RISK COMMISSION. FROM MONEY LENDING TO BANK LOANS

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Abstract:

The objective of this paper is to study the significance of the word commission, with special emphasis on the risk commission of bank institutions in relation to the legal requirements enforced by lawmakers, thus highlighting the abusive nature of this type of commission introduced in loan contracts, also making a short history of bank activities.

Taking into account the chaotic legal background as well as the various misleading information sent to the population by means of the media to trigger a state of confusion determining inexperienced bank customers with good credit history and scoring to observe all contract clauses, I deem that it is necessary to make a thorough study of these bank commissions from the perspective of Law no. 193/2000 on abusive clauses concluded between commercial operators and consumers and especially according to the Government Emergency Ordinance no. 50/2010 on loan agreements for consumers.

Moreover, by virtue of these regulations I wonder what is the impact of the article 969 and 970 of the Civil Law which enforce the principle of pacta sunt servanda or of the provisions of article 15 paragraph 2 from the Constitution which lays down the principle of law's retroactive application.

Another significant issue is that of the time when loan agreements are concluded, the consumer's position being completely unequal to that of the bank; these are adhesion contracts whose clauses are pre-established by the lender without providing the other contract party the opportunity to change or remove some of these clauses.

Keywords:

risk commission, Government's Emergency Ordinance 50/2010, abusive clause, loan agreement, administration fee

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In the Middle Ages, in the Romanian principalities, there were no banks. Loan operations were performed by moneylenders and money changers. Moneylenders were merchants whose main activity consisted in giving money loans to those who needed them. Money changers were merchants who dealt especially with changing very different coins that were in circulation. The great variety of coins that simultaneously circulated asked for specialty knowledge for establishing the value of each coin in part. That is how money merchants, the money changers have appeared. Money changers' abuses due to monetary anarchy reached the climax during the Phanariotes who tried to establish some rules regarding money trade, but without significant results. Money changers also performed money loan operations. The interest perceived by the borrower was called usury. Later on, when the level of the interests has been regularized, the notion of "interest" had a pejorative character, moneylender designing the creditor who perceived interests much higher than the legal ones.

Moneylenders conferred loans only with guaranties that always surpassed loan value. Guaranties were personal when one or more persons (guarantors) granted loan repayments in the specified time; on the contrary, moneylenders had the right to reclaim from them what the debtor owes to him. The guaranties were real when the debtor gave a part or the totality of his goods to the moneylender: cows, crops, movable and immovable properties. Not repaying in time the debt gave the creditor the right to acquire these goods. Sometimes the peasant debtor retained himself to the lord and if he did not succeed to repay the loan, he could lose his freedom by becoming enslaved: peasant laborer, servant or serf.

On April 1880 there was adopted the Law for the founding of the National Bank, inspired from the Law for organizing and functioning of the Belgian bank. The legal nature of the bank pertained to an anonymous joint stock company, the state participating with 1/3 to share capital. The law limited the number of votes of a shareholder to maximum 10, no matter of the number of the acquired shares. The shareholders with lesser shares did not have the right to vote. The bank provided operations similar to other banks of emission in the west and backed up the interests of the two classes: bourgeoisie and the land owners (Turcu, I.,(2008) : 80 - 81).

At the beginning, for a few years, the bank offered loans granted with interests that were much over the value of the discount credits. Usually, it should offer credits on short time for industry and trade, the anticipative bill to a bank being a more serious guaranty than the estate payoff. In so doing, the bank did not succeed to maintain a healthy equilibrium between cash needs of the company and banknotes emission. In time, the guaranteed advances granted with titles have decreased and re-discounting increased. The capital loaned from the bank was not destined anymore to consuming, as in most cases in the past, but for production and circulation, that is for industry and trading. The National Bank contributed to decreasing interests that were over 15%, while the

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anticipative tax varied between 4 and 6%, leading to the significant reduction of the current interests (Gionea, V.,(1993) : 110 – 112).

Nowadays, banks act as veritable money lenders.

First, it is very eloquent the example in which obtaining a credit is conditioned by both a real immovable guaranty[1] and a movable guaranty[2] .

In this situation, the risk is covered by the fact that non-accomplishing the contractual obligations of the borrower means that the bank has the guaranty of the immovable mortgage. Also, the bank can not justify which is the risk presented by the borrowers who have a stable profession and a constant income superior to the national medium one, as well as an age that does not compromise accomplishing the contractual relations. In this way, the risk of the contract is carried by the borrower who in the case of culpable non-accomplishment of the contractual obligations may lose the mortgaged immovable in favor of the bank. Consequently, in the case of a credit with mortgage, the contractual risk pertains to the one who obtains the credit, to the borrower and to the one who guarantees, but not to the bank. It is not the bank that loses, because for it was instituted the guaranty in the guise of an immovable mortgage. Therefore, in the case of non-accomplishing the contractual obligations, the bank does not take any risk, it will execute the mortgage, so the bank will be the indemnified party. The one who loses the immovable is the borrower, so he/she is the one who supports the risk.

Hence it appears that the bank has all the material guaranties for covering an eventual nonpayment of the loan on the client's side.

Almost all the time the financial disequilibrium produced to the co-contractors consists in the fact that they are obliged to pay to the bank, during the entire length of the contract, an amount with title of risk commission, sum which is exorbitant in comparison with the value of the credit, representing, for example, a fifth of the effective contractual loan, in the conditions in which credit repayment is integrally granted in favor of banks through real movable and immovable guaranties.

Considering the above mentioned, risk commission appears to be an abusive clause, from the perspective of art. 4 alin. 1 of Law no. 193/2000. The risk is not shared between bank and client, it is entirely borne by the client, who has to bear a supplementary tax – risk commission, and in the case of non-accomplishing the contractual obligations, it is still the client the one who will lose the mortgaged immovable in favor of the bank.

Moreover, the new regulation, O.U.G. no. 50/2010 complements the previous rules, by enforcing the idea that a risk commission is an abusive clause. Thus, in art. 36 of O.U.G. no. 50/2010 are established the limits of the

[1] For example, a mortgage on a good – consumer's property

[2] Cession of the insurance policy in favor of the bank for covering all the risks for the immovable goods that represent the immovable goods

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commissions that may be perceived by the bank. Risk commission is not included in this limitative enumeration. Consequently, risk commission is abusive, and the new legislative provisions do not do anything else than removing vague provisions from the previous legislative rules.

The Constitution consecrates in paragraph 2 of art.15 a principle of law with a indisputable tradition, actuality and justice, that is law non-retroactivity. There is no doubt that once adopting a law it produces and must produce the legal effects only for the future. This for the simple reason that the law is addressing to persons, allowing or forbidding and, of course, executing the abnormal attitudes. It is absurd to ask a person to be held liable for a conduct that is previous to entering into force of a law that governs this conduct. The person could not anticipate what the legislator intends, and his behavior is normal and natural if it is developed within the effective rule of law. The principle of non-retroactivity is expressly formulated in the Civil Law under which "the law rules only for the future; it does not have retroactive force" as well as in Civil Law in art. 11 under which "penal law is not applied to the facts that on the date of their commitment were not envisaged as infractions." Upon the principle under which the law produces legal effects only for the future were imposed in the legal practice and of course in legislation, two big exceptions and namely the one regarding applying milder penal law and the one regarding interpretative laws. Paragraph 2 art. 15 provides only excepting the more favorable penal law. The other hypothesis remains valid, being at the disposal of the State authority that has the attribution of general-compulsory interpretation of laws. But this hypothesis is not an exception from law non-retroactivity because the general – compulsory interpretation, as any interpretation in fact, defines the meaning of the interpreted rule, if does not add or modify this meaning, but clarifies it, depending on the diversity of situations ruled by the interpreted rule. Thus, through interpretation are defined the contents that the interpretative rule had *ab initio*. Any application act of a rule of law presupposes its previous interpretation, in order to establish whether it is or applicable or not to the considered legal situation. The general-compulsory interpretation guarantees the compulsoriness of such an interpretation in order to cure interpretation conflicts, produced or that are possible to produce. Usually, such an interpretation regards the authority that emitted the rule, but this – especially if it is the legislative authority – may add to the rule, in defining purposes, some new subsidiary rules; in this case it is necessary to distinguish between what means interpretation – stricto sensu – and what represent new rules that even if consecrated with the purpose of ensuring a more strict application of the law, are applicable only for the future, striking the principle of non retroactivity.

By observing the law system during its evolution and actuality, paragraph 2 of article 15 highlights a transformation of a legal principle into a constitutional one. This transformation has important legal significations. Therefore, non retroactivity of the law, as constitutional principle is compulsory

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for all the fields of law, with no exception, not only for those that figure it explicitly. Then, besides the exception established by Constitution, no other exception produces limitations of this constitutional principle any other contrary legal provisions that need to be considered non constitutional and can be attacked through constitutionality control. The principle of law non-retroactivity is presented as a fundamental guaranty of the constitutional rights, mainly of liberty and person's safety. The value and actuality of the principle are incontestable and of notorious, any attenuation meaning a removal or a limitation of human rights and liberties (Muraru I., Tanasescu S., (2001) : 180-185).

Emergency ordinance 50/2010 transfers into the Romanian legislation the European Directive 48/CE/2008, among the most known provisions of the rule act being removing anticipate reimburse commission to credits with variable interest and calculating the interest according to a transparent reference index, to which is added a fix margin that can not be modified upon the initial contract. The European Directive is a collection of principles, but not of rules immediately applicable. In what concerns consumer protection, the member states have the right to insert in their own regulations more favorable dispositions than the ones that are present in the directive.

The ordinance is legally perfect, the effects produced by it exist and can not be intervened upon them. Retroactivity means that to a situation that finished the effects before entering into force of a law is applied the new law. But now we speak of contracts that were entered into force in the moment of ordinance enacting and that will enter into force after 25 or 30 years. We speak of law enacting to a present and future legal situation.

On the same line, article 95, paragraph 1, of the order states that the provisions of this normative act also apply to credit contracts under way, as the creditors have the obligation to change the contracts with the purpose of making them compliant with the new regulations, within a delay of 90 days after the urgency order becomes applicable, an obligation that is not fulfilled by the banks that illegally aim at transforming a risk commission into a handling commission by closing an additional act.

Levying a new commission is rather absurd and is against the provisions of article 40, paragraph 3, and article 95, paragraph 4, of UGO 50/2010 that forbids the application, in additional acts, of other provisions than those in the mentioned urgency order, and the introduction in additional acts of any provisions other than those stipulated in the normative act are considered null (no article of the order imposes the introduction, during the applicability of a credit contract, of the handling commission), of article 35 paragraph 1, letter b, which *forbids, during the applicability of the credit contract, the introduction and levy of new commissions not stipulated in the contract*, except for the costs corresponding to supplementary services expressly requested by the consumer and that were not mentioned in the contract, an exception that does not apply to the respective credit

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conventions, of article 36, which forbids the creditor to levy a risk commission. The mere modification of the name of the risk commission abusively stipulated in credit conventions to handling commission, but not that of the substance of this commission (the additional act does not provide the same definition of this commission as the already closed conventions), cannot make this commission legal.

The risk commission is not the exchange value of a banking service provided by the bank together with the given loan, nor a cost associated to the contract for the provision of supplementary services, but, in fact, the defendant has a supplementary income to that represented by the contractual interest, hidden under the name of risk commission, an earning that has not been taken into account upon closing the contract.

For a better illustration of the financial banking strategies, as well as of the bank dishonesty, we can also resort to usage credits whose "interest" is masked by a monthly handling commission of the credit that increases significantly, doubling or even tripling its value within a short time frame, although the amount of the debit decreases.

The major problem is that these contracts are liability contracts, their clauses being pre-established by the lender, without allowing the borrower the possibility to modify or remove any of these clauses. The banking customers find themselves in the impossibility to negotiate any clause of the contract, as the entire act is imposed as such by the bank. According to article 4, last paragraph of Law no. 193/2000, the bank still has the obligation to prove in court that it has directly negotiated this clause.

Liability contracts are created by one of the parties – the contracting party, which, often, has monopole rights[1] or a de facto monopole[2] in what concerns the legal operations and the provisions that make the object of the respective contracts. This explains why, sometimes, it is possible for the most economically powerful party to impose their viewpoint, establishing its own law, which triggers the risk to create a disadvantage for the weaker party. Therefore, with the purpose of protecting the great majority of the population, the state intervenes and sets certain rules and limitations that the party that determines the contents of the liability contracts has to meet. There are also some positive aspects of the liability contracts, represented by practical advantages. The certainty of the established clauses, the simplification of the closing procedure, the time and means savings, all lead to accelerating the closure of the contracts, insuring the speed of performance of the legal operations, in other words, of the civil circuit (Pop, L., (1994) : 43 – 44).

[1] For example, radio television, gas, water, electricity, sanitation, etc.

[2] For example, insurances, maritime and fluvial transport, sales of new vehicles and of other new goods of sustainable use

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A contractual clause will not be considered as directly negotiated with the consumer if it has been established without giving the latter the possibility to influence its nature, such as standard pre-formulated contracts or the general sales conditions applied by the provider on the market of the respective product or service. The fact that some aspects of the contractual clauses or only one clause has been directly negotiated with the consumer does not exclude the application of the provisions of the present law to the rest of the contract, in case that a global evaluation of the contract proves that it has been unilaterally pre-established by the provider.

By not conditioning in any way the elements that allow the bank to unilaterally modify the current contractual interest or commission, by not indicating any criterion that would give the bank this right, leaving it at its own evaluation to increase the interest or the commission, this type of clause flagrantly contravenes to the legal provisions applicable in this context, causing a direct prejudice to the borrower.

The clause that gives the bank the right to unilaterally modify the interest/ commission is not related to a specific, individualized indicator, and this factor is generically mentioned as "the financial context at the national and international level", and it is impossible to deny that the financial market evolves differently according to the index to which the relation is made.

This expression makes the interpretation of the respective clause to favor exclusively the bank, serving only its own interests, without giving us the possibility to check if the increase is judiciously imposed and if it is necessary and proportional to the purpose aimed.

There are situations in which a relation is made to the reference interest of the Central European Bank, which is decreasing, although at the same time the reference interest of the Bank of America is increasing.

Therefore, such a clause without a precise indicator established beforehand gives the bank the possibility to change the interest as it wishes.

The abusive flagrant nature as well as the dishonest application of these clauses by the bank are illustrated by the way in which these contracts are applied, as the bank manifestly infringes the contractual provisions and does not communicate the modifications that occur during the credit applicability.

Moreover, the clause also infringes the legislation of the community, being against the provisions of articles 3 and 4 of Council Directive 87/102/CEE, of December 22, 1986 regarding the harmonization of legal, regulatory and administrative provisions of the Member States concerning the consumer credits.

By wavering from the provisions of common law concerning fines, the observing body is not entitled to apply the law but, according to article 13 paragraph 1 of Law no. 193/2000, the court is the one that applies the sanction, ruling at the same time, sanctioning damages, the modification of the contractual clauses when the contract remains applicable.

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In what concerns "the law of the parties"[1] [2](Le Galcher-Baron, M., Droit civil.Les obligations., Troisieme Edition, F.P.V. Preparation Francais Lefebvre 15, Rue Viete, 15, Paris –XVII) – the legally established conventions have the power of laws between the contracting parties – it is never incident because only the conventions that comply with the legal norms are compulsory for the signatory parties, according to the provisions of article 969 of the Civil Code, which is not the case for the abusive clauses inserted in credit conventions.

In what concerns the responsibility of the bank, it relies first and foremost on the contract closed with its customer, being thus a contractual liability (Turcu, I., (1994) : 53-55). Banks intermediate between those who have a need for financing and those who have a cash surplus or saving results. The banker is seen as a money and credit speculator, whose job is to receive money funds from the public and use it to its own interest. This idea is related to risk as well as to liability.

The inferior position of the customer is compensated (at least in theory) with the increased responsibility of the bank, placed on a power position.

In what concerns the crediting activity, the responsibility of the bank starts where the normal performance of this activity ends. Among the obligations of the bank is the obligation to inform, which obviously implies the liability of the bank in case it does not comply. Banks are forced, all along the crediting operation, to inform their customers on the quantum of their interest, commissions, expenses, and other due accessories (Turcu, I., (1994) : 42- 58).

It is natural for the present generation to wish to benefit as much as possible from the comfort provided by the production and services of contemporary economy. At the same time, however, the development of production and services imposes an encouragement of consumption, so that it is difficult to establish if production stimulates consumption or if the consumers' demands give an impulse to production. The access to these goods and comfort conditions is facilitated by credits.

In order to be able to speak of the existence of real democracy in the life of a country, to prevent political groups from abusively taking over the lead of the tasks in the state, the focus needs to be set on the monetary mechanisms. The proofs are irrefutable. Money gives a lot of power, a power that becomes dangerous (Negrea, R., (1990): 7-9).

[1] See art. 969 and art. 970 from Civil Code

[2] Article 1134 of the French Civil Code, la force obligatoire du contrat a l'egard des parties

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