

## **Swiss Franc Loans and Unfair Behavior of the Banks in Croatia**

# **First Collective Redress in Croatia**

### **Short Exposition by Nicole Kwiatkowski**

This short exposition will be review of the practical experience from the first collective law action arisen on the base of the Consumer Protection Act.

Transparency principle essentially means that the merchant, when advertising, bidding and contract concluding with a consumer shall present his goods and services in a transparent way, and enter the business relationship transparently too.

The principle of informing the consumer will also be met if the consumer obtains all the required information in order to be able to make economically correct decision, or the decision that will not be to the detriment of his interests of economic, financial, material or any other type.

There should be born in mind that the consumer is always the weaker contracting party, often insufficiently informed, as a rule, of an inferior education, influenced by advertising and urged to meet his needs.

Therefore, due to consumer protection, it is of a great importance to have well-regulated legislative frame, the concern of state institution, civil sector and all the subjects of market competition.

The collective civil action is one of the ways to protect the collective rights and interests. This institute has been introduced into Croatia's legal system only in 2003 and 2009 by means of the regulations on consumer protection and discrimination forbidding.

General legal frame for initiating the procedure of the protection of collective rights and interests in Croatia has been regulated by means of the Code of Civil Procedure while the collective action for consumer rights protection has been regulated by means of the Consumer Protection Act.

In that way the position of an individual was strengthened through abstract protection that has been rendered in the proceedings the associations or institutions authorized for it.

In that way the general land individual consumer protection is provided without exposing an individual to an expensive and uncertain judicial procedure.

Croatian legislation prescribes an obligation, prior to initiating a collective action, to send a written warning to a merchant or another person that an action will be filed against in case if it would not stop the unpermitted behavior.

The consumer disputes, on the occasion of collective civil action, are under jurisdiction of commercial courts.

The court decision by means of which the merit of a claim is examined defines on the act of law and interests violation. Thereafter such behavior is ordered to stop; the identical proceeding is forbidden and the damaged is ordered to be removed, and the time limit is defined within which the defendant shall adjust its behavior.

Such a court decision obliges the third persons and other courts. The position of consumers would be much more difficult if the abstract protection rendered in collective disputes would not be directly achievable in concrete legal proceedings.

The same means that after sustaining the claim by the court, or after establishing the violation of collective rights, the particular consumer has the right to refer to such a decision of the court and request the damage compensation. Therefore, such a court decision makes obliging the legal base in particular dispute for damage compensation.

Lawsuit was filed in April 2012. at the Commercial Court of Zagreb. The claimant was trying to show evidence of unfair behavior of the Banks during informing their clients, explanation of contracts and completing contracts, concerning household loans denominated in Swiss Francs.

The raise of Swiss Franc value against Croatian Kuna combined with high interest rates increased of monthly loan payments for those loans by an average of 220 Euros (an average salary in Croatia is 730 Euros).

In 2011. when the Swiss Franc was at its highest value there were around 100.000 Swiss Franc denominated loans. The claimant was showing arguments that those house hold loans are unfair contracts in which all the risks are transferred to the side of the debtor while the Banks are earning extra profit. Inadequate regulation of financial sector and weak institutional control over Banks are the main source of the debt crisis.

The main problem of those contracts was two clauses concerning variable interest rate without any definition of variable parameters behind interest rate variation (such as LIBOR, EURIBOR) and denomination in Swiss Franc.

Most of the contracts had the clause that interest rate is variable without any other qualification. This meant that the banks could change the interest rate whenever they wanted, only informing their clients about the change. The other important consequence of unregulated interest rate contracting was that the low interest rates were used for aggressive marketing purposes.

Banks literally advertised housing loans on discount, with interest rates below 4 %, knowing that they could increase them shortly after the contract is signed. This resulted in rapid Swiss Franc expansion, characterized by the fact that the banks almost never warned their clients about the extent of the risk behind the combination of the floating of Swiss Franc exchange rate and variable interest rate.

Discussion on the first day of this trial was about what was the collective interest:

- How to define whether certain behavior of a merchant endangers the collective rights, or the question is only of endangering the rights of a larger number of individuals
- How seriously should be endangered the rights of consumers by the acts and behavior of merchants against which the complaint is filed in order to proclaim the same behavior as endangering.

The Court took the stand that this was Collective interest. Continuing the trial the claimant presented evidence of unfair behavior of the Banks, such as several contracts for each Bank, hearing of witnesses (consumers) which had taken household loans from those Banks.

In addition, claimant presented marketing commercials and advertisement for those loans, relevant information given by the Croatian National Bank (Institution supervisor and regulator of commercial banking behavior) which had shown that those Banks were in debt in Swiss Francs towards other commercial Banks. The defendants never presented any evidence on their behalf during the whole trial.

The Commercial Court ruled that those commercial banks are guilty of unfair behavior and that those clauses concerning interest rates and denomination in Swiss Francs are not valid. In addition, those Banks should denominate those loans to Kuna, that variable interest rate must be fixed and it must be reestablished to those default values in the time when those contracts were signed.

Banks issued appeal to Higher Commercial Court of Republic of Croatia. Higher Commercial Court issued rule that the interest rate clause is not valid but it should not be fixed and that the clause about denomination is valid because the clause is clear and easily understandable for any average consumer. The rule had been issued after one year in session of Higher Commercial Court. The issuing date was July 2014.

Both Claimant and defendants filed for revision to Supreme Court of Republic of Croatia. In summer of 2015, Supreme Court of Republic of Croatia issued rule that confirmed the rule of High Commercial Court of Republic of Croatia.

Both parties filed constitutional lawsuit to Constitutional Court of Republic of Croatia against the ruling of Supreme Court of Republic of Croatia.

Constitutional Court of Republic of Croatia issued conclusion in December of 2016. Court dismissed Banks lawsuit complain, and confirmed consumers complain.

Constitutional Court of Republic of Croatia established that Supreme Court had double standards in their conclusion regarding variable interest rate and denomination in Swiss Francs regarding valuate clause.

Therefore, Constitutional Court accepted the relevance of case study of EU Court – ruling number C-26/13 from 30th of April 2014. Regarding interpretation and application of paragraph 4. Verse 2. Of directive 93/13/EEZ.

Constitutional Court emphasize that EU Court had pointed out that the paragraph of directive 93/13/EEZ should not be interpreted in grammatical sense, but that consumer must be explained about reasons and mechanisms so that consumer can comprehend economical effects of their decisions.

Double standards, that is inadequate explanation of criteria which lead Supreme Court in different approach in comprehension(fairness) of contract clause on variable interest rate and contract clause concerning valuate clause, are especially important if we have in mind that we are dealing with consumer credits that were connected with two important exchangeable elements – valuate clause and variable interest rate. Court should have included and rule if the consumers had been aware about the economic consequences of that high-risk arrangement.

Those were the main reasons for the Constitutional Court to dismiss the ruling of Supreme Court and to return the case to Supreme Court for new decision.

In the meantime, individual consumers had filed individual suits in which they are claiming overpaid amounts due variable interest rates.

The rulings are in the favor of consumer and we are hoping that the Supreme Court Decision will be in favor of consumers and that the Banks should also pay overpaid amounts due the valuate clause.