RULINGS OF THE NATIONAL COURTS FOLLOWING THE CURIA DECISION IN CASE C-186/16, *ANDRICIUC AND OTHERS VS BANCA ROMANEASCA*

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Abstract

The CJEU's judgment in Andriciuc and Others vs Banca Românească Case C-186/16 that came in September 2017 is an addition to a growing body of case law on procedural obstacles to consumer protection under Directive 93/13/EEC. According to the Court, a contractual term must be drafted in plain intelligible language, the information obligations should be performed by the bank in a manner to make the well-informed and reasonably observant and circumspect consumer aware of both possibility of a rise or fall in the value of the foreign currency and also enabling estimation of the significant economic consequences of repayment of the loan in the same currency as the currency in which the loan was taken out.

Following a succession of consumer-friendly preliminary rulings from European Court of Justice (Case C-26/13, Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt and Case C-186/16 Andriciuc and Others v Banca Românească, bank customers across the European Union are increasingly taking their banks to court. However, there are still a lot of provisions in the national legislations which made the judicial review of unfair contract terms difficult and reveals the limits of consumer protection under Directive 93/13. Also, we focus on the powers of the national court when dealing with a term considered to be unfair (civil) courts and the availability of legal remedies in ensuring the effectiveness of the Directive.

Although the CJEU provides interpretation of EU law, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. The ruling issued by the Court of Justice of the European Union (CJUE) in the Andriciuc versus Banca Românească case represents a great advantage for some of the European debtors.

In this paper, we intend to examine, starting from the theory of abusive clauses and referring to the jurisprudence of the European Court of Justice in the matter, to what extent it is possible that under Council Directive 93/13 / EEC of 5 April 1993 on unfair terms in consumer contracts and the national laws of the various Member States to order "freeze of the exchange rate" or conversion of the currency of the credit into domestic currency

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1. Introduction

The problem of foreign exchange loans in Romania, as well as in other European Countries, is well known. Banks have been miss selling this kind of loans, especially in Swiss Francs (CHF), to European families with a terrible impact in their economy.

The European Court of Justice ruled on 20th of September 2107 that lenders must be frank with borrowers about the economic consequences of foreign-currency loans. "When a financial institution grants a loan denominated in a foreign currency, it must provide the borrower with sufficient information to enable him to take a prudent and well-informed decision."

A preliminary ruling was requested in a proceeding between Mrs Ruxandra Paula Andriciuc and 68 other consumers with Swiss francs loans and Banca Românească SA ('the Bank'). Ruxandra Paula Andriciuc and 68 other borrowers brought the underlying challenge in the District Court of Bihor, Romania, with regard to loans they obtained in Swiss francs from Banca Românească about a decade ago.

In 2007 and 2008, Mrs Ruxandra Paula Andriciuc and other persons who received their income in Romanian lei (RON) took out loans denominated in Swiss francs (CHF) with the Romanian bank Banca Românească in order to purchase immoveable property, finance other loans, or meet their personal needs. According to the loan agreements concluded between the parties, the borrowers were obliged to make the monthly loan repayments in CHF and they accepted to bear the risk related to possible fluctuations in the exchange rate between the RON and the CHF. In the event that the borrowers failed to repay their loans, the contracts allowed Banca Romaneasca to debit their accounts and carry out any currency conversion where necessary, using that day's exchange rate.

Mrs Andriciuc and the other borrowers claim in their lawsuit that the contracts were unfair, saying the Swiss franc fluctuates significantly against the Romanian leu, and that the bank failed to fully explain the exchange risk despite its foresight about the exchange rate. The exchange rate changed considerably, at enormous cost to the borrowers. Between mid-2007 and mid-2011, the lei's value halved against the Swiss frank.

The main argument put forward by the borrowers was that, „at the time of conclusion of the contract the bank presented its product in a biased manner, only pointing out the benefits to the borrowers without highlighting the potential risks and the likelihood of those risks occurring. According to the borrowers, in the light of the bank's practice, the disputed term must be regarded as being unfair."

Judgment C-186/16 was issued on the request of the Appellate Court in Oradea (Romania) for a preliminary ruling, in which the Romanian court asked several questions regarding the scope of banks' obligation to inform clients about the exchange rate risk in foreign currency loans, from the perspective of the Directive 93/13/EEC on unfair terms in consumer contracts.

The Court of Justice ruled in case C-186/16 "that financial institutions must provide borrowers with adequate information to enable them to take well-informed and prudent decisions and should at least encompass the impact on installments of a severe depreciation of the legal tender of the member state in which a borrower is domiciled and of an increase of the foreign interest rate."

If the contract terms were clear is a question that the Romanian court must examine.

In addition, the CJEU took the view that, when determining the existence of an uneven position of contracting parties, the circumstance whether a bank, at the moment of entering into the contract, had certain knowledge on the facts that could affect the performance of contractual obligations has to be taken into account as well.

"First, the borrower must be clearly informed of that fact that, by concluding a loan agreement denominated in a foreign currency he is exposing himself to a certain foreign exchange risk which will, potentially, be difficult to bear in the event of a fall in the value of the currency in which he receives his income," the court said in a statement about the ruling. "Second, the financial institution must explain the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency, particularly where the consumer borrower does not receive his income in that currency."

If the bank has not fulfilled those obligations, the national court must determine whether the bank acted in bad faith and if the parties to the contract are imbalanced.

"That assessment must be made by reference to the time of conclusion of the contract concerned, taking account of the expertise and knowledge of the bank, in the present case the bank, as far as concerns the possible variations in the rate of exchange and the inherent risks in contracting a loan in a foreign currency," the court's statement says[1].

But for the consumers in this case the legal battle is far from over. Having ruled on this point of law, the ECJ handed the case back to the Romanian courts to determine whether the Romanian bank has met these criteria, because the Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

With this ruling the CJEU has created a very wide space for examining clauses which established the liability to repay the loans in foreign currencies. Namely, as a result of the subject judgment, if it is determined that a bank did not inform its client about possible risks, but emphasized only the advantages when entering into the contract, the subject term may be declared unfair, and consequently null, i.e. without legal effect.

The number of individuals in Romania with Swiss franc loans declined to 37,907 at the end of the first quarter of 2017, half as compared to 2014, before the franc grew strongly against the Romanian leu. At the end of 2014 there were 74,849 francs debtors. Credits in Swiss francs are mainly directed to the population - 98% and 5.3 billion lei respectively. In March 2017, banks had 12,252 mortgage loans and 12,458 mortgage-backed consumer loans denominated in Swiss francs. As a result of the negotiation between debtors in Swiss francs and banks, 37,586 consumers accepted the conversion of the loans from Swiss francs to leu. In front of the Romanian courts are a few thousand consumers asking the declarations that the term according to which the loan must be repaid in CHF, regardless of the potential losses that those borrowers might sustain on account of the exchange rate risk, is an unfair term which is not binding on them in accordance with the provisions of Directive 93/13/EEC[2] on unfair terms in consumer contracts.

[1] https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170103en.pdf.

[2] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31993L0013.

2. Content

In C-186/16 case, examining the aspects of the knowledge of average consumers and banks' obligations towards them, the European Court of Justice establishes that contractual terms regarding the denomination of a consumer loan in a foreign currency and the requirement the loan to be paid back in the same currency are core terms of the loan agreement. They are seen as defining the 'main subject matter of the contract' (par. 38). This implies that this contractual clauses are not subject to the unfairness test, provided the terms were transparent.

Curia's decision distinguishes between consumer loan agreements denominated in foreign currency which have to be paid back in the same currency (like in current case), and the loan contracts where the monthly installments only have been indexed to foreign currencies, which means that the repayment occurs in local currency and its rate is calculated on the basis of the exchange rate of foreign currency (para. 39-40):

"39 It is true that the Court held in paragraph 59 of the judgment of 30 April 2014, Kásler and Káslerné Rábai (C-26/13, EU:C:2014:282) that the 'main subject matter of the contract' covers a term incorporated in a loan agreement denominated in a foreign currency concluded between a seller or supplier and a consumer which was not individually negotiated, pursuant to which the selling rate of exchange of that currency applies for the calculation of the loan repayments, only if it is established, which is for the national court to ascertain, that that term lays down an essential obligation of that agreement which, as such, characterizes it.

40 However, as the referring court also pointed out, in the case which gave rise to the judgment of 30 April 2014, Kásler and Káslerné Rábai (C-26/13, EU:C:2014:282), the loans, although denominated in foreign currency, had to be repaid in the national currency according to the selling rate of exchange applied by the bank, whereas in the case in the main proceedings, the loans must be repaid in the same foreign currency as that in which they were issued. As the Advocate General observes, in point 51 of his Opinion, loan agreements indexed to foreign currencies cannot be treated in the same way as loan agreements in foreign currencies, such as those at issue in the main proceedings.). In the second case, the term describing the repayment mechanism could be classified as an ancillary contractual term, and, therefore, subject to the unfairness test. The same cannot be said of the term setting an obligation to repay the loan in the same (foreign) currency:

"...the fact that a loan must be repaid in a certain currency relates, in principle, not to an ancillary repayment arrangement, but to very nature of the debtor's obligation, thereby constituting an essential element of a loan agreement." (par. 38)

Consumers in Andriciuc case did not, therefore, enjoyed the protection of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, because, Oradea Court of appeal, in Decision 370/2017 28.11.2017 rendered in file no. 1713/111/2014 that the plaintiffs couldn't prove that the contractual term was non-transparent (not written in plain and intelligible language):

"Although the court finds that the defendant has not proved that it has informed the plaintiffs of the actual consequences of the reimbursement clause, the court of appeal considers that this lack of information is not such as to lead to the absolute nullity of the clause, because an informed average consumer knows that the currency in which it was borrowed is subject to a currency risk, unless it could retain bad faith of the defendant that the lender was

aware that there will be a significant depreciation of the national currency, a currency shock, sufficient to break the contractual balance between the parties. In this regard, it should be noted that, as stated above, the clause providing for the repayment of a loan in a foreign currency is the contractual transposition of the principle of monetary nominalism regulated by Art. 1578 Civil code, which in a credit agreement is naturally implicit, even in the absence of a contractual clause in this respect. Foreign currency credit agreements are not characterized by the usual imbalance in consumer contracts caused by the consumer's lack of information or differences in negotiating power, but by an imbalance generated by the attribution of currency risk to the consumer because the bank always receives the currency in which the credit was granted, irrespective of the intrinsic value of the foreign currency in which the credit is denominated, but the consumer who earns the income in another currency, in case of devaluation of it against the currency of the credit, has to submit an additional financial effort to obtain the necessary resources for repayment. Although a certain level of informational asymmetry can be identified between the bank and the consumer even in the case of foreign currency loans, the information held by the bank does not allow it to anticipate the shock events and consumer ignorance no longer plays the same role in the equilibrium contractual imbalance. Forex fluctuations are not only abnormal but are quite typical and predictable, but if course variations can be anticipated, their meaning and magnitude can not be anticipated. The unpredictability of foreign exchange fluctuations must also be related to the different degrees of currency exoticism, but irrespective of the status of the foreign currency on the credit market, currency shocks are generally unpredictable events not only for the consumer but also for the bank."

The Oradea Court of Appeal continues: "Even if one could have anticipated a certain increase in the exchange rate, as existed in previous periods, when there were variations in the course, without these being excessive, from the evidence administered does not result that the defendant could have anticipated the extent of the increase exchange rate CHF/ Leu in the period following the granting of the loans. It was identified only after the economic crisis and after the outbreak of currency shocks into the true size, the problems caused by foreign currency lending, both the recommendation of the ESRB / 2011 and the 2014/17 / EU Directive following them. Even though, as is apparent from the recitals of Directive 2014/17 / EU[3], it was noted that there was an irresponsible behavior of market participants this aspect is not likely to leads to the conclusion that the bank, at the time of the granting of the loans, knew or could have known or anticipate the subsequent currency shock."

This reasoning follows also from the European Court of Justice in judgement for a for a preliminary ruling in case C-186/16, Ruxandra Paula Andriciuc and Others v Banca Românească SA, and invoking the European Systematic Risk Board's Recommendation ESRB/2011/1 of 1 September 2011 which specified risks to consumers of lending in foreign currencies (par. 49): "49 In the present case, as regards loans in currencies like those at issue in the main proceedings, it must be noted, as the European Systematic Risk Board stated in its Recommendation ESRB/2011/1 of 21 September 2011 on lending in foreign

[3] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property.

currencies (OJ 2011 C 342, p. 1)[4], that financial institutions must provide borrowers with adequate information to enable them to take well-informed and prudent decisions and should at least encompass the impact on instalments of a severe depreciation of the legal tender of the Member State in which a borrower is domiciled and of an increase of the foreign interest rate (Recommendation A — Risk awareness of borrowers, paragraph 1).”

The Oradea Court concludes: “The Court of Appeal does not dispute that, as a result of the explosive growth of the Swiss franc, the execution the credit agreements would not have become overly burdensome for the applicants, both from the point of view of the financial effort that they must make to pay the rates, as well with regard to the balance of credits, most of plaintiffs are likely to be in a situation where, while paying rates nearly 10 years, the remaining balance in lei equivalent is equal to or even higher than the credit equivalent in RON at the time it was granted, but, as it showed both the court of first instance and the Romanian Constitutional Court by decision no. 62/2017[5], these issues are not likely to lead to nullity of clauses, but could call into question contractually solidarism and adjusting the contract by applying the unpredictability, not covered by the object of case.”

The German Federal Court in Karlsruhe (Bundesgerichtshof – BGH is the highest court of civil and criminal jurisdiction in Germany) in case XI ZR 152/17, decided on 19 December 2017 with a judgment in favor of the borrower. Notwithstanding the fact that in a concrete lawsuit it is not about a consumer, who has special protection, the German Federal Court has ruled that the explanatory duty of the bank in terms of foreign currency loans must include specific weaknesses and risks of such a product.

In Spain, the Supreme Court, Civil Chamber, in Ruling no. 608/2017 tof November 15, 2017, which considered that a multi-currency clause did not exceed transparency control. “43.- The lack of transparency of the clauses relating to the denomination in foreign currency of the loan and the equivalence in Euros of the repayment instalments and of the capital pending amortisation, is not innocuous for the consumer but causes a serious imbalance, going against the requirements of good faith, since, by not knowing the serious risks involved in contracting the loan, they could not compare the offer of the multicurrency mortgage loan with those of other loans, or with the option of maintaining the loans already granted and that were cancelled through the multicurrency loan, which generated new expenses for the borrowers, the payment of which came from the amount obtained with the new loan. The economic situation of the borrowers worsened severely when the risk of fluctuation materialised, such that not only the periodic instalment payments increased drastically, but the Euro equivalence of the capital pending amortisation increased instead of decreasing while they were paying regular instalments, which was detrimental to them when the bank exercised its power to terminate the loan early and demand the capital pending amortisation in a foreclosure process, which turned out to be superior to the amount they had received from the lender when arranging the loan.”

[4] https://www.esrb.europa.eu/pub/pdf/recommendations/2011/ESRB_2011_1.en.pdf.

[5] Decizia no. 62/2017 referitoare la admiterea obiecției de neconstituționalitate a dispozițiilor Legii pentru completarea Ordonanței de urgență a Guvernului no. 50/2010 privind contractele de credit pentru consumatori, text published in the Official Journal of Romania no. 161 03 March 2017.

51. - No matter how much Barclays alleges the difference between the loan object of this appeal and the one which is the subject of the main proceedings in respect of which the questions were referred giving rise to the judgments of the CJEU, and in particular the STJUE of the Andriciuc case, requires the denomination in a given monetary unit of the amounts stipulated in the pecuniary obligations, which is an inherent requirement of monetary obligations.

There is no problem of separability of the invalid content from the loan contract.

55. - This substitution of a contractual regime is possible when it comes to avoiding the total nullity of the contract in which the unfair clauses are contained, so as not to harm the consumer, since, otherwise, the purpose of the Directive on unfair clauses would be contravened.

This was stated by the CJEU in the judgment of 30 April 2014 (Kásler and Káslerné Rábai case, C-26/13), paragraphs 76 to 85.

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