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## **LEGAL ASPECTS OF LOANS DENOMINATED IN SWISS FRANC**

### **Introduction**

The great financial crisis of 2007-2008 still has a negative impact on numerous Polish citizens and is revealing banking practices that are harmful and costly to the population. The operations of banking institutions seem to be far from serving the economy and they do not finance a significant, socially justified and indispensable project that is important for many individuals willing to improve their living conditions. Banks still strive to make speculative profits that will be beneficial only to a sparse number of the privileged individuals at the expense of citizens. The necessary solution in this situation is to ensure a balanced control over banks and to make them subject to public control within the framework of a public banking system that acts for the general interest. Coordinated measures should be taken in the whole Europe to eliminate the burden of illegal debt resting on the disadvantaged group, especially of the debts associated with Swiss franc loans which were used by banks as a tool of unfair procedures. The loans, which constitute a significant percentage of the GDP, made Poland consider further possibilities concerning the assessment methodology of the “franc issue” impact on the functioning of the state, but above all on the financial position of defrauded individuals<sup>1</sup>.

### **1. Historical background and the genesis of the problems of Swiss franc borrowers**

Before the Europe’s financial crisis, banks sold loans in Swiss francs on a very large scale. Poland is a country which is still getting used to this form of the limited property right. Numerous Poles who set up loans were the first in their families to do so and they did not know several rules governing this type of obligation. A long-term system transformation process resulted in the lack of opportunities and – first of all – of the commitment of the state authorities

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<sup>1</sup> A. M. Fischer, P. Yesin, *Foreign currency loan conversions and currency mismatches*, Swiss National Bank, Zurich 2019, pp. 2-14.

to educate Polish society in the area of crediting, particularly of foreign currency loans<sup>2</sup>.

The role of the state, particularly of the government is an unmeasurable factor as regards combating unfair practices of banks which, using all possible legal administrative as well as manipulative and psychological measures, try to act to the disadvantage of their customers. Starting from 2015, the Polish authority of financial supervision induced the banks to offer non-zloty mortgage loans by forcing them to allocate part of their profits as capital buffers. The idea was to encourage banks to a “voluntary” conversion of Swiss franc loans on terms that would be acceptable by borrowers. This approach did not work, which caused frustration among mortgage borrowers and initiated further court cases. In 2016, the lawmakers debated provisions on help for Swiss franc borrowers but they finally abandoned the idea of forcing banks to convert the loans, which would cost them billions of zlotys. One of the thousands of lawsuits concerning unfair loan practices went to the European Court of Justice in Luxemburg and was settled on October 3, 2019. The ruling of the highest court of the European Union indicated that if Polish courts consider mortgage credit agreements unfair, the EU law will not stop their nullity. This decision was considered a partial victory of mortgage borrowers but its implementation depends on national court and there may be significant consequences for banks if Polish courts follow the guidelines of the EU Court of Justice<sup>3</sup>.

Government administration units should focus on making sure that the indicated responsibility of mortgage borrowers for the mortgage should be limited to the value of the purchased property. This idea follows the American model. However, its implementation may paralyze the mortgage market or at least significantly increase the mortgage costs. In some states in the US the mortgage borrower can terminate the agreement and transfer to the bank the property which is financed by the mortgage. Even if at a given moment the property value is lower than the mortgage value, the bank cannot require more money from the borrower. Such a solution decreases potential risk on the client’s side (the client can never lose more than a flat or a house) but at the same time it increases the bank’s risk. Nevertheless, banks in the USA are still willing to offer mortgage at a comparatively low cost. This is possible as American regulations accept a much quicker eviction process compared to Poland<sup>4</sup>.

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<sup>2</sup> A. Kotowicz, *Ocena wpływu na sytuację sektora bankowego i polskiej gospodarki propozycji przewalutowania kredytów mieszkaniowych udzielonych w CHF na PLN według kursu z dnia udzielenia kredytu*, Urząd Komisji Nadzoru Finansowego, Departament Bankowości Komercyjnej i Specjalistycznej oraz Instytucji Płatniczych, Warszawa 2013, pp. 3-13.

<sup>3</sup> *Raport – Kredyty frankowe, strony sporu i ich argumenty*, Centrum Grabskiego, Kraków 2017, pp. 31-59.

<sup>4</sup> *Każdy kredyt hipoteczny to dla kredytobiorcy tykająca bomba zegarowa. Jak ją rozbroić?*, <https://subiektywnieofinansach.pl> (Accessed: 21.08.2021).

The state should not arbitrarily change agreements in favor of the borrowers but supervise banks so that they do not abuse their powers. That is why the Office of Competition and Consumer Protection should investigate abuses in agreements and the Ombudsman should point at possible mediation methods and through a network of Regional Ombudsman Offices and information centers disseminate in society the knowledge of legal measures available in the applicable law. All business and legal entities having an influence on the rules of the financial market should have a decisive impact on the environment and support the actions of individuals who want to recover the money that they are entitled to. However, this is not merely a material issue but a psychological one. These problems are existential and often lead to dramatic decisions. That is why education of people who experience this type of financial phenomena is crucial in developing clear paths of action that give hope in a successful solution of the problem. All kinds of public administration entities, the state government as well as local government units should organize meetings with legal and economic specialists to convince Swiss franc borrowers that they are deeply supported through legislative assistance and to provide them with educational support making aware of and warning against future threats from banks. Some countries have already passed legislation to protect consumers and small business owners while others are considering such action<sup>5</sup>.

Considering the issue of Swiss franc cases, which are complex themselves, one should also remember about the overload of courts. Franc cases constitute a substantial part of cases in civil divisions of courts in Poland. Moreover, political situation increases legal chaos and has a negative impact on judges as well as – even more importantly – on the citizens that are affected by unfair bank practices. Their actions violate the values of the Code of Banking Ethics and first of all of the consumer rights. The whole correspondence with banks should be scrupulously collected, which may significantly lead to the success of future settlements. When complete documentation is received, it is recommended that mediation activities are started as the initiation of amicable measures is an important element of modern means of resolving conflicts. This will benefit loan borrowers as they will be able prove that a consensus could not be reached despite conciliatory attempts<sup>6</sup>.

Franc loan cases are quite a challenge to judiciary as their economic complexity and particularly their individual character make them difficult to consider in courts. In spite of the

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<sup>5</sup> *Sprawozdanie – wspólna kampania RPO i RF we współpracy z UOKiK skierowana do „Frankowiczów” 2016-2017* (Accessed: 29.12.2017), Rzecznik Praw Obywatelskich, Warszawa 2018, pp. 1-10.

<sup>6</sup> *Ibidem*.

fact that their cases are pending, the aggrieved borrowers still pay instalments that are unfairly calculated, which results in substantial overpayments. One should not forget about the discrepancies in the jurisprudence which often affect the duration of the procedures and often require an in-depth verification of the facts. According to the report prepared by the Polish Judges Association *Iustitia*, at the end of 2019 there were twice as many unsettled cases in court offices than in 2015. It should be strongly emphasized that it is necessary to introduce reforms in the current judicial system, focusing first of all on the interest of citizens, for whom everyday political struggles frequently constitute a barrier to an effective pursuit for justice in their cases<sup>7</sup>.

Thanks to the work of specialists in private consultancies and, above all, law offices that focus on helping people who have a dispute with banking institutions, it is possible to calculate the estimated damage or disadvantages of a typical loan and make comparisons between a liability in a foreign currency and a conventional one. Law offices that employ people with the required experience and analytical skills bring hope for a successful solution of the loan issue, for receiving the money owed as well as the recovery of other costs that the borrower had to cover as part of the proceeding against the bank. The cooperation with consultancies develops the awareness of the clients and people interested in the subject. Importantly, legal advisers do not only use instruments strictly focused on confrontation but, first of all, they try to use all conciliatory methods. This is an important didactic form for both parties and gives a chance to launch mediation measures which are becoming a modern and more and more frequently applied alternative method of dispute resolution in the legal and financial area. Such legal offices have a direct contact with the client and they build mutual trust. The consultants are not only professionals but also, in a way, therapists who through an in-depth analysis of the cases specify appropriate types of conduct and forms of contact with the opposite party<sup>8</sup>.

One should not neglect a significant role of the broadly understood media whose activities often introduce misinformation distorting rational attitude to issues related to Swiss franc loans. Media apply a series of interconnected techniques where the picture or arguments are presented to support their particular interests. This tactics may include the use of logical errors, psychological manipulations, overt deception, rhetorical or propaganda mechanisms, and often involves the suppression of information or points of view by displacing them and forcing people

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<sup>7</sup> Interview with Dr. Tomasz Spyra, attorney-at-law and partner in SPCG Legal Office, *Orzecznictwo sądóww sprawach frankowiczów wciąż jest niejednolite*, Raport Specjalny, Horyzonty Bankowości 2019, No. 3 (308), Kraków 2019.

<sup>8</sup> A. Gospodarowicz, A. Nosowski, *Zarządzanie instytucjami kredytowymi*, C.H. Beck, Warszawa 2016, pp. 1-14.

to stop listening to some arguments, or simply directing attention elsewhere. This is why one should be extremely careful with the media which, even from an insignificant information on the subject, attempt to create conclusions that support their opinions. Media, as one of the major sources of global information, should not only present true content but also educate. One should be careful and analyze scrupulously all the information given by TV, radio and the Internet, above all. This concerns, for example, the cases of mortgages denominated in CHF because after the recent numerous judgements of both Polish and European institutions, there was an unlimited optimism among the public, which automatically influenced the ones who were personally interested in the subject. The judgement of the European Court of Justice of October 3, 2019, in the Dziubak case C-260/18 and the judgement of the Supreme Court of November 7, 2019, case IV CSKA 13/19 on the annex to the loan agreement on currency conversion into Swiss francs were events that could significantly affect the perception of the pending cases and the over-idealization of the current procedures. A commonsense approach to the above issues is necessary as Polish judiciary institutions treat each case of the franc loan agreement individually and judges, guided by their own ideological values as well as political and legislative preferences, may negatively surprise the parties of the proceedings. The current activities of the media destroy the idea of effective legal education of people who are interested in the subject of credits<sup>9</sup>.

## **2. Loans indexed to the CHF in Europe**

The issue of Swiss franc loans does not only raise concerns in Poland but it is also discussed in Europe, as evidenced by countless cases pending before continental courts. As a result the issue enjoys great media attention. The essence of court ruling of the European Court of Justice is the need for the borrowers to be informed about the risk associated with foreign currency loans. There is a substantial number of cases where borrowers have paid the original loan amount but the banks are claiming extraordinary returns from their bank charges. The need for legislative regulation for Swiss francs loans is evident. The best scenario would be for banks to offer a risk-sharing solution with less liability to the borrower and for cases to be settled out of court. The damage suffered by banks are discernible in contrast to the harm experienced by the borrowers which is evidenced and demonstrated in a series of judgements

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<sup>9</sup> M. Halawa, *Kategorie moralne w społecznym życiu kredytów frankowych w Polsce*, Instytut Filozofii i Socjologii Polskiej Akademii Nauk, *Prakseologia* nr 159/2017, IFiS PAN i Akademii Leona Koźmińskiego, Warszawa 2017, pp. 1-25.

by European courts. The questions that are routinely asked during court hearings on franc loan cases are whether only the borrowers suffered financial losses by changing the exchange rate to Swiss francs, whether the banks providing the loan were affected by a part of this loss and how this affected the bank's profit. The answers to these questions are given by the Central European Bank, which obliged the banks transacting in foreign currencies, including Swiss francs, to take security measures. They were, however, ineffective and resulted in losses for both parties. One should mention here that the so-called Black Thursday, i.e. January 15, 2015, when the Central Bank of Switzerland made the decision to free the franc exchange rate was the day that had a dramatic impact on the financial position of the Europeans. The on-going increase in loan instalments reached a ridiculous level. It should be pointed out that the International Monetary Fund informed banks in a timely manner about the approaching revaluation of franc and because of this the European Systemic Risk Board was established. The Board concluded that in some EU member-states there was an increase in the number of foreign currency loans in a foreign granted to borrowers who were not secured against currency risk. If crediting institutions had provided (as they should have done) the consumers with protection from exchange rate risk, the present problems of both the borrowers and the banks would not have appeared. The borrowers should have been informed precisely and in detail on the consequences of a foreign currency loan. The bank should be obliged to reveal potential exchange rate fluctuations particularly when the borrowers do not have income in a particular foreign currency<sup>10</sup>.

### **3. Differences in the economic potential of EU countries as a factor affecting the number of liabilities in a foreign currency**

The weakness of CEE currencies during the crisis increased the risk of foreign currency debts. Such debts can protect the exporters' cash flow but households with no foreign currency income may face a sudden increase in mortgage servicing cost. It turned out after the analysis of "franc" cases that foreign currency loans in Europe, particularly in the previous East-block countries, were greater than expected. Secondly, the scope of foreign currency loans in each country depended on the ratio of savings to the currency volatility. This may explain why borrowers in some countries took loans mainly in euros or the local currency while in other

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<sup>10</sup> S. Savvides, *Cyprus: The Whole Truth About Loans In Swiss Francs*, <https://www.mondaq.com> (Accessed: 12.09.2021).

countries Swiss francs were preferred. Thus, interest rate policy and the exchange rate influenced the demand for foreign currency debts. The supply adjusted to the situation, e.g. Swedish banks lent euros to the Baltic states, while German, Italian and American bank branches offered Swiss franc for example to Poland and Hungary. As interest rates in many CEE countries were permanently higher than in Switzerland and the euro area, national and foreign banks started selling mortgage loans in foreign currencies, mainly in Swiss francs and euros. Due to lower interest rates, these loans proved to be significantly cheaper and easier to obtain than loans in national currencies. The scope of foreign currency loans in our part of Europe can be largely explained by the demand side. Private borrowers preferred the savings from foreign currency loans to the risk of an increase in debts in the national currency. Considering interest rates in occidental currencies, the compromise reflected the policy differences in “emerging” Europe both in terms of setting interest rates and managing currencies. Due to a significant presence of foreign owned banks, the experience of EU-CEE countries from outside the euro area proved that dealing with the issue of foreign currency loans and the excessive increase of loan activities was difficult on the national level and the role of the state was significantly limited. This leads to the conclusion that a broadly coordinated action with the participation of national supervisory entities is necessary to solve the problem both on the subsidiary and the consolidated level. However, one should not forget that most of the EU member-states in the CEE region which are not in the euro area are in the period of catching up with the Western leading countries and have insufficient national financial resources. In these countries a substantial influx of foreign capital is natural and foreign currency loans are a crucial financing source of real investment. This is why it is particularly important to find optimal balance between foreign currency loan-related risk and the desired economic growth and then to develop a policy that will eventually result in the replacement of foreign currency loans by national currency loans while avoiding a crisis<sup>11</sup>.

#### **4. Proconsumer rulings of European courts**

On 26 February 2020, following an investigation that lasted more than ten years and a trial lasting a few days, the Paris Criminal Court found BNP Paribas Personal Finance guilty of misleading commercial practices and the concealment of this offence. The verdict by the President of the XIII Chamber of the Paris Criminal Court, Cecile Ramonatxo ordered BNP-PF

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<sup>11</sup> P. Yeşin, *Foreign Currency Loans and Systemic Risk in Europe*, “Federal Reserve Bank of St. Louis REVIEW”, St. Louis 2013, pp. 219-233.

to pay compensation to 2 300 clients who brought civil action. The court believed that the bank provided its clients, either directly or through intermediaries, with inaccurate and false information. It was pointed out that the bank followed a marketing approach rather than the desire to provide the borrowers with reliable information. In March 2008, the French banking giant started offering mortgage loans in Swiss franc through its subsidiary Personal Finance. The loan product, designated *Helvet Immo* was finally sold to over 4600 borrowers until December 2009. The formal attraction to the borrowers was also the interest rate which was lower than that in the national currency. There was another reputed advantage. As the loans were directed to the purchase of rental properties, they were considered a perfect and safe investment for retirement. However, the monthly payments for these loans were to be denominated in euros just as the final capital payment. BNP decided to sell the product only through intermediaries, which potentially reduced its liability. The initial marketing document included the warning against the fluctuations of currency exchange rates but it disappeared in subsequent versions. Marketing documents consistently emphasized that the product is safe and risk-free. On 29 March 2017, the French Court of Cassation ruled that BNP could have prevented the issue of the dangerous product. The court also ruled that a typical loan contract contained “unfair contract terms” which strategically favored the creditor. The ruling is consistent with EU consumer law and can be applied by the CEE aggrieved borrowers in their own proceedings<sup>12</sup>.

Another case concerns Hungary, where unlawful banking activities took place. On 29 March 2008, the Kasler family concluded an agreement with a Hungarian bank on a mortgage loan denominated in a foreign currency. The agreement stipulated that the determination of the amount of the loan in Swiss francs was to be made on the basis of the exchange rate applicable to calculate the amount of the loan at the time it was made available (the buying rate). The amount in Hungarian forints for each monthly payment was to be determined on the day before the payment on the basis of the exchange rate applied by the bank to sell Swiss francs. In 2014, the Court of Justice of the European Union ruled in favor of the aggrieved client who had a foreign currency mortgage loan. That was also confirmed by the Hungarian Supreme Court. In Hungary, credits were granted in euros so when the forint lost value, mortgage borrowers could not afford the payments. The ruling of the Supreme Court of Hungary (*26/13 Kásler Árpád, Káslerné Rábai Hajnalka v OTP Jelzálogbank Zrt.*) had a significant legal impact. The

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<sup>12</sup> E. C. Frety, *French court severely condemns BNP Paribas subsidiary*, <https://www.ibanet.org> (Accessed: 14.07.2020).

pressure from the aggrieved loan borrowers forced the government to pass a law setting an exchange rate equating the forint with the euro. Financial institutions from the OTP Bank group appealed against this law to the Hungarian Constitutional Court which found the banking entity's application inadmissible, which was then confirmed by the European Tribunal of Human Rights which received a letter alleging violation of the principle of equality and property rights<sup>13</sup>.

The use of capital remains an important issue as for the parties interested in the “franc issue” it may become an area where banks will want to search processual advantages. However, also in this case the consumer in most of the options appears to have a dominant position. After suing the bank by the consumers, the CJUE in case *C-301/18 Thomas Leonhard v. DSL-Bank* decided that under an invalid agreement the clients are not entitled to the remuneration for the funds used but only to the capital and interest repayment. Considering Polish cases, the seemingly unfavorable ruling gives Polish loan borrowers the possibility of legal protection against the counteroffensive of banks which, after the decision on the annulment of the loan agreement and the reimbursement to the consumers of all the costs resulting from the obligation under the final ruling, will refer to the concept of non-contractual use of capital. The aforementioned ruling restores some kind of contractual balance, which results in the lack of penalty on the consumer and puts the entrepreneur in a difficult position when the illegality and abusiveness of some clauses is confirmed<sup>14</sup>.

## Conclusions

The great financial crisis of 2007-2008 revealed practices of financial institutions that are harmful and very costly for the European community. Coordinated measures should be taken across the whole Europe to remove the burden of illegal debts from the shoulders of weaker citizens, this particularly regards Swiss franc loan agreements. Legal situation of the European loan borrowers whose liabilities are strictly related to CHF or euro has a significant impact on the economic position of European countries. It should be a priority to find legislative solutions that would effectively help counteract the emergence of liabilities in the form of unlawful

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<sup>13</sup> Press release on the ruling of 30.04.2014 ., C-26/13 Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt, *Consumers who contract a loan in foreign currency must be able to assess the economic consequences of the application of a rate of exchange (the selling rate) to the repayment of the loan which is different from that applicable to the calculation of the amount of the loan when it is made available (the buying rate)*, Official website of EC, <https://ec.europa.eu> (Accessed: 30.04.2014).

<sup>14</sup> Judgement of the EU Court of Justice of 4 June 20202 in case No. *C-301/18, Thomas Leonhard v. DSL-Bank – eine Niederlassung der DB Privat- und Firmenkundenbank AG*.

agreements and result in stopping simultaneous bankruptcies of banks in cases when a substantial depreciation of national currencies makes it impossible for borrowers to service their loans. State administration entities, private entities as well as media are very important sources of legal assistance in the area of mortgage loans. Nevertheless, the consumers as entities for whom effective pursuit of claims is of major importance should constantly acquire information concerning their situation.

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## **Abstract**

The article discusses the problem of mortgage loans indexed to the Swiss franc, which is an important issue for the Polish society. The choice of the topic resulted from the author's professional experience who wants – as a person committed to help people with complicated financial and legal situation and often with existential problems – to present the most significant

issues that may make it possible to settle disputed situations that involve not only the interested parties but also government bodies. It should be emphasized that there are numerous articles that refer directly to Swiss credit loans and present mathematical data describing the genesis of the problem; however, they do not deal with legal and psychological aspects and lack opinions and the assessment of the situation of the parties involved. The analysis of the issue was based both on national and European regulations. The author made use of Polish and English language sources, using such research methods as observation and induction in order to present conclusions that seem to the greatest extent to correspond to the actual state of the problem through in-depth observations from the entourage of entities that are directly interested in the final resolution of conflicts in the area of foreign currency loans, particularly of Swiss franc loans. The article presents current economic problems in Poland which have a significant impact on the development of associate groups that are active in the public space aiming to influence both banks and state authorities through political and legal measures and to help people with unlawful loans. On the basis of the above factors a thesis was formulated that conflicts relating to loan agreements denominated in Swiss francs are becoming one of the most important socio-political issues in Poland whose legal significance is high and the need of explication is constantly increasing due to varied rulings. The role of public administration and private entities as well as of media has its significance as they, using various communication instruments, should resolve conflicts that appeared in recent years between Swiss franc loan borrowers and the banks.

Another issue mentioned in the article is the reference to differences in this area between West European and East and Central European countries. The article presents one of the most significant problems of the Polish present-day society which became a victim of a cruel loan mechanism due to illegal activities of banking institutions. Based on the above factors, a supplementary thesis was created that EU regulations play an important role regarding cases pending in the Polish justice system and the rulings in Swiss franc cases are mostly favorable to consumers.

***Key words***

Loan, bank, currency, crisis, loan borrower.