PARTICULARITIES OF CIVIL ACTION IN THE CASE OF FRAUD BY BANK CREDIT CONTRACTS

Andrei-Viorel IUGAN[*]

Abstract

The crime of fraud is one of the most important threats facing the contemporary Romanian society. One of the most common ways of fraud is fraud through credit agreements. Of course, as in any criminal proceedings, in this case the question arises as to the way of repairing the damage caused by the offense. The particularity of solving the civil action in this case is the fact that, according to Romanian law, the credit contract is an executory title, so the bank would have no reason to wait for the criminal trial because it can immediately proceed to the forced execution of the person who obtained the credit in fraudulently.

However, there is also the view that the criminal court will have to cancel the credit agreement, which has been hit by absolute nullity at the end of the criminal trial, and to oblige the defendant to pay damages. Throughout this study, we will try to analyze the consequences of both solutions and try to identify the legal and sound solution.

Keywords: *fraud, civil action, credit contract, executory title, penalty.*

1. Introductory considerations.

It is possible that the commission of an offense will produce, in addition to the socially dangerous consequences, material and moral damages to the detriment of a natural or legal person, in which case the offense is also the source of civil proceedings.

The legal means by which the person materially or morally damaged seeks compensation for the damage caused in a criminal trial is the civil action.

As a judicial action, civil action is essentially an institution of civil law, becoming an institution of criminal procedural law insofar as it is exercised in a criminal proceeding.[1]

In this respect, Article 19 (1) C.pr.pen. states that "the civil action brought in the criminal proceeding has as its object the tortuous civil liability of the persons responsible under civil law for the damage caused by committing the deed which is the object of the criminal action".

Civil action arising from the commission of a criminal offense can also be exercised separately in civil proceedings; in some legal systems, such as the Anglo-Saxon, a civil action can not be brought before the criminal court, so that the person injured by the offense must go to the civil court to obtain compensation for the damage suffered. In most legislation, the two actions - both criminal and civil - have as a common source that the same offense can be exercised concurrently in the same criminal process; in this sense, the romanian specialists in the field of criminal procedural law were pronounced. The Romanian criminal procedure has been known this system since 1864.[2]

2. Fraud by credit bank contracts.

The crime of fraud is one of the most important threats facing the contemporary Romanian society. A particular feature of this form of criminal behavior is fraud by credit bank contracts

The economic crisis that the Romanian society has traveled since 2009 proved a particularly cruel reality: a large part of the loans granted by the banking units were fraudulently granted and the accompanying guarantees had no real effective coverage . The desire for enrichment of bank employees (who were rewarded by the amount of the credits granted, without counting that they later did not have any chance of recovering the amounts of money granted), the lending policy (the granting of loans was not decided by an independent structure in the bank's structure that has no contact with the client, but also by the officials of the agencies and branches to be rewarded for the respective credits), the formal verification of the sources of income for those applying for loans (the information in the income certificates, which most of the time they were forged, were not for example checked at the Territorial Labor Inspectorates) were the main elements that favored fraud. Practice has shown that there have been numerous criminal networks specializing in fraudulently obtaining credits, networks formed of managers of commercial companies (who issued employee certificates although their companies did not carry out any concrete economic activity, the only purpose of the existence of these companies being strictly deception banking units), bank officials, persons with the ability to falsify identity documents or other documents, etc. Against the backdrop of the desperate financial situation of many people, these

[1] Ion Neagu, Drept Procesual Penal.Partea Generala, Bucuresti,Ed. Global Lex, 2007, p.73

[2] G. Theodoru, *Tratat de Drept Procesual Penal,* Bucureşti, Ed. Hamangiu, 2008, p. 113-114

groups have found numerous clients who have agreed to contract bank loans in their own name, with most of the loans coming back to the members of the criminal group.

Although the period we refer to seems far away, judicial practice proves that there are many cases currently pending court trials dealing with such bank frauds. Although such crimes are not as common at present, they are a constant reality.

3. Solving the civil action.

In this article, we aim to deal with the issue of solving civil action in the case of a fraud committed through credit agreements. Is such a civil action exercised by the banking unit in criminal proceedings admissible? And if so, under what conditions? The solutions were contradictory in the case-law.

In a first opinion, it was considered that the exercise of civil action in this case is inadmissible. The credit agreement between the bank unit and the person who took the credit is an enforceable title according to O.U.G. no. 99/2006. Thus, according to art. 120 of O.U.G. no. 99/2006, credit agreements, including real or personal guarantee contracts, concluded by a credit institution shall be enforceable titles.

The civil party already has an enforceable title, represented by the credit agreement, so that the admission of the civil action would lead to two titles for the same claim. In other words, the civil party already has an enforceable title in respect of that amount, the enforceable title which is precisely the contract of credit concluded. As a result, the enforcement of these titles would be of greater interest to the civil party, even through a forced execution conducted with the bailiff.

The situation is similar to the one in which the civil action is taken in the case of the offense of family abandonment, although for the maintenance pension there is an enforceable title represented by the court order by which the parent was obliged to pay it. In this respect, it has been stated in the case-law that "as regards the civil aspect of the present case, the court found that there was a ground for inadmissibility of the civil action, deriving from the fact that no longer a decision can be made to order the defendant to pay of the amounts targeted in the criminal proceedings, as long as the defendant has already been obliged, in a civil proceeding, to pay exactly the same amounts and the same title. In other words, the civil party already has a writ of execution on the respective pension, an enforcement order which is precisely the final and irrevocable civil sentence by which the defendant was obliged to pay a monthly maintenance pension."[3]

In another opinion it is considered that in such cases, the court is obliged to order the cancellation of credit agreements as a result of the restoration of the previous situation, and these have been hit by absolute nullity as a result of the unlawful cause. Under the conditions of the abolition of credit agreements, the possibility for the bank to make claims in the criminal proceeding opens through the exercise of civil action. In other words, the bank will not have two enforceable titles, because when the court order by which the defendant was ordered to pay the sums due defines definitively, the credit agreement is abolished and therefore can not constitute a basis for enforced execution the one found guilty.

4. Possible solutions

In our opinion the first opinion is the correct one. In this sense, it is also the majority practice. For example, in a recent ruling, the Bucharest Court of Appeal stated that "the Court, in line with the view of the court of first instance, notes that the claims relating to the credit agreement concluded with the defendant B in the amount of RON 30 485.90 are inadmissible since the contract in question is an enforceable title, so that the admission of a civil action under this contract would lead to two titles for the same claim."[4] In another case, another panel of judges from the same court stated that "in such situations, there is no question of an unlawful cause of the contracts concluded, but of a vitiation of consent (inferiority), which only attracts the relative nullity of credit agreements . At the same time, as long as the civil party already had an enforceable title against the defendants, it is questionable to what extent he could claim the same claims in a criminal trial."[5]

Besides, we can not help notice that the second opinion would only cause many practical difficulties. For example, almost always bank units do not wait for the criminal process to be finalized but address the bailiff to execute the credit agreement. If the credit agreement were to be canceled as a result of restoring the previous situation, virtually all execution acts under the credit agreement would have to be effectively abolished as a result of the principle of accessorium sequitur principalae. Such an interpretation would only jeopardize the principle of legal certainty and would be capable of generating new litigation (for example, the debtor's assets have been executed and leased to a third party in good faith). Even more obvious is the erroneous nature of that view if the credit agreement was associated with a mortgage contract on the assets of a third party.[6] In this situation, cancellation of the credit agreement would lead to the termination of the mortgage contract as a result of the latter's accessory character. Practically, as a result of this interpretation, the bank would obviously be disadvantaged because it would lack a real estate collateral that it consented to

[3] Jud. . Brașov, s. pen., sent. pen. nr. 2075/11.10.2016, J. Timișoara, s. pen. sent. pen. nr. 3073/7.10.2016, in I. Neagu, M. Damaschin, A.V. Iugan., Codul de Procedură Penală Adnotat, București, Ed. Universul Juridic, 2018, p. 91-92.

[4] C. Apel București, s. I pen., dec. nr. 1463/1.11.2018, unpublished

[5] C. Apel București, s. a II-a pen., dec. nr. 308/23.02.2016, unpublished.

[6] See also, T. București, sent. pen. nr. 221/13.02.2019, unpublished.

granting credit. In particular, the bank would have diminished its chances of obtaining compensation for the damage caused.

That is why we consider that in such cases the banking units are not in a position to demand compensation for the damage in the criminal proceedings, but will execute the credit contract.

However, two exceptions are to be recognized from this rule: the situation in which the bank carries out the civil action against other participants in the offense than the one with which it actually concluded the credit agreement and the hypothesis in which the credit agreement was obtained under a different name, using fake identity documents.

In the first case, obviously civil action is admissible in respect of the damage created, the civil party having no enforceable title against the defendant in respect of these amounts, if he is complicit or instigator of the acts by which the bank was deceived.

In the same sense, in a solution of judicial practice, it was shown that "regarding the rest of the claimed claims, in the context in which the defendant had the procedural quality of accomplice and instigator of the material acts by which the bank was injured, the civil party does not have a enforceable title against the defendant, but only against the suspects for whom the case was closed in the course of the criminal prosecution - as the act does not present the degree of social danger of a crime - and on whose behalf the contracts in question were concluded. Under these circumstances, amounts of money corresponding to credit agreements made by suspects AC, IM, RN and ZM with the civil party through the support and at the request of the defendant may be the object of the civil action in question.

In a fair and thorough manner the court of first instance analyzed the conditions of civil liability in question, 998-999 C.civ. previously valid on the date when the offense was committed, holding that the offending offense is the action of the defendant to issue false certificates, which allowed AC, IM, RN and SM to obtain credits, although not they had this right. Indeed, the condition of the existence of damage is also met, since the actions of the accused have caused material damage, amounting to the amounts with which the civil party has been harmed by the non-repayment (or delayed repayment) of the loans. At the same time it was rightly pointed out that the damage caused is the consequence of the illicit deed committed by the defendant, the act being committed by the guilty defendant, having the possible consequences of his actions on the civil party, consequences that, even if he did not follow, he accepted.

The Court observes that the first instance found that there are fulfilled the conditions for the detention of the defendant's civil liability and legally forced the defendant to pay the amount requested by the civil party. The Court also takes into consideration the provisions of Art. 1382 of the Civil Code, according to which those responsible for a damaging act are held jointly and severally liable for the damage and, in the case of joint and several liability, the creditor is entitled to require any person to execute the full benefit of the obligation which is the subject of the obligation.

The defendant had in the criminal case in question, complicity in the material acts imputed to suspects AC, IM, RN and ZM. Therefore, in this situation, the civil party could claim payment of the entire debt from any of those charged with the civil liability."[7]

Also, in the second case the civil action is admissible. The credit contract is concluded by the defendant under another name, it is obvious that the bank does not have a writ of execution against him and can not carry out his forced execution. Under these circumstances, it is necessary to terminate the concluded credit agreement, which is being punished with absolute nullity for the unlawful cause and the substantive settlement of the civil action.

If the court will effectively resolve the civil action, the question arises as to how the amount of the damage will be determined, namely whether the defendant will be required (of course, in addition to the amount borrowed) to pay all the penalties and commissions provided in the credit agreement or just to pay legal interest.

The problem arises from the art. 19 par. (1) C.pr.pen. in which it is stated that the civil action in the criminal proceedings has as object the tortuous civil liability of the persons responsible under civil law for the damage caused by committing the deed which is the object of the criminal action. As regards tort liability and not contractual liability, the question arises as to the extent to which the provisions of a contract for determining the amount of the damage can be taken into account. Moreover, the fact that the credit agreement in question is abolished must also be taken into account. Could such a contract be the basis for calculating the damage?

In the case-law, the views on how to calculate the damage in the case of frauds in the conventions, in the event that the parties have introduced a criminal case, are controversial.

For example, in a case involving a crime of fraud, consisting in the fact that the defendants as promise-sellers deceived 8 (eight) persons by signing of the sale-purchase pre-contracts with the notary of apartments to be built in Sibiu, for which the injured parties paid between 5.000-64.000 euros (penalties were set in each contract if the promissory-sellers did not sell the apartments), and later they found that those the apartments were either sold to others or were not finalized and entered in the Land Book, the defendants refusing under certain pretexts to repay sums of money collected in advance, the court, by settling the civil action, ordered the defendants not only to pay the sums

[7] C. Apel București, s. I pen., dec. nr. 1463/1.11.2018, unpublished.

received but also to pay penalties according to the concluded contracts.[8]

In another case, the defendant was convicted of deception, noting that he had requested from B.C.R. SA a credit of 43.500,00 Euro, granted on February 27. The credit was guaranteed with the apartment located in Vaslui, ŞMM, bl. 337, et. 3, sc. C, ap. 7, on which a first-rank mortgage was signed in favor of the bank, authenticated by the conclusion no. 735 dated 29 February 2008 by the Bureau of Notary Public Associates B.M. and CRD defendant stating that the flat is good for themselves and "is free of charges or prosecutions of any kind on it there is litigation pending, being the acquisition date and so far legally and continuously" in its property despite the fact that that apartment was a common good of the defendant and his wife with whom he was in the process of divorce. The court, admitting the civil action brought by the bank unit, ordered the defendant to pay the outstanding debit and penalties under the credit agreement.[9]

Conversely, in a case where the defendant was convicted of fraud, it was noted that the defendant misled the injured person C.D. after 14 October 2011 when the parties authenticated B.N.P. A.A.A. the addendum to the authenticated Sale / Purchase Agreement dated September 29, 2011 (ending the authentication of October 14, 2011) invoking various unrealistic reasons not to end on January 25, 2012, the purchase contract for the studio for which an antecontract was previously concluded selling sale for the price of 26,000 euros, the goal pursued by defendant BH being to get a better price from another buyer for the same studio (32,000 euros) and thus causing damage to the injured party C.D. by the fact that he could not become the owner of the respective studio and can not oblige the defendant B.H. to conclude an authentic act of sale, provided that the respective studio was sold at auction under a forced execution procedure and subsequently sold to another person.

In the case, at the time of the conclusion of the sale / purchase agreement, the injured C.D. paid the accused B.H. the amount of 22,000 euros by bank transfer from C.M. - Buyer's father opened at Banca R.D. in the account of the defendant B.H. opened at the same bank. The price difference of 4,000 euros was to be paid by the injured C.D. in 2 installments, namely 2,000 euros until September 30, 2012, and 2,000 euros by September 30, 2013. The authentic purchase purchase agreement for the studio would be completed on September 30, 2013, otherwise defendant BH had to pay the injured party double the amount of the advance received or the injured party may apply to the civil court to obtain a court order to place a sale-purchase contract for that studio.

Solving the civil action, the appellate court held that it is not possible to order the defendant to pay double the advance received from the injured party, namely the sum of 44,000 euros, as this sum has its source in the clauses of the bilateral sale-purchase promise. However, the defendant's liability is engaged in the criminal offense on a non-contractual basis. In this respect, the appellate court considered that there was no causal link between the defendant's act of misleading the injured party and the amount of the damage consisting in the payment of an additional amount equal to the advance paid by the injured party resulting from the failure to execute the pre- for sale – purchase.[10]

In our opinion, in such cases, the defendant may be required to pay all the interest and penalties stipulated in the credit agreement, and not just to pay the legal interest. As long as both parties to the contract have agreed on the claims that the creditor may claim in the event of the debtor's non-performance, there is no reason that this clause will not produce its effects for the future until the payment effective flow.

It is necessary that the contractual provisions relating to the calculation of interest and commissions due by the defendant should continue to exist only for the proper compensation of the civil party, who is entitled both to recover the actual loss and the unrealized gain. If the defendant were not obliged to pay the interest and commissions set, it would be the paradoxical situation in which debtors of bad faith, who obtained fraudulent credits through the use of falsified documents, owe the bank in case of default of the credit compensation lower than a bona fide debtor who has legally obtained a credit and can no longer pay for it due to objective circumstances.

One last issue we want to address is the possibility of the criminal court invested with the resolution of civil action in these cases to censure the penalties and interest set out in the credit agreement and to find that these are abusive clauses.

In our opinion, not only can the court, but it is even obliged (including ex officio) to consider whether the bank contract, which is the basis for establishing the amount of the damage in the criminal proceedings, contains abusive clauses or not.

As regards the possibility for the court to raise of its own motion this issue, the Court of Justice of the European Union in Murciano Quintero judgment C-240/98 decided that the protection afforded to consumers by Directive No. 93/13 on unfair terms in consumer contracts requires the national court to be able to examine of its own motion whether a contract clause inferred from the judgment is abusive.

Applying this rule in practice, a court held in a case that the clause in Article 6 (2) of each credit agreement, which provides for penalties of 1% per day

[8] I.C.C.J, s.pen., dec. pen. Nr. 2978/13.11.2014, according www.scj.ro

[9] C. Apel Iași, s.pen., sent. pen. nr. 82/18.12.2014, according www.scj.ro; n the appeal made by the banking unit, the court ordered the pending settlement of the civil action following the death of the defendant - I.C.C.J, s.pen., dec. pen. nr. 197/29.05.2015, according www.scj.ro

[10] I.C.C.J, s.pen., dec. pen. nr. 219/12.06.2015, according www.scj.ro

of delay, must be interpreted in the light of the provisions of Law No 193/2000 , with amendments to the abusive clauses in contracts between traders and consumers, in force at the time of the conclusion of the agreement between the parties to the dispute. Under Article 1 paragraph 3, traders are forbidden to stipulate abusive clauses in cartels with consumers.

Any contract provision that has not been negotiated directly, which does not allow the consumer to influence its nature and which creates a significant imbalance between the rights and obligations of the parties to the detriment of the consumer and violates the principle of good, is regarded as an abusive clause under Article 4 of the same act, Faith.

Thus, this provision protects the interests of the consumer, in the sense of allowing the possibility of negotiating the contractual terms from equality, while being an expression of the actual (real) manifestation of the will of freedom.

According to the court, the clause inserted in Article 6 (6) (2) of the General Conditions, which does not limit the amount of penalties in time or in amount, thus allowing the creditor to remain passive until the limitation period is fulfilled, does not entirely satisfy the requirements of a clause complying with legal provisions and the principle of good faith. That is because, on the one hand, the debtor could not have influenced its content, since that convention is a standard contract, which contains pre-established clauses unilaterally. On the other hand, the provision in question produces a serious imbalance between the situations of the parties, to the detriment of the debtor, because it establishes a unilateral liability by forcing the debtor to pay penalties in the event of default or late enforcement but not the creditor .

Under these conditions, seeing also the provisions of letter i) of Annex no. 1 to Law no. 193/2000, which lists exemplary types of abusive clauses, including the obligation to pay disproportionately high amounts in case of non-fulfillment contractual obligations by the trader in comparison with the damage suffered by the trader, the court instance considered that the obligation of the debtor to pay penalties in an unlimited amount, reaching a value exceeding two or three times the value of the debit for example, in the case of RN the outstanding capital is 13,273.68 lei and the delay penalties are 45,062.34 and in the case of ZM the remaining capital is 6,894.75 lei and the penalties are 22,096.82 lei - is justified by the actual loss suffered by the creditor, since in the period between the date of declaring the maturity of the loan up to which the penalties have been calculated - not serious monetary instability) is an abusive clause that damages the interests of the consumer-debtor.

Failure to observe the imperative, public order provisions of Article 4 of Law no. 193/2000 brings the total absolute nullity of the aforementioned abusive clauses. The sanction of invalidity has a virtual character, but it certainly results from the way in which the legal provision is drafted, as well as from its rationale and purpose.

Considering that the law was adopted to transpose the European Community Directive No.93 / 13 on unfair terms in consumer contracts and Romania has assumed the obligation to transpose and effectively apply Community legislation in inter-individual relations, only an interpretation that ensures the effective effectiveness of the prohibition of imposing unfair terms in contracts between traders and consumers can ensure the attainment of the aim pursued by the legislature, namely to discourage the laying down of unfavorable clauses for consumers under the general conditions imposed on them.

From the wording of the contract, which in fact is an adhesion contract, the party having no active role in negotiating the clauses, it has not obviously been that the debtor has had an effective opportunity to influence the nature of the inserted clauses, including those relating to and the amount of penalties in case of late payment of invoices and the collection of a pre-term termination fee.

On the effects of ineffectiveness, the Court held that in the judgment in Case C-618/10 Banco Español de Credito SA, the Court of Justice of the European Union stated that the national courts had only the obligation to exclude the application of an unfair contractual clause so that it produces binding effects on the consumer, but without being able to alter its content. That contract must, in principle, continue to exist without any change other than that resulting from the abolition of unfair terms inasmuch as, in accordance with the rules of national law, such maintenance of the contract is legally possible .

Under these circumstances, the court deduced from the amount of the damage claimed by the civil party the amount of penalties calculated according to the contract.[11]

5. Conclusions

As we have seen, the practical problems faced by courts in dealing with civil action in the case of credit fraud were quite numerous. Under these circumstances, the case-law solutions were also very varied.

Unitary jurisprudence is an indispensable element for increasing citizens confidence in the justice system. We hope that the present study, through the solutions proposed and the case-law presented, will be a first step in the unification of judicial practice and a useful tool for every person involved in the execution of the act of justice, and why not for any person interested in the issues presented.

[11] Jud. Sect. 5 București, sent. pen. nr. 1316/2.05.2018, unpublished.

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