CHF denominated loans – a case study of Montenegrin approach

PhD. **Nikola DOŽIĆ**[1]

Abstract

Montenegro has harmonized its legislation with EU consumer protection directives during its ongoing accession negotiations. However, in view of the CHF denominated loans issue, harmonization in financial services sector came too late. To that end, the main objective of this paper is to present the case study of Montenegrin "solution" to this problem, as well as some of the key problems this "solution" has caused. The reactions of the Montenegrin Parliament, amendments and new legal texts relating to consumer protection, which were the product of the Parliaments frenetic legislative activities carried on the wings of public's outrage with this case, are scrutinized. In that regard, all the problems that followed the "Montenegrin solution" are critically examined and along with those some of the most interesting cases trialed before the Montenegrin courts in the cases of CHF denominated loans. The above analyses are complemented with the analysis of the Montenegrin media coverage of some of the most interesting media reports regarding the CHF denominated loans, particularly of the relevant case law. The conclusion is made that cooperation of all the relevant persons and institutions entrusted with facilitating and executing consumer protection is of primary importance for efficient protection of consumer's rights and legitimate interests.

Keywords: *CHF denominated loans, Montenegro,* harmonisation of national law**,** *lex specialis, CJEU ruling.*

JEL Classification: K12, K33

1. Introduction

Signing of the Stabilisation and Association Agreement between European Communities and their Member States and Montenegro in the October of 2007 caused intensive development of consumer protection mechanisms in Montenegro. Following the successful examples of other candidate countries, the decision was made that harmonization through several legal texts was necessary given the complexity of relations and the number of areas covered by European acquis on consumer protection.

Following 2007, Montenegro has harmonized its legislature with number of EU consumer protection directives, but still harmonization with some of the directives in the financial services sector, as well as with new consumer directive is yet to come.[2] Naturally, the most important novelties in consumer protection were

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[1] Nikola Dožić - Faculty of Law, University of Montenegro, dozicn@t-com.me.

[2] The new Montenegrin Consumer Protection Act of 2014 does not comply with the Directive on consumer rights (2011/83/EU), wich amended the Directive on unfair terms in consumer contracts

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incorporated in the Consumer Protection Act,[3] and some were incorporated into the Law on Obligations,[4] the Consumer Credit Act,[5] the General Product Safety Act,[6] the Supervision of products on the market Act,[7] as well as other laws which in addition to its the underlying regulation contains some important provisions related to the consumer protection. Almost all legal texts in this area were adopted in the end of 2013 and beginning of 2014, which coincides with the obligation form the Directive on consumer rights, although Montenegrin legislation is not yet harmonized with this Directive. Main rezoning behind this decision was that when the drafting of the Consumer Protection Act started the Directive on consumer rights was not yet adopted, and that there will be enough time in the transitional period for its transposition. Although the amendments to the Consumer Protection Act were adopted in 2015, all of the novelties related to some impugned provisions of the original text and problems in the implementation of its new rules.[8]

It is evident that majority of the Montenegrin legislation on consumer protection was either changed or adopted for the first part of 2014, with a high level of normative approximation to the EU directives, with mentioned exception. Until these changes some of the areas now clearly defined were prescribed by the Consumer protection law only in principle (credit agreements for consumers, for example).

The aim of this paper is not to show the most important novelties in consumer protection in Montenegro (which are numerous), or to highlight the problems in the application of specific solutions (which are numerous as well), or to propose solutions for further harmonization in the field of consumer protection. Since the CHF denominated loans were a common problem in the East European countries,[9] the main objective is to present the case study of Montenegrin "solution", if it may be termed "solution" to begin with. Hence, the reactions of the Montenegrin parliament, amendments and new legal texts, which were the product of its frenetic legislative activities carried on the wings of public's outrage with this

(93/13/EEC) and the Directive on certain aspects of the sale of consumer goods and associated guarantees (1999/44/EC), and repelled the Directive to protect the consumer in respect of contracts negotiated away from business premises (85/577/EEC) and Directive on the protection of consumers in respect of distance contracts (97/7/EC).

[3] Consumer Protection Act, Official Gazette of Montenegro, No. 2/2014.

[4] Law on Obligations, Official Gazette of Montenegro, No. 47/2008.

[5] Consumer Credit Act, Official Gazette of Montenegro, No. 35/2013.

[6] General Product Safety Act, Official Gazette of Montenegro, No. 45/2014.

[7] Supervision of products on the market Act, Official Gazette of Montenegro, No. 33/2014.

[8] In July of 2015 Montenegrin Parliament adopted amendments on the Consumer Protection Act (Official journal No. 43/2015). The impugned provision, was amended so that information on products in Braille are required for the certain products and in certain trade facilities. Remaining provisions were the solutions for the complaints filed by some consumers who paid the weight of packing case by the price of the goods that are packed. Also, new amendments brought protection to the consumer against the trader which wants to bill the consumers for the shopping bags with his advertisements, his logo, official sign or a name of its company.

[9] The term East European countries is used as a geographical determination intended to point out common problems of the countries regardless of that if they are a member state of the European union, and not as a regional determination in any statistical way.

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case, are examined in detail. Moreover, in view of the issue's public importance and inextricable connection between the two, media coverage by national media is analyzed as well. In this sense, we will first present the problem of CHF denominated loans in Montenegro, and the first steps to the Montenegrin "solution", with all problems that followed in its implementation, that have induced a "strange" reaction of the Montenegrin parliament in its legislative activities. One part of the paper will present most interesting parts of the rulings of Montenegrin courts in these cases. The part of this paper will be dedicated to the analysis of the media coverage of some of the most interesting media reports regarding the ruling of the Court of Justice of the European Union.

2. The "Montenegrin solution" for the CHF denominated loans

2.1 CHF denominated loans in Montenegro

Montenegro, even though one of the smallest East European countries with the population of 622.159 inhabitants mid-2015, was not spared in the case of CHF denominated loans.[10] More than 700 consumers have concluded the credit arrangements with one Montenegrin bank in CHF denominated loans.

Most of the public knew about the problems these consumers were facing. Even if they were not aware of it prior to beginning of October 2015, despite regular media coverage of this problem and parliamentary debates that lead to the adoption of new regulation in this area of law in Montenegro, the issue of CHF denominated loans has certainly caught public's attention after the unfortunate suicide of one of the debtor in the public bailiff office in Podgorica, after the forceful collection of its debt.[11]

Prior to this unfortunate incident legal professionals have already knew about this problems and have worked on the solution. It is unfortunate that the first Montenegrin solution was adopted by the Parliament more than a month before this incident, nevertheless too late. The Law on the Conversion of Swiss Franc - Denominated Loans into Euro - Denominated Loans (heir and after: Law on conversion) was adopted by Montenegrin Parliament and has entered into force on 22nd August 2015, and necessary by-laws for its implementation were adopted in the beginning of September. The law was passed in summary proceedings, during which the draft was amended significantly by its proponent after the negative opinion of the Government.

The Government pointed out that reprogram should ensure that these clients are brought into a position comparative to the clients who used similar types

[10] Statistical Yearbook of Montenegro 2016, page 36; the document is available online at: http:// monstat.org/userfiles/file/publikacije/ godisnjak%202016/4.stanovnistvo.pdf. Last accessed on 5.10.2017.

[11] Montenegrin newspaper "Vijesti", the document is available online at: http://www.vijesti.me /vijesti/podgorica-aktivirao-bombu-u-kancelariji-javnog-izvrsitelja-855006. Last accessed on 05.10.2017.

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of loans without currency clause, which was not provided by this draft. It is also pointed out that a significant number of clients have initiated court proceedings against the bank and this process is in progress, and that this draft does not define deadlines for declaring client's acceptance or non-acceptance of new conditions, nor consequences in the case of a failure to contracts under new conditions.[12] Proponents justified this draft with the fact that consumers have concluded these contracts unadvisedly and without sufficient information and warnings, from the commercial banks or from the Central Bank, which have led to “debt slavery”. Also, they deemed the use of two or more protective clauses in the contract as unauthorized, and that interest rate represents not only the bank profit but also the price of the risk for the extended loan. They concluded that the bank have realized the income not only thru interest rate but thru currency clause as well, which lead to disproportion between material gain of the participants in this contract, and to obvious disproportion of prostrations.

2.2 The first “Montenegrin solution” - The Law on the conversion of Swiss Franc - denominated loans into Euro - denominated loans

The adopted Law, *lex specialis* by its nature, had only 6 articles, and many shortcomings that had significantly limited its implementation.

This law covered all loans granted by commercial banks to foreign currency clients – Swiss Franc - Denominated Loans, including those that were unilaterally terminated by banks due to clients inability to pay. The basis for the loan conversion is the amount received by the client at the bank at the time of the contracts conclusion.[13]

Commercial banks were obliged, to convert all the loans to loans denominated in the official currency in use in Montenegro – the euro, at the official exchange rate published by the Central Bank of Montenegro as at the loan agreement date, within 30 days following that of the entry into force of the Law. This Law regulated the use of the fixed interest rate of 8.2% per annum,[14] and obligation to the banks to offer loan beneficiaries new loan conversions and loan rescheduling calculated in euros within 45 days following that of the entry into force of the Law on conversion.[15] Supervision of implementation was entrusted to the Central Bank of Montenegro.

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[12] Opinion of the Government of Montenegro, the document is available online at: http://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/717/751-4843-28-1-15-1-4.PDF. Last accessed on 05.10.2017.

[13] See article 1 of the Law on the Conversion of Swiss Franc - Denominated Loans into Euro - Denominated Loans (Official Gazette of Montenegro, No 46/2015), the document is available online at: http://www.sluzbenilist.me/PravniAktDetalji.aspx?tag=%7B05788 047-BD18-4049-A27D-99E2299E19CE%7D. Last accessed on 09.10.2017.

[14] See Articles 2 and 3 of the Law on the Conversion of Swiss Franc - Denominated Loans into Euro - Denominated Loans.

[15] Article 4 of the Law on the Conversion of Swiss Franc - Denominated Loans into Euro - Denominated Loans.

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Even before the implementation of this Law has started commercial bank has brought an Initiative for review of compliance of the law with the constitution of Montenegro.[16]

So problems with the implementation were evident even prior to the adoption of the law. In the first Report on supervision over the implementation of this Law submitted to the Parliament by the Central Bank,[17] it is obvious that the Central Bank didn't have the necessary instruments for the forceful implementation of this law, since the measures at its disposal are strictly regulated by the Law on Banks, so that they cannot be used for the enforcement of this Law. Central Bank has pointed out that their mandate for supervision derives from risk based supervision and that it cannot enforce the rules that should be enforced by the courts. Central Bank has also conducted the control of the Consumer Credits Act provisions that regulate pre contractual obligations and procedure of conclusion of the contract.

During this control it was determined that 762 contracts with denomination clauses. Only 482 credits in total amount of 208.017 CHF or 129.998 EUR were in the bank portfolio in the moment of the control, since 98 were repaid early, 18 thru regular payment procedures or enforced debt collections, 129 were transferred via cession to other legal entities and 35 were liquidated or written off. Only first category of these loans was converted into euros. It is emphasized that only 321 offers were accepted and only 156 contracts concluded, since the law didn't predict the offer expiration date. Many of the offers were not singed because the clients were waiting for the resolution of disputed articles in the annexes. Central bank has noted that no measures were taken against the commercial bank, because of the previously mentioned problem and that some measures are pending in accordance with the Consumer Credit Act.

Extreme lack of needed provisions, inconsistency and contradiction in certain segments in this law caused significant problems in its implementation. The question of the scope of the Law was most prominent since the bank didn't offer conversion and annexes for early repaid loans, loans that were terminated and forcibly collected (through court proceedings or realization of collateral), loans that were terminated due to nonpayment and were transferred to other legal persons. The last category of contracts relates to more than 66 million of euros in the moment of transfer of these contracts, since the Central Bank didn't have the mandate to supervise legal entities. One of the legal entities that acquired over 99% of these loans is owned by Republic of Austria. All statutory and ownership changes were realized before the Law on conversion has entered into force.

Central Bank has again used the opportunity to remind the Parliament that in the opinion that they gave on the text of the draft, and was ignored by the

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[16] We use a term as singular because only one commercial bank was using curency clause in its loan contracts.

[17] Report on supervision over the implementation of this Law submitted to the Parliament by the Central Bank, the document is available online at: http://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/977/1028-6572-00-72-15-50.PDF. Last accessed on 09.10.2017.

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Parliament, stating that there are significant regulatory insufficiencies that will significantly hinder or prevent the implementation of its provisions, especially the nonexistence of the obligation of the factoring companies to realize the conversion. Again, Central Bank had to make these notations since public opinion was set that Central Bank has refused to participate in drafting of this Law, and was usually labeled as biased towards the banks.

So the only, by the Central Banks opinion, was to amend the Law on conversion with special provisions that will prescribe the obligation of the factoring companies and banks in cases that were not covered by the provisions of the existing Law.

2.3 The second "Montenegrin solution"

So by all accounts, despite the good will of the Parliament and well-meaning suggestions of the Central Bank, more than 99.8% of total amount of the credits denominated in CHF were not encompassed with the original text of the Law on conversion, which main purpose was to create the solution for this problem. Proponents of the amendments rationale the amendments with the need to regulate the problem of denominated loans transferred to other legal person's which were not under the control of the Central Bank. They noted that even though the Law on conversion, was clear, and was in effect for a year there were no conversions of these loans and that over 30 forced collection procedures were started in this period, and that court proceedings started in 2013 are still at the early stages of the process because judges have been changed three times so the procedure was starting from the beginning after each change.[18] Proponents have deemed the interest rate of 8.2% as enough reword, and that anything else would represent unfounded speculative income for the commercial banks.

Again the Parliament has maybe unnecessarily went into regulation of one of the questions that has already been decided by the Montenegrin courts during the proceedings mentioned before. In the course of the proceedings before the Basic court, by its request a Supreme Court of Montenegro has already gave a legal opinion in June of 2016[19] on the question of the existence of obligation of factoring companies in this case. Supreme Court concluded, from the reasoning of the question raised, that the bank has transferred the claims to another legal entities, and that the disputes should be resolved by the rules of the Law on Obligations on Contractual Transfer of Claims. Therefore, according to the contract on the transfer of claims (cession), this person has the same rights towards the debtor as the assignee before the transfer. The position of the borrower from the transferred

[18] Draft of the Law on Amendments of the Law on the Conversion of Swiss Franc Denominated Loans Into Euro Denominated Loans , with the rationale of the law, page 7; the document is available online at: http://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/1186/1244-8110-28-1-16-2.pdf. Last accessed on 09.10.2017.

[19] Legal opinion of the Supreme Court of Montenegro no.166-2; the document is available online at: /http://sudovi.me/ podaci/vrhs/ dokumenta/3931.pdf. Last accessed on 09.10.2017.

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claim is not altered. After the loan is transferred, the debtor is authorized to assert all complaints arising from the original relation.

But again Montenegrin Parliament has decided to regulate this issue by Amendments to the existing Law on denominated loans only three months later. Again parliamentarians have seen their duty to intervene so they have adopted the Law Amending the Law on the Conversion of Swiss Franc Denominated Loans into Euro Denominated Loans, in mid-September 2016.[20]

By the provisions of Amendments all categories of the loans that were not converted during the implementation of the original text, due to the insufficiencies of the original text as it was seen by the commercial banks and factoring companies, or by inactivity of the Central Bank as it was the view of the Parliament, were included into the text of the amendments.

Not only that the amended Law on conversion now contained detailed obligation stipulating that obligation of the conversion exists not only for the existing loans, still being in the process of repayment, but also for the contracts that were terminated due to the nonpayment and were transferred to factoring companies. It is particularly important that the Law on conversion contained new provisions which have made possible for the loans that have been repaid during the regular repayment period or enforced collection, to the bank or to third parties, to be recalculated and that specific obligation is prescribed to repay the clients funds exceeding the obligation stipulated under the law.

By the amendments the provisions of the Law on Default Interest Rate[21] can't be used when calculating the debt based on receivables under the agreement terminated unilaterally by the commercial banks, including receivables ceded to third parties.

Also special provisions on treatment of receivables ceded to third parties were detailed enough for the implementation. Any additional provisions requiring additional security interest, fees for agreement preparation and other similar payments, as addition of any other rights and obligations shall be determined under this agreement without debtor's consent if they put the debtor in an unfavorable position relative to the debtor's rights and obligations under the initial loan agreement. A significant novelty was the limitation of the offers duration with the introduction of the obligation of the debtor to make a statement of acceptability within 60 days of reception of the proposal. Another novelty was the introduction of suspension of all activities concerning enforced collection for settling debtor's receivables, to a period of 60 days (after which enforced collection may continue) which corresponds with the duration of the proposal on debt repayment.[22]

This time by the amendments the penalty provisions ranging from 20.000 to 40.000 euros for the bank or third party, or form 2.000 to 4.000 for the

[20] Law on Amendments of the Law on the Conversion of Swiss Franc Denominated Loans Into Euro Denominated Loans, Official Gazette of MNE, no. 59/16).

[21] Law on Default Interest Rate, Official Gazette of MNE, no. 83/09).

[22] Article 3b of the Law on Amendments of the Law on the Conversion of Swiss Franc Denominated Loans Into Euro Denominated Loans, Official Gazette of MNE, no. 59/16.

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responsible persons in these legal entities, were introduced to Law on conversions that can be imposed against a commercial bank or third party, if it fails to recalculate loan and/or receivable, if it does not repay the funds exceeding the obligation determined, if fails to submit data and documentation to third party within the prescribed timeframe, it fails to submit to the debtor the proposal of the agreement on debt repayment within the prescribed timeframe, it does not suspend all activities pertaining enforced execution for settling debtors' receivables from the entry into force of this law. These provisions gave the Central Bank instruments it needed for the forceful implementation of the provisions in this case.

Again Commercial Bank and Factoring Company were not satisfied with the decisions of the Montenegrin Parliament, so the implementation was deemed to be problematic at best if not completely sabotaged. As we mentioned before the existing Initiative for review of compliance of the law with the constitution of Montenegro was amended by new arguments after the Law was amended, and new Initiative for review of compliance of the law with the constitution of Montenegro was brought before Constitutional Court of Montenegro by the factoring company as well. Although the initiatives were brought before the Constitutional Court of Montenegro in 2015 and 2016 the proceedings before this court are still in progress.

The only publicly accessible document on the implementation of the amendments is the Report on the complaints of the debtors of CHF denominated loans on the application of the Law on amendments of the Law on conversion, by the Banking Ombudsman.[23]

According to the Bank's data, a total of 242 approved loans denominated in CHF, which had to be converted according to the Law on Amendments to the Law on Conversion a 108 loans were repaid through regular repayment, early repayment or through forced collection procedure, 6 loans were liquidated after restructuring by concluding a new contract, and 128 were unilaterally terminated by the Bank and transferred to third parties (123 loans HETA and 5 loans B2).

Out of a total of 242 loans up until the 10 march 2017, 90 conversion contracts were concluded, or 38%. Out of these 242 loans the Bank concluded 79 conversion contracts or 69%. Out of a total of 114 credit lines with the Bank, in 91 cases a positive difference was determined in the favor of the clients, so Bank have made repayments of funds to clients in over 10,000 euros per credit line. By implementation of the Amendments, the Bank was obliged to make a refund to its clients in the amount of 963,741.35 euros.

According to the Bank's data on claims of the factoring companies, included in the conversion on the end of the September 2016 was a little under 62

[23] Report on the complaints of the debtors of CHF denominated loans on the application of the Law on amendments of the Law on conversion of the Montenegrin Banking Ombudsman, the document is available online at: https://www.google.com/url?sa=t&rct =j&q=&esrc=s&source=web&cd=1 &ved=0ahUKEwiW0Nyo-bbXAhVD46QKHdbvBlUQFgglMAA&url=http%3A%2F%2Fwww. cezap.org%2Fwp-content%2Fuploads%2F2017%2F05%2FI-Z-V-J-E-%25C5%25A0-T-A-J-Bankarskog-Ombudsmana-od-19.04.2017.-na-primjenu-Zakona-o-konverziji.docx&usg=AOvVaw0M_Jfkh_h6BHhz3lb-kRec. Last accessed on 09.10.2017.

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million euros. Form 128 contracts that should be concluded only 11 were, which means that over 90% of clients didn't conclude the contract on conversions.

Over 50 clients sought the protection of the Banking Ombudsman with claims relating to problems during the conversion process. Complaints were made against the Bank and against the bigger factoring company because they didn't present to them all necessary documentation and against smaller factoring company because it didn't present any documents at all. Clients also complained that presented documents had many errors in calculation of debt, or that documentation doesn't show the balance of the debt on the day of the conversion or the amount of funds that need to be repaid to the loan beneficiary, so that they were forced to hire financial experts to calculate the amount of debt (and that the experts fund significant discrepancies between the calculations) in order for them to be able to object to the presented contracts. The debtors complaining on the conversion contracts didn't receive the response from the bank, positive or negative, so they were unsure if they will receive new contracts and plans of repayment. Some clients complained that the Bank didn't send the contracts since by its calculation the bank found that there was no positive difference in the benefit of the client, so that there was no obligation to reimburse funds. Clients also complained on inclusion of the default interest rate in the calculation of debt, from the date of contract termination to the collection of the loan. One of the complaints related to forceful collection after the Law on Amendments to the Law on Conversion has entered into force, despite a special provision postponing enforced collection.

The principal complaint of the debtors, related to the inclusion of the specific article in the contracts stating that: "By signing this agreement (the contract) the borrower irrevocably confirms and accepts the accuracy of the calculation of those amounts in the sense of the provisions of the Law, and waives the right to deny the accuracy of these calculations, agreement after the signature of this agreement and especially for the reason of the misunderstanding of this agreement or the misunderstanding of the method of calculating the amount of the refund, by application of Article 3b of the Amendments to the Law. "

In the proceedings before the Ombudsman the following irregularities in the application of this Law were established. The banks and factoring companies had to comply with the deadlines of the Conversion Law. Also, Ombudsman reminded that the law clearly stipulates the obligation to inform the borrower about the results of the calculation, in order for the clients to have the opportunity to check the accuracy of the performed debt calculation, and in case of disagreement with the amount of the debt, use their right to object, especially when the expert analysis have proven existence of the mistakes in the calculations. Inclusion of the default interest rate was against the Law. Also, it was determined that the bank had procrastinated the responses to the consumer complaints which created insecurity with the debtors' weather the forceful collection will be continued, and that in significant number of cases the bank didn't conduct in due time internal procedures, relating to consumer complaints regarding the debtors' obligation, or didn't respond to the financial expert opinions.

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The principal complaint of the debtors, related to the inclusion of the specific article in the contracts, by the opinion of the Banking Ombudsman, caused suspicion on accuracy of the banks calculation of the amount of debt in euros, as well as the amount of funds for the refund. This was deemed as one of the reasons why a large number of conversion contracts were not acceptable to the debtors. Banking Ombudsman determined that this provision does not correspond with the applicable laws, as well as the provisions on consumer protection in Montenegro.

Banking Ombudsman have concluded that there are various interpretations of certain provisions of the Law on amendments to the Law on Conversion by the entities in charge of the implementation of that Law, and that is necessary to strengthen the implementation of the Law, and to sanction the entities that did not comply with obligations and deadlines from the Act Amending the Law on Conversion.

3 Montenegrin CHF denominated loans case law

During the notation of the arguments against some of the parliamentarians' decisions on unnecessary legal intervention we have already briefly mention courts proceedings in the cases of CHF denominated loans.

One of the arguments referred to the legal opinion of the Supreme Court of Montenegro, which explained the correlation of the Law on obligation and the Law on conversion, and provided the courts with an interpretation that, has extended the scope of the original text of the Law on conversion. This opinion was given in the course of the only case that has been led against the bank that concluded all the contracts with CHF denominated loans in Montenegro. As mentioned this process was followed by a great number of delays since presiding judge was changed three times during the process, which has caused a significant stalling in this case.

Since the lawsuit was filed in 2013, after four years of the proceedings, as we can see form the previous notations, a lot of changes in the substantive law has happened, that had to have some influence on the content of the final decision in this case. The extent of that influence was unexpected to say the least. Still there is no final judgment in this case. Basic court in Podgorica has made only one decision in this case, to terminate the proceedings via a decision.

Since this is a much resent decision of the court, the only document that is accessible over the internet, although all the judgments of the Montenegrin courts are available on official internet presentation of each Montenegrin court, is the appeal of the lawyer that is presenting the plaintiffs in this case. As it is noted in the appeal, the main reason that court made in the decision is that the legal interest of the plaintiffs does not exist anymore, which as a procedural presumption has to be met at any time in the initial proceedings otherwise lawsuit becomes inadmissible if the legal interest is lost during the proceedings. The court deemed that after the adoption of the Law on Amendments to the Law on conversion, plaintiffs legal interest need for a passing of the declaratory judgment has ceased.

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The main reason for the public outrage with this decision was the part on expenses claims. By the media accounts and the appeal of the plaintiffs' lawyer, court have decided that since the legal interest of the plaintiffs does not exist anymore, plaintiffs are obliged to pay the expenses to the defendants. Considering that the proceedings have started by the lawsuits of over 200 plaintiffs in 2013, against the bank and against one of the factoring companies, and have lasted until 2017, as it can be expected expenses were rather high. In total about 1.3 million euros were the expenses of the defendants in this process, so every plaintiff that brought the lawsuit against the bank was obliged to pay an amount of 3.751 euros, and amount of 3.079 euros to the factoring company if they have sued this entity. So if the individual plaintiff had sued both defendants he would have to pay the expenses in the total amount of 6.830 euros. This was the main reason for the strong reaction of the Montenegrin public against the decision of the court.

Since this is the very recent and controversial decision, still not publicly accessible, and that the appeal process is still ongoing before the High Court in Podgorica, it is prudent to wait the final decision in this case. It's enough to say that Montenegrin legal and lay public eagerly awaits the outcome of these proceedings.

But the debtors were not only ones unsatisfied with the developments over the years. The bank and factoring companies have started some proceedings as well. As we have mentioned in the previous arguments the two proceedings were brought before the Montenegrin Constitutional Court with two Initiatives for review of constitutionality and legality, one of which was amended. Since these proceedings have started at the end of 2015 and end of 2016 the proceedings are still ongoing. Since the detailed analysis of these Initiatives would demand the separate scientific paper we will not go into the interesting arguments of the initiatives applicants.

It will be very interesting to see the argumentation of the Montenegrin Constitutional Court, having in mind that similar proceedings have been finished in the neighboring Croatia with a negative ruling on unconstitutionality of the similar legal text, especially if we look at the some of the argumentation made by the Croatian Constitutional Court in the similar case.

The Croatian Constitutional Court has determined that the purpose (core function) of the currency clause is to protect the real value of the monetary claim, to maintain the value as it existed at the time of the contractual conclusion, as well as to ensure the equality of parties, equal value of the performance or maintaining the contractual balance. So the court has determined that the aim of the clause is protective and not profitable, so the currency clause should not become an instrument of enrichment of the creditor and the impoverishment of the debtor, the means of disruption of the contractual balance and the equality of the parties to a degree that leads to the extreme inferiority of the debtor. The Constitutional Court found that the protective clause obviously "slipped" out of its functional boundaries resulting from the legal nature and scope of that institute. The fact that Croatian commercial banks in didn't expose themselves to the currency risk was especially pointed out, since they used funds in kunas and euros for the loans they have

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approved. Special emphasis was given to the fact that even the slightest measure of exchange rate risk prevention in the form of a timely consumer warning were not taken, unlike the Austrian Financial Market Regulator, which has, since 2003, systematically and successfully undertaken various activities in order to protect the consumer from the adverse effects of denominated loans, warning consumers that it is "high risk products", and with final ban of these loans in 2008.[24]

4 Bias and incorect media reports in Montenegro

The case of CHF denominated loans had full attention of Montenegrin public from the first reports on this case, and all Montenegrin media continued covering every new development in this case. The media reporting was one of the factors that attracted attention of the Montenegrin parliamentarians that sawed an opportunity for the promotion of their own ideas by using this problem to attract public's attention. This was one of contributing factors that have motivated the swift reaction of the Parliament.

Every step in this case was covered by the media. Some of the media coverage was bias against regulators in the banking sector, as we have mentioned earlier. But again the media were reporting on the actions taken by the banks and factoring companies against the Law on conversion before the constitutional Court of Montenegro.

The first decision before the general jurisdiction courts was subject of the bombastic media headlines. The same media outlets have reported multiple times on the same decision of the court, conveying the opinions of all interested parties, but usually with a negative notation to the decision of the court.[25]

The bias is not the only problem of the media reporting in Montenegro. As we have announced earlier the question of correct media coverage can be in question in Montenegro as well. Since the CHF denominated loans story have broken the news it is was obvious that the bombastic news reports will fill the paper and electronic media. Usually the most bias and marginally incorrect reports could be found on the presentation of the consumer protection organizations. But it is not expectable that professional media are reporting the incorrect news.

The most problematic was the case of the incorrect reports on the judgment of the Court of Justice of the European Union decision in the case C-186/16, Ruxandra Paula Andriciuc and Others v. Banca Românească SA, on the request for a preliminary ruling from the Appellate Court in Oradea, Romania.

It could be expected that some of the incorrect reports could be found on the consumer's private websites and on the internet presentation of the consumers

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[24] Decision of the Constitutional Court of the Republic of Croatia No. U-I-246/2017. The document is available online at: https://narodne-novine.nn.hr/clanci/sluzbeni/2017_04_35_774.html. Last accessed on 11.10.2017.

[25] Financial portal Banker reported four times on this decision. See http://www.bankar.me. National Public service Montenegrin Television has reported two times. See http://www.rtcg.me/. News outlet Vijesti reported twice. See http://www.vijesti.me/vijesti. Internet portal Analitika has reported twice as well. See http://m.portalanalitika.me last accessed on 09.11.2017.

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associations affected by this problem. Some of the reports can be the result of the misconceptions about the decisions of the Court. But one thing that shouldn't be expected is the outright incorrect reporting on the court decision by the professional media.

So it was strange to encounter the headlines in almost all Montenegrin professional Medias stating: „European Court of Justice ruled in favor of the Swiss-franc borrowers: Judgment binding for Montenegro". Leaving aside the error made in naming the Court that gave the verdict - Court of Justice of the European Union, still there are at least two more questionable parts of this headline. First, questionable is the part stating that this ruling was made "in favor of the Swiss-franc borrowers", and second, questionable is also the last part of this headline stating "Judgment binding for Montenegro". Since the objective of this paper is to analyze the Media reports in Montenegro we will not go into explanation the legal argumentation for the questionability of these accounts. We will keep our attention to the rest of the article because of the number of errors that were made in all the reports on this ruling.

Usually the interesting news headlines have a purpose to attract reader's attention, but after the headline information in the article are reported correctly.

But in this case all printed media,[26] and almost all Montenegrin televisions[27] and almost all internet portals[28] have reported on this judgment of the CJEU the same way. In the most of these reports there is a notation that the "European Court of Justice has shown that the CHF clauses are deeply contractually dishonest, so that all the courts of the member countries can and should initiate procedures and must consider the contractual terms, that will unlikely be cost effective for banks."

These reports were published soon after the judgment was made, which coincided with the decision of the Montenegrin Basic court that had preoccupied the Montenegrin publics' attention. By printing and publishing these kinds of reports the Montenegrin public has again been misled by the Media. It would be unfounded to say that all Medias in Montenegro had the intention to mislead the public. Probably the information that was publicized by one of the media and other media quoted the information. But the one thing we can say with certainty is that the news accounts were spreading thru Montenegro like a wildfire.

[26] See the reports of the printed Medias, the documents are available online at: http://www.vijesti.me/forum/sta-sad-956733 and http://www.dan.co.me/?nivo=3&rubrika=Ekonomija&clanak=615924&najdatum=2017-09-23&datum=2017-09-24. Last accessed on 09.11.2017.

[27] See the report of the Montenegrin national TV, the document is available online at: http://www.rtcg.me/vijesti/ekonomija/178866/ presuda-suda-eu-obavezujuca-za-cg.html. Last accessed on 10.11.2017.

[28] See the reports of the Montenegrin internet portals, the documents are available online at: https://m.cdm.me/ekonomija/krediti-u-francima-sud-eu-presudio-u-korist-klijenata-presuda-obavezujuca-za-cg/,http://www.paragraf.me/dnevnevijesti/25092017/25092017-vijest1.html, http://www.cezap.org/sta-sad-krediti-u-svajcarcima/ and https://www.vazdan.com/vijest/foto-nevjerovatne-fotografije-napustenih-zgrada-u-koje-nikada-necete-smjeti-uci/1077874. Last accessed on 10.11.2017.

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Intentional or not these kinds of reports have again created the confusion in Montenegrin professional and lay public. It can be expected that nonprofessional internet portals are publishing the information without the verification of their validity. But it is unusual and undesirable that the professional Media outlets have reported on this problem without verification of the validity of the information they were reporting.

5 "Montenegrin problem"

As we have previously noted, until 2013 and adoption of the Consumer Credit Act, the areas now clearly defined were regulated by the Consumer Protection Act only in principle.

Even though this rules were not the ones that were used as a basis for the settlement of the CHF denominated loans in Montenegro, their adoption, that precedes the emergence of the CHF denominated loans problem, its implementation and problematic legislative reaction of the Montenegrin parliament, as a repercussion to this problem, can attest to general ignorance of the consumer protection provisions in Montenegro.

Therefore, we will not try to justify and classify the method of Montenegrin harmonization with the rules of the Directive, or to explain all the novelties to Montenegrin consumer protection law, or is it better to say that provisions of this law have brought clearly defined rules to a somewhat unregulated area in Montenegro, and had a greatest impact on consumers protection. So, even though Montenegro is not yet a member of the EU, the rules which aims at fostering the integration of the consumer credit market in the EU and ensuring a high level of consumer protection by focusing on transparency and consumer rights were even then in the effect in Montenegro.

Instead we will only emphasize some novelties that represented a significant victory over the requests of the banking sector that were possible in accordance with the Directive, which later fell victim to frenetic legislative activity of the Montenegrin Parliament.

It is important to emphasize that Montenegrin legislators, as it was a usual case with member states, have extended the scope of the definition of consumer credit contract, that was aloved by the Directive, and despite a request by representatives of the banking sector, did not introduce exemptions related to the exclusion of credits related to real estate, mortgages, and those whose amount is less than 200 euros and more than 75,000 euros.[29] Emphasis must be given to the rules of this law giving the right to the consumer to repay obligations under a credit agreement fully or partially at any time, which entitles him to a reduction in the credit costs, with limit of the objectively justifiable compensation for the creditor.

This Law has represented a significant step forward in the consumer protection in Montenegro, since its rules didn't apply only to the credits provided

[29] See Article 6 of the Consumer Credit Act.

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by the banking sector in Montenegro, supervised by the Montenegrin Central Bank, but to all other credit armaments concluded by the consumer, supervised by the Market Inspectorate. Especially we must emphasize that this law was the product of the long process of public debates with participation of all interested parties.

Soon after the adoption of the, a „new" question of consumer protection had preoccupied the legislators. So even doe the Montenegrin Parliament has adopted the Consumer Credit Act in the year preceding the law containing "Montenegrin solution" to the CHF problem, the parliamentarians have sought to protect the consumers even more, so they have planned to adopt a law which will regulate the area of the consumer credits. The procedure begun in March 2015 and law was passed by the middle of July 2013.

Obviously the parliamentarians have forgotten that two year before that they have adopted the law regulating consumer credits. Unlike the Consumer Credit Act, that was drafted by the Montenegrin Ministry of Economics, and has gone through rigorous legislative procedure, the draft of the Law on Consumer Protection – users of the financial services was the proposal of one of the representatives in the Parliament. This meant that this draft was adopted trough less demanding procedure than in the case of the drafts proposed by the Government.

Montenegrin media have also reported on this draft and parliamentary procedure that will follow. One of the political parties was a sole proponent of this draft, who used this opportunity to point out significance of this law which, by their accounts, will regulate detailed mechanisms for consumer protection. They have made an argument that this will solve the existing problems in Montenegrin banking sector, and that at least 10 % of the Montenegrin citizens will benefit from the regulation in this law, and also pointed out the lack of existing regulation in this area.[30]

Parliamentarians have used this opportunity to promote their enrolment in the consumer protection and their intent to protect the citizens from "petty fraudulent ads".[31] During the parliamentary procedure in the Committee on Finance and Budget, in the report on adoption of the draft by this committee, only once was noted that it would be purposeful for the Central bank to give an opinion on this text, since Central bank was a supervising authority. The procedure was so expedient, that the opinion of the Montenegrin Government was two weeks too late.

It is obvious that parliamentarians had to realize that new law in this area was unnecessary and that it does not extended the scope of the definition of consumer credit contract, as the Consumer Credit Act does, and that certain rules

[30] Report of the electronic media "Portal analitika", the document is available online at: http://m.portalanalitika.me/clanak/188787/ lp-zakonodavni-odbor-prihvatio-prijedlog-zakona-o-zastiti-potrosaca. Last accessed on 10.11.2017. Report of the newspaper "Vijesti", the document is available online at: http://www.vijesti.me/vijesti/podrzan-predlog-zakona-o-zastiti-potrosaca-korisnika-finansijskih-usluga-825311. Last accessed on 10.11.2017.

[31] Report of the newspaper "Vijesti", the document is available online at: http://www.vijesti.me /vijesti/radunovic-precistiti-tekst-predloga-zakona-ima-mnogo-kroatizama-839522. Last accessed on 11.11.2017.

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provide a lower level of consumer protection than Consumer Credit Act. Despite everything, in middle of July of 2015 a Law was passed.

It is unfortunate that not only the parliamentarians have forgotten that they have already regulated this area, and have adopted the new text, but also that the president of Montenegro didn't use the veto power in this case, which would be possible by the rules of Montenegrin Constitution, and that he has proclaimed this law.[32]

The Opinion of the Montenegrin Government, prepared in consultation of the Ministry of Justice, Ministry of economics, Ministry of finance and Central Bank of Montenegro, form the end of July came too late, since the law was already in effect. In this opinion it is stated that draft law is again harmonizing national legislation with the Directive 2008/48/EC that has already been harmonized in the national law in 2013 which have already been reviewed by the European Commission. It is also pointed out that Montenegro has assumed the obligation to align all regulations with relevant EU law, and that the procedure of such harmonization implies that before the adoption of any legal act implementing the EU rules, this act must be have the opinion of the European Commission, prior to its adoption.[33] Montenegrin Central bank has pointed out that some of the regulations in this law are a significant step back regarding the harmonization of the national consumer law with the EU *acquis*, that some rules in this law which are already harmonized are being changed in such a manner that will provide fever rights to the consumers than existing law, and that that necessary by-laws for the Consumer Credit Act are already in place.

All these events have led to the situation that nowadays in Montenegro there are two laws with the same legal power, with and rules on the same issues, which is legally unsustainable. Although two years have passed since the new law was enacted, there are no new developments in this area, even though there are numerous problems in implementation of these laws in Montenegro today.

This can also be an indication, but not a justifiable argument, as to why Montenegrin legislators have yet to harmonies the Consumer Credit Act with the provisions of the Directive 2014/17/EU of the European Parliament and of the Council on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010.

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[32] See article 94 of Constitution of Montenegro; the document is available online at: http://www.skupstina.me/images/documents/ constitution-of-montenegro.pdf. Last accessed on 10.11.2017.

[33] Opinion of the Montenegrin Government. The document is available online at: https://www.google.me/url?sa=t&rct=j&q=&esrc =s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwikmL2i6KzXAhWkF5oKHe1aDGgQFggkMAA&url=http%3A%2F%2Fwww.predsjednik.gov.me%2FResourceManager%2FFileDownload.aspx%3Frid%3D212483%26rType%3D2%26file%3D27_125_03_09_2015.pdf&usg=AOvVaw3lRvBH3_j1rZpkLqu0dhMR. Last accessed on 12.11.2017.

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6 Conclusion

As we mentioned at the beginning of the paper, its aim was not to show the most important novelties in consumer protection in Montenegro (which are numerous), or to highlight the problems in the application of specific solutions (which are numerous as well), or to propose solutions for further harmonization in the field of consumer protection. It was to shed some light on the key problems that have plagued the Montenegrin citizens as the result of the CHF denominated loans.

In view of the given aim and analyses provided in the paper to that end, the first conclusion is that cooperation of all the relevant persons and institutions entrusted with facilitating and executing protection of consumers in Montenegro is the condition *sinea qua non* for the successful creation and implementation of the rules on consumer protection. The case of Law on conversions of the CHF denominated loans clearly describes the consequences of absence of this cooperation.

It is obvious that Parliaments' activities in the case at hand and passing of laws in summary proceedings were the one of the main reason for the failure of the efforts to protect the consumers. Also the unwillingness of the proponents of these Laws in the Parliament to include amendments proposed by the other branches of the Government have led to great number of additional problems.

The summary proceedings in the last case have clearly led to the adoption of the law the passing of which proved to be unnecessary. If the Parliament had waited for the opinion of the Government and Central Bank, which is the main supervising authority by the provisions of this law, the adoption of the Law on Consumer Protection – users of the financial services, on the off-chance wouldn't have happened.

Bibliography

Consumer Protection Act, Official Gazette of Montenegro, No. 2/2014.
Consumer Credit Act, Official Gazette of Montenegro, No. 35/2013.
Constitution of Montenegro, Official Gazette of Montenegro, No. 1/2007.
Law on the Conversion of Swiss Franc - Denominated Loans into Euro - Denominated Loans, Official Gazette of Montenegro, No 46/2015.
Law on Amendments of the Law on the Conversion of Swiss Franc Denominated Loans into Euro Denominated Loans, Official Gazette of MNE, no. 59/16.
Statistical Yearbook of Montenegro 2016.
Legal opinion of the Supreme Court of Montenegro no.166-2.
Decision of the Constitutional Court of the Republic of Croatia, No. U-I-246/2017.
Report on supervision over the implementation of this Law submitted to the Parliament by the Central Bank.
Report on the complaints of the debtors of CHF denominated loans on the application of the Law on amendments of the Law on conversion of the Montenegrin Banking Ombudsman.

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