, D. D. (2005) *Inequality of Bargaining Power*. In: University of Colorado Law Review, 2005, vol. 76, pp. 139 – 241 ISSN 0041-9516.

<sup>(12)</sup> ZOULÍK, F. (2013) *Cesty práva. Výbor statí*. Praha: Wolters Kluwer, 2013. 293 p. ISBN 978-80-7478-039-4.

definition of the weaker party is not universal, since it concerns only the relations of the weaker party and a businessman in a business environment; but it is sufficiently vague to allow the Court to exercise its discretionary power, i.e. the position of the person as being the weaker party will always depend on the specific circumstances of a given case and, thus, if proved otherwise, even a person entering into a relationship with a businessman outside his own business will not be considered the weaker party. Thus, the legal regulation of the weaker party takes into consideration Barnhizer's recommendations<sup>(13)</sup>, to reflect the omnipresence, complexity and dynamics of the bargaining power of the participants of the contractual relationship.

## II. Objective and Methodology

The range of entities, which are presupposed to act as the weaker party in contractual relations also includes the consumer. The term consumer has not been defined unambiguously in the European law yet and the Member States defined the consumer in their national law with different content, because the harmonization directives had been perceived as a minimum standard to be reached. Therefore, the notion of the consumer has become a subject of several decisions of the Court of Justice of the EU (hereinafter referred to as CJEU).

The notion of the consumer is defined neither in the primary law nor in different political documents adopted by the EU. On the contrary, a number of definitions can be found in the EU secondary law, in particular in the harmonisation directives, as well as in some regulations and especially those of procedural nature.

The present paper brings the overview of how the notion of the consumer has developed in the EU secondary law and in the judicature of the Court of Justice of the EU and it points out actual issues related to the notion of the consumer.

For the purpose of this paper, the jurisprudence and the judicature of the Court of Justice of the EU and the basic methods of jurisprudence such as legal analysis and comparison were used.

## III. The Notion of Consumer in the EU Secondary Law and Its Development

In the EU secondary law, there is no general definition of a consumer, but every legal regulation defines that term for its own purposes. Individual definitions are very similar at first glance, yet it is possible to find differences among them – the differences can be specifically observed in their historical development.

<sup>(13)</sup> BARNHIZER, D. D. (2005) *Inequality of Bargaining Power*. In: University of Colorado Law Review, 2005, vol. 76, pp. 139 – 241 ISSN 0041-9516.

### III.1 The Notion of Consumer in Substantive Law

One of the earliest definitions of the consumer was provided by Art. 2 of already repealed Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises. Pursuant to this article, a consumer is a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession. This definition describes the consumer from both a personal perspective, i.e. as a natural person, and a functional perspective, i.e. as someone, who is acting outside his trade or profession, and it also provides a description of an implicit relational aspect, i.e. his relationship with an entity other than the consumer<sup>(14)</sup>.

The Directive distinguishes between the terms trade and profession. We assume that both cases represent a business activity and while the term profession relates to the performance mainly of freelance professions, the term trade comprises other business activities. In our opinion, the term “business” could replace both terms without the need for the expansion of their enumeration, which occurred in later definitions of the consumer. However, the scientific literature offers us a different opinion.<sup>(15)</sup>

Harmonisation of the Member States' law by means of the consumer directives has been minimal.<sup>(16)</sup> The definition therefore has not prevented the Member States from extending the protection even to some legal persons, or even some businessmen in cases when their action had no direct connection with their business, or when the contracts were of so-called dual purpose (i.e. businessmen's action served both business and private purposes). Such an approach was encouraged in the Member States by the definition itself, as its words “can be regarded as” actually order the Member States to examine the predominant purpose of the contract and hence to enable the consumer protection within the meaning of this Directive to apply to legal relationships which do not pursue purely private purposes.

The new directive repealing Council Directive 85/577/EEC tried to remove the legal uncertainty introduced by the mentioned phrase. According to Art. 2 par. 1 of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of

<sup>(14)</sup> TICHÝ, L. et al. (2006) *Evropské právo*. Praha: C.H.Beck, 2006. 928 p. ISBN 80-717-9430-9.

<sup>(15)</sup> Drápal, L., Bureš, J. et al. 2009, p. 2932, where Simon argues that the term professional activity designates the profession of the consumer and if the consumer concludes a purchase contract for the purchase of something he needs for the performance of his job, it is not a consumer contract for the purposes of Art. 15 par. 1 Council Regulation No. 44/2001.

<sup>(16)</sup> Green Paper on the Review of the Consumer Acquis COM (2006): “The current directives allow Member States to adopt more stringent rules in their national legislation (minimum harmonisation) and many Member States have made use of this possibility in order to ensure a high level of consumer protection.”

the Council, the consumer means *any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession*. Despite this change, the vagueness of the definition of the consumer has not been removed and the uncertainty in the definition of when a person is still acting as a trader, and when the purposes are private has remained. The same person signing the same contract that involves the same subject can act as a consumer one time and as a trader another time, and it depends on whether the subject of the contract is used for his own personal purposes, the needs of his family members, or in his business. Hence it is still necessary to examine the purpose of the contract, if the contract concluded involves the subject, which he will use in his business (regardless of whether it represents an input into the production process, or it serves for consumption that ensures the operation of his business; e.g. office supplies, telephone, car, etc.) or for private purposes outside his business. Subsequently, a question related to the so-called dual purpose contracts arises – when is a buyer still acting as a consumer and when is he already acting as a trader if he uses one and the same subject for both private and business purposes? At first, the issue of the dual purpose contracts was addressed only by the case-law of the Court of Justice and its restrictive approach. The Court of Justice rejects to recognize a person involved in a dual purpose contract as having a status of a consumer, except for the case when the business purpose *is so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded*<sup>(17)</sup>. In this case, however, it was an interpretation of the provisions of the Brussels Convention, i.e. procedural rules, in which the provisions on jurisdiction in consumer cases are an exception to the general rule. It is not clear whether the Court of Justice took the same position in the case of interpretation of the substantive provisions on consumer protection. The Directive 2011/83/EU of the European Parliament and of the Council on consumer rights does not include any provision on the status of the dual purpose contracts, but the second sentence of recital 17 of its preamble states that 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. Unlike the quoted judgment, the Directive does not require just a marginal and complementary nature of the business activity and is based on the criterion of the predominant purpose, while the assessment of the purpose of the contract takes into consideration all the circumstances and evidence available to the Court beyond the quantitative criterion<sup>(18)</sup>.

The definition of the consumer has been developing in a similar way in the directives on consumer credit despite the fact that the Slovak version does not reflect this development due to inconsistent translation. According to Art. 1

<sup>(17)</sup> Judgement of the Court of 20 January 2005 in case C-464/01 Johann Gruber.

<sup>(18)</sup> Opinion of Advocate General of 23 April 2015 in case C-110/14 Horatiu Ovidiu Costea v SC Volksbank Ramania SA, par. 45 and 47.

of Council Directive 87/102/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, the consumer is a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession.<sup>(19)</sup> However, a new directive on consumer credit removes the possibility to judge whether a person is acting within and outside his business. According to both English and Slovak versions of Art. 3(a) of the Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers and repealing Council Directive 87/102/EEC, the consumer means a natural person who, in transactions covered by this Directive, is acting for purposes which are outside his trade, business or profession. Even in these cases, it can be concluded that neither the original nor the new definition of the consumer, though only for the purposes of the Directive, did clarify the relation to the dual purpose legal acts.

Other directives adopted for the purposes of consumer protection define the consumer without using the phrase “which can be regarded as”. The first directive that did so was Council Directive 93/13/EEC on unfair terms in consumer contracts. Pursuant to Art. 2(b) of the Council Directive 93/13/EEC on unfair terms in consumer contracts, *the consumer is any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession*. According to this definition, it is no longer necessary to take into consideration whether the activities of the person can be regarded as business. However, unlike the previous definitions, this one adds the term “business”. Despite the fact that the Slovak version replaced the term equivalent to “profession” with the term equivalent to “occupation”, the English version continues to use the same terminology (“profession”). However, the addition of the term “business” to the definition did not clarify the vague and ambiguous definition of the consumer, as the Court of Justice of the EU considers the terms “trade” and “business” to be synonyms for the purposes of defining the trader.<sup>(20)</sup>

The following directives concerning the consumer protection copy this definition and apply it to their own purposes: e.g. in accordance with Art. 2(d) of Directive 2002/65/EC of the European Parliament and of the Council concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, *consumer means any natural person who, in distance contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession; according to Art. 1 par. 2 of Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees, consumer means any*

<sup>(19)</sup> The English version uses the words “can be regarded” and thus offers a possibility to consider whether the activities in question fall within the scope of business, whereas the Slovak version does not offer this functional criterion.

<sup>(20)</sup> See the Judgement of the Court of 3 October 2013 in case C-59/12 BKK Mobil Oil, par. 31: „(...) for the purpose of applying the Unfair Commercial Practices Directive, the terms ‘business’ and ‘trader’ have an identical meaning and legal significance”

natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession<sup>(21)</sup>; according to Art. 2(e) of Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, consumer means any natural person who is acting for purposes which are outside his or her trade, business or profession.

A certain deviation from the established terminology in the definition of the consumer can be seen in Art. 2(e) of Directive 98/6/EC of the European Parliament and of the Council on consumer protection in the indication of the prices of products offered to consumers, pursuant to which the consumer shall mean any natural person who buys a product for purposes that do not fall within the sphere of his commercial or professional activity. Despite the fact that the terminology of the English version has not changed in relation to the term professional activity, the Slovak version replaced the term professional activity that had been used until that time with an equivalent to occupational activity. This translation can only be found in this single directive. At first glance, the words evoke an incorrect translation into the Slovak language, yet after a deeper analysis of the term ("occupational activity") a question arises – is it possible to consider an employee concluding a contract with his employer as a consumer? The law and the practice related to this issue differ in individual Member States. Nevertheless, the creators of the Draft Common Frame of Reference (DCFR) excluded these activities from the legal protection provided to consumers<sup>(22)</sup>.

After 2000, no change has occurred in the definition of the consumer, individual directives have only extended the range of fields, which can be recognized as encompassing activities that exclude the person from consumer protection, i.e. commercial, professional and business activities were supplemented with "craft", for instance, according to Art. 2(a) of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council, the consumer is any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession; according to Art. 4 par. 1(a) of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, consumer means any natural person who is acting for purposes which are outside his trade, business, craft or profession.

The issue of the consumer is also addressed by directives

concerning provision of tourism services, which offer a definition of a consumer, or a recipient of such services, that differs from all of the abovementioned definitions, as it is not doubtful whether the relevant person is a consumer for the purposes of provision of the services covered by those directives. Art. 2 par. 4 of Council Directive 90/314/EEC on package travel, package holidays and package tours determined the consumer as *the person who takes or agrees to take the package ('the principal contractor'), or any person on whose behalf the principal contractor agrees to purchase the package ('the other beneficiaries') or any person to whom the principal contractor or any of the other beneficiaries transfers the package ('the transferee')*. The new directive regarding tourism services did not use the term consumer, but the term traveller. Pursuant to Art. 3 par. 6 of Directive (EU) 2015/2302 of the European Parliament and of the Council on package travel and linked travel arrangements, amending Regulation (EC) No. 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, *the traveller is any person who is seeking to conclude a contract, or is entitled to travel on the basis of a contract concluded, within the scope of this Directive*. Based on the abovementioned definitions of the consumer, it can be concluded that for the purpose of this Directive the consumer (traveller) is any (natural or legal) person who, either by himself or through an agent, or as a third party in favour of which the action takes place, is receiving a package of tourism services. It stresses neither subjective nor functional criteria. The emphasis is laid on the objective perspective – the fact whether the person is authorized to accept the tourism services; if he is, he is recognized as a consumer (traveller) who is entitled to the protection provided by the Directive regardless of his status of a natural or a legal person and regardless of whether the relevant action falls within the scope of his business.

Another definition of the consumer is provided by European academics and legal experts in Draft Common Frame of Reference or the so-called European Civil Code, pursuant to which the consumer is *any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession*. At first glance, the definition corresponds with those that are offered in the most recent directives. But the term "primarily" raises a question mark. This proposal unambiguously excludes legal persons from the legal consumer protection. The term "primarily" is confusing if no further explanation is provided and, like the previous definitions, it does not bring more light to the content of the definition of a consumer. The Commentary to the Draft Common Frame of Reference explains that the term "primarily" comprises those legal acts of a person which serve to fulfill personal family use, or the household use regardless of the fact that the person involved in the legal act will make profit from them later, if it is not based on regularity (e.g. purchase of a book for personal (study) purposes, if the person decides to sell it later (e.g. after examination)). The criterion for distinguishing an occasional sale from business is the frequency and volume of such actions<sup>(23)</sup>. In accordance with the authors of the Draft Common Frame of Reference,

<sup>(21)</sup> The English version is, however, identical with the abovementioned definitions: "consumer is any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession."

<sup>(22)</sup> VON BAR, Ch. – CLIVE, E. – SCHULTE-NÖLKE, H. et al. (2009) *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference*. Munich: Selier. European law publishers GmbH, 2009. 648 p. ISBN 978-3-86653-097-3.

<sup>(23)</sup> *Ibid.*

the definition of the consumer does not apply to the activities that are atypical for businessmen, i. e. situations with no direct link with business of a businessman, which was used by some Member States in the framework of minimum harmonisation to extend the legal protection to businessmen as well<sup>(24)</sup>. A person who intentionally pretends to be acting within business is also not regarded as a consumer. However, there is a question whether the consumer should be deprived of the legal protection if he had pretended to be acting within business only due to negligence. While in procedural law the Court of Justice has unambiguously rejected to provide the consumer with this protection,<sup>(25)</sup> it is questionable whether it would reject to do so even in substantive legal regulation. According to the authors of the Draft Common Frame of Reference, such an approach could undermine the mandatory rules of law relating to the consumer protection<sup>(26)</sup>.

Finally, the term consumer appears in the Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). According to Art. 6 par. 1 of the Regulation, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed (...). The Rome I Regulation extended the range of the consumer contracts in comparison with the statement of Art. 5 of the Rome Convention of 1980 on the law applicable to contractual obligations: "This Article applies to a contract the object of which is the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object." There are two major differences visible in the quoted articles. The first one is the determination of the personal criterion. While the Rome Convention applies to a person with no specification of whether he is a natural or a legal person, the Rome I Regulation explicitly states that it applies to natural persons only. The second difference lies in the definition of the range of legal acts, to which the quoted legal rules apply. The Rome Convention applies to contracts having a purpose of the supply of goods and the provision of services or credit. The Rome I Regulation applies to all types of contracts. As for the terminology, English version uses the same terms "trade" and "profession" and it is just the Slovak version that uses three different terms equivalent to terms "activity", "profession", and "business".

### III.2 The Notion of Consumer in Procedural Law

The original version of the Brussels Convention of 1968 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>(27)</sup> does not even mention any consumer provisions. We can find them for the first

time in 1978 after the adoption of the Convention on the accession of Denmark, Ireland and the United Kingdom to the Brussels Convention, which supplemented the Convention<sup>(28)</sup> with Art. 13-15 on consumer contracts.

At present, the issue of consumer contracts is regulated by Art. 15-17 of the Brussels Convention<sup>(29)</sup>, but the definition of the consumer has not changed. Pursuant to Art. 15 par. 1 of this Convention, "in matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section (...)". Though the Slovak version provides us only with the functional criterion of the definition of the consumer, which corresponds to the primary definitions in the consumer directives, the English version offers the personal criterion as well, since the Slovak version omits the reference to the consumer as a "person". It follows that the Brussels Convention did not define the legal protection of the consumer explicitly only for natural persons.

After the partial communitisation of the third pillar, the role of the Brussels Convention was undertaken by the Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in all EU Member States (except Denmark). The Regulation copied Art. 15 par. 1 literally, and hence defined the consumer with a definition which was not adapted to the new wording used by the consumer directives after 2000. Both Slovak and Czech versions omitted the personal criterion in the definition in this case again, although all other languages incorporated this criterion into their definitions of the consumer. The unchanged wording was also taken over and used in the current Art. 17 of the new Regulation (EU) No. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

The Court of Justice prefers a restrictive approach to the definition of the consumer for the purposes of this Regulation<sup>(30)</sup>. Therefore, it can be assumed that a similar restrictive interpretation will be retained by the Court of Justice even in the other procedural regulations.

The Art. 6 par. 2 of Regulation (EU) No. 655/2014 of the European Parliament and of the Council establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters governs the jurisdiction of courts in the event that the debtor is a consumer who has concluded a contract with the creditor for a purpose which can be regarded as being outside the debtor's trade or profession. Once again, the phrase "can be regarded" that occurred in the first directives concerning consumer protection is used and thus the Regulation enables a subjective judgement of the purpose of the transaction. But the wording does not define the personal criterion in detail, i.e. whether the consumer may be considered as a natural person only or as a legal person as well.

On contrary, Art. 6 par. 2 of Regulation (EU) No. 1896/2006

<sup>(24)</sup> *Ibid.*

<sup>(25)</sup> See the Judgement of the Court of 20 January 2005 in case C-464/01 Johann Gruber.

<sup>(26)</sup> *Ibid.*

<sup>(27)</sup> Official Journal L 299, 31/12/1972 P. 0032-0042.

<sup>(28)</sup> Official Journal L 304, 30/10/1978 P. 0001-0102.

<sup>(29)</sup> Official Journal L 339, 21/12/2007 P. 0003-0041.

<sup>(30)</sup> See, for instance, Judgment C-464/01 Gruber.

of the European Parliament and of the Council creating a European order for payment 6 par. defines the consumer as *a person who has concluded a contract for a purpose which can be regarded as being outside his trade or profession* even in the Slovak version. In spite of the altered terminology in the Slovak language, which uses terms equivalent to “activities and performance of profession”, English still uses the terms “trade” and “profession”, i.e. the content of the functional criterion does not change in comparison with the original consumer directives. However, the personal criterion is defined more broadly, as it refers to persons without identifying whether or not they are only natural persons or legal persons as well.

Similarly, the personal criterion is not mentioned in Art. 6 par. 1(d) of Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, which identifies the consumer as meaning *a person who has concluded a contract for a purpose which can be regarded as being outside of his trade or profession*. Once again, Slovak version changes the terminology expressing the functional criterion when using words equivalent to “performance of his trade activities or profession”, and, moreover, the subjective assessment of the functional criterion “can be regarded” is still maintained like in all procedural regulations.

### III.3 Concluding Remarks on the Notion of Consumer in the EU Secondary Law

The EU directives and regulations specify several criteria in the definitions of the consumer. Firstly, it is the personal (subjective) criterion which makes the distinction between natural and legal persons and which creates legal certainty in comparison with the other two criteria. Secondly, it is the functional criterion which is, on the other hand, unstable and brings uncertainty to legal relations, as it is necessary to judge every legal relationship in terms of its purpose, objective, and function. Thirdly, it is an objective criterion that allows us to judge the legal relationship based on the objective aspects connected with legal acts, such as a type of legal act, or the amount of monthly income.

The regulations determine the functional perspective of the consumer in the same manner. The differences are only in the personal criterion, which may apply to both natural and legal persons in accordance with the interpretation of the wording; the Regulation (EU) No. 655/2014 of the European Parliament and of the Council does not use the term person, but it does not change the fact that the definition can include both types of persons.

All of the procedural regulations are based on the definition used by the initial directives, i.e. the wording including the phrase “can be regarded”, which evokes the possibility of the subjective judgement of the legal act in terms of its purpose even with the possibility of inclusion of dual purpose legal acts; and whereas the substantive directives have replaced the phrase with “is”, the procedural regulations have preserved it. However, the change of terminology in the definition of the consumer in substantive directives has not brought

more legal certainty to legal consumer relations, because the question of legal uncertainty in case of dual purpose legal acts still resonates in both jurisprudence and practice.

The directives define the consumer predominantly as a natural person (with the exception of 2015 Package Travel Directive and its 1990 predecessor). Although some changes have occurred in functional criterion, they have not led to a higher degree of the legal certainty – at first, the term “can be regarded as” was replaced with “is”, but it did not bring the desired change; then the specification of business activities was extended by supplementing “trade” and “profession” with “craft”. However, none of the abovementioned changes has brought more legal certainty into the definition of the consumer.

It follows from the definitions that every legal regulation defines the consumer for its own purposes. There is no common general definition. Therefore, the application of procedural provisions is based on the definitions provided by these Regulations irrespective of the fact that the substantive legal relationship representing the subject of the legal act comes under the scope of the framework of one of the consumer directives. And what is more important, the substantive directives define the consumer for the purpose of legal acts in general, whereas the procedural rules regard him as more of an exception from the general provisions, which is probably the reason why the case-law of the Court of Justice decided to use the restrictive interpretation of the term consumer in the case of procedural regulations.<sup>(31)</sup>

## IV. The Notion of Consumer in the Judicature of the Court of Justice of the EU

The case-law of the Court of Justice of the EU does not belong to formal sources of the EU law, but represents a rewarding tool for the interpretation of the vague and ambiguous terms in the EU law. Unfortunately, this is not true in terms of the definition of the consumer even despite the fact that the Court of Justice has had the opportunity to clarify the meaning of this term many times in several sources of the EU secondary law. The case-law of the Court of Justice can be divided into two basic groups in terms of the definition of the consumer – the case-law relating to the definition of the consumer from the personal perspective and the case-law concerning the definition of the consumer on the basis of the functional criterion.

### IV.1 Personal Criterion

Despite the fact that most of the directives explicitly define the consumer as a natural person, within the transposition of the directives, a number of Member States have decided to apply a higher degree of legal protection than the one provided by the directives. Some legal persons have been recognized as consumers. However, the case-law of the Court of

<sup>(31)</sup> Opinion of Advocate General of 23 April 2015 in case C-110/14 Horatiu Ovidiu Costea v SC Volksbank Ramania SA, par. 41.

Justice has preserved the restrictive definition of the personal criterion of the consumer when identifying him as a natural person in both the substantive directives<sup>(32)</sup> as well as the procedural provisions.<sup>(33)</sup>

The Court of Justice rejected to recognize not only a person forwarded a claim of a consumer from a consumer contract<sup>(34)</sup>, but also a person representing the interests of consumers against businessmen, as having the position of the consumers.<sup>(35)</sup> In both cases, it was the Brussels Convention which regulates the procedural arrangements relating to the jurisdiction of the courts of the contractual states.

According to the DCFR, the position of the consumer and the businessman is changed even by the fact that they decide to be directly represented by another person in certain legal acts. If the businessman is represented by a consumer, or the consumer is represented by a business entity (e.g. a commercial agent), their positions of a consumer and a businessman do not change for the purpose of consumer protection pro-

vided by the law.<sup>(36)</sup> However, the DCFR does not determine whether it shall be the same in legal relations between two consumers if one of them is represented by a business entity<sup>(37)</sup>.

## IV.2 Functional Criterion

The primary case-law of the Court of Justice preferred the restrictive interpretation of the phrase to be acting for private purposes, i.e. to be acting outside business and profession. In the *Di Pinto* Judgement, the Court of Justice refused to recognize the businessman as a consumer for the purposes of Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises even despite the fact that the Advocate General, the Commission and France favoured a broad interpretation, arguing that if the businessman makes steps to sell his business, that action cannot be considered as an exercise of his trade or profession, as he has only little or no experience concerning the sale of the business and is therefore in the same position, i.e. as unprepared as a consumer.<sup>(38)</sup> However, the Court of Justice did not base its judgement on the interpretation of the definition of the consumer *contrario*, since it contains a negatively determined functional criterion, but it specified a positive definition of the term, which follows that it is necessary to examine family or personal requirements in order to identify the action of the consumer.<sup>(39)</sup>

The restrictive interpretation was also confirmed by the judgment in the case of *Benincasa v Dentalkit*, although in this case it was the interpretation of procedural provisions of the Brussels Convention.<sup>(40)</sup> The Court of Justice tried to define the objective criteria of the term consumer. According to the Court of Justice, the judgement of whether a person is a consumer must always be done in relation to a particular contract while taking into account the nature and the aim of the contract and not the subjective situation of the person concerned. As the Advocate General pointed out, one and the same person may be regarded as a consumer in relation

<sup>(32)</sup> Judgment of the Court of 22 November 2001 in joined cases C-541/99 (*Cape Snc v Idealservice Srl*) and C-542/99 (*Idealservice MN RE Sas v OMAI Srl*): "The term the consumer, as defined in Art. 2(b) of Council Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts must to be interpreted as referring solely to natural persons."

<sup>(33)</sup> Judgment of the Court of 21 June 1978 in case C-150/77 *Bertrand v Paul Ott KG*, par. 21 and 22: "A restrictive interpretation of the second paragraph of Art. 14, in conformity with the objectives pursued by Section 4, entails the restriction of the jurisdictional advantage described above to buyers who are in need of protection, their economic position being one of weakness in comparison with sellers by the fact that they are private final consumers and are not engaged, when buying the product acquired on instalment credit terms, in trade or professional activities. The answer to be given to the national court should therefore be that the concept of the sale of goods on instalment credit terms within the meaning of Art. 13 of the Brussels Convention of 27 September 1968 is not to be understood to extend to the sale of a machine which one company agrees to make to another company on the basis of a price to be paid by way of bills of exchange spread over a period."

<sup>(34)</sup> Judgment of the Court of 19 January 1993 in case C-89/91 *Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH*: "It follows that Art. 13 of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters is to be interpreted as meaning that a plaintiff who is acting in pursuance of his trade or professional activity, and who is not, therefore, himself a consumer party to one of the contracts listed in the first paragraph of that provision, may not enjoy the benefit of the rules of special jurisdiction laid down by the Convention concerning consumer contracts."

<sup>(35)</sup> Judgment of the Court of 1 October 2002 in case C-167/00 *Verein für Konsumenteninformation v Karl Heinz Henkel*: "The rules on jurisdiction laid down in the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, [as amended] must be interpreted as meaning that a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Art. 5(3) of that Convention."

<sup>(36)</sup> See, for example, Judgement of the Court of 4 October 2007 in case C-429/05 *Max Rampion, Marie-Jeanne Rampion, née Godard, v Franfinance SA, K par K SAS*, par. 65.

<sup>(37)</sup> VON BAR - Ch., CLIVE, E. - SCHULTE-NÖLKE, H. et al. (2009) *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference*. Munich: Selier. European law publishers GmbH, 2009. 648 p. ISBN 978-3-86653-097-3.

<sup>(38)</sup> Opinion of Advocate General of 12 December 1990 in the case C-361/89 *Criminal Proceedings against Patrice Di Pinto*, points 21-22.

<sup>(39)</sup> Judgment of the Court of 14 March 1991 in case C-361/89 *Criminal Proceedings against Patrice Di Pinto*, par. 16: "Acts which are preparatory to the sale of a business, such as the conclusion of a contract for the publication of an advertisement in a periodical, are connected with the professional activity of the trader; although such acts may bring the running of the business to an end, they are managerial acts performed for the purpose of satisfying requirements other than the family or personal requirements of the trader."

<sup>(40)</sup> Judgment of the Court of 3 July 1997 in case C-269/95 *Francesco Benincasa v Dentalkit Srl*.

to some contracts and as a trader in relation to others.<sup>(41)</sup> The Court of Justice affirmed the conclusions from the judgement in the case *Di Pinto* and stated that only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically. The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character.<sup>(42)</sup>

The Court of Justice addressed the nature of the contracts concluded for future purposes again later in the case of *Berliner Kindl Brauerei*.<sup>(43)</sup> In this case, a natural person, a non-trader, Mr Siefert, gave a guarantee to a third party for a credit for opening a restaurant. The Court of Justice declared that Directive concerning consumer credit (87/102/EEC) does not apply to contracts of guarantee, which are side contract to the main credit contract, even if the guarantor and the borrower had acted outside their trade or profession. The Court of Justice, however, did not directly express its attitude to whether the credit contract concluded for the purpose of financing the establishment of a restaurant can be regarded as a consumer contract for the purpose of the Directive concerning consumer credit.

The first verdict on the nature of side legal acts in relation to consumer contracts was provided by the Court of Justice already in the case of *Dietzinger*.<sup>(44)</sup> The Court of Justice maintained the restrictive interpretation of the term consumer and refused to grant legal protection for the purposes of Council Directive No. 85/577/EEC to the natural person, a non-trader, who had provided a contract of guarantee for a credit because the main credit contract was concluded between the bank and the person who had drawn the credit for the purpose of his trade and profession. However, the fact that the debt arising out of the [consumer credit] contract is secured by a security agreement concluded by that person as a representative of his law firm and involving the property intended for trade, business, or profession of that person, such as the building owned by the firm, is not relevant in this context, i.e. the main credit contract is subject to the provisions on the consumer protection.<sup>(45)</sup>

In terms of the issue of aval as a secondary legal act, the Court of Justice expressed its decision in the judgement in

the case of *Česká spořitelna, a.s.*,<sup>(46)</sup> pursuant to which, Art. 15 (1) of Regulation (EC) No. 44/2001 must be interpreted as meaning that a natural person with close professional links to a company, such as its managing director or majority shareholder, cannot be considered to be a consumer within the meaning of that provision when he gives an aval on a promissory note issued in order to guarantee the obligations of that company under a contract for the grant of credit.

However, the Court of Justice considered a co-debtor to be a consumer in the recent judgement in the case of *Bucura*<sup>(47)</sup> when declaring that Art. 1(2)(a) of Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, as amended by Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998, and Art. 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a natural person who becomes a co-debtor under a contract concluded with a seller or supplier comes within the concept of "consumer" within the meaning of those provisions, since that person is acting for purposes which can be regarded as outside his trade or profession.

Neither did the Court of Justice make use of the opportunity to state clearly whether it is possible to recognize a person acting for the purpose of his future trade or profession as a consumer<sup>(48)</sup>, nor is its attitude to the dual purpose legal acts clear although the Court of Justice had the opportunity to directly express its standpoint for instance in the case of *Gruber*.<sup>(49)</sup> Mr Gruber from Austria lived on a farm, where one part of the building (approximately 60%) was used as a dwelling for himself and his family and the rest of the building served as a farm. The dispute between him and the company named Bay Wa occurred as a result of the delivery of a roof covering, which was delivered in a variety of shades of colour despite the warranty that the colour of the whole roof would be uniform. The question was whether the provisions on the jurisdiction of courts in consumer issues within the meaning of the Brussels Convention apply to his situation. According to the judgement of the Court of Justice, the provisions of the Convention must be interpreted as follows: (1) a person who concludes a contract concerning goods intended partly for purposes which are in part within and in part outside his trade and profession may not rely on the special rules of jurisdiction laid down in Art. 13 to 15 of the Convention, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect; (2) it is for the court seised to decide whether the contract at issue was concluded in order to

<sup>(41)</sup> Judgment of the Court of 3 July 1997 in case C-269/95 *Francesco Benincasa v Dentalkit Srl*, par. 16.

<sup>(42)</sup> Judgment of the Court of 3 July 1997 in case C-269/95 *Francesco Benincasa v Dentalkit Srl*, par. 17 (franchise contract had been concluded before the acquirer entitled by the contract established his business and received the business licence).

<sup>(43)</sup> Judgment of the Court of 23 March 2000 in case C-208/98 *Berliner Kindl Brauerei AG v Andreas Siefert*.

<sup>(44)</sup> Judgment of the Court of 17 March 1998 in case C-45/96 *Bayerische Hypotheken- und Wechselbank AG v Edgar Dietzinger*.

<sup>(45)</sup> Judgment of the Court of 3 September 2015 in case C-110/14 *Horățiu Ovidiu Costea v SC Volksbank Romania SA*.

<sup>(46)</sup> Judgment of the Court of 14 March 2013 in case C-419/11 *Česká spořitelna, a.s. v Gerald Feichter*.

<sup>(47)</sup> Judgment of the Court of 9 July 2015 in case C-348/14 *Bucura*.

<sup>(48)</sup> The case *Dentalkit* concerned the interpretation of the procedural provisions and of the judgement in the case of *Brauerei* regarding substantive provisions, the Court's attitude to those legal acts is not clear.

<sup>(49)</sup> Judgment of the Court of 20 January 2005 in case C-464/01 *Johann Gruber v Bay Wa AG*.

satisfy, to a non-negligible extent, needs of the business of the person concerned or whether, on the contrary, the trade or professional purpose was negligible; (3) to that end, that court must take account of all the relevant factual evidence objectively contained in the file; on the other hand, it must not take account of facts or circumstances of which the other party to the contract may have been aware when the contract was concluded, unless the person who claims the capacity of consumer behaved in such a way as to give the other party to the contract the legitimate impression that he was acting for the purposes of his business.<sup>(50)</sup>

Once again, the Court of Justice confirmed the restrictive interpretation of the term consumer, which was expected based on the procedural provision providing an exception to the general rule on the basis of the so far existing case-law. However, it remained unclear whether the restrictive approach applies to the substantive provisions of the directives. In addition, the reasoning for the existence of exceptions to the general jurisdiction in accordance with Brussels Convention is bewildering, as the aim of the Convention is to ensure an adequate protection for the consumer as the party economically weaker and less experienced than the other, commercial, party to the contract, who must not therefore be discouraged from suing by being compelled to bring his action before the courts in the Contracting State in which the other party to the contract is domiciled.<sup>(51)</sup> We believe that neither the current definitions of the consumer nor the case-law of the Court of Justice have managed to adequately ensure that goal.

It follows from the abovementioned case-law and legal norms defining the consumer that if Mr Gruber had covered only the roof of that part of building used for dwelling, he could have claimed the protection regardless of whether he was a trader; however, since he had also covered the roof of the other part of building used for farming purpose, he was considered to be a trader and the provisions on consumer protection did not apply to him, while in both situations, Mr Gruber acts with the same (non-) experience, information and status in relation to the supplier. So if the objective of the provisions is to ensure the protection of the economically weaker party as described above, the objective will be achieved neither by the consumer legislation nor the case-law of the Court of Justice concerning it. If the objective pursued by the given legislation is not achieved, the need for its existence in the current wording, or its existence at all should be considered.

We believe that the term consumer should be determined by personal and objective criteria and not the functional perspective and specific circumstances of individual cases. We incline to the restrictive interpretation of the term consumer, but not to such an absurd degree as in the case of Mr Gruber, who could not rely on the protection only because the roof that had been replaced was located above the farming part of the building as well. More logical and restrictive approach would be maintained if the legal protection of the

consumer did not apply to business entities regardless what the purpose of the act is, especially if the reason for the protection of the consumer is the protection of the weaker party, non-experience and the lack of information of the consumer as stated directly in the abovementioned judgement of the Court of Justice.

The issue of the dual purpose contracts is also addressed by the DCFR, according to which, a person who is buying a computer for personal purposes and who will also use it for business purposes to a small extent shall be considered to be a consumer for the purposes of the provision of legal protection. However, if the person decides to sell the computer, he is considered to be a trader in relation to the buyer, who is a consumer, as the buyer does not have the information, or may not have the information on the extent to which the seller is acting as a trader<sup>(52)</sup>.

A similar absurd conclusion was reached by the Court of Justice in the case of Costea<sup>(53)</sup>, in which Mr Costea, a lawyer, concluded a credit agreement with Volksbank. The question was whether Mr Costea could have been considered to be a consumer for the purposes of the credit agreement, in which the purpose of the credit was not specified. Pursuant to par. 18 of the judgment, *the consumer is in a weaker position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge and this leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms*. In the par. 20, the Court of Justice admits that *it should be noted that one and the same person can act as a consumer in certain transactions and as a seller or supplier in others. On the contrary, the definition of the consumer is distinct from the concrete knowledge the person in question may have, or from the information that person actually has* (par. 21 of the quoted judgement). The statements in par. 20 and 21 directly support the aim that is pursued by the Directive and that is quoted in par. 18 of the judgment.

Within the meaning of par. 23, *the national court must take into account all the circumstances of the case, particularly the nature of the goods or service covered by the contract in question, capable of showing the purpose for which those goods or that service is being acquired*. However, this does not ensure the objective of the Directive, which is thus completely neglected, because the nature of the goods or services leading to revealing the purpose of their acquisition does not affect the disadvantages, which the consumer has in relation to the other party to the contract.

Within the meaning of par. 26, a lawyer who concludes, with a natural or legal person acting for purposes relating to his trade, business or profession, a contract which, particularly as it does not relate to the activity of his firm, is not linked to the exercise of the lawyer's profession, is, vis-à-vis that person, in the weaker position referred to in paragraph 18 of this judgment. So the question is – if the credit agree-

<sup>(50)</sup> Judgment of the Court of 20 January 2005 in case C-464/01 Johann Gruber v Bay Wa AG.

<sup>(51)</sup> Judgment of the Court of 20 January 2005 in case C-464/01 Johann Gruber v Bay Wa AG, par. 34.

<sup>(52)</sup> VON BAR, Ch., CLIVE, E., SCHULTE-NÖLKE, H. et al. (2009) *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference*. Munich: Selier. European law publishers GmbH, 2009. 648 p. ISBN 978-3-86653-097-3.

<sup>(53)</sup> Judgment of the Court of 3 September 2015 in case C-110/14 Horațiu Ovidiu Costea v SC Volksbank Romania SA.

ment had had related to the activities of his law firm, how big would his advantage have been in relation to Volksbank in the view of disadvantages that the consumer has within the meaning of par. 18 of this judgment? Would Mr Costea have studied the credit market conditions in more detail, would he have done a market survey, could he have bargained for better credit terms compared to his status as a consumer? Would the bank have allowed bargaining for better credit terms only to traders?

Pursuant to paragraph 27, in such a situation, even if a lawyer were considered to display a high level of technical knowledge, he could not be assumed not to be a weak party compared with a seller or supplier. As has been noted in paragraph 18 of the present judgment, the weaker position of the consumer vis-à-vis the seller or supplier, which the system of protection implemented by Directive 93/13 is intended to remedy, relates both to the consumer's level of knowledge and to his bargaining power under terms drawn up in advance by the seller or supplier the content of which that consumer is unable to influence. So if he had used the credit to run his law firm, would he have been better informed and more powerful in bargaining? Even the bank itself did not know for what purpose the credit would be used, as shown in the prejudicial question – the purpose of the credit was not determined in the contract. It means that the bank would have treated him in the same manner regardless of how the credit would have been used. Nevertheless, the Court of Justice came to conclusion that Art. 2(b) of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts is to be interpreted as meaning that a natural person who practises as a lawyer and concludes a credit agreement with a bank, in which the purpose of the credit is not specified, may be regarded as a 'consumer' within the meaning of that provision, where that agreement is not linked to that lawyer's profession. Thus, the purpose followed by the consumer protection is probably just formal and the basic element is the functional criterion focusing on the purpose of the contract irrespective of whether it is in accordance with the objective of the Directive and the consumer protection. It means that the current definition of the consumer based on the functional criterion leads to an absurd conclusion and denies the objective followed by the legal regulation of the consumer protection. So it becomes only an unnecessary bureaucratic tool not fulfilling the aim which is needed in order to achieve a functional internal market environment.

## IV.3 Concluding Remarks of the Notion of Consumer in the EU Judicature

The current directives and regulations, and especially certain judgements of the Court of Justice create an absurd situation instead of bringing more legal certainty to the position of the consumer. Liberal, sociological, economic, or other social background of the definition of the consumer admits that the term consumer has a wide and often limitless interpretation (54), (55), (56).

Therefore, we assume that in order to increase the legal certainty for persons involved in legal relations, it would be appropriate to replace the uncertain functional criterion with objective criteria.

In terms of de lege ferenda considerations, it would be suitable to consider drawing inspiration from Directive (EU) 2015/2302 of the European Parliament and of the Council on package travel, pursuant to which the consumer is any person concluding a contract, the subject of which represents tourism services. The term consumer could be defined in a similar way in other directives that protect consumers in specific legal acts, such as doorstep selling, distance selling, consumer credit, etc. In terms of those legal acts, the consumer could be perceived as any person, who is seeking to conclude a contract, or who has concluded a contract, within the scope of the relevant directive.

Then de lege ferenda general definition of the consumer (in cases of unfair terms or unfair trade practices that may occur in different legal acts) can be restrictive and can apply only to a natural person who does not carry out any business, i.e., does not have the status of a trader who is likely not to be in a disadvantaged position in terms of bargaining power, as well as the level of informedness.

The objective criteria will not create an absolute equality in legal relations as well, but the equality is not guaranteed even with the current legislation. If a trader, a lawyer, buys office supplies for the purposes of his business, the consumer protection is not applicable; however, if he buys them for his children to school, he is considered to be a consumer, although the degree of informedness about office supplies and their quality, or their properties, is exactly the same in both cases. And the aim of the consumer protection is particularly to ensure the balance which has been disturbed in legal relations mainly due to a lower degree of informedness of the consumer. Using the objective criteria in the proposed definition would remove the legal uncertainty over who is

(54) Denkinger, F. (2007) *Verbraucherbegriff: eine Analyse persönlicher Geltungsbereiche von verbraucherrechtlichen Schutzvorschriften in Europa*. Berlin: Walter de Gruyter, 2007. 670 p. ISBN 978-3-8994-9401-3.

(55) Pfeiffer, T. (1999) *Der Verbraucherbegriff als zentrales Merkmal im europäischen Privatrecht*. In: Schulte – Nölke, H., Schulze R. (1999) *Europäische Rechtsangleichung und nationale Privatrechte*, Baden – Baden: Nomos, 1999, pp. 21-43. ISBN 978-3789061868.

(56) Dreher, M. (1997). *Der Verbraucher als Phantom in den opera des europäischen und deutschen Rechts*. In: *Juristenzeitung*, 1997, vol. 52, no. 4, pp. 167-178 ISSN 1868-7067.

considered to be a consumer, although we do not exclude that this definition may cause anomalies similar to those existing nowadays. The benefit of the new definition lies in the higher degree of legal certainty.

## V. Conclusion

The personal criterion of the definition of the consumer does not cause more serious problems in terms of interpretation and application despite the fact that the secondary law sources do not always define the consumer in the same way. However, the functional criterion represents a problematic aspect, and it is so even after changing its expression in the definition the consumer. The issue of the legal uncertainty resonates not only in the case of dual purpose legal acts, but also in the cases of legal acts, in which the functional criterion is not clearly defined (e.g. the absence of the purpose of the credit in credit agreements between a bank and a lawyer). Therefore, we assume that in order to increase the legal certainty for persons involved in legal relations, it would be appropriate to replace the uncertain functional criterion with objective criteria. The objective criteria will not create an absolute equality in legal relations as well, but the equality is not guaranteed even with the current legislation. Using the objective criteria in the proposed definition would remove the legal uncertainty.

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