TUCA ZBARCEA
ASOCIATII

30 April 2015

Legal Bulletin

Banking Law

In this issue:

Amendments and supplementations to Government Emergency Ordinance No. 99/2006 on credit institutions and capital adequacy

Law No. 29 of 9 March 2015 approving Government Emergency Ordinance No. 113/2013 on budgetary measures, amending and supplementing Government Emergency Ordinance No. 99/2006 (the **"GEO 99/2006"**) on credit institutions and capital adequacy was published in the Official Journal of Romania, Part I, No. 171/12 March 2015 (the **"Law 29/2015"**).

- **New requirements on the management of credit institutions.** For credit institutions with a one-tier board system, the chairperson of the board of directors must not simultaneously hold the position of general manager within the same credit institution. However, an exception is also established so that, upon the approval of the National Bank of Romania (the "**BNR**"), and only in cases well justified by the credit institution, such multiple positions may be held.

  The members of the supervisory board and of the board of directors of the credit institutions: (i) may not hold a term of office in a management position at the same time with two terms of office in non-management positions, and (ii) may not hold four terms of office in non-management positions at the same time. When both

management and non-management terms of office are held within the same group, they shall be deemed as one and the same term of office. Such interdictions do not apply to (i) the terms of office held within credit institutions and investment firms that are part of the same institutional protection scheme, according to Regulation (EU) No. 575/2013 on prudential requirements for credit institutions and investment firms, amending Regulation (EU) No. 648/2012 and (ii) the terms of office held in organizations or entities that do not predominantly pursue business objectives.

- **Contractual framework and relationship with the clients.** The credit institutions have the right to carry out transactions with the clients exclusively on a contractual basis, acting in a prudent fashion and in compliance with the consumer law. The contractual documents must be drawn up in such a way so as to enable the clients to understand all contractual terms and conditions, and especially the performances undertaken by them. If the agreement does not provide for it, the credit institutions may not charge the client for interests, penalties, fees or other costs and banking charges.

  Credit institutions are prohibited from conditional selling. Therefore, the granting of loans or the supply of other products or services to clients may not be conditioned by the sale or purchase of shares or other equity securities/financial instruments issued by the institution of creditors by another entity of the same group or by the acceptance by the client of other products or services, offered by the credit institution or by an entity belonging to its group, that have no connection to the crediting operation or to the requested product or service.

- **Sanctions.** Law 29/2015 introduces new sanctions that may be applied by the NBR to credit institutions. The BNR shall have the right to request (i) the cessation of the activities that carry excessive risks to the integrity of the credit institution; (ii) the limitation or prohibition of the distribution of profits from distributable elements to its shareholders or members and/or the payment of interest to the holders of additional 1-tier capital, if such prohibition is not a case of non-repayment for the credit institution. The members of the board of directors and the managers or, as the case may be, the members of the supervisory board and of the board of directors of a credit institution, as well as the persons appointed to lead the structures dealing with the activities related to risk management and control, internal audit, legal, compliance, treasury, crediting activities, and any other activities that may put the credit institution at significant risks, or the persons appointed to lead the credit institution branches, responsible for the sanctioned action, shall be temporarily prohibited from holding certain positions within a credit institution.

- **Offences.** Pursuant to the supplementing of the GEO 99/2006, it is set forth that the commencement of activities as credit institution without obtaining the authorization required under the law is an offence punishable with imprisonment from one to five years.

- **Limitation of the enforcement for the funds related to the payment systems.** The funds and the financial instruments existing in the accounts of the participants to the payment systems and to the financial instruments' settlement systems, which are intended for purposes of fulfilling the participant's obligations arising from the irrevocable transfer orders and from the net positions resulting from setoff, may only be subject to enforcement by third parties, including via provisional remedies or enforcement measures, after the fulfilment of the said obligations. In addition, the financial instruments registered into the accounts of the participants to the financial instruments' settlement systems, accounts exclusively intended for registering the holdings of their clients, are not affected, in case of insolvency of the participant, and may not be subject to the enforcement of the participant by third parties, including via provisional remedies or enforcement measures.

Clause regarding the prepayment under a credit agreement. Abusive clause

The High Court of Cassation and Justice (the "**ICCJ**") decided, by Decision No. 2665 of 24 September 2014, issued in final appeal by 2nd Civil Law Division of the High Court of Cassation and Justice, that the clauses via which the bank is granted the right to accelerate payment in case of non-fulfilment of obligations resulting from other contracts entered into with the bank or other financial or credit companies, or in unexpected situations which, in the bank's opinion, render it impossible for the borrowers to fulfil their contractual obligations, are abusive.

In its reasoning, the ICCJ held that, via such clauses, the bank is granted the discretionary right of accelerating the payment, and the court of law has no criteria for verifying such measure.

Moreover, the ICCJ stated that the provisions contained in the clauses of the agreement do not offer an independent observer the actual possibility to assess the grounded nature of such clause, and, in order for such clauses not to be abusive, they should indicate a grounded reason for accelerating the payment.

Clause regarding the risk fee. Abusive clause

The High Court of Cassation and Justice (the "**ICCJ**") decided, by Decision No. 2896 of 6 October 2014, issued in final appeal by 2nd Civil Law Division of the High Court of Cassation and Justice, that the clauses via which a significant monthly risk fee is established, *i.e.* 0.15%, respectively, 0.22% of the credit value, are abusive, and that they lead to a significant imbalance between the rights and obligations of the parties.

In its reasoning, the ICCJ held that such required fee covers an insurance taken by the bank against a potential risk, namely that the borrower becomes insolvent, but the amounts collected as risk fee are not returned at the end of the loan term, even if the borrower proves to be a good payer.

Moreover, the ICCJ stated that the obligation to have a plain and intelligible language of the clauses cannot be reduced to having a clear and easily intelligible language from the grammatical or textual standpoint, because consumers must have a clear representation of the reasons and grounds pertaining to the content and the effects of the clause on the agreement in its entirety.

Measures for strengthening financial discipline concerning cash collection and payment operations, and on introducing modern payment systems

Law No. 70/2015 for strengthening financial discipline concerning cash collection and payment operations and for amending and supplementing Government Emergency Ordinance No. 193/2002 on introducing modern payment systems was published in the Official Journal of Romania, Part I, No. 242 of 9 April 2015 (the **"Law 70/2015"**).

Law 70/2015 will apply in the case of collection and payment by or to legal entities, freelancers, individual undertakings, family undertakings, self-employed individuals, other individuals who conduct activities independently, associations and other entities with or without legal personality (hereinafter jointly referred to as **"Persons"**), but it also contains a provision concerning operations conducted between individuals.

The provisions of Law 70/2015 will not apply to the state treasury, credit institutions, e-money issuers, payment service providers, authorized by the National Bank of Romania or another Member State of the European Union, non-banking financial institutions and entities that conduct foreign exchange operations, but only in the case of operations that are specific to the scope of business for which they were authorized. Gambling operators are also exempted from the application of this law.

Cash operations will be allowed only if their aggregate value does not exceed the following thresholds:

- for collections – daily threshold of RON 5,000 from a Person;
- for *cash and carry* shops[1] – daily threshold of RON 10,000 from a Person;
- for payments – daily threshold of RON 5,000/Person, without exceeding an aggregate daily threshold of RON 10,000;

[1] As defined under Article 4 letter e) of Government Ordinance No. 99/2000 on the trading of products and market services, republished, as further amended and supplemented.

- for payments to *cash and carry* shops – daily threshold of RON 10,000;
- for payments with advance money – daily threshold of RON 5,000 for each person who received advance money.

The Persons' cash collections from individuals for assignments of receivables, loans or other financings, as well as the payment for the delivery of goods or provision of services, as well as payments to individuals for purchases of assets or provisions of services, dividends, assignments of receivables or other rights and returns of loans or other financings, will be made within the limits of a daily threshold of RON 10,000 from or to an individual. An exception from this rule is that of collections under sale agreements with payment by instalments, in which case the limitation will not apply.

The following operations may be made in cash without the application of the thresholds mentioned above:

- submission of cash to credit institutions or payment service providers, including in cash collection ATMs;
- payment of travel expenses for business purposes;
- payment of taxes, charges, contributions, fines and other obligations owed to the consolidated general state budget;
- cash withdrawal from accounts opened with credit institutions or payment service providers by individuals, for the purpose of payment of salaries and other personnel rights and for other payments to individuals other than those prohibited by this law;
- transfer of sums through payment service providers;
- submission of cash in ATMs operating with banknote or coin acceptors.

Advantages granted by the Persons to clients for the performance of cash payments will be prohibited. The breach of this interdiction will be fined by RON 3,000 to RON 4,500. Operations between individuals based on the transfer of ownership over assets or goods, the provision of services, as well as those corresponding to the granting or returning of loans will be limited to a daily threshold of RON 50,000/transaction. The law does not allow the state treasury, credit institutions, e-money issuers, payment service providers, non-banking financial institutions and entities that carry out foreign exchange operations to release to the Persons, as well as to branches and secondary offices of legal entities that have their own cashier's office and/or an account opened with a credit institution, cash amounts in excess of the daily threshold of RON 5,000/person, except for operations not governed by this law, as mentioned above.

The law also prohibits the operation of dividing into smaller parts the sum to be collected, the invoices or cash payments so as not to exceed the thresholds. In case of invoices that exceed the thresholds provided by law, it is allowed to pay in cash the sum within the threshold, while the excess will be paid by non-cash payment instruments. In the case of cancelled invoices and invoices related to returned goods and/or un-provided services worth more than RON 5,000 and RON 10,000,

respectively, in case of *cash and carry* shops, the return may be within the limits of RON 5,000 and RON 10,000, respectively, in cash, and the amount that exceeds the threshold may be returned only through non-cash payment instruments. In case of individuals returning goods or services not provided to individuals, the sums can be returned in cash within the limits of RON 10,000, while sums in excess of the threshold may be returned only through non-cash payment instruments. The law provides for the exception of individuals who declare on the return date that they no longer have a bank account, in which case the restitution may be made fully in cash, regardless of the amount of the returned sum.

The non-observance of the interdictions provided by Law 70/2015 constitutes a misdemeanour, if the actions were not perpetrated under conditions which, according to the criminal law, would render them offences. The fine is of 10% from the collected sum in excess of the threshold for each operation but, in any case, no less than RON 100.

Law 70/2015 supplements Government Emergency Ordinance No. 193/2002 on introducing modern payment systems, approved by Law 250/2003, as further amended and supplemented, by introducing provisions on determining thresholds in case of certain bank fees.

Credit institutions or non-banking financial institutions that issue e-payment instruments cannot charge inter-banking fees over 0.2% of the value of each operation performed by using debit cards, or over 0.3% of the value of each operation performed by using credit cards.

Agreements concluded between the beneficiaries of the payments and the accepting institutions must contain detailed information on the inter-banking fee, the fee for the payment and processing system, the margin of the accepting institution, as well as the additional fees charged depending on the type and category of the payment cards.

The provisions on inter-banking fees will not apply to operations involving commercial cards, cash withdrawals from ATMs and card operations issued by card payment systems in which issuance and acceptance functions are integrated in a single financial institution, which is also the owner of the system.

Failure to observe the provisions above constitutes a misdemeanour and is sanctioned by a fine of RON 10,000 to RON 200,000.

The measures for strengthening financial discipline concerning cash collection and payment operations will become effective 30 days from publication in the Official Journal and will **not apply to agreements concluded before the effective date of the law**. The law will repeal Government Ordinance No. 15/1996 on strengthening financial and foreign exchange discipline, as amended and supplemented by Law No. 131/1996, as further amended and supplemented.

The provisions amending and supplementing Government Emergency Ordinance No. 193/2002 on introducing modern payment systems will be applied 12 months from the entry into force of the law.

Abusive clause. The court cannot amend the clause

The High Court of Cassation and Justice (**"ICCJ"**) decided, through Decision No. 3234 of 23 October 2014, issued in final appeal by the 2nd Civil Division of the High Court of Cassation and Justice, that, with regard to abusive clauses, the courts only have the obligation to exclude the application thereof, so as not to have binding effects on consumers, by ascertainment of the absolute nullity, but do not have the possibility to amend them.

In the grounds section, the ICCJ upheld that, in accordance with the practice of the Court of Justice of the European Union, the regulations on unenforceability of abusive clauses on consumers are governed by the same legal framework as absolute nullity because they protect a general interest, not an individual one, and the courts have the obligation to exclude the application thereof.

The ICCJ also stated that Law No. 193/2000 on abusive clauses included in agreements between sellers/providers and consumers does not allow the judge to intervene, in breach of the principle of contractual liberty, in the parties' agreement. The judge only has the right to ascertain the abusive or non-abusive nature of the clauses and, in case they meet the criteria on abusive nature, to order their removal as null and void. The consequence is that, if the agreement is no longer effective after the removal of the clauses considered abusive, the consumer is entitled to request the rescission of the agreement, subject to damages, if applicable.

gabriela.anton@tuca.ro

sergiu.negreanu@tuca.ro

Editors

Our lawyers specialing in **Banking and Finance Law** provide professional counselling in the regulatory and advisory fields, ranging from bank acquisitions and privatisations to structuring of bilateral, syndicated and other loan facility agreements, including the accessory transaction documentation. The group represents high-profile international and domestic commercial banks, investment banks, multilateral development banks, leasing companies, insurance companies, arrangers and other financial institutions with a presence in Romania or interested to invest in Romania.

Since many financings may be part of a larger business transaction, our banking and finance lawyers work closely with lawyers from other practice groups of Țuca Zbârcea & Asociații and are well versed in completing most any kind of transaction with a financing component, including banks privatisation, bankruptcy and restructuring of banks, collateral enforcement and debt recovery, counselling of financial institutions in mergers & acquisitions projects, portfolio transfers and restructuring and disposal of non-performing loans.

Mihai Dudoiu
Partner
+4 021 204 76 36
mihai.dudoiu@tuca.ro

Gabriela Anton
Managing Associate
+4 021 204 88 90
gabriela.anton@tuca.ro

TUCA ZBARCEA
ASOCIATII

Șos. Nicolae Titulescu nr. 4-8
America House, Aripa de Vest, et. 8
Sector 1, 011141, București, România
T + 4 021 204 88 90
F + 4 021 204 88 99
E office@tuca.ro
www.tuca.ro