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CURRENCY RISK CLAUSE IN INTERPRETING THE C.J.E.U.

Assistant Professor Carmen Adriana GHEORGHE
TRANSILVANIA UNIVERSITY, LAW DEPARTMENT
carmenadrianagheorghe@yahoo.com

Abstract

The issues of unfair contractual terms still involves many interpretations, and the currency risk clause is one of the most abusive. The phrase "to be clearly and intelligible" was recently interpreted by C.J.E.U.- september 2017- in favor of consumer credit.

At first sight, the decision it seems to be pronounced for credit consumers, but, in fact, the court leave it to the national courts to find if the clause was "clearly and intelligible" in the contract, for a normal consumer, medium informed and closely enough. The national courts have the task to assess the possible breaches of banks according bona fides/good faith and, on the other hand, one possible significant imbalance between contracting parties.

Keywords: *Public law, private law, consumer law, banking law, consumer law, abusive clause, C.J.E.U., credit consumer*

1 Overview

How much does the bank, how much does the consumer incur out of the effects produced by the exchange rate fluctuations? This is the question which C.J.U.E.was expected to answer, after years in which the litigations in national courts reached an impressive number, and after the Romanian authorities did not manage to deal with this problem in terms of solving it.

We invoke the Directive 93/13/CEE of the Council, from April 5th, 1993 regarding the abusive clauses in the contracts concluded with the consumers, according to which such a clause is part of the main object of the loan agreement. Therefore, its abusive character can be examined in relation to the provisions of the Directive, but only if the clause was not clearly and comprehensibly expressed. The Court of Appeal Oradea requested in 17.06.2016 the Court of Justice of the European Union – C.J.U.E. to rule on the extent of the bank's obligation to inform the clients on the exchange-rate risk related to the loans concluded in a foreign currency. [1]

Article 3 par. (1) and article 4 par. (2) regulate:

- the abusive character of the contractual clauses

[1] See C-186-16 Cause Andriciuc and others, v. Banca Românească SA. Abusive Clauses in the Contracts Concluded with Consumers. Prof. dr. Camelia Toader, member of the panel of judges September, 20th 2017 | JURIDICE.ro, preliminary reference from March 3rd, 2016, http://indrumari-juridice.eu/indrumarijuridice/c-18616-andriciuc-si-altii/

- the credit agreement concluded in a foreign currency
- the exchange-rate risk (in the consumer's exclusive responsibility?)
- the significant imbalance between the rights and obligations of the parties, which arise from the contract
- the moment at which the existence of the imbalance must be assessed
- the content of the notion of "clearly and comprehensibly expressed" clauses
- the level of information which must be provided by the bank

On the whole, it is about a decision favourable to the consumers, in terms of the increased protection they must be provided, in relation to the banks. What is already stipulated in the actual legal regime of the credit institutions, is that these institutions are on a clearly higher position to the consumer – natural person. It stands to reason that the credit entities benefit from economic and financial superiority, as well as from knowledge of financial-banking technique at a professional level.[2],[3],[4],[5]

What the Romanian jurisprudence hasn't done is to identify which type of credit is under consideration – in general, it comes to real estate acquisitions, personal loans and closing other credits – and which is the currency upon which an official intervention could be made. And BNR did not announce any intention to make direct transactions with the six banks - Romanian legal persons who have loans in Swiss francs in their balance sheets. In Romania, the most frequent litigations refer to the loans granted in Swiss francs, regardless of the purpose of using the credit. At present, there is no common position of the Courts, banks and State authority. [6]

In the case in which it has recently ruled[7], the Court brings a clarification which might prove favourable to banks, and not to consumers, forasmuch, as before, this has been one of the key points of their defence in sensitive files. The consumers asked the exchange rate freeze in the loan agreements in Swiss francs, at the level of the contract date, and the conversion of these loans in the national currency.

2 Comparative Law

Another country confronted with this problem, Hungary, decided: the conversion only applies to the housing loans, thus delimiting only a certain category of loans. Furthermore, the loans in all currencies were targeted, not only

[2] Bercea. L.,Gheorghe, C.A., (2014) Contractul de credit bancar, Regimul juridic al clauzelor abuzive in contractele de credit bancar, pp.157-173

[3] Dodocioiu, L., Sauleanu L., Smarandache, L. Banking Law, (2011) pp.376-384

[4] Gheorghe, C.A. (2014). Banking Law, pp.123-150

[5] Postolache, R., Banking Law (2012), pp.145-150

[6] Gheorghe, C.A. Eficienta politicilor publice de protectie a consumatorilor de credite in Romania, RSJ nr.2/2014, pp. 135-146

[7] September, 20th 2017 | JURIDICE.ro

those in francs, extending the analysis in this regard, and the conversion was not made at the historical currency exchange, namely the one at which the loan was made, but at a fixed currency exchange, set by the Central Bank of Hungary (on November 7th, 2014, for instance). The Central Bank also set the interest rate for the credits in national currency, after the conversion from currency was capped, lest the converted loans should have a higher overall cost total than the one stipulated in the former contracts. Not least, so that the financial institutions might put this scheme into practice, with as little damage as possible, the central bank of Hungary offered them liquidities, and a dangerous variation of the exchange rate was thus avoided. The proposed solution tilted thus in favour of the consumer.

Another example is given by a different U.E. country. The Parliament of Croatia adopted the conversion of the credits from francs into euros in September 2015. The Government let the banks bear the burden of this measure, which is estimated between 800 million and one billion euros. As a result, the credit institution- UniCredit, Zagrebacka Banka and so forth- sued the Government for the forced conversion of the credits into francs at an international Court. The settlement is expected.

Poland made, moreover, efforts in this regard, being in the process of reaching a solution by setting up a commission consisting of representatives of the Ministry of Finance, of the institution which oversees the banking market, and of the Guarantee Fund. This structure aims at mitigating the effects of these loans, on both sides.

Another normative act which regulates the crediting is the Mortgage Directive no.2014/17/UE. This does not expressly set out, in the case of the credits in CHF, for the conversion to be made at the current exchange rate, not even at the basic level. Art. 23 par.3 stipulates that "the State has the obligation to ensure that a conversion shall be made at the exchange rate of the day, in case the consumer is allowed, by contract, to request the conversion".[8]

3 What the Directives stipulate. Directive 93/13/CEE of the Council from April 5th, 1993 on the abusive clauses in the contracts concluded with the consumers.[9] Mortgage Directive no.2014/17/UE[10]

The Directive 93/13/CE defines the notion of abusive clause, consumer and seller-supplier.

Given that the Romanian courts insisted upon CJUE with the request to interpret a currency-risk clause, the European Court chose from the normative

[8] https://www.facebook.com/gheorghe.piperea/posts/874971389235154

[9] J.O. L 095, 21.4.1993, p.29 http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:01993L0013-20111212, modificata

[10] J.O. L 60, 28.2.2014, p. 34-85 http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32014L0017

content, the phrase provided in art. 4 par. 2, respectively "clearly and comprehensibly expressing" a clause.

Thus, art.4 par.(2) stipulates that "Assessing the abusive character of the clauses targets neither defining the object of the contract, nor the adequate character of the price or of the remuneration, on one hand, towards the services or assets supplied in exchange thereof, on the other hand, insomuch as these clauses are **clearly and comprehensibly** expressed".

A contractual term which has not been individually negotiated shall be considered abusive if, contrary to the good-faith requirement, it causes a significant imbalance between the rights and obligations of the parties, which arise under the contract, to the detriment of the consumer (art.3)

The normative act resumes the phrase in the content of the art.5 which speaks exclusively of the written form of the contract, under which form the consumer can assess if the language is clear and comprehensible for him/her.

As regards the contracts in which all clauses or a part thereof are submitted to the consumer in writing, they must always be drafted in a ***clear and comprehensible language.*** *If there are any doubts as to the meaning of a clause, the most favourable interpretation for the consumer prevails* (art 5).

The Mortgage Directive no.2014/17/UE contains clarifications, but only in terms of the real estate, in special in Cap.9, Loans in a foreign currency and loans with variable interest rate (art.23-24).

"Member States make sure that, if a consumer has a loan in a foreign currency, the creditor periodically warns the consumer, on paper or other durable media, at least in cases where the value of the total amount payable by the consumer which remains to be reimbursed, or of the periodical instalments varies by more than 20 % in relation to the value they would amount to, if the exchange rate applicable on the date of signing the contract between the currency of the loan agreement and the currency of the member State. The warning informs the consumer about a rise in the total quantum payable by the consumer, it presents, where applicable, the conversion right into an alternative currency, and the conditions in which this can be achieved, and it explains any other applicable mechanism with a view to limiting the exchange-rate risk the consumer is exposed to."

4 Conclusions. Advertising. Sufficient information. Clearly and comprehensibly expressed clauses. Role of the national court. Financial education of the consumer

If a financial institution grants a loan in a foreign currency, it must provide the borrower sufficient information to adopt a cautious and informed decision. Thus, the professional must transmit the targeted consumer any pertinent information allowing the latter to assess the economic consequences of a clause upon his/her financial obligations.

The requirement that a contractual term be clearly and comprehensibly drafted enforces, moreover, that the contract transparently expose the actual operation of the mechanism referred to by the respective clause. Possibly, the contract must also highlight the relation between this mechanism and the one provided by other clauses, so that the consumer be in a position to assess, based on specific and comprehensible criteria, the economic consequences that arise on his/her part.

This issue needs to be examined by the Romanian court, taking into account all pertinent facts, including the advertising and the information supplied by the lender, when negotiating a loan agreement.

Specifically, the obligation to verify whether the consumer was informed about all elements which may have an effect on the extent of his/her obligation, and which allow him/her to assess the total cost of his/her loan lies with the national court. Thus, on the one hand, the borrower must be clearly informed that, by concluding a loan agreement in a foreign currency, (s)he is exposed to a currency-exchange risk which might be economically difficult for him/her to assume, in case of the *devaluation of the currency* in which (s)he receives his/her income. On the other hand, the banking institution must submit the possible *variations of the foreign exchange rates* and the inherent risks of contracting a loan in a foreign currency, especially if the borrowing consumer does not receive his/her income in the respective currency.

C.J.U.E. emphasized that, if the banking institution did not fulfil these obligations and one can therefore examine the abusive character of the litigated clause, the task to assess, on the one hand, the possible non-compliance of the bank with the good-faith requirement and, on the other hand, the existence of a possible significant imbalance between the contracting parties lies with the national court. This assessment must be made in relation to the time of conclusion of the contract under consideration and taking into account especially the expertise and the knowledge of the bank on the possible variations of the exchange rates, and the risks inherent in contracting a loan in a foreign currency. In this regard, the Court stressed that a contractual term may involve an imbalance between the parties which might only occur during the execution of the contract.[11]

Furthermore, let us not forget that, only with the enforcement of the Directive 2014/17/ UE, the obligation (by art. 6. Cap.2) to ensure the financial literacy of the consumer was imposed on the States. "Member States promote measures that support the education of the consumers on the responsible loan- and debt-management practices, especially regarding the mortgage contracts. Clear and general information is needed on the credit granting process, in order to provide guidance to consumers, especially to those who contract a mortgage for the first

[11] https://www.juridice.ro/535950/cjue-c-18616-andriciuc-si-altii-v-banca-romaneasca-sa-clauze-abuzive-in-contractele-incheiate-cu-consumatorii.html

time. Furthermore, information is needed on the guidance that can be provided to the consumers by consumer organizations and national authorities."[12]

REFERENCES

1Bercea, L.,Gheorghe, C.A., (2014) Contractul de credit bancar, Regimul juridic al clauzelor abuzive in contractele de credit bancar, pp.157-173

2 Dodocioiu, L., Sauleanu L., Smarandache, L. Banking Law, (2011) pp. 376-384

3 Gheorghe, C.A. (2014). Banking Law, pp.123-150

4 Gheorghe, C.A. Eficienta politicilor publice de protectie a consumatorilor de credite in Romania, RSJ nr.2/2014, pp. 135-146

5 Postolache, R., Banking Law (2012), pp.145-150

6 https://www.facebook.com/gheorghe.piperea/posts/874971389235154

7 http://indrumarijuridice.eu/indrumarijuridice/c-18616-andriciuc-si-altii/

8 JURIDICE.ro

[12] http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A32014L0017