

Conference of European Lawyers in London on Swiss Franc Loans to Consumers 9/9/2015.

SWISS FRANC LOANS IN PRACTICE AND BANKING ETHICS

EVI AVLOGIARI

Attorney & Counsellor –at- law (Supreme Court)
Accredited Mediator (CiArb)
Honorary Consul of the Republic of Estonia
15 Dodekanisou Str.
54626 Thessaloniki Greece
Tel./Fax: +30 2310 538919
Mobile: +30 6977 260901
e-mail: law@avlogiari.gr
www.avlogiari.gr

Dear sirs/madams,

As you already know, my name is Evi Avlogiari and I am from Northern Greece, specifically from the city of Thessaloniki.

It is a great honour and pleasure to be here today to share with you my experience concerning Swiss Franc Loans to Consumers in Greece, and this is thanks to my special friend and colleague Katherine Alexander Theodotou who invited me to this conference. Thank you very much, Katherine, for giving me this unique opportunity.

Once upon a time, in Greece, in December 2012, a young nurse came to my office. She told me that she had a home loan of 300.000 €, since 2006. She had to repay the loan in 30 years. She urgently wanted to move to London, because she had found a new job there. For this reason, she wanted to sell the house and to pay off the mortgage, the soonest possible. She had already paid to the bank the last 7 years, the amount of 100.000€. That amount included repayment of capital and interest. The following day we go to the bank and what do we find out? The poor nurse owned to the bank the surprising amount of 400.000€, which means 100.000€ more than the initial capital she had borrowed. How was it possible? And this is when the bank informed us that the nurse's loan was in swiss francs and the difference in the remaining capital was due to deterioration of the currency exchange rate between the Euro and the Swiss Franc. "You are very unlucky that you want to pay off the loan at this particular time and move to London", the bank's employee ironically said to the nurse. The nurse fainted in the bank. This is a very sad story and it is not the only one.

70 thousands consumers in Greece, took out home loans denominated in Swiss Franc. Especially between 2006 and 2008. All these people are now in very difficult financial circumstances. And all this due to the deterioration of the currency exchange rate between the Euro/Swiss Franc. In the years since, they did not enjoy the low monthly repayments, they had been promised when they took out these loans, but also, and this is the most important, their outstanding capital still remains close to the amount of the original capital, and even higher.

The option to convert these loans to Euro, at that part of time, cannot solve the problem. That is because the borrower's **accounting loss** with this conversion, will be an **actual loss**. These

borrowers feel that, by taking out a typical home loan, as they thought, they are facing consequences, that no one warned them of.

In fx loans, the cost of borrowing is **indeterminate** and this is not because of interest rate fluctuation. On the contrary, the problem is **the fluctuation of the actual foundation of the loan** – which is the capital that the borrower must repay. The capital the borrower will return is unknown, uncertain and continuously varied. It can go up and down according to parity. The total capital that the consumer will return, will be different from the initial capital he had borrowed. Also, the most important is that, the total amount of the returned capital will be defined at the time the loan will be totally paid off. This is when the consumer will be able to know the capital he had returned.

However, this capital in fx loans is now disconnected from its use value. The amount that the borrower must repay with interest, is no longer the capital that he was granted and invested in buying his house. It is an unknown capital, as we said before, that is shaped by forex market, which subvert any balance between the grant and its repayment. As you understand, this is absolutely devastating for the consumers.

For these reasons, the issuing of fx loans to consumers, is already a problematic and disputed commercial practice. It goes against the principle of responsible lending. Responsible lending is founded

1. on the predictability of future liabilities and **2. the weighing of the consumer's ability to meet them**. The consumer by taking fx loan, without being aware of it, is turned into an investor, **leveraging the same capital that he is borrowing** to buy his house. Fx loans are not like the usual mortgage house loans but high risk financial products. **The banks gave at this high risk investment product the fake name of “loan”, instead of its real name of “interest reduction with cross currency swap” and sold it to innocent consumers, not businessmen and for long-termed loans (20-30 years). And this of course did it on purpose.**

Choosing to take out a fx loan means for the borrower to undertake the currency exchange risk – and the borrower certainly cannot handle the responsibility of such a choice. Assessing this risk, requires knowledge. Knowledge of **the operating mechanism underlying such loans**, and knowledge of **the historic evolution of currency exchange rates**.

It is obvious that home loan recipients are often unable to understand the complex nature of fx loans. They do not have the knowledge of all the crucial parameters. They do not have the experience required to perceive the ensuing risks. So, they usually simplify their choice and typically decide, based only on the information given to them by the bank. But unfortunately the bank's information was focused only on a comparison of the interest rate of a loan in Euro with that of a loan in Swiss Franc. Inevitably consumers trust the bank's recommendation and disregard future risks. That is why it is crucial, in such cases, the bank to provide the whole information about the risks, with the necessary intensity and emphasis.

Banks have an obligation, based on good faith and transparency. It is their duty **to preserve the balance of loan and repayment**. It is their duty to inform, enlighten and counsel their

customers. That is why it is the bank's obligation, before granting a fx loan, **to inform the borrower of the risks he will face**, and also **to investigate borrower's ability to understand and deal with these risks**.

Only once a consumer has received full, clear and correct information, only then, he is capable to make a responsible choice about taking out a fx loan.

But, the bank's obligation to inform and enlighten, is not limited, to an abstract or generalized reference to currency exchange risk. It includes many duties.

1. The bank must **provide information on the characteristics and knowledge** that a customer must possess in order to choose a fx loan;

2. The bank must warn about the risks that may ensue,

3. The bank must **give specific examples of a detrimental fluctuation** of the currency exchange rate so that the borrower may perceive and understand the dangers;

4. Also the bank must give **information:**

about methods to balance the risk;

about unfavourable limitations

about consequences from exercising his rights from the loan (e.g. early repayment);

about the skill required to monitor currency exchange rates, etc.

It is easily understood that if the consumers were properly and analytically informed, there would be no logical person willing to accept this type of loan. But why so many people decided to take this type of loan? It was so wonderfully organized by the banks that even the lawyers were tricked because there was no reference to the swap in the contracts. So they didn't know what was really going on. And as if this was not enough in 2010 when the consumers became suspicious because the amount of the monthly installments increased, the bank managers started convincing them (and we have evidence about that) that there was no need to worry because the cost of the loan in swiss francs is still lower than the cost of the loan in euros.

The most impressive fact is that in the majority of the greek loan contracts there is no term allowing the consumer to change the currency of the loan. So for 30 year he is imprisoned in the certain contract with no alternative solutions.

Just sit down and think about it. Think about it seriously. This is a way to commit suicide.
There is no way out

This is a crime.

The fx home loan agreement also creates several further questions in regards to **its legal nature and its validity**.

A. THE CONTRACT IS VOID AS FICTITIOUS /PLASMATIC

In its letter it is, indeed, a home loan contract in Swiss Franc. However, **Swiss Francs were never actually transferred** to the borrowers in ownership, **they were never given the opportunity to negotiate the price of conversion** of the currency of which they supposedly became owners, **and the agreed purpose of the loan** (buy a house in Greece) **did not justify a loan in foreign currency**. Consequently, it is a **fictitious/plasmatic contract**. And for this reason its validity is questionable. But **the covered, initial legal transaction of the home loan in Euro remains valid**, and the borrowers are still liable for the loan contract in Euro.

The above hypothesis on fictitiousness is further supported by the fact that **the bank mortgaged the properties of the borrowers** for the initial capital of the loan in euro, **which is fixed (300.000 € mortgage loan)**; But, if we assume that the fx loan contracts were true, actually intended and not fictitious, **the mortgages should have extended to greater amounts in Euro and perhaps to other properties**, in order the bank to secure the new increased capital, which arise from the exchange rate risk, which the borrowers supposedly undertook. But **this did not happened**.

In reality what happened? In Greece in case of a consumer not being able to pay the loan, the bank has a legal claim not only on the house that you have the mortgage for but also on the rest of your property. At this critical point Greece is under the influence of a serious financial crisis, real estate property is in its lowest rates so a consumer may lose all of his property.

B. THE CONTRACT IS AGAINST ACCEPTED PRINCIPLES OF MORALITY

The contract goes **against accepted principles of morality** (Greek Civil Code 178, 179). That is **the bank, taking advantage of its consumers' inexperience**, concluded a contract with risks, which would burden exclusively the consumers, while the bank would in any case secure its profit. This is a **behaviour contrary to accepted principles of morality** and for that reason invalid.

C. EMBEDDING OF A DERIVATIVE INTO A FX LOAN AGREEMENTS

The bank proceeded **to conclude a swap (currency exchange) contract, in addition to the loan agreement**. Specific, the bank agreed primarily to a loan agreement which includes **loan repayments in Swiss Francs. But the bank added to the borrower's obligation for loan repayment**, a derivative agreement. So a fx loan agreement includes two separate agreements, the main agreement for the loan and the second for the swap. That derivative swap agreement, means that every month the consumer will repay, instead of the payable Swiss Francs, their equivalent in Euro. That is, the Swiss Francs owed would be mandatorily exchanged for their equivalent in Euro, at the exchange rate valid at the time of payment due by the borrower. Hence, this agreement affected solely and exclusively the borrower, because he alone had to repay the loan. However, this additional swap agreement does not clearly

result from the loan contract. The swap is not covered in any case by the will of the borrowers.

Consequently, the above fx loan contract that consists of two separate contracts (the loan in Swiss Franc and the swap) constitutes a non-concluded, unsubstantial contract, because the parties and especially the borrower did not agree to all of its constituent parts (case of misconception, per GCC 195).

All of the above prove a series of violations by the bank that issued the fx loans, in regards to legal obligation to its consumers

(a) Firstly, generally accepted in the science is the view on the existence of a **trust relationship** between a bank and its customer. This relationship also has legal grounds in the good faith provisions of articles 197, 198 and 288 GCC, and it obligates the bank, in its relationship with its customer, to prioritize the latter's interest and the need to protect his personality and property.

(b) The bank's entire behaviour as we have proeipame in this fx loans is characterized by the bank exercising its power of persuasion on simple customers who trusted it, to convince them that the proposed transaction in Swiss Francs did not hold any risks and was truly beneficial. It appears that the bank committed **fraud** against unsuspecting borrowers (GCC 147 et seq.). In any case, at least the **deception** of the borrowers appears undeniable (GCC 140 et seq.).

(c) Finally, the bank's behaviour without any doubt constitutes an **unfair commercial practice** (act or omission), in the senses of articles 9c – 9e of Law 2251/1994.

Already in Greece four court decisions have been issued at first instance in favour of the borrowers; The courts ordered that loan repayments throughout the loan duration should be calculated and paid at the Euro value of the Swiss Franc on the date that the contract was concluded.

In my opinion, this is also a political issue, and a solution should be provided by the governments, and borrowers-consumers should repay their loans based on the principal they actually received.

And in closing, perhaps we should question about our future.

What about bank ethics? What about people? What about respect? What about humanitarian principles? What about compassion? What about trust? What about cooperation?

What about the real values in life? These have all collapsed.

And they have collapsed not just in Greece, but throughout the world.

We are not experiencing a financial crisis, but an ethical crisis.

Thank you