THE LOAN AGREEMENTAND CONSUMER PROTECTION: AN OVERVIEW ON CREDIT AGREEMENTS CONCLUDED IN FOREIGN CURRENCY

Raluca Ioana ORZA*

ABSTRACT: *Technological progress, the development of the market economy and the intensification of trade are just some of the characteristics of a new social reality: a consumption phenomenon characterized not only by the increase in the quantity of goods and services but also by their diversity, all aimed at increasing welfare and standard of living. Therefore it is not surprinsing that the institution of the consumer loan agreement, recognized and regulated by Roman law since antiquity, not only has not lost its relevance but has gained many different forms. One of these is consumer credit, a type of contract in which the dynamics between credit institutions and individual consumers in the role of debtors is considered to be characterized by a strong imbalance to the detriment of the latter, considered vulnerable both in terms of economic as well as legal statute. This premise of the implicit contractual imbalance has become, in the context of qualifying the field of consumer protection as one of major importance for achieving the objectives of the European Union, the cornerstone of a specific legal regime configured to restore the balance between contractual parties, a regime that goes beyond the legal boundaries of the Member States and which, favoured by the case law of the Court of Justice of the European Union, tends to establishing uniformity.*

KEYWORDS: *credit contract; loan agreement; consumer protection; EU law*
JEL Code: *K12 K15 K33*

1. THE GENERAL PROVISIONS REGULATING THE LOAN AGREEMENT

The loan agreement is generally regulated by Chapter XIII of Title IX "Different contracts" of the Civil Code[1], and according to the provisions of art. 2,144, the loan is of two types, the loan for use or commodate and the loan for consumption.

Considering the object of the present study, namely the loan of money, respectively, given not only the legal definition included in the provisions of art. 2158 of the Civil Code, but also the related legal regime, only the institution of the loan for consumption is to be analyzed.

* Judge at Mureş Specialized Tribunal, PhD Student, West University of Timişoara,ROMANIA.

[1] Law nr. 287/2009 regarding the Civil Code (C. Civ), republished in M. of nr. 505 of 15.07.2011.

Considering the definition of the legislator, detailed in the legal provisions, the loan of a certain amount of money is legally qualified as a loan for consumption, thus exempting everyone from the need to carry out a qualification operation[2].

Analyzing the same legal definitions, the main feature that differentiates the loan for consumption (also called mutuum) from the loan for use is the prerogative of the use of the received goods, in a manner that leads to their consumption (Dincă, 2013, p. 266), meaning that the borrower can be qualified as the owner[3]. It can be stated, therefore, that it is of the essence of the loan for consumption contract that the borrowed goods are consumable[4]. Further analyzing the particularities of this type of contract, in relation to the main obligation of the borrower (to return goods of the same nature and quality) the legal definition also adresses the requirement that the borrowed goods need to be replaceable (fungible)[5], or at least considered by the parties as so. But as far as this the latter feature goes it can no longer be regarded as a necessary requirement for the classification of the contract as a loan for consumption, but only as a consequence of its legal effects[6].

However, going back to the loan agreement, when money is the object, these distinctions relative to the dynamics between the characteristics of consumable good and fungible good are less relevant considering the fact that money is, by nature, both consumable and fungible.

According to the provisions of art. 2159 paragr. 2 of the Civil Code, a loan regarding a sum of money is presumed, until proven otherwise, as being onerous, as an exception to the rule, respectively that the loan agreement is a gratuitous contract. Also, regarding the extent of the restitution obligation, according to art. 2164 of the Civil Code, when the loan concernes a sum of money, the borrower is required to repay the nominal amount received, regardless of the variation of this value, in the absence of a contrary stipulation of the parties; the latter thesis is the expression of the principle of monetary nominalism traditionally enshrined in Romanian legislation[7], both according to legal provisions and through doctrine and jurisprudence.

An onerous contract exists when each party assumes an obligation to obtain an advantage in exchange for his obligations[8]. In the case of a money loan agreement, the borrower receives a certain amount of money that can be used for a certain period of time, undertaking the obligation to repay that amount within a time limit agreed by the parties. The lender, on the other hand, on maturity, receives not only the borrowed

---

[2] According to art. 2158 C. Civ, the object of a loan for consumption agreement is represented by sums of money or other such goods that are essentially consumable by their nature and replaceable; in such a contract the lender delivers to the borrower a certain quantity of goods which are consumed by use, on condition that the latter shall return the same amount of money or goods of the same kind and quality.

[3] According to art. 2165 of the Civil Code, it is expressly specified that the valid conclusion of the contract makes the borrower become the owner of the goods and bear the risk of their loss.

[4] According to art. 544 C. civ., movable goods are considered consumable when their regular usage implies either alienation or the use of their substance.

[5] According to art. 543 C. civ., fungible goods are identified through characteristics like number, size or weight; that makes them interchangeable in the performance of an obligation.

[6] Art. 2158 C. civ. regarding the loan for consumption mentions the goods as being "consumable by their nature", without emphasizing on the fungible attribute in the same manner.

[7] According to art. 1488 C. civ.: „(1) The debtor of a sum of money is released of duty by returning to the creditor the numerical amount due”.

[8] Art. 1172 paragr. (1) C. civ.

capital but also another benefit, agreed by the parties and conventionally estimated by the them as representing the equivalent value of using the amount of money borrowed, which he was deprived of during the contract. This benefit is called interest.

Summarizing all these characteristics, a suggested definition for the interest loan agreement can be that it is an onerous loan for consumption contract in which the borrowed good is a sum of money (Dincă, 2013, p. 271). As for the legal nature of the interest, it can be established both in money and in other benefits that can bear any name, as long as they result from the obligation of the borrower to pay the equivalent of the use of the borrowed capital.

Given the importance of this type of contract, the legislator chose to establish according to art. 2167 of the Civil Code, the fact that the regulations regarding the interest loan contract represent the common law in the matter of all contracts that give rise to an obligation to pay a sum of money (or other goods), with the exception of the situations in which there are particular rules on the validity and execution of such an obligation.

In the context of establishing the common law concerning this type of contract, it is necessary to emphasize a legal provision of particular importance for consumer credit contracts, namely the provisions of art. 2158 paragr. 2 of the Civil Code according to which the granting of the loan on a professional basis determines the applicability of the legal provisions regarding credit institutions and non-banking financial institutions.

2. PARTICULAR PROVISIONS REGARDING CONSUMER (FOREIGN CURRENCY) CREDIT AGREEMENTS

In accordance with the idea advanced at the end of the previous section, it is clear that the Civil Code and its provisions regarding the interest loan agreement represent the general framework in the matter. However, given the increase and development of the lending market, the emergence of specialized credit institutions, as well as the particularities of the legal relationship generated by credit agreements concluded between the latter and natural persons contracting for extra-professional purposes[9], a separate regulatory framework has been created. This set of special provisions is, on the one hand, a reflection of the need for regulation and, on the orther hand, it is a direct and specific consequence of consumer credit agreements.

One aspect that needs to be clarified is that this study focuses on the characteristic of the loan being "granted to consumers", and not on the specifics of the credit agreement from the perspective of the lender as a credit institution or its general legal regime analyzed as an autonomous legal institution (Bercea, Creditul bancar: what's in a name ?, 2017).

Given this clarification, in order to properly identify the normative framework relevant for the consumer credit agreement it is necessary to bring together a set of specific regulations, that apply in a concurrent manner. These regulations can be viewed both from the point of view of the object of regulation (the credit agreement) as well as in relation to the recipients to whom it applies (consumers), without at the same time

[9] According to art. 7 p. 1 of O.U.G. no. 50/2010, a consumer is a natural person who acts for purposes that are outside his commercial or professional activity.

ignoring their source. Thus, while some acts are purely internal in nature, others are mandatory transpositions of regulatory acts issued by the European Union and adopted by Romania by virtue of its status as a Member State[10]. Both these legislators act on a common goal, a concern to ensure compliance with the principle of consumer protection, viewed as a public order principle (Goicovici , 2014, p. 19).

Without, therefore, exhaustively addressing the issue of the evolution and the complex dynamics that exist between all applicable legal provisions in the field of consumer protection, the relevant legal provisions for consumer credit agreements are to be analyzed, in particular those in foreign currency, in an attempt to deduce from them some of the essential characteristics of this legal operation.

In order to have a clearer picture of the credit agreements concluded with consumers, the provisions of the following normative acts must be taken into account: Government Emergency Ordinance (O.U.G.) no. 50/2010 on consumer credit agreements[11], Government Emergency Ordinance (O.U.G.) no. 52/2016 on credit agreements offered to consumers for real estate, as well as for amending and supplementing the Government Emergency Ordinance no. 50/2010 on credit agreements for consumers[12], respectively Law no. 77/2016 on the giving in payment of real estate in order to settle the obligations assumed through loans (*datio in solutum*)[13].

At the same time, even if they do not strictly address the issue of credit agreements, there are other applicable regulations on consumer protection that cannot be ignored as they may still be relevant: Law no. 193/2000 regarding the unfair terms in the contracts concluded between professionals and consumers[14], Law no. 296/2004 regarding the Consumer Code[15], Government Ordinance no. 85/2004 on consumer protection when concluding and executing distance contracts on financial services[16], the list is not

---

[10] Some regulations were implemented in the pre-accession period, while others were transposed after Romania's acquisition of EU membership.

[11] M. of. no. 389 of 11.04.2010. According to OUG no. 50/2010, this ordinance transposes Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC published in O.J., L 133, 22.05.2008, with the exception of art. 19, 20, 35-44, art. 71 alin. (3) - (5), art. 79, 86-89 și 95. Also, O.U.G. no. 50/2010 repealed Law nr. 289/2004 regarding the legal regime of consumer credit contracts intended for consumers, natural persons, republished in M. of. no. 319 of 23.04.2008.

[12] M. of. no. 727 of 20.09.2016. According to the provisions of OUG nr. 52/2016, this ordinance transposes Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No. 1093/2010, published in O.J., L 60, 28.04.2014, with the exception of art. 13, 14-23, 25, 26, 28, 58-60, art. 130 pct. 2-11 and art. 134-136.

[13] M. of. no. 330 of 28.04.2016. The very statement of reasons of Law no. 77/2016 expressly specifies that the purpose of the law is to establish consumer protection measures, namely that it transposes Directive 2014/17/EU. Although formally the transposition of the directive is considered to be done by O.U.G. no. 52/2016, the latter does not include any article resuming the content of art. 28 paragr. 4 of Directive 2014/17/EU on the obligation of States not to prevent the parties to a credit agreement from explicitly agreeing that the return or transfer to the creditor the guaranteed good or of the proceeds from the sale of the guaranteed good is sufficient to repay the credit; in fact, O.U.G. no 52/2016 expressly excludes art. 28 from the transposition, while at the same time this issue falls under the scope of Law no. 77/2016.

[14] M. of. no. 543 din 03 august 2012, republished. Law no. 193/2000 represents the transposition act for Directive 93/13/EEC of 5 April 1993
on unfair terms in consumer contracts, OJ, L 95, 21.04.1993.

[15] M. of. no. 224 of 24.03.2018, republished

[16] M. of. no. 365 of 13.05.2008, republished.

exhaustive. There is also, Law no. 190/1999 on mortgage credit for real estate investments[17] and it cannot be ignored as it includes legal provisions of interest in the field of consumer protection.

For a better understanding of what defines the way that consumer credit agreements work, it is necessary to set some basic parameters of the interaction of the previously mentioned legal provisions.

The regulatory object of Law no. 190/1999 is the mortgage loan for real estate investments[18], with the entry into force of the O.U.G. no. 50/2010 the applicability of Law no. 190/1999 was restricted, in part, to contracts concluded with legal entities[19]. Subsequently, the entry into force of O.U.G. no. 52/2016 brought other changes, namely there were removed from the scope of the O.U.G. no. 50/2010: "credit contracts for the sale, respectively purchase of real estate, credit agreements secured by a mortgage on real estate, credit agreements involving a right related to real estate[20]".

One can notice a lack of consistency of the Romanian legislator in the way he understands to individualize the criteria taken into account for the customization of certain provisions; while the delimitation between Law no. 190/1999 and O.U.G. no. 50/2010 was made in relation to the quality of the borrower: natural person or legal entity, the limits chosen for determining the scope of each of the two ordinances was whether the credit agreement concerns a real estate[21].

In this succession of normative acts, it would seem that Law no. 190/1999 continues to apply to credit contracts that comply with the conditions of art. 2 lit. c) and are concluded by legal entities, without any other distinction, while in relation to the natural persons a series of observations are required.

[17] M. of. no. 611 of 14.12.1999.

[18] According to art. 2 lit. c): "mortgage loan for real estate investments - the loan granted with the collective fulfillment of the following conditions: 1. it is granted for the purpose of making real estate investments for residential or non-residential use or for the purpose of repaying a previously contracted real estate investment mortgage; 2. the granting of the loan is guaranteed at least by the mortgage on the real estate subject to the investment for the financing (respectively the refinancing) of which the loan is granted", while the notion of real estate investments is defined by art. 2 lit. g) as those having as object "the legal, onerous acquisition of the property right over an immovable good, the improvement of such a good, its rehabilitation, consolidation or extension, without being limited to them".

[19] According to art. 91 of O.U.G. no. 50/2010: "From the entry into force of this emergency ordinance, the provisions of Law no. 190/1999 on the mortgage loan for real estate investments, with subsequent amendments and completions, applies only to contracts concluded with legal entities, except for art. 1, art. 2 lit. a) -g), art. 3-5, 10-12, art. 13 paragr. (2), art. 16-25, 27-28 and 33-34, which also apply to contracts concluded with individual consumers". Initially, the listing of the articles that remained relevant for contracts concluded with natural persons included fewer elements, but art. 91 has undergone changes as a result of the approval of the ordinance by Law no. 188/2010, in such a way that although apparently the domain of the law has been restricted, in fact the numerous exceptions allowed largely cancelled out the effects of this restriction. On the other hand, in the meantime, several of the articles listed have been partially repealed.

[20] By introducing art. 2 p. j) to the O.U.G. no. 50/2010 and adding to the list of contracts that fall out of the scope of the ordinance, respectively by including these credit agreements in the scope of the O.U.G. no 52/2016, according to art. 2 of the latter act.

[21] Notice the passivity of the Romanian legislator regarding the correlation of the national law with the mandatory European provisions, which in this case were the object of transposition.

First of all, Law no. 190/1999 applies to the mortgage credit contracts for real estate investments concluded by individuals only with respect to art. 1, art. 2 lit. a-g, art. 3-5, 10-12, 13 paragr. 2, 16-23[1], 33-34[22].

Secondly, it is necessary to pay more attention to the concept of mortgage lending for real estate investments and its definition, in relation to the scope of O.U.G. no. 52/2016 regarding consumer credit contracts[23], meaning that the distinction between the mortgage credit contract and the real estate credit contract[24] becomes relevant, in order to determine the dynamics between the two normative acts.

Third, the scope of the O.U.G. no. 52/2016 considers according to art. 2 all credit agreements which, in essence, imply a right relating to immovable property[25], therefore it also includes credit agreements which have not been included by the European legislator in the european directive; with respect to these contracts the rules of the ordinance are purely internal. Doctrine (Rizoiu, 2017, pp. 166-167) identifies by the phrase "spill-over effect", the particularities of the legal effects produced by the norm of domestic law when it has a wider scope than that covered by the norm of European law.

However, the dynamics between the normative acts remains unclear, as at least two very different opinions can be expressed.

On the one hand, it can be appreciated that the applicability of the provisions of Law no. 190/1999 regarding mortgage loans for real estate investments concluded by consumers must in principle be removed, either for reasons of priority of Union law[26], or due to the takeover established by O.U.G. no. 52/2016[27], because it has the same scope. An indication in this sense would be the vision of the legislator who, once with the regulation of art. 91 of the O.U.G. no. 50/2010, choose as a special, prior feature the

---

[22] As stated by art. 91 of the O.U.G. no. 50/2010 and taking into consideration the repealed articles of Law no. 190/1999.

[23] The scope of O.U.G. no. 52/2016 as mentioned in footnote no. 20.

[24] See Judgement no. 1617/2014 of the Supreme Cort of Justice, Second Civil section, available on scj.ro, case-law search section, in reference to such a distinction: "Analyzing the credit agreement concluded between the plaintiff and the defendant B.C.R. SA, the High Court holds that its legal nature is that of a real estate credit contract (loan agreement), subject to the regulation of the common law provisions contained in the Civil Code of 1864, and not that of a mortgage loan, within the meaning of Law no. 190/1999, since the loan contracted by the plaintiff was not intended for real estate investments, but for the purchase of a building for personal purposes. The fact that, in this case, the credit guarantee was made with a mortgage on the credit financed immovable property is irrelevant, as such a form of guarantee is also accepted for the real estate credit contract, along with any other form of guarantee. In other words, the simple way of guaranteeing the loan repayment in the sense of establishing a mortgage right in favor of the bank, does not transform the real estate credit contract into a mortgage credit contract, since the special law establishes in art. 2 paragr. (1) lit. c) two collective conditions for the existence of a respective mortgage loan: in addition to the need to guarantee the repayment of the loan with a mortgage right, there is a second requirement that the loan is intended for a real estate investment, condition not fulfilled in the present case. The distinction made by the court is partially correct under the current provisions, in relation to contracts that do not fall under the scope of O.U.G. no 52/2016; the ruling of the court is one of principle, based on the special character of Law no. 190/1999.

[25] Under art. 3 paragr. (1), Directive no. 2014/17/EU is applicable to: (a) credit agreements secured either by a mortgage or by another comparable security, commonly used in a Member State over a residential immovable property, or by a right in respect of a residential immovable property; and b) credit agreements the purpose of which is to acquire or retain ownership of an existing or projected land or building.

[26] Where there is a strict overlap with the field covered by Directive no. 2014/17/EU, aside form when the protection granted by the internal rule is superior.

[27] For those provisions which go beyond the scope of Directive no. 2014/17/EU, but fall within the scope of the O.U.G. No. 52/2016.

particular quality of one of the parties (that of consumer, all the more so as in national law, consumer can only be a natural person or entity representing their rights, and not a legal entity), rather than emphasizing on the object of the loan agreement.

On the other hand, however, the same legislator, showing inconsistency, maintains, at least apparently, the distinction between mortgage loans for real estate investments and real estate credit, when in 2017 it adopts a law amending the O.U.G. no. 50/2010[28], which among others established the obligation to qualify loans in mortgage or real estate agreements[29]. As so, it would seem that the object of the contract remains an important feature to be taken into account when marking off different types of contracts, setting aside the criterion of the quality of one of the parties.

The solution to the problem therefore lies in determining the priority ratio between the two criteria, that are both, equally special[30].

In conclusion, the special regulation of credit agreements concluded with consumers is currently[31] made out of O.U.G. no. 52/2016 regarding all contracts that essentially imply a right related to a real estate, with the exceptions expressly provided by art. 2 paragr. 2, and O.U.G. no. 50/2010 that applies to credit agreements that do not involve rights over real estate[32], with the exceptions expressly provided by art. 2.

The particularities of the framework regulating the bank loan/credit agreement as a contract (from the consumer rights protection perspective) is given by those legal provisions that establish specific rights in favor of the borrower and impose equivalent duties on financial institutions. The way in which these new rules of law changed the formation and enforcement of the credit agreement led to its definite alienation from the basic interest-bearing loan agreement as its next of kin. Several authors have also expressed themselfs on this matter, according to one opinion (Goicovici, 2014, pg. 20-21) the credit agreement concluded with consumers is a formal contract, valid only if it is concluded in the form and in compliance with the information obligations previously provided by the O.U.G. no. 50/2010, which leads to the conclusion of the loss of one its fundamental features: the necessity of the remision of goods, while another opinion draws attention to the pre-contractual nature of the bank loan agreement (Rizoiu, 2017, p. 170).

---

[28] This draft amendment of O.U.G. no 50/2010 was declared unconstitutional within the *a priori* verification undertaken by the Constitutional Court.

[29] Another similar indication, of form more than of substance resides in the provisions of art. 2 of Law no. 77/2016 which accepts the corroboration of the provisions of this normative act – by nature dedicated to the individual consumers, with the provisions of Law no. 190/1999.

[30] Without calling an end to the discussion, considering as specific for the field of consumer credit contracts the importance of ensuring a high level of consumer protection, the prevailing opinion is that O.U.G. no. 52/2016 will regulate credit agreements concluded with a natural person and involving a right over an immovable property (an extremely generous regulated category), including mortgage contracts for real estate investments as long as they are concluded by consumers. In this way, the legal issues generated by the need to distinguish mortgage for real estate investments credits and real estate credits, can be resolved, especially since the latter notion does not benefit from an express legal regulation (it doesn't have a definition, nor a legal regime). Another argument to support this opinion is the fact that the articles of Law no. 190/1999 (that according to art. 95 of O.U.G. no. 50/2010 are still applicable to natural persons) are not directly related to the purpose of making real estate investments.

[31] These conclusions do not take into account any issues related to the way these ordinances succed one antother.

[32] These may be pre-determined loans (similar to leasing financing) or personal loans.

O.U.G. no. 50/2010 regulates aspects related to the publicity of credit offers, expressly enshrines the consumer's optional right to withdraw his consent within 14 days of signing the contract, introduces the obligation to exemplify a representative calculation of the total value of credit, respectively interest, regulates limits to the way the interest is determined and the conditions of exercising the right of early repayment, establishes rules in relation to certain types of commissions, respectively imposes on creditors the obligation to inform the consumer both in the pre-contractual stage and during the contract, but also the obligation to insert some mandatory provisions in the contract, as elements called "pillars of legal protection" (Goicovici, 2014, pg. 10-19).

As for foreign currency contracts, O.U.G. no. 50/2010 establishes through art. 37 paragr. 1 p. a) a method of determining the adjustable interest rate, respectively the fact that it will be composed of a EURIBOR / LIBOR reference index for a certain period, depending on the credit currency, to which the creditor adds a certain fixed rate indicated in the contract.

O.U.G. no. 50/2010 and its enforcement have risen practical difficulties because in the initial form, through the provisions of art. 95, the normative act established the obligation of the so-called alignment of ongoing contracts according to which creditors had the obligation, within 90 days from the date of entry into force of the emergency ordinance, to ensure compliance of the contract with the provisions of the emergency ordinance. The alignment consisted in amending the contracts by additional acts, the creditor had a duty to submit all diligences in order to inform the consumer regarding the signing of the documents, establishing at the same time that the non-signing had tacit acceptance value.

The regulation designed to aprove de above mentioned ordinance, Law no. 288/2010[33], brought radical changes to art. 95. Art. II paragr. 2 of the law established that additional acts not signed by consumers but applied to the contract by virtue of tacit acceptance may be denounced by the consumer within 60 days from the entry into force of the law.

Turning towards O.U.G. no. 52/2016, it also regulates aspects related to information and pre-contractual practices, elements of financial education, consumer rights regarding early repayment, respectively the duties of the creditors/lenders concerning the determination of interest rates; it establishes duties of counseling in charge of the latter and respectively, it also regulates the institution of the assignment of the contract or only of the receivables.

O.U.G. no. 52/2016, unlike O.U.G. no. 50/2010, contains an entire chapter dedicated to the foreign currency loan agreement, chapter that includes a legal definition of this type of operation.

According to art. 3 p. 28, the foreign currency loan contract is the credit agreement that implies the granting of the credit in one or both of the following situations: "a) in a currency other than the one in which the consumer receives the income or holds the assets on the basis of which the credit is to be repaid", respectively " b) in a currency other than the currency of the Member State in which the consumer resides;".

O.U.G. no. 52/2016 establishes obligations for financial institutions as lenders to warn the consumer about the currency risk for loans in foreign currency, including the

[33] M. of. no. 888 of 30.12.2010.

manner in which possible fluctuations in the exchange rate could affect the amount to be paid by the consumer and the explanation of the implications of a foreign currency credit. The particular choice of words used by the legislator in the legal provisions and the actual content of the duties established on account of the lenders materializes into an actual obligation to advice the consumer who chooses a foreign currency loan, the position of the creditor becoming contradictory in relation to its quality in the contract. The ordinance establishes the exchange rate at which the currency in which the credit was granted is purchased in the situation where, at the time of the payment, the lending bank does not hold that currency for sale, respectively the exchange is to be made at the NBR[34] exchange rate, at no other additional cost for the consumer.

Neither provision of the two ordinances expressly refers to a particular foreign currency.

3. ATTEMPTS TO AMEND THE SPECIAL REGULATIONS ON FOREIGN CURRENCY CREDIT AGREEMENTS ADDRESSING IN PARTICULAR THE ISSUE OF CURRENCY CONVERSION

Through Chapter VI, called "Foreign currency loans", O.U.G. no. 52/2016 brings in the foreground the issue of converting the loan into another currency than the one in which it was initially granted.

The possibility of converting the credit into an alternative currency is accessible throughout the entire contractual relationship, based on a written request, without any restriction from the lending financial institution. Therefore, based on this obligation the consumer has a choice between the products available in the lender's portfolio at the time of the submission of the conversion request.

The provisions of the ordinance establish what the alternative currency means, namely: "a) the currency in which the consumer mainly receives his income or holds the assets that finance the loan payment, as indicated at the time of the most recent creditworthiness assessment in relation to the credit agreement;" or "b) the currency of the Member State in which the consumer either resided at the time the credit agreement was concluded or is currently resident." The same provisions also require that the conversion take place at the exchange rate communicated by the NBR on the day of the conversion request.

In art. 36, O.U.G. no. 52/2016 establishes a special duty on behalf of the creditor: he has an obligation to regularly[35] inform the consumer holding a foreign currency loan with respect to variations of more than 20% of the total amount remaining to be repaid or of periodic installments, in relation to the amount that would result if the initial[36] exchange rate between the currency of the credit agreement and the national currency was to be applied.

According to art. 37 of O.U.G. no. 52/2016, ESIS[37] contains an illustrative example of the impact of a currency fluctuation of 20%[38].

[34] National Bank of Romania.
[35] „ periodically, anytime needed, al least monthly, (...), at least in situations when (...)".
[36] The exchange rate at the time the parties entered the contract.
[37] European Standardised Information Sheet.

A failed attempt to regulate a mechanism for converting foreign currency loans is represented by the so-called "law of credit conversion"[39]. Without resuming from the content of the decision declaring the bill unconstitutional, the following aspects can be summarized: the legislative procedure violated the principle of bicameralism (extrinsic/external unconstitutionality), the conversion mechanism targeted in an unjustified manner only the credits in Swiss francs, derogating from the regulation of the right to conversion regulated in general by the provisions of the O.U.G. no. 52/2016 and was based on a presumption of contractual contingency established *ope legis*, being violated, among others, the constitutional provisions regarding the right to a fair trial, respectively those regarding the administration of justice.

The reasons for declaring the law on credit conversion unconstitutional resumed in a large extent the Decision no. 623/2016[40]. The Court held that there was an overlap between the regulatory object of the bill to supplement O.U.G. no. 50/2010 and that of Law no. 77/2016, meaning that the application of contingency (hardship) as configured in the interpretation of the latter by the constitutional court[41] is an effective remedy for "rearranging" the contract for all types of loans, including those granted in Swiss francs. Analyzing these arguments the need for certain clarifications seems obvious, for a better understanding of the functioning of the debtor consumer protection system in a credit agreement in foreign currency, it is imperative especially to determine the content of the notions of currency risk, the right to convert credit and the theory of contingency in light of the decisions of the Constitutional Court on foreign currency loans as tools for consumer protection. (Bercea, 2017, pp. 190-281).

Also, in connection with the right to credit conversion, but without any express legal bond, two other mechanisms are of interest.

The first, already underlined, aims at applying the theory of judicial contingency in the context of Law no. 77/2016 on the giving in payment and is based on the mandatory considerations of Decision no. 62/2017 with reference to those of Decision no. 623/2016 of the Constitutional Court according to which: "The adaptation to the new conditions can be made including by a conversion of payment rates in national currency at an exchange rate that the court may establish depending on the specific circumstances of the case in order to rebalance the obligations of the parties, an exchange rate that can be either the one from the date of the conclusion of the contract, or from the date when the unforseen event took place, or the one from the date of the conversion request." (paragraph 49 - with reference to the notion of rebalancing of benefits)

---

[38] Given these detailed regulations, there is too little left for the consumer to exclusively be dilligent about, and this should be reflected in a reasonable reassessment of the "average informed consumer" criterion.

[39] The bill aimed to amend O.U.G. no. 50/2010, however it was declared entirely unconstitutional as a result of the Government initiating the constitutionality verification prior to the promulgation; see Judgement of the Constitutional Court no. 62/2017 published in M. of. no. 161 of 03.03.2017.

[40] Judgement no. 623/2016 regarding the exception of unconstitutionality of the provisions of art. 1 paragr. (3), art. 3, art. 4, art. 5 paragr. (2), art. 6-8, especially art. 8 paragr. (1), (3) and (5), art. 10 and of art. 11 of Law no. 77/2016 on the giving in payment of real estate, as well as the law as a whole, published in M. of. no. 53 of 18.01.2017.

[41] See paragr. 53 of Judgement no. 62/2017 (Constitutional Court): "only when the rules of hardship are verified by a judge can the distinction be made "between good-faith and bad-faith debtors, between those who can no longer pay and those who no longer want to pay ".

Regardless of what was the initial intention of the legislator, the constitutional court has definitively drawn the path towards which the applicability of Law no. 77/2016 should go. As such, the recent amendment[42], through which an express regulation of what is unforeseen has been made as well as other corrections inspired by previous unconstitutionality decisions are probably not accidental either.

With respect to the definition of hardship, three new paragraphs have been introduced, paragraphs 1^1 to 1^3, added to art. 4 of the law, respectively unforeseen circumstances are represented either by an increase of the the exchange rate, during the execution of the credit agreement, of over 52, 6% in comparison to the exchange rate at which the credit agreement was concluded[43] or by an increase of the monthly payment obligation of over 50% as a result of the increase of the variable interest rate during the execution of the credit agreement.

However, it remains to be seen to what extent this legal definition of contingency will pass, in the event of future complaints, the constitutionality test, as long as, by decision no. 731/2019[44], within the *apriori* control, the Constitutional Court ruled, among other things, that, although the legislator has the legal competence to establish the criteria of contingency, "provided that they are subsumed to the added risk of the contract, thus respecting art. 15 paragr. 2, art. 44 and art. 147 paragr. 4 of the Constitution"[45], the unforeseen capitalization of an exchange rate difference, which is "limited to the inherent risk, respectively 20%, is not proportionate to the legitimate aim pursued, so that it represents a violation of art. 44 of the Constitution and, implicitly, of art. 147 paragr. 4 of the Constitution, as a result of non-compliance with the constitutional requirements regarding the relationship between the right of private property and contingency, established by Decision no. 623/2016"[46].

A second possible legal mechanism relevant for the enforcement of the right to credit conversion may be the potentially unfair nature of the contractual term relating to the foreign exchange risk. As some authors emphasize (Bercea, Conversion of loans in foreign currency as consumer protection instruments, 2017, p. 261), the simple removal from the contract of such a term would not in itself produce a real effect; the situation of the parties would be identical since the foreign exchange risk bears on the debtor. Only to the extent that the declaration of unfairness is doubled by the application of hardship followed by the adjustment of the contract in court (by the potential freezing of the exchange rate as a form of manifestation equivalent to credit conversion), will the consumer be put in a more favorable situation.

[42] Law no. 52/2020 for the amendment and completion of Law no. 77/2016 on the giving in payment of real estate in order to settle the obligations assumed through loans, published in M. of. no. 386 of 13.05.2020.
[43] In order to calculate the percentage of 52.6%, the exchange rate published by the National Bank of Romania on the date of sending the payment notification and the exchange rate published by the National Bank of Romania on the date of concluding the credit agreement shall be taken into account.
[44] M. of. no. 59 of 29.01.2020.
[45] Paragraph 53 of Decision no. 731/2019.
[46] Paragraph 67 of Decision no. 731/2019.

4. THE JURISPRUDENCE OF THE CJEU ON CONSUMER (FOREIGN CURRENCY) CREDITS, INCLUDING RELEVANT PRELIMINARY REFERENCES ADDRESSED BY ROMANIAN COURTS

The issue of foreign currency consumer credits is currently an important and recurring subject in the case law of the Court of Justice of the European Union (CJEU), as the Member States often use the preliminary references mechanism in order to further clarify the interpretation of EU law on the matter.

An interesting aspect is that although the consumer credit subject benefits from a specific regulation through the two directives, Directive no. 2008/48/EC and Directive 2017/14/EU, the case law of the Court is fundamentally based on the assesing of the unfair nature of the contractual terms in the light of the requirements provided by Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[47].

This is not coincidental, however, on a closer look at the European consumer safeguarding system, it can be seen that Directive no. 93/13/EEC (hereinafter referred to as the Directive) represents the common ground in the field of unfair terms (regardless of the nature of the contracts), being issued in a field in which the primary EU legislation grants an exclusive legislative power in order to pursue a specific goal: the establishment of the internal market[48]; in order to achieve such an objective it is necessary to ensure a minimum level of legal harmonization[49] common to all Member States aiming at increasing the standard and quality of life as a whole[50].

Taking into account the ever growing phenomenon of consumer lending, the effects of the financial crisis of 2008, but also the existent safeguarding mechanism of the assesment of the unfair contractual terms (the main legal leverage established by Directive 93/13/EEC), a considerable increase in the number of relevant rulings in the last 10 years is more than justified, as well as the outlining of a sub-specialization of these rulings affected by the subject of credit agreements concluded with consumers.

Therefore, it is logical and natural for the European legislator to continue the mission of ensuring a common level of consumer protection by issuing regulations to harmonize the legislation of the Member States towards this goal and a direct consequence is specialized legislation areas. Moreover, the evolution of EU law on consumer credit matters reflects the enforcement of the principles surging from the adjacent case-law of the Court which over time has "polished" the content of the various autonomous European concepts such as diligent and informed average consumer, intelligible contractual terms, transparency etc.

Given the vast nature of the case law in this area, this analysis aims to identify the highlights in the evolution of the jurisprudence on consumer credit agreements, focusing on several key decisions.

---

[47] O.J.,L 95, 21.04.1993.

[48] According to the preamble of Directive 93/13/EEC, paragr. 4: "Whereas it is necessary to adopt measures with the aim of progressively establishing the internal market before 31 December 1992; whereas the internal market comprises an area without internal frontiers in which goods, persons, services and capital move freely."

[49] According to the preamble of Directive 93/13/EEC, paragr. 6: " Whereas, in particular, the laws of Member States relating to unfair terms in consumer contracts show marked divergences. "

[50] Court's judgement in C-40/08, Asturcom Telecomunicaciones, p. 51.

First of all, taking into account the objectives of the Directive, but also the provisions of the Treaty on the Functioning of the European Union, namely those contained in the Charter of Fundamental Rights of the European Union, the Court has established that consumer protection must be ensured at a high level and this leads to the qualification of this protection as being of "public interest"[51].

The Court, through its case law, has defined a series of functional autonomous concepts suggested by the provisions of the Directive. Thus, it ruled with respect to the scope and execution of the Directive, on the meaning of concepts like consumer or the main subject matter of the contract.

Related to the scope of the Directive, in Case C-51/17, OTP Bank v Ilyés and Kiss, the Court ruled that a standard contractual term on foreign exchange risk in a mortgage contract concluded in foreign currency is not excluded from the scope of the Directive even if national law contains binding provisions on the currency conversion mechanism. The case concerns the analysis of a binding national law, adopted in Hungary and enforced with respect to ongoing consumer credit agreements through which contractual terms were amended by a mandatory national statutory provision for the purpose of removing a term considered null and void. The goal was to replace the exchange rate of the currency in which the loan agreement was concluded with an official exchange rate, established by the National Bank of Hungary.

With respect to the concept of "main subject matter of the contract", the Court has issued a series of general principles in the judgment of Case C-26/13, Kásler and Káslerné Rábai. It ruled on the differences between the essential benefits of the contractual relationship itself and those which are only ancillary, transferring the power to differentiate between the two to national courts on the basis of the: "nature, general scheme and the stipulations of the loan agreement, and its legal and factual context"[52]. Despite the general nature of those statements, in its actual answer to the referred question, the Court expressly stated that: "such a term, in so far as it contains a pecuniary obligation for the consumer to pay, in repayment of instalments of the loan, the difference between the selling rate of exchange and the buying rate of exchange of the foreign currency, cannot be considered as 'remuneration', the adequacy of which as consideration for a service supplied by the lender cannot be the subject of an examination as regards unfairness under Article 4(2) of Directive 93/13"[53].

The judgment in Kásler concerned a mortgage warranted foreign currency loan contract, and its relevance to the configuration of the test on the unfair nature of the contractual terms is given by other important provisions. The Court attached to the notion of transparency (clear and intelligible nature of the contractual terms), the importance of pre-contractual information offered to the consumer, especially concerning the contractual conditions so that the latter not only acknowledges the mechanism applied by a certain term, but is able to assess the economic impact on its assets. The

[51] According to the Court's ruling in C-168/05, Mostaza Claro, p. 38: "The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier."

[52] Paragraph 51 of the Kasler ruling.

[53] The attribute of the national court of assessing the specific circumstances of the case was significantly reduced.

case law of the Court of Justice of the European Union is in a continuous process of transformation and configuration in terms of the content of specific notions and concepts, and regarding the concept of transparency there has been an evolution from an informative (preventive) type to an explanatory (justifying) type of transparency (Bercea, 2018).

The Romanian courts have not stood behind when it comes to preliminary references in the matter of foreign currency loans, especially since the tool of assesing the unfair nature of contractual terms has proved to be quite effective. Moreover, because the Romanian consumer did not resist the temptation to borrow in Swiss francs, an extra pressure was brought on the legislative and judicial factors involved in the process of solving the problems of over-indebted debtors.

Regarding the situation of debtors borrowing in foreign currency, especially in Swiss francs, the ruling in Case C-186/16, Andriciuc addresses the potentially unfair nature of the foreign exchange risk term[54]. First of all, it was left to the discretion of the national court the decision regarding the application of the exception provided by art. 1 paragr. 2 of the Directive in the sense of excluding from the scope of the Directive the term in question on the ground that it reflects an act of law or a binding administrative rule. Second, the Court established that the concept of "main subject matter of the contract" includes a contractual term according to which the loan must be repaid in the same foreign currency in which it was contracted, given that this term establishes an essential benefit which characterizes this contract. Therefore, in addition to the conditions provided in art. 3 paragr. 1 of the Directive, in order to be regarded as unfair, it is necessary for the term to not be drafted in plain and intelligible language.

With regard to the requirement of transparency, the Court reiterated the importance of pre-contractual consumer information as stated in Kásler ruling, but went a step further by confirming, on behalf of the financial institutions, an obligation to advise the consumer rather than simply informing him. The information provided to the lending consumer must be sufficient to enable him to take prudent and well-informed decisions. Moreover, a currency risk term must be understood in terms of both an awareness of the possibility of appreciation or depreciation of the foreign currency as well as of its actual effects and economic consequences.

In Case C-81/19, NG, OH v. Banca Transilvania SA, the Court of Justice examined the situation of a consumer credit agreement contracted in Swiss francs which stipulated that any payment made under it had to be in its foreign currency. For this purpose, the bank was empowered to execute the exchange necessary to settle the due payment obligations, using its own exchange rate. At the same time, although the contract contained provisions for the conversion of the loan into another currency, the bank had no obligation to comply with such a request should the borrowers choose to act on it.

Despite the questions asked[55], the answer was firm: "Article 1 (2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be

[54] Paragr. 8: " It is apparent from the order for reference that between 2007 and 2008 the applicants in the main proceedings who, during that period, received their income in Romanian lei (RON), concluded loan agreements with the Bank denominated in Swiss francs (CHF) with a view to acquiring immovable property, refinancing other credit arrangements or meeting personal needs."

[55] The questions are the following:

interpreted as meaning that a contractual term which has not been individually negotiated but which reflects a rule that, under national law, applies between contracting parties provided that no other arrangements have been established in that respect falls outside the scope of that directive". The Court's reasoning is based on the legal nature of the principle of monetary nominalism in the national legal system, namely its character as a principle of law reflected by a rule of a supplementary nature, but binding, applicable when the parties to the contract did not agree otherwise. CJEU gives further clarifications on how the mechanism for interpreting the provisions of the directive works, given the terminology used in the various language versions of it, namely the concepts of "imperative" and "mandatory". In particular, the Court has reiterated from its settled case-law that: "Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all languages of the European Union. Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the general scheme and purpose of the rules of which it forms part"[56]. Therefore, the expression "acts with the force of law or mandatory norms" also includes the notion of supplementary provisions.

The case law of the Court of Justice of the European Union is broad and dynamic, and in order to keep up with its evolution, the efforts of the European institutions to systematize it can be considered useful. Such a recent instrument can be considered the Commission "Guidelines on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts"[57], with respect to consumer credit agreements.

This document addresses relevant case law in an attempt to develop a structured and thematic study of the directive on unfair terms, covering topics such as: the scope of the directive, both in terms of the quality of the contracting parties, as well as regarding the nature of the contractual terms that may be assessed as unfair, without neglecting the expressly regulated exceptions; it analyzes the mechanism for the assessment of unfair terms, including the definition of concepts as the main subject of the contract or transparency requirements and the actual consequences of the removal of unfair terms

"(1) Must Article 1 [paragraph 2] of Directive 93/13 be interpreted as not precluding any analysis, with regard to unfairness, of a contractual term that reproduces a supplementary rule from which the parties could have derogated, but did not in fact do so as there was no negotiation in that regard, as in the present case analysed here with regard to the term requiring repayment of the loan in the same foreign currency as that in which it was granted?

(2) In a context where, when being granted a loan in a foreign currency, the consumer was not given calculations/estimates relating to the economic impact that any exchange rate fluctuation would have as regards the overall payment obligations arising under the agreement, can it reasonably be maintained that such a term, under which the exchange risk is borne entirely by the consumer (in accordance with the nominalist principle), is clear and intelligible and that the seller or supplier/bank has complied in good faith with the obligation to provide information to the other party to the agreement, in circumstances in which the maximum degree of indebtedness of consumers established by the National Bank of Romania has been calculated by reference to the exchange rate prevailing on the date when the loan was granted?

(3) Do Directive 93/13 and the case-law based on it and the principle of effectiveness preclude a contract from continuing unchanged after a term relating to the party that bears the exchange rate risk has been declared unfair? What change could be incorporated into the contract in order to disapply the unfair term and comply with the principle of effectiveness?"

[56] Paragraph 33 of the ruling in Case C-81/19, NG, OH v. Banca Transilvania SA.

[57] O.J., C 323, 27.09.2019.

from the contract, respectively it addresses procedural issues such as the principles of equivalence and effectiveness or ex officio assement.

5. Evolution of domestic case law on foreign currency loans

With regard to domestic case law on foreign currency credit agreements, there are different types of cases, each standing out because of specific aspects.

First of all, from a chronological point of view, a first moment of reference is the entry into force of O.U.G. no. 50/2010. The relevance of the normative act is determined by the fact that it imposes a general but imperative obligation that financial institutions have to comply with consumer protection requirements. *Inter alia*, these requirements are taken into account when drafting the contractual terms, determining the interest or the types of fees that are allowed and their content.

Second, it is noted that most of the foreign currency credit agreements deduced from the court analysis were concluded by credit institutions.[58]

Given these circumstances, in the period before the entry into force of O.U.G. no. 50/2010, the content of credit agreements concluded with consumers was substantially different from the content of such contracts nowadays.

Several terms were eliminated, including: - contract interest terms, indicated as adjustable according to the bank's benchmark / bank policy and subject to unilateral adaptations executed by the bank; such a change in the contract was usually followed by a simple notification to the consumer who, in case of any opposition was sanctioned with the immediate maturity of the contract for the loan not paid up to that point; - the rate of penalty interest, calculated by applying a generous percentage to the amount of the current interest; - the terms referring to various fees: file analysis, credit granting, processing and administration, risk commission stipulated without explanation, calculated in standardized percentages by reporting sometimes to the amount of credit granted, other times to its balance; - cases of fault of the debtor that determined the early maturity of the entire loan, including situations of default in other contracts. In the case of these contracts, the content of the terms did not differ significantly in relation to the currency, national or foreign, in which the loan was granted.

The existence of these contracts determined a first series of lawsuits: the so-called "assesment of unfair contractual terms" based on the provisions of art. 14[59] of Law no. 193/2000. The purpose of such a request was to eliminate from the contracts the unfair terms, but also to repair the damage caused to consumers by refunding the amounts illegally collected under the unfair terms[60].

---

[58] That is why the term "bank" will continue to be used to designate the quality of the creditor, because it is based on the terminology used by credit institutions in drafting credit agreements. Therefore, the intention is not to exclude credit agreements concluded with non-banking financial institutions, but only to draw a series of conclusions regarding a specific type of case-law that occupies a high percentage in the litigations registered before the Romanian courts in the matter of unfair contract terms.

[59] According to this article: "Consumers harmed by contracts breaching the provisions of this law have the right to address the courts in accordance with the provisions of the Civil Code and the Code of Civil Procedure."

[60] Regarding the refunding of amounts paid under unfair terms there is divergent jurisprudence even at the level of the supreme court. Thus, according to Decision no. 76/25.01.2017 of the Second Civil section, available on scj.ro, jurisprudence search section: "From this point of view, the court finds the criticism unfounded, as the material law applicable in the field of consumer protection, respectively the Law no. 193/2000 and Directive

Another type of lawsuite in connection with these contracts were those determined by the application of the provisions of art. 12 paragr. 1, respectively paragr. 3 of Law no. 193/2000, these are the actions for termination, the object of which is to establish the existence of unfair terms and their elimination by amending the contracts in progress[61].

The different rulings given on the analysis of different types of contractual terms are difficult to systematize in a concise manner in this analysis; as they are so many and various and because the CJEU's jurisprudence is in a continuous state of evolution, it is suffice to say that they are among the most diverse[62].

Advancing to 2016, with the entry into force of Law no. 77/2016, the courts were faced with a new type of lawsuite. If before the intervention of the constitutional court, the role of the judge was reduced to the formality of verifying the conditions provided by art. 4 of the law, after the rendering of the first decision, Decision no. 623/2016, the role of the common court and its assessment of the factual situation becomes decisive for finding or not the intervention of hardship. Although, the provisions of the law do not refer in particular to the currency in which the loan was granted, since the condition of credit repayment was inextricably linked to the incidence of contingency, the jurisprudence developed in connection with Law no. 77/2016 mainly concerns loans in foreign currency, mostly loans granted in Swiss francs. The borrowers argue that the change in the exchange rate of the Swiss franc, in the sense of a significant appreciation after the loan is granted as an unforeseen, objective situation that cannot be considered accepted by the debtor, thus justifying judicial intervention to rebalance the parties' benefits. In this matter, too, the courts' solutions have varied considerably.[63]

The desire of consumers to rebalance contractual benefits, in particular those resulting from credit agreements in Swiss francs, due to overburdening of debtors as a result of the appreciation of foreign currency has materialized in another type of case, namely the assesment of the unfair nature of the currency risk term and the request to freeze the exchange rate at the value from the date of contract conclusion. Rulings given in these types of demands also vary considerable, but a large part of the courts have expressed serious reservations regarding the validity of the legal arguments because they

---

no. 93/13/EEC stipulates that the sanction imposable when finding unfair terms is of *sui generis* nature, respectively the terminations of the effects for the future, without questioning the benefits already executed, as it happens in case of annulment ". On the other hand, in Decision no. 2875/26.09.2017, the supreme court upheld, by rejecting the appeal, the decision of the inferior court including the reimbursement of benefits received under the unfair clauses, considering that this is a natural effect of the application of the legal regime of annulment as a sanction for inserting unfair terms in the contract.

[61] In the case of lawsuits initiated by the control bodies represented by authorized agents of the National Authority for Consumer Protection, respectively by the associations for consumer protection.

[62] See Decision no. 167/31.01.2019 issued by the Supreme Court of Justice, Second Civil section, available on scj.ro, jurisprudence search section, for a fairness assesment of the clause regarding the granting commission with the argument that this is a "valid and transparent clause, the borrower was able to acknowledge, at the date of concluding the credit agreement, what are the legal and economic consequences that the respective fee involves", respectively Decision no. 199/31.01.2018 issued by the Supreme Court of Justice, Second Civil section, available on scj.ro, jurisprudence search section, according to which: "in the absence of highlighting the services related to the costs resulting from the collection of the credit granting and the additional commission, it is obvious the violation of the transparency obligation sanctioned by the law with the annulement of the unfair term".

[63] See Decision no. 312/ 07.04.2020, rendered by Braşov Tribunal for the interpretation that the Swiss francs exchange rate fluctuation can be considered as contractual contingency (hardship), resepctivele Decision no. 250/07.05.2019, rendered by the Specialized Mureş Tribunal, for the contrary interpretation.

tend to create a mechanism parallel to the regulations of Law no. 77/2016, to more so as it cannot, by itself, lead to the consequence of freezing the exchange rate.

The existence of such a mixed judicial practice in the matter of credit agreements concluded with consumers enhances the importance of creating actual proceeding in order to unify the solutions of the courts.

These remedies fall into two categories: those that are mandatory, such as the rulings of the Supreme Court of Justice given in specific proceedings[64], respectively those without binding force, materialized in specialized professional meetings of magistrates in order to discuss the legal issues generating non-unitary practice and attempts to converge towards similar solutions.[65]

6. CONCLUSIONS

As a brief conclusion, it can be noted that the matter of credit agreements (in foreign currency) granted to consumers is still in the attention of the European legislator, but also of the national one. As a general aspect, it can be noted that, regardless of the currency in which the loans were granted, the contracts concluded 10-12 years ago have the same structural problems in terms of the unfair content. Legislative remedies of European origin have now led to a clearing of the content of contracts in the context in which the distinction between national and foreign currency has been necessary and sufficient. As a specific aspect, as long as the matter of loans in Swiss francs continues to be an important one in Romania, it is expected that special legislation will continue to be issued at least at a national level, especially taking into account that the only normative act, of a purely internal nature and dedicated exclusively to contracts in Swiss francs, failed to pass the constitutionality test.

REFERENCES

Bercea, L. (2017). Conversia creditelor în valută ca instrumente de protecție a consumatorilor. In M. Nicolae, I.F. Popa (coord.), *Credite pentru consumatori - Provocări legislative și tensiuni constituționale românești.* Editura Solomon.

Bercea, L. (2017). Creditul bancar: what's in a name? *Universul Juridic nr. 12 (legestart.ro, retrieved 20.06.2021)*.

Bercea, L. (2018). Transparența costurilor în contractele de credit pentru consumatori. Cât de departe trebuie să ajungă Curtea de Justiție a Uniunii Europene ca să afle că a greșit drumul? *juridice.ro*. Retrieved 20.06.2021.

[64] The ruling given in such a proceeding is essentially a mandatory interpretation of the law.

[65] The analysis of these discussions, materialized in documents available on inm-lex.ro, case-law unification section, reveals the variety of interpretations and solutions given in practice. As an example, in the Meeting of the presidents of the specialized sections (former commercial) of the Supreme Court of Justice and the courts of appeal, dedicated to debating the issues of non-unitary practice in litigation with professionals and insolvency in 2018, the following points were discussed (the development can be consulted in detail on the website): 1. The abusive nature of the currency risk clause in the light of the CJEU decision in case C-186/16, Andriciuc and others v. Banca Românească SA. 2. Application of the contingency theory in the case of credit agreements concluded prior to the entry into force of the new Civil Code. Applicability in the case of contracts awarded in CHF. 3. Admissibility of requests for judicial determination of the credit interest rate of CHF/EUR. Criteria for setting the interest rate.

Dincă, R. (2013). *Contracte civile speciale în noul Cod civil.* Universul Juridic.
Goicovici, A. J. (2014). *Creditele de consum și investiții imobiliare, Comentarii și Explicații.* Editura C.H. Beck.
Rizoiu, R. (2017). Lumina vine de la Apus - Aplicarea în timp a Ordonanței de Urgență a Guvernului nr. 52/2016. In M. Nicolae, I.F. Popa (coord.), *Credite pentru consumatori - Provocări legislative și tensiuni constituționale românești.* Editura Solomon.