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Articles

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Currency Clauses in CHF Credit Agreements: A 'Small Wheel' in the Swiss Loans' Mechanism

The so-called Swiss loans, i. e. consumer credit agreements expressed in Swiss Francs, can be compared to another famous Swiss product. Also the famous Swiss clocks and watches are characterized by a complex mechanism with many important parts guaranteeing an effective and proper functioning of the whole. However, different to Swiss clocks the Swiss loans have not run smoothly in EU Member States such as e. g. Hungary, Croatia, Poland, Romania and Slovenia. The national courts of these Member States have been struggling with a variety of issues arising under the Swiss loan agreements. The CJEU is almost regularly faced with requests for preliminary rulings in cases dealing with complex aspects of consumer crediting, unfair commercial practices and unfair contractual terms related to Swiss loans. With this in mind, this paper analyses key consumer protection issues related to consumer credit agreements expressed in Swiss Francs. It also addresses an important question arising from the above comparison: is the 'currency clause' expressing the loan in Swiss Francs, a 'small wheel' without which the contract mechanism cannot function?

I. Background

Prior to the analysis of consumer protection issues related to Swiss loan agreements, the paper provides a short insight into the background of the topic. From 2000 onwards, many credit and financial institutions established in the European Union began to increasingly offer credit agreements on the market, most of them being loans,[1] in which the loans' principal was linked to or denominated in Swiss Francs (CHF) as a foreign currency. The contractual term expressing the loan in a foreign currency is thereby often referred to as the 'currency clause'. This practice was a legally accepted solution in many South-East European countries and extensively used there.[2] For example, the Croatian, Slovenian and Serbian Obligations Act, which share a common legal background, all contain a provision enabling the conclusion of an agreement, where the subject matter of the contract, in this particular case the main principal of the credit agreement, is expressed in a national currency; however, it is linked to and calculated with respect to another currency.[3]

Despite the 'legality' of the currency clause institute, the question of the 'validity' of CHF loans was nevertheless raised in many countries, such as Hungary, Romania, Poland, Croatia and Slovenia, where CHF loans were offered on the market.[4] This had several reasons. First of all, CHF loans were usually concluded by linking the principal to CHF and, at the same time, by linking the contractual interests to a variable interest rate. That made the financial product flexible, but also not safe with respect to the possible currency and interest rate risks that could occur on the market. As explained *infra*, both national and CJEU case law confirmed the use of disputable wordings of the mentioned contractual terms that often omit criteria or references to parameters according to which the loans' interests or the principal are about to vary.

Moreover, the conclusion of CHF loans was often accompanied by the use of various unfair commercial practices and the violation of other mandatory consumer protection rules, such as those on consumer credit agreements. The mandatory nature of the consumer protection *acquis* requires national courts to examine ex officio whether the rules have been complied with.[5] This duty has been confirmed by the settled CJEU case law, in particular with respect to consumer credit agreements. According to the view of the CJEU, in the case *Radlinger and Radlingerová*, "*effective consumer protection could be achieved only if the national court were required, of its own motion, to examine compliance with the requirements which flow from EU law on consumer law*".[6]

With the arrival of the global financial crisis in 2008, the realisation of the above mentioned risks and the worst possible scenarios for CHF loan debtors went from being a possibility to becoming reality. The appreciation of the CHF resulted in an unexpected increase of loan repayments. In certain Member States, individual or collective redress proceedings against banks were initiated due to the use of unfair contractual terms in CHF consumer credit agreements. The Hungarian case *Kásler and Káslerné Rábai*,[7] the Romanian *Andricuc*,[8] the Croatian *Franak*[9] as well as the Polish *Dziubak*[10] all belong to a line of cases dealing with unfair contractual terms in CHF loans. Consequently, in many of the mentioned countries, the legislator reacted by amending the existing consumer credit legislation and by introducing new legal rules demanding a greater trans-

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1 On lending of CHF loans in Member States *see* Martin Brown, Marcel Peter, and Simon Wehrmüller, 'Swiss Franc Lending in Europe' (Swiss National Bank 2009) 1 *et seq*.

2 In contrast to some Western European countries, such as France, where the Constitutional Court found such possibility as 'une indexation déguisée' almost thirty years ago, and where, in 2013, the French legislator adopted an act prohibiting 'les prêts libellés en devises' with effect from 1 October 2014. Critically on French regulation Caroline Kleiner, 'Les prêts libellés en devises octroyés aux particuliers: l'inutile réforme?' (2017) Revue de Droit Bancaire et Financier 2.

3 Art. 22 of the Croatian Obligations Act, OG Nos. 35/05, 41/08, 125/11, 78/15 and 29/18; Art. 372 of the Slovenian Obligations Act, OG Nos. 83/01, 32/04, 28/06, 40/07, 64/16 and 20/18; Art. 395 of the Serbian Obligations Act, OG Nos. 01/03 and 18/20.

4 On CHF loans in Croatia *see* Emilia Mišćenić, Silvija Petrić, *Nepoštenost valutne klauzule u CHF i HRK/CHF kreditima* (Narodne novine, 2020), in Slovenia *see* Damjan Možina, *Kreditne pogodbe v švicarskih franak* (GV Založba 2018) and Michal Buszko, Dorota Krupa, 'Foreign Currency Loans in *Poland* and *Hungary* – A Comparative Analysis' (2015) 30 Procedia Economics and Finance 124 *et seq*.

5 Emilia Miscenic, 'The Effectiveness of Judicial Enforcement of the EU Consumer Protection Law' in Zlatan Meškić *et al.* (eds), *Balkan Yearbook of European and International Law* (Springer 2020) 144.

6 Judgment of the Court of 21 April 2016, C-377/14, *Radlinger and Radlingerová*, EU:C:2016:283, para. 66. See also judgment of 4 October 2007, C-429/05, *Rampion and Godard*, EU:C:2007:575, para. 61 and 65.

7 Judgment of 13 April 2014, C-26/13, *Kásler and Káslerné Rábai,* EU:C:2014:282.

8 Judgment of 20 September 2017, C-186/16, *Andriciuc and Others,* EU:C:2017:703.

9 Emilia Miscenic, 'Croatian Case "Franak": Effective or "Defective" Protection of Consumer Rights?' (2016) V Harmonius Journal of Legal and Social Studies in South East Europe 184 *et seq*.

10 Judgment of 3 October 2019, C-260/18, *Dziubak,* EU:C:2019:819.

parency of terms used in consumer credit agreements. For example, in Hungary[11] and Croatia[12] there were several legislative amendments during that period introducing more detailed pre-contractual and contractual information duties to include exact parameters regarding variable interest rates and currency clauses.

When in January 2015, the Swiss National Bank announced that it would no longer hold the CHF at a fixed exchange rate with the Euro (EUR), a line of new difficulties for CHF loan debtors occurred.[13] With no possibility of repaying their debts to banks, a huge number of CHF loan debtors across the European Union was exposed to foreclosure proceedings and lost their homes and other assets. Different countries reacted with different protective legislative measures, many of them following the Hungarian conversion model.[14] This model applied in Croatia, Cyprus, Montenegro, Romania, Serbia, Poland and Slovenia and made it possible to converse loan contracts expressed in CHF to loan contracts expressed in EUR or the national currency.[15]

The legal consequences of these exceptional legislative measures were far reaching and resulted in various problems which have not been resolved until today. While Member States justify their intervention as being exceptional measures needed to protect the public interest and order, social justice as well as consumers, banks argue that they have lost the expected profits from these highly disputable financial products. A range of cases were initiated by banks both at the national as well as the European level requiring compensation for their losses from the states.[16] The European Central Bank expressed its disagreement with the conversion model on several occasions.[17] On the other hand, competent EU institutions failed to address the complaints on violation of the *acquis* on consumer crediting and use of unfair commercial practices and unfair contractual terms. The most difficult task of interpreting EU Directives´ provisions lying in the background of national rules on consumer protection was left to the CJEU and their interpretation and application in practice to Member States national courts.[18]

II. Unfair behaviour of fair market players

Although perceived as fair market players, banking and financial institutions severely misused their position on the market by violating mandatory consumer protection rules on credit agreements and by using misleading advertising, unfair commercial practices and unfair contractual terms. All of these rules are often ill-conceived in the practice of national courts and other enforcement bodies as separate and unrelated legal matters. However, these national rules, having their background in the EU directives on consumer protection, must be observed as a whole. Only then can the contract mechanism function properly, achieving thereby '*effet utile*' of EU directives on consumer protection.

CHF loans were offered on the credit market from approximately 2000 to 2009. There are several EU directives relevant for the time period in which the consumer credit contracts were concluded. First of all, B2C (*business-to-consumer*) loan agreements were subject to Directive 87/102/EEC concerning consumer credit.[19] This directive was in 2008 repealed by Directive 2008/48/EC on credit agreements for consumers,[20] which was in 2014 amended by another important Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property.[21] With regard to the manner in which consumer credit agreements, i. e. loans were concluded, two EU directives were applicable during the relevant time period. The first one is Directive 84/450/EEC concerning misleading and comparative advertising[22] and the second one, Directive 2005/29/EC, on unfair commercial practices.[23] The supervision of contract contents is regulated by Directive 93/13/EEC on unfair terms in consumer contracts.[24]

With the exception of Directive 2005/29/EC following the maximum harmonisation approach, all relevant directives are based on the minimum harmonisation principle and establish a common minimum level of consumer protection in all Member States.[25] The presented EU legal framework is relevant for all states, including Croatia, which, at the time, was not part of the Union,[26] in light of the fact that these directives had already been introduced into the Croatian legislation in 2003, when the first Consumer Protection Act was adopted.[27] Investigating the national case law and CJEU judgements on CHF loans, this

11 *See* Hungarian Act LXXV of 2011 on Fixing of Exchange Rates Used for Calculation of Instalments of Foreign Exchange Denominated Mortgage Loans and Forced Sales Procedure of Residential Properties, and other legislative interventions analysed by Judit Fazekas, 'The Consumer Credit Crisis and Unfair Terms Regulation – Before and After Kásler' (2017) 3 EuCML 99.

12 Amendments of Consumer Credit Act from 2012 and 2013 (OG Nos. 75/09, 112/12, 143/13, 147/13, 9/15, 78/15, 102/15 and 52/16) introducing parameters related to change of interest rates, a threshold of APRC to consumer mortgage loans and setting a threshold to interest rates for foreign currency mortgage loans. Amendments of Credit Institutions Act from 2013 (OG Nos. 159/13, 19/15, 102/15, 15/18 and 70/19) strengthened credit institutions' pre-contractual information duty, particularly on warning about foreign exchange risks. *See* Tatjana Josipović, Hano Ernst 'Recent Crisis-Motivated Reforms in Croatian Private Law' (2015) 13(1) European Lawyer Journal 78 *et seq*.

13 Swiss National Bank, Swiss National Bank discontinues minimum exchange rate and lowers interest rate to -0.75 %, Zurich 15 January 2015, available at: https://www.snb.ch/en/mmr/reference/pre_20150115/source/pre_20150115.en. pdf.

14 Csaba Balogh, Áron Gereben, Ferenc Karvalits, György Pulai, 'Foreign currency tenders in Hungary: a tailor-made instrument for a unique challenge' (2013) 73 BIS Papers 155.

15 Andreas M. Fischer, Pinar Yesin, 'Foreign currency loan conversions and currency mismatches' (Swiss National Bank 2019) 1.

16 E.g. arbitration proceedings before *International Centre for Settlement of Investment Disputes* (ICSID), which continued even after the famous *Achmea* case and signing of the Declaration by the Member States on 15th January 2019 on the fate of BITs and investment dispute settlement. See judgment of 6 March 2018, C-284/16, *Achmea,* EU: C:2018:158, para. 13.

17 Opinion of the European Central Bank of 16 April 2018 on the conversion of Swiss franc loans (CON/2018/21), of 24 March 2017 on foreign exchange-linked loans (CON/2017/9) and of 18 September 2015 on the conversion of Swiss franc loans (CON/2015/32).

18 Emilia Miscenic, 'Uniform Interpretation of Article 4(2) of UCT Directive in the Context of Consumer Credit Agreements: Is it possible?' (2018) 3 Revue du droit de l'Union européenne 150.

19 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.

20 Directive 2008/48/EC of the European Parliament and Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133/66.

21 Directive 2014/17/EU of the European Parliament and 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, OJ L 60.

22 Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising, OJ L 250.

23 Directive 2005/29/EC of the European Parliament and Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149.

24 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95.

25 Stephen Weatherill, 'Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market' in Niamh Nic Shuibhne N. N., Laurence W. Gormley (eds), *From Single Market to Economic Union* (Oxford University Press 2012) 175.

26 Croatia became a Member State on 1 July 2013. *See* Decision of the Council of the European Union of 5 December 2011 on the admission of the Republic of Croatia to the European Union, OJ L 112, 24.4. 2012.

27 The approximation duty was set in the Stabilisation and Association Agreement signed between EC and its Member States and Croatia in 2001. *See* Emilia Miscenic, 'Croatian Consumer Protection Law: From Legal Approximation to Legal Fragmentation' (2018) 22 Studia Iuridica Toruniensia 189.

paper also analyses the extent to which EU directives are respected in the practice of banking and financial institutions.

1. Violation of consumer credit rules

Both the Member States and the CJEU case law interpreting the provisions of the above EU directives confirm a violation of consumer credit rules. Moreover, there appears to be a pattern of banking and financial institutions practices related to the conclusion of CHF loans. For example, consumers' *creditworthiness* was often not assessed when concluding CHF loans. In other cases, clients were assessed as creditworthy for loans in CHF, but not for loans in EUR or the national currency of the respective country.[28] Although Directive 2008/48/EC and Directive 2014/17/EU deal extensively with the assessment of creditworthiness, the most relevant directive at the time, Directive 87/102/EEC, did not address the issue. For this reason the banks used discrepancies in the regulation of Member States, where the matter was (and still is) regulated by national banking acts,[29] without prejudice to the fact that such behaviour runs counter to banking and credit rules on creditworthiness assessment.[30]

The CJEU recognised the consequential importance of this stage of consumer crediting in cases such as *CA Consumer Finance SA*[31] and *LCL Le Crédit Lyonnais SA v Fesih Kalhan*.[32] In the latter, the CJEU proofed the *effectiveness* of French national rules providing sanctions against the violation of rules on creditworthiness assessment. The uncertainty of performance created by approving loans to clients, who were not creditworthy, was, in practice, mitigated by stronger insurance mechanisms, most notably mortgage on consumers' home.[33] The experience from some countries shows that, in case of non-performance, a direct and out-of-court enforcement was possible. This was enabled by an enforcement clause (Lat. *clausula exequendi*) inserted into the pre-formulated standard contract, by means of which direct out-of-court enforcement and repossession of clients property was allowed to the banks.[34] The importance of the fundamental right to a home was again emphasised in the CJEU case *Kušionová*.[35] The illustrated violation of the responsible lending principle resulted in undermining the *ratio* of EU rules on creditworthiness assessment.[36] The aim of the principle is to prevent late payments and non-fulfilment of contractual obligations by observing the creditworthiness of a client, hence, by failing to do so, banks contributed to the realisation of the mentioned risk.[37] As referred to in *LCL Le Crédit Lyonnais*, which invokes recital 26 of Directive 2008/48/EC, "*it is important that creditors should not engage in irresponsible lending or give out credit without prior assessment of creditworthiness…*".[38]

Another important aspect of consumer crediting concerns the violation of creditors' *information duty* during all stages of contracting – from advertising and pre-contractual informing to contract conclusion. These were regulated by Directive 87/102/EEC to a certain extent and, therefore, existed in Member States' rules on consumer crediting. According to Arts. 3 and 4 Directive 87/102/EEC, any advertisement or offer should have included information on the annual percentage rate of charge (APRC) by means of a representative example, and credit agreements should have contained information on APRC and information under which conditions the APRC can change as well as the *essential terms of the contract*. It was required that consumers 'actually' receive all the terms and conditions by getting a copy of the written agreement. The exemplary list of essential terms in the annex of the Directive included the contractual terms on the price (i. e. interest rates) and the subject matter (i. e. loan principal, amount and number of instalments), etc.[39] Furthermore, additional rules on the information duty were prescribed in national provisions on banking and crediting services.[40]

In practice, besides using misleading advertising, creditors have usually circumvented the information duty by referring to business contract terms and conditions. The latter issue was addressed in the *Home Credit Slovakia* case, where the CJEU required for the loan terms and conditions and other relevant documents to be "*actually given to the consumer prior to the conclusion of the agreement so as to give him the opportunity to be genuinely apprised of all his rights and obligations*".[41] However, national case law and requests for preliminary rulings confirm a violation of rules in practice related to CHF loans.[42] The relevance of information duty for control of contract contents and transparency of contractual terms was underscored in another famous CJEU case on credit agreements. In *Radlinger and Radlingerová*, the CJEU clearly stated that "*(…) information, before and at the time of concluding a contract, on the terms of the contract and the consequences of concluding it is of*

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28 On the Serbian experience *see* Ana Opacic, Vladan Perisic, Jelena Gluscevic, 'The Problem of Currency-Indexed Loans – Case Of "CHF"' (2016) 3-4 International Review 140: "*…in many cases the user was not creditworthy for taking the loan in euros*, so… was offered, by the bank employees, as the only way of concluding a contract on housing loan, to take a loan indexed in CHF."

29 Art. 73 Croatian Banking Act from 2002 (OG Nos. 84/02, 141/06, 117/08 and 74/09) on creditworthiness assessment duty before and during contractual relation. In relying on Art. 73 Slovenian Banking Act (OG No. 7/99) the Bank of Slovenia sent a warning to national banks on creditworthiness assessment in 2006.

30 *See* judgment of Croatian High Commercial Court of 14 June 2018, 43 Pž-6632/2017-10, 62: "…individually persuading consumers during contract conclusion that *Swiss franc is a safe currency*, also *often giving them an individual assessment that they are creditworthy only for entering into contract containing terms under which the principal is pegged to the Swiss franc exchange rate*." See witness statements in Commercial Court judgment of 4 July 2013, 69: "*…stated that they were creditworthy for a "Swiss" loan, but not for a EUR loan*".

31 Judgment of 18 December 2014, C-449/13, *CA Consumer Finance SA*, EU:C:2014:2464.

32 Judgment of 27 March 2014, C-565/12, *LCL Le Crédit Lyonnais*, EU:C:2014:190.

33 Nikola Filipovic, Transparency in the Insurance Contract Law of the Western Balkans in Pierpaolo Marano, Kyriaki Noussia (eds), *Transparency in Insurance Contract Law* (Springer 2019) 495 *et seq*.

34 Paula Poretti, 'Debt Collection Practices under Croatian Enforcement Law – Is there a way out for over-indebted consumers?' (2018) 6 EuCML 236.

35 Judgment of 10 September 2014, C-34/13, *Kušionová*, EU:C:2014:2189.

36 *See* Udo Reifner, 'Verantwortung bei Kreditvergabe oder im Kredit? – Zum Konzept des Entwurfes der Konsumentenkreditrichtlinie' (2006) VuR 121. *See* also Commission Working Paper on Responsible Mortgage Lending and Borrowing of 22 July 2010.

37 Art. 18(5)(a) of Directive 2014/17/EU: the bank "…only makes the credit available to the consumer where the result of the creditworthiness assessment indicates that the obligations resulting from the credit agreement are likely to be met…".

38 Directive 2008/48/EC, recital 26: "…and the Member States should carry out the necessary supervision to avoid such behaviour and should determine the necessary means to sanction creditors in the event of their doing so".

39 Emilia Mišćenić, 'Mortgage Credit Directive (MCD): Are Consumers Finally Getting the Protection They Deserve?' in Zvonimir Slakoper (ed), *Liber Amicorum in Honorem Vilim Gorenc* (Faculty of Law Rijeka 2014) 235.

40 E.g. Art. 172 Croatian Banking Act regulated that *prior to conclusion of a loan agreement, a bank "is obliged to present or make available to the consumer all essential terms of the contract on contractual parties' rights and obligations"*.

41 Judgment of 9 November 2016, C-42/15, *Home Credit Slovakia*, EU:C:2016:842, para. 34.

42 On the violation of information duty in Slovenian case law *see* Nina Zupan, 'Pregled sodne prakse Vrhovnega sodišča Republike Slovenije o kreditnih pogodbah v tuji valuti' (2019) 2-3 Pravosodni bilten 9: "by which he wanted to prove *commercial policy of that bank when informing consumers on CHF loans*". In judgement of 20 December 2017, Cp 1218/2017, High Court in Ljubljana and District Court in Ljubljana, P 153/2016-II, concluded that violation of information duty could result in nullity of loan agreement. Croatian Commercial Court judgment of 4 July 2013, 94: "*…upon conclusion of the agreement, she did not receive terms and conditions* of… bank, or the General terms and conditions on interest rates of that bank…".

fundamental importance for a consumer". On the grounds of this information, "*the consumer decides whether he wishes to be bound by the conditions drafted in advance by the seller or supplier*".[43]

Therefore, information duty prescribed by EU directives on consumer credit agreements contributes significantly to the fulfilment of the *transparency requirement* as set by the settled CJEU case law.[44] By making contract contents available and understandable to the consumer so that he can 'truly' understand possible legal and economic consequences of contractual terms when signing the contract, the information duty guarantees transparency and enables the so-called informed transactional decision of the consumer.[45] In light of these considerations, national courts must watch ex officio upon compliance with this duty and apply an effective sanctioning mechanism in case of its violation.[46]

2. Use of misleading advertising and unfair commercial practices

By violating the information duty through omitting or offering misleading information in any of the above illustrated stages of credit contract conclusion, creditors use unfair commercial practices. In doing so, they affect the economic behaviour of an average consumer or even of a vulnerable one,[47] who takes a transactional decision that he would not have taken otherwise.[48] The time period, during which CHF loans were concluded, was mainly governed by Directive 84/450/EEC prohibiting misleading and comparative advertising.[49] However, the adoption of Directive 2005/29/EC brought about the so-called *Frustrationsverbot* (Germ.), prohibiting any action that would endanger *effet utile* of the adopted directive.[50] Nonetheless, both the national and CJEU case law confirm that banking practices were not concerned with rules of EU directives, whether transposed into national laws of Member States or not.[51] Although recognised as speculative financial products of high risk,[52] CHF loans were advertised and offered as favourable and reliable products in SEE countries.[53] For example, consumers were convinced that, in comparison to other loan agreements, CHF loans bring benefits in the form of low interests.[54] This statement that was used in advertising and conclusions of CHF loans is misleading as it leads consumers to an incorrect conclusion about the essential elements of the contract by convincing them that the currency clause is a contractual term to be linked to interests (as price) instead to the principal (as subject matter) of the loan.[55]

In some European countries, misleading advertising and other forms of unfair commercial practices are not only regulated by consumer protection legislation, but also sanctioned as criminal offences. Currently, there is a collective redress proceeding in France against the filial of the *Banque Nationale de Paris Paribas,* BNP *Paribas Personal Finance* before the *Tribunal correctionnel de Paris,* due to the mis-selling of CHF loans to more than 4,600 French consumers. In the French case *Helvet Immo* on unfair commercial practices, a mis-selling of CHF loans was recognised as an offence and sanctioned by the court. In a legal memorandum on CHF loans in Slovenia, *Zupancic* and *Ribicic* emphasise the criminal dimension of such conduct by comparing Member States´, the CJEU and ECHR case law. The authors of the memorandum point out that CHF loans might seem to be "acceptable from the purely banks' profit-making perspective", but consider them "criminally illegal and intolerable" products.[56] Their view was recently supported by the media, which published a call of the Austrian Raiffeisen Bank for services of a PR agency in relation to CHF loans. Among other tasks, this PR agency should "put the pressure on the Constitutional and other Croatian courts."[57]

What is often neglected by national case law and practitioners is the bond between EU directives on consumer crediting, unfair commercial practices and unfair contractual terms.[58] Violation of the rules on creditworthiness assessment by misleading consumers that they are creditworthy for CHF loan and not for EUR of another loan (despite the fact that evaluation criteria are the same) violates consumer crediting rules and presents an unfair commercial practice. According to the CJEU case law, violation of these rules is a *decisive fact* to be observed when evaluating the unfairness of a contractual term.[59]

In the *Matei* case, the CJEU held that the unfairness and transparency of a loan term must be examined "*in the light of all the relevant facts, including the promotional material and information provided by the lender in the negotiation of the loan agreement…*".[60] It follows from *Andriciuc and Others* case that, during the assessment of unfairness of a contractual term, the national court must take into account "*at the time of conclusion of the contract all the circumstances attending its conclusion*".[61]

43 Judgment of 21 April 2016, C-377/14, *Radlinger and Radlingerová*, EU:C:2016:283, para. 64.
44 Mia Junuzović, 'Transparency of (Pre-)Contractual Information in Consumer Credit Agreements: Is Consistency the Missing Key?' (2018) 14 CYELP 81 *et seq*.
45 Joasia Luzak, Mia Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) EuCML 100 *et seq*.
46 *Radlinger and Radlingerová,* para. 102: "*…national court… to examine of its own motion whether the obligation to provide information… has been complied with and to establish the consequences under national law of an infringement of that obligation…*".
47 Norbert Reich, 'Vulnerable Consumers in EU Law' in: Dorota Leczykiewicz, Stephen Weatherill (eds.) *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 139.
48 Directive 2005/29/EC, Art. 2(e).
49 Gert Straetmans, 'Misleading Practices, the Consumer Information Model and Consumer Protection' (2016) 5 EuCML 199 *et seq*.
50 *See* judgement of 22 November 2005, C-144/04, *Mangold*, EU:C:2005:709, para. 67 and judgement of 18 December 1997, C-129/96, *Inter-Environnement Wallonie*, EU:C:1997:628 para. 45.
51 Slovenian Consumers' Association Report of 20 February 2015: "*pegging your loan to the Swiss franc… guarantees that the amount of monthly annuity shall not be increasing significantly"* presented in Boštjan M. Zupančič, Ciril Ribičič, *Legal Memorandum on Violations of Constitutional and Convention Rights of Slovenian Borrowers of Mortgages Denominated in Swiss Francs* (Institute of Constitutional Law 2017) 8.
52 European Systemic Risk Board Recommendation of the European Systemic Risk Board of 21 September 2011 on lending in foreign currencies (ESRB/2011/1) OJ C 342/01.
53 Zupančič and Ribičič (fn 51) 8 claim that "the banks' catchphrase *'Rely on solid currency!'* was false and misleading". Collective redress proceeding in the case *Franak* points to phrases used to convince the consumers that CHF loans are reliable products, such as 'discount', 'without charges' or 'for a limited time period'.
54 Croatian Commercial Court judgment of 4 July 2013, 91: "*…Bank had tried to talk her into taking out a CHF loan because it had the most favourable interest rate…*"; and bank CEO statement, 126: "*…the clients most often opt for housing loans in Swiss francs, as the interest rates are significantly lower, i.e. from 4.40%, which is the lowest interest rate for a housing loan in the Croatian market*".
55 *See* partially revoked judgment and order of Croatian Supreme Court of 9 April 2015, Revt-249/14-2, 21: "…initial interest rate, although concluded as variable, was lower than the rate for loans concluded in Kuna or with a currency clause in EUR, *so it is easy to explain why the consumers found it more acceptable to conclude loan agreements with a currency clause in Swiss francs*".
56 Zupančič and Ribičič (fn 51) 29.
57 Consequently, Michael Müller as CEO of Raiffeisen Bank Austria resigned, <https://www.total-croatia-news.com/news/40997-rba> accessed 20 April 2020.
58 Mateja Durovic, *European Law on Unfair Commercial Practices and Contract Law* (Hart Publishing 2016) 56. *See* also Salvatore Orlando, 'The Use of Unfair Contractual Terms as an Unfair Commercial Practice' (2011) 1 ERCL 25 *et seq*.
59 On the gap-filling role of the CJEU *see* Geraint Howells, Gert Straetmans, 'The Interpretive Function of the CJEU and the Interrelationship of EU and National Levels of Consumer Protection' (2017) 9 Perspectives and Federalism 194 *et seq*.
60 Judgment of 26 February 2015, C-143/13, *Matei*, EU:C:2015:127, para. 75.
61 *Andriciuc and Others,* para. 53.

These circumstances include also those which might present an unfair commercial practice towards the consumer.[62] Insufficiently transparent advertising of the consumer loan contrary to Directive 87/102/EEC presented a misleading and unfair commercial practice affecting the unfairness of loan terms in the *Cofidis* case.[63] The *Pereničová and Perenič* case belongs to rulings confirming the interaction between various EU directives on consumer protection. Here, the indication of APRC, as a determinant of the loans' price, was lower than the real rate.[64] The CJEU emphasised the importance of unfair commercial practices for the assessment of unfairness of loan terms by saying: "*A finding that such a commercial practice is unfair is one element among others on which the competent court may… base its assessment of the unfairness of the contractual terms*".[65]

The European Commission followed its finding in the *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices* from 2016. By reciting the *Pereničová and Perenič c*ase, the Commission confirmed the relation existing between two directives: "*erroneous information provided in the contract terms is 'misleading' within the meaning of the …(UCP) Directive if it causes, or is likely to cause, the average consumer to take a transactional decision that he would not have taken otherwise*".[66] Moreover, the Commission accentuated economic risks linked to financial services, requiring from traders to act "*with the standard of skill and care which can reasonably be expected from a professional within this field of commercial activity* cf. Article 5(2)(a) UCPD", and "*should not exaggerate economic benefits, not omit information about financial risks to consumer*".[67]

3. Use of unfair contract terms

What made CHF loans highly insecure and risky contracts is not only the manner in which they were concluded, e. g. namely with persons of poor or no creditworthiness, unable to repay their debt irrespective of the realisation of financial, currency or interests risks. It is the content of these contracts that rendered them into 'toxic' financial products, as they were often described in practice. This is due to the fact that contractual terms affecting the price and subject matter of the contract as essential elements (Lat. *essentialia negotii*), and which were drafted in advance and imposed on consumers unilaterally and without individual negotiation,[68] were against the good faith requirement.[69] Such contractual terms are considered unfair and consequently non-binding under Directive 93/13/EEC if they cause a significant imbalance between the parties' rights and obligations to the detriment of the consumer.[70]

On the one hand, there was a currency clause linking the loan's principal to the foreign currency of CHF and, on the other, a variable interest rate making interests dependent upon the bank's decision and variations on the credit market.[71] In principle, there was no indication of exact parameters upon which these key contractual terms would depend.[72] In some cases, contracts referred to EURIBOR or LIBOR as the reference rate upon which contractual interest rate varies.[73] This made both the price and the subject matter of the contract conditional upon the bank's unilateral amendments, without offering transparent criteria for possible alterations to the essential elements of the contract.

By assuming control over the whole contract, banks had transferred the realisation of possible currency, interests and financial risks to consumers.[74] The global economic crisis however turned a 'possibility' into 'reality' resulting thereby in a substantial increase of CHF loans and debtors' impossibility to repay the owned debt. These severe consequences could have been avoided or at least mitigated if the banks, as professionals, had acted with a due level of care and had warned the consumer "of the fact that, in entering into 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 depreciation of the currency in which he receives his income in relation to the foreign currency in which the loan was granted*".[75]

The question whether the currency clause and variable interest rate are essential elements of the contract or rather contractual terms upon which the essential elements, i. e. loan's principal and interests depend, calls for further clarification. This highly disputable issue has still not been clarified, and national case law varies significantly in this regard. In the Croatian collective redress proceeding in the case *Franak,* the courts proceeded from a qualification of both contractual terms as essential elements of the contract and placed them under the exclusion from the unfairness test. The Hungarian *Kúria* took one view in a legal standing from 2012 and an opposite one in the legal standing from 2014;[76] the latter corresponding to the position of Croatian courts. According to Art. 4(2) Directive 93/13/

62 On lowering the level of protection offered by the Directive 2005/29/EC in the CJEU case law *see* Mateja Durovic, 'Private Law Consequences of Unfair Commercial Practices' in Lucila de Almeida *et al.* (eds), *The Transformation of Economic Law: Essays in Honour of Hans-W. Micklitz* (Hart Publishing 2019) 29 *et seq*.

63 Judgment of 21 November 2002, C–473/00, *Cofidis*, EU:C:2002:705, para. 21: "…form used by the credit establishment of wording of an *advertising nature giving the impression that the transaction is free of charge, which the national court regards as having been such as to mislead the consumer*".

64 Judgment of 15 March 2012, C-453/10, *Pereničová and Perenič,* EU:C:2012:144, para. 47: "*…indicating in a credit agreement an APR lower than the real rate must be regarded as 'misleading' within the meaning of… Directive 2005/29/EC*".

65 *Pereničová and Perenič*, para. 47.

66 Commission Staff Working Document, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, Brussels, 25.5.2016 SWD (2016) 163 final, 21.

67 Commission Staff Working Document (fn. 69) 166-167.

68 Under Art. 3(2) Directive 93/13/EEC such contractual term "shall always be regarded as not individually negotiated". Commercial Court judgment of 4 July 2013, 29 where banks claimed that it is "*an illusion to expect the bank to negotiate with every consumer on individual contract terms*".

69 Croatian High Commercial Court judgment of 14 June 2018, 62: "*By offering lowest interest for contracts in which the principal is pegged to the Swiss franc currency*, the bank is encouraging consumers, *in an unfair way*, to conclude contracts… where *failure to provide this relevant information* at the very start, leads to *significant imbalance to the detriment of the consumer and is contrary to the principle of good faith*".

70 Art. 3(1) Directive 93/13/EEC.

71 Contractual term on variable interest rate allowed banks to unilaterally change the interests, as in *Matei* case, para. 26: "*…the bank reserves the right to alter the current rate of interest in the event of significant changes on the financial markets…*".

72 Examples show that currency clauses were expressing *only* the amount of loans' principal in CHF, without additional information: "The Creditor grants and makes available to the Borrower the loan in (national currency) equivalent to CHF (amount) calculated on the bases of middle rate of… National Bank".

73 *See* Miscenic (fn 9) 185; Mozina (fn 4) 12; Michal Buszko, Supporting of Swiss Frans Borrowers and Sustainability of the Banking Sector in Poland in Agnieszka Bem *et al.* (eds) *Banking and Sustainability* (Springer 2018) 16.

74 *Andriciuc and Others*, para. 11: "*…the presentation was made in a biased manner, emphasising the advantages of that type of product and the currency used, while failing to point out the potential risks or the likelihood of those risks materialising*". *See* Croatian Supreme Court judgement of 3 September 2019, 25: "*…banks as traders were aware of risks for consumers* as credit users… *they consciously omitted to inform the client about it*".

75 Judgement of 20 September 2018, C-51/17, *OTP Bank and OTP Faktoring,* EU:C:2018:750, para. 75.; *Andriciuc and Others,* para. 49-50.

76 *See* Fazekas (fn 11) 104-105 describing *Hungarian Kúria* Opinion 2/2012 and Civil Law Uniformity Decision 2/2014. The first one 'excluded' terms on unilateral modifications, and the second one 'included' terms transferring exchange risks to consumers to "main subject matter of the contract", and therefore submitted them to exclusion from the unfairness test, unless contractual terms are not transparent.

EEC, the definition of the main subject matter or adequacy of the price/remuneration is excluded from the unfairness test if it satisfies the so-called transparency requirement.[77]

While the meaning of the transparency requirement was clarified by the CJEU, the qualification of contractual terms as essential elements was left to Member States' courts, to whose competencies it belongs.[78] However, the CJEU did hint at the answer in the *Kásler and Káslerné Rábai* case. Here, it allowed an amendment of a contractual term, which would result in nullifying of the whole contract if found to be essential by national courts.[79] It went a step further in the *Andriciuc and Others* case. By interpreting the concept of the "main subject matter" under Art. 4(2) Directive 93/13/EEC, it concluded that "*the fact that a loan must be repaid in a certain currency relates… to very nature of the borrower's obligation, thereby constituting an essential element of a loan agreement*".[80] As always in cases where the lines between the competencies are blurred, the CJEU established that the final decision lies in the hands of Member States' courts, which must ascertain "*…that that term lays down an essential obligation of that agreement which, as such, characterises it*".[81]

Not less disputable is the transparency requirement under Arts. 4(2) and 5 Directive 93/13/EEC, demanding for contractual terms to be drafted in plain intelligible language.[82] According to the *Guidance on the Interpretation and Application of Directive 93/13/EEC* from 2019, the transparency is to be understood in a broad sense.[83] The transparency relates not only to formal, grammatical and substantial understanding of contractual terms, but their availability to consumers in the first place.[84] Despite an extensive interpretation by the CJEU case law,[85] the practice indicates a multitude of cases in which the consumers are deprived of relevant contractual terms.[86] Likewise, there are cases on CHF loans in which the contractual terms were neither explained, nor negotiated during the pre-contractual stage.[87] By relying on the professional expertise and due care of the banks, the consumers followed the advice on entering 'reliable' CHF loan agreements with variable interest rates and secured by a mortgage.

National case law demonstrates that when concluding the contract, consumers paradoxically did not 'understand' that they do not 'understand' the functioning of the complex mechanism of CHF loans,[88] due to the failure of the banks to explain the functioning of the currency clause to the consumers, and to name and explain the parameters affecting the clause. The lack of understanding was also caused by the failure to explain the manner in which the interest rate may vary and affect not only interests but also the loans' principal, as well as by neglecting to explain legal and economic consequences of contracting such terms. Consequently, the transparency requirement, as set by the settled CJEU case law, was not satisfied in practice.[89]

Nonetheless, the courts of some Member States found the currency clause to be transparent and the CJEU case law irrelevant when deciding cases on CHF loans.[90] In the Croatian collective redress proceeding, the courts corrected previous failures in the renewed proceeding to which they were forced by the decision of the Constitutional Court from 2016 adjudicating on their non-conformity to EU law.[91] This gave national courts the opportunity to overrule their previous standing on the currency clause.[92] In renewed proceeding from 2018, the High Commercial Court pointed to the real cause of a significant imbalance between parties' rights and obligations, which "*was not caused either by change of currency of the Swiss francs or by change of the variable interest rate, but by contractual terms*".[93]

This suggests that the national case law often lacks the necessary understanding of the fact that national rules derive from EU directives on consumer protection, including Directive 93/13/EEC. It also hints at the courts' reluctance to the application and *ex officio* observance of mandatory consumer protection

77 On Art. 4(2) Directive 93/13/EEC *see* Sergio Cámara Lapuente S., 'Control of Price Related Terms in Standard Form Contracts in the European Union: The Innovative Role of the CJEU's Case-Law' in Yesim M. Atamer, Pascal Pichonnaz (eds) *Control of Price Related Terms in Standard Form Contracts. Ius Comparatum – Global Studies in Comparative Law* (Springer 2020) 72 *et seq*.

78 Józon Monika, 'Unfair Contract Terms Law in Europe in Times of Crisis: Substantive Justice Lost in the Paradise of Proceduralisation of Contract' (2017) 3 EuCML 163-164.

79 *Kásler and Káslerné Rábai,* para. 82-83. Such conclusion is opposite to the one from *Banco Español de Crédito* case, where the contractual term in question was not an essential term and the CJEU, therefore, denied such possibility. *See* judgement of 14 June 2012, C-618/10, *Banco Español de Crédito, EU*:C:2012:349, para. 89.

80 *Andriciuc and Others,* para. 38.

81 *Andriciuc and Others,* para. 39. Cf. *Matei*, para. 54: "it is for the referring court to determine… *whether the term concerned constitutes an essential element of the debtor's obligations …*"; *Kásler and Káslerné Rábai*, para. 51; judgment of 23 April 2015, C-96/14, *Van Hove*, EU:C:2015:262, para. 51.

82 *See* Marco BM Loos, 'Transparency Under the UCTD: Could You Please Explain what these Terms are Supposed to Mean?' (2020) 1 EuCML 25 *et seq*. *See* also Thomas Wilhelmsson, 'Unfair Contract Terms' in Geraint Howells, Christian Twigg-Flesner, Thomas Wilhelmsson (eds), *Rethinking EU consumer law* (Routledge 2018) 129 *et seq*.

83 European Commission, Guidance on the interpretation and application of Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts, C(2019)5325 final, Brussels, 27.7.2019., p. 26.

84 *Home Credit Slovakia,* para. 34. According to Directive 93/13/EEC preamble "contracts should be drafted in plain, intelligible language, (and) the *consumer should actually be given an opportunity to examine all the terms"*.

85 The CJEU case law requires for contractual terms to *transparently* set out the reasons for and particularities of the contracted mechanisms or arrangement; set out their relationship with mechanisms provided for by other contractual terms; and to enable the consumer to evaluate, on the basis of precise, clear/plain intelligible criteria, the economic consequences for him which derive from the contract. *See Kásler and Káslerné Rábai,* para. 73; *Andriciuc and Others,* para. 45; *van Hove,* para. 51; judgment of 9 July 2015, C-348/14, *Bucura*, EU:C:2015:447, para. 55.

86 Rulings of Slovenian Supreme Court of 7 May 2018, II Ips 201/2017, of 18 October 2018, II Ips 141/2017 and of 25 October 2018, II Ips 195/2018 where information duty of banks as professionals was brought in question.

87 Croatian Supreme Court Judgement of 3 September 2019, 24: "…the contractual terms were *unintelligible* to clients, since the *consequences and reach of such contract terms were not properly explained to them…*".

88 Judgment of the Municipal Court in Osijek of 1 April 2015, P-788/2014-48, 20: "…*plaintiff understood* that this provision linked the loan principal to CHF, but… *had no knowledge of and could not presume that by accepting the given provision, the loans' principal became dependent on the Swiss Franc exchange rate…*".

89 See Order of 22 February 2018, *Lupean and Lupean*, C-119/17, EU:C:2018:103, para. 2: "…a term in a loan agreement… as a consequence of which the entire exchange rate risk is transferred to the borrower, and *which is not drafted transparently*, with the result that *the borrower is unable to assess, on the basis of clear and intelligible criteria, the financial consequences of signing that agreement*, is liable to be regarded as unfair…".

90 *See* partially annulled Croatian Supreme Court judgement of 9 April 2015, 22: "*plaintiff refers to legal opinion of (CJEU) expressed in ruling C-26/13, which refers to application of Directive 93/13 EEC… It is clear…that the facts from described Hungarian and this case are not the same, and they cannot be compared or related"*.

91 Decision of Constitutional Court of 13 December 2016, U-III-2521/2015 *et al*., which established failure to apply *Kásler and Káslerné Rábai* transparency criteria and violation of the right to a fair trial: "… *Supreme Court used different interpretations of the notion of understandability of disputed contractual terms on currency clause, on the one hand, and contractual terms on variable interest rates depending on unilateral decision of banks, on the other hand*".

92 High Commercial Court judgment of 14 June 2018, 62: "…absence of transparency of contractual terms under which the principal is pegged to the Swiss franc is… serious cause for significant imbalance in the rights and obligations of contracting parties to the detriment of the consumer, contrary to the principle of good faith since the bank is aware of this risk, but is not disclosing it".

93 High Commercial Court judgment of 14 June 2018, 65.

rules.[94] In this respect, it is instructive to mention recent developments at the EU level. While the new *Directive (EU) 2019/2161 on better enforcement and modernisation of Union consumer protection rules*[95] requires more effective sanctions by amending Directive 93/13/EEC and introducing Art. 8.b on '*effective, proportionate and dissuasive*' penalties for those using unfair contractual terms, the CJEU case law seems to 'weaken' the protection of the 'weaker' party.[96] In the newly published judgment on CHF loans, the CJEU departs from the settled case law on the duty of national courts to observe the unfairness of contractual terms *ex officio*, even in those cases where the unfairness was not invoked by the consumer due to his ignorance or lack of legal expertise.[97]

The CJEU makes an important shift in case *Lintner* on CHF loans, by establishing that a national court must observe on its own motion the unfairness of only those contractual terms which were challenged by the consumer.[98] What was once established by the famous *Océano Grupo and Salvat Editores* case as an extensive duty of *ex officio* control, and then relieved with legal and factual circumstances available for that task,[99] has now been reduced to the limits of consumers' claim (Lat. *ne ultra petita*).[100] Protection that was justified by the weaker position of the consumer, who, due to the low level of knowledge and ignorance of the law "*will not rely on the legal rule that is intended to protect him*",[101] is substantially narrowed in the *Lintner* case.[102] The key argument of public policy or interest lying behind the interpretation of Art. 6(1) Directive 93/13/EEC[103] and justifying *ex officio* control of unfair contractual terms was abandoned in this particular case on CHF loans.[104]

III. The role of the currency clause in the swiss loans' mechanism

The violation of consumer protection rules in the illustrated practices of banking and financial institutions has resulted in high-risk credit products, but also in contracts of uncertain validity. It is in this regard that the role of the currency clause in CHF loans comes into play. The validity of the whole contract depends upon the legal qualification of the currency clause, as well as the variable interest rate. Still, the legal qualification of terms in the sense of national civil laws and legal consequences of the unfairness of contractual terms are not regulated by EU law.[105] Therefore, this interrelated and demanding legal task is left to Member States' national courts. Under Art. 6(1) Directive 93/13/EEC, unfair contractual terms are not binding on the consumer and the contract is valid if it can remain valid without them. However, a contract cannot continue to bind the parties and stay valid if unfair contractual terms are the essential ones (Lat. *essentialia negotii*), which is for the Member States' courts to decide.

National courts of Member States took different approaches on the matter. As seen in the Croatian collective redress proceeding *Franak,* courts qualified both terms as essential.[106] A discrepancy occurred in the renewed proceeding, where the currency clause was considered as a contractual term falling under the exclusion from the unfairness test, but as a non-essential term with respect to legal consequences of unfairness, i. e. validity or nullity of CHF loans.[107] To the contrary, many individual civil proceedings evaluating unfairness of both terms nullified CHF loans in their entirety due to the unfairness of essential contractual terms.[108] A similar approach was taken by the Slovenian courts, where the currency clause was considered as an essential contractual term of the credit agreement and was nullified in some cases but not in others.[109] In Poland, CHF loans faced a different fate after the famous CJEU *Dziubak* case, where the District Court in Warsaw annulled the CHF loan contract in its entirety.[110] In Serbia, as a country aspiring to become an EU Member State, contracts are evaluated by applying *clausula rebus sic stantibus* and the right to terminate the contract is made conditional upon change of circumstances.[111] French courts recognised the unfairness of currency clauses in some cases, while not in others.[112] However, quite recently, the *Tribunal correctionnel de Paris* found BNP Paribas Personal Finance "*coupable de pratique commerciale trompeuse*" in its judgement of 26 February 2020 in the *Helvet Immo* case.[113]

Further on, the currency clause plays a crucial role for CHF loans that were converted (so-called converted contracts) and

94 Jacolien Barnard, Emilia Mišćenić, 'The role of the courts in the application of consumer protection law: A comparative perspective' (2019) 44 (1) Journal for Juridical Science 127.

95 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12. 2019, 7–28.

96 On *Calimero* consumer Vanessa Mak, 'The Consumer in European Regulatory Private Law' in Dorota Leczykiewicz, Stephen Weatherill (eds) *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 389.

97 Critically on the CJEU case law on *ex officio* control and effectiveness guarantee Miscenic (fn 6) 144 *et seq*.

98 Judgment of 11 March 2020, C511/17, *Lintner*, EU:C:2020:188, para. 50.

99 Judgment of 27 June 2000 in joined cases C-240/98 to C-244/98, *Océano Grupo and Salvat Editores,* EU:C:2000:346; judgment of 4 June 2009, C-243/08, *Pannon GSM,* EU:C:2009:350; order of 21 November 2002, C-76/10, *Pohotovosť,* EU:C:2010:685; *Banco Español de Crédito*, para. 46 and many others.

100 *Nota bene,* in the judgment of 3 October 2013, C-32/12, *Duarte Hueros,* EU:C:2013:637, para. 39, the CJEU criticised Spanish national procedural rules *ne bis in idem* and *res iudicata* as principles restricting national courts duty to guarantee consumer rights, even beyond consumers' claim and considered these as a violation of the principle of effectiveness.

101 *Radlinger and Radlingerová,* para. 65.

102 *Lintner*, para. 31, 44 and 50.

103 *See* Anthi Beka, *The Active Role of Courts in Consumer Litigation: Applying EU Law of the National Courts' Own Motion* (Intersentia 2018) 66 *et seq*.

104 So far, the CJEU has justified the limitation of national procedural rules "*in exceptional cases where the public interest requires its intervention*". See judgment of 17 December 2009, C-227/08, *Martín Martín,* EU:C:2009:792, paras. 19 and 20. With respect to public policy argument *see* judgment of 26 October 2006, C-168/05, *Mostaza Claro,* EU:C:2006:675, para. 38 and judgment of 6 October 2009, C-40/08, *Asturcom Telecomunicaciones*, EU:C:2009:615, para. 52.

105 *See* Józon (fn 78) 163-164.

106 Judgment and order of the High Commercial Court in Zagreb, Pž-7129/13-4 of 13 June 2014, 50: "A term by virtue of which the loans' principal is linked to Swiss Francs, *is a term on subject matter of the contract.*"; and 58: "*Essential elements of the credit contract are certainly subject matter and the price, and interests are price*".

107 Croatian High Commercial Court judgment of 14 June 2018, 51: "… nullity of terms in part in which the safety clause was agreed and the manner in which interest rate changes, *does not result in nullity of entire terms on main subject matter and price and even less in nullity of entire contract*, *since these are not essential elements of credit contract* and the contract can survive without them".

108 Municipal Court judgment of 1 April 2015, 18: "It is a term binding the capital of the credit to CHF, i. e. a *term on the subject matter of the contract*, that makes… capital dependent upon relation between CHF and Kuna, *and this is why the contractual term in question is… essential element of the credit contract*".

109 See rulings of Slovenian Supreme Court of 7 May 2018, II Ips 201/2017, and of 25 October 2018, Ips 137/2018 and of 20 December 2018, II Ips 197/2018 elaborated by Zupan (fn 43) 6 and 16.

110 Judgement of the District Court in Warsaw of 3 January 2020, XXV C 2514/19, 32 warning on "*a number of legal issues that may affect the shape of… reciprocal rights and obligations arising in case of nullity of the contract*".

111 Judgement of Serbian Supreme Court of 25 January 2017, Rev 321/2016; judgement of Appellate Court in Novi Sad of 1 September 2016, Gž. br. 1781/16.

112 See judgements of *Cour de cassation* of 29 March 2017, n° 16-13.050 and n° 15-27.231, where it was established that putting all of exchange risk exclusively on borrowers results in significant imbalance between the parties' rights and obligations.

113 Xavier Henry, 'Contentieux civil Helvet Immo. De quelques questions toujours sans réponse' Recueil Dalloz 4 (2020) 223.

for the conversion of CHF loans in general. If the currency clause is a non-essential term of the contract, then its unfairness and nullification lead to the conversion of the CHF loan into a loan in the official currency of the respective Member State, in which the contract's principal is expressed. Hence, the contract stays in force and is valid, as a legal consequence of the above illustrated institute of the currency clause. Such solution would be in line with the CJEU interpretation of the aim of Directive 93/13/EEC, which is not to abolish all contracts containing unfair terms, but to restore the balance between the parties, while preserving the validity of the contract.[114] Likewise, it would be in line with the CJEU standing in cases *Sziber* and *Dunai,* according to which the Directive 93/13/EEC does not preclude national legislation that "*would restore the legal and factual situation that the consumer would have been in had those unfair terms not existed*".[115]

In turn, the author argues that the legal qualification of the currency clause in CHF loans strongly depends on its role in consumer credits mechanism. Similar as the variable interest rate, which in terms of consumer credits is a mechanism affecting the APRC and consequently 'interests' as the price of the credit, the currency clause is a mechanism affecting the loan's principal as the 'main subject matter' of the credit contract.[116] Still, in spite of the illustrated scenario showcasing possible legal consequences of the unfairness of the currency clause, a number of Member States have introduced a legislative measure on the so-called loan 'conversion'. As rightly explained by the Hungarian Supreme Court (Kúria) and Constitutional Court, amendments to contracts resulting from judicial intervention in a number of civil law disputes are not an appropriate legal remedy for a multitude of contracts containing unfair currency clauses.[117] Depending on the conversion model introduced in the respective country, this extraordinary measure provided a possibility for loan debtors to convert their CHF into EUR loans or loans in the national currency.[118]

In doing so, countries such as Hungary, Cyprus, Croatia, Poland, Romania and recently Slovenia, have enabled an amendment to the currency clause, usually with a retroactive effect from the moment of the contract conclusion.[119] In principle, offered as an 'option' for debtors, this exceptional measure was *inter alia* justified as protecting public interests and policy, i. e. order, social justice, as well as consumer protection.[120] Nonetheless, similar as the issue of the unfairness of currency clauses, the conversion of loans became highly disputable and proceedings were initiated at the Member States courts.[121]

In 2017, the Romanian Constitutional Court found the Act on Conversion of CHF loans to be unconstitutional.[122] To the contrary, Hungarian Constitutional Court in 2014 and Croatian Constitutional Court in 2017 dismissed proposals for an evaluation of the constitutionality of adopted Conversion Acts and found conversion measures to be constitutional despite of retroactivity.[123] The legal standing to converted contracts was also taken by Croatian and Serbian Supreme courts. The Serbian Supreme Cassation Court confirmed the conversion of CHF loans as a legal consequence of the annulment of currency clauses. According to its legal standing from 2019, the CHF currency clause that was not founded on reliable written proof that the bank obtained the placed amount of Dinar (Serbian national currency) by its own borrowing in CHF, and where, prior to the credit conclusion, the borrower was completely informed in writing of all business risks and financial consequences of applying the clause, is null and void. In such cases, the credit contract stays in force, but converts into a EUR loan by application of the official EUR course on the day of the contract conclusion.[124] In 2020, the Croatian Supreme Court confirmed that the converted contracts, which had been concluded after the adoption of the so-called Conversion Act in 2015, are valid even in cases where the currency clauses out of converted contracts are unfair, and, therefore, null and void. The Supreme Court accentuated that conversion was an "*extraordinary, one-time and retroactive measure*" intended to relieve the debt crisis in the state, caused by CHF loans.[125]

As regards the arguments of the banks arising from the illustrated CHF loans proceedings, these are mostly focused on the fairness and legality of currency clauses, retroactivity of conversion and loss of profit expected from CHF loans. However, these only seem to strengthen the CJEU case law on unfair contractual terms in CHF loans and foreign currency loans in general. The latter requires from Member States courts to watch *ex officio* upon the compliance with information duty during the conclusion of credit agreements[126] and considers information affecting consumer's obligations under a loan agreement to be essential.[127] Hence, the duty to warn consumers of possible risks of the currency clause as a contractual term affecting the loans' principal has nothing to do with the legal regulation of the institute of the currency clause *per se*. The awareness of an average consumer of the existence of laws regulating foreign currency institute or of banking practices using the institute is not to be confused with the duty of the banks as professionals to explain the very same institute and its functioning to the consumer.[128]

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114 *Pereničová and Perenič, p*ara. 31, *Banco Español de Crédito, p*ara. 40, *Káslernè Rábai, p*ara. 82.

115 Judgement of 31 May 2018, C483/16, *Sziber*, EU:C:2018:367, para. 55; judgement of 14 March 2019, *Dunai,* C-118/17, EU:C:2019:207, para. 56 and 65.

116 Miscenic (fn 18) 131 *et seq*.

117 *See* Fazekas (fn 11) 105 describing Hungarian Kúria Civil Law Uniformity Decision 6/2013 on theoretical aspects of consumer credit agreements denominated in foreign currency and Decision of Hungarian Constitutional Court 8/2014 (III. 20.) AB határozat.

118 *See* Pinar Yeşin, 'Foreign Currency Loans and Systemic Risk in Europe' (2013) 95(3) *Federal Reserve Bank of St. Louis Review* 222.

119 *OTP Bank and OTP Faktoring,* para. 26: "…requires such a term to be replaced, *with retroactive effect*, by a provision providing for the application of the official exchange rate of the currency concerned set by the National Bank of Hungary".

120 Miscenic, Petric (fn 4) 207.

121 In five ICSID arbitration proceedings and several national proceedings initiated against Croatia, the banks demanded compensation of damage caused by the conversion. Besides the loss of profit (Lat. *lucrum cessans*), this damage allegedly included the administrative costs of conversion. The latter were proportionally divided between consumers and business by the so-called Conversion Act, while the costs were also mitigated by tax releases to banks in 2015 and 2016. *See* Order of Constitutional Court of 4 April 2017, U-I-3685/2015 *et al.*

122 Decision of the Romanian Constitutional Court of 7 February 2017, o. 62, para. 1-3 on *Legii pentru completarea Ordonanței de urgență a Guvernului nr. 50/2010 privind contractele de credit pentru consumatori*.

123 Order of the Constitutional Court of 4 April 2017, U-I-3685/2015 *et al.* confirming constitutionality of conversion introduced by the Act on Amendments of Consumer Credit Act, OG No. 102/15, and the Act on Amendments of Credit Institutions Act, OG No. 102/15. A similar case happened in Hungary after the adoption of Act XXXVIII of 18 July 2014 on the Regulation of Consumer Credits Denominated in a Foreign Currency, where the Constitutional Court confirmed its constitutionality in Decision 34/2014 (XI. 14.) AB határozat.

124 Legal Opinion of Serbian Supreme Cassation Court of 2 April 2019.

125 Order of Croatian Supreme Court of 4 March 2020, Gos 1/2019-36.

126 *Radlinger and Radlingerová,* para. 102.

127 See *Bucura,* para. 67: "the circumstance linked to the *lack of mention in the consumer credit contract of information* which… *is regarded as being essential*…" and is a decisive fact in assessing the unfairness of a contractual term.

128 The Croatian High Commercial Court judgement from 2018, 52: "… whether the banks presented to consumers in the precontractual stage information containing accurate, unambiguous criteria written in plain and intelligible language, in the spirit of EU law, on the basis of which an *average consumer*, *who does not have the expertise and to whom the legal concept of the foreign currency clause is familiar only as a general principle, could understand and is able to foresee the economic consequences which are derived for him from agreeing to the foreign currency clause in the Swiss francs*".

Such explanation would, of course, have to emphasise possible legal and economic consequences of contracting the currency clause for the consumer, as required by the settled CJEU case law.[129] If the duty to inform of the functioning mechanism and risks of currency clauses had been observed in the commercial practice of the banks,[130] then they would have been aware of the fact that the argument on the loss of profit is unfounded. The reason behind the use and introduction of the foreign currency institute (which was in some countries initially applied 'retroactively' in order to upheld invalid loan agreements concluded by the banks)[131] is to retain the balance between the rights and obligations of contracting parties in case of currency risks realisation. As pointed out by Croatian Constitutional Court in 2016, the aim of the currency clause "*is not to enable a creditor to obtain a higher value compared to the value of obligation fulfilled toward the borrower* as a result of potential appreciation of gold or the agreed foreign currency", but to preserve the actual value of contractual obligation.[132]

Lastly, the often heard argument of the inadequacy of illustrated conversion models when compared to the legal solution and conversion proposed by Art. 23 Directive 2014/17/EU is not to be accepted in the case of unfairness of currency clauses.[133] The provisions that deal with the mitigation of economic consequences occurred by the realisation of exchange risks is not to be confused with the unfairness of the contractual term on a foreign currency. Therefore, this argument cannot overrule the duty of states to protect their public interest and policy, as well as the fact that conversion is a reaction to severe violations of the consumer protection *acquis* across the Union.

IV. Final remarks to the Swiss loans' saga

What was once considered and offered to millions of consumers Europe-wide as a so-called 'safe haven' or 'shelter' clause, has eventually forced them to look for actual shelter in real life.[134] Many of them, unaware of the risks they were entering into, lost their homes, health and human dignity by being unable to repay the owned debt, which increased significantly from the initial obligation under the contract. In the case of credit contracts that are based on the principle of parties' mutual trust (Lat. *credere*), the currency clause denominating the loan in Swiss francs (CHF) undermined its *causa credendi*.

Although it is difficult to present precise numbers, different reports evaluate that there are app. 550,000 Polish, 170,000 Hungarian, 150,000 Romanian, 75,000 Croatian, 70,000 Greek, 22,000 Serbian, 16,000 Slovenian, 4,600 French and thousands of other European consumers affected by unfair CHF loans.[135] Overlooked by the statistics is the fact that CHF loans did not affect only consumers as the weaker parties to credit agreements, but also their families, children, relatives and friends, hence creating difficult social surroundings and life conditions for millions of European citizens.

Both national legislators and jurisprudence reacted mostly by evaluating the fairness of the CHF loans and introducing a model of converting the so-called toxic or unhealthy products into legally valid ones. The conversion models in their different variations across the Union seem to be a far better legal solution than nullifying CHF loans in their entirety.[136] In a similar vein, AG *Wahl* pointed out in his opinion on the *Dunai* case that "nothing should prevent the legislature from declaring certain unfair terms invalid *through laws which are aimed at preventing widespread unfair banking practices, but not annulling the contracts concerned*".[137] Nonetheless, the banks initiated proceedings by invoking conversion measures due to the loss of profit expected from CHF credit products.

In several of its opinions on Member States' requests for the introduction of a legislative measure on conversion, the European Central Bank criticised the model.[138] In its Opinion from 2019 related to the Slovenian request for the introduction of conversion the ECB emphasized that "…it is important to carefully consider *the impact of the draft law in order to ensure legal certainty*, and to *prevent moral hazard from arising in the relationship between creditor and debtor*."[139] What is not considered in the opinions such as these is the 'moral hazard' that arose to the consumers by concluding contracts, which violated the key aspects of the consumer *acquis*. While criticisms focus primarily on retroactivity and costs of conversion, possible benefits of conversion measures for the EU internal market are not recognized. As highly speculative financial products CHF loans brought millions of European citizens into indebtedness, thereby endangering public interest and policy of affected Member States. Such a state justifies legislative attempts aimed at keeping the contracts in force by means of their conversion to the benefit of both contracting parties. On the other hand, devastating economic consequences of finding millions of CHF loans null and void by Member States´ courts would seriously distort the functioning of the internal market.

The Swiss loans' saga has made an important mark upon all stakeholders, both creditors and borrowers, as well as Member States´ legislations and case law. At the same time, CHF and other foreign currency loans issues have contributed to a further development of the national and CJEU case law on consumer protection: from setting the criteria to the transparency of the currency clause in the credit contract mechanism (*Kásler and Káslerné Rábai*), over interpreting the role of the currency clause in credit contracts (*Andriciuc and Others*) to

129 *Lupean and Lupean,* para 2; *Kásler and Káslerné Rábai,* para. 73; *Andriciuc and Others*, para. 45; *van Hove,* para. 51; *Bucura*, para. 55 and many others.

130 Judgements of *Cour d'appel de Limoges* of 4 November 2015, n° 13/01024 and of 9 December 2014, n° 13/01205 recognized the duty of banks to warn consumers about risks related to foreign currency clause. This approach was not followed in judgement of *Cour d'appel de Douai* of 17 September 2015, n° 14/07861, judgement of *Cour d'appel de Colmar* of 4 August 2016, n° 614/16 and judgements of *Cour d'appel de Paris* of 31 December 2015, n° 14/16416, 14/24721 and 15/00441 and of 6 January 2017, n° 15/14320, n° 15/14030 and n° 15/14029. On these contradictory rulings in French case law *see* Kleiner (fn 2) 4.

131 Foreign currency institute was introduced into the Croatian legal system through amendments of the Obligations Act in 1994, OG No. 3/94 as a reaction to illegally concluded foreign currency loan agreements on the market. The amendments enabled a retroactive application of the institute in order to guarantee legal certainty and prevent annulment of loans. Miscenic, Petric (fn 4) 28.

132 Constitutional Court Decision of 13 December 2016, 89-90: *"…such a contract clause should not, however, turn a loan agreement into a risky speculative transaction…*Therefore, the consumer… has a legitimate expectation that… *the use of currency clause (as a safeguard, not a profit clause) when fulfilling the contractual obligation of loan repayment will not make him poor and bankrupt…*".

133 On Art. 23 Directive 2014/17/EU *see* Miscenic (fn 39) 247.

134 On housing rights and consumer law *see* Kenna Padraic, Simón-Moreno Héctor, 'Towards a common standard of protection of the right to housing in Europe through the charter of fundamental rights' (2019) 25 Eur Law J. 608 *et seq*.

135 Croatian National Bank Report from 2015 on Issues of Citizens Indebtedness in CHF loans; National Bank of Romania, Analysis on CHF denominated loans from February 2015.

136 Hungarian economic experts claim that the conversion of loans into national currency phased out foreign currency loans and related exchange risks until 2014, which made the system untangled by the 2015 SNB announcement. Pál Péter Kolozsi, Ádám Banai, Balázs Vonnák, 'Phasing out household foreign currency loans: schedule and framework' (2015) 14(3) Financial and Economic Review 83: "*On the whole, the conversion has a positive effect on the stability of the banking system*".

137 Opinion of Advocate General *Wahl* of 15 November 2018, C-118/17, *Dunai*, EU:C:2018:921, para. 84.

138 See *supra* (fn 17).

139 Opinion of the European Central Bank of 18 July 2019 on the conversion of Swiss franc loans (CON/2019/27), 3.2.5.

setting the limits to *ex officio* control of contractual terms (*Lintner*). Despite different approaches of national and CJEU case law on the unfairness or transparency of currency clauses, they all seem to share a common view on the role that the currency clause played in CHF loans. By transferring all of the exchange, interest and financial risks on the consumer as the borrower, the currency clause in CHF loans transformed from a 'protective' into an 'abusive' clause aiming at the realisation of profit, instead of guarantying contracting parties balance and equality. ■