JACEK SKOCZEK

Limits of Application of the Institution of Free Credit by a Member of the Cooperative Savings and Credit Union

Abstract

The author discusses the limits of the application of the institution of interest-free credit by members of the Cooperative Savings and Credit Union (SKOK). The concept of interest-free credit was introduced into Polish law as a result of the implementation of EU Directive 2008/48/EC, which allows member states to establish sanctions for breaches of national provisions adopted in accordance with this Directive.

According to Polish law, a consumer may demand repayment of the credit without interest and other costs if the creditor has violated the information obligations specified in the Consumer Credit Act. Similar sanctions already existed in national law, but their wording was changed, including the requirement of a written declaration by the consumer.

However, the interest-free loan sanction appears to be disproportionate and one-sided, negatively affecting the economic interests of the creditor. Its implementation is especially problematic in the case of SKOKs, where members have extended financial liability for the activities of the union.

An analysis of the principle of proportionality in the context of the application of the interest-free credit sanction to SKOKs highlights the need to maintain a balance between consumer interests and the financial stability of the union. In the case of SKOKs, which operate on the basis of shared ownership by members and a common economic purpose, the application of the interest-free credit sanction requires particular caution and consideration of the specific nature of these relationships.

The author of the article emphasizes the need to amend the regulations on interest-free credit in order to take into account the differences in the creditor's misconduct and the specific economic relations between the creditor and the

JACEK SKOCZEK, PhD in law, Cooperative Research Institute in Sopot,
ORCID – 0000-0001-8037-2661, e-mail: jacek.skoczek@sin.edu.pl

HTTPS://DOI.ORG/10.36128/PRIW.VI50.898

consumer. The de lege ferenda proposal suggests introducing differentiated sanctions and taking into account the actual damage to the consumer, which would allow for more proportionate and fair regulations regarding consumer protection and the stability of SKOK-type financial institutions.

KEY WORDS: credit unions, cooperative savings and credit unions, sanction of interest-free credit, consumer credit, proportionality

The institution of free credit was introduced into the national legal order through the implementation of Directive 2008/48/EC of the European Parliament and of the Council of April 23, 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC[1].

Article 23 of the Directive allows Member States to lay down rules on sanctions applicable to violations of the national provisions adopted pursuant to the Directive.

The implementation of Article 23 in the Polish legal system is Article 45(1) of the Consumer Credit Act (CCA)[2], which introduces the so-called sanction of free credit.

According to the wording of the above provision, if the creditor fails to comply with the disclosure requirements set out in Articles 29(1), 30(1, p. 1-8, 10, 11, 14-17), 31-33, 33a and 36a-36c, the consumer shall, after giving written notice to the creditor, repay the credit, without interest and other credit costs, to the creditor at the time and in the manner agreed in the contract.

It should be noted that the introduction of a similar sanction by the 2011 Act is not a complete novelty in Polish legislation. The Consumer Credit Act of 2001[3] already contained Article 15, which allowed the borrower to repay the loan without interest and other credit costs if the creditor violated[4] the disclosure obligations and the form of the contract set forth in Articles 4-7.

1 Directive 2008/48/EC of the European Parliament and of the Council of April 23, 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008).

2 Act of May 12, 2011 on consumer credit (Journal of Laws 2011 No. 126 item 715).

3 Act of July 20, 2001 on consumer credit (Journal of Laws 2001.100.1081).

4 In the course of parliamentary work, an attempt was made to introduce a restriction into Article 15 u.k.k. that the sanction in question would come into effect only in the event of a „material" violation of the provisions indicated. The

This provision also implements the provision of Article 14(1) of Council Directive 87/102/EEC on the approximation of the laws, regulations and administrative provisions of the member states concerning consumer credit[5].

Interestingly, the provision of Article 15 of the CCA 2001 in its original version did not require the consumer to make any statement. The provision stipulated that in the event of a creditor's violation of Articles 4-7 of the 2001 CCA, the content of the concluded consumer credit agreement was changed so that the consumer was obliged to repay the loan without interest and other credit costs due to the creditor[6], but the 2003 amendment[7] introduced the obligation for the consumer to submit a written statement to the creditor on the application of the sanction of free credit[8].

Nevertheless, both the provision of Article 15 of the CCA 2001 and the provision of Article 45(1) of the CCA 2011 are examples of so-called gold-plating. Gold-plating is the process by which a Member State that is required to transpose an EU directive into national law or to implement

---

above proposal was criticized by the Authors of the government draft bill – in more detail Dominika Rogoń, *Kredyt Konsumencki. Komentarz* (LEX/el. 2002).

5 Council Directive of December 22, 1986 on the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (87/102/EEC) (OJ EU L of February 12, 1987).

6 More extensively: Małgorzata Bednarek, „Sankcja «kredytu darmowego» jako środek ochrony konsumenta" *Europejski Przegląd Sądowy*, No. 3 (2009): 18.

7 Act of May 23, 2003 amending the Consumer Credit Act (Journal of Laws 2003.109.1030).

8 Doubts about the way in which the free credit sanction affects the contractual credit relationship arose only with the amendment of the provision of Article 15(1) of the UCC as a result of the addition of the phrase „upon submission of a written statement to the creditor". Firstly, there was a question about the content of the statement required of the consumer – whether it should contain only information about the consumer's intention to take advantage of the sanction of free credit, or whether such a statement should contain a justification indicating the type of failure from which the consumer derives his right to free credit. Secondly, an ambiguity arose about the legal meaning of the legislative amendment in question, and, as a result, about the legal nature of the statement made by the consumer – whether the consumer's statement serves as a prerequisite for the conversion of a credit agreement into a free credit agreement, or whether it is of a purely organizational (informational) nature. In other words, it was a question of whether the sanction of free credit occurs *ex lege, or whether the* occurrence of this sanction depends on the initiative of the consumer, with this initiative usually counted among the consumer's constitutive legal powers – so: Bednarek, „Sankcja «kredytu darmowego»,19.

EU legislation takes the opportunity to impose additional requirements, obligations or standards on the addressees of the national law that are not provided for in the transposed EU legislation or that go beyond the requirements or standards provided for in the transposed EU legislation[9].

Undoubtedly, the sanction of free credit is an extremely one-way institution that *de facto* undermines the entire economic purpose of granting consumer credit and even generates costs on the part of the lender (payment to the employee selling the credit, cost of maintaining the credit risk assessment system, searches in the credit information database, etc.), which are usually covered by the commission on the granting of credit.

This type of „total" protection is too one-sided in favor of the „weaker" party to the transaction and, moreover, encourages unfair attitudes toward the entrepreneur. The accepted meaning of the provisions is at odds with the need to strike an appropriate and fair balance between the interests of the consumer and those of the professional, and thus with the need for an appropriate distribution of the risks borne by each party to the contractual credit relationship[10].

The problem is more relevant when the lender is a cooperative savings and credit union and the consumer taking the loan is its member, who at the same time has an extended responsibility for the financial performance of his cooperative.

In accordance with the provision of Article 2 of the SKOK Act[11] a cooperative savings and credit association is a cooperative to which the provisions of the law – the Cooperative Law[12] – apply, to the extent that they are not regulated by this law.

The provision of Article 19 §2 of the Cooperative Law introduces the general principle that the risk borne by a member of a cooperative is his share, which can be used to cover the loss[13].

---

9 Definition introduced by the European Commission in *Better Regulation Guidelines (Commission Staff Working* Document, SWD (2017) 350, July 7, 2017.

10 Bednarek, „Sankcja «kredytu darmowego»", 19.

11 Act of November 5, 2009 on cooperative savings and credit unions (Journal of Laws 2012 item 855).

12 Law of September 16, 1982 – Cooperative Law. (Journal of Laws 2021 item 648).

13 On the liability of cooperative members for the cooperative's loss up to the amount of their declared shares, see Henryk Cioch, *Zarys prawa spółdzielczego* (Warszawa: Wolters Kluwer, 2007), 49 and idem, *Prawo spółdzielcze* (Warszawa: Wolters Kluwer, 2011), 81.

On the other hand, the provision of Article 26 § 3 of the SKOK Act additionally stipulates that if the charter of the SKOK so provides, the liability of the members for the balance loss[14] may be increased to twice the amount of the subscribed shares, in which case the SKOK member may be required to pay a surcharge on the share equal to its original amount[15].

A member of a cooperative credit union has a membership relationship with the cooperative, as well as relationships that are derived from and related to that membership[16]. Relationships related to membership are primarily property-legal relationships that serve to actualize the member's participation in the potential of the cooperative enterprise. Of these, the most significant is the membership participation relationship. The relationship of obligatory share in a cooperative is closely linked to membership. Each member of the cooperative is required to establish this relationship, which persists throughout the duration of their membership.

Furthermore, the legal relationship of superobligatory shares demonstrates a diminished connection with membership, as the member is not obligated to establish such a legal relationship with the cooperative. Additionally, this relationship can be terminated in its entirety or in part (the deadlines and rules for repayment of superobligatory shares will be outlined in the cooperative's statutes), while retaining membership in the cooperative.

Upon the termination of a superobligatory membership share or membership, the legal relationship, whether superobligatory or obligatory, undergoes a transformation. In place of the previous relationship, a claim for the return of amounts paid for shares arises for the member, while on the part of the cooperative, a debt is incurred. The ultimate resolution of this claim is dependent upon the prevailing economic circumstances of the cooperative and the decision of its general assembly. Indeed, should

14 Although this provision omits the word „balance sheet", it should be considered that it refers to the liability of members for balance sheet losses, yes: Piotr Zakrzewski in Andrzej Herbet, Szymon Pawłowski, Piotr Zakrzewski, *Spółdzielcze kasy oszczędnościowo kredytowe. Komentarz* (Warszawa: C.H. Beck, 2014), 214 et seq.

15 Jacek Skoczek, „Członek spółdzielczej kasy oszczędnościowo – kredytowej – konsument czy inwestor?" *Głos Prawa. Przegląd Prawniczy Allerhanda*, nr 1 (2023).

16 Szerzej na temat stosunków pochodnych i powiązanych zob. Adam Jedliński, *Członkostwo w spółdzielczej kasie oszczędnościowo-kredytowej* (Warszawa: Lexis Nexis, 2002). 170 i nast., Piotr Zakrzewski, Status prawny członka spółdzielni mieszkaniowej w spółdzielczych stosunkach lokatorskich (Warszawa: Wolters Kluwer, 2010), 165-166, o swobodzie nawiązywania stosunków pochodnych: Dominik Bierecki, *Zasada swobody umów w prawie spółdzielczym* (Warszawa: C.H. Beck, 2021), 76 i n.

the cooperative exhibit a balance sheet deficit during the year in which the member terminated their shares or ceased to be a member of the cooperative, it may adopt a resolution to offset the deficit from the share fund, thereby extinguishing the member's or former member's claim in its entirety or in the relevant portion.

It is similarly conceivable that the shares may have been utilized to offset the deficit prior to the member's termination or loss of membership. In such a situation, it can be assumed that the claim for reimbursement of the amounts paid for the shares also lapses upon approval of the report for the year in which the member terminated the shares or lost membership. This is because there is a possibility that the cooperative will generate a profit and elect to utilize it for the purpose of replenishing the shares that were previously employed to offset the loss. This is a solution unique to cooperative savings and credit unions, described in the provision of Article 26 (1) of the SKOK Act. In such a situation, if the credit union has a surplus and the general assembly decides to replenish the shares from the balance surplus, the claim for reimbursement of the amounts paid for the shares will not expire, but will become due on the date specified in the statute.

Another event that may affect the legal relationship of participation is the situation described in Article 130 § 3 of the Cooperative Law: the adoption by the general assembly of an insolvent cooperative of a resolution to continue its operation by imposing surcharges on members' shares as a way out of insolvency. In such a case, members holding shares in the cooperative, as a result of a resolution of its general assembly, may become obligated to make such surcharges.

The provisions of the SKOK Act establish a distinct category of surcharges applicable to members' shares. In accordance with the stipulations of Article 26(3) of the SKOK Act, the articles of association of a credit union may impose liability upon members for the losses of the credit union up to twice the amount of their paid-up shares. As has been established in the legal sciences and jurisprudence, in order for such liability to arise, it is necessary for a resolution of the highest body of the cooperative fund to approve the financial statements indicating a loss that exceeds the cooperative's basic own funds (resource and share funds) and to cover this loss from additional member liability. In such a situation, members may also be required to make supplementary payments equal to the value of their shares.

The termination of supercompulsory shares or loss of membership has a significant impact on the fate of the legal relationship of the share. As indicated above, it is transformed into a claim for reimbursement of the

amounts paid for the shares. This raises the question of whether the member can be charged a surcharge as a result of this change, either under the resolution referred to in Article 130 § 3 of the Cooperative Law or under the additional membership liability referred to in Article 26 § 3 of the SKOK Act.

In the event that a general assembly approves a report for a year in which a member has terminated excess shares or lost membership, and subsequently passes a resolution to cover the resulting loss from the share fund and require members to make surcharges on their shares, it is necessary to determine whether such obligations would apply to terminated excess shares and former members of the cooperative. If the answer to this question were in the affirmative, it would be tantamount to assuming that the legal relationship of a membership share may last longer than the membership of the cooperative itself.

The literature[17] indicates that the purpose of the exception to the principle that members of a cooperative are liable for its losses up to the amount of their contributed shares, introduced by Article 26(3) of the SKOK Act, is to strengthen the financial stability of the credit union, but this is done at the expense of the members, whose degree of participation in the credit union's losses is increased[18].

Therefore, in the case of cooperative savings and credit unions, there can be no simple dichotomous division between a „strong" lender-entrepreneur and a „weak" consumer-borrower, exposed to the capitalist temptations of the former, and the role of the legislator – both national and European – is to give him the most "absolute" tools with which to fight for his rights and the economic conditions directly related to them. Unfortunately, unlike at least bank customers, the situation of SKOK members is directly linked to the financial stability of their credit union.

Such a solution, which makes the member of the cooperative not only a consumer but also an informed investor, has its historical justification

17 See Piotr Zakrzewski in: Herbet, Pawłowski, Zakrzewski, *Spółdzielcze kasy*, 215.

18 See Jacek Skoczek, „Źródła obowiązku dopłat z tytułu dodatkowej odpowiedzialności członkowskiej", [in:] *Prawo prywatne w służbie społeczeństwu, Księga poświęcona pamięci prof. Adama Jedlińskiego* (Sopot: Spółdzielczy Instytut Naukowy, 2019), 279 et seq.

and has already been used in the Cooperative Law of 1920[19] and then many times in more than 100 years of legislation[20].

In spite of the fact that at present both some scholars[21] and the Supreme Court's jurisprudence[22] are inclined to grant a broad consumer protection to a member of a credit union, one cannot overlook the fact that membership in a credit union is a unique arrangement, which combines both consumer and investor characteristics. This is, so to speak, a peculiarity that justifies the legal distinctiveness of credit unions in comparison with other credit institutions, such as banks or cooperative banks, and should therefore be taken into account when interpreting all the provisions that characterize the rights and obligations of a member of a cooperative savings and credit union.

The second extremely important interpretive guideline, without which it seems impossible to deal with the topic presented later in this article, is the principle of proportionality[23], which requires the use of appropriate and

19 Law of October 29, 1920 on cooperatives. (Journal of Laws 1920 no. 111 item 733). For more on the law itself and the solutions used in it, see Stanisław Wroblewski, *Ustawa o spółdzielniach z dnia 29 października 1920. Dz. Ust. n. 111, poz. 733 wraz z rozporządzeniami wykonawczemi* (Krakow 1921; reprint Warsaw 2020).

20 For more on the history of members' responsibility for the cooperative's losses, see Skoczek, „Członek spółdzielczej kasy oszczędnościowo – kredytowej – konsument czy inwestor?".

21 Witold Srokosz, „Członek SKOK jako konsument usług bankowych" *E – biuletyn CBKE* (2008); Krzysztof Łabęda, „Arbitraż konsumencki na przykładzie unii kredytowych funkcjonujących w systemie prawa common law" *Pieniądze i Więź*, nr 4 (2003): 184; Piotr Zakrzewski in: Herbet, Pawłowski, Zakrzewski, *Spółdzielcze kasy.*

22 See Jacek Skoczek, „Problematyka członkostwa w kasach oszczędnościowo-kredytowych w orzecznictwie Sądu Najwyższego w latach 2019-2022" *Prawo i Więź*, nr 43 (2022).

23 Principle of Union administrative law – delimits the discretion of Union institutions deciding individual cases. Article 5(4) TEU – „In accordance with the principle of proportionality, the scope and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality in accordance with the Protocol on the application of the principles of subsidiarity and proportionality". The principle of proportionality is a widely accepted method of resolving conflicts between individual rights and the public interest, and this is true both in the national judiciaries of democratic states and within pan-European normative orders, such as in the jurisprudential activity of the ECHR. It is a product primarily of judicial jurisprudence, and its practical application „consists not so much in recalling its general definition as in applying its three criteria (necessity, usefulness and proportionality sensu stricto) to specific norms from 10 individual fields of law". Consequently, one can speak of the formation of a kind of casuistry of its detailed

necessary measures in order to achieve the objectives set for the member states.

Directive 2008/48 stipulates that sanctions adopted by Member States „must be effective, proportionate and dissuasive" (Article 47). The sanctions adopted in national law to ensure that the objectives of both credit directives are met should therefore be: (1) effective (efficient) for the consumer, (2) proportionate to the interests of lenders and borrowers, and (3) dissuasive by deterring lenders from engaging in practices that are unfair or misleading to consumers[24].

As I pointed out above, the sanction contained in the provision of Article 45(1) of the CCA 2011 is a typical example of *gold-plating*, a phenomenon that is openly undesirable in the national legislation of member states[25].

The regulation in question, by its absolutism and unilateralism, goes beyond the requirements and standards contained in the transposed EU legislation and, moreover, imposes additional requirements and standards on the addressees of the national law.

Indeed, a violation of EU law may also consist in the fact that a member state, through the enactment of national law, implements the provisions of EU law too intensively in a manner that violates the principle of proportionality.

Article 76 of the Constitution of the Republic of Poland provides that public authorities shall protect consumers, customers, hirers or lessees from actions that threaten their health, privacy and safety, and from dishonest market practices.

Consumer protection is not a protectionist or paternalistic action, but aims to protect the interests of the weaker market participant, whose

---

applications, which, on the one hand, requires constant clarification of the criteria that make up the proportionality test, and, on the other hand, referring them to particular types of individual freedoms and rights – Lech Garlicki, Krzysztof Wojtyczek, „Komentarz do art. 31", [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. II, *Art. 30-86*, red. Lech Garlicki, Marek Zubik (Warszawa: Wydawnictwo Sejmowe, 2016), 94.

24 See Bednarek, „Sankcja «kredytu darmowego»,19.

25 See, inter alia, Opinion of the European Economic and Social Committee on The impact of legislative barriers in the Member States on the competitiveness of the EU (Reporting Opinion at the request of the Czech Presidency) (OJ EU C of November 17, 2009); Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Annual Growth Survey – 2012 (OJ EU C of May 22, 2012);

knowledge and orientation are limited compared to the professional partner (seller, service provider). The consumer has a weaker bargaining position, and his particular handicap is due to systemic reasons determined by his market position. For this reason, consumer protection measures designed to strengthen the consumer's position *vis-à-vis* the professional partner serve to level the playing field between them and to ensure, also in the retail market, freedom of choice and unrestricted decision-making. Thus, the essence of consumer protection is not to grant the consumer additional extraordinary privileges, but to subject the entire transaction to „market-compensating" practices designed to restore the lost ability to make consumption decisions[26].

There is no doubt that a sanction which allows the consumer, by means of a unilateral declaration of intent, to distort the essence of the chargeability of a consumer credit agreement for even a minor breach of the creditor's information obligations is an extraordinary privilege which does not fall within the concept of proportionate sanctions referred to in the provision of Article 23 of Directive 2008/48/EC of the European Parliament and of the Council.

The determination of such limits results from both the functional context and the systemic context, which for the norm expressed in Article 45 of the CCA is formed by the principles and practice of the operation of cooperative credit unions and the laws that form the framework for this activity.

According to Article 1 §1 of the Cooperative Law, a cooperative is a legal form in which its members jointly run an enterprise. Thus, it follows from the very nature of a cooperative that its members work together to achieve the goal of permanent and stable operation of the cooperative. This goal constitutes the unity of interests of the cooperative members.

In addition, according to the provision of Article 67 of the Cooperative Law, the cooperative shall conduct its business on the basis of economic calculation, ensuring the benefit of the cooperative members. With regard to cooperative credit unions, or more broadly – credit unions in the world – this principle is expressed by the credo: *Not For Profit, Not For Charity, But For Service*.

Thus, the benefit of the members of the cooperative is the possibility to use its services (the members do not receive interest on their shares, i.e. the so-called dividends, the entire balance surplus of the cooperative is credited to its capital). The services of the credit union are available only

26 See the judgment of the Constitutional Tribunal of 21.04.2004 (K 33/2003).

to its members, who are also its sole owners. At the same time, the voting rights of all members of the union are equal.

It follows from the above that any sanction imposed on the credit union reduces the profitability of its operations and thus distances it from the common goal of its members. An important element of the functional and systemic context in the case of cooperatives is the principle of equal treatment of its members.

If a cooperative credit union applies equal rules to its members and, within the framework of these equal and universal rules, shapes the obligations of its members as, for example, consumer borrowers in a certain way, it will generally be unjustified to impose the sanction of free credit on it for doing so. It will be particularly unjustified if such a way of shaping the consumer's obligations is common in the market of credit services.

In such a situation, the sanction of free credit, intended to protect the consumer, would in fact turn against his cooperative and thus against him. The reciprocal nature of a cooperative credit union (expressed in the fact that it lends only to its members, only with funds entrusted to it by its members, and only at the risk of its members) would justify applying a sanction as far-reaching as that of free credit with great caution.

It would be appropriate to limit this sanction to extreme cases – when the member suffers damage as a result of unfair actions by the cooperative, not within the framework of an equitable balancing of the mutual obligations of the parties to the legal relationship. Such a sanction would be justified if the cooperative had deliberately misled the member in order to induce him to enter into a contract granting him unjustified benefits. In such a case, there would be a legitimate basis for all members of the cooperative to bear the sanction against the wronged member in order to restore equality.

The reciprocal nature of a credit union makes it particularly important, in the case of contracts between a credit union and its member, that the rights and obligations arising therefrom be shared equally between the parties to a reciprocal contract (and such a contract is a credit agreement), and any disruption of this symmetry has far-reaching consequences for the realization of the common goal of the members.

In an extreme case, the excessive use of sanctions against the cooperative as a business, theoretically in the interest of protecting the rights of its members as consumers, could jeopardize the sustainability and stability of its operation, derailing the possibility of achieving the cooperative's objective.

It is worth noting that in the case of credit unions and their dispersed shareholding structure (credit union members hold equal, undiminished shares in their capital, and no outside investors are involved in the formation of this capital), no one other than the members bears the economic consequences of the failure of the credit union's operations.

The pursuit of the balance described above is justified by the more general references to the principle of proportionality made by the European legislator in the preamble to the Directive and by the courts in the grounds of their judgments.

The *de lege lata* postulate should therefore be the application of moderation by the courts adjudicating „free credit" cases. The court should examine each case *ad causum*, interpreting Article 45(1) of the CCA from a systemic perspective, taking into account the legal situation of both the lender and the borrower and their relationship to each other, and – very importantly – in conjunction with Article 5 of the Civil Code.

Such an examination would be aimed at determining whether the application of the sanction of Article 45(1) of the CCA in a given case does not violate the fundamental requirement of effectiveness and, at the same time, proportionality of measures aimed at protecting consumer rights in the light of EU legislation. The severity and inevitability of the sanction of free credit cannot be absolutized, as it would be completely devoid of the requirement of proportionality, and under domestic law, those factors that constitute „proportionality" in the sense of EU law must be sought in domestic law, including Article 5 of the Civil Code.

It is worth mentioning the preliminary question referred by the District Court for the Capital City of Warsaw to the European Court of Justice in July 2023, registered as C-472/23.

The Court asked whether Article 23 of Directive 2008/48/EC, read in the light of recitals 6, 8, 9 and 47 in the preamble to that directive, is to be understood as precluding national legislation which provides for only one sanction for breach of the creditor's duty to provide information, irrespective of the seriousness of the breach and its effect on the consumer's possible decision to conclude a credit agreement, including the provision of interest-free credit free of charge.

This case seems extremely important in the context of the problem discussed in this article, as it shows that the problem of the absolutism of the free credit sanction has been recognized by the national courts, which have noted the need to normalize the application of the free credit sanction, and perhaps to make a distinction between the severity of the

lender's misconduct in failing to comply with the disclosure obligations that led to the sanction in question[27].

The above should be included in the framework of a de lege ferenda postulate aimed at amending the provision of article 45 (1) of the CCA, in which the legislator would introduce differentiated sanctions, adapted to the degree of misconduct of the creditor, as well as the requirement of the existence of actual damage on the part of the borrower, and – what the author of this article is most concerned about – would take into account the specificities of the economic relations between the creditor and the borrower. Such changes would be in accordance with the principle of proportionality and would lead to the „de-absolutization" of the sanction of free credit, while maintaining an adequate protection of the consumer[28]; adapted to his legal and economic situation and with a view to his responsibility for the goal shared with other members of the cooperative.

27 As an aside, it is worth mentioning that two more issues were raised in the above inquiry aimed at detailing the lender's obligations and the degree of their violation: 1) Whether Article 10(2)(g) of Directive 2008/48/EC of the European Parliament and of the Council of April 23, 2008. on credit agreements for consumers and repealing Council Directive 87/102/EEC (1), in the context of recitals 6, 8 and 31 in the preamble to the directive, is to be understood as meaning that in a case in which, because part of the provisions of a consumer credit agreement are considered unfair, the annual percentage rate of charge given by the creditor at the conclusion of the agreement is higher than if the unfair contractual term were not binding, the creditor has failed to comply with the obligation imposed on it by that provision? (2) Is Article 10(2)(k) of Directive 2008/48/EC, in the context of recitals (6), (8) and (31) in the preamble to the directive, to be understood as meaning that it is sufficient to provide the consumer with information on how often, in what situations and by what maximum percentage the fees associated with the performance of the contract may be increased, even if the consumer cannot verify the occurrence of the situation and the fee may consequently be doubled?

28 A good model for a similar practice is the French example, in which the problem of opportunistic allegations against the content of consumer credit contracts was met with a response consisting of changes in the law that prevented any effective challenge to the RRSO at all without a demonstration of actual financial damage on the part of the consumer, which was the French legislator's response to the "flooding" of civil courts with an increasing number of cases on this background. Although it should be noted that even before this legislative change, there was a judgment going in this very direction, noting that the rate of RRSO (French: TEG) in a given case „did not work to the disadvantage" of borrowers, because it was erroneously inflated and therefore could not be the basis for imposing sanctions on the lender.

Bibliography

Bednarek Małgorzata, „Sankcja «kredytu darmowego» jako środek ochrony konsumenta" *Europejski Przegląd Sądowy*, No. 3 (2009): 13-21.

Bierecki Dominik, *Zasada swobody umów w prawie spółdzielczym*. Warszawa: C.H. Beck, 2021.

Cioch Henryk, *Prawo spółdzielcze*. Warszawa: Wolters Kluwer, 2011.

Cioch Henryk, *Zarys prawa spółdzielczego*. Warszawa: Wolters Kluwer, 2007.

Garlicki Lech, Marek Zubik, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Tom II. Art. 30–86, red., Warszawa: Wydawnictwo Sejmowe, 2016.

Herbet Andrzej, Szymon Pawłowski, Piotr Zakrzewski, *Spółdzielcze kasy oszczędnościowo kredytowe. Komentarz*. Warszawa: C.H. Beck, 2014.

Jedliński Adam, *Członkostwo w spółdzielczej kasie oszczędnościowo-kredytowej*. Warszawa: Lexis Nexis, 2002.

Łabęda Krzysztof, „Arbitraż konsumencki na przykładzie unii kredytowych funkcjonujących w systemie prawa common law" *Pieniądze i Więź*, nr 4 (2003): 193-191.

Rogoń Dominika, *Kredyt Konsumencki. Komentarz*. LEX/el. 2002. https://sip.lex.pl/#/commentary/587235321/32761?tocHit=1.

Skoczek Jacek, „Członek spółdzielczej kasy oszczędnościowo-kredytowej – konsument czy inwestor?" *Głos Prawa. Przegląd Prawniczy Allerhanda*, nr 1 (2023). https://glosprawa.pl/artykul-305/czlonek-spoldzielczej-kasy-oszczednosciowo-kredytowej-konsument-czy-inwestor.

Skoczek Jacek, „Problematyka członkostwa w kasach oszczędnościowo-kredytowych w orzecznictwie Sądu Najwyższego w latach 2019-2022" *Prawo i Więź*, nr 43 (2022): 173-186. https://www.prawoiwiez.edu.pl/piw/article/view/622.

Skoczek Jacek, „Źródła obowiązku dopłat z tytułu dodatkowej odpowiedzialności członkowskiej", [in:] *Prawo prywatne w służbie społeczeństwu, Księga poświęcona pamięci prof. Adama Jedlińskiego*. Sopot: Spółdzielczy Instytut Naukowy, 2019.

Srokosz Witold, „Członek SKOK jako konsument usług bankowych" *E – biuletyn CBKE* (2008). https://sip.lex.pl/#/publication/469846579.

Wojtyczek Krzysztof, „Komentarz do art. 31", [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. II, *Art. 30-86*, red. Lech Garlicki, Marek Zubik. Warszawa: Wydawnictwo Sejmowe, 2016.

Zakrzewski Piotr, *Status prawny członka spółdzielni mieszkaniowej w spółdzielczych stosunkach lokatorskich*. Warszawa: Wolters Kluwer, 2010.

This article is published under a Creative Commons Attribution 4.0 International license.
For guidelines on the permitted uses refer to
https://creativecommons.org/licenses/by/4.0/legalcode