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NEWLY ADOPTED LAW ON PROTECTION OF CONSUMERS AGAINST EXCESSIVE INTEREST – MORE REASONS FOR CONCERN RATHER THAN BENEFITS?

INTRODUCTION

On 6 May 2020, the law on the protection of consumers against excessive interest (the "**Law**") was adopted by the Romanian Parliament. The Law has yet to enter into force, as it is subject to a constitutionality review by the Constitutional Court, initially scheduled for 10 June 2020 and postponed to 8 July 2020. This alert aims to provide financial creditors affected by the Law (i.e. credit institutions, non-banking financial institutions and debt collection entities) with an overview of the new framework set out by the Law.

In spite of its title, the Law not only deals with the legal relations between consumers and financial creditors regarding excessive interest, it also regulates: (a) certain requirements for the mandatory amendment of certain credit contracts; (b) certain illicit commercial practices such as abuse of economic power and specific unfair commercial practices; and (c) a number of misdemeanours.

KEY CONCEPTS

The Law defines **consumers** apparently differently than other existing laws on consumer credits (e.g. the Emergency Government Ordinance 52/2016 on credit agreements offered to consumers for immovable assets (the "**Immovable Consumer Credit Act**"). It does so by excluding natural persons acting as professionals and including natural persons acting as various guarantors (e.g. endorers of promissory notes securing receivables subject to the Law) with several exclusions (e.g. guarantors who are shareholders or directors of legal entities, acting as main debtors). These exclusions are contained in the new Law despite the fact that under the Immovable Consumer Credit Act, natural persons acting as guarantors are not expressly excluded as consumers.

By defining **financial creditors**, the Law sets out the entities which must comply with it: (a) credit institutions authorized by the National Bank of Romania ("**NBR**"); (b) branches of

foreign credit institutions acting in Romania; (c) non-banking financial institutions; and (d) debt collection entities. It is worth noting that other entities which may lend in Romania (e.g. credit institutions authorized by competent authorities in EU member states and providing direct services in Romania, branches of foreign financial institutions, payment institutions, real estate developers) are not expressly covered by the Law and, therefore, should not be bound by it. That said, only time will shed light on the consequences of loans granted by such excluded lenders where their receivables are acquired by debt collection entities (which must abide by the Law) and whether this Law will bring a new element to the non-performing loans market.

As opposed to the Immovable Consumer Credit Act, the Law defines the **credit contract** by linking it to (re)payments in instalments. Essentially this raises the question of whether consumers under loans providing for a single bullet repayment may benefit from the Law. If the answer is in the negative, then it would be interesting to explore the reasons behind such different treatment.

In addition, the Law defines three categories of credits: (a) **real estate credits**; (b) **mortgage credits**; and (c) **consumer credits**. Unfortunately, such concepts are neither clear nor aligned with the existing legislation (e.g. credits related to real estate under the Immovable Consumer Credit Act; mortgage credits under the Law 190/1999 on mortgage lending). Thus, serious concerns arise e.g. (i) whether consumer credits with values of over RON 100,000, without a purpose related to real estate, may benefit at all from the protection under the new Law, as these do not fall under any specific category thereunder; and (ii) what should be the applicable regime in the event that a loan qualifies as both real estate credit and consumer credit. In brief, such unclear definitions may bring about confusion among consumers as well as further costs and risks of interpretation.

APPLICATION IN TIME VERSUS THE CONSTITUTION

The Law states that it applies to ongoing contracts in order to balance considerations and reduce risks from such contracts and that the protection offered by the Law seeks to maintain contractual balance. Such purposes may be construed as regulating imbalances occurred throughout the life of such contracts and, thus, as providing a form of addressing hardship, similarly to the Law 77/2016 on *datio in solutum* for the extinction of certain obligations deriving from loans ("**Datio in Solutum Act**").

As a principle, the Romanian Constitution requires that laws apply to the future, except for contravention or criminal laws which are more favourable. To comply with this core principle and the principle of legal certainty, the civil law norms encapsulated in the Law should apply only to contracts concluded after its entry into force. Despite this rationale, in 2016 the Constitutional Court decided that the provisions of the *Datio in Solutum Act* related to its application (additionally) to ongoing agreements were constitutional to the extent that courts of law would verify the existence of hardship requirements. That said, it remains to be seen whether the Constitutional Court will take a similar view as in 2016 and consider that the Law is constitutional in relation to its application to contracts concluded before its entry into force.

WHAT IS THE PROTECTION AGAINST EXCESSIVE INTEREST?

The Law expressly prohibits the inclusion of clauses and the use of excessive interest in credit contracts concluded with consumers as defined under the Law. **Excessive interest** under the Law means the contractual interest (including default interest) that is higher than the limits established thereunder. It follows that financial creditors must observe such limits in relation to consumer credits. Nevertheless, the Law mainly provides for limits to the effective annual interest ("**EAI**") and not to interest rates.

The Law defines the EAI in a rather ambiguous way, it being the difference between the total credit costs and the amount effectively lent (which suggests an absolute value), in accordance with the Immovable Consumer Credit Act. However, under the Immovable Consumer Credit Act, the EAI is expressed as an annual percentage calculated based on a formula and various assumptions. By way of background, as per Directive 2014/17, the annual percentage of rate charge (i.e. transposed as EAI in the Immovable Consumer Credit Act) is intended to serve as a uniform tool for comparing offers of credits from various lenders.

The limits to EAI and to the amounts that may be recovered from the consumer under the Law depend on the type and value of credit and/or type of creditor (see the table below, with potential questions in italics due to unclearly stated relations between rules).

Rule no.	Type of credit	Value of credit	Creditor(s)	Limit (when referring to interest such limits do not include default interest, in relation to which different rules apply)
1.	Real estate credits	Any value	All <i>*The Law does not include any carve-out. However, a different interpretation could arise, if rule #1 is read in correlation with rule #2 below, whereas rule #1 is a general norm and rule #2 seems to be a special and derogatory norm (despite the improper drafting of the Law). On this basis, rule #1 would apply strictly to credit institutions, branches of foreign credit institutions and debt collection entities while rule#2 would apply only to non-banking financial institutions.</i>	two (2) percentage points plus the reference interest rate used by the National Bank of Romania (" NBR ") (currently set at 1.75%) on the internal financial-banking market
2.	Real estate credits	Any value	Non-banking financial institutions	double the reference interest rate used by NBR (at the date of this material set at 1.75%) on the internal financial-banking market
3.	Consumer credits	up to RON 100,000 (approx. EUR 20,000)* <i>*Given the ambiguous wording of Articles 5 and 6 various</i>	All	fifteen (15) percentage points plus the reference interest rate used by the NBR (at the date of this material set at 1.75%)

interpretations could arise:
 - rule #3 is applicable only to credits exceeding RON 15,000 and up to RON 100,000; or
 - rule #3 is applicable also to credits up to RON 15,000 provided that cumulatively rule #4 is observed.

4. Consumer credits up to RON 15,000 (approx. EUR 3,000)

All

The total payable amount (i.e. principal, interest, fees, and other costs) may not exceed double the lent amount. **Please see also concerns listed in rule #3.*

The Law further expressly states that Articles 53 and 54 of the Immovable Consumer Credit Act also apply to credits falling under the scope of the Law, and thus the above limits must be applied together with the restrictions on the default interest rate set out in the Immovable Consumer Credit Act. As a result, the default interest rate may be up to three (3) percentage points above regular interest, may be applied solely to the outstanding principal and may not exceed the amount of the outstanding principal.

NEW AND EXISTING OBLIGATIONS AND ADDITIONAL SANCTIONS

Breach of the obligations regarding excessive interest is sanctionable (a) contractually, by reduction of the interest and the granting of potential damages to the consumer (in this sense a court action being required); and (b) administratively. With respect to administrative sanctions, the Law mentions several (apparently cumulative) misdemeanours for the same action (abuse of economic power; unfair commercial practices, aggressive or misleading commercial practices, fraud, illicit practices in accordance with Law 12/1990 on protection of the population against illicit production, commercial or services) in spite of the principle that one action constituting a misdemeanour may be sanctioned only through one principal sanction.

In addition, other actions of financial creditors are sanctioned as unfair commercial practices in accordance with Law 363/2007 on combating unfair business-to-consumer practices. Therefore, creditors may be fined, (e.g. prohibition of the unfair practice) and/or other complementary measures may be imposed on them (e.g. temporary suspension of business, repayment of price paid by the consumer) as a result of clauses in agreements allowing a creditor to, *inter alia*:

- charge penalty interest which exceeds the principal;
- charge interest on interest;
- charge fees, expenses, premium, or other accessories to the credit with the intention to hide excessive interest.

As a separate obligation, if the consumer is unable to perform his/her obligations due to the high costs of the credit, financial creditors must (a) amend the credit contract within

45 days as of the request of the consumer; (b) refrain from terminating or enforcing the credit contract for a period of 90 days as of being notified of such circumstances; and (c) refrain from charging cumulatively regular interest and default interest after the due date of the loan.

WHAT NEXT?

While the Law is intended to offer an enhanced level of protection to consumers by limiting the interest under consumer credits, it may not achieve its goals unless it is integrated in the existing consumer protection legal framework, including complying with all principles in the Romanian Constitution and eliminating ambiguity and grounds for discrimination among consumers.

Update 2021: On 28 January 2021, the Romanian Constitutional Court ruled that the Law in its entirety is unconstitutional.

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