Croatian Case “Franak”: Effective or “Defective” Protection of Consumer Rights?

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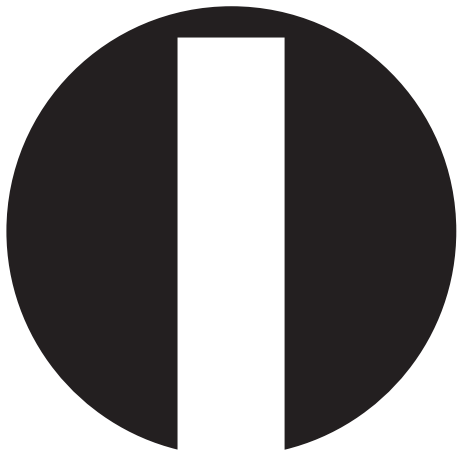

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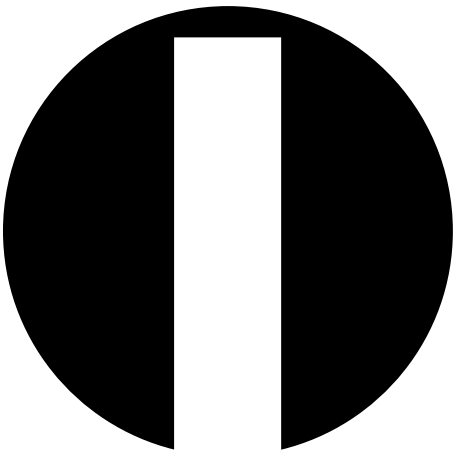

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*Emilia Mišćenić, Dr. Iur., LL.M.**

CROATIAN CASE "FRANAK": EFFECTIVE OR "DEFECTIVE" PROTECTION OF CONSUMER RIGHTS?**

By using the example of the famous Croatian case "Franak", the first collective redress proceeding in the Croatian court practice of protection of consumer rights, the author presents the struggles of Croatian courts when it comes to EU consistent interpretation and proper application of harmonized Croatian consumer protection law. In this case, concerning the use of unfair contract terms in consumer credit agreements, a whole variety of issues arose, such as determination of collective interest, distinction between national and harmonized notions of credit contract, determination of essential elements of consumer credit contracts and of legal consequences of unfairness etc. Whether some of these issues can be attributed to the EU consumer protection acquis itself remains to be analysed.

Key words: *Credit Agreements. – Swiss Franc. – Unfair Contract Terms. – Collective Redress Proceedings. – Principle of Effectiveness.*

1. INTRODUCTION

During the mid 90s and early 2000s, as in many Member States of the European Union or South East European countries, in Croatia also started a trend of concluding credit contracts denominated in a foreign currency that has continued until today.[1] This way of contract-

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1 See the Report of the Croatian National Bank demonstrating the percentage of CHF credits within all credits during 2012 in Hungary (28,9 %), Po-

ing is allowed under the Croatian Obligations Act[2] and according to the latest statistics of the Croatian National Bank the percentage of credit contracts denominated in a foreign currency is 92 %.[3] Back then, at the beginning of this trend, the preferred foreign currency was Swiss francs over euros, which was generally supported by banks and recommended to people when agreeing to contract details.[4] One should also bear in mind that most of these contracts were mortgage loans, i.e. loans secured by real estate, a so-called hypothec, which was very often the only real estate and the home of contracting parties. According to the *supra* mentioned statistics, even today, 48 % of credit contracts are mortgage loans.[5]

Another important aspect of these contracts is that most of them contained a clause according to which the interest rate was not fixed, but variable.[6] In practice, this variable interest rate was usually linked to an Interbank Offered Rate (IBOR), i.e. a reference rate based on the average interest rate according to which banks lend and borrow funds to each other on the interbank market, which was linked either to the euro (EURIBOR) or to the Swiss franc (CHF LIBOR).[7]

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land (18,5 %), Austria (12,2 %), Croatia (10,3 %), Serbia (7,7 %) and Rumania (6,0 %). Hrvatska narodna banka (HNB), Izvješće o problematici zaduženja građana kreditima u švicarskim francima i prijedlozima mjera za olakšavanje pozicije dužnika u švicarskim francima temeljem zaključka Odbora za financije i državni proračun Hrvatskog sabora, September 2015, *http://www.hnb.hr/priopc/2015/hrv/hp15092015_CHF.pdf*, last visited 6 July 2016, 5, 8.

2 *Arg. ex* Article 22(1) of the Obligations Act, *Official Gazette of the Republic of Croatia*, Nos. 35/05, 41/08, 125/11 and 78/15.

3 HNB, *op. cit.* fn. 1.

4 This conclusion has been drawn from numerous statements of consumers given as a testimony during the taking of evidence within the collective redress proceeding in the case "*Franak*". See Judgment and Ruling of the Commercial Court in Zagreb, P-1401/12 of 4 July 2014; Judgment and Ruling of the High Commercial Court of the Republic of Croatia, Pž-7129/13-4 of 13 June 2014; Judgment and Ruling of the Supreme Court of the Republic of Croatia, Revt-249/14-2 of 9 April 2015.

5 HNB, *op. cit.* fn. 1.

6 P. Miladin, "Promjenjive kamate, devizna klauzula i klizna skala", *Aktualnosti hrvatskog zakonodavstva i pravne prakse, Godišnjak* 21–2014, Organizator, Zagreb, 2014, 37. *et seq.*

7 According to a Decision of the Government on the Publication of Rules for the Determination of the Reference and Discount Rate (Odluka Vlade o objavljivanju pravila o utvrđivanju referentne i diskontne stope), *Official Gazette of*

Combined together, these two terms of credit contracts led to the worst possible scenario for thousands of Croatian consumers, allegedly 125.000. The appreciation of the Swiss franc resulted simultaneously in the significant increase of the amount of the loan and of the variable interest rate.[8] All this culminated in the consumers' inability to repay the debt owed to banks and consequently in numerous proceedings of forced execution over their homes as well as other property.[9] Many associations were formed trying to help the affected Croatian citizens, such as "The Blocked Ones" or "The Living Wall", whose goals were to stop forced execution proceedings, sometimes even by forming a wall of people standing in front of private homes on the day of repossession and eviction of whole families.[10] Spurred by all these difficult events, the awareness of Croatian consumers about their rights started to grow and at one point in 2011 the newly formed association "*Franak*",[11] i.e. the Croatian synonym for a (Swiss) franc, initiated a collective redress proceeding in front of the Commercial Court in Zagreb (the capital city of Croatia) against seven commercial banks. However, their action was dismissed as inadmissible due to a lack of standing to initiate a collective redress proceeding. The reasons for this failure can be found unfortunately in a quite complex and scattered Croatian legislation on consumer protection.

2. LEGAL FRAMEWORK

Most of the above-mentioned credit contracts were consumer contracts, i.e. contracts concluded by natural persons for purposes outside their business, trade or professional activity. In the Croatian legal system, which does not contain a uniform or systematic approach re-

the Republic of Croatia, No. 114/08, which took over the rules contained in the Communication from the Commission on the revision of the method for setting the reference and discount rates, *OJ* C 14/6, 19.1.2008, IBOR was defined as "Inter-bank offered rate on the money market".

8 HNB, *op. cit.* fn. 1, 5.

9 More about this issue in G. Mihelčić, "Prisilno namirenje tražbine u svjetlu Direktive o hipotekarnim kreditima", *Javni bilježnik*, 42/2015, 15.

10 See Živi zid ("The Living Wall"), *http://zivi-zid.org/*, last visited 6 July 2016. See also Blokirani ("The Blocked Ones"), *https://blokirani.org/*, last visited 6 July 2016.

11 See Udruga Franak (Association "*Franak*"), *http://udrugafranak.hr/*, last visited 12 August 2016.

garding the protection of consumer rights, this means the involvement of various legal acts, which sometimes contradict each other.[12]

According to the current state of law in Croatia, if a contract is a consumer contract, it falls under the application of the Consumer Protection Act[13] as a *lex specialis* for obligation law relations between consumers and traders.[14] In case there are no special rules prescribed by the Consumer Protection Act, the Obligations Act as a more general act, i.e. *lex generalis*, applies.[15] However, if a consumer contract is a credit contract, then an even more special act applies, i.e. the Consumer Credit Act,[16] which actually transposes Directive 2008/48/EC on credit agreements.[17] If a consumer credit contract has been concluded with a credit institution, such as a bank, then the Credit Institutions Act[18] applies too. One should also recall the many different sub-statutory acts applicable in this case, such as the Decisions of the Croatian National Bank on the calculation of interest rates[19] and on informing consumers

12 About various definitions of consumers and numerous sources of the Croatian consumer protection law consult E. Mišćenić, "Consumer Protection Law", in: T. Josipović (ed.), *Introduction to the Law of Croatia*, Kluwer Law International, 2014, 279 *et seq*.

13 Consumer Protection Act, *Official Gazette of the Republic of Croatia*, Nos. 41/14 and 110/15.

14 The Consumer Protection Act that applies to *business-to-consumer* (B2C) relations defines a consumer in Article 5(15) as "any natural person who concludes the legal transaction or acts on the market outside of its trade, business, craft or professional activity", while a trader is defined in Article 5(27) as "any person who concludes the legal transaction or acts on the market within its trade, business, craft or professional activity, including a person acting in the name or on behalf of the trader".

15 *Arg. ex* Article 4(2) of the Consumer Protection Act.

16 Consumer Credit Act, *Official Gazette of the Republic of Croatia*, Nos. 75/09, 112/12, 143/13, 147/13 – *corrigendum,* 9/15, 102/15 and 52/16.

17 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 87/102/EEC, *OJ* 2008 L 133/66, last amended by Directive 2014/17/EU. The *ratione personae* of the Consumer Credit Act corresponds to the one of the Directive and is applicable to relations between "consumers" (Article 2(1)(1)) and "creditors" (Article 2(1)(2)).

18 Credit Institutions Act, *Official Gazette of the Republic of Croatia*, Nos. 159/13, 19/15 and 102/15. This Act also contains a definition of a "consumer" in Article 300, in the Chapter XXIII on consumer protection.

19 Decision of the Croatian National Bank on the Annual Percentage Rate of Charge of Credit Institutions and of Credit Unions and on Contracting of Ser-

prior to the conclusion of banking services contracts[20], or the Order of the Ministry of Finance on the Duty to Inform Consumers also on Additional Presumptions for Calculation of the Annual Percentage Rate of Charge,[21] the Order of the Ministry of Finance on Charges in Consumer Credits[22] etc.[23] Moreover, the Ministry of Finance announced the adoption of and published a Proposal on the new Residential Consumer Credit Act[24] for the purpose of implementing Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property[25] that shall *pro futuro* make the legislative framework even more complex regarding consumer mortgage credit contracts.[26] When it comes to judgments adopted in the case "Franak", one should emphasize that these concern adjudication on credit contracts concluded between 2003–2008 and consequently involve the application of the relevant provisions of statutory and sub-statutory acts that were in force at the time of the conclusion of the contracts, i.e. of the revoked Consumer Protection Act from 2003, as well as the one from

vices with Consumers, *Official Gazette of the Republic of Croatia*, Nos. 1/09, 41/09 and 159/13. This Decision is still in force and applicable in the part that is not contradictory to Regulation (EU) No. 575/2013 and to the Credit Institutions Act.

20 Decision on the Content and the Form in which a Consumer is Given Information prior to the Contracting of an Individual Banking Service, *Official Gazette of the Republic of Croatia*, No. 2/15.

21 Order on Duty to Inform Consumers also on Additional Presumptions for Calculation of the Annual Percentage Rate of Charge, *Official Gazette of the Republic of Croatia*, Nos. 14/10 and 124/13.

22 Order on Charges to Consumer Credits, *Official Gazette of the Republic of Croatia*, No. 15/14.

23 More in detail: E. Mišćenić, "Ugovor o potrošačkom kreditu", in: Z. Slakoper (ed.), *Bankovni i financijski ugovori*, Pravni fakultet Rijeka, Rijeka, 2016 (accepted for publication).

24 Ministry of Finance, *http://www.mfin.hr/hr/okoncana-savjetovanja*, last visited 7 July 2016.

25 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 and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No. 1093/2010 (Text with EEA relevance), *OJ* L 60/34 of 28 February 2014, *corrigendum – OJ* L 65/22 of 10 March 2015.

26 E. Mišćenić, "Mortgage Credit Directive (MCD): Are Consumers Finally Getting the Protection They Deserve?", in: Z. Slakoper (ed.), *Liber Amicorum in Honorem Vilim Gorenc*, Zagreb, 2014, 235 *et seq*.

2007,[27] and also of the revoked Banking Act,[28] their sub-statutory acts etc.

Therefore, it is not surprising that the association "*Franak*" actually missed the key Regulation determining the precise list of bodies in Croatia[29] entitled to initiate collective redress proceedings in consumer disputes. According to the provisions of the Consumer Protection Act, every qualified entity or person has a right to initiate proceedings for the protection of collective interests of consumers against a person, who acts against the in Article 106(1) of the Consumer Protection Act enumerated provisions of the Consumer Protection Act, Obligations Act, E-Commerce Act,[30] Consumer Credit Act etc. Article 107(1) of the Consumer Protection Act requires that qualified entities or person have a justified interest for the collective protection of consumers, such as consumer protection associations or state authorities competent for consumer protection do.[31] On the list of then seven, now eight

27 As a consequence of fulfilling a duty to harmonize Croatian national law with the *acquis communautaire* set by Article 69 and more specifically for consumer protection in Article 74 of the Act on Confirmation of the Stabilisation and Association Agreement between the Republic of Croatia and the European Communities and their Member States, *Official Gazette of the Republic of Croatia – International Agreements,* Nos. 14/01, 15/01, 14/02, 1/05, 7/05, 9/05 and 11/06; the first Consumer Protection Act was published in the *Official Gazette of the Republic of Croatia,* No. 96/03. The second Consumer Protection Act was adopted in 2007, *Official Gazette of the Republic of Croatia,* Nos. 79/07, 125/07, 75/09, 79/09, 89/09, 133/09, 78/12 and 56/13. More in detail: E. Mišćenić, "Usklađivanje prava zaštite potrošača u Republici Hrvatskoj", *Godišnjak Akademije pravnih znanosti Hrvatske*, 4/1 2013, 145–176.

28 Banking Act, *Official Gazette of the Republic of Croatia,* Nos. 84/02 and 141/06 was replaced in 2009 by the entrance into force of the Credit Institutions Act, *Official Gazette of the Republic of Croatia*, Nos. 117/2008, 74/09, 153/09, 108/12, 54/13 and 159/13. See E. Čikara, *Gegenwart und Zukunft der Verbraucherkreditverträge in der EU und in Kroatien*, LIT Verlag, Wien *et al.*, 2010, 357.

29 At that time the Regulation on Determining of Persons Authorized to Initiate the Proceeding for Protection of Collective Interests of Consumers, *Official Gazette of the Republic of Croatia*, No. 124/09 was in force. The Regulation has been replaced by the Decision on Determining of Authorities and Persons Authorized to Initiate the Proceeding for the Protection of Collective Interests of Consumers, *Official Gazette of the Republic of Croatia*, No. 105/14.

30 E-Commerce Act, *Official Gazette of the Republic of Croatia*, Nos. 173/03, 67/08, 36/09, 130/11 and 30/14.

31 In cases of consumer protection collective redress proceedings Articles 502.a *et seq.* of the Civil Procedure Act on collective redress proceedings (*arg. ex*

entitled bodies, there were and still are "Consumer" – Croatian Union of the Consumer Protection Associations, as well as the Union of the Consumer Protection Associations of Croatia, while the others concern certain ministries and regulatory agencies. Consequently, the association "*Franak*" signed a cooperation agreement with the Union "Consumer", which in April 2012 initiated the procedure for protection of collective interests of consumers before the Commercial Court in Zagreb.

3. CLAIMS IN THE CASE "FRANAK"

In the action for protection of collective interests of consumers submitted to the Commercial Court in Zagreb, the Union "Consumer" as a plaintiff raised two main claims against eight commercial banks as defendants. The plaintiff held the position that both the currency clause and variable interest rate clause contained in thousands of consumer credit contracts, mostly secured by real estate, were unfair contract terms according to the special provisions of the Consumer Protection Act.[32] In its requests, the plaintiff took into account the manner in which consumer credit contracts were regularly concluded, i.e. by using standard contract terms and without thoroughly informing the consumers on the impact, effects as well as possible consequences of these contract terms on the rights and obligations of consumers.[33]

For example, when dealing with the variable interest rate many credit contracts contained a clause stating that a "regular interest rate

Article 122 of the Consumer Protection Act) are applicable subsidiarily. When there are no special provisions, the rest of the provisions of the Civil Procedure Act apply. More in detail: V. Tomljenović, E. Mišćenić, National Report for Croatia, in: European Commission, "An evaluation study of the impact of national procedural laws and practices on the free circulation of judgements and on the equivalence and effectiveness of the procedural protection of consumers under EU law", JUST/2014/RCON/PR/CIVI/0082.

32 Implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ* L 095/29, 21.04.1993, last amended by Directive 2011/83/EU, which resulted in the transposition of the Directive into the Consumer Protection Act (Arts. 49–56) and in the approximation of the already existing provisions of the Obligations Act on general contract conditions (Articles 295–296).

33 Exhaustively on this issue: E. Mišćenić, "Nepoštene odredbe u ugovorima o kreditu", in Tomljenović, V. *et al.*, *Nepoštene ugovorne odredbe: europski standardi i hrvatska provedba*, Pravni fakultet Rijeka, 2013, 113–164.

shall vary in accordance with changes of market conditions and on the ground of the Decision of the Bank", without binding the possibility of variation or at least referring to a certain reference interest rate in the contract. Since the interest rate presents a key element in the calculation of the annual percentage rate of charge (APRC) expressing the "total cost of the credit for a consumer", it is of particular importance to give consumers information on the reference rate upon which the variations of the interest rate depend.[34] However, despite the exhaustive Croatian legal framework about the duty of informing consumers on the conditions affecting an interest rate,[35] at the time of the conclusion of most of the above-mentioned contracts there was no legal duty for Croatian banks and credit institutions to link variations of interest rates to a certain reference rate. Nonetheless, as mentioned *supra,* in practice, when calculating interest rates of their clients' credit agreements, banks usually used a basic reference rate based on CHF LIBOR or EURIBOR. In its claims, the plaintiff therefore stated that this failure to inform consumers on the key factor affecting interest rate as a price of a contract and the creation of a right of banks to unilaterally amend interest rates made the presented standard contract terms on the variable interest rate unfair.

Similar arguments were used regarding currency clauses, i.e. clauses according to which the credit capital is calculated based on the Croatian currency, i.e. Croatian kuna, in relation to a foreign currency, i.e. the Swiss franc in the case at hand.[36] As it follows from the testi-

34 According to Article 2(1)(9) of the Consumer Credit Act, the APRC demonstrates the "total cost of the credit for a consumer", expressed as an annual percentage of the total amount of credit, including the costs referred to in Article 20(2) of this Act. The broad definition of "total cost of the credit for a consumer" in Article 2(1)(7) of the Consumer Credit Act encompasses *inter alia* interests, which can be calculated based on a fixed or variable interest rate (Article 2(1)(10) of the Consumer Credit Act).

35 Detailed analysis of relevant provisions of the Consumer Credit Act, Credit Institutions Act, Obligations Act and different substatutory acts requiring the referring in credit contracts of the conditions affecting interest rate, when available, of a reference or index rate etc. offered by E. Mišćenić, *op. cit.* fn. 30.

36 Article 22(1) of the Obligations Act prescribes that a "term of contract according to which a value of a contractual obligation in a currency of the Republic of Croatia is calculated on the ground of the price of gold or of the exchange rate of the currency of the Republic of Croatia in relation to a foreign currency is allowed".

monies given by consumers during the collective redress proceeding, consumers had no idea and were not properly informed by the banks on the currency risks involved and were even convinced to accept the, at that time, convenient conditions related to credit contracts with currency clauses linked to the Swiss franc.[37]

In order for these (standard) contract terms to be qualified as unfair terms and consequently made null and void, they had to fulfil the requirements taken over from Directive 93/13/EEC on unfair terms in consumer contracts into the then applicable Article 81 of the Consumer Protection Act from 2003and Article 96(1)of the Consumer Protection Act from 2007, which is now Article 49(1) of the Consumer Protection Act. They all prescribe that a contract term shall be regarded as unfair if it has not been individually negotiated and if contrary to the principle of conscientiousness and honesty, which is accepted as the Croatian equivalent to a "good faith" requirement from Directive 93/13/EEC,[38] it causes a significant imbalance in the contract parties' rights and obligations to the detriment of the consumer.[39] Correspondent to Directive

37 Judgment and Ruling of the Supreme Court of the Republic of Croatia, Revt-249/14-2 of 9 April 2015, 18.

38 According to Article 4 of the Obligations Act in the creation of obligation relations and realization of rights and obligations out of these relations, participants shall observe the principle of conscientiousness and honesty. Although this fundamental principle of Croatian obligations law is regarded as an equivalent to a 'good faith' principle, these are not identical concepts. See S. Šarčević, E. Čikara,'European vs. National Terminology in Croatian Legislation Transposing EU Directives' in S. Šarčević (ed.), *Legal Language in Action: Translation, Terminology, Drafting and Procedural Issues,* Nakladni zavod Globus, Zagreb 2009, 211.

39 One should not neglect that at the time of initiating a collective redress proceeding there was already a settled case law on this matter by Croatian ADR bodies. In the Judgment of the Court of Honour of the Croatian Chamber of Economy No. P-I-50/10 of 25 March 2011 it was established that the bank P.B.Z. d.d. was responsible for concluding an unclear and incomplete credit contract with the consumer A.D. because the parties were prevented to individually negotiate at the time of the contract conclusion as well as because the contract did not contain any exact parameters or a method of calculation of these parameters, which affected the bank's Banks' Decision on the alteration of contractual interest rates.Therefore, an imbalance between the parties' rights and obligations based on anunilateral augmentation of contractual interest rates occurred. The Court of Honour decided that the provisions of the pre-formulated contract on the alteration of the interest rate and on currency risks fulfil the prerequisites of *ex* Article 81 of the Consumer Protection Act

93/13/EEC, further provisions regulate a presumption on non-negotiation in case of standard contract terms and reverse the burden of proof in this respect to the trader, i.e. to the defendants in this case.[40]

4. RULINGS IN THE CASE "FRANAK"

The proceeding in the case "*Franak*" that started in 2012 ended a year ago, in 2015, and resulted in three very important judgments in the first Croatian consumer protection collective redress procedure. Without the pretension of entering into a detailed analysis of the proceeding, the following text only emphasizes key conclusions of various court instances.

In the first instance judgment containing detailed and exhaustive explanations on more than 180 pages, the Commercial Court in Zagreb stated that the disputed clauses are unfair contract terms and declared them null and void.[41] It also required the annulled contract terms to be amended and ruled the conditions for their amendments. The judge required the amendment of contract terms with a retroactive effect from the moment of the contract's conclusion, and the amendment of the currency clause into a clause denominating the consumer credit in Croatian kunas (conversion), and of the variable interest rate into a fixed one.[42]

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on unfair contract terms. In the second instance Judgment of the Court of Honour of the Croatian Chamber of Economy No. PŽ-II-13/11 of 7 October 2011, the Court of Honour confirmed the conclusions from the first instance judgment.

40 E. Mišćenić, "Unfair Contract Terms in the Contract Law, Country Report for Croatia", in: Ch. Jessel-Holst *et al.* (eds.), *Unfair Contract Terms in General Contract Law*, Civil Law Forum for South East Europe-Collection of Studies and Analyses, 2012, 195–223.

41 Judgment and Ruling of the Commercial Court in Zagreb, P-1401/12 of 4 July 2014, 1–7.

42 *Ibid*., 7: "*It is ordered to all plaintiffs to stop with the above described actions and it is ordered to them within the period of 60 (sixty) days to offer to consumers amendment of a contract term determining that the amount of a capital of credit obligation is bound to Swiss Franc currency, and an interest rate is variable, in a manner that the capital shall be expressed in Kunas in the amount that was paid out in the stage of using the credit and with fixed interest rate, and in the percentage which was explicitly referred to in the concluded consumer contract*

In the second instance judgment, the High Commercial Court confirmed the annulment of contract clauses on a variable interest rate, but denied the annulment of currency clauses and dismissed the part of the ruling on the amendment of contract terms by applying the civil law procedure principle *non ultra petita,* i.e. by saying that a judge cannot go beyond the parties' claims in the action and decide on matters not requested by the parties.[43] Regarding the currency clause, the Court established that a clause linking the capital of the credit to Swiss francs is a "*term on the subject matter of a contract*" and therefore excluded from the unfairness test presented above as regulated by the applicable Consumer Protection Acts from 2003 and 2007[44] as well as Article 4(2) of Directive 93/13/EEC.[45]

In the last judgment brought upon request for a revision, the Supreme Court confirmed the findings of the second instance court that a currency clause cannot be the subject of an unfairness test and elaborated in detail why it considers that a currency clause should be comprehensible to an average consumer.[46]

5. CHOSEN ISSUES

From the whole range of issues of both procedural as well as substantive law nature, which were part of the collective redress proceeding in the case "*Franak*", this paper analyses three following important questions and wonders whether the causes of some of them can to a certain extent be attributed to the EU consumer protection *acquis*.

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as valid rate of the regular interest on the day of conclusion of the contract, while otherwise their offer shall be replaced by this judgement".

43 Article 2(1) of the Civil Procedure Act, *Official Gazette of the Socialist Federal Republic of Yugoslavia*, Nos. 4/77, 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90 and 35/91, incorporated into the Croatian legal system by *Official Gazette of the Republic of Croatia*, Nos. 53/91, 91/92, 58/93, 112/99, 129/00, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 25/13 and 89/14.

44 Article 84 of the Consumer Protection Act from 2003; Article 99 of the Consumer Protection Act from 2007, i.e. Article 52 of the Consumer Protection Act currently in force.

45 Judgment and Ruling of the High Commercial Court of the Republic of Croatia, Pž-7129/13–4 of 13 June 2014.

46 Judgment and Ruling of the Supreme Court of the Republic of Croatia, Revt-249/14–2 of 9 April 2015.

5.1. What is a "Consumer Credit Contract"?

The first issue, which came up during the second instance procedure, concerns the fundamental question of what "consumer credit contracts" are in the first place. During the proceeding, one of the accused banks claimed that most of the consumer credit contracts in the case at hand were secured by a hypothec or another real estate security and therefore in accordance with the provisions of Directive 87/102/EEC concerning consumer credits,[47] are not consumer credit agreements and are excluded from the protection offered by the Consumer Protection Act to consumer loans. Moreover, it claimed that consequently the order of the first instance judgment of the Commercial Court in Zagreb was not related to credit contracts intended for the purpose of acquiring or keeping the right of ownership on immovable property or credit contracts secured by a real estate lien. In this respect, it is interesting to notice that the judges deciding in a panel of the High Commercial Court did not go into the necessary analysis of the *ratione materiae* of the relevant provisions implementing Directive 87/102/EEC into the Chapter on Consumer Loan of the then in force Consumer Protection Acts.[48] Instead, they just dismissed the argument of the bank and continued paraphrasing the provisions of the Consumer Protection Act transposing the institute of the linked credit agreements,[49] which can be important in cases such as these, but have nothing to do with the invoked argument of the banks. The proper answer to such an allegation of the bank seems to be crucial, particularly when one party contests the matter of proper application of sub-

47 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* L 42/48 amended by Council Directive 90/88/EEC and Directive 98/7/EG and repealed by Directive 2008/48/EC.

48 Directive 87/102/EEC was transposed into the first Croatian Consumer Protection Act of 2003 into Chapter 8, Consumer Loan (Articles 56–71), and the second Consumer Protection Act of 2007 into,Chapter IX, Consumer Loan (Articles 71–86). Pursuant to Article 2(1)(a) of repealed Directive 87/102/EEC, she shall not apply to "*(a) credit agreements or agreements promising to grant credit – intended primarily for the purpose of acquiring or retaining property rights in land or in an existing or projected building, – intended for the purpose of renovating or improving a building as such*".

49 More in detail on linked credit agreements: E. Mišćenić, "Povezani ugovori o kreditu", *Zbornik Pravnog fakulteta u Rijeci*, 32/1 2011, 155–189.

stantive law as well as the proper establishment of the facts.[50] Instead of the answer offered,[51] it would have been necessary to explain that relevant provisions of the Chapter on Consumer Loan were applicable to both of the *supra* mentioned categories of consumer contracts, since the Croatian legislator decided to use the option contained in the minimum harmonization clause of Directive 87/102/EEC[52] and to thus widen the material scope of the application of national harmonized provisions to them too. Moreover, since the bank also invoked the question of whether these contracts were consumer contracts, this seems to be a missed chance to explain the notion of "dual purpose contracts" by using the method of interpreting national law consistently to EU law. According to the definition of dual purpose contracts contained in the preamble of both Directive 2011/83/EU on consumer rights[53] and Directive 2014/17/EU, "*where the contract is concluded for purposes partly within and partly outside the person's trade, business or*

50 According to the applicable provisions of the Civil Procedure Act, the second instance court examines the first instance judgment within the limits of the reasons stated in the appeal by observing *ex officio* certain essential violations of civil procedure rules and regular application of substantive law (Article 365(2)).

51 Judgment and Ruling of the High Commercial Court of the Republic of Croatia, Pž-7129/13–4 of 13 June 2014, 47: *"Allegation of the Z.B. that Article 2 paragraph 2 point a and b of the Directive of the European Parliament and of the Council 87/102/EEC of 22 December 1986 on consumer credit contracts (hereinafter: Directive) exclude explicitly from the application of the Directive contracts intended for the purchase of immovable or contracts by which the repayment of the depth is secured by a real estate lien is correct, but from that statement does not arise that these contracts are not consumer contracts, what the Z.B. also claims together with allegation that order of this judgment does not relate to consumer contracts. Unfounded is the allegation of the Z.B. that order of judgment relates to non-consumer contracts on credit too, because in the order of the judgment it is clearly stated that it is a matter of consumer credit contracts."* The inadequate knowledge of the *acquis* is visible from the answer itself since the bank did not invoke and actually describe the content of the cited provisions of Directive 87/102/EEC, but of Directive 2008/47/EC, which the court confirmed as being correct. Moreover, even the name of the Directive was written wrongly.

52 According to Article 15 of Directive 87/102/EEC, this Directive did not preclude MS from retaining or adopting more stringent provisions to protect consumers consistent with their obligations under the Treaty.

53 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Directive 93/13/EEC and Direc-

profession and the trade, business or professional 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".[54] Interpretation consistent to the above-presented definition could have been of key importance for the proper application of substantive law to many credit contracts concluded for purposes of renovating or purchasing apartments, which are sometimes exclusively rented to tourists, but in other cases used predominantly as a private home.

Nonetheless, one cannot help but wonder whether these issues can be attributed to the EU consumer protection *acquis* itself. All Consumer Credit Directives, i.e. both the repealed Directive 87/102/EEC and Directive 2008/48/EC as well as recently Directive 2014/17/EU use the definition of "credit agreement" to regulate the material scope of application of the relevant Directive.[55] Moreover, these definitions have to be read and applied with the other provisions of these Directives on the exclusion of "certain" credit agreements from the previously widely set definition of "credit agreements".[56] The (non-) adoption of these exclusions at national level will again depend on the decision of MS' legislators to use one or another "option" contained in these Directives, either in minimum harmonization clauses or even provisions of preambles of Directives.[57] Consequently, when transpos-

tive 1999/44/EC and repealing Directive 85/577/EEC and Directive 97/7/EC, *OJ* 2011 L 304/64, 22 November 2011.

54 Recital 17 of the preamble of Directive 2011/83/EU and recital 12 of the preamble of Directive 2014/17/EU.

55 *Arg. ex* Articles 1(2)(c) of Directive 87/102/EEC, Article 3(c) of Directive 2008/48/EC and Article 4(3) of Directive 2014/17/EU, according to which "credit agreement" is an agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, loan or other similar financial accommodation, with the exception of agreements forprovision on a continuing basis of services or for the supply of goods of the same kind, where the consumer pays for such services or goods for the duration of their provision by means of instalments".

56 *Arg. ex* Article 2(1) of Directive 87/102/EEC, Article 2 of Directive 2008/48/EC and Article 3(2) of Directive 2014/17/EU excluding a whole line of credit agreements from the in fn. 54 mentioned definition.

57 *Arg. ex* minimum harmonization clauses in Article 15 of Directive 87/102/EEC and Article 2(1) of Directive 2014/17/EU, or recital 10 of the preamble of Directive 2008/48/EC or recitals 13 and 14 of the preamble of Directive 2014/17/EU.

ing the definition of the "credit agreement" from the Consumer Credit Directives into the MS' private laws, we are often faced with a direct conflict of this definition with a definition of the same term contained in many civil codes as well as other private law acts of MS', where a definition of a "credit agreement" concerns the substantive law definition of a credit contract[58] and not a provision on *ratione materiae* of an act. These are opposite approaches to definitions of certain civil law institutes or contracts, such as in the case at hand, where EU Directives use the same legal term corresponding to the one of national private laws in order to encompass not only credit contracts, but also financial leasing and other forms of credit agreements.[59] When it comes to the definition of "dual purpose contracts", the problem lays, similarly as with the "options" on *ratione materiae* and *personae* of Directives, in the fact that these are contained in the Directives' preambles instead of within the main normative text.[60] Although the principle of EU consistent interpretation requires interpretation of harmonized national law consistent to the text of the whole Directive, including the preamble, placing these key provisions and definitions into a normative text would have guaranteed their transposition into national harmonized provisions and facilitated the uniform interpretation and proper application of EU law at the level of MS.

58 E.g. Article 1021 of the Obligations Act defines a credit contract as a contract where "*a bank undertakes an obligation to make available a certain amount of money funds to a borrower for a definite or indefinite period of time, for a certain purpose or without any certain purpose, and the borrower undertakes an obligation to pay the agreed interests to a bank and to return the used amount of money at a time and in a manner agreed upon*".

59 More on the consequences regarding legal certainty of the conflict between EU and national legal terms and their content: E. Mišćenić, "Legal Translation vs. Legal Certainty in EU Law", in: E. Mišćenić, A. Raccah (eds.), *Legal Risks in EU Law*, Springer 2016, 88 *et seq*.

60 This issue was dealt with e.g. by the CJEU in C-602/10, *SC Volksbank România* of 12 July 2012, EU:C:2012:443, para. 40: *"However, as is also clear from recital 10 in the preamble to Directive 2008/48, the Member States may, in accordance with European Union law, apply provisions of that directive to areas not covered by its scope. Thus they may, in respect of credit agreements not falling within the directive's scope, maintain or introduce national measures corresponding to the provisions of the directive or to certain of them."*

5.2. What are the Legal Consequences of Unfairness of Contract Terms?

To the second important issue that arose during the first instance procedure belongs the adjudication on legal consequences of unfairness of contract terms. As mentioned *supra,* the first instance court ruled on the unfairness and nullity of both disputed contract terms and ordered the defendants to amend them into valid contract terms with a retroactive effect from the moment of conclusion of credit contracts. Such a ruling, which was removed by the second instance court applying the *non ultra petita* principle of civil procedure law, opens a Pandora's box of issues. Both the Consumer Protection Acts from 2003 and 2007 as well as the one currently in force transposed Article 6(1) of Directive 93/13/EEC by saying that an unfair contract term is null and void and by regulating that the nullity of one contract term shall not result in the nullity of the whole contract, if the contract can survive without such a term.[61] Regarding all the other aspects and consequences of nullity, Articles 322 *et seq*. of the Obligations Act apply subsidiary.[62] However, the latter provisions do not contain any rule on the preservation of permissible content of an unfair contract term or on the alteration, amendment and adjustment of unfair contract terms. Except in certain prescribed cases,[63] null and void contracts and their

61 Article 87 of the Consumer Protection Act from 2003, Article 102 of the Consumer Protection Act from 2007 and Article 55 of the Consumer Protection Act from 2014. The corresponding provision on partial nullity can be found in Article 324 of the Obligations Act.

62 More in detail: E. Mišćenić, "Legal Consequences of Unfairness of Contractual Terms", in: Jessel-Holst Ch. *et al.* (eds.), *Unfair Contract Terms in General Contract Law*, Civil Law Forum for South East Europe-Collection of Studies and Analyses, 2012, 244–246.

63 *Arg. ex* Article 322(1) of the Obligations Act. These exceptions relate e.g. to Article 325 of the Obligations Act on the conversion of a null and void contract to another valid one, when the prior contract satisfies the conditions for the validity of some other contract. One could also use the provisions on usury contracts out of Article 329 of the Obligations Act according to which a damaged party can request from the court a reduction of a contractual obligation to a just amount within five years from the conclusion of a contract. See the Judgment and Ruling of the Supreme Court of the Republic of Croatia, Rev 749/2006–2 of 10 October 2006, where the Supreme Court revoked the judgments of lower court instances, which dismissed the plaintiffs' action on the ground of expired five years' time period. Regarding the plaintiffs' claim that

terms cannot be replaced with valid ones, while the nullity of essential contract terms leads to the nullity of the contract as a whole. Therefore, in order to avoid burdensome legal consequences of the nullity of disputed contract terms for consumers,[64] the judge tried to use the institute of *clausula rebus sic stantibus* out of Article 369 of the Obligations Act in order to remedy the established nullity of unfair contract terms on the denomination of a loan in a CHF currency and the variable interest rate.[65]

The issue can, however, also be linked to Directive 93/13/EEC itself, which has never completely clarified the legal consequences of unfairness of contract terms. Article 6(1) of Directive 93/13/EEC stipulates a duty for MS to lay down that unfair terms used in B2C contracts, *"as provided for under their national law"*, shall not be binding on the consumer and *"that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair term"*. This provision left the regulation of many questions, e.g. concerning absolute or relative nullity, alteration, amendment or replacement of unfair contract terms, limitation period etc. to the MS. Over the years, the established ECJ/CJEU case law gave answers to some of them. For example, in the case *Banco Español de Crédito* concerning the use of unfair terms in credit contracts, the CJEU concluded that *"Article 6(1) of Directive 93/13 must be interpreted as precluding*

the agreed interest rate of 30 % (lowered to 15 %) is null and void, the Supreme Court concluded that the right to invoke nullity does not lapse pursuant to Article 328 of the Obligations Act.

64 Pursuant to Article 323 of the Obligations Act on the consequences of nullity in the case of nullity of a contract, every contract party has a duty to return to the other everything she obtained under such a contract, and if this is not possible or the nature of that which was fulfilled is in conflict with the returning, one should give appropriate monetary compensation according to the prices at the time of adopting the court decision, if the law does not prescribe anything else.

65 Judgment and Ruling of the Commercial Court in Zagreb, P-1401/12 of 4 July 2014, 1–7. Article 369(1) enables one contract party to request amendments or even the rescission of the contract due to extraordinary circumstances, which were not foreseeable at the moment of the contract's conclusion, and make the fulfilment of a contractual obligation heavily burdensome or create an overly great loss for that party. It is the opinion of the author that this Article is not applicable in the case at hand since the first instance judge established the unfairness and consequently the nullity of the disputed contract terms *ex tunc*.

legislation of a Member State [...] which allows a national court, in the case where it finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, to modify that contract by revising the content of that term".[66] This ruling is of particular importance for the Croatian case "*Franak*", not only because the Obligations Act in principle does not allow such a contract modification, but also because Croatian courts are obliged to observe the uniform interpretation given by the CJEU case law when applying harmonized national law. This duty, which arises both from the Croatian Constitution and the EU law,[67] was explicitly confirmed by the Supreme Court in the case "*Franak*". In the judgment rendered upon revision, the Supreme Court stated that the *"Republic of Croatia became a full Member of an European Union on 1 July 2013 from when on the European Union law forms a part of its legal system and must be applied, moreover, that law is superior to the national one*".[68] Furthermore, regarding the legal relations and disputes, which had occurred prior of becoming a MS of the EU, the Court emphasized that *"there is however a duty of Croatian courts to interpret national law in the spirit of the law of the European Union and of her overall acquis (what includes among others also a practice of the Court of Justice of the European Union), to what the Republic of Croatia obliged itself by signing the Stabilisation and Association Agreement that was in force from 2005"*.[69] Nonetheless, the courts deciding in the Croatian case "*Franak*" did not observe the ruling on the interpretation of Article 6(1) of Directive 93/13/EEC given in the CJEU case *Banco Español de Crédito*.[70] The case they did observe, to a certain

66 C-618/10, *Banco Español de Crédito,* EU:C:2012:349, para. 89.

67 See Chapter VII.A. European Union of the Constitution of the Republic of Croatia, *Official Gazette of the Republic of Croatia*, Nos. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14. See also the definition of a directive and a principle of loyalty and sincere cooperation contained in Article 288(3) of the Treaty on the Functioning of the European Union and Article 4(3) of the Treaty on European Union, *OJ* C 326 of 26 October 2012.

68 Judgment and Ruling of the Supreme Court of the Republic of Croatia, Revt-249/14–2 of 9 April 2015, 23.

69 *Ibid.*

70 The first instance court invoked only the case C-126/91, *Schutzverband gegen Unweseni.d.Wirtschaft v Rocher*, EU:C:1993:191, while the second instance court referred to C-484/08, *Caja de Ahorros y Monte de Piedad de Madrid,* EU:C:2010:309 and to C-26/13, *Kásler and Káslerné Rábai,* EU:C:2014:282. In

limited extent, was the CJEU case *Kásler and KáslernéRábai,*[71] which also concerned the use of unfair terms in credit contracts denominated in Swiss francs. In this case, the CJEU gave a further clarification of Article 6(1) of Directive 93/13, by saying that *"the substitution of an unfair term for a supplementary provision of national law is consistent with the objective of Article 6(1) of Directive 93/13, since, according to settled case-law, that provision is intended to substitute for the formal balance established by the contract between the rights and obligations of the parties real balance re-establishing equality between them, not to annul all contracts containing unfair terms".*[72] The reasoning behind such a decision of the CJEU lies in different factual circumstances between *Banco Español de Crédito* and *Kásler and Káslerné Rábai* that would consequently lead to different legal consequences for consumers. While the first case dealt with the use of an unfair and too highly set interest rate on late payments, the second one included an unfair currency clause, the annulment of which could eventually render the entire contract null and void, thus exposing the consumer to particularly unfavourable consequences. Whether the consumer would suffer burdensome consequences actually depends on the qualification of the above-mentioned unfair contract term as an *essentialia negotii.*

5.3. What are the essentialia negotii of Consumer Credit Contracts?

The answer to this question became "essential" for the destiny of consumer credit contracts in the case "*Franak*" and beyond. As mentioned *supra*, the first instance court came to quite favourable conclusions for consumers in establishing the unfairness and nullity of both disputed terms and in ordering their amendments. However, the High Commercial Court and the Supreme Court changed the first instance ruling by encompassing the currency clause and variable interest rate with an exception, according to which *"it is not allowed to evaluate the fairness of contract terms on subject matter of the contract and on adequacy of the price, if these terms are clear, easy understand-*

addition to the last two, the Supreme Court also invoked C-472/10, *Invitel*, EU:C:2012:242.

71 C-26/13, *Kásler and Káslerné Rábai,* EU:C:2014:282.

72 *Ibid*., 82.

able and noticeable". The provision, which was taken over from Article 4(2) of Directive 93/13/EEC[73] into the Croatian Consumer Protection Acts of 2003, 2007 and 2014, seemed to be clear and to exclude the subject matter and the price as *essentialia negotii* of contracts from the (un)fairness tests for obvious reasons.[74] Nonetheless, the interpretation of Article 4(2) of Directive 93/13/EEC given by the CJEU case law and by the European Commission in its Report on implementation of Directive 93/13/EEC[75] demonstrated differently. For example, though a prescribed exclusion, in the case *Caja de Ahorros y Monte de Piedad de Madrid*[76] concerning unfair terms in Spanish credit contracts, the CJEU established that it is not against Directive 93/13/EEC not to transpose Article 4(2) into the national law and therefore to cover contractual terms on the subject matter and adequacy of the price or remuneration by an (un)fairness test, even if these are drafted in a plain and intelligible language.[77] The arguments for this decision come from the minimum harmonization principle on which Directive 93/13/EEC is founded and which allows a more stringent protection of consumers at the national level of MS.[78] Regarding the case "*Franak*", there was a controversy dealing with the question if this Article excludes only the subject matter, i.e. the capital of the credit, or also the contract terms related to the capital, such as the currency clause, or related to the adequacy of a price, such as the variable interest rate. In respect of the latter, the Commission's Report stated that contract "*terms laying down the manner of calculation and the procedures for altering the price remain*

73 Article 4(2) of Directive 93/13/EEC regulates: *"Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language."*

74 The CJEU clarified several times that Article 4(2) of the Directive concerns essential obligations of contracts concluded between a seller or supplier and a consumer. See C-484/08, *Caja de Ahorros y Monte de Piedad de Madrid,* EU:C:2010:309, 34 and C-26/13, *Kásler and Káslerné Rábai,* EU:C:2014:282, 46.

75 Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, COM(2000)248 final, Brussels, 27.04.2000.

76 C-484/08, *Cajade Ahorros y Monte de Piedad de Madrid,* EU:C:2010:309.

77 *Ibid*., 50.

78 *Arg. ex* Articles 8 and 8a ofDirective 93/13/EEC.

entirely subject to the Directive".[79] This was also confirmed by the CJEU case law, e.g. in the cases *Invitel* and *Kásler and Káslerné Rábai* saying that this "*exclusion does not apply to a term concerning a mechanism for amending the prices of the services provided to the consumer*".[80]

When deciding in the case "*Franak*", the Croatian courts qualified both disputed contract terms as *essentialia negotii,* thereby relying on the interpretation of the credit contract out of Obligations Act.[81] Regarding the variable interest rate, the change of which was made conditional upon the decision of a bank, the High Commercial Court stated that this contract term is clear and noticeable, but not understandable to either an average consumer or anybody else.[82] It also creates a significant imbalance in the rights and obligations of contracting parties to the detriment of a consumer because it leads to a situation where a creditor unilaterally determines the obligation of a debtor, who cannot foresee a change and check the regularity of a change because he/she has no exact parameters at their disposal.[83] Therefore, the defendants completely avoided the influence of the other contracting party on the price, which is against the provisions of the Obligations Act regulating that a contract is concluded when the contracting parties have agreed on the essential elements of a contract, and *interest rates are price*.[84] Contrariwise, the High Commercial Court established that a *clause binding the capital of a credit to a Swiss franc is a clause on a subject matter of the contract* and as such is clear, easily understandable and noticeable to consumers.[85] The Supreme Court confirmed the findings of the High Commercial Court and offered a detailed explanation of the institute of the currency clause as well as of the presented movements of the Croatian kuna in relation to other foreign currencies for the relevant period.[86]

79 Report..., *op. cit.* fn. 75, 15.

80 C-472/10, *Invitel*, EU:C:2012:242, 23 and C-26/13, *Kásler and Káslerné Rábai,* EU:C:2014:282, 56.

81 G. Mihelčić, E. Mišćenić, "*Credere* ili kredit: Dva srodna ili suprotstavljena pojma?", *Zbornik PFR*, 73/1 2016, 336.

82 Judgment and Ruling of the High Commercial Court of the Republic of Croatia, Pž-7129/13–4 of 13 June 2014, 57.

83 *Ibid*., 58.

84 *Ibid.*

85 *Ibid*., 50 and 53.

86 Judgment and Ruling of the Supreme Court of the Republic of Croatia, Revt-249/14–2 of 9 April 2015, 17 *et seq*.

Such an approach seems to confirm the certainty of Croatian courts regarding the qualification of the disputed contract terms as "subject matter" and "price" of consumer credit contracts. However, that which was an "undisputed fact" for Croatian courts, was not quite clear to the Hungarian *Kúria*, which in the preliminary ruling procedure explicitly asked whether a currency clause may fall within the '*definition of the main subject matter of the contract*'.[87] The CJEU stated that Article 4(2) of Directive 93/13 needs to be interpreted strictly in the sense that *"contractual terms falling within the notion of the 'main subject-matter of the contract', within the meaning of that provision, must be understood as being those that lay down the essential obligations of the contract and, as such, characterise it"*.[88] It left the final decision to the referring court, which has to determine, *"having regard to the nature, general scheme and the stipulations of the loan agreement, and its legal and factual context, whether the term setting the exchange rate for the monthly repayment instalments constitutes an essential element of the debtor's obligations*". By ruling that Article 6(1) of Directive 93/13 allows the substitution of an unfair term for a supplementary provision of national law in order to avoid the annulment of the whole contract, in the case *Kásler and Káslerné Rábai* the CJEU actually held the position that national courts could eventually qualify the currency clause as an *essentialia negotii*. In another request for a preliminary ruling, the Romanian *Tribunalul Specializat Cluj* asked the CJEU, whether Article 4(2) of Directive 93/13/EEC can be interpreted as meaning that "the main subject matter of the contract" and the "price" also cover the elements, which make up the consideration owed to the credit institution, i.e. the annual percentage rate of charge, which consist of the interest rate (whether fixed or variable), bank charges and other costs included in the credit agreement.[89] According to the interpretation given by the CJEU, the 'main subject-matter of the contract' and 'adequacy of the price and remuneration" do not, in principle, cover contract terms in B2C credit agreements, *"which, on one hand, allow, under certain conditions, the lender unilaterally to alter the interest rate and, on the other hand, provide for a 'risk charge' applied by the lender"*.[90] Nevertheless,

87 C-26/13, *Kásler and Káslerné Rábai,* EU:C:2014:282, 35.

88 *Ibid*., 49.

89 C-143/13, *Matei*, EU:C:2015:127, 36.

90 *Ibid.,* 79.

the CJEU defers to the national courts to verify the classification of contractual terms by taking into account the nature, general scheme and stipulations of contracts, as well as the legal and factual circumstances of the case. The interpretation given by the CJEU in the case *Matei,* which is of crucial importance for the Croatian case "*Franak*", was, however, not observed in the last judgment rendered by the Supreme Court.

6. CONCLUDING REMARKS

The Croatian case "*Franak*" presents an important milestone in the development of the Croatian consumer protection law. Although their analysis would go beyond the framework of this paper, one should also mention the numerous amendments of the Croatian legislation on consumer credit agreements that were the direct consequence of the case "*Franak*". Key legal acts, such as the Credit Institutions Act and the Consumer Credit Act, went through many changes in order to strengthen the duty to inform consumers on various contract terms, in particular on those concerning the variable interest rate.[91] For example, the duty to refer to the applicable reference rate or index in credit contracts (e.g. EURIBOR, LIBOR etc.) was introduced.[92] Nonetheless, there is still a lot of room for improvement of the existing legislation on consumer credit agreements. This is confirmed by several constitutional complaints against amendments of the Consumer Credit Act before the Constitutional Court[93] and recently by the 'letter of formal notice' addressed on 6 June 2016 to Croatia by the European Commission.[94]

91 A critique of the amendments: E. Mišćenić, E. Srdoč, "Studentski krediti kao sredstvo financiranja visokog obrazovanja", in: G. Mihelčić *et al.* (eds.), *Proces preobrazbe hrvatskog visokoobrazovnog sustava*, Pravni Fakultet Sveučilišta u Rijeci, 2014, 111.

92 Article 11.a(2) of the Consumer Credit Act; see also Article 307(1) of the Credit Institutions Act.

93 See the Decision of the Constitutional Court of the Republic of Croatia, Nos. U-I-3541/2015, U-I-2780/2015, of 4 May 2016 in which the Constitutional Court nullified part of Article 13(2) of the Act on Amendments of the Consumer Credit Act, *Official Gazette of the Republic of Croatia*, Nos. 143/13 and 147/13.

94 European Commission, Infringement Decisions, *http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.*

The letter finds that the solution offered to Croatian consumers by the amendment of the Consumer Credit Act and of the Credit Institutions Act enabling the conversion of the capital denominated in Swiss francs into euros at an exchange rate predating the appreciation of the Swiss franc violates several Treaties' provisions, in particular those on fundamental freedoms.[95] Besides placing the costs of conversion predominately on the side of the banks as lenders, the consumer protection provisions introduced are also questionable for other reasons. Since they only regulate the conversion of credits denominated in Swiss francs, one could invoke the existence of inequality and discrimination regarding other consumers, who concluded their contracts denominated in some other foreign currency.[96] Another big issue is the introduction of the retroactive application of these statutory provisions, which is in direct conflict with Article 90 of the Constitution and can only be allowed exceptionally due to justifiable reasons.

Apart from legislation amendments, another consequence of the collective redress proceeding are the following individual civil law proceedings relying on the conclusions of the case "*Franak*".[97] The results of some of them demonstrate clearly that there is a strong disagreement between Croatian courts in respect of validity of disputed contract terms.[98] Moreover, the approach of Croatian courts taken in the case "*Franak*" seems also to demonstrate a disagreement regarding the comprehensibility of disputed clauses to consumers. While the first instance Commercial Court in Zagreb found the currency clause also to be incomprehensible to an average consumer, the High Commercial

cfm?lang_code=EN&r_dossier=&decision_date_from=16%2F06%2F2016&decision_date_to=16%2F06%2F2016&EM=HR&title=&submit=Search, last visited 10 August 2016.

95 Act on Amendments of the Consumer Credit Act, *Official Gazette of the Republic of Croatia*, No. 102/15 and Act on Amendments of the Credit Institutions Act, *Official Gazette of the Republic of Croatia*, No. 102/15.

96 E. Mišćenić, "The Impact of the Croatian Anti-discrimination Law on Private Law Relations", in: N. Bodiroga-Vukobrat *et al.* (eds.), *New Europe – Old Values? Reform and Perseverance*, Springer, 2015, 97.

97 E.g. Judgment of the Municipal Court in Osijek, P-135/2018–8 of 19 June 2015; Judgment of the Municipal Court in Osijek, P-788/2014–14 of 1 April 2015; Judgment of the Municipal Court in Rijeka, P-3196/2012 of 31 July 2014.

98 In the Judgment of the Municipal Court in Osijek, P-788/2014–14 of 1 April 2015, the judge found both contract terms to be null and void by applying the general principles of the Obligations Act.

Court and the Supreme Court concluded exactly the opposite. However, numerous arguments used by the Supreme Court to disqualify the variable interest rate could have been applied to the currency clause as well. The currency clauses were agreed upon in the same manner as variable interest rates, i.e. consumers were not adequately informed about the conditions because of which a currency clause could affect the capital of the credit and were even convinced to sign contracts denominated in Swiss francs. The latter fact was neglected during the court procedure although the preamble of Directive 93/13/EEC explains that such behaviour goes against good faith as one of the key elements of unfairness test.[99] Moreover, regarding the plaintiffs referring to the *Kásler and Káslerné Rábai* case during the revision, the Supreme Court concluded that *"factual content of described Hungarian and of this subject matter are not identical, and therefore can neither be compared to each other or be brought into relation*".[100] Though of different factual circumstances, the author considers that the interpretation of transparency requirements from Directive 93/13/EEC given by the CJEU in the *Kásler and Káslerné Rábai* case could have also been applied by analogy in the Croatian case "*Franak*". Therein, the CJEU concluded *"that it is of fundamental importance for the purpose of complying with the requirement of transparency, to determine whether the contract sets out transparently the reason for and the particularities of the mechanism (...), so that the consumer can foresee, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it"*. However, this standard of transparency interpreted by the CJEU was set much lower in the Croatian case "*Franak*". Here, the Supreme Court concluded that it should be clear to every full age, adult and averagely careful person that during a longer period of time on which such credit contracts have been concluded, one cannot expect for circumstances in the society to stay unchanged, in particular the economical ones, which unquestionably affect the value and therefore exchange rates both of the national kuna as well as of other world currencies such as euro, Swiss franc, Japanese jen, US dollar etc.[101] There is a piece of truth in the last argument, since even if the Croatian consumer credit contracts would have

99 *Arg. ex* recital 16 of Directive 93/13/EEC.

100 Judgment and Ruling of the Supreme Court of the Republic of Croatia, Revt-249/14–2 of 9 April 2015, 23.

101 Judgment and Ruling of the Supreme Court of the Republic of Croatia, Revt-249/14–2 of 9 April 2015, 19.

contained a detailed explanation of the currency clauses mechanism, no Croatian or any other European average consumer would have expected from banks to manipulate the CHF LIBOR[102] or understood the consequences arising from such unconscious behaviour.

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HRVATSKI SLUČAJ „FRANAK": EFIKASNA ILI „MANLJIVA" ZAŠTITA PRAVA POTROŠAČA?

Korišćenjem primera čuvenog hrvatskog slučaja „Franak", kao prvog postupka kolektivne zaštite potrošačkih prava u hrvatskoj sudskoj praksi, autorka objašnjava dileme hrvatskih sudova u vezi sa doslednim tumečenjem prava Evropske unije i pravilnom primenom harmonizovanog hrvatskog prava zaštite potrošača. U ovom slučaju, u pogledu korišćenja nepravičnih ugovornih odredbi u potrošačkim ugovorima o kreditu, pojavili su se brojni problemi, poput utvrđivanja kolektivnog interesa, razlike između nacionalnog i harmonizovanog pojma ugovora o kreditu, definisanja bitnih elemenata ugovora o potrošačkom kreditu i pravnih posledica nepoštenosti, itd. Da li su neki od ovih problema uzrokovani samim komunitarnim pravom zaštite potrošača, ostaje otvoreno pitanje.

Ključne reči: *Ugovori o kreditu.– Švajcarski franak.– Nepoštene ugovorne odredbe. – Postupak kolektivne zaštite.– Princip efikasnosti.*

102 See the summaries of the Commission's Decisions of 21 October 2014 in Case AT.39924 — Swiss Franc Interest Rate Derivatives (CHF LIBOR) (notified under document C(2014) 7605) *OJ* C 72/9 and in Case AT.39924 — Swiss Franc Interest Rate Derivatives (Bid Ask Spread Infringement) (notified under document C(2014) 7602) *OJ* C 72/14 of 28.2.2015.