



## ABUSIVE TERMS IN LOAN CONTRACTS

Mirela NICULAE<sup>1</sup>, Beatrice-Tanța STRAT<sup>2</sup>

<sup>1</sup>Faculty of Finance, Banking and Accountancy, Department of Finance and Banking, Dimitrie Cantemir Christian University, Romania, E-mail: [mirela\\_s\\_radu@yahoo.com](mailto:mirela_s_radu@yahoo.com)

<sup>2</sup>High Court of Cassation and Justice Romania, E-mail: [mirela\\_s\\_radu@yahoo.com](mailto:mirela_s_radu@yahoo.com)

### Abstract

*This study displays several theoretical and practical remarks on certain abusive terms of loan contracts. Considering the European Law, the main regulation framework is given by Directive 93/13/EEC approved by the Council on the 5th April, 2013, regarding the abusive terms and conditions within the contracts concluded with customers, Directive 2008/48/EC regarding the credit contracts for consumers and the repeal of Directive 87/102/EEC of the Council; Directive 2009/22/EC regarding the cease action related to the protection of consumers' interests. This year, there has been Directive 17/2014 regarding the credit contracts concluded with different consumers for residential real estates and the modification of Directives 2008/48 and 2013/36/EU and EU Regulation no. 1093/2010. Directive 93/13/EEC aims at "eliminating the abusive terms stipulated in the contracts." We must add that the Romanian trial courts entitled to solve the actions regarding the identification of the abusive terms in credit contracts- as the paper refers only to this type of contracts- took in consideration the jurisprudence of the High Court of Luxembourg.*

### Key words:

Bank loan, loan contract, abusive terms, banking risk

### JEL Codes:

G21, K12, K41

### 1. Introduction

*Banking loan* is defined in doctrine as any commitment for the provision or payment of an amount of money or extending the maturity date of the debt, in exchange for the debtor's obligation to reimburse the amount concerned, the payment of interest or other expenses related to the commissions as well as the commitment fees, also the ones for the neutralization of the credit, tracking or management of compliance with contractual provisions or any commitment for the purchase of a title that incorporates *debt* notion.

The risk is generated by simply granting loan and must be continuously evaluated during the carrying out the contract. *Banking risk* is a concept inherent to loan activity which has, in turn, economic origin and is transposed in various legal techniques, such as the loan, overdraft, discount, acceptance, downstream, autonomous guarantee.

Thus, the concept of banking risk has various meanings, depending on the various classification criteria and considering the basis of the risk concept in the marketing context takes the form of potential hazard on a business operations performed over time, susceptible to generate certain inconvenience to the debtor of an unpredictable trading liabilities.

By the provisions referred to in Article 3 paragraph (1) letter g) of The National Bank of Romania no. 17/18.12.2003, *credit risk* as the main risk banking system is defined as a risk of recording losses, or of not achieving the profits envisaged, as a result of failure by

customers of contractual obligations consisting of the repayment of the loan and the costs relating thereto. Also, there are other categories of risk that a bank must take into account.

The quality indicators of continuous credit portfolios keep on reflecting a vulnerability of banking system, but it is expected to alleviate during the following period, in the context of improving economic fundamentals, continuing the credit cost trend and speeding up the process of removal in off-balance-sheet items of claims entirely covered or at a very high proportion with depreciation adjustments. (RNB, 2014)

The National Bank of Romania in the Report on the financial stability for 2014 indicates the fact that the medium rates of the interest afferent to the new loans and deposits introduced in the Romanian banking system in relation to the non-banking customer generated significant adjustments during July 2013-July 2014:

- average interest rate for the loans granted in lei (Romanian currency) to natural individuals decreased significantly in the period under consideration (3.3 percentage points, from 11.4 percent in July 2013 to 8.2 percentage in July 2014), in response to signals given by the central bank for reduction of loan by gradual reduction of the interest rate, as well as as a result of the increase in competition between loan institutions in this market;

- average interest rates for the loans in hard currency granted to individuals has reversed the trend

recorded in the previous period, placing itself on onward trend (with 0.9 percentage points, from 4.6 percentage in July 2013 to 5.5 percentage in July 2014, a level close to that of the buffer stock related credits), particularly as a result of structural adjustments generated either by reducing credit granted for the acquisition of houses in favour of other types of loans or increasing the degree of risk attached.

## 2. Literature review

Law No 193/2000 establishes a relative presumption in the sense that a clause will be considered as not having been negotiated on an individual basis if it has been pre-drawn up, the consumer unable to influence its content. This assumption can be overthrown by contrary by trader, which shall bear the burden of proof. As a consequence, the fact that a contractual clause would not have been negotiated directly with the consumer does not automatically lead to the conclusion that this would be abusive.

In the case law national court has acted as O. U. G No 50/2010 is not applicable to the contracts in progress. Government Emergency Ordinance no. 50, 22 June 2010 relating to loan contracts given to the consumer, eliminating, according to Article 36: the fee at risk, has been adopted, as a transposition into national law of Directive 2008/48/EC. We note that the bill represented a severe dispute for both banks, as well as courts of law, but which is not the subject of this work, since it would require more space with comments law interpreting such legislation develops and doctrinally, on the one hand, and on the other hand, the attitude of the banks in the interpretation and application of the standard.

Initially, after the entry into force of the government's emergency decree No 50/2010, its provisions have been applied to both new loans granted, as well as for the outstanding ones, through the completion of additional acts with customers. But, Law no 288/2010 has eliminated the obligation of bank to limit banks commissions (charges) also for the outstanding loans.

Coming back, it is to be noted that concerned of its Decision C-602/10, the Court of Justice of the European Union has stated that a Member State may limit EU banking charges levied by creditor.

The communitarian provisions as well the ones of the National Romanian Law set up three conditions whose cumulative accomplishment reveals abusive character of a clause contained in a contract concluded with consumers clause shall not be negotiated directly with the consumer; clause shall be contrary to good-faith; and by itself, or in conjunction with other provisions of the contract, to create a significant

imbalance between the rights and obligations of the parties, to the detriment of the consumer.

The following contract procedures are considered to be *abusive terms*:

- entitle the bank to alter unilaterally the terms of the contract, without a valid reason specified in the credit agreement;
- oblige consumers to be subject to the terms of the contract which has not yet been able to take real knowledge at the date of signing of the contract;
- oblige consumers to fulfil their contractual obligations, even in those cases in which the bank would not have been unable to fulfil them;
- entitle the bank to extend the loan contract concluded for a determined period of time through the tacit agreement, if for the determined period of time, the consumer has the right to express his option as insufficient;
- entitle banks to make changes unilaterally, without the consumer's consent, regarding the features of products and services that are going to be provided or the date of delivery of the product, as well as the execution date of a service; entitle exclusively the bank to interpret the contractual terms;
- entitle banks to repeal then contract unilaterally, ignoring the same right for the consumer.

## 3. Background research

Under *national law*, Directive 93/13/EEC had been transposed through Law No 193/2000 on unfair terms in contracts concluded between professionals and consumers. Last modification of the law, due to Law No 76/2012 for the implementation of Law no. 134/2010 relating to the Code of civil procedure, which covered possibility of formulating the so-called collective actions in termination, has become applicable with effect starting with 1 October 2012. Directive 2008/48/EC has been transposed by O. U. G No 50/2010 regarding the loan contracts for consumers. As regards to the recent Directive 17/2004, by 21 March 2016, the Member States are obliged to transpose this directive into national law, but only applicable to loan agreements which existed prior to that date. Besides, the recent amendments to the Law no. 304/2004 on court organization by Law No 296/2013, created the framework for the setting up some specialized courts to judge certain disputes, including those concerning the protection of consumers.

At present, in the framework of these European and national rules, we are witnessing the enrichment of legal instruments for the protection of consumers in terms of loan agreements.

According to annex to the law no 193/2000 regarding the abusive terms in contracts concluded between professionals and consumers are regarded as abusive, provisions on contract price: giving rise to the right trader to alter unilaterally the rate of interest payable by the consumer or due of the latter or the other charges for financial services, without a valid reason which is specified in the contract.

In the contracts of consumer credit concluded with the consumer, there are two main parts: General Terms of Crediting and Special conditions. General conditions of the Contract shall be the same for a given product and shall mean the common banking body which gives specificity to banking product. They shall be submitted for approval to the National Bank of Romania and define the main characteristics of the granted loan. In addition to this, the details specific to each loan contract shall be determined by the Bank together with each customer and mentioned at Special Conditions.

It should be noted that, Romanian courts are vested with the settlement of actions regarding the ascertainment abusive clauses in the loan contracts - this work refers only in respect to these contracts - had in view of the case law of the Court of Luxembourg.

Accordingly, it was acted constantly on the sense (*ratio legis*) and field of application Art. 4 paragraphs (2) of Directive 93/13/EEC as follows: *„it is undoubtedly an expression of the likelihood of taking account of the autonomy of the will and of freedom of contract of the parties, which is the corollary of a market economy. This provision connects the application of the exception rule that excludes certain contractual clauses from their abusive character examination, the cumulative performance of the two conditions: firstly, these clauses must relate to "object (main) contract" or "the adequacy of the price or remuneration", on the one hand, the services or goods supplied in exchange, on the other hand", and in the second row, the terms must be expressed in a clear and intelligible manner.”(my translation)*

It should be noted, in the first instance, that the Directive 93/13/EEC has not been carried out than a minimum and partial harmonization of national laws on unfair terms, recognizing at the same time the possibility for the Member States to ensure the consumer a higher level of protection than the stipulated one, The Court stated that this provision does not follow the definition of the scope of Directive 93/13/EEC, but only the establishment of arrangements and the basic control extension in the contractual terms which have not been the subject of negotiations and which describe the essential benefits of the contracts concluded between a seller or a supplier and a consumer.

Finally, in denying any imperative character of the Art. 4 paragraph (2) of Directive 93/13/EEC, the Court concluded that Art. 4 paragraph ( 2 ) , and Article 8 of the same Directive must be interpreted in the sense that it does not oppose any national rules and regulations that authorize a judicial check to the abusive character of contractual clauses concerning the definition of the main object of the contract or the adequacy of the price or remuneration, on the one hand, the services or goods supplied in exchange, on the other hand, even if these clauses are drawn up in a clear and understandable manner.

So, by allowing the possibility of a complete court control regarding the abusive character of the clauses, such as those referred to in Article 4 (2) of that Directive, of a contract concluded between a seller or supplier and a consumer, national regulations stipulate to provide for the latter, in accordance with Article 8 of this Directive, a level of effective protection higher than those laid down by this ( Caja Ahorros y Monte of the Piedad Madrid Decision) , quoted above (points 42-44). This implies, in the first place, that the criteria for defining object or a value-for-money of the object or service provided must be clearly defined, without prejudice to an appreciation of the power of national court.

Secondly, the requirement of "clarity and readability" laid down in Directive 93/13/EEC shall take account of the fact that the consumer, although entitled and carefully in a reasonable manner, is in a position of inferiority in relation to sellers or suppliers with which should be able to conclude contracts. Clarity and legibility must not be limited to aspects purely formal or languages, but must also take into account the asymmetry of information that characterizes the report consumer/seller or supplier.

In case C 26/2013 Árpád Kásler, Hajnalka Káslerné Rábai against OTP Jelzálogbank Zrt, the Court stated that, in order to determine which constitute the primary object of a contract, it is the decision of the Court that agrees on the benefit or benefits that should be considered as objectively essential for overall economy of the contract. This assessment, which may not be designed in an abstract way, it cannot be limited to an examination of the parameters that define a particular contract in relation to national law, but must also take account of the specific nature resulting from the content of contract.

The *consumption credit contract* can be defined as a global convention on the basis which the loan giver shall make available to borrower a certain amount of money, which the latter must repay with interest in respect of a loan with interest. This definition corresponds almost entirely to the one of European Union law, as an example, in Directive 2008/48/EC

relating to loan contracts [(Directive of the European Parliament and of the Council since 23 April 2008 relating to loan contracts for consumers and repeal of Directive 87/102/EEC of the Council (OJ L 133, p. 66, Corrections in OJ 2009, L 207, p. 14, OJ 2010, L 199, p. 40, and OJ 2011, L 234, P. 46), as defined in Article 3 (c) the loan contract as a contract by which a creditor grants or promises to grant a consumer a credit in the form of deferment of payment, loan or other similar financial facilities, except in the case of contracts for the provision of services continually or for the provision of the same goods when the consumer pays for these rates during their provision)] as well as the one stipulated in the Romanian national law (Decision of the High Court of Romanian no 2164/ 2014, quoted in this paper).

#### 4. Methodology of research. Conclusions

*High Court Jurisprudence regarding the abusive terms in the loan contracts highlighted and addressed this issue as follows:*

By decision No 2146 of 11 June 2014 delivered by the High Court of Cassation and Justice has been kept the solution of finding abusive terms of the plaintiffs arguing with the Bank Volksbank, i.e. the terms in point 3 (D) special conditions, terms provided for in section 10 (10.1 point A), (b), (c) and 10.2), additional costs of general conditions, terms provided for in section 8 (8.1) (A), the measures provided for under the 2nd, 3rd, 2) (C), (D), anticipated maturity in the general conditions and of other clauses provided for in Article 3.5 of General conditions and Article 5. (L) of the Special conditions relating to the risk premium.

The defendant company was forced to refund the complainants with the amounts considered to be risk premium from the date of conclusion of the contract to date, amounts that will be updated in accordance with the inflation rate applicable on the date of payment of the actual interest rate legally applicable. By decision no. 564/9.02.2012 - Raiffeisen Bank – the interest rate was reduced from 6.9% at annual interest rate of 5.9%.

Interest established by contract was fixed in the first year of credit, and for the following years, plaintiffs have the right to opt for more variants. It was provided, at the same time, that the plaintiff exercise his option for one of the variants. It was noted that after the first year of credit, defendant shall notify plaintiff with a view to have his option, at the same time, informing him on the levels of interest for each variant. Plaintiff contested bank margin, stating that this was not justified by defendant." The appeal was accepted and in fact the action was rejected "whereas the inferior courts judges, recognizing the plaintiff's action, forced defendant to return to interest rate set for the first year of crediting, without justifying why for this first year of crediting there

is no abuse of a dominant position from the bank and a lack of negotiation, although it is obvious that even for that period there have been no components for the calculation alleged by the plaintiff in order to determine the banking margin."

*Through decision no. 578 since 14 February 2013 of The High Court of Cassation and Justice – Section II – Civil, there were set up the following ones:*

In addition, regarding the consumer protection there has been taken into account that, through the adoption of Council Directive 93/13/EEC of 5 April 1993, transposed into national legislation by Law No 193/2000, the European and national legislators considered in certain hypotheses the attenuation of principle *pacta sunt servanda*, giving the Court an opportunity to cancel those clauses, in so far as it is noted that they are abusive and that such an action is not a breach of the principle of contract compulsory force, enshrined in Article 969 (1) C. civ., contractual freedom of contract not being identical to an absolute or discretionary power of contracting.

*Analysing the abusive character of the term concerning the risk premium, as a component of the total cost of the credit, having in view of the fact that Article 4 (6) of Law no. 193/2000 does not exclude "ab initio" of a control of any abusive character of the terms concerning the main subject of contracts by reference to the price as part of the object of the contract, subject to the conditions in which that term that causes them is clear, determined unequivocally and intelligibly expressed.*

*The phrase "expressed in a language easily understandable" used by national legislator through Law No 193/2000, as well as the one used in Community regulations, "... expressed in a clear and intelligible manner", can not be reduced to a clear expression and easily understandable from the point of view of grammar or literally as otherwise it would have been no need for such a reference to be made in terms of a normative document, but in a situation where the term is clearly defined in such a way as to allow consumers to have the clear representation of reasons and principles regarding the contents and their effects on contract as a whole.*

On this aspect, although the risk premium is part of the total cost of the credit contract, the term governing its implementation can be analysed under the conditions in which it is not expressed in a clear and intelligible manner, leaving room to equivoque. According to the European law, the main regulation framework is given by Directive 93/13/EEC of the Council since 5 April 1993 regarding the abusive terms in the contracts agreed on with the consumers, Directive 2008/48/CE on loan contracts with consumers and the abrogation of Directive 87/102/EEC of the

Council; Directive 2009/22/EC regarding the actions in termination relating to the protection of consumers' interests. This year there has been adopted Directive 17/2014 regarding the loan contracts offered to consumers for residential estates and there have been adjusted Directives 2008/48 and 2013/36/EU as well as EU Regulation no. 1093/2010.

Directive 93/13/EEC aims at eliminating the abusive terms within such contracts".

Art.6 paragraph 4 of the law, Art. 4 paragraph 2 of Directive 93/13/EEC with the following content: "evaluation of the abusive nature of the terms that is associated neither with the definition of the main contract object and the quality of meeting the requirements for price and payment, on the one hand, or the services offered in exchange, on the other hand, as long as these terms are expressed in an intelligible language."

As for the concept of "abusive term", Art. 3 of Directive 93/13/EEC shall assign this character to contractual clause which has not been individually negotiated and, in breach of requirement of good faith, causes a significant imbalance between the rights and obligations of the parties arising from the contract, to the detriment of the consumer.

Under national law, Article 4 (2). 1 of the law provides that there are abusive those terms that have not been negotiated directly with the consumer and which by themselves or in conjunction with other contractual provisions create at the expense of the consumer and not good faith a significant imbalance between the rights and obligations of the parties. Both regulations can distinguish some conditions which pinpoint an abusive character to a contractual term, namely: term may not be negotiated individually, creating a significant imbalance between the rights and obligations of the parties, to the detriment of consumers.

In addition, paragraph 3 of Article 4 of the law establishes a presumption with a relative abusive character of the terms in the case of the pre-established contracts containing standard terms, presumption that can only be removed by written proof, made of professional, regarding the negotiated character of the contract or of some of its terms.

Moreover, according to a consistent jurisprudence of CJUE (High court of Cassation and Justice) the protective system, implemented by directive referred to, is based on the idea that the consumer is in a situation of inferiority towards the seller or supplier in respect of both negotiating power, as well as the level of information, a situation which leads to joining the conditions drawn up in advance, without being able to exercise an influence on their content (Decision of 27 June 2000, Oceano editorial and Solvat Editores and

Decision of 26 October 2006, Mostaza Claro) in witness whereof, to ensure the protection given by Directive 93/13/EEC, CJUE has stressed, on several occasions, that the situation in Kosovo which exists between consumer and the seller or supplier cannot be compensated by a positive intervention, without involving the parties of the contract (Decision Oceano Editorial). Note that for the purpose of creating a significant imbalance to the detriment of the consumer - assessment of its completion shall be done concretely, for each term according to the critics corresponding to the contested term.

As for the appreciation of good-will, although this does not constitute a condition in itself to establish the abusive character of some of its terms, there should be paid a special attention to the negotiating positions of the parties so as to be able to ascertain whether professionalism has worked in a fair and equitable manner for the consumer whose legitimate interests must be taken into account. In Romanian law, there have been controversies with regard to such disputes, under the aspect of an infringement of parties demands as a result of finding out the invalidity of some of its abusive terms.

Or, both Old Civil Code and New Civil Code set up the following ones:

Article 969 And Article 5 of the old Civil Code provide the assumption that although the parties have agreed by the contract on its terms - abusive terms - which do not prove to be illicit, he provisions of Article 966, from the same code, enter in force, stipulating that the obligation without a cause or based on a false or non-illicit cause, can produce no effect.

As the contractual terms have been considered abusive, there is excluded any possibility of disrespecting the principle of consensualism and the obligation through contract in considering the legal dispositions mentioned above in accordance with the communitarian legislation as it is.

The theory of unforeseeability, popular due to certain doctrines and jurisprudence under Civil Code since 1864 and regulated intentionally in the New Civil Code, Art. 1.272 may be a jurisprudential solution suitable for the loans in hard currency in order to re-establish the contractual equilibrium, under the terms of a high foreign currency risk, in such a way that the judge adapt the contract and make manageable the foreign currency risk for the consumer. On the other hand, the legislator can and must intervene, in his turn, establishing adequate protection through a special provision regarding certain loan contracts, as the regulatory framework may match with other regulations with "adjuvant" role, such as the natural person's insolvency.

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