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Considerations on unfair terms in bank credit contracts

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Abstract. Over the last few years, we have seen an increasingly number of case law that was presented before national courts as well as the European Court of Justice concerning unfair terms in bank credit contracts. This subject was raised especially during the crisis in which the swiss francs had appreciated, leading numerous customers that had previously taken bank loans in this currency unable to pay back loans that had risen in almost half their value. Development in international and national legislation, such as Law no. 193/2000 concerning unfair terms in contracts concluded between professionals and consumers, that transposed into our national legislation the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, both restricted or banned the use of such practices and were in force long before the crisis was generated. This however did not stop credit institutions from inserting these types of clauses in the contracts that they had concluded. The issue that we aim to treat in this article is whether the recent practices of credit and bank institutions has changed over the course of the last few years, given the development of jurisprudence that most often than not condemns abusive or unfair terms in credit agreements with consumers.

Keywords. credit contracts, unfair terms, consumers, banks

1. Introduction

We consider the topic of unfair or abusive terms in credit contracts still a current topic. Although a lot has been done in terms of in force regulations that sanction or try to prevent the use of the said clauses, it seems that banking practices have not changed by far – some contract provisions might have been reworded, but as we shall see during our analysis, we find that in order to have contracts that are in equity for both parties, a lot more needs to be done.

If we study the provisions granted by the general law in contract matters, our civil Code defines a contract as the agreement (of will) of two or more persons with the intention of constituting, modifying or terminating a legal relation (art. 1166). This article, corroborated with article 1270 of the civil Code which establishes that a validly concluded contract has the same power as the law for the parties (*pacta sunt servanda*), might lead to concluding that any type of clauses are permitted in a contract as long as all parties agree upon them.

This conclusion is not applicable in matters pertaining to credit contracts – first, we must underline that any banking contract is an adhesion contract, meaning that only one of the parties, in this case the bank, has the power to impose the terms of the agreement to the other party, in our case the consumer. Second, we stress out that almost all contracts are concluded with consumers and, as such, fall under distinct regulations. Third, as we shall underline during this study, several other obligations, such as the obligation of information or good faith have to be

imposed during the contract, as well as during the information period (or negotiation to the adhesion of the contract).

As doctrine has noted, the obligations of the bank during the negotiation period are limited to presenting the customer with the whole picture of the legal effects of the contract and to propose feasible alternatives, so that the customer may exert his option in full knowledge [1]. But even this obligation of information is not always respected. The consumers usually need a line of credit, and therefore pay little or none attention to the conditions of it. Furthermore, it must be noted that they are not trained professionals and have little knowledge of the meaning of contract terms.

Despite the repeated strikes against bank practices ruled by the European and national courts, the situation of the consumers has not improved a lot. The European Court recently deemed that any unfair terms comprised in a credit contract should not only be deemed nonexistent, but also give right to the restitution of advantages wrongly obtained by the seller or supplier and allow the restoration of the legal and factual situation of the consumer in the absence of such an unfair term[2].

Alongside international organisms, such as the OECD, the European Union as well as the Court of Justice have long stated the need on an international regulation in favor of the consumers that would help relieve the pressure of the banking industry. In this matter, they stressed out that this would also lead to better competition on the market and noted that consumers are usually trapped as a result of high switching costs [3].

In the first part of this study we aim first to briefly define what credit contracts are, to then linearly analyze unfair terms in these contracts. In a third part of this study, we shall point out existing clauses in ongoing banking contracts, that were concluded not longer than 2 years ago to see if unfair terms still subsist. Doctrine has long analyzed this subject and has usually blamed the current practices of the banking sector. Nevertheless, it is interesting to see if the practices still exist, or if on the contrary, following court rulings, they have changed.

2. Credit contracts

Bank credit contracts were defined by doctrine, as they are not directly defined by the legislator (thus falling under the category of unnamed contracts), as a contract by which a bank or a similar institution, the lender, commits to providing to a natural or moral person, the borrower, a sum of money (the credit) on a determined period of time or assumes a financial commitment by aval (bill of exchange, promissory note etc.) or by a letter of guarantee in the interest of the person, in exchange of a remuneration. The parties of the contract are the lender (banking institution) and the borrower (natural or moral person) [4].

It must not be understood that all types of bank agreements are unnamed contracts – for instance, the credit facility is a named contract, regulated in art. 2193-2195 by the civil Code as the contract by which a credit institution, non-bank financial institution or any other entity authorized by a special law, named funder, commits to hold a sum of money at the disposal of the client for a determined or undetermined period of time. As doctrine has noted the most common types of credit facilities are the line of credit, the revolving credit and the credit card [5].

From a banking perspective, credit represents any type of commitment to pay a sum of money in exchange of the right to its reimbursement, as well as the payment of interests or any other expenses related to this sum [6]. Thus, there is a variety of credit contracts that can be concluded between banks and their clients, be they natural or moral persons, but consumers nevertheless; we may list mortgage agreements, credit agreements for personal needs, credit card agreements, credit saving contracts, consumer loans etc. [7].

Unassuming that we shall treat all of these types of contracts, we shall focus on the type of clauses that are generally inserted in all types of credit contracts, regardless of their specific purpose. The civil Code clearly defines in art. 1177 that a contract concluded with consumers is regulated by the provisions of the specific law, in our national legislation Law no. 193/2000 pertaining to unfair terms in contracts concluded between professionals and consumers. This law defines the terms of consumer [8], in this case the clients of the bank and professionals [9], the financial or nonfinancial credit institutions.

We join in the majority opinion of doctrine, that stresses out that all these contracts are adhesion contracts [10], and as such the essential clauses of the contract are imposed or drafted by one of the parties (the bank or financial institution), for the latter or following its instructions, the other party not having as an option but to accept them as such (art. 1175 of the civil Code).

Adhesion to a credit contract possess several specific traits, as it implies adhesion not only to the explicit contract terms, but also to the usage of trade and general conditions and rules of the bank. Generally, all the terms are reproduces on the forms that consumers sign and are therefore imposed by the consensual principle, but if that is not the case, they may only be imposed if the consumer was aware of them; in the latter case the adhesion may only be presumed on the basis of a sufficient and prior information [11]. The fact that the bank had previously made available to the general public the standard conditions for obtaining a credit contract and negotiates certain terms of the agreement such as the currency, the amount of credit loan, the rate of interest or the period of the availability does not equal the negotiation of the contract with each consumer [12].

As for the jurisprudence on the matter, it is important to observe that following decisions of the European Court of Justice, most national courts of the Member States still consider that banks can't be compelled to drop unfair terms, such as for instance guarantee consumers against monetary risk provided that such an obligation is not mentioned by the contract or the stabilization of the exchange rate of the currency [13]. As we shall underline in the following development, unfair terms still subsist in most credit contracts granted by banking institutions, sometimes with the indirect consent of Member State, who though trying to prevent them, in reality make it easier for these types of clauses to subsist in contracts [14].

3. Common unfair terms in credit agreements

1.1. Defining unfair terms

Unfair terms are defined by our national legislation in art. 4 paragraph 1 of Law no. 193/2000 and retakes after the regulations imposed at a EU level [15]; thus, a contractual term that was not directly negotiated with the consumer will be deemed unfair if, by itself or together with other contractual provisions it creates, at the expense of the consumer and against the demands of good faith, a significant imbalance between the rights and obligations of the parties.

Our national legislation provides a "black list" of unfair terms, listing in its annex several types of clauses that will be deemed unfair, without having to verify the general conditions. This conclusion is reached by both the formulation of the law "the list comprised in the annex that is an integrated part of this law renders, as examples, terms deemed unfair", as well as from the jurisprudence of the European Court of Justice [16] "by means of a mechanism consisting in drawing up a 'black list' of terms to be regarded as being unfair".

In the EU law system, the Council Directive only provides for a "grey list" of unfair terms, in the sense that the analysis of the abusive character of a term is made overall, classifying a term in the types of clauses in annex of the Directive only representing an argument in favor of the claim that the said term is unfair. This argument needs to be sustained with an analysis of the fulfilment of the general conditions, provided by the text that defines the abusive character

[17]. The European Court of Justice, by its jurisprudence established several general rules in determining the unfair character of a contract clause, from which we may list the unequal positions of the parties, the inferiority of the consumer in the contract, or the fact that a national court may be obliged to declare the abusive content *ex officio* [18].

In analyzing the national legislation, we find several factors that influence the qualification of a clause as unfair. First, one must check if the term is comprised in the annex of the law – as explained before, if it is comprised in the “black list”, then the term will be deemed unfair. A second important factor is the unnegotiated character of the term with the consumer. This derives from the adhesion character to the standard contract with predefined terms, thus restricting the redistribution of risks or the cease of abusive effects of the contract [19]. The last factor that might indicate the unfairness of a term is the way in which it is drafted: all contractual terms must be redacted in a comprehensible manner for the consumer, but the expression in a readily understandable language cannot be limited to a correct grammatically, morphologically, syntactically and semantically and that easily intelligible language means that in the case of conventions, each of the contracting parties should have the unambiguous representation of the nature and extent of its own acquired rights and obligations and of the rights and counterparts of the other side [20].

The unfair nature of a term can't always be appreciated on its own, therefore the law establishes that it will be appreciated in accordance with the nature of the products or services provided, the factors that determined the conclusion of the contract and other terms of the contract or of other contracts upon which the first relies.

1.2. Examples of abusive clauses

Legal disposition in force define types of unfair terms in all types of contracts, not only credit agreements; in the latter case, doctrine and jurisprudence have taken on the task of pointing out practices that are in the disadvantage of consumers. The same type of unfair clause can be formulated in several ways, depending on the type of credit agreement it relates to, or on the type of institution that drafts it [21].

According to the provisions of Law no. 193/2000, the National Authority for Consumer Protection (NACP) also has the right to petition the court in order to obtain the removal of unfair terms of all undergoing contracts. In this regard, the NACP constantly releases different statements that aim at bringing to the awareness of consumers their respective rights [22].

For the purpose of this study, we shall exemplify some clauses that bank institutions usually insert into their contracts. The first type of unfair term that we shall subject to attention will concern bank charges or commissions. According to Government Ordinance 50/2010 regarding credit contracts for consumers, there are limited types of charges that can be demanded from the consumer [23]. Specific laws on different types of credit agreements impose that only certain types of bank charges will be asked of consumers (for instance when constituting a mortgage, the only charges that may be required of the consumer are the ones pertaining to the drafting of the credit documentation, the constitution of the mortgage and its warranties) [24]. The credit institutions tend to insert other types of clauses in the adhesion agreements.

Thus, risk charges are widespread in bank practices – they usually demand a risk charge that is calculated at the initial value of the credit. Even though the bank has several other ways of insuring against the consumers insolvency (such as a warranty or a co-debtor), they may add this type of clause. Scholars as well as courts [25] have long condemned this practice, deeming it unfair, as each month the debtor would have to pay the risk charge as well as the instalment, whereas the banks never could justify what operations they were actually charging for; what's more, the bank never reimburses the amount paid by the consumer who keeps up to date with the repayment of his loan [26].

The administration of credit charge, that is expressly stipulated by the law is considered abusive, especially when calculated upon the entire credit and not upon the value of the balance. The law clearly states that the charge is to be perceived for monitoring/registering/conducting transactions by the creditor for the use/repayment of the credit granted to the consumer. The law further defines that if the charge is to be calculated as a percentage, it will be applied to the current balance of the credit. Nevertheless, as shown in jurisprudence [27], banks usually have a difficult time in proving some counterpart for this charge, and sometimes it surpasses the amount of the interest paid. Scholars have pointed out that the administration charge can't find its justification in specific actions of the professionals, given that the charge that is perceived covers the legal operations that the bank must do for the accomplishment of the object of the contract. Even if specific operations existed, they would not have a continuity character and would not be accomplished monthly [28].

Other contract terms that are deemed abusive by law, doctrine and jurisprudence alike relate to the right of the professional to establish or change the amount of the interest. This term is usually drafted as allowing the credit institution to display at its headquarters the amount of the interest, thus granting them the possibility of changing that amount unilaterally. The bad faith of the bank is proven by attracting the customer to conclude the contract based on an attractive interest, that is only available for a certain period of time, afterward becoming a variable interest rate [29].

Other terms are related to the obligation of the consumer to reimburse the credit in the currency that they obtained it in, regardless of the fluctuation of the exchange rate. A very famous case presented in front of the European Court is the Kásler case [30], in which both the Court as well as the advocate general formed opinions pertaining to the comprehensive nature of the clause as well as it being a main subject matter of the contract; nevertheless, "the difference between the selling rate of exchange and the buying rate of exchange of the currency cannot be considered to constitute remuneration whose equivalence with the service provided cannot be analysed from the viewpoint of unfairness" [31]. The credit institutions invoke the rule of monetary nominalism, stating that the borrower must reimburse the same amount and quality of goods that he is granted. Most courts [32] however consider the abusive nature of the clause, taking into account the hardship clause that most often than not is only granted in favour of the bank.

Another term that was deemed unfair is the creditor's right to declare the early maturity or the transfer of the credit. This clause especially arises issues as it creates a significant imbalance between the parties and grant the right to the credit institution to declare early termination or transfer regardless of the non-performance of the consumer. Furthermore, in case of assignment of the contract to a non-banking institution, the debtor no longer holds the quality of customer in relation with the non-banking company, thus affecting his rights and obligations. Usually, the debtor is only notified regarding the assignment of his debt, his approval not being necessary [33].

Apart from the terms we mentioned, a lot of others have been deemed unfair by both law, jurisprudence and scholars. Some of them are even theoretically and only potentially unfair, depending on the formulation of the term; as such, we might exemplify, the fact that credit institution never refer to their clients as "consumers", the procedure of centralizing litigation on unfair terms in Bucharest, that might put some consumers in a position of inferiority, the fact that the consumer must almost always also be a client of the bank etc [34]. Ascertaining the unfair nature of a term is the first step in granting a balance between the parties, but consumers must also be able this into transpose into practice.

1.3. Sanction of the unfair terms and grounds to invoke

Given the recent jurisprudence, in accordance with the conclusion of the European Court, even if the sanction provided by Law no. 193/2000 is the ineffectiveness of the term in relation to the consumer, the High Court of Cassation and Justice considers that the legal regime of the sanction of the unfair term in a contract is identical to that of absolute nullity. The High Court emphasized that the legal provisions are aimed at the protection of the general interest and not the individual one, protecting the generic category of consumers, and therefore the sanction that intervenes in case of violation of the norms is absolute nullity, which can be invoked any time by any interested person, even by the court *ex officio* [35]. Doctrine has followed in this line, stressing out that the declaration of the unfair nature of a term is a *sui generis* nullity cause, based on the non-negotiated character and the injurious character of contractual balance [36]. From the absolute nullity of the term, we may deduce that it can be invoked anytime, regardless of the state of the trial.

To answer the question of who can invoke the unfair character of a term, one must bear in mind the provisions of the special law as well as those of the general law. Thus, a consumer might invoke the unfairness of terms individually, or by a collective action under the provisions of the civil procedure Code. In accordance with the provisions of Law no. 193/2000, the NACP can also ask for the modification of ongoing contracts that contain unfair provisions. What is more, the European Court of Justice established that national courts are required to determine *ex officio* the unfair nature of terms. The absolute nullity the unfair clauses will be determined regardless of whether they are inserted into the main contract, in subsequent amendments, notices or communications issued without the express consent of the debtor and hence may oblige the bank to return the amounts unduly paid by the beneficiary of the credit concluding the documents to date [37]. The consumer may relinquish the right to the legal action at any time but usually does so either when finding that their actions were prematurely formulated, or when they hold no sufficient evidence to win the case submitted for settlement with the court-of-law [38].

1.4. Effects of the nullity of the unfair term

As previously established, in a credit contract, the unfair terms will be declared null and void, and as such not enforceable for the consumer. A problem might be developed if the contract contains more than one provision that is deemed unfair, and furthermore if the said provision is an important part of the contract, meaning it is an essential provision to it. Some might argue that the whole contract must be annulled, and as such parties must be placed in the position in which they were before the conclusion of the contract, whereas others might claim that the contract still represent the will of the parties and annulling it would lead to the alteration of such will, expressed at the conclusion of the contract.

At a European level, the Directive 93/13/EEC states in article 6, paragraph 1 that “Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or a supplier shall, as provided for under their national law, not be binding on the customer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms”. As doctrine has pointed out, the provision of article 6 is an imperative rule [39]. This means that the Directive usually considers that a contract can continue to exist even without the unfair terms.

The European Court of Justice underlined the importance of this provision stressing that it should have the same importance in all Member States’ legal system, being considered as a rule of public interest: “Article 6(1) of Directive 93/13 is a mandatory provision. [...] must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy.” [40]

In more recent jurisprudence, the European Court underlines that the contract is to be maintained and the simple existence of unfair terms in a contract cannot constitute on its own sufficient grounds for the annulment of the contract: “the objective pursued by the European Union legislature in connection with Directive 93/13 consists in restoring the balance between the parties while in principle preserving the validity of the contract as a whole, not in abolishing all contracts containing unfair terms. As regards the criteria for assessing whether a contract can indeed continue to exist without the unfair terms, it must be noted that both the wording of Article 6(1) of Directive 93/13 and the requirements concerning the legal certainty of economic activities plead in favor of an objective approach in interpreting that provision, so that, [...] the situation of one of the parties to the contract, in this case the consumer, cannot be regarded as the decisive criterion determining the fate of the contract. Consequently, Article 6(1) of Directive 93/13 cannot be interpreted as meaning that, when assessing whether a contract containing one or more unfair terms can continue to exist without those terms, the court hearing the case can base its decision solely on a possible advantage for the consumer of the annulment of the contract as a whole.” [41]

We thus consider that national courts should find a balance between the parties, having indeed a primarily regard upon the interest of the consumer, but the latter alone, can’t constitute the grounds for the nullity of the contract.

4. Current practices in credit contracts

As we have seen before, unfair terms are sanctioned by the absolute nullity of the clause, but the credit contract will continue to exist, both parties disregarding the existence of the unfair term. In this context, we consider that it is important to analyze whether the credit institutions respect these conditions when laying the clauses of the adhesion contracts, or if on the contrary they disregard them and hope that the debtors, in this case the consumers will not invoke their rights in front of courts.

Thus, we have analyzed three type of credit contracts: two types of consume contracts, a credit card agreement and a credit agreement guaranteed with the salary, and a third type of contract, a credit contract for an immovable good, guaranteed with a mortgage. The contracts are made at three different banks that operate in Romania and were concluded during the time frame 19.06.2018 (for the credit agreement) and 15.06.2019 for the credit card agreement, by three different natural persons.

We shall present several of the terms included in these agreements without always stating the agreement number, the number of the term or the bank with which the contract was concluded. In our opinion, the above-mentioned facts are not relevant for this study, as we aim to show that the bank credit practices have not changed, but simply evolved and are still non-compliant with the regulations and principles in force.

As a first example we present the following term: “The Bank is required to notify Customer of changes to the contractual terms related to the use of the credit card (including fees and charges related to the use of the credit card) at least 2 months in advance of the proposed application date. The Customer is required to communicate the option to accept or non-acceptance of the new conditions within the said 2-month period previous. If by the date of proposed application the Customer does not notify the bank in writing at any of the Bank’s territorial units of not accepting the changes, the Parties agree that the Customer’s silence should be worth tacitly accepting the changes. If the Customer notifies the Bank in compliance with the above conditions that he does not accept the changes proposed by the Bank, before the proposed date for application of the amendments, the Customer has the right to withdraw from the contract immediately and free of charge, the credit card(s) shall be deposited with the credit

account(s) and shall be fully reimbursed.” Thus, the bank can unilaterally change the terms of the contract by simply notifying the customer with a two months advance notice. The customer has two months to notify the bank of their non-acceptance of the new conditions and the same amount of time to come up with the sum of money required to reimburse the entire loan, as the non-acceptance supposes the immediate withdraw from the contract.

As a second example of unfair terms, in our opinion, is the fact that the bank reserves its right to immediately terminate the agreement in case of any infringement of any obligation of the contract by the debtor, as follows: “The nonfulfillment by the Borrower of any obligation of the present Contract may have as a consequence the declaration of the term of the loan immediately, regardless of the repayment schedule and, as a consequence, the Bank may take any measure that it deems necessary in order to repair the damages caused by the nonfulfillment, measures that can lead to the loss by the Borrower of his property rights upon the goods, in the benefit of the Bank or of third parties, according to their will, under the condition of the previous notification of the Borrower by the Bank, according to the provisions of art. 11 of the present General Conditions.” Article 11 regulates the forfeiture of rights of the Borrower for any cases in which the latter “does no longer satisfy any of the conditions imposed by the bank for the granting of the loan” and allows the bank to immediately declare all obligations of the borrower due. The credit agreement further continues to develop the cases in which the borrower is at fault, and for which the contract might be terminated, depending on the will of the bank. The bank doesn’t limit by contract the cases of fault but states simply that “as examples, and not constituting a limitation in any way, any of the following will constitute a case of fault”. From these cases we may cite the one that we find the most unfair as: “Credits resulted from any other credit contracts concluded by the Borrower with the Bank become in any way due”. We consider that in this case the bank doesn’t only reserve its right to unilaterally add to the terms of the contract, but also reserves the right to declare the anticipated termination of the contract, according to its own terms.

As we shall see, the bank can also in this case assign the contract to a third party, as follows: “(1) The Bank may transfer the Contract and/or any of its rights and/or obligations by assignment of the Contract and/or novation, assignment of the claim or any mechanism for transmitting obligations recognized by law, and the Borrower agrees by signing this contract in an early and irrevocable manner to such transfer. (2) The Borrower shall not transfer any of its rights, benefits or obligations under the contract without the written approval of the Bank. (3) The transfer made in accordance with paragraph 1 above shall be notified by the Bank, in compliance with the provisions of the law, within 10 (ten) days of the date on which it was completed.” Another example in the same logic would be: “The Bank may assign or transfer in another way, totally or partially, the present Contract, on the condition of previous notification of the Borrower. (2) The Borrower hereby expressly authorizes the Bank, by the present Contract, to supply to any assignee of the Contract any information or documents pertaining to the Borrower, mortgage, immovable and other warranties detained by the Bank, in regards to any of the mentioned or to the administration of the account that the Borrower has at the Bank. (3) In case of assignment or transfer by the Bank of the present Contract, all or any of the declarations, warranties, commitments and obligations of the Borrower in the present Contract, as well as all pledges, mortgages, and other warranties constituted by the Borrower, for guaranteeing the loan granted by the Bank by the present Contract, will remain in force and will produce effects towards all successors in rights or assignees of the Bank. (5) The Bank will notify the assignment to the borrower in 10 days from the conclusion of the assignment contract by registered letter with the receipt confirmation by which he will bring to notice the name and

address of the registered office and workstation in Romania of the assignee creditor that will continue to collect from the Borrower the necessary sums for the reimbursement of the credit.”

In the mentioned examples, not only does the bank have the possibility to assign the credit agreement, without the approval of the debtor, in our case the consumer, but they can also transfer any and all warranties that were used in the contract. As doctrine has pointed out, if the credit is assigned towards a non-financial institution, the consumer will lose part of the rights he had in actions against the initial creditor, the bank.

In one case, the bank goes even further and instates a hardship (unpredictability) term that makes the consumer renounce at any of his rights to the rebalancing of the contract: “The Borrower/Guarantor is held to execute their obligations even if their execution has become more onerous, either because of the increase of the price of the own obligation, or because of the decrease of the value of the counterpart.”

The proof that the banks took little to none consideration regarding the transfer of risks pertaining to currency exchange only to the charge of the debtor is the following: “The Credit will be reimbursed in the same currency, by the Borrower and/or the Codebtor, that will also cover the costs of conversion and will bear the risks of currency exchange. If the payment is made by bank transfer, the date of the payment is that in which the account of the Bank was charged with the amount that made the object of the payment. In case an obligation comes to term in a nonworking day, the term will be reported to the next working day.” Thus, the bank assumes no risk regarding the monetary fluctuations, and as mentioned before, also determine that any hardship clause will not be applicable in this contract.

The last clause that we consider unfair and will exemplify is the one pertaining to the administration of credit charge, that in one case “will be perceived yearly in a single instalment, at the maturity of the credit in the month of June, no later than the 30th of June”. In order to be in accordance with the provisions of the law, the contract stipulates that “the credit administration charge will be perceived for the monitoring/registering/conducting transactions by the creditor for the use/repayment of the credit granted to the Borrower”. In other words, this charge appears to be in accordance with the legislation in force as it reproduces a legal rule. We consider this credit administration charge to be an unfair one, as even though it will be fixed and paid yearly it still does not justify the actions undertaken by the bank in administering the credit, especially considering that if the borrower wants the forbearance of his loan he has to pay another commission. This clause, read in conjunction with another clause that obliges the borrower to keep his current account open with the bank until the fulfillment of all obligations of the contract, is particularly unfair, as that account generates other types of charges of administration that need to be paid monthly.

Give the examples cited above, we consider that banks and credit institutions in general have not yet renounced to their unfair practices. What we have noticed is that some terms are designed as to limit the liability of the bank in case of a lawsuit. For instance, one clause states that: “the Borrower/Guarantor declare that any of the commitments assumed by him in this credit agreement are not contrary to the law and public order and will be carried out according to the laws and regulations in force”; we find this clause to say the least odd, given that this adhesion contract was drafted by the bank, who should be the one guaranteeing for its conformity with the in force regulations. Another term that is designed to limit the responsibility of the bank in our opinion is: “the Borrower/Guarantor declare that he was completely and correctly informed with regard to all aspects of the present convention, all information regarding the costs of the credit being made available to him, as well as a copy of the contract, whose provisions the Borrower/Guarantor declares that he understood fully”. In this respect,

the bank tries to limit the possibility of the customer to start a litigation based on the wording and phrasing of the contract.

5. Conclusions

In Romania, the matter of unfair terms in credit agreements tends to be a sensible subject and this is reflected in the evolution of the legislative process as well as in the case law, especially give the media coverage from which it benefits. At a national level, as well as at the international one, the general tendency is to impose a higher standard of protection for consumers. All rulings of the European Court that are publicly conceived as being in favor of consumers are very rapidly appropriated by the latter and pave the way to new lawsuits against unfair practices.

In terms of national rulings, we have had several main types of lawsuits against unfair practices: the first concerned the individual and collective actions started by consumers in the case of credit contracts granted in a foreign currency (swiss francs), the second was marked by the cases filed by the NACP, and the third is currently composed of several individual and collective actions of consumers that try to obtain the qualification of several types of terms as unfair.

As we have analyzed before, the unfair practices of banks have not yet disappeared, and thus we consider that this theme is not only very current but also important. We also stress that there is a lot to be considered and developed from a legislative point of view, as to the extent of our knowledge there is no official record of terms that were deemed abusive in the past and that the credit institutions are no longer entitled to use. Apart from the terms listed in the Annex of Law no. 193/2000 there is also no list that provides consumers with means as to get informed about the clauses that are considered unfair. So, setting aside that credit contracts are adhesion contracts and can't be negotiated, the possibilities of a consumer to get official information on unfair clauses before the conclusion of a credit agreement are limited. Furthermore, we consider that none of the regulations in force provide courts with enough elements as to be able to intervene and modify the terms of a contract that are deemed unfair. In our opinion, this leads to an inconsistent practice in case law, that further confuses consumers and limits their will to address courts on the matter.

We believe that the solution to limiting or removing unfair terms from credit contracts is not a simple one, as credit institutions will pose immense pressure on the legislative body as to keep the matters in place; in order to support our claim, we underline that doctrine has pointed out that if the credit institutions eliminated all abusive clauses from bank contracts, the losses for the banks would stand at 5.2 billion lei (1.3 billion euros) [42]. Since the study is dated several years ago, we consider that the losses today would be even bigger.

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- [6] Ioana Rațiu, *Unele aspecte cu privire la clauzele abuzive în contractele de credit bancar încheiate în România*, în *Studia Universitatis Babes Bolyai*, issue 3/2015, p. 128
- [7] For a more detailed view of the possible bank credits agreements see Mariana Rodica Țirlea, *Empirical study concerning the current state of abusive clauses in credit bank contracts*, in *Knowledge Horizons – Economics*, volume 9, no. 2, 2017, p. 19
- [8] As defined by Law no. 193/2000, art. 2 paragraph 1, a consumer is any natural person or group of natural persons constituted as an association, whom on the basis of a contract that falls under the incidence of the present law, acts outside of the scope of his commercial, industrial, production, crafts or liberal activity.
- [9] As defined by Law no. 193/2000, art. 2 paragraph 2, a professional is any natural or moral authorized person, whom on the basis of a contract that falls under the incidence of the present law, acts within the scope of their commercial, industrial, production, craft or liberal activity, as well as any person that acts with the same end in the name or on the account of the first.
- [10] To name only a few: Lucian Bercea (ed.), *Contractul de credit bancar: principiile, legea, uzanțele*, Gheorge Piperea, *Contractele bancare în noul cod civil. Comentarii*, Ed. Universul Juridic, București, 2014, p. 14; Adriana Ioana Pîrvu, *The dispute over invoking abusive clauses inserted in banking contracts in the trial of a contestation of the execution – alignment to European trends in the matter*, in *Law Review*, special issue December 2019, p. 212; Ion Turcu, *Contractele bancare în Noul Cod civil: art. 2184-2194, art. 2279-2492: comentarii și explicații*, Editura C.H.Beck, București, 2013, pp. 51-54
- [11] Ion Turcu, *op. cit.*, p. 51
- [12] See art. 4 paragraphs 2 and 3 of Law no. 193/2000
- [13] Mircea Grozavu, *Considerations on the national case law regarding the control of abusive clauses in the matter of credit loan repayment*, in *European Journal of Law and Public Administration*, issue 2/2016, p. 22
- [14] See regulation adopted by Hungary following the ruling in case 26/13, Kásler and Káslerné Rábai, of the 30 april 2014, European Court of Justice, by which the state recognized the abusive character of exchange differences and adopted a law stating that all ongoing contracts that contained that clause will see to its suspension, applying instead the rate of exchange fixed by the National Bank of Hungary, but making the annulment of the contract in its entirety impossible. This decision was criticised by national courts, especially in case 118/17, Zsuzsanna Dunai v ERSTE Bank Hungary Zrt, who claimed that by adopting such a regulation, the legislator aimed to influence the future rulings of national courts in favor of banks.
- [15] See art. 3 paragraph 1 of the Council Directive 93/13/EEC, on unfair terms in consumer contracts, as amended by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011
- [16] Case C-143/13, Bogdan Matei și Ioana Ofelia Matei împotriva SC Volksbank România SA, demand of a preliminary ruling, of 26 of February 2015, European Court of Justice, published in Reports of Cases [published in the electronic Reports of Cases \(Court Reports - general\)](#)
- [17] Lucian Mihali-Viorescu, *Clauzele abuzive în contractele de credit*, Editura Hamangiu, București, 2015, p. 103
- [18] *Idem*, pp. 178-182
- [19] Dragoș Lucian Rădulescu, *Aspecte privind clauzele abuzive în contractele bancare. Presumpția discriminării*, in *Analele Științifice ale Universității Alexandru Ioan Cuza*

- din Iași, serie Științe Juridice, issue 1/2018, pp. 25-26
- [20] Eugenia Voicheci, *Action for declaring the abusive character and for ascertaining the absolute nullity of some clauses from a credit contract concluded between a professional merchant and a consumer. conditions of admissibility from the perspective of the special law and of the common law. Effects on the development of the contract*, in Proceedings of Challenges of the knowledge society Conference of Nicolae Titulescu, 2018, p. 343
 - [21] For a list of unfair terms depending on interest rates, nature of bank charges and nature of interest rate, see Mariana Rodica Tîrlea, *op. cit.*, pp.19-24
 - [22] For a summaries view of the releases of unfair terms by NACP see Dan Lupu, *op. cit.*, p. 83, Table 2
 - [23] Art. 36, paragraph 1 states that for the granted credit, the creditor may only perceive: charge for analysing the file, charge for administrating the credit *or* for administrating the current account, compensation in case of anticipated reimbursement, costs pertaining to insurance and, as the case, sanctioning rates, other costs perceived by tiers, as well as a unique charge for services rendered upon request of the consumer.
 - [24] See art. 15 of Law no. 190/1999 referring to mortgage credit for real-estate investment
 - [25] Lucian Mihali-Viorescu, *op. cit.*, pp. 192-209
 - [26] See Agata Mihaela Popescu, *Practici discriminatorii prevăzute în clauzele abuzive din contractele bancare*, in Lucările celei de a VII-a Conferințe a nediscriminării și egalității de șanse, Universitatea Creștină Dimitrie Cantemir, 2013, p. 82
 - [27] Lucian Mihali-Viorescu, *op. cit.*, pp. 300-306
 - [28] Dragoș Lucian Rădulescu, *op. cit.*, pp. 28-29
 - [29] Lucian Mihali-Viorescu, *op. cit.*, pp. 210-232
 - [30] Request for a preliminary ruling from the Kúria, case C-26/13, Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt, 30 April 2014, European Court of Justice, in Reports of Cases [published in the electronic Reports of Cases \(Court Reports - general\)](#)
 - [31] Opinion of Mr Advocate General Wahl delivered on 12 February 2014 in case Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt., paragraph 72
 - [32] See Lucian Mihali-Viorescu, *op. cit.*, pp. 247-297
 - [33] Dragoș Lucian Rădulescu, *Unpredictability in banking contracts. Unfair terms*, in Perspectives of Business Law Journal, issue 3/2014, pp. 332-333
 - [34] Mariana Rodica Tîrlea, *op. cit.*, pp. 23-27
 - [35] Adriana Ioana Pîrvu, *op. cit.*, p. 218
 - [36] Eugenia Voicheci, *op. cit.*, p. 345
 - [37] Dragoș Lucian Rădulescu, *Unpredictability in banking contracts. Unfair terms*, p. 334
 - [38] Andreea Stoican, *Procedural incidents: relinquishing the legal action in the appeal proceedings or in the extraordinary legal remedies*, in Juridical Tribune, volume 7, issue 2, 2017, p. 70
 - [39] Adriana Ioana Pîrvu, *op. cit.*, p. 213
 - [40] Reference for a preliminary ruling, Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira, Case C-40/08, European Court of Justice, in Reports of Cases 2009 I-09579, paragraphs 51-52
 - [41] Reference for a preliminary ruling, Jana Pereničová și Vladislav Perenič împotriva SOS financ spol. s r. o., Case C-453/10, European Court of Justice, in Reports of Cases [published in the electronic Reports of Cases \(Court Reports - general\)](#), paragraphs 31-33
 - [42] Dan Lupu, *op. cit.*, p. 86