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Consequences of the CJEU Ruling of 3 October 2019 on Swiss Franc Mortgage Loans for Polish Borrowers

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***Abstract*—The article discusses the effects of the recent ruling of the Court of Justice of the European Union (the CJEU), regarding the impact of abusive contractual provisions included in the foreign currency loan contracts on the legal effectiveness of the entire contract. The position of the CJEU may trigger the necessity to modify and unify the previous sentencing guidelines. Moreover, it may become necessary to revoke some final judgements in cases of individual borrowers that have been issued so far. The author analyses the direction the case law will take after the CJEU's ruling and its impact on cases which have already been closed.**

Index Terms— foreign currency loan, credit recipient, consumer, borrower, ruling

I. INTRODUCTION

On 3 October 2019 the Court of Justice of the European Union issued a long-awaited by Polish borrowers ruling in case ref. number C-260/18 concerning mortgage loans indexed to Swiss franc. It is worth considering what effects this ruling will have for a wide range of Polish consumers who have taken out such loans. It turns out that those effects can be far-reaching not only for the future but they will also impact previously binding judgments issued in complaints filed by borrowers before the ruling of the CJEU was made public.

II. THE POSITION OF THE CJEU

The ruling in question was based on the case of Polish citizens, the Dziubaks, who entered into a mortgage agreement with a bank. The value of their loan was expressed in Polish zlotys (PLN) but indexed to a foreign currency-Swiss franc (CHF), with a loan term of 480 months (40 years). The rules for indexing this loan to a foreign currency were established in the bank's Regulations of a mortgage and they were written down in the loan contract. Regulations provided that the disbursement of a loan in question was to be made in the Polish currency according to the exchange rate not lower than the Polish-Swiss currency purchase rate in accordance with the exchange rate table in force at the bank at the moment the loan was released, wherein the balance of the loan debt is expressed in the Swiss currency based on this rate. According to Regulations, monthly instalments of a repayable loan were expressed in the Swiss currency and, on the day of their maturity, were taken from the bank account maintained in the Polish currency, due to the Polish-Swiss currency sale rate given in the exchange rate table. The Dziubaks filed an action with the court to annul the loan contract claiming that provisions regarding the indexing mechanism are abusive because they allow the bank to set the exchange rate freely and arbitrarily. As a consequence, the same bank unilaterally determines both the loan balance expressed in the Swiss currency and the amount of loan installments expressed in the Polish currency. The plaintiffs argued that the removal of these contractual conditions made it impossible to determine the applicable exchange rate, so that the contract could no longer be binding for the parties. Alternatively, they indicated that the contract could survive but without the abusive indexation clauses, based on the loan amount specified in the Polish currency, and the interest rate specified in the contract calculated on the basis of the variable LIBOR rate and the bank's fixed margin.

Hearing the case of the Dziubaks, the Warsaw District Court suspended the proceedings and submitted the following questions to the ECJ for a preliminary ruling on the issue:

– Does Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts and particularly art. 1 clause 2 stipulating that the contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive and art. 6 clause 1 stating

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that Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms allow to assume that in a situation in which as the result of announcing that some contract terms which determine the way of performing obligations by the parties are abusive and the entire contract collapses which is unfavourable for the borrower, it is possible to fulfil loopholes in the contract not based on a disposable provision constituting an explicit replacement of an unfair clause, but on the grounds of provisions of national law which provide for supplementing the effects of a legal act expressed in its content, and also by effects arising from the principles of equity (principles of social coexistence) or customary arrangements?

- Should an assessment of effects of the entire contract's failure on the consumer take into account the circumstances existing at the time of the conclusion of the contract or at the moment the dispute regarding alleged abusiveness of a clause arose between the parties. Another question concerns the significance of the viewpoint expressed by the borrower during such a dispute.
- Is it possible to maintain in force provisions which in line with Directive 93/13 constitute unfair contract terms if the adoption of such a solution would be objectively beneficial to the consumer at the time the dispute is resolved?
- In the light of the content of art. 6 clause 1 of Directive 93/13, does recognition of abusive contractual terms determining the amount and manner of performance by parties lead to a situation in which the shape of the legal relationship determined on the basis of the content of the contract excluding the effects of the abusive terms, will deviate from the intended performance agreed by the parties? Does the recognition of a contractual provision as unfair mean that it is possible to maintain other provisions which are not considered abusive and which specify the main performances of the consumer and whose shape agreed by the parties (as they were introduced into the contract) was inextricably linked to the provision challenged by the borrower?

According to the CJEU, art. 6 clause 1 of Directive 93/13, which basically only requires removal or amendment of the offending term and the contract as such remains in force, should be interpreted as follows:

- there are no obstacles for a national court, after determining the unfair nature of certain terms of a loan contract indexed to a foreign currency and bearing an interest rate directly related to the interbank rate of a currency, to accept that in accordance with national law a contract cannot apply without such conditions because their removal would change the nature of the main subject matter of the contract,
- in the light of the article it is impossible to fill the gaps in a contract which arose after removal of the abusive terms solely on the grounds of general national provisions which stipulate that the effects expressed in the content of a legal act are supplemented, in particular, by effects arising from the principles of equity or established customs, which do not constitute disposable provisions or provisions which apply should both parties agree to them,
- the article does not allow to maintain abusive terms in a contract if their removal would lead to the annulment of that contract, and the court claims that such an annulment would have adverse effects for the consumer, if the consumer would not agree to maintain such a contract in force.

Additionally, the CJEU stated that on one hand, the effects arising from the annulment of a contract in its entirety must be assessed in the light of circumstances existing or foreseeable at the time the dispute arose, and on the other hand, the expediency of such assessment can only be determined by the will of the borrower.

III. IMPACT OF THE RULING ON THE FUTURE LINE OF JURISPRUDENCE IN POLAND

Until now, in Polish judicature there have been three lines of jurisprudence regarding the impact of the abusiveness of currency valorization clauses contained in franc loan contracts: according to the first line, if the valorisation clause is announced as non-binding, the loan starts to be based on a fixed rate or the loan ceases to be a currency-indexed loan (it is payable in the original nominal amount expressed in a foreign currency or even in Polish zloty); according to the second and most radical line, the loan contract becomes void in its entirety; while pursuant to the third line, the contract is still valid and is still based on variable indicators (interest rate or indexation), however, the abusive contractual mechanism of currency changes should be replaced with indicators based on principles of equity (Karasek-Wojciechowicz, 2018 and the case law cited therein).

Taking the above into account, it must be now considered what consequences the ruling of the CJEU will have for Polish judicature? As regards the first jurisprudence line discussed above, it should be noted that the first valid judgement of a Polish court has already been passed after the relevant ruling of the CJEU became known. The Court of Appeal in Warsaw in the judgment of 14 October 2019 (ref. number VI ACa 264/19) stated that the loan contract in question is valid, however, the loan is 'transformed' into a loan in the Polish currency. Yet, it has not been decided whether and how the loan would bear interest (Słowik, 2019) (Siatkowski, 2019). The written reasoning for this ruling is not made public yet but it has already been criticized by representatives of the banking sector who pointed out that courts, in the process of reshaping contracts which were signed years ago, should determine which behaviour of the parties was rational at the time of concluding

the contract. Therefore, the solution which assumes reclassification of the agreements into loans granted in Polish zloty is surprising, because a decade before none of the parties to the contract would take into account the option of granting and taking such a variant of the loan. Additionally, no bank would ever enter into a loan contract without interest or at an interest rate much lower than the market average (Słowik, 2019). The District Court for the Capital City of Warsaw issued a similar judgment (which at the moment of writing of this publication is not valid yet) which states that borrowers are bound by the content of the contract which is left after the removal of the abusive currency valorisation clauses, and thus, they are bound to return the capital in the Polish currency in instalments calculated according to the LIBOR rate for the Swiss currency since the moment the loan was disbursed (Domagalski, 2019).

With reference to the second line of jurisprudence supporting the invalidity of the contract, it can be observed that this line was represented by some courts before the ruling of the CJEU was issued (e.g. the judgment of the Court of Appeal in Katowice of 19 January 2018, I ACa 632/17). After the judgment of the CJEU it is difficult to predict whether courts will continue to use the option of annulment. It is worth noting that the ruling of the CJEU shows that it should be up to the borrower to decide whether the effect of abusive currency clauses should have a more far-reaching effect (declaring invalidity of the entire contract) or will only give rise to the need to fill the gap arising as a result of removing the abusive clause e.g. through 'transformation' of the loan into a loan in a national currency. However, the annulment of the contract does not mean that consumers will not be required to return any sum to a bank. The District Court in Warsaw correctly remarked in its judgment of 22 August 2016 (case ref. number III C 1073/14) that *when a loan contract is declared invalid the borrowers are entitled to claim for refund of all amounts of money paid to the bank in connection with their performances of the loan contract, and the bank may claim for repayment of the loan amount, which does not preclude mutual deduction of those monetary obligations. The reimbursement of actual mutual benefits does not exhaust all claims that may be made in such a situation. The fact that the borrower utilises capital without paying remuneration in the form of commissions and capital interest may be considered as a source of unjustified enrichment (corresponding to the fair cost of raising capital) and the bank may claim reimbursement of these resources*. Undoubtedly, the obligation to return the total sum of the loan may exceed the financial capability of the consumer, that is why, it is often more beneficial for the borrower to reclassify the loan into a loan payable in Polish zloty.

When it comes to the third jurisprudence line, it will certainly be marginalized. The ruling of the CJEU states clearly that a gap in a loan contract arising after removal of abusive clauses cannot be supplemented by reference to equity principles or customary arrangements. It should be noted that this line of jurisprudence had not been marginal before as demonstrated by judgements of e.g. the Supreme Court. A judgement of 14 May 2015 (II CSK 768/14) stated that declaring the entire content of a loan contract as abusive does not allow to obtain the proper legal effect in the form of determining the existence and the size of borrowers' debt to the bank due to interest capital in the period covered by the lawsuit because as the result it becomes impossible to verify this debt due to the rejection of economic parameters for calculating the amount of interest provided in contested clauses, and thus, the legal possibility of determining and recognizing a contractual obligation which the bank could have violated. According to the Supreme Court, there are two basic elements of the content of the challenged clause regarding the interest rate change i.e. the part referring to the criteria for determination (verification) of the interest rate during the duration of the credit relationship (parametric or economic element), and then the statement that the change in the interest rate on a loan may be introduced 'when the changes of the mentioned parameters occur' (decisive, competence element). Thus, the Supreme Court concluded that if only a part of the challenged clause is considered abusive, the remaining part of the clause remains valid i.e. its parametric element. According to the Supreme Court, the role of an expert is to determine whether the bank was guided by the most rational, economically justified and verifiable factors in determination of the level of final interest debt of borrowers. This means that an expert should verify the bank's conduct in the area of defining the variable interest rate with prior determination that the bank had a contractual obligation to properly divide (repartition) an increase or decrease of the interest rate level between parties.

IV. IMPACT OF THE CJEU'S RULING ON PREVIOUS VALID JUDGMENTS

As a result of the expected substantial modification and unification of the Polish case law in the so-called franc loans matters, it is necessary to consider the significance of the CJEU's rulings for relevant judgments which have been issued so far and to prepare appropriate mechanisms for potential challenging of legally binding judgements. The existing legal judgments representing the third line of reasoning discussed above will become marginalized after the ruling of the CJEU. If they are not legally binding they will be raised by means of ordinary legal remedies. However, valid judgments in which the gap in the contract was filled with reference to the principles of equity, social coexistence or customary arrangements will constitute a problem because for them the deadline for filing a cassation appeal has already expired. The problem is really serious because revoking such judgements may be beneficial for both borrowers and lenders. The same problem applies to cases in which borrowers lost their lawsuits to the banks. It should be noted that the current provisions of the code of civil proceedings regarding the resumption of proceedings, do not provide the possibility of resumption caused by the subsequent decision of the CJEU in an issue relevant to a given case. This is a significant oversight of the legislator, especially that such a regulation exists in the administrative court proceedings. Pursuant to art. 272 § 3 of the Act of 30 August 2002 on proceedings in administrative courts (Journal of Laws of 2019, item 11, 934) it is possible to request resumption of proceedings

also if such a need arises from a decision of an international body operating on the basis of the international agreement ratified by the Republic of Poland. Therefore, parties can make a complaint about the unlawfulness of a final judgment. Although, in this case certain restrictions may apply e.g. a two-year time limit for filing counted from the date the judgment became final, which means that this measure cannot be used with respect to earlier judgments. Another restriction applies to judgments of the second instance courts, against which a cassation appeal was lodged and to judgements of the Supreme Court. Plaintiffs can also take advantage of the new institution of the extraordinary complaint described in provisions of the Act of 8 December 2017 on the Supreme Court (Journal of Laws of 2019, item 825). Notwithstanding, the right to use this measure is also limited by time (the time frame here is 5 years). Furthermore, an extraordinary complaint may only be lodged by authorized bodies (e.g. the Prosecutor General, the Ombudsman, the Financial Ombudsman) and cannot be based on allegations which were the subject of consideration of a cassation complaint that was accepted for consideration by the Supreme Court. It seems that the most appropriate way to revoke final court judgments regarding franc loans should be resumption of proceedings but this would require legislative changes.

V. CONCLUSIONS

The discussed ruling of the CJEU may constitute a significant challenge for Polish jurisprudence and for the legislator. First of all, it will be necessary to adapt the jurisprudence to the position of the CJEU and develop appropriate concepts regarding the possibility of revoking previously valid judgments which are not in line with the opinion expressed by the CJEU. The latter issue may require legislative changes as the construction of the currently existing extraordinary appeals may not be sufficient. Also consumers and their proxies will be forced to make important decisions about how to formulate their demands for possible lawsuits. The ruling of the CJEU clearly states that the will of the borrower is the decisive factor regarding the possibility of keeping a loan contract in force after removal of the abusive clauses, however, such decision should be thoroughly considered because finding total ineffectiveness of a contract will not always be the more favorable solution for borrowers.

VI. REFERENCES

Domagalski M. (2019). Frankowicze: pierwsze wyroki po orzeczeniu TSUE, Rzeczpospolita of 9 October 2019. Available at: http://www.rp.pl

Judgement of the Court of Appeals in Katowice of 19 January 2018, I ACa 632/17. Available at: Portal Orzeczeń Sądów Powszechnych-http://www.orzeczenia.ms.gov.pl

Judgement of the District Court in Warsaw of 22 August 2016, sygn. akt III C 1073/14. Available at: Portal Orzeczeń Sądu Okręgowego w Warszawie-http://www.orzeczenia.warszawa.so.gov.pl

Judgement of the Supreme Court of 14 May 2015, II CSK 768/14, Legalis.

Karasek-Wojciechowicz I. (2018). Wpływ niedozwolonego charakteru klauzuli na związanie stron umową, Transformacje Prawa Prywatnego no 2/2018.

Ruling of the Court of Justice of the European Union of 3 October 2019, ref. C-260/18. Available at: http://www.curia.europa.eu

Siałkowski K.(2019). Frankowiczki kontra bank. Jest pierwszy prawomocny wyrok po orzeczeniu TSUE, Gazeta Wyborcza of 14 October 2019. Available at: http://www.warszawa.wyborcza.pl

Słowik P. (2019). SA: Kredyt frankowy to kredyt złotowy, Gazeta Prawna of 15 October 2019. Available at: http://www.gazetaprawna.pl