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Review paper

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CONFIDENCE IN THE JUDICIARY REGARDING UNFAIR BANKING OPERATIONS IN RELATION TO THE CURRENCY CLAUSE AND ITS IMPACT ON THE REAL RIGHTS OF CONSUMERS

ABSTRACT

As a new opportunity arose for taking loans denominated in Swiss francs and loans denominated in kuna with a currency clause in Swiss francs, bankers and banking institutions saw the chance to present loans in Swiss francs to average citizens, who lacked expert knowledge and skills, as an opportunity that could not be turned down. What the citizens as consumers could not even dream of was the reality that ultimately awaited them: after years and years of regular repayment of annuities of loans taken in Swiss francs, they ended up with even more loan to repay. How is this possible? In this case, banks and bankers did not explain to the consumers, or warn them of the meaning, or the legal consequences of the currency clause risk and the floating interest rate risk. So, instead of the currency clause serving to protect the value of provided money, it was offered to achieve unimaginable earnings for the banks, while the interest rate was very simply and effectively changed by unilateral decisions made by the banks. This resulted in consumers accumulating debt that they were unable to repay and escape the debt spiral, which in turn led consumers to establish the association "FRANAK - ASSOCIATION FOR THE PROTECTION OF CONSUMERS USERS OF FINANCIAL SERVICES" with the headquarters in Zagreb, Avenija Marina Držića 81B to protect their rights and interests and to go into battle against banking giants. Whether they will succeed in this battle, and on what grounds collective actions for the protection of consumer rights and interests, as well as individual restitution lawsuits, have been filed, is detailed below.

Keywords: Currency Clause, Swiss francs, Loan Agreement, Nullity of Provisions, Floating Interest Rate

1. INTRODUCTION

In the period from 2004 to 2009, the citizens of the Republic of Croatia took loans denominated in Swiss francs, as well as a loan denominated in kunas with a currency clause in Swiss francs, because these loans were presented as one of the most favorable financial product available on the market at the time. In these agreements, credit institutions had far more knowledge of currency risk and

floating interest rate which concepts are still unfamiliar to consumers. This raises the question and creates justified doubt about whether such credit obligations of the citizens of the Republic of Croatia were, in essence, a form of fraud in economic operations that endangered the existential security not only of individuals but also of entire households of the citizens of the Republic of Croatia who took on such credit obligations.¹ Given that the average citizen of the Republic of Croatia lacks sufficient expert knowledge, skills, and education, they rely on recommendations, opinions, and suggestions of credit institutions whose interests do not align with those of the users of credit institution services. This creates an imbalance between the contracting parties in contractual arrangements of those forms of crediting as were loans of Croatian citizens denominated in Swiss francs, as well as loans denominated in kuna with a currency clause in Swiss francs.²

Namely, in order for consumers to take out a loan from a bank, it is necessary for the consumer to enter into a loan agreement with the bank, and, as stipulated by Article 247 of the Obligations Act,³ an agreement is concluded when the contracting parties agree on the essential elements of the contract.⁴ Thus, if the concept of a legal transaction, as a manifestation of will aimed at achieving permissible legal effects, were based solely on the provisions of the Obligations Act, one would have to say that a legal transaction actually arises through the expression of will.⁵ The loan agreement is defined in Article 1021 of the Obligations Act, in which the legislator clearly stipulated that it is the type of agreement in which the bank commits to make available a certain amount of money to the loan user for a specified or unspecified period, for a particular purpose or without a specified purpose, and the user commits to pay to the bank agreed interest and to repay the used amount of money in the time and manner

¹Buljan Barbača, D.; Piplica, D., „*Slučaj franak*“– *poslovna prijevara kao ugroza egzistencijalne sigurnosti građana Republike Hrvatske?*, Policija i sigurnost, vol. 32, no. 1, 2023, p. 32.

²*Ibid*, pp. 32 - 33

³Obligations Act, Official Gazette, No. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021, 114/2022, 156/2022, 145/2023, 155/2023 (hereinafter: Obligations Act). The provisions of the Act on Consumer Protection, Official Gazette, No. 96/2003, 46/2007, 79/2007 which, among other things, defined the concept of consumer as well as the concept of unfair provision and the concept of the assessment of unfairness, and the provisions of the Civil Procedure Act, Official Gazette, No. 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011, 25/2013, 89/2014, 70/2019, 80/2022, 114/2022, 155/2023 were applied in order to protect the rights and interests of consumers.

⁴Article 247, Obligations Act

⁵Klarić, P.; Vedriš, M., *Građansko pravo, Opći dio, stvarno pravo, obvezni i nasljedno pravo*, Narodne novine, Zagreb, 2006, p. 107.

agreed upon⁶, such a type of legal transaction is also concluded through the manifestation of will between the consumer and the bank. Therefore, the consumer's will is necessary for the conclusion of the agreement, and that consumer's will is influenced by the information provided to him by the bank itself. Thus, consumers, by expressing their will, entered into loan agreements with the aim of obtaining a certain sum of money⁷ can be acquired. In this particular case, these were goods of existential importance to the consumers, such as real estate. Namely, in order for the citizens of the Republic of Croatia to gain any knowledge about loans that involve currency risk and floating interest rate risk, they had to turn to the same credit institutions, whose interest and goal was not to fully and timely inform the citizens of the Republic of Croatia, but rather to ensure that the citizens of the Republic of Croatia became indebted specifically in their banks, in the hopes that such indebtedness would lead to the enrichment of the banks providing such credit services. In this way, credit institutions gained undue benefits without any grounds. The question that arises in this situation is whether the banks knew what was going to happen, and whether the banks were aware that loans denominated in Swiss francs, as well as loans denominated in kuna with a currency clause in Swiss francs, would lead to the enrichment of banks at the expense of impoverishing and endangering the existential security of the citizens of the Republic of Croatia?

2. “WHITE-COLLAR” CRIME

In contractual relationships arising with the aim of realizing loans denominated in Swiss francs, as well as loans denominated in kuna with a currency clause in Swiss francs, one contracting party is the average citizen of the Republic of Croatia, and the other contracting party is a professional person who possesses the necessary expert knowledge and skills to realize such a contractual relationship, i.e., a person “in a suit.” This already creates an imbalance in the contractual relationship due to the social position and required expert knowledge and skills, and opens up space for manipulation with information, which can only be manipulated by those who possess it, in this case, the people “in suits.” In this manner, one form of business fraud can be concealed making it appear as a completely ordinary business relationship, leading to the emergence of a new term, namely “white-collar crime”.⁸

⁶ Article 1021, Obligations Act

⁷ Tomašević, J., *Novac i kredit*, Dom i svijet, University of Zagreb, Faculty of Economics and Business, Zagreb, 2004, p. 60.

⁸ Buljan Barbača; Piplica, *op. cit.* note 1, p. 35

The key task of bank supervisors and financial analysts is the consolidation and analysis of data on bank risk management. Since banks participate in both domestic and international markets and play a crucial role in national economies, banking statistics can provide insight into the economic situation.⁹ The term “white-collar crime” is closely related to the appearance of individuals working in offices, typically wearing business suits and white shirts, such as bankers, managers, and the like, which would mean that “white-collar crime” involves a higher business or social status of the perpetrators and the commission of unlawful acts within the scope of one's professional activity. Thus, these are criminal acts committed by individuals or groups of people who use their higher business status and the influence that comes with it to unlawfully gain material or immaterial benefits for themselves, as well as for other people or groups of people.¹⁰ Credit crime can also be referred to as the crime of privileged individuals and groups, and due to its characteristics, it can be considered a special form of white-collar crime.¹¹ Namely, there is a significant difference between banking services providers and the users of banking services, primarily in their interests, which substantially differ in the fact that banking institutions want to make as much money as possible from providing their services, while on the other hand, the user of banking services is interested in having as few banking costs as possible. Therefore, users of banking services can often make poor business decisions based on incorrect, incomplete information provided with insufficient quality by bank employees.¹² The citizens of the Republic of Croatia who took out loans in Swiss francs were attracted by the lower interest rate, which would ultimately affect the total repayment of the loan. By taking loans in Swiss francs, the citizens of the Republic of Croatia also assumed the exchange rate risk, which is generally not possible to protect against. Furthermore, the citizens of the Republic of Croatia do not have sufficient knowledge or understanding of what this risk means and what it can bring over time.¹³ The problem faced by the users of loans in Swiss francs was that despite the fact that they were making regular and timely payments of their loan annuities in Swiss francs, the principal of the loan, when converted to kuna or euro, still increased, despite regular repayments. This raised the question of whether it was worth making this conversion, as it not only involved assuming a new currency risk, this time with the euro exchange rate, but also brought new costs related to loan restructuring, as well as an increased annuity due to the fact that, at that time, the interest rates on loans in euros were still higher than those in

⁹ Van Greuning, H.; Brajović Bratanović, S., *Analiza i upravljanje bankovnim rizicima, pristupi za ocjenu organizacije upravljanja rizicima i izloženosti financijskom riziku*, 2nd ed., Library Gospodarska misao, Zagreb, pp. 17–18.

¹⁰ Buljan Barbača, Piplica, *op. cit.* note 1, pp. 33 - 34

¹¹ Orlović, A., *Gospodarski kriminalitet u Republici Hrvatskoj*, Redak, Split, 2013, p. 92.

¹² Buljan Barbača, Piplica, *op. cit.* note 1, p. 36

¹³ *Ibid.*, p. 39

Swiss francs, making it difficult to provide an answer to that question.¹⁴ The prerequisites for the implementation of the conversion were created by upgrading the legislative framework, with the Act on Amendments to the Consumer Credit Act, Official Gazette, No. 102/2015¹⁵ and the Act on Amendments to the Credit Institutions Act, Official Gazette, No. 102/2015¹⁶, which came into effect on 30 September 2015. These amendments prescribed the conversion of loans denominated in Swiss francs into loans denominated in euros and the conversion of loans denominated in kuna with a currency clause in Swiss francs into loans denominated in kuna with a currency clause in euros. It is important to note that a currency clause is a type of clause inserted into contracts to protect the value of a monetary claim from fluctuations in the value of the currency in which the obligation is expressed.¹⁷ Also, there was another risk associated with taking loans in Swiss francs for the citizens of the Republic of Croatia, the risk of floating interest rate, which correlated with the emergence of the currency risk, thus increasing the annuity burden. Namely, the interest rate is determined by the decision on interest of each individual credit institution, and changes in interest rates are linked to changes in market conditions that determine the terms under which banks can secure financing sources on both the domestic and international markets, as well as the country's credit risk.¹⁸ Regarding the roles of the banks themselves, the damage incurred by the "injured parties" has transferred to the entire society, while the situation with Swiss francs reached proportions that altered the position of banks, once very powerful and referred to as the "state within a state", and in this context, they were treated as undesirable and neglecting, highlighting the diminishing importance of banks in relation to debtors.¹⁹ Given all the circumstances, risks, and problems faced by the citizens of the Republic of Croatia as consumers who ultimately paid ever-increasing loan annuities for loans taken in Swiss francs, on 22 July 2011, a civil initiative was launched to establish a non-profit association named "FRANAK - ASSOCIATION FOR THE PROTECTION OF CONSUMERS USERS OF FINANCIAL SERVICES" with the headquarters in Zagreb, Avenija Marina Držića 81B.²⁰ And so, in 2011, the Franak Association was founded, with over 13,000 members today, making it a

¹⁴*Ibid.*, p. 40

¹⁵The Act on Amendments to the Consumer Credit Act, Official Gazette, No. 102/2015 (hereinafter: the Consumer Credit Act)

¹⁶The Act on Amendments to the Credit Institutions Act, Official Gazette, No. 102/2015 (hereinafter: the Credit Institutions Act)

¹⁷Babić, M., *Valutna klauzula*, Obnovljeni Život, vol. 70, no. 3, 2015, p. 394.

¹⁸Buljan Barbača; Piplica, *op. cit.* note 1, pp. 41- 42

¹⁹Kačer, H.; Kačer, B., *CHF case - 2019. god., Freedom to provide services and legal security*, 15th International Conference of the Faculty of Law, University of Kragujevac, 2019, p. 154.

²⁰Association "FRANAK - ASSOCIATION FOR THE PROTECTION OF CONSUMERS USERS OF FINANCIAL SERVICES" with the headquarters in Zagreb, Avenija Marina Držića 81B (hereinafter: the Franak Association)

truly respected civil association in the Republic of Croatia. Its goal was to study the terms of disputed loans, identify illegalities, and sue the banks that had led citizens to the verge of bankruptcy, i.e. brought them to the brink of existence.²¹

3. LEGISLATIVE FRAMEWORK THAT ENABLED THE REALIZATION OF CONSUMERS' RIGHTS AND INTERESTS

The then newly established Franak Association decided to take matters into its own hands and stand up for the rights and interests of all users of loans taken in Swiss francs, as well as the rights and interests of all consumers whose rights and interests were violated by unfair conduct of banks under the guise of good business cooperation. Thus, the legislator in the Republic of Croatia, through provisions of various mandatory regulations of the Republic of Croatia, prescribed and enabled protection for all natural and legal persons whose interests and/or rights were violated in this case, through a civil litigation process, which is the general, regular, and basic method of protecting threatened or violated subjective civil rights provided by the state judicial organization.²²

The provisions of the Civil Procedure Act,²³ as well as the provisions of the Civil Procedure Act,²⁴ prescribe and regulate actions for the protection of collective interests and rights. In the provisions of Article 502(a) of the Civil Procedure Act, the legislator clearly stipulated that associations, bodies, institutions, or other organizations can file an action against a natural or legal person who, through performing certain activities or generally through actions, conduct, and omissions, seriously violates or significantly endangers such collective interests and rights, and such an action is called an action for the protection of collective interests and rights.

In the Civil Procedure Act, the legislator has also given natural and legal persons the ability to initiate special lawsuits for damage compensation or lawsuits for payment. In these lawsuits, natural and legal persons can refer to the legal finding

²¹ See <https://udrugafanak.hr/slucaj-franak-sazetak/>, 13 January 2025

²² Triva, S.; Dika, M., *Građansko parnično procesno pravo*, VII revised and updated edition, Narodne novine, Zagreb, 2004, p. 3.

²³ Civil Procedure Act, Official Gazette, No. 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011, 25/2013, 89/2014, 70/2019, 80/2022, 114/2022, 155/2023 (hereinafter: the Civil Procedure Act)

²⁴ Civil Procedure Act, Official Gazette, No. 53/1991, 91/1992, 112/1999, 88/2001, 117/2003, 88/2005, 2/2007, 84/2008, 96/2008, 123/2008, 57/2011, 148/2011, 25/2013, 89/2014 and 70/2019 (hereinafter: the Civil Procedure Act of 2019)

from the judgment that accepted the claims from the lawsuit for the protection of collective interests and rights. In that case, the court will be bound by those findings in the lawsuit in which the person refers to them.²⁵ Thus, the legislator has enabled natural and legal persons, under the provisions of the Civil Procedure Act, to file actions for the protection of collective interests and rights. Once the competent court renders a judgment that adopts the claims sought in the lawsuit for the protection of collective interests and rights, natural and legal persons can then initiate individual lawsuits in which they can refer to findings from earlier judgments.

Representative actions are generally regulated by laws that have arisen as a result of adopting the European *acquis communautaire*²⁶ into Croatian law, such as the Consumer Protection Act,²⁷ which came into force on 29 March 2014, and which prescribes various solutions regarding representative action. However, it stipulates at the same time that the protection provided by such an action is always primarily abstract in nature and aimed at a wide circle of potential authorized persons, who can, after the finalized representative action, file their individual actions.²⁸ "Procedures for the protection of collective interests and rights are applied in numerous foreign legal systems where collective protection is foreseen in similar or even same areas of law. These are areas of law where collective interests and the public interests are emphasized over individual interests, such as, for example, the interests and rights of consumers, anti-discrimination and social interests and rights, environmental protection, etc."²⁹ The introduction of these procedures should be considered as a positive development, because Croatian law so clearly recognized the necessity of introducing the protection of collective interests and rights into its legal system in adapted form, as well as many European countries³⁰. The Consumer Protection Act of 2014 enabled the protection of collective consumer interests by regulating unfair terms in consumer contracts. Therefore, in Article 49 of the Consumer Protection Act of 2014, the concept of an unfair contractual term was defined in the manner that an unfair contractual term is a term that was not individually negotiated if it causes a significant imbalance in the

²⁵ Article 502(c) of the Civil Procedure Act

²⁶ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests was included in Article 3 Consumer Protection Act, Official Gazette, No. 41/2014

²⁷ Consumer Protection Act, Official Gazette, No. 41/2014 (hereinafter: the Consumer Protection Act of 2014)

²⁸ Pavlović, M., *Tužba za zaštitu kolektivnih interesa i prava*, April 2018, <https://www.iusinfo.hr/strucni-clanci/tuzba-za-zastitu-kolektivnih-interesa-i-prava>, 20 January 2025.

²⁹ *loc. cit.*

³⁰ Pavlović, M., *Značaj tužbe za zaštitu kolektivnih interesa i prava*, Collected Papers of the Faculty of Law in Split, vol. 52, no. 3, 2015, p. 818.

rights and obligations of the contracting parties to the detriment of the consumer, contrary to the principle of good faith and fairness. According to the provisions of the Consumer Protection Act of 2014, it is considered that a particular contractual term was not individually negotiated if it was formulated in advance by the trader, for which reason the consumer had no influence on its content, especially if it pertains to a term in the trader's pre-formulated standard contract. However, if individual negotiations took place regarding certain aspects of a contractual term, or an individual contractual term, and the overall assessment of the contract indicates that it is a pre-formulated standard contract of the trader, this will not affect the possibility of assessing other terms of the contract unfair. Yet, if the trader claims that a particular contractual term in the pre-formulated standard contract was individually negotiated, he must prove it.³¹

Thereafter, the legislator prescribed such protection in the provisions of the Act on Representative Actions for the Protection of Collective Interests and Consumer Rights,³² in force since 25 June 2023. With this Act on Representative Actions for the Protection of Collective Interests and Consumer Rights, the legislator regulated the right to file domestic and cross-border representative actions in collective consumer disputes and the procedural rules based on which the court considers and decides in these disputes. Such an action, according to the Act on Representative Actions for the Protection of Collective Interests and Consumer Rights, is called a representative action. According to the Act on Representative Actions for the Protection of Collective Interests and Consumer Rights, a representative action is an action for the protection of collective consumer interests filed by an authorized plaintiff on behalf of consumers, seeking to determine that the defendant acted contrary to the provisions of the Act on Representative Actions for the Protection of Collective Interests and Consumer Rights, a ban on actions representing such violation, compensation for material and non-material damage, and/or restitution for unjust enrichment caused by that violation.³³ Currently valid Act on Representative Actions for the Protection of Collective Interests and Consumer Rights also contains provisions protecting consumer rights and interests from unfair contractual terms. It is thus stipulated that representative actions can be filed for violations of material rights included in the scope of European Union

³¹ Article 49 of the Consumer Protection Act of 2014

³² Act on Representative Actions for the Protection of Collective Interests and Consumer Rights, Official Gazette, No. 59/2023 (hereinafter: the Act on Representative Actions for the Protection of Collective Interests and Consumer Rights)

³³ Article 5 of the Act on Representative Actions for the Protection of Collective Interests and Consumer Rights

acts, including Council Directive 93/13/EEC.³⁴³⁵ Therefore, the legislative framework of the Republic of Croatia has enabled consumers to assert and exercise their rights before the competent courts in the manner envisioned by the legislator within the legislative framework, and the consumers have done so by filing numerous individual lawsuits and conducting numerous individual restitution proceedings, which resulted in judgments in favor of the consumers.

4. THE “FRANC” CASE IN THE REPUBLIC OF CROATIA

The legislator in the Republic of Croatia created a legislative framework and the foundation that enables all citizens of the Republic of Croatia to initiate class actions to realize and protect their rights and interests, due to which the “franc” case was initiated in the Republic of Croatia with the action filed by the plaintiff “Petrošić” - Croatian Union of Consumer Protection Associations in liquidation³⁶ to protect collective consumer interests against eight largest Croatian banks, based on the provisions of articles 502(a) of the Civil Procedure Act of 2019 to 502(h) of the Civil Procedure Act of 2019. The plaintiff in these proceedings sought protection of consumer collective interests by requesting the determination of the nullity of the provisions of the agreements concerning the currency clause in Swiss francs, believing that the provisions in the loan agreements that the defendant banks concluded with consumers during the contested periods, which provisions established the Swiss franc as the currency linked to the principal, were invalid. In addition to the aforementioned and in the same lawsuit, the plaintiff also sought the determination of the nullity of the provisions of the agreement concerning the regular interest rate which was variable during the term of the contractual obligations in accordance with the unilateral decisions of the defendants that were not individually negotiated, all in accordance with the provisions of the Consumer Protection Act.³⁷ The first decision adopted in the aforementioned proceedings was the judgment of the Commercial Court in Zagreb, reference number P-1401/2012 of 4 July 2013,³⁸ determining that the defendant banks violated the collective rights and interests of consumers, that is, loan users, by entering into loan agreements that contained unfair and null contractual provisions in consumer credit

³⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts of 5 April 1993, Official Journal 95, 21. 4. 1993, p. 29 (hereinafter: the Directive)

³⁵ Appendix I to the Act on Representative Actions for the Protection of Collective Interests and Consumer Rights

³⁶ *Petrošić* - Croatian Union of Consumer Protection Associations in liquidation, with the headquarters in Zagreb, Kneza Ljudevita Posavskog 48

³⁷ Consumer Protection Act, Official Gazette, No. 41/2014 and 110/2015 (hereinafter: the Consumer Protection Act)

³⁸ Judgment of the Commercial Court in Zagreb, reference number P-1401/2012 of 4 July 2013 (hereinafter: Judgment P-1401/2012 of 4 July 2013)

agreements - loan agreements - by stipulating the Swiss franc as the currency linked to the principal, and prior to and during the conclusion of the respective agreements, the defendant banks, as traders, did not fully inform the consumers of all the necessary parameters important for making an informed decision based on complete information, resulting in an imbalance in the rights and obligations of the contracting parties. Furthermore, the judgment P-1401/2012 of 4 July 2013, determined that the defendant banks violated collective interests and rights of consumers, loan users, by concluding loan agreements that contained invalid and unfair contractual provisions in consumer credit agreements. By acting in this manner, the defendant banks acted contrary to the provisions of the then-applicable Consumer Protection Act, Official Gazette, No. 96/2003, Consumer Protection Act Official Gazette, No. 79/2007, 125/2007, 75/2009, 79/2009, 89/2009, 133/2009, and contrary to the provisions of the Obligations Act.³⁹ Furthermore, by the judgment P-1401/2012 of 4 July 2013, the defendant banks were ordered to offer consumers a modification of the contractual provision that determined the principal amount of the loan obligation to be linked to the Swiss franc, and the interest rate to be variable, in such a way that the principal would be expressed in kuna in the amount that was disbursed in the loan utilization phase, and with a fixed interest rate, at the percentage that was explicitly stated in the consumer loan agreement as the applicable regular interest rate on the date the agreement was concluded.⁴⁰

The defendant banks filed an appeal against the judgment P-1401/2012 of 4 July 2013, which was partially upheld by the High Commercial Court of the Republic of Croatia, and a decision was made, namely a judgment and a ruling, reference number Pž-7129/2013 of 13 June 2014,⁴¹ by which the judgment P-1401/2012 of 4 July 2013, was modified in such a way that the request was rejected in the part related to the determination that the banks violated the collective interests and rights of consumers, loan users, by using an unfair contractual provision in consumer loan agreements, by which the currency linked to the principal was agreed to be the Swiss franc (currency clause), which was not individually negotiated.⁴²

³⁹ Judgment P-1401/2012 of 4 July 2013

⁴⁰ Judgment P-1401/2012 of 4 July 2013

⁴¹ Judgment and ruling of the High Commercial Court of the Republic of Croatia, reference number Pž-7129/13 of 13 June 2014 (hereinafter: the judgment and ruling Pž-7129/2013 of 13 June 2014)

⁴² Rončević, V., *Predmet Franak - rekapitulacija kroz sudsku praksu*, October 2019, <https://www.iusinfo.hr/strucni-clanci/predmet-franak-rekapitulacija-kroz-sudsku-praksu>, 16 January 2025.

The plaintiff and first-seventh defendants filed revisions against the judgment and ruling Pž-7129/2013 of 13 June 2014 which were rejected by the Supreme Court of the Republic of Croatia in the judgment and ruling, reference number Revt-249/14-2, dated 9 April 2015.⁴³ Subsequently, the plaintiffs filed a constitutional complaint, partially accepted by the Constitutional Court of the Republic of Croatia. The Supreme Court's decision reference number Revt-249/2014-2, dated 9 April 2015, was annulled in the part where the plaintiffs' revision against the judgment and ruling Pž-7129/2013 of 13 June 2014 was rejected. This judgment had modified the first-instance decision by dismissing the plaintiffs' claim that the defendants violated consumer rights by including an unfair currency clause in loan agreements, specifically linking the principal to the Swiss franc without individual negotiation. The annulment also applied to the part rejecting the plaintiffs' claim against the eighth defendant, sending the case back to the Supreme Court for retrial. As a result, the Supreme Court was required to reconsider the revisions, particularly regarding the disputed currency clause. The Supreme Court of the Republic of Croatia was supposed to decide again on the request to declare those contractual provisions invalid, and in the part concerning the agreed interest rate in the loan agreements with a currency clause concluded with the eighth defendant.

The Supreme Court of the Republic of Croatia acted in accordance with the instructions of the Constitutional Court of the Republic of Croatia and issued the ruling Revt-575/16-5 of 3 October 2017, in which it annulled the judgment of the High Commercial Court of the Republic of Croatia number Pž-7129/13-4 of 13 June 2014, in the part concerning the request to determine that the defendant banks violated the collective interests and rights of consumers by stipulating the currency clause linked to the principal in Swiss francs, and against the part of the judgment where the plaintiffs' claim against the eighth defendant was rejected, as well as regarding the floating interest rate and currency clause. In view of the above, the case was sent back to the High Commercial Court of the Republic of Croatia for reconsideration, with the instruction that the disputed issue, specifically the currency clause, be resolved in accordance with the legal interpretation of the Constitutional Court of the Republic of Croatia expressed in its annulment decision.⁴⁴ The High Commercial Court of the Republic of Croatia acted in accordance with the instructions of the Supreme Court of the Republic of Croatia, resulting in a new judgment, reference number Pž-6632/2017-10 of 14 June

⁴³ Judgment and ruling of the Supreme Court of the Republic of Croatia, reference number Revt-249/2014-2 of 9 April 2015 (hereinafter: Judgment and ruling, reference number Revt-249/2014-2 of 9 April 2015)

⁴⁴ Rončević, *op. cit.* note 42.

2018⁴⁵, in which the appeal of the defendant banks was rejected, and the judgment of the Commercial Court in Zagreb, reference number P-1401/2012 of 4 July 2013, was upheld. This meant that it was determined that all the defendant banks violated the collective interests and rights of consumers, loan users, by entering into loan agreements using unfair and null contractual provisions.

Hence, it was established that the banks violated the collective interests and rights of consumers, loan users, by stipulating that the currency linked to the principal be the Swiss franc, in the credit agreements, i.e. loan agreements, and, as traders, they did not fully inform the consumers prior to and during the conclusion of the aforementioned agreements about all the necessary parameters important for making an informed decision that consumers would make based on complete information, during negotiations and in relation to the conclusion of these loan agreements.

“In other words, the High Commercial Court of the Republic of Croatia, with its new decision, has determined by final judgment that all eight defendant banks used unfair and invalid provisions regarding the currency clause and the floating interest rate, as was established by the first-instance judgment of the Commercial Court in Zagreb. This is significant because now, in individual restitution proceedings, consumers have the opportunity to claim overpaid amounts on two grounds. With the change of the interest rate, which was increased over time, it is quite understandable that there was an increase in the monthly annuities that consumers were required to pay compared to the annuities that were agreed upon at the time of the conclusion of the loan agreement. As for the currency clause, it should be clarified that due to the exchange rate change of the Swiss franc, particularly its appreciation (increase in value), there was also an increase in the monthly annuity amounts, as the payment was linked to the CHF currency, whose value dramatically rose during the critical period, thus increasing the equivalent of the annuity in kuna.”⁴⁶

Finally, in the decision number Rev 2221/2018-11, dated 3 September 2019, the Supreme Court of the Republic of Croatia confirmed the determination of the High Commercial Court of the Republic of Croatia in its substantial part, namely that the banks used unfair and null provisions regarding the currency clause and the floating interest rate.

⁴⁵Judgment of the High Commercial Court of the Republic of Croatia, reference number Pž-6632/2017-10 of 14 June 2018 (hereinafter: Judgment Pž-6632/2017-10 of 14 June 2018)

⁴⁶Rončević, *op. cit.* note 42.

Thus, the result of the “franc” case is that a decision was ultimately made in favor of consumers, i.e., loan users, who now had a ruling in their favor, which they could refer to in restitution proceedings initiated by private actions, as a final decision had been made establishing that the banks used unfair and null provisions regarding the currency clause and the floating interest rate.

Such judicial practice allowed consumers to initiate individual lawsuits in which overpaid funds based on invalid contractual provisions would be returned to consumers, which funds were acquired by the credit institutions without legal grounds, as the competent courts established that the provisions were null and void. Also, it can be said that case Franak influenced the development of Croatian consumer protection law and led to numerous legislative amendments that followed in order to strengthen the duty to inform consumers about various contractual terms, particularly those concerning floating interest rates.⁴⁷ Such a result has undoubtedly contributed to increased legal certainty and enhanced consumer protection in loan agreements.

5. UNFAIRNESS TEST

The unfairness test was adopted from the Directive and implemented into Croatian legislation, and Article 55 of the Consumer Protection Act of 2014, prescribes nullity as the consequence of an unfair contractual provision. Hence, in order for a contractual provision to be considered unfair and, consequently, null and void, the following conditions must be cumulatively fulfilled:

- “1) The absence of individual negotiations of the contractual provision
- 2) Contradiction to the principle of good faith and fairness
- 3) Significant imbalance in the rights and obligations of the contracting parties to the detriment of the other contracting party/consumer
- 4) ... Endangerment of achieving the purpose of the concluded contract”⁴⁸

The first condition of the unfairness test refers to the general terms of a contract, which are pre-drafted contractual provisions for a large number of contracts, and are either contained in a form or standard contract or referred to in the contract. It is therefore considered that no individual negotiations took place regarding a

⁴⁷ Mišćenić, E., *Croatian case “Franak”: Effective or “Defective” protection of consumer rights?*, Harmonius: Journal of Legal and Social Studies in South East Europe, vol. 5, 2016, pp. 184–209, p. 206.

⁴⁸ Mišćenić, E.; Petrić, S., *Nepoštenost valutne klauzule u CHF i HRK/CHF kreditima*, Narodne novine, Zagreb, 2020, p. 100.

specific contractual provision if the provision was pre-drafted by the trader and the consumer had no influence on its content.⁴⁹ However, the scope of application is considerably broader in relation to consumer contracts because it is considered that if certain contractual provisions were individually negotiated, but the overall assessment indicates that the contract is a standard pre-formulated contract, this will not affect the possibility of assessing other provisions of that contract unfair.⁵⁰ The second condition, which must be cumulatively fulfilled, relates to the contradiction of the contractual provision with the principle of good faith, i.e., the principle of diligence and fairness, and since legal provisions do not contain explicit regulations concerning this principle, its interpretation and application come from the case law. Therefore, it is considered that the author of the general terms respected the criteria of diligence and fairness if they always acted honestly and conscientiously towards the other party and always took the other party's legitimate interests into account, meaning that the court must take into account all the different interests that arise from the agreement.⁵¹

The third condition relates to the consequence that a provision in the loan agreement causes to the weaker contracting party, i.e., the consumer, so, in order for a contractual provision to be considered unfair by the court or body assessing its fairness, the condition of the consequence of a significant imbalance in the rights and obligations of the contracting parties to the detriment of the consumer must be met. The court or body deciding on the fulfillment of this condition will, in each case, consider all circumstances existing before and during the conclusion of the loan agreement, especially the legal nature of the agreement and the type of goods or services involved.⁵² Endangering the achievement of the purpose of the concluded loan agreement relates only to the general terms of the agreement.

6. INDIVIDUAL RESTITUTION LAWSUITS OF CONSUMERS IN THE REPUBLIC OF CROATIA

After all the aforementioned decisions in the "franc" case which was initiated based on class action for the protection of consumer rights and interests, consumers, as individuals, initiated individual legal proceedings that resulted in numerous judgments by competent courts in favor of consumers, such as the judgment of the County Court in Pula - Pola, reference number Gž-283/2023-2 of

⁴⁹*Ibid.*, p. 101

⁵⁰*Ibid.*, p. 102

⁵¹*Ibid.*, p. 109

⁵²*Ibid.*, p. 121

20 April 2023,⁵³ which confirmed the judgment of the Municipal Court in Zlatar, reference number: P-367/2021-19 of 25 January 2023,⁵⁴ judgment of the County Court in Sisak, reference number: Gž-316/2023-3 of 14 March 2024,⁵⁵ which confirmed the judgment of the Municipal Court in Slavonski Brod, reference number: P-641/2021-30 of 20 April 2023,⁵⁶ judgment of the County Court in Varaždin, reference number: Gž-775/2022-3 of 4 April 2023,⁵⁷ which confirmed the judgment of the Municipal Civil Court in Zagreb, reference number P-793/2020-22 of 1 April 2022,⁵⁸ then the judgment of the Municipal Civil Court in Zagreb, reference number: P-6284/2019-45 of 6 July 2023⁵⁹ and numerous other rulings of the competent courts of the Republic of Croatia rendered in favor of consumers.

Despite the fact that a uniform case law has already been established in ongoing proceedings related to the Swiss franc currency clause and floating interest rates, some issues, such as proving the status of the consumer, have already been addressed in the practice of the Supreme Court of the Republic of Croatia. However, some lower courts are struggling with the implementation of this position and the concept of proof.⁶⁰

Thus, in lawsuits before lower courts, evidence was presented to prove the consumer status of the plaintiff by hearing personal evidence and the parties to the proceeding. For instance, in the case conducted before the Municipal Civil Court in Zagreb, reference number: P-6284/2019, the competent court also heard witnesses:

“Therefore, based on the testimony of the witness as well as the documentation enclosed with the file, the court determined that the plaintiff has proven his status

⁵³ Judgment of the County Court in Pula - Pola, reference number: Gž-283/2023-2 of 20 April 2023

⁵⁴ Judgment of the Municipal Court in Zlatar, reference number: P-367/2021-19 of 25 January 2023

⁵⁵ Judgment of the County Court in Sisak, reference number: Gž-316/2023-3 of 14 March 2024

⁵⁶ Judgment of the Municipal Court in Slavonski Brod, reference number: P-641/2021-30 of 20 April 2023

⁵⁷ Judgment of the County Court in Varaždin, reference number: Gž-775/2022-3 of 4 April 2023

⁵⁸ Judgment of the Municipal Civil Court in Zagreb, reference number P-793/2020-22 of 1 April 2022

⁵⁹ Judgment of the Municipal Civil Court in Zagreb, reference number: P-6284/2019-45 of 6 July 2023 (hereinafter: the Judgment of the Municipal Civil Court in Zagreb, reference number: P-6284/2019-45 of 6 July 2023)

⁶⁰ Metelko, I., *Otvorena pitanja u slučaju Franak*, February 2022, <https://www.iusinfo.hr/aktualno/u-sredistu/otvorena-pitanja-u-slucaju-franak-49577>, 17 January 2025.

as a consumer in this agreement, that the agreement was used for its intended purpose, that no professional activity was carried out in the subject apartment by the plaintiff, his wife, or any other family members. The defendant, as the bank and creditor, was obliged to monitor the intended use of this loan, and the defendant did not provide the court with any evidence of having noticed any irregularities related to the use of the loan by the plaintiff.”⁶¹

Since the court established that this specific Purpose Loan Agreement, a standard form agreement composed by the defendant, contains contractual provisions that were determined in the final collective dispute for the protection of consumers regarding the stipulation of a floating interest rate by the unilateral decision of the defendant, as well as the loan being linked to the CHF currency, and since the defendant, according to this court's finding, did not prove that in this specific case, the provisions in question were different in significance and content from those that were declared null and void in the final judgment of the collective consumer protection lawsuit regarding loan agreements with a floating interest rate in the previously described manner, and with the agreed loan currency linked to CHF, the court found all the defendant's objections regarding the impossibility of applying the findings from the collective dispute to this specific case unfounded in entirety.⁶² Specifically, in this case, due to the null and void provision of the loan agreement, the consumer suffered damage, and the credit institution gained financial benefit without legal basis and to the detriment of the consumer.

Additionally, in the same case, the court decided and deliberated on unfair provisions in consumer contracts, and so, in the judgment of the Municipal Civil Court in Zagreb, reference number: P-6284/2019-45 of 6 July 2023, the court took the stance that:

“It should be emphasized that at the time of concluding the subject agreement, the Consumer Protection Act (Official Gazette, No. 96/03 – hereinafter: CPA/03) was in force, which also contained provisions on unfair terms in consumer contracts. Thus, the provision of Article 81, paragraphs 2 and 3 of the CPA/03 prescribe that a contractual provision not individually negotiated is considered unfair if, contrary to the principles of good faith and fairness, it causes a significant imbalance in the relations and obligations of the contracting parties to the detriment of the consumer, especially if the consumer had no influence on its content.”⁶³

⁶¹Judgment of the Municipal Civil Court in Zagreb, reference number: P-6284/2019-45 of 6 July 2023, pp. 23 - 24, passage 88

⁶²Judgment of the Municipal Civil Court in Zagreb, reference number: P-6284/2019-45 of 6 July 2023, p. 24, passage 89

⁶³Judgment of the Municipal Civil Court in Zagreb, reference number: P-6284/2019-45 of 6 July 2023, pp. 32 - 33, passage 128

Thus, the Municipal Civil Court in Zagreb accepted the plaintiff's claim, confirming their consumer status and that the loan was used as intended. No professional activity was conducted in the apartment by the plaintiff or their family, and the bank failed to provide evidence of irregularities in the loan's use. The court also determined that the loan agreement's provisions, in terms of content, legal significance, and effect, align with those deemed null and void by the High Commercial Court of Croatia in the collective dispute regarding linking consumer contracts to the Swiss franc. It was further proven that the provisions related to the unilateral change of interest rates also matched those in the collective dispute. The burden of proof that the provisions differ or that the loan was misused lies with the defendant. Based on these findings, the Municipal Civil Court in Zagreb granted the plaintiff's claim in judgment P-6284/2019-45 on 6 July 2023.

At the session held on 31 January 2022, the Civil Department of the Supreme Court adopted the legal interpretation under number: Su-IV-33/2022-2 of 31 January 2022,⁶⁴ which clarified the application of the statutory rules regarding the statute of limitations:

“According to the revision court's understanding, the initiation of legal proceedings for the protection of collective consumer interests results in the suspension of the statute of limitations based on Article 241 of the OA/05, and the statute of limitations for individual restitution claims begins to run again only from the moment the court decision rendered in relation to that lawsuit becomes final.”

The legal interpretation of the Civil Department's session is as follows: “The limitation period in the case of a restitution claim, where the contracting parties are obliged to mutually return everything they have received based on a null and void agreement, or in the case of a claim under Article 323, paragraph 1 of the OA/05 (Article 104, paragraph 1 of the OA/91) as a result of the determination of the nullity of the agreement, starts to run from the day the court decision that determined or otherwise established the nullity of the agreement becomes final.”⁶⁵

In the spirit of the legal interpretation of the Civil Department of the Supreme Court number: Su-IV-33/2022-2 of 31 January 2022, lower courts have also made decisions, and thus, in the judgment of the Municipal Civil Court in Zagreb, reference number: P-6284/2019-45 of 6 July 2023, it was decided:

⁶⁴ Excerpt from the minutes of the Supreme Court of the Republic of Croatia, Civil Department, number: Su-IV-33/2022-2 of 31 January 2022

⁶⁵*loc. cit.*

“According to the interpretation of the Supreme Court of the Republic of Croatia in the judgment Rev-2245/17 of 20 March 2018, the initiation of civil proceedings for the protection of collective consumer interests leads to the interruption of the statute of limitations based on Article 241 of the OA/05, and the statute of limitations for individual restitution claims starts anew only from the moment the court decision adopted in relation to that lawsuit becomes final (here, on 13 June 2014).”⁶⁶

Thus, the issue of the statute of limitations has been clarified by establishing that the initiation of legal proceedings for the protection of collective consumer interests leads to the interruption of the statute of limitations, and that the statute of limitations for individual restitution claims starts anew only from the moment the court decision in response to that lawsuit becomes final. This means that the statute of limitations starts anew from the moment when the court decision regarding the lawsuit for the protection of collective consumer rights and interests is rendered.

Regarding the issue of the statute of limitations for restitution claims in cases where the nullity of the agreement is established in general, the limitation period begins to run from the day the court decision that establishes or otherwise recognizes the nullity of the agreement becomes final. In cases where the nullity is established already in the collective consumer protection proceedings, the limitation period starts to run from the day the court decision confirming the nullity in the collective protection process becomes final, and this also applies to the legal consequences of the action for the protection of collective consumer interests and the parties involved in that procedure.

7. PROCEDURE BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION

The Court of Justice of the European Union has made several decisive rulings, such as:

Judgment - 62019CJ0081 of 9 July 2020. In case C-81/19, regarding a request for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania), made by decision of 27 December 2018, received at

⁶⁶ Judgment of the Municipal Civil Court in Zagreb, reference number: P-6284/2019-45 of 6 July 2023, p. 32, passage 127

the Court on 1 February 2019, in the proceedings NG, OH against SC Banca Transilvania SA;⁶⁷

Judgment - 62017CJ0051 of 20 September 2018 in case C-51/17, regarding a request for a preliminary ruling under Article 267 TFEU from the Fővárosi Ítéltábla (Regional Court of Appeal, Budapest, Hungary), made by decision of 17 January 2017, received at the Court on 1 February 2017, in the proceedings OTP Bank Nyrt., OTP Faktoring Követeléskezelő Zrt. against Teréz Ilyés, Emil Kiss;⁶⁸

Judgment - 62017CJ0118 of 14 March 2019. In case C-118/17, regarding a request for a preliminary ruling under Article 267 TFEU from the Budai Központi Kerületi Bíróság (Central District Court, Buda, Hungary), made by decision of 9 January 2017, received at the Court on 7 March 2017, in the proceedings Zsuzsanna Dunai against ERSTE Bank Hungary Zrt, (hereinafter: C-118/17);⁶⁹

Judgment - 62018CJ0452 of 9 July 2020. In case C-452/18, regarding a request for a preliminary ruling under Article 267 TFEU from the Juzgado de Primera Instancia e Instrucción No 3 de Teruel (Court of First Instance and Preliminary Investigations No 3, Teruel, Spain), made by decision of 26 June 2018, received at the Court on 11 July 2018, in the proceedings XZ against Ibercaja Banco SA.⁷⁰

In short, the judgments in these cases decided as follows: in case C-81/19, it was determined that if the subject is void, the law must regulate it as void for the law to apply; in cases C-51/17 and C-118/17, the court established the nullity, within which there is no act of the parties that would exclude the right to the difference they are economically owed between the establishment of nullity and full compensation. In case C-452/18, it was decided that an agreement with a void

⁶⁷ Judgment - 62019CJ0081 of 9 July 2020. In case C-81/19, regarding a request for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania), made by decision of 27 December 2018, received at the Court on 1 February 2019, in the proceedings NG, OH against SC Banca Transilvania SA, (hereinafter: C-81/19)

⁶⁸ Judgment - 62017CJ0051 of 20 September 2018 in case C-51/17, regarding a request for a preliminary ruling under Article 267 TFEU from the Fővárosi Ítéltábla (Regional Court of Appeal, Budapest, Hungary), made by decision of 17 January 2017, received at the Court on 1 February 2017, in the proceedings OTP Bank Nyrt., OTP Faktoring Követeléskezelő Zrt. against Teréz Ilyés, Emil Kiss, (hereinafter: C-51/17)

⁶⁹ Judgment - 62017CJ0118 of 14 March 2019. In case C-118/17, regarding a request for a preliminary ruling under Article 267 TFEU from the Budai Központi Kerületi Bíróság (Central District Court, Buda, Hungary), made by decision of 9 January 2017, received at the Court on 7 March 2017, in the proceedings Zsuzsanna Dunai against ERSTE Bank Hungary Zrt, (hereinafter: C-118/17), (hereinafter: C-118/17)

⁷⁰ Judgment - 62018CJ0452 of 9 July 2020. In case C-452/18, regarding a request for a preliminary ruling under Article 267 TFEU from the Juzgado de Primera Instancia e Instrucción No 3 de Teruel (Court of First Instance and Preliminary Investigations No 3, Teruel, Spain), made by decision of 26 June 2018, received at the Court on 11 July 2018, in the proceedings XZ against Ibercaja Banco SA (hereinafter: C-452/18)

subject but treated as valid, thus failing to meet the transparency criterion, cannot be considered valid in the context of the Directive⁷¹. Therefore, it is evident that Croatian courts, even before the Court of Justice of the European Union, took a stance, correctly, lawfully, and fairly applied the legal provisions prescribed in the Republic of Croatia, demonstrating the alignment of Croatian legislation and judiciary with the spirit of the European Union.

8. CONCLUSION

Like many others, citizens of the Republic of Croatia took loans in Swiss francs, hoping for a better future, as these loans were presented as one of the most favorable financial products available on the market at the time. What they couldn't foresee was the prolonged struggle for their basic rights and fairness in contracts. Given that average consumers were in an inferior position to banks and had far less knowledge than bank employees, they trusted the banks, which only provided information deemed sufficient to get them to agree to the loan terms. Based on this selective information, consumers entered into loan agreements in Swiss francs. Such conduct by banking institutions calls into question the fairness of the contractual relationships formed between the banks and consumers, which ultimately proved to be unfair and has been described in literature as white-collar crime, given the nature of employment and the social status of the contracting party who sought to exploit the consumer's inferior position using their vast knowledge and experience. It became clear and obvious to consumers that they were paying larger and larger loan annuities for loans taken in Swiss francs, which was ultimately the result of exchange rate risks and the risk of floating interest rates which changed through unilateral decisions made by the banks. Moreover, the Croatian Supreme Court confirmed that the unilateral change in interest rates, without predetermined criteria, was illegal.⁷²

It is clear that the banks have failed consumers and that they have gained unjustified material benefits for themselves through their dishonest business practices. Although the courts have declared the provisions on the CHF currency clause and the floating interest rate null and void in their decisions, thus restoring faith in the Croatian judiciary and legislative system to a certain extent. However,

⁷¹ Tomić, M. C., *Applicability of EU Court decisions on the conversion agreements (C-81/19 and C-452/18)*, July 2020, <https://www.iusinfo.hr/aktualno/u-sredistu/primjenjivost-odluka-suda-eu-a-na-sporazume-o-konverziji-c-81-19-i-c-452-18-42240>, 17 January 2025.

⁷² Kačer, H.; Ivančić Kačer, B., *Problemi poznati kao CHF case u 2016. god. - quo vadis CHF*, in: *Services and service rules*, proceedings from an international scientific conference, Kragujevac: Faculty of Law, University of Kragujevac, 2016, p. 190.

we are still witnessing the ongoing proceedings before the Constitutional Court of the Republic of Croatia, in which a decision needs to be made on the consumer's right to have the CHF contract declared null and void in its entirety, while at the same time there are EU Court decisions from which it can be concluded that the CHF contract is null and void in its entirety. Therefore, there is a certain level of trust in the judiciary, but the author believes that faster and more efficient conduct of court proceedings and decision-making by the courts of the Republic of Croatia in accordance with the existing decisions of the Court of Justice of the European Union would certainly improve and contribute to strengthening citizens' trust in the independence and responsibility of the judiciary and legislative system, because this would, among other things, ensure a high degree of legal responsibility on the part of the banks themselves, which in the event of the nullity of the entire contract in Swiss francs would have to return to the consumer everything they acquired based on such a null and void contract in its entirety.

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