Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 23 April 2015 [1]

Case C-110/14

Horațiu Ovidiu Costea
v
SC Volksbank România SA

(Request for a preliminary ruling from the Judecătoria Oradea (Romania))

(Consumer protection — Definition of consumer within the meaning of Article 2(b) of Directive 93/13/EEC — Credit agreement concluded by a natural person who practises as a lawyer — Loan secured on a building owned by the borrower's law firm — Effect of knowledge and profession on the status of consumer — Determination of the purpose of the loan — Dual purpose contracts within the meaning of recital 17 in the preamble to Directive 2011/83/EU — Effect of an ancillary contract on the principal contract)

1. The present request for a preliminary ruling from the Judecătoria Oradea (Romania) provides the Court with the opportunity to rule on the definition of consumer within the meaning of Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('the Directive'), [2] pursuant to which a 'consumer' is any natural person who, in contracts covered by the Directive, is acting for purposes which are outside his trade, business or profession.

2. Although judicial interpretations of the term 'consumer' have been provided in a number of areas of EU law, the concept has so far not been developed exhaustively in the case-law relating to the specific area of the Directive, [3] the interpretation of which is sought in the present case. In particular, the unusual feature of this case is that it questions whether a legal professional may be regarded as a consumer when he concludes a credit agreement secured on immovable property owned by his law firm. The question thus arises, on the one hand, of the effect of the particular skills and knowledge of a person on his status as a consumer and, on the other hand, of the effect of that person's role in an ancillary security agreement on his status as a consumer in a principal credit agreement.

1 — Original language: Spanish.

2 — OJ 1993 L 95, p. 29.

3 — The Court interpreted that concept in relation to Directive 93/13/EEC in *Cape and Idealservice MN RE* (C-541/99 and C-542/99, EU:C:2001:625).

I – Legislative framework

A – *EU law*

3. The fifth, tenth and sixteenth recitals in the preamble to the Directive are worded as follows:

‘(5) Whereas, generally speaking, consumers do not know the rules of law which, in Member States other than their own, govern contracts for the sale of goods or services; whereas this lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State;

…

(10) Whereas more effective protection of the consumer can be achieved by adopting uniform rules of law in the matter of unfair terms; whereas those rules should apply to all contracts concluded between sellers or suppliers and consumers; whereas as a result inter alia contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organization of companies or partnership agreements must be excluded from this Directive;

…

(16) Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account’.

4. Article 1(1) of Directive 93/13 provides that the purpose of the Directive is ‘to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer’.

5. Article 2 of the Directive defines the terms ‘consumer’ and ‘seller or supplier’. According to that provision, ‘[f]or the purposes of this Directive:

…

(b) “consumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;

(c) “seller or supplier” means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned’.

B – *Romanian law*

6. Article 2 of Law No 193/2000 on unfair terms in contracts concluded between consumers and traders (*Legea privind clauzele abuzive din contractele încheiate între comercianți și consumatori*), in the version in force on the date when the credit agreement at issue in the main proceedings was concluded, reads as follows:

'1. "Consumer" means any natural person (or group of natural persons forming an association) who, on the basis of a contract covered by this law, is acting for purposes that are outside his trade, business, industry or profession.

2. "Trader" means any natural person or duly authorised legal person who, on the basis of a contract covered by this law, is acting for purposes that relate to his trade, business, industry or profession, as well as any other person acting for those purposes for and on behalf of that person.'

II – Main proceedings and question referred for a preliminary ruling

7. The present reference for a preliminary ruling arises in the context of civil proceedings between Mr Costea, the applicant, and SC Volksbank România SA ('Volksbank'), the defendant, in which a declaratory judgment is sought from the Judecătoria Oradea (Romania), a civil court of first instance.

8. The applicant, Mr Costea, is a lawyer practising in the field of commercial law. In 2008, Mr Costea entered into a credit agreement with Volksbank ('the disputed agreement'). According to the order for reference, that agreement was also signed by the law firm 'Costea Ovidiu' in its capacity as mortgage guarantor. On the same date as the credit agreement, an agreement was also concluded pursuant to which the law firm 'Costea Ovidiu', as the owner of the building, agreed with Volksbank the security for repayment of the loan referred to above ('the security agreement'). The law firm 'Costea Ovidiu' was represented for those purposes by Mr Costea. It is that fact which drew the attention of the defendant bank to the borrower's profession.

9. On 24 May 2013, Mr Costea lodged the application in the main proceedings against Volksbank, seeking a declaration that the term relating to the 'risk charge', set out in paragraph 5(a) of the credit agreement, is unfair,[4] and also seeking reimbursement of the amounts received by the bank in respect of that charge. Mr Costea bases his claims on his status as a consumer, relying on the provisions of Law No 193/2000 which transposes the Directive into Romanian law. In particular, Mr Costea submits that the 'risk charge' term was not negotiated and was instead imposed unilaterally by the bank. The applicant concludes from this that the term is unfair and further submits that the mortgage guarantee attached to the loan eliminated that risk. The order for reference does not discuss the subject-matter of the term or its possible unfairness.[5]

4 — It is apparent from the documents in the case-file that the term in question is included in the 'special conditions' section of the agreement and is headed 'risk charge'; that charge amounts to 0.22% of the balance of the loan and must be paid monthly on the instalment dates throughout the term of the agreement.

5 — Volksbank's practice of including 'risk charge' terms in credit agreements has led to a number of cases before the Court of Justice. In *SC Volksbank România* (C-602/10, EU:C:2012:443), the Court held that Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/12/EEC (OJ 2008 L 133, p. 66) must be interpreted as not precluding a national measure (in that case, Government Emergency Order 50/2010, *Monitorul Oficial al României*, Part I, No 389, of 11 June 2010) designed to transpose that directive into domestic law from including in its material scope credit agreements concerning the grant of credit secured by immovable property, even though such agreements are expressly excluded from the material scope of the directive. The Romanian courts have sought preliminary rulings in five other cases which were, however, subsequently removed from the register after the withdrawal of the requests for a preliminary ruling (orders in *SC Volksbank România* (C-47/11, EU:C:2012:572); in *SC Volksbank România* (C-571/11, EU:C:2012:726); in *SC Volksbank România* (C-108/12, EU:C:2013:658); in *SC Volksbank România* (C-123/12, EU:C:2013:460); and in *SC Volksbank România* (C-236/12, EU:C:2014:241). In *Matei* (C-143/13, EU:C:2015:127), the Court had the opportunity to interpret Article 4(2) of Directive 93/13 in relation to certain terms included in credit agreements concluded between a seller or supplier and consumers, which provide for a 'risk charge'.

10. The Judecătoria Oradea took the view that an interpretation of Article 2(b) of the Directive is necessary in order to dispose of the main proceedings and it therefore referred the following question to the Court for a preliminary ruling:

'Must Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as including in, or as excluding from, the definition of "consumer" a natural person who practises as a lawyer and concludes a credit agreement with a bank, in which the purpose of the credit concerned is not specified, when in that agreement that natural person's law firm is stated to be the guarantor for the mortgage?'

11. Written observations were lodged in the proceedings before the Court by SC Volksbank România, the Romanian Government, the Italian Government, the Netherlands Government and the European Commission. At the hearing, held on 28 January 2015, the parties were invited to concentrate in their submissions on the effect of the ancillary security agreement on the status of consumer and on the usefulness, in the context of the present case, of the information about dual purpose contracts contained in recital 17 in the preamble to Directive 2011/83/EU.[6] Oral argument was presented by Mr Costea, the Romanian Government and the European Commission.

III – Preliminary remarks

12. As a preliminary point, it should be noted that, whereas in the order for reference the national court states that the purpose of the loan is not indicated anywhere in the wording of the agreement, both the Romanian Government and the Commission state in their written observations that the disputed agreement includes a term identifying the purpose of the agreement, which states that the loan was granted to 'cover personal current expenditure'. That fact is not disputed by Volksbank, and it was confirmed at the hearing by Mr Costea.

13. In that regard, notwithstanding the fact that the national court refers in its question to a situation where the purpose of the credit is not specified, I believe that the discrepancy between the order for reference and the observations submitted to the Court cannot preclude the Court from providing a useful reply to the question referred for a preliminary ruling.

14. According to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[7]

15. In addition, as regards, specifically, the alleged omissions and factual errors in the order for reference, it is settled case-law that it is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver.[8]

6 — Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/CE 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 the Council (OJ 2011 L 304, p. 64).

7 — See, inter alia, *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 27 and the case-law cited).

8 — See, for example, *Traum* (C-492/13, EU:C:2014:2267, paragraph 19), and *PreussenElektra* (C-379/98, EU:C:2001:160, paragraph 40).

16. In the present case, the question has been referred for a preliminary ruling in the context of a specific dispute the outcome of which depends on the interpretation of the term 'consumer' in the Directive. In addition, the order for reference contains sufficient material to enable the Court to provide the national court with a useful answer.

IV – Analysis

17. Bearing in mind the relevant factors which will enable a useful answer to be provided to the question referred for a preliminary ruling by the national court, on which the observations of the participants have also focused, my analysis will entail an examination of the concept of consumer in the Directive and also of the effect of other factors on that concept, such as the reference to dual purpose contracts in Directive 2011/83 and the relationship between the principal agreement (the credit agreement) and the security agreement.

A – *The concept of consumer in Directive 93/13*

18. The concept of consumer appears across many fields of EU law, beyond the specific instruments on the approximation of laws on consumer protection; examples are the fields of competition law,[9] judicial cooperation in civil matters,[10] the common agricultural and fisheries policies,[11] and other fields where measures to approximate laws exist.[12] In that regard, the many instruments of secondary law aimed at consumer protection do not provide an unambiguous conception of the term 'consumer' either.[13] It is, therefore, a notion which is present in many areas of the European Union's legislative activity but one which has not been specifically defined in primary law,[14] and its application as a category for identifying certain persons is not monolithic but is altered by each of the relevant instruments of secondary law. Thus, the notion of consumer is not defined uniformly in all instruments, which belong to different spheres and have different objectives: it is a working, dynamic notion, which is defined by reference to the subject-matter of the legislative act concerned.[15]

19. In the present case, the Court is required to interpret the term 'consumer' in the context of Directive 93/13. It is clear that the starting point for carrying out that task must be the wording of Article 2(b) of the Directive, which sets out the definition of consumer.

9 — Articles 102(b) TFEU and 107(2)(a) TFEU.

10 — Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1972 L 299, p. 32), Article 13, and Council Regulation (EC) No 44/2001 **of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters** (OJ 2001 L 12, p. 1), Article 15.

11 — Articles 39(1)(c) TFEU and 40(2) TFEU.

12 — For example, see Directive 2000/31/EC **of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce**') (OJ 2000 L 178, p. 1).

13 — However, the term 'consumer' was defined similarly, but not identically, in certain instruments, such as Council Directive 85/577/EEC **of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises** (OJ 1985 L 372, p. 31) and Directive 97/7/EC **of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts** (OJ 1997 L 144, p. 19) — both of which were repealed by Directive 2011/83 — and also in Council Directive 90/314/EEC **of 13 June 1990 on package travel, package holidays and package tours** (OJ 1990 L 158, p. 59) and Directive 2005/29/EC **of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market** (OJ 2005 L 149, p. 22). Moreover, the latter takes as a benchmark the concept of the 'average consumer', who, in line with the interpretation of the Court of Justice, 'is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors …' (recital 18). For a comparison of the concept of consumer in the different instruments, see M. Ebers, 'The notion of "consumer"', *Consumer Law Compendium*, www.eu-consumer-law.org.

14 — On the different functions of the notion of consumer, see K. Mortelmans and S. Watson, 'The Notion of Consumer in Community Law: A Lottery?', in J. Lonbay (ed.), *Enhancing the Legal Position of the European Consumer*, BIICL, 1996, pp. 36 to 57.

15 — M. Tenreiro, 'Un code de la consommation ou un code autour du consommateur? Quelques réflexions critiques sur la codification et la notion du consommateur', in L. Krämer, H.-W. Micklitz y K. Tonner (eds.), *Law and diffuse Interests in the European Legal Order. Liber amicorum Norbert Reich*, p. 349.

20. It is apparent from that provision that, for the purposes of the definition of consumer and the definition of seller or supplier, the sphere in which the individual concerned acts is relevant. Thus, Article 2(b) of the Directive provides that a consumer is 'any natural person who, in contracts covered by this Directive, *is acting* for purposes which are outside his trade, business or profession'. By contrast, according to Article 2(c), a seller or supplier is 'any natural or legal person who, in contracts covered by this Directive, *is acting* for purposes relating to his trade, business or profession …'

21. In that connection, the case-law of the Court has made clear that the contrast between the concepts of seller or supplier and consumer does not operate in completely symmetrical terms (not everyone who cannot be regarded as a seller or supplier is a consumer), since, in particular, a legal person cannot be regarded as a consumer within the meaning of Article 2 of the Directive.[16] In the present case, there is no doubt that Mr Costea concluded the credit agreement in his capacity as a natural person and not as the representative of his law firm.

22. The uncertainty surrounding Mr Costea's status as a consumer, which is the reason for the question referred for a preliminary ruling, stems from the fact that Mr Costea is a lawyer by profession. All the participants who submitted written observations and presented oral argument, with the exception of Volksbank, take the view that the profession practised by a natural person has no bearing when it comes to assessing whether a person may be regarded as a consumer within the meaning of Article 2(b) of the Directive. However, Volksbank states that, in order to be able to regard a person as a consumer, in addition to finding that an objective criterion is satisfied — resulting from the wording of Article 2(b) of the Directive — a subjective criterion must also be satisfied, relating to the spirit of the Directive, which is to protect the consumer as the weaker party who is generally not aware of the statutory provisions. Thus, according to Volksbank, the presumption that a consumer is in a position of inequality may be rebutted if that consumer is found to have the experience and information necessary to protect himself on his own.

23. Taking into account the wording of the definition in Article 2(b) of the Directive, interpreted systematically in conjunction with the other provisions of the Directive, and in the light of the judicial interpretation of the concept of consumer in other instruments of EU law, I believe that Volksbank's reasoning cannot be accepted.

24. The central element of the notion of consumer, as defined in the Directive, is an element which can be clearly circumscribed: the position held by the contracting party in the legal transaction in question. In that connection, as pointed out in *Asbeek Brusse and de Man Garabito*, it is necessary to take into consideration the fact that '[i]t is … by reference to the capacity of the contracting parties, according to whether or not they are acting for purposes relating to their trade, business or profession, that the directive defines the contracts to which it applies.'[17]

25. The emphasis on the sphere of activity in which the transaction concerned takes place as a factor determining the status of consumer is also confirmed by the case-law of the Court on other instruments relating to consumer protection, which contain definitions of the term 'consumer' similar to that in Article 2(b) of the Directive. Thus, in *Di Pinto*,[18] with regard to the interpretation of the concept of consumer in the context of Directive 85/577/EEC,[19] the Court pointed out that the criterion for the application of protection lay in the connection between the transactions which were

16 — *Cape and Idealservice MN RE* (C-541/99 and C-542/99, EU:C:2001:625, paragraph 16).

17 — C-488/11, EU:C:2013:341, paragraph 30.

18 — C-361/89, EU:C:1991:118.

19 — Directive repealed by Directive 2011/83/EU, Article 2 of which defined 'consumer' as 'a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession'.

the subject of the canvassing of traders — aimed at inducing the conclusion of an advertising contract concerning the sale of a business — and the professional activity of the trader concerned, so that the latter could claim that the directive was applicable only if the transaction in respect of which he was canvassed lay outside his trade or profession. [20]

26. Thus, the wording of the Directive and the case-law interpreting that instrument and Directive 85/577 appear to opt for a concept of consumer which is both objective and functional; therefore, as regards a specific person, it is not an inherent, unalterable category, [21] but is, on the contrary, a quality which may be assessed by reference to a person's status in relation to a particular legal transaction or operation, among the many which he may carry out in his daily life. As Advocate General Mischo observed in *Di Pinto*, as regards the concept of consumer in the context of Article 2 of Directive 85/577, the persons referred to in that provision 'are not defined *in abstracto, but rather according to what they do in concreto', so that the same person, in different circumstances may be sometimes a consumer and sometimes a seller or supplier*. [22]

27. That conception of a consumer as an actor in a specific legal transaction, which entails both objective and functional elements as the case may be, is also confirmed in the context of the Brussels Convention, a context in which the Court has also interpreted the term 'consumer'; however, as I shall point out below, the analogy must be qualified when interpreting the Directive, taking account of the different objectives of the two measures. Thus, in *Benincasa*, [23] the Court held that, in order to determine whether a person has the capacity of a consumer, 'reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned. … [T]he self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others.' [24]

28. In short, this is an *objective* and *functional* definition which is satisfied on the basis of a *single criterion*: the legal transaction in particular must form part of activities which are outside a person's trade, business or profession. As the Romanian Government has observed, the Directive does not lay down any additional criteria for establishing the status of consumer. It is, moreover, a concept which is defined from a *situational* perspective, in other words, in relation to a specific legal transaction. [25] Accordingly, no one can be deprived of the possibility of being treated as a consumer in relation to a contract which is outside his trade, business or profession by reason of his general knowledge or his occupation, and instead regard must be had exclusively to his position vis-à-vis a specific legal transaction.

29. That conclusion is not called into question by Volksbank's submissions based on the spirit of the Directive, referring, in particular, to a number of recitals in the preamble to the Directive. [26] Taking a systematic approach to the Directive, the idea that the consumer is vulnerable and in a weak position as regards both his bargaining power and his level of knowledge is the rationale for the Directive, since it is based on a situation in which a consumer agrees to terms drawn up in advance by the seller or

20 — *Di Pinto* (C-361/89, EU:C:1991:118, paragraph 15).

21 — In the words of Advocate General Jacobs, '[t]here is no personal status of consumer or non-consumer; what counts is the capacity in which the customer was acting in entering into the particular contract'. Opinion in *Gruber* (C-464/01, EU:C:2004:529, point 34).

22 — Opinion of Advocate General Mischo in *Di Pinto* (C-361/89, EU:C:1990:462, point 19). In that case, the Advocate General proposed that a trader who is canvassed in connection with the sale of his business should have the status of consumer. The Court did not follow that guidance.

23 — C-269/95, EU:C:1997:337.

24 — Ibid., paragraph 16. In conclusion, the Court declared that *'a plaintiff who has concluded a contract with a view to pursuing a trade or profession, not at the present time but in the future, may not be regarded as a consumer'* (paragraph 19). The Advocate General took the same view, stating that '[*i*]*t is precisely the activity in question — and not, I emphasize, the existing personal circumstances of the party to the agreement — which was the factor taken into account when special rules of jurisdiction in relation to certain contracts were laid down in Article 13 of the Convention*.' Opinion of Advocate General Ruiz-Jarabo Colomer, point 49.

25 — F. Denkinger, *Der Verbraucherbegriff*, De Gruyter Recht, Berlin, 2007, p. 287 et seq.

26 — Inter alia, recitals 4 to 6, 8 to 10, 12, 16 and 24.

supplier without being able to influence the content of those terms.[27] However, those notions of vulnerability and weakness, which generally underlie EU consumer protection law as a whole,[28] were not given concrete form in the legislative expression of the concept of consumer as necessary conditions through its definition in positive law. Thus, neither the definition of consumer nor any other provisions of the Directive make the existence of the status of consumer in a particular situation subject to a lack of knowledge, a lack of information or a genuine position of weakness.

30. It would undermine the practical effect of the Directive if it were possible to call into question the status of consumer in each individual case, based on factors related to the experience, education, occupation and even the intelligence of the consumer. In particular, lawyers (or those with a law degree, and other professionals) would be deprived of protection in many aspects of their private affairs. As the Romanian Government points out, even where the level of knowledge of the person in question may be comparable to that of the lender, that does not alter the fact that his bargaining power is the same as that of any other natural person vis-à-vis a seller or supplier.

31. The Court held in *Šiba*[29] that '[l]awyers display a high level of technical knowledge which consumers may not have'.[30] However, those considerations referred to a situation in which the lawyer in question 'provides a legal service for a fee, in the course of his professional activities, to a natural person acting for private purposes' and is, therefore, a seller or supplier within the meaning of Article 2(c) of the Directive.[31]

32. Further, an interpretation of the kind proposed by Volksbank would result in all persons who had legal advice or professional advice of another kind when the contract was concluded being denied the status of consumer.[32]

33. In addition, the effect of the knowledge or specific situation of the person concerned has been rejected by the Court in areas distinct from that of the Directive, when the objective requirement that the activity must be outside the trade, business or profession of the person concerned was not satisfied. That occurred in relation to Directive 85/577, with regard to which the judgment in *Di Pinto* shows that where a person acts in the context of his trade, business or profession a genuine lack of knowledge in the particular case does not detract from his status as a seller or supplier.[33]

34. In conclusion, I believe that the concept of consumer, within the meaning of Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, must be interpreted as including a natural person who practises as a lawyer and concludes a credit agreement with a bank, where a building owned by his law firm is also covered by that agreement as mortgage security, when, in the light of the evidence available to the national court, it emerges that that person acted for purposes outside his trade, business or profession.

27 — *Asbeek Brusse and de Man Garabito* (C-488/11, EU:C:2013:341, paragraph 31), and *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 39, and the case-law cited).

28 — See, in that connection, the 'Preliminary programme of the European Economic Community for a consumer protection and information policy', 1975 (OJ 1975 C 92, p. 1), and the Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy (OJ 1981 C 133, p. 1).

29 — C-537/13, EU:C:2015:14.

30 — Ibid., paragraph 23.

31 — Ibid., paragraph 24.

32 — In that regard, it should be recalled that the Court held in *Rampion and Godard* (C-429/05, EU:C:2007:575, paragraph 65), that the fact that a person was represented by a lawyer does not affect the interpretation of Article 11(2) 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 (OJ 1987 L 42, p. 48), according to which that provision may be applied by the national court of its own motion.

33 — Thus, the Court held that '*[t]here is every reason to believe that a normally well-informed trader is aware of the value of his business and that of every measure required by its sale, with the result that, if he enters into an undertaking, it cannot be through lack of forethought and solely under the influence of surprise*', *Di Pinto* (C-361/89, EU:C:1991:118, paragraph 18).

B – *The concept of consumer in relation to dual purpose contracts*

35. In addition to the foregoing considerations, I believe that, in order to reply to the question referred for a preliminary ruling, it is helpful to discuss so-called 'dual purpose contracts', in particular in so far as that question refers expressly to a contract in which the purpose of the credit is not specified.

36. In that connection, the Romanian Government and the Netherlands Government have pointed to the usefulness of the judgment in *Gruber* when it comes to determining whether Mr Costea is a consumer in the present case. [34] For its part, the European Commission drew attention in its written observations and at the hearing to the relevance of recital 17 in the preamble to Directive 2011/83. That recital and the *Gruber* judgment both refer to dual purpose contracts in different contexts.

37. The criteria for determining whether a contract comes within the private sphere or the trade or professional sphere are different in *Gruber* and Directive 2011/83. As I shall point out below, I believe that the criterion in Directive 2011/83 is the relevant criterion in the circumstances of the present case.

38. In *Gruber*, [35] the Court opted for a strict interpretation of the term 'consumer' in situations relating to dual purpose contracts. That interpretation makes paramount the criterion of marginality: a person may not rely on the special rules of jurisdiction relating to consumers laid down in the Brussels 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'. [36] The Court also held in that context that the burden of proof rests with the person wishing to rely on Articles 13 to 15 of the Convention. [37]

39. Recital 17 in the preamble to Directive 2011/83, which is worded quite differently, opts for a criterion based on the predominant purpose: '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'.

40. Thus, whereas, according to the criterion of marginality laid down in *Gruber*, use for a trade or professional purpose must be so limited that it may be regarded as negligible in order for a contract to fall within the private sphere, Directive 2011/83 opts for a more balanced solution, using the criterion of the predominant purpose in the overall context of the contract.

41. As the European Commission stated at the hearing, the application of the *Gruber* case-law in connection with the interpretation of the Directive should be treated with caution. The case-law of the Court interpreting the concept of consumer in the context of Article 13 of the Brussels Convention and Article 15 of Regulation No 44/2001 emphasises a restrictive approach, which undoubtedly takes into consideration the fact that those provisions involve exceptions to the general criterion of jurisdiction based on the defendant's domicile and, therefore, must be interpreted strictly. [38] Thus, it does not appear that it is possible to transfer by analogy the restrictive application of the concept of consumer in dual purpose contracts to the context of special provisions aimed at the protection of consumers, such as the Directive. [39]

34 — *Gruber* (C-464/01, EU:C:2005:32) was a case concerning the purchase of tiles and the tiling of a farm building in which Mr Gruber also had his family home.

35 — C-464/01, EU:C:2005:32.

36 — *Gruber* (C-464/01, EU:C:2005:32, paragraph 54). Emphasis added.

37 — Ibid., paragraph 46.

38 — See, for example, *Shearson Lehman Hutton* (C-89/91, EU:C:1993:15, paragraph 18), and *Gabriel* (C-96/00, EU:C:2002:436, paragraph 39).

39 — On that discussion, see N. Reich, H.-W. Micklitz, P. Rott and K. Tonner, *European Consumer Law*, 2nd ed. Intersentia, 2014, p. 53.

42. In addition, the difference between the approach in recital 17 in the preamble to Directive 2011/83 and that taken in *Gruber* is no coincidence. During the negotiations on that directive, the European Parliament introduced an amendment which expressly proposed the alteration of the definition of consumer so as to widen it to 'any natural person who … is acting for purposes which are *primarily* outside his trade, business, craft or profession.[40] During the subsequent negotiations, the European Parliament agreed to retain the definition of consumer, removing the adverb *primarily*, on condition that in the recital clarifying the definition of consumer, which was originally based on the *Gruber* judgment,[41] the word 'limited' was replaced by the word 'predominant'.[42]

43. In short, in the light of the different functions of the concept of consumer in the different legislative acts and of the finding which is clear from the preparatory documents, I believe that recital 17 in the preamble to Directive 2011/83 enshrines the criterion of the predominant purpose in the overall context of the contract.

44. As far as the present case is concerned, I, like the Romanian Government and the Commission, incline to the view that recourse to the explanation provided in recital 17 in the preamble to Directive 2011/83 for the purpose of interpreting the concept of consumer is also required in the context of the Directive. That conclusion is justified in the light of the shared objective and the clear link between the two instruments. In that connection, Directive 2011/83 is a measure amending the Directive.[43] Moreover, the wording of the definition of consumer in those two provisions is almost identical, the sole difference being that, whereas the Directive refers only to 'trade, business or profession', Directive 2011/83 refers to 'trade, business, craft or profession'.

45. Accordingly, in order to ascertain whether a person may be regarded as a consumer for the purposes of the Directive in circumstances in which there is evidence that the contract at issue pursues a dual purpose, so that it is not clear that that contract was concluded exclusively for either a private purpose or a trade or professional purpose, the criterion of the predominant purpose provides a tool for establishing, through an examination of the totality of the circumstances surrounding the contract at issue — beyond a purely quantitative criterion —[44] and an assessment of the objective evidence available to the national court, the extent to which the trade or professional purpose or the private purpose is predominant in relation to a particular contract.

46. Although the European Commission and Mr Costea stated at the hearing that the account of the facts provided by the national court does not reveal any evidence suggesting that the agreement at issue is a dual purpose contract, it is for the referring court to clarify the factual situation in relation to the purpose of the loan by means of the evidence available to it, which undoubtedly includes the terms contained in the agreement itself, the subject-matter of which may well underpin the presumption that the loan in question is intended for private purposes.

40 — Report on the proposal for a Directive of the European Parliament and of the Council on consumer rights, Internal Market and Consumer Protection Committee, 22 February 2011, A7-0038/2011, p. 36, amendment no 5. Emphasis added.

41 — Council Document 10481/11 of 20 May 2011, p. 3.

42 — Council Document 11218/11 of 8 June 2011, p. 5.

43 — Directive 2011/83 replaces Directive 85/577/EEC and Directive 9/7/EC, and amends Directive 93/13/EEC and Directive 1999/44/EC. In relation to Directive 93/13, although the Commission's Proposal (COM(2008) 614 final) envisaged the complete repeal of the Directive and its incorporation into the new directive, in the end Directive 2011/83 merely inserted into Directive 93/13, by means of Article 32, a new Article 8a relating to the introduction of more stringent consumer protection provisions by Member States.

44 — It is indisputable that there is some complexity involved in the practical application of the criterion of the predominant purpose. On that debate, see L. D. Loacker, 'Verbraucherverträge mit gemischter Zwecksetzung', *Juristenzeitung* 68, 2013, p. 234 to 242.

47. In conclusion, I believe that if the national court takes the view that it is not clear that a contract was concluded exclusively with either a private purpose or a trade or professional purpose, the contracting party in question must be regarded as a consumer if the trade or professional purpose is not predominant in the overall context of the contract, having regard to the totality of the circumstances and an assessment of the objective evidence available to the national court, which it is for that court to evaluate.

C – *The relationship between the principal agreement and the ancillary agreement*

48. Finally, it remains to be established whether the classification of Mr Costea's status as that of consumer may be affected by the fact that the principal credit agreement was secured on a building which is used for the borrower's professional activity.

49. In that connection, the observations submitted by both the Romanian Government and the Commission contend that the security agreement does not affect the credit agreement. Those observations, and Mr Costea's observations at the hearing, pointed out that the law firm 'Costea Ovidiu' has the status of third party in relation to the credit agreement, observing that the mere fact that a building owned by the firm constitutes security for the credit agreement does not mean that that firm becomes a party to the credit agreement.

50. Taking the same view as that put forward in the observations submitted to the Court, I believe that there are two distinct legal relationships: on the one hand, the relationship between Mr Costea, as a natural person — in his capacity as borrower — and the bank, and, on the other hand, the relationship between the law firm 'Costea Ovidiu' — as mortgage guarantor — and the bank. The two legal relationships must be considered separately, so that the latter — which, moreover, is ancillary in nature — does not affect the nature of the former.

51. In that regard, the case-law of the Court offers some guidance on the relationship between contracts which may be regarded as ancillary and the respective principal contracts, in the context of both Directive 85/577 and Regulation No 44/2001. Thus, as regards Directive 85/577, the Court held in *Dietzinger*[45] that, in view of the ancillary nature of contracts of guarantee, 'on a proper construction of the first indent of Article 2 of Directive 85/577 [which contains the definition of consumer], a contract of guarantee concluded by a natural person who is not acting in the course of his trade or profession does not come within the scope of the directive where it guarantees repayment of a debt contracted by another person who, for his part, is acting within the course of his trade or profession'.[46] The Court took the same view when interpreting Article 15(1) of Regulation No 44/2001, holding in *Česká spořitelna*[47] that that provision '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.'[48]

52. However, the case before the Court involves the opposite situation. Any professional aspect applies only to the ancillary agreement, in so far as Mr Costea signed the security agreement as the legal representative of his law firm. Accordingly, unlike in *Dietzinger* and *Česká spořitelna*, this case does not involve the application of the maxim *accessorium sequitur principale*, in the sense that the effects

45 — C-45/96, EU:C:1998:111.

46 — Ibid., paragraph 23. However, application of the maxim *accessorium sequitur principale* was not considered to be sufficient for a finding that a contract of guarantee concluded to secure the repayment of a loan fell within the scope of Directive 87/102, even though neither the guarantor nor the recipient of the loan had acted in the course of their trade or profession. See, in that connection, *Berliner Kindl Brauerei* (C-208/98, EU:C:2000:152).

47 — C-419/11, EU:C:2013:165.

48 — Ibid., paragraph 40.

of the ancillary agreement must suffer the same fate as those of the principal agreement, but rather it is necessary to take into account the individual nature of each of these legal relationships in order to be able to identify the different functions which the same person performs in them. The decisive point for the purposes of the present case is not to establish Mr Costea's status as legal representative in the security agreement, which is the ancillary agreement, but rather to ascertain what his position is in the credit agreement, which is the principal agreement.

53. Thus, the fact that Mr Costea signed the security agreement as the representative of the law firm does not adversely affect Mr Costea's status as a consumer in relation to the principal credit agreement. On the contrary, based on the case-law cited, it could even be argued that the ancillary security agreement comes under the influence of the principal agreement. [49]

54. For the reasons set out above, I believe that the role of a natural person, in his capacity as the legal representative of his law firm, in the conclusion of an ancillary security agreement does not affect his status as a consumer in relation to a principal credit agreement.

V – Conclusion

55. In the light of the foregoing considerations, I propose that the Court reply as follows to the question referred for a preliminary ruling by the Judecătoria Oradea:

'The concept of consumer, within the meaning of Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, must be interpreted as including a natural person who practises as a lawyer and concludes a credit agreement with a bank, where a building owned by his own law firm is also covered by that agreement as mortgage security, when, in the light of the evidence available to the national court, it emerges that that person acted for purposes outside his trade, business or profession.

If the national court takes the view that it is not clear that a contract was concluded exclusively with either a private purpose or a trade or professional purpose, the contracting party in question must be regarded as a consumer if the trade or professional purpose is not predominant in the overall context of the contract, having regard to the totality of the circumstances and an assessment of the objective evidence available to the national court, which it is for that court to evaluate.

The role of a natural person, in his capacity as the legal representative of his own law firm, in the conclusion of an ancillary security agreement does not affect his status as a consumer in relation to a principal credit agreement.'

49 — However, there are limits to the criterion of the ancillary nature of a contract as a factor for determining whether EU law is applicable. See, in that respect, the Opinion of Advocate General Léger in *Berliner Kindl Brauerei* (C-208/98, EU:C:1999:537, point 65).