The Abusive Character of the Contractual Clauses Currency Risk Clause

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Abstract

If a financial institution grants a loan in a foreign currency, it must provide the borrower sufficient information to adopt a cautious and informed decision. Thus, the professional must transmit the targeted consumer any pertinent information allowing the latter to assess the economic consequences of a clause upon his/her financial obligations. The requirement that a contractual term be clearly and comprehensibly drafted enforces, moreover, that the contract transparently expose the actual operation of the mechanism referred to by the respective clause. Possibly, the contract must also highlight the relation between this mechanism and the one provided by other clauses, so that the consumer be in a position to assess, based on specific and comprehensible criteria, the economic consequences that arise on his/her part. This issue needs to be examined by the Romanian court, taking into account all pertinent facts, including the advertising and the information supplied by the lender, when negotiating a loan agreement. Specifically, the obligation to verify whether the consumer was informed about all elements which may have an effect on the extent of his/her obligation, and which allow him/her to assess the total cost of his/her loan lies with the national court. Thus, on the one hand, the borrower must be clearly informed that, by concluding a loan agreement in a foreign currency, (s)he is exposed to a currency exchange risk which might be economically difficult for him/her to assume, in case of the devaluation of the currency in which (s)he receives his/her income. On the other hand, the banking institution must submit the possible variations of the foreign exchange rates and the inherent risks of contracting a loan in a foreign currency, especially if the borrowing consumer does not receive his/her income in the respective currency. C.J.U.E. emphasized that, if the banking institution did not fulfil these obligations and one can therefore examine the abusive character of the litigated clause, the task to assess, on the one hand, the possible non-compliance of the bank with the good-faith requirement and, on the other hand, the existence of a possible significant imbalance between the contracting parties lies with the national court. This assessment must be made in relation to the time of conclusion of the contract under consideration and taking into account especially the expertise and the knowledge of the bank on the possible variations of the exchange rates, and the risks inherent in contracting a loan in a foreign currency. In this regard, the Court stressed that a contractual term may involve an imbalance between the parties which might only occur during the execution of the contract. Furthermore, let us not forget that, only with the enforcement of the Directive 2014/17/ UE, the obligation (by art. 6. Cap.2) to ensure the financial literacy of the consumer was imposed on the States. “Member States promote measures that support the education of the consumers on the responsible loan- and debt management practices, especially regarding the mortgage contracts. Clear and general information is needed on the credit granting process, in order to provide guidance to consumers, especially to those who contract a mortgage for the first time. Furthermore, information is needed on the guidance that can be provided to the consumers by consumer organizations and national authorities.

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