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O DOZVOLJENOSTI UGOVARANJA TROŠKOVA OBRADE KREDITA U PRAVU SRBIJE

Prevod obezbedio autor

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Rezime

Banke su od izbijanja svetske ekonomske krize opterećene negativnom reputacijom u javnosti, i taj trend postoji i u Srbiji. Posledice ovakve reputacije su brojni sporovi protiv banaka, uključujući i sporove za proglašenje odredbe ugovora o kreditu o obavezi korisnika da banci naknadi troškove obrade kredita ništavom, uz obavezu vraćanja naplaćene naknade s kamatom. Uporednopravno, u Nemačkoj je od 2014. godine zastupljen stav Saveznog suda (*Bundesgerichtshof*, BGH) da nije dozvoljeno ugovarati naknadu troškova obrade kredita putem opštih uslova poslovanja. Taj stav nemačkih sudova imao je odjeka i van Nemačke, ali su uprkos tome sudovi u nekim drugim zemljama, poput Austrije, stali na stanovište da je ovakvo ugovaranje dozvoljeno. U Srbiji je, posle tranzicije s početka dvehiljaditih, postojala jedinstvena sudska praksa o dozvoljenosti ove odredbe sve do marta 2017. godine, kada je Viši sud u Somboru doneo odluku da je ovo ugovaranje ništavo s pozivom na član 1065. Zakona o obligacionim odnosima (ZOO), posle čega je praksa sudova postala nejedinstvena. Razlozi navedeni u domaćoj sudskoj praksi nisu dovoljni da bi se mogao braniti stav da je ugovaranje obaveze naknade troškova obrade kredita ništavo. Dodatna analiza primenjivosti rezonovanja nemačkih sudova u okvirima srpskog prava takođe pokazuje da nema mesta zaključku o tome da je ovakvo ugovaranje ništavo, ni kad je saugovarač banke potrošač ni kad nije, ni kad je odredba deo opštih uslova poslovanja ni kad je individualno ugovorena. Najposle, autor navodi pravne i ekonomske posledice koje bi prouzrokovao drugačiji stav Vrhovnog kasacionog suda po ovom pitanju, te zaključuje da bi sem pozitivnih posledica za jednu i negativnih za drugu stranu u sporu, posledice po opšti interes bile vrlo negativne i ozbiljne, kako s pravnog tako i s ekonomskog stanovišta.

Ključne reči: naknada troškova obrade kredita, zaštita korisnika finansijskih usluga, kredit, potrošač

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ON LEGALITY OF THE LOAN PROCESSING FEE IN THE SERBIAN LAW

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Summary

Ever since the outbreak of the world economic crisis the banks have been burdened by a negative public image, which is a trend existing in Serbia as well. One of the consequences of such reputation are numerous lawsuits against the banks, including the ones requesting that the clause on loan processing fee be declared null and void, accompanied by the request for a refund of the amount paid with interest. Comparatively, in Germany, since 2014, a position has been taken by the Federal Court (*Bundesgerichtshof*, BGH) that contracting the payment of the loan processing fee by means of general terms and conditions of banks is null and void. This position of German courts resonated outside Germany as well, but nevertheless, the courts in some other countries, such as Austria, took the position that such contracting is allowed. In Serbia, after the transition commenced in the early 2000s, the case law was unified in the position that such contracting is allowed and valid until March 2017, when the Higher Court in Sombor passed a decision that such contracting is invalid, invoking Article 1065 of the Law on Contracts and Torts (ZOO), after which the case law started to meander. The reasons put forward in the domestic case law do not suffice for the successful defense of the position that contracting the clause on loan processing fee is null and void. Additional analysis of applicability of the reasoning of German courts within the framework of the Serbian law also demonstrates that the conclusion of such contracting being invalid is out of place, irrespective of whether the other contracting party is a consumer or not, and irrespective of whether the clause is a part of general terms and conditions or is individually agreed. Lastly, the author highlights the legal and economic consequences should the Supreme Court of Cessation take a different position regarding this issue, concluding that, apart from the favorable consequences for one party to the dispute and adverse consequences for the other, there would be severe negative consequences for the common interest, both from the legal and economic point of view.

Keywords: Loan processing fee, financial services consumer protection, loan, consumer

JEL: E43, K22

Uvod

Poslednjih desetak godina, preciznije u periodu od svetske ekonomske krize s kraja protekle decenije, delatnost finansijskih usluga nalazi se pod pojačanim nadzorom i pod dejstvom raznovrsnih negativnih uticaja na banke i druge kreditne ustanove (nadalje ću, zbog konciznosti, koristiti termin banke da bih označio sve kreditne ustanove). Nije nerazumno pretpostaviti da je ovakva situacija upravo posledica pomenute krize, koja je nastala u finansijskom sektoru i za koju laička javnost uglavnom najviše okrivljuje upravo banke. Prva linija pomenutih negativnih dejstava na banke obično su javni mediji i društvene mreže, gde je predmet obrade reputacija banaka koje se predstavljaju kao „nužno zlo" ili jednostavno „zlo". Jednom kada je javno mnjenje snažno okrenuto protiv banaka, dejstva se „konkretizuju" time što se od banaka, pred različitim organima, zahteva povraćaj novca koji je naplaćen od njihovih klijenata, ili umanjenje postojećih obaveza klijenata. Istini za volju, ovakvoj situaciji doprinele su i neke banke koje su, radi povećanja sopstvene zarade, zloupotrebljavale svoj nadmoćniji položaj kako bi svojim klijentima nametnule neke odredbe ugovora o kreditu koje, u celini ili delimično, nisu bile dozvoljene po važećem pravu ili su bile očigledno nepravične za klijente (prikriveni tereti za klijente uneti u opšte uslove, tzv. *smallprint*, jednostrana izmena kamatne stope na osnovu poslovne politike banke, ograničavanje varijabilnog dela kamate na nulu kako bi se izbeglo dejstvo njegove negativne vrednosti, razlika u vrstama kursa po kojoj se pušta u tečaj i vraća kredit i slično). U javnoj sferi se današnji trend negativnog uticaja na banke najčešće i opravdava postupanjem onih manje savesnih banaka u prošlosti, jer se, kao reakcija, „klatno pomerilo" u pravcu dodatne zaštite klijenata na račun interesa banaka.

Najznačajnije linije dejstava na banke dolaze iz oblasti potrošačkog prava, čiji smisao jeste upravo zaštita potrošača kao ekonomski slabije i manje obrazovane i informisane strane u kreditnom poslu, a radi postizanja kolike-tolike jednakosti ugovornih strana. Na nivou EU doneti su, posle izbijanja svetske ekonomske krize, novi propisi o zaštiti korisnika finansijskih usluga, čiji je prevashodni cilj upravo bio borba protiv nefer bankarskih praksi prema korisnicima finansijskih usluga (klijentima-potrošačima). Ovde se pre svega misli na Uredbu 2008/48/EC Evropskog parlamenta i Saveta od 23. aprila 2008. o ugovorima o kreditu za potrošače, izmenjenu Uredbom Komisije 2011/90/EU od 14. novembra 2011 (izmena se odnosila na pretpostavke za određivanje godišnje efektivne kamatne stope) i tzv. Uredbom o hipotekarnim kreditima, zvanično Uredbom 2014/17/EU Evropskog parlamenta i Saveta od 4. februara 2014 o potrošačkim kreditima u vezi s rezidencijalnim nepokretnostima. Uredba 2008/48/EC je uneta u naše pravo posredstvom Zakona o zaštiti korisnika finansijskih usluga iz 2011. godine, izmenjenog 2014. godine (Sl. glasnik RS br. 36/2011 i 139/2014). Uredba o hipotekarnim kreditima, inače, nije do danas u potpunosti uneta u srpsko pravo, iako je njena transpozicija navođena kao jedan od razloga za usvajanje Zakona o proceniteljima vrednosti nepokretnosti (Sl. glasnik RS br. 108/2016 i 113/2017). Dešava se, međutim, da organi nadležni za primenu potrošačkog prava proglašavaju nepravičnim i otud ništavim odredbe ugovora o kreditu koje su u nekim zemljama bile uobičajene u kreditnom poslovanju banaka decenijama, što je, primera radi, slučaj u Poljskoj. Bankari se obično žale da ih to stavlja u podređen i nepravičan položaj, jer oni nemaju mogućnost da se obrate tim istim nadležnim organima kako bi dobili meritornu odluku da neka ugovorna odredba nije nepravična i da je punovažna, pa tako zapravo nema načina za banku koja želi da radi savesno i pošteno da bude sigurna da klauzule koje primenjuje u svom poslovanju neće za tri, pet ili deset godina, dakle retroaktivno, biti proglašene nepravičnim i ništavim. Razume se, opšta javnost koja je medijskim delovanjem pripremljena da protiv banaka ima predrasude, nema mnogo razumevanja za probleme bankara, ali može se očekivati da će, kao i ranije, zbog interesa pravne sigurnosti i ekonomskih zakonomernosti, „klatno" u doglednom periodu početi da se vraća u ravnotežu.

Trend naknadnog preispitivanja ugovora sa bankama preneo se, s izvesnim zakašnjenjem, i u Srbiju. Pored negativnih dejstava na banke u javnosti, sudski su epilog dobila sporna i

Introduction

In the last ten years, specifically after the outbreak of the global economic crisis at the end of the past decade, the financial services industry has been under intensive scrutiny and subjected to versatile adverse influences towards the banks and other financial institutions (hereafter, for the sake of being concise, the term "banks" will be used to denote all lending institutions). It is not unreasonable to assume that this situation is in fact the consequence of the mentioned crisis, which originated in the financial sector and for which the general (lay) public holds the banks responsible. The front line of the mentioned adverse effects towards the banks are usually the media and the social networks, targeting the reputation of banks by denoting them as the "necessary evil" or simply the "evil". Once the public opinion is strongly biased against the banks, the effects are being "particularized" by addressing requests towards the various authorities for the refunds of paid amounts from the banks, or for the reduction of existing obligations of the banks' clients. Truth be told, some banks contributed to this situation by attempting to increase their revenues by abusing their advantageous position in order to force upon their clients some provisions of the loan agreement which, in their entirety or partially, were not allowed under the applicable law or were manifestly unfair for the client (hidden burdens for the clients in the general terms and conditions, the so-called *smallprint*, unilateral change of the interest rate based upon the commercial policies of the bank, limitation of the variable part of the interest rate to zero in order to avoid the effects of its negative value, differences in exchange rates according to which the loan was paid out and according to which it is to be returned, etc.). In public discourse, the current trend of the negative impact towards the banks is most often justified by past actions of those less conscientious among the banks, because, as a reaction, the "pendulum shifted" towards the additional protection of the clients at the expense of the banks.

The most significant lines of action against the banks come from the area of consumer protection regulations, whose very purpose is the protection of consumers as economically weaker, less educated and less informed party in the loan agreement, in order to achieve an acceptable level of equality of the contractual parties. At the EU level, after the outbreak of the world economic crisis, new regulations concerning the protection of users of financial services have been passed, the primary aim of which was to battle against the unfair business practices towards the users of financial services (i.e. clients-consumers). This refers primarily to the Directive 2008/48/EC of the European Parliament and the Council of 23 April 2008, on loan agreements for consumers, as amended by Commission Directive 2011/90/EU dated 14 November 2011 (the amendment related to conditions for determination of the annual percentage rate of charge) and the so-called Mortgage Credit Directive, officially Directive 2014/17/EU of the European Parliament and the Council of 4 February 2014 on loan agreements for consumers relating to residential immovable property. Directive 2008/48/EC has been transposed into Serbian law by means of the Law on Protection of Financial Services Consumers from 2011, amended in 2014 (Official Gazette of the Republic of Serbia No. 36/2011 and 139/2014). The Mortgage Credit Directive has not been fully transposed into the Serbian law yet, even though its transposition served as one of the reasons for adopting the Law on Real Estate Valuers (Official Gazette of RS No. 108/2016 and 113/2017). It has happened, however, that the authorities in charge of application of consumer protection laws declare unfair and, thus, null and void the provisions of the loan agreements that have, in some countries, been common in lending operations of banks for decades, which is, for example, the case in Poland. The bankers usually complain that such actions place them in an disadvantageous and unfair position, because they do not have the possibility to address that same authorities with a request to obtain a merited decision that a certain contractual provision is not unfair and that it is valid, so that, in fact, there is no way for a bank that strives to conduct its business in good faith to be sure that the clauses it applies in its course of business shall not, in three, five or ten years, retroactively be declared unfair and null and void. Of course, the general public, which is prepared by the biased media coverage

docnijim propisima kao izričito nepoštena predviđena ponašanja nekih banaka, u pogledu ugovaranja jednostrano promenljive kamatne stope (Hiber i Živković, 2015), različitih kurseva po kojima se kredit pušta u tečaj i vraća, dok se još uvek vodi pravna borba u vezi s tretmanom kredita s valutnom klauzulom u švajcarskim francima (CHF krediti). Organ koji je u prvom redu nadležan za rešavanje po prigovorima korisnika kredita je Narodna banka Srbije (NBS), kao regulator i organ nadzora nad radom bankarskog sektora, ali to naravno ne sprečava vođenje sudskih postupaka ako su korisnici kredita nezadovoljni odgovorom poslovne banke i NBS na njihovu primedbu. Situacija je u ovom pogledu normativno unapređena donošenjem Zakona o zaštiti korisnika finansijskih usluga 2011. godine (stupio na snagu 5. decembra 2011), jer je cela ta oblast preciznije uređena i usklađena s evropskim standardima. Iako su postojali stavovi da su ovim zakonom zapravo samo kodifikovani već postojeći dobri običaji u poslovanju domaćih poslovnih banaka, nema sumnje da je donošenje ovog zakona i precizno unošenje evropskih standarda u ovoj oblasti u pravo Srbije značajno povećalo pravnu sigurnost i olakšalo prosuđivanje o tome šta jeste a šta nije dozvoljeno ugovaranje u ovoj oblasti. Ipak, ovim zakonom nije predviđeno njegovo retroaktivno dejstvo (Hiber i Živković, 2015, 579), pa su ostala otvorena neka od pitanja dozvoljenosti pojedinih klauzula za period pre njegovog stupanja na snagu, koja u međuvremenu dobijaju sudski epilog. Takođe, postoje neka pitanja koja se otvaraju u sudskoj praksi, a koja nisu predmet izričitog regulisanja ovim zakonom. Naplata troškova obrade kredita jedno je od takvih pitanja, uz još neka koja se pojavljuju u sudskoj praksi, poput prevaljivanja troškova osiguranja stambenih kredita kod Nacionalne korporacije za osiguranje stambenih kredita (NKOSK) na korisnike kredita.

U daljem tekstu biće predstavljena situacija u Nemačkoj, koja nesumnjivo utiče na spor u vezi s dozvoljenošću ugovaranja troškova obrade kredita u Srbiji, te ukratko i situacija u nekim drugim evropskim zemljama, a potom će biti predstavljena postojeća (neujednačena) sudska praksa o ovom pitanju u poslednjih desetak godina u Srbiji i argumenti koji se u sudskim odlukama navode u prilog različitih presuda. Potom će biti data analiza argumentacije sadržane u domaćoj sudskoj praksi i sopstvena analiza pitanja dozvoljenosti naknade za troškove obrade kredita, a u zaključku će biti dat sopstveni stav kao rezultat analize, ali i analiza posledica eventualnog zauzimanja suprotnog stava o ovom pitanju u sudskoj praksi.

Uporedno pravo - iskustvo Nemačke i evropski standard

Kao što je rečeno, za temu ovog napisa od srazmerno većeg značaja jeste niz odluka nemačkih sudova, uključujući i Savezni sud (*Bundesgerichtshof*, BGH) kao najvišu instancu, kojima je, počev od polovine tekuće decenije, naplata troškova obrade kredita, pod određenim uslovima, proglašavana ništavom. Imajući u vidu današnja sredstva komunikacije nije neobično da su ove odluke neposredno uticale da se isto pitanje predstavi pred sudove u Srbiji, pošto su organizacije koje se bave zaštitom korisnika finansijskih usluga u Evropi srazmerno dobro povezane.

Još u maju 2014. godine BGH je stao na stanovište da je naplata troškova obrade kredita čija je naknada predviđena opštim uslovima poslovanja nedozvoljena u ugovorima o kreditu s potrošačima, odnosno da je pogođena sankcijom ništavosti (Odluke BGH od 13.5.2014, Az. XI ZR 170/13 i Az. XI ZR 405/12). Sud je, naime, našao da je odredba o naplati troškova kredita (u jednom od dva slučaja u iznosu od 3%, u drugom 1%) bila, prema § 305 Nemačkog građanskog zakonika (*Bürgerliches Gesetzbuch*, dalje: BGB), opšti uslov poslovanja, koji nije, shodno § 307 BGB, izuzet od sadržinske kontrole, usled čega je podvrgnuta sudskoj kontroli sadržine, te da je ta odredba po stavu suda ništava jer protivno savesnosti i poštenju preterano otežava položaj potrošača-korisnika kredita (Vid. BGH XI ZR 170/13, Rn. 27 i dalje; sud je priznao da o tom pitanju postoje različita mišljenja u literaturi i sudskoj praksi, utvrdio da je preovlađujući stav u prilog ništavosti i prihvatio taj stav, uprkos ranijoj praksi BGH koja je, još od 1979 pa sve do 2004, prihvatala uobičajen trošak obrade kredita od 2% kao dozvoljen, bez naročito detaljnog obrazloženja). Ne ulazeći detaljno u

to be prejudiced against the banks, has no understanding for the problems of the bankers, but one can expect that, as it was before, the interests of legal certainty and economic realities shall start turning the "pendulum" back to the balanced position in the foreseeable future.

The trend of subsequent reconsideration of agreements with the banks has also, though with some delay, reached Serbia. Apart from the negative impact towards the banks in public, some of the disputed issues, which have been explicitly declared as unfair by subsequently adopted regulations, have been solved by decisions of the courts. This applies to contracting unilaterally variable interest rates (Hiber and Živković, 2015), different exchange rates according to which the loan is paid out and returned, while the legal battle regarding the treatment of the loans indexed in Swiss francs (CHF loans) is still ongoing. The authority having the primary competence to decide on the objections and complaints of the loan users is the National Bank of Serbia (hereinafter: NBS), as the regulator and supervisor of the banking sector, but this, naturally, does not preclude carrying out the court procedure if the loan user is dissatisfied with the reply of the commercial bank and/or the NBS to its complaint. The normative situation in this respect has been improved by adopting the Law on Protection of Financial Services Consumers of 2011 (came into force on 5 December 2011), because the whole area has been regulated much more precisely since, being better harmonized with the European standards. Even though there have been opinions that this particular Law has merely codified the existing customs in operations of commercial banks, there is no doubt that the adoption of this Law along with the precise transposition of the European standards in this area into the Serbian law have significantly increased legal certainty and made decision-making on what is allowed and what is not allowed in loan agreements much easier. However, this law does not have a retroactive effect (Hiber and Živković, 2015, 579), so some of the issues regarding the validity of certain contractual clauses in the period before it came into force remained open, in the meantime getting solved at the courts of law. Also, there are some issues opened in case law of the courts, which are not subject to explicit regulation by this Law. One of such issues is the validity of charging the loan processing fee, along with some other issues, such as shifting the expense of mortgage loan insurance of the National Mortgage Insurance Corporation (NKOSK) to loan users.

The following sections of this paper present the situation in Germany, which certainly influences the dispute related to the loan processing fee in Serbia, and then shortly the situation in some other European countries. Thereafter, the paper deals with the existing (incoherent) case law of Serbian courts related to this issue in the previous ten years, along with the arguments put forward in different court decisions. Subsequently, the paper provides an analysis of the arguments contained in Serbian case law, followed by the additional analysis of this issue, and finally, after featuring the author's own position as the result of the performed analysis, the conclusion offers the analysis of the consequences of the (potential) taking of the opposite position on this issue in court decisions.

Comparative Law - The German Experience and the European Standard

As already mentioned, several decisions made by the German courts, including the Federal Court (*Bundesgerichtshof,* BGH) as the supreme instance, by which, starting form the first half of the current decade, contractual clause on loan processing fee, under certain conditions, has been declared null and void, are of a relatively high interest for the topic of this paper. Bearing in mind the contemporary means of communication, it is not unusual that these decisions have directly influenced posing the same question to the courts in Serbia, given the relatively good communication between the organizations for protection of financial services users in Europe.

Back in May 2014, the BGH took the position that charging the loan processing fee based upon a clause contained in the general terms and conditions is not allowed in loan agreements with consumers, i.e. that such clause is null and void (BGH Decisions dated 13.5.2014, Az. XI ZR 170/13 and Az. XI ZR 405/12). The Court, namely, found that the provision on charging

argumentaciju BGH valja, zbog činjenice da se čini da neki od domaćih sudova imaju slično rezonovanje, napomenuti da se BGH pozivao i na § 488 BGB, koji je pandan čl. 1065. Zakona o obligacionim odnosima (Sl. list SFRJ 29/1978, 39/1985, 57/1989, Sl. list SRJ 31/1993, dalje: ZOO) jer definiše objektivno bitne elemente ugovora o zajmu. Ipak, važno je naglasiti da BGH nije u ovim odlukama tvrdio da banka može da naplaćuje samo kamatu, već je, u kontekstu raspravljanja o tome da odredba o troškovima kredita ne potpada pod izuzetak od mogućnosti sudske kontrole opštih uslova iz § 307 BGB, našao da je ova naknada zapravo predstavlja dodatak na kamatu kao „cenu zajma", a ne naknadu za neku posebnu identifikovanu uslugu, te da se otud taj izuzetak na nju ne primenjuje i ona podleže sadržinskoj kontroli kao deo opštih uslova. Po nemačkom pravu, naime, ako bi se uzelo da su troškovi deo kamate, kao glavne protivprestacije korisnika zajma, oni ne bi mogli biti podvrgnuti sadržinskoj kontroli opštih uslova poslovanja, oni to ne bi mogli ni kad bi troškovi bili protivnaknada za neku drugu, posebnu prestaciju (a ne za osnovnu obavezu zajmodavca da stavi na raspolaganje i pusti u tečaj zajam), ali ako bi se uzelo da se radi o dodacima na kamatu onda je sadržinska kontrola dozvoljena, i drugostepeni sud (u slučaju BGH XI ZR 170/13, LG Bonn) i BGH su našli da je upravo ovo potonje slučaj. BGH je takođe potvrdio i načelnu dozvoljenost višekomponentnih cena, odnosno da se cena zajma može sastojati iz više različitih sastavnih delova, ali je kod zajma stao na stanovište da troškovi obrade, pošto se ne plaćaju obročno nego odjednom, podležu kontroli sadržaja (dok tzv. disagio, koji se plaća obročno t.j. na rate, ne podleže, jer je sastavni deo kamate kao glavne obaveze iz ugovora o kreditu). Prema nemačkom pravu opštih uslova poslovanja (tačnije, sudskoj praksi), nije dozvoljeno opštim uslovima prevaljivati obaveze jedne strane na drugu (BGH XI ZR 170/13, Rn. 73 i dalje). Logika tog rešenja polazi od stava da je dispozitivnim zakonskim odredbama uređen pravičan raspored međusobnih obaveza ugovornih strana u imenovanim ugovorima, te da je jednostrano menjanje tog rasporeda opštim uslovima, u smislu prevaljivanja troškova ili obaveza jedne ugovorne strane na drugu, nedozvoljeno, jer se uzima da se protivno načelu savesnosti i poštenja preterano tereti strana koja pristupa opštim uslovima. BGH je našao da sve ono što je podnosilac revizije naveo da bi trebalo da „pokrivaju" troškovi obrade kredita (provera kreditne sposobnosti, aktivnosti oko zaključenja ugovora, obaveze dostavljanja primeraka itd.) zapravo predstavlja troškove u interesu davaoca kredita, a ne posebne usluge za korisnika kredita, pa je zbog toga, prvo, sudu dozvoljeno da kontroliše sadržinu ove odredbe opštih uslova, i drugo, prevaljivanje ovih troškova na korisnika kredita putem opštih uslova poslovanja po nemačkom pravu zabranjeno.

U julu 2017. godine BGH je doneo još dve presude kojima je utvrdio da je ugovaranje i naplata troškova obrade kredita u opštim uslovima poslovanja prema nemačkom pravu ništava i kad korisnik kredita nije potrošač (Odluke BHG od 4.7.2017, br. XI ZR 233/16, kojom je ukinuta drugostepena odluka Hanseatisches OLG Hamburg i vraćeno na ponovno odlučivanje i br. XI ZR 562/15, kojom je potvrđena drugostepena odluka OLG Celle). Obrazloženje je u osnovi bilo isto kao kod „potrošačkih" odluka, s tim što je u ovim slučajevima sud razmatrao i neke dodatne argumente, poput poreskih pogodnosti za korisnike kredita usled jednokratne naplate troškova obrade, ali nije zahvaljujući njima promenio svoj stav. Tuženom nije pomoglo ni pozivanje na uobičajenost takve odredbe, jer je sud uzeo da je nije dokazao, niti pozivanje na poslovnu praksu. Iako je BGH potvrdio da u nepotrošačkim ugovorima korisnik kredita načelno uživa manju zaštitu, stao je na stanovište da rezonovanje po kom jednostrano prevaljivanje obaveza odredbama opštih uslova nije punovažno važi i kada je korisnik kredita sasvim informisan i ekonomski jednake snage.

Naposletku valja primetiti da čak ni nemački BGH nije sasvim dosledan u svom stavu, jer je kad se radi o banci koja je pod državnom kontrolom, *Kreditanstalt für Wiederaufbau* (KfW), zauzet stav da je jednokratna naknada (*Auszalungsabschlag*) u iznosu od 4% (2% na ime troškova obrade i 2% na ime premije na rizik) prilikom isplate kredita punovažna iako je predviđena opštim uslovima, svakako za ugovore zaključene pre 11. juna 2010 (tog dana je na snagu stupila reforma odredaba BGB o ugovoru o zajmu), a za ugovore zaključene

the loan processing fee (in one of the cases set at 3%, and at the other at 1%) was, according to § 305 of the German Civil Code (*Bürgerliches Gesetzbuch*, hereinafter: BGB), a general term and condition, which is, according to § 307 BGB, not exempt from content control; therefore, it is subject to the judicial control of content, and, according to the finding of the court, invalid because it excessively burdens the position of the loan user (consumer) contrary to the requirements of good faith (See BGH XI ZR 170/13, Rn. 27 *et seq*.; the Court admitted that there are different views on the issue in legal writings and case law, determined that the prevailing position is in favor of invalidity of the clause and accepted that position, despite the earlier case law of the BGH which, ever since 1979 all the way up to 2004, used to accept the charging of the usual loan processing fee of around 2% as allowed and thus valid, without any special reasoning). Without going into a detailed presentation of the BGH reasoning in this case, it is worth mentioning, given that some of the domestic courts have similar reasoning, that the BGH also invoked § 488 BGB, which is the German counterpart of Art. 1065 of the (Serbian) Law on Contracts and Torts (Official Gazette of the SFRY Nos. 29/1978, 39/1985, 57/1989, Official Gazette of the FRY No. 31/1993, hereinafter: ZOO), because it defines the (objectively) essential terms of the loan agreement. However, it is important to emphasize that in these decisions the BGH did not claim that a bank can charge only interest, but that, in the context of discussing the issue that the clause on loan processing fee does not fall under the exemption of content control of general terms and conditions provided in § 307 BGB, it found that this fee is in fact an addition to the interest as the "price of the loan", and not a charge for a separate identified service, and that therefore the exemption does not apply being subject to content control as a part of general terms and conditions. According to the German law, namely, if one would consider the loan processing fee as a part of the interest, as the main consideration paid by the loan user, it could not be subjected to content control of general terms and conditions; the same would apply if the loan processing fee would have been treated as a separate consideration for some other, special service (and not for the basic obligation of the lender to make available and disburse the loan). But, if one would consider the loan processing fee as an addition to the interest, than the content control is allowed, and the second instance court (in the case of BGH XI ZR 170/13, LG Bonn) and the BGH found that this is exactly the case. BGH also confirmed that the multi-component prices are allowed in principle, meaning that the price of the loan may consist of more different constitutive parts, but in respect of the loan it took the position that loan processing fees, given the fact that they are not paid in installments but rather as a single, one-off payment, are subjected to content control (while the so-called *disagio*, which is paid in installments, is not subject to content control because it is a part of the interest, the payment of which is the main obligation based on the loan agreement). According to the German law on general terms and conditions of contracts (more precisely, its case law), it is not allowed to shift the obligation of one party to the other by means of general terms and conditions (BGH XI ZR 170/13, Rn. 73 *et seq.*). The logic of this rule starts from the position that the non-mandatory provisions of the law determine the just distribution of mutual obligations of the parties in nominated contracts, followed by the position that unilateral change of such distribution from one party to the other, in the sense of shifting costs or obligations of one party to the other, by means of general terms and conditions, is not allowed because it is considered as an excessive burden to the party accepting the general terms and conditions, contrary to the principle of good faith and fair dealing. BGH found that all that the party having filed the complaint (revision) quoted as costs that should "cover" the loan processing fee (checking the creditworthiness, activities regarding the execution of the agreement, obligations on disclosing the copies of contract, etc.) are in fact costs made in the interest of the lender, and not any special separate services rendered to the loan user, and that, therefore, first, the court is allowed to control the content of this provision of general terms and conditions and second, shifting of these costs to the loan user by means of general terms and conditions is forbidden under the German law.

posle tog datuma svakako za one kod kojih korisnik kredita nije potrošač, a za one kod kojih jeste potrošač, BGH se još nije izjasnio, ali sva je prilika da KfW neće morati da vraća novac (Odluke BGH od 16. februara 2016 br. XI ZR 454/14, br. XI ZR 63/15, br. XI ZR 73/15 i br. XI ZR 96/15). Sud je drukčiji tretman troškova obrade u ovom slučaju obrazložio činjenicom da KfW ne daje kredite po tržišnim cenama, pa otud ima prostora da naplati i troškove obrade, pošto je već kamata niža od tržišne.

Koliko je meni poznato, ovakva praksa BGH nije prihvaćena u drugim evropskim zemljama, pre svega jer se smatra nacionalnom specifičnošću vezanom za razvoj prava opštih uslova poslovanja u Nemačkoj. Tako se austrijski Vrhovni sud, Oberste Gerichsthof (OGH), iako su mu bile poznate odluke BGH iz 2014. o potrošačkim kreditima, izričito izjasnio da odredba o naknadi troškova obrade kredita po austrijskom pravu nije ništava i ako je deo opštih uslova poslovanja (presuda OGH br. 6Ob13/16d od 30.3.2016). Ova odluka doneta je u postupku po tužbi radi propuštanja u kojoj je organizacija za zaštitu potrošača tužila poslovnu banku za zahtevom da u ugovore o kreditu ne unosi odredbu o naknadi troškova obrade kredita jer je nezakonita i ništava (smisao ove tužbe bio je upravo sudska odluka o dopuštenosti pomenutih odredbi u pravu Austrije). Tužba je bila uspešna pred nižim sudovima, ali je odluka preinačena po reviziji. Uz to, ona takođe svedoči o „prelivanju" nemačkog iskustva u inostranstvo, jer je sasvim jasno da je podnošenje tužbe u ovom austrijskom slučaju inspirisano pomenutom praksom nemačkog BGH iz 2014. godine, što se vidi iz tač. 3.2 obrazloženja navedene presude austrijskog OGH. Stav o dozvoljenosti ugovaranja naknade za troškove obrade kredita zauzeli su i sudovi Češke Republike (Odluka Najvišeg suda Češke Republike CPJN 203/2013 i Odluka III. ÚS 3725/13 Ustavnog suda Češke Republike). Iako ne postoji odgovarajuća objavljena presuda švajcarskog Saveznog suda, nema sumnje da se ni u Švajcarskoj ugovaranje naknade troškova obrade kredita ne smatra ništavim. Zapravo, čini se da nemačko pravo u ovom konkretnom slučaju predstavlja izuzetak, i smelo bi se reći da je opšteusvojeni uporedni (minimalni) standard u Evropi onaj o dozvoljenosti ugovaranja naknade za troškove odobrenja kredita, čak i posredstvom opštih uslova i u ugovorima s potrošačima (naravno, pod uslovom da su poštovani zahtevi transparentnosti i obaveštavanja potrošača). To, razume se, ne znači da pojedina nacionalna prava ne mogu svojim zakonima predvideti da je takvo ugovaranje ništavo; to tek znači da ništavost ovakvih odredaba svakako ne proizlazi iz acquis communitaire, odnosno iz prava EU.

Sudska praksa o dozvoljenosti ugovaranja naknade troškova obrade kredita u Srbiji

Najstarija domaća objavljena odluka u kojoj se pominju troškovi obrade kredita jeste Rešenje Vrhovnog suda Srbije Prev. 295/99 od 19. januara daleke 2000. godine, objavljeno u časopisu Privrednik br. 131 i u bazi Paragraf lex. Prema objavljenoj sentenci ove odluke, banka nema pravo na naknadu troškova koje naplaćuje u procentualnom iznosu od iznosa kredita, zajedno sa kamatom. U ovom slučaju radilo se o tome da je banka aneksom ugovora o kreditu zapravo podigla kamatu sa 15% mesečno na 18,5% mesečno, predstavljajući to povećanje od 3,5% kao troškove kredita koji se plaćaju mesečno. Vrhovni sud Srbije je tada poništio odredbu o povećanju od 3,5% mesečno na ime mesečnih troškova kredita s obrazloženjem da prema članu 1065. ZOO banka ima pravo na povraćaj glavnice i kamatu, a ne na naknadu troškova u procentualnom iznosu od iznosa kredita, nalazeći da po članu 1065. ZOO banka ima pravo samo na stvarne troškove koji su nastali iz kreditnog odnosa. Domašaj ove presude danas je srazmerno mali, jer je potpuno izmenjen pravni okvir za rad banaka, kao i ukupno okruženje u kojem banke posluju. Ono što ovu odluku čini relevantnom je činjenica da se Vrhovni sud opredelio da utvrdi ništavost s pozivom na član 1065. ZOO, a ne na neke druge članove ZOO, odnosno ustanove (zelenaški ugovor, simulovan ugovor itd.). Kao što će se videti, to je član koji se do danas pominje u kontekstu punovažnosti odredbe o dozvoljenosti ugovaranja naknade troškova obrade kredita.

U novije vreme, posle temeljne rekonstrukcije bankarskog sektora i zatvaranja tzv. „starih banaka" nad kojima je otvoren stečaj, te ulaska banaka iz inostranstva na domaće tržište,

In July 2017 the BGH passed two further decisions, by which it determined that contracting and charging the loan processing fee in general terms and conditions is invalid under the German law even if the loan user is not a consumer (BHG decisions dated 4.7.2017, XI ZR 233/16, annulling the second instance decision of the OLG Hamburg and returning the case for retrial and XI ZR 562/15, confirming the second instance decision of the OLG Celle). The reasoning was basically the same as in the decisions related to the consumers, the difference being the consideration of some additional arguments by the court, such as the tax benefits for loan users due to the single payment of the loan processing fee, yet not changing its position based on these additional arguments. The respondents claimed that this provision is usual and common in commercial loan agreements, but the court concluded that this claim is not proven, while invoking the business practices did not help either. Even though the BGH confirmed that in "non-consumer" loan agreements the loan user, in principle, enjoys less protection, it took the position that the reasoning according to which unilateral shifting of obligations by means of general terms and conditions is not valid applies also in the cases where the loan user is fully informed and of equal bargaining power.

At the end one should notice that even the German BGH is not completely consistent in its position, because in the case of the state controlled bank, *Kreditanstalt für Wiederaufbau* (KfW), it took the position that the single, one-off fee (*Auszalungsabschlag*) amounting to 4% (2% for the loan processing fee and 2% for the risk premium) payable upon disbursement of the loan is valid even if it is stipulated in the general terms and conditions, in all contracts concluded before 11 June 2011 (which is when the reform of BGB provisions pertaining to the loan agreement came into force), and for contracts concluded after that date in all contracts with "non-consumers", whereas for the loan agreements with consumers, BGH has not yet made its position public, but in all probability KfW will not have to return the money it received (BGH decisions dated 16 February 2016 XI ZR 454/14, XI ZR 63/15, XI ZR 73/15 and XI ZR 96/15). The court justified the different treatment of the loan processing fee in these cases by the fact that KfW does not grant loans under market prices, hence there is room for it to charge the loan processing fee, when the interest rate is below the market.

To the best of our knowledge, this case law of BGH is not followed in other European countries, mainly because it is considered a national peculiarity related to the development of the law on general terms and conditions in Germany. Thus, the Austrian Supreme Court, *Oberste Gerichsthof* (OGH), even though aware of the 2014 BGH decisions on loans with consumers, explicitly found that the clause on loan processing fee is not null under the Austrian law, even in the cases where it is a part of the general terms and conditions (OGH decision 6Ob13/16d dated 30.3.2016). This decision was passed in the proceedings following an action for an injunction filed by an organization for consumer protection against a commercial bank, requesting the bank to omit the clause on payment of loan processing fee in loan agreements because it is illegal and invalid (the purpose of this type of lawsuit is exactly to obtain a court decision on legality of loan processing fee in the Austrian law). The plaintiff succeeded at the courts of lower instance, but their decision was reversed by the OGH after revision. Besides, it also testifies to the effects of the German experience outside Germany, because it is perfectly clear that filing the lawsuit in this Austrian case was inspired by the decision of the German BGH from 2014 (which is obvious from point 3.2 of the reasoning of the mentioned OGH decision). The courts in Czech Republic also took the position that contracting loan processing fee is allowed and valid (Supreme Court of Czech Republic decision CPJN 203/2013 and decision III. ÚS 3725/13 of the Constitutional Court of the Czech Republic). Even though there is no relatable published decision of the Swiss Federal Court (*Bundesgericht*, *Tribunal fédéral*), there is no doubt that charging loan processing fee in Switzerland is also not considered invalid. In fact, it seems that the German law, in this particular case, is more of an exception, and one could say that the general comparative (minimal) standard in Europe is the one on the validity of contractual clause on charging the

situacija se značajno promenila, jer su ukinute sankcije, ostvarena je relativna stabilnost kursa dinara i nivo kamatnih stopa je značajno pao. Tako je već 10. marta 2006. godine Viši trgovinski sud doneo odluku Pž. 10482/2005, objavljenu u Sudska praksa trgovinskih sudova - Bilten br. 2/2006, u kojoj je stao na stanovište da ugovaranje naknade troškova obrade kredita nije suprotno prinudnim propisima i da je otud dozvoljeno. Tužbu je, u ovom slučaju, podnela jedna od državnih banaka u stečaju, protiv korisnika kredita koji nije ispunio svoje obaveze po ugovoru o kreditu. Tuženi se branio pozivanjem na ništavost odredaba ugovora o kreditu kao zelenaških. Osim poziva na relevantne odredbe Zakona o bankama i drugim finansijskim organizacijama koji je bio na snazi u vreme zaključenja ugovora, Viši trgovinski sud se pozvao i na članove 1065. (po pitanju dozvoljenosti zahteva za revalorizovanom glavnicom i kamatom) i 1066. ZOO (po pitanju dozvoljenosti ostalih ugovorenih zahteva).

Od većeg značaja za sadašnju sudsku praksu bile su odluke donete posle izbijanja svetske ekonomske krize krajem 2008 godine, koje su donošene po tužbama korisnika kredita protiv banaka. Najveći uticaj imala je objavljena odluka Privrednog apelacionog suda Pž. 2603/2013 od 25. septembra 2013. godine, objavljena u Sudska praksa privrednih sudova - Bilten br. 4/2013 i u bazi Paragraf lex. Prema objavljenoj sentenci, ugovaranje prava na naplatu ugovorene kamate ne isključuje pravo banke da na korisnika kredita prenese i deo troškova oko odobravanja i praćenja korišćenja kredita. Prema obrazloženju te odluke, „činjenica da u specijalnim odredbama koje regulišu ugovor o kreditu Zakona o obligacionim odnosima, te u Zakonu o bankama, nije izričito zakonom predviđeno pravo banke da prilikom plasmana novčanih sredstava kroz ugovor o kreditu, od korisnika kredita naplaćuje i naknade za troškove svog poslovanja, ne znači da je ugovaranje ovakvih vrsta naknada zabranjeno“. Sud je stao na stanovište da načelo autonomije volje iz čl. 10 ZOO omogućava banci da prevali deo svojih troškova poslovanja, koji obuhvataju rad oko obrade kreditnog zahteva i drugih aktivnosti tokom praćenja i otplate kredita, na korisnika kredita. Jednokratna naknada troška obrade u iznosu od 2% odobrene glavnice i provizija od 3% od preostalog iznosa za slučaj prevremenog vraćanja kredita otuda po stavu ovog suda nije zabranjena. U obrazloženju se navodi i sledeće: „Drugostepeni sud ne prihvata tezu žalioca da banka prilikom zaključenja ugovora o kreditu sa korisnikom isključivo ima prava da ugovara ugovornu kamatu kao cenu plasiranih novčanih sredstava. Ovo stoga, što ugovorna kamata upravo i predstavlja prihod od plasmana, ali njeno ugovaranje ne obuhvata i obračunate troškove poslovanja, te se isti mogu i samostalno ugovoriti“. Ovaj stav dosledno je sproveden u kasnijim odlukama Privrednog apelacionog suda, 6 Pž. 4339/14 od 11. septembra 2015. godine (sud izričito konstatovao da odredba o naknadi troškova kredita nije ništava u smislu čl. 103 ZOO) i najposle 5 Pž. 637/17 od 2. februara 2017. godine (sud je našao da se ne radi o naknadi troškova već o naplati provizije kao ugovorene odredbe koja nije zabranjena). Valja napomenuti da se radi o odlukama specijalizovanih, privrednih sudova, tako da je izvesno da u ovim slučajevima korisnici kredita nisu potrošači.

Delimičan preokret u sudskoj praksi dešava se dvema odlukama Višeg suda u Somboru od 15. marta 2017. godine, koje je u dva predmeta istog dana donelo isto tročlano sudsko veće (broj jedne odluke je 320/17, broj druge odluke izostavljen je s objavljene verzije). U obe ove odluke, čije je obrazloženje gotovo istovetno, sud je potvrdio prvostepene presude i našao je da je odredba o naknadi troškova obrade kredita ništava. Prvostepeni sud je u oba slučaja konstatovao da je ugovorom izričito predviđeno da korisnik kredita posebno plaća naknadu za tzv. spoljašnje usluge, poput naknade za izvod iz kreditnog biroa, troškova procene vrednosti nepokretnosti, troškova kupovine menice, troškova osiguranja nekretnine, troškova overe založne izjave radi zasnivanja hipoteke i troškova upisa hipoteke, te da se troškovi obrade kredita otud na njih ne odnose, već se naplaćuju za tzv. unutrašnje, interne usluge. Prvostepeni sud je, pozivom na „stanovište ekonomske struke“ zaključio da svi interni troškovi banke moraju da budu uračunati u kamatu, koja kao cena kredita u sebi mora da sadrži cenu koštanja i maržu, te da banka ne angažuje dodatnu radnu snagu u procesu odobravanja kredita, pa je dužna

loan processing fee, even if it is contained in the general terms and conditions and even in loan agreements with consumers (naturally, under the condition that the requirements of transparency and informing the consumer were met). This, of course, does not mean that particular national legal systems cannot, by their own laws, proclaim such contracting as illegal and invalid; it merely means that the invalidity of such clauses does not derive from *acquis communitaire*, i.e. the law of the EU.

Case Law on Legality of Contracting Loan Processing Fee in Serbia

The oldest published domestic decision mentioning the loan processing fee is the Decision of the Supreme Court of Serbia Prev. 295/99 dated 19 January 2000, published in periodical *Privrednik* No. 131 and in the *Paragraf lex* database. According to the published *dictum* of this decision, a bank has no right to the loan processing fee, charged as a percentage of the amount of loan together with the interest. In this case the bank has annexed the loan agreement so that the monthly interest was increased from 15% per month to 18.5% per month, whereby this increase by 3.5% was presented as a loan processing fee payable monthly. The Supreme Court of Serbia annulled the provision on the 3.5% monthly increase based on the loan processing fee, explaining that according to Art. 1065 ZOO a bank has the right to have the principal amount returned with interest, and not the right to the compensation of costs in the percentage amount of the loan, finding that according to the same Article 1065 ZOO a bank only has the right to the expenses that actually occurred due to the loan relation. The reach of this decision is nowadays relatively small, because the legal framework for the operation of banks is completely changed, as well as the overall business climate in which the banks operate. What makes this decision still relevant is the fact that the Supreme Court decided to determine the invalidity invoking Article 1065 ZOO, and not some other articles thereof, i.e. some other legal institutions (usury, simulation etc.). As we shall see, this is the article being invoked in the context of (in)validity of the loan processing fees until today.

More recently, after the thorough reconstruction of the banking sector and closing of the so-called "old banks" which went bankrupt, followed by the entry of foreign owned banks into domestic market, the situation has changed significantly, because sanctions have been lifted, foreign exchange rate of dinar was made relatively stable and the level of interest rates dropped drastically. Thus, already on 10 March 2006, the Higher Commercial Court passed the Decision Pž. 10482/2005, published in *Sudska praksa trgovinskih sudova - Bilten* No. 2/2006, in which it took the position that charging the loan processing fee is not contrary to mandatory provisions of the law and that it is thus allowed. The lawsuit was, in this case, filed by one of the state banks in bankruptcy, against the loan user who failed to perform his obligations from the loan agreement. The respondent defended himself by claiming that some contractual provisions are invalid due to usury. Apart from invoking the relevant provisions of the Law on Banks and Other Financial Organizations that was in force at the time the contract was executed, the Higher Commercial Court also invoked Articles 1065 (regarding the issue of claim for the return of revalued principal and interest) and 1066 ZOO (regarding the legality of other contracted claims).

Relatively more important for the current case law were the decisions passed after the outbreak of the world economic crisis in late 2008, which were passed as a consequence of the lawsuits submitted by loan users against the banks. The most influential was the published Decision of the Commercial Court of Appeals Pž. 2603/2013 dated 25 September 2013, published in *Sudska praksa privrednih sudova - Bilten* No. 4/2013 and in *Paragraf lex* database. According to the published *dictum*, contracting the right to charge interest does not exclude the right of a bank to shift a part of its expenses related to granting and supervising the loan to the loan user. According to the reasoning of this decision, "the fact that special provisions of the Law of Contracts and Torts pertaining to the loan contract, as well as the relevant provisions of the Law on Banks, do not explicitly grant the right of a bank to, at the time it disburses the lent money as foreseen in the loan agreement, charge some of its expenses to the loan user, does not mean

da te troškove uračuna u kamatu i ne može ih posebno naplatiti. Viši sud u Somboru potvrdio je takav stav s pozivom na članove 12 (načelo savesnosti i poštenja), 15 (načelo jednake vrednosti uzajamnih davanja), članove 46 i 47 (o predmetu obaveze), 105 (delimična ništavost), 109 (na ništavost se pazi po službenoj dužnosti) i najposle 1065 ZOO (objektivno bitni elementi ugovora o kreditu). U suštini, sud je zauzeo stav da banke mogu da posebno naplaćuju samo spoljne usluge, te da je kamata jedina dozvoljena cena za unutrašnje, interne troškove banke, odnosno da ti troškovi moraju biti sadržani u kamati, s pozivom na član 1065 ZOO. Doduše, verovatno kao refleks odluke Vrhovnog suda Srbije iz 2000. godine, u obrazloženju se navodi i da banka ima pravo „samo na stvarne troškove koji su nastali iz kreditnog odnosa", što je očigledno protivrečno stavu da svi interni troškovi moraju biti sadržani u kamati. Sud je posebno uzeo u obzir činjenicu da banka nije dokazala postojanje internih troškova na čiju se naknadu odnosi bančinom tarifom predviđeni iznos naknade za obradu i puštanje kredita u tečaj, te da je veštačenje koje je predložio tužilac pokazalo da takvih troškova nema mimo redovnih troškova poslovanja banke. Veštačenje je, čak, pokazalo da „ne postoji ekonomsko opravdanje za postojanje tih troškova", iako banka nije sarađivala s veštakom i nije mu dala na uvid nikakvu internu dokumentaciju o svojim troškovima poslovanja. Sud je pomenuo činjenicu da se radi o opštim uslovima, odnosno činjenici da korisnik kredita samo potpisuje unapred pripremljen i odštampan ugovor, ali u kontekstu toga da korisniku nije poznat mehanizam na osnovu kojeg je određena visina naknade za obradu kredita, što po stavu suda dovodi korisnika u neravnopravan položaj i suprotno je načelu ekvivalencije kod dvostranih ugovora.

Ubrzo potom, 18. maja 2017. godine Treći osnovni sud u Beogradu donosi odluku 18 P br. 3656/15, u kojoj je takođe našao da je odredba o naknadi troškova obrade kredita ništava. Ova odluka sadrži, delimično čak od reči do reči, prepisano obrazloženje pomenutih odluka Višeg suda u Somboru kad je reč o razlozima ništavosti odredbe o naknadi troškova obrade kredita. Suštinski, sud je stao na stanovište da sve kreditne usluge banka mora da naplati kroz kamatnu stopu, dedukujući taj stav iz člana 1065 ZOO. Kao što će se videti, Apelacioni sud je potvrdio ovu presudu u drugostepenom postupku.

Za dalje postupanje sudova u ovoj oblasti nije bio bez značaja ni dopis Narodne banke Srbije od 5. jula 2017. godine, koji je, kako je u njemu napisano, došao kao reakcija na veliki broj obraćanja Narodnoj banci sa zahtevom da se od poslovnih banaka traži „nadoknada štete po osnovu naplaćene naknade za obradu kredita". Pozivajući se na član 19 stav 1 tačka 12 Zakona o zaštiti korisnika finansijskih usluga, kojim je predviđeno da je vrsta i visina svih naknada koji padaju na teret korisnika kredita obavezan element ugovora o kreditu, NBS u dopisu preporučuje da, iako je banka načelno slobodna da, u granicama javnog poretka, određuje vrstu i visinu naknada i troškova, ove troškove treba opredeliti u fiksnom nominalnom iznosu, a ne u procentu od odobrene glavnice, jer u potonjem slučaju se različito plaća za istu uslugu. U dopisu se takođe ističe da bi „cenu kredita pre svega treba da određuje kamatna stopa", te da naknada troškova kredita treba da bude „odraz stvarnih troškova koje banka ima pri uspostavljanju i u toku trajanja ugovornog odnosa", kako bi sve bilo u skladu s članom 1066 ZOO.

Iako se u javnosti pojavila znatno kasnije (u prvoj polovini marta 2018. godine, videti http://rs.n1info.com/a371176/Biznis/Efektiva-Potvrda-da-banke-ne-mogu-da-naplate-obradu-kredita.html), pri razmatranju ovog pitanja treba pomenuti i odluku Vrhovnog kasacionog suda Rev. 1655/2017 od 1. novembra 2017. godine, kojom je prihvaćena revizija i ukinute presude nižih sudova kojima je, između ostalog, pravosnažno odbijen zahtev za utvrđivanje ništavosti i povraćaj novca plaćenog na osnovu naknade troškova obrade kredita. U pogledu razloga za ukidanje, Vrhovni kasacioni sud se nije decidno izjasnio, pomenuvši samo da „za sada" ne može da prihvati zaključak nižih sudova da se radi o delu cene ugovora, pošto je cena kredita, shodno članu 1065. ZOO, kamata, pa se ne vidi po kom su osnovu niži sudovi zaključili da je naknada na ime obrade kredita deo cene. Iako se u javnosti navodilo da se ovom odlukom Vrhovni kasacioni sud definitivno i decidno izjasnio o pitanju (ne)

that contracting these types of fees is forbidden". The Court took the position that the principle of freedom of contract, provided in Article 10 of the ZOO, enables the bank to shift a part of its operational expenses, including the work related to loan processing and other activities related to loan supervision and loan repayment, to the loan user. A one-off, single payment of the loan processing fee amounting to 2% of the loan principal and a fee of 3% of the remaining amount for the case of premature repayment of the loan are thus, by the finding of this Court, not forbidden. The reasoning also contains the following: "The second instance court does not accept the position of the appealing party that a bank, while executing a loan agreement with a user, exclusively has the right to contractual interest as a price for the granted loan. This because the contractual interest represents the income related to the loan, but contracting it does not include the existing operational expenses, hence the compensation of these can be contracted separately". This position was consequently implemented in the subsequent decisions of the Commercial Court of Appeals, 6 Pž. 4339/14 dated 11 September 2015 (the Court has explicitly stated that the provision on the loan processing fee is not invalid on the grounds of Article 103 ZOO) and lately 5 Pž. 637/17 dated 2 February 2017 (the Court found that the disputed provision was not concerning the loan processing fee but rather the charging of a commission fee, which is not forbidden). It should be noted that these are the decisions of specialized, commercial courts, so that it is certain that in these cases loan users were not consumers.

A partial reversal of the case law occurred based on the two decisions of the Higher Court in Sombor dated 15 March 2017, which the same tribunal of three judges passed on the same day in two different cases (the reference number of the first decision is 320/17, the number of the second one is omitted from the electronically published version). In both of these decisions, the reasoning of which is practically the same, the Court confirmed the first instance decisions and found that the clause on the loan processing fee is null and void (invalid). The first instance court in both cases stated that the contract explicitly stipulates that the loan user separately pays the compensation for the so-called "external services", such as the fee for the loan report, real property valuation costs, costs for purchasing the promissory note forms, real property insurance costs, mortgage deed notarization costs and mortgage registration costs, so that the loan processing fee does not include those costs, but is rather charged to cover the so-called "internal services". The first instance court has, by invoking the "positions of the financial profession", concluded that all internal costs of a bank must be included in the interest, which, as the price of the loan, must contain both the cost and the margin, and also that the bank does not engage additional labor in the process of approving the loan, and is therefore compelled to include these costs in the interest and cannot charge them separately. The Higher Court in Sombor confirmed this position invoking Articles 12 (principle of good faith), 15 (principle of equivalence), 46 and 47 (on the subject matter of an obligation), 105 (partial invalidity), 109 (invalidity is determined *ex officio*) and lastly 1065 ZOO (essential terms of a loan agreement). Fundamentally, the Court took the position that banks can charge separately only the "external services", and that the interest is the only allowed price for "internal costs" of the bank, i.e. that such costs must be included in the interest, based upon Article 1065 ZOO. Though, probably as a reflection of the Supreme Court decision from 2000, the reasoning also states that the bank has the right to collect "only the actual costs deriving from the loan relation", which is in obvious contradiction to the position that all internal costs must be included in the interest. The Court specifically took into consideration the fact that the bank did not prove the existence of internal costs, which the provision on loan processing fee, contained in the tariff of the bank, was meant to cover, and that the expertise proposed by the plaintiff demonstrated that there are no such costs apart from the regular operating expenses of the bank. Moreover, the expertise demonstrated that "there is no economic justification for the existence of such costs", even though the bank did not co-operate with the expert and provided any of its internal documents related to its operational costs. The Court did mention the fact that the disputed clause is contained in general terms and conditions, respectively that the loan user

dozvoljenosti ugovaranja naknade troškova obrade kredita, takav zaključak očigledno ne proizlazi iz teksta te odluke.

Hronološki sledeća je presuda Višeg suda u Jagodini Gž br. 2106/17 od 5. decembra 2017. godine, kojom je potvrđena odluka Trećeg osnovnog suda u Beogradu u kojoj je zauzet stav da ugovaranje naknade troškova obrade kredita nije ništavo. Tužilja je u ovom predmetu tvrdila da je odredba o naknadi troškova obrade kredita (u iznosu od 1,5% od glavnice) apsolutno ništava jer nije u skladu s dobrim poslovnim običajima, jer su troškovi određeni paušalno i najposle jer je suprotna čl. 103 ZOO. Prvostepeni sud je utvrdio da je ova naknada jasno određena, da je tužilja to znala prilikom potpisivanja, pa nema povrede čl. 103. ZOO. Potvrđujući prvostepenu presudu, Viši sud u Jagodini gotovo je od reči do reči preuzeo obrazloženje iz objavljene presude Privrednog apelacionog suda iz 2013. godine. Ipak, ova presuda sadrži i rezervu u pogledu navoda da je iznos naknade paušalno određen te da nije jasno šta troškovi podrazumevaju, jer ističe da ti navodi nisu dokazani veštačenjem, ne ulazeći u pitanje njihove pravne relevantnosti kad bi bili dokazani.

Presudom Apelacionog suda u Beogradu Gž br. 5061/17 od 14. decembra 2017. godine potvrđena je pomenuta odluka Trećeg osnovnog suda u Beogradu od 18. maja 2017. godine, te je tako pravosnažnom odlukom ovog suda utvrđeno da je ugovaranje troškova obrade kredita ništavo. U pogledu obrazloženja, ono je gotovo doslovce preuzeto iz presuda Višeg suda u Somboru, uz jedan dodatak - tvrdnju da je uzrok ništavosti ne samo odredba člana 1065 ZOO, već uz to i odredba čl. 47 ZOO, jer predmet obaveze nije određen.

Najzad, hronološki poslednja jeste prvostepena presuda Privrednog suda u Nišu 3 P 784/17 od 1. februara 2018. godine. Ono što treba imati u vidu prilikom analize ove presude jeste činjenica da je ona doneta u periodu u kojem je, za razliku od prethodnog, pitanje dozvoljenosti ugovaranja naknade troškova obrade kredita postalo izuzetno medijski izloženo, zahvaljujući saopštenjima udruženja „Efektiva“, s jedne, te Udruženja banaka Srbije i Narodne banke Srbije, s druge strane. Čini se da su zbog toga i zastupnici obe strane (pogotovo tužene banke), ali što je još bitnije i sâm sud, ovom pitanju prišli mnogo ozbiljnije i otud pružili znatno obimniju argumentaciju nego u ranijim postupcima u kojima je ovo pitanje postavljeno. Tužba u ovom sporu podneta je 22.11.2017. godine, kada je ovo pitanje uveliko bilo u žiži javnosti, a kao dokazi su podnošeni i novinski napisi o nedozvoljenosti ugovaranja naknade troškova odobrenja kredita. Ugovoreni iznos naknade za troškove obrade kredita u konkretnom ugovoru o kreditu, koji, iz nadležnosti suda proizlazi, nije bio s potrošačem, već između banke i privrednog društva, bio je 0,4%. Tužilac je tvrdio da je odredba ništava s pozivom na član 103, pozvavši se na odluke Vrhovnog suda Srbije iz 2000. godine i Apelacionog suda u Beogradu od 14. decembra 2017. godine. Tuženi je istakao da se članom 1065 ZOO ne isključuje mogućnost da ugovorne strane u granicama slobode ugovaranja saglasnošću volja ugovore i druge odredbe, da nema povrede člana 103. ZOO što je potvrđeno u brojnim ranijim sudskim odlukama, pozvavši se na objavljenu presudu Privrednog apelacionog suda iz 2013. godine. Tuženi se pozvao i na stav regulatora bankarskog sektora, Narodne banke Srbije, da je ovo ugovaranje dozvoljeno, te na odredbe člana 19 Zakona o zaštiti korisnika finansijskih usluga koje predviđaju da se i svi ostali troškovi kredita, sem kamate, moraju uneti u ugovor i uzeti u obzir prilikom izračunavanja efektivne kamatne stope, što pokazuje da je ugovaranje naknade troškova obrade kredita dozvoljeno kod kredita s potrošačima, pa je tim pre dozvoljeno u nepotrošačkim ugovorima o kreditu. U osnovi, tuženi je istakao da banka može da ugovorom prevali svoje troškove na korisnika kredita na način kojim se ne narušava načelo ekvivalentnosti uzajamnih davanja. Sud je u ovom slučaju prvo konstatovao postojanje protivrečne sudske prakse (zbog čega je postupajući sudija 5. marta 2018. uputio Vrhovnom kasacionom sudu Zahtev za pokretanje postupka rešavanja spornog pravnog pitanja), a potom je zauzeo stav da je tužiočeva tvrdnja da je odredba ništava s pozivom na član 103 u vezi s članom 1065 ZOO „očigledno pogrešan“ pošto polazi od pogrešne premise da je zabranjeno sve što nije izričito dozvoljeno. Sud dalje nalazi da Zakon o

merely signs the text of the contract prepared in advance and already printed out, but only in the context of the fact that the loan user is not privy to the mechanism for determination of the amount of the loan processing fee, which altogether, in the opinion of the Court, puts the loan user in an unequal position, and represents a breach of the principle of equivalence pertaining to bilateral contracts.

Soon thereafter, on 18 May 2017, The Third Primary Court in Belgrade passed its decision 18 P br. 3656/15, in which it also found that the clause on the loan processing fee is invalid. Related to the invalidity of the clause on loan processing fee, this decision contains, partially even verbatim, the same reasoning as the mentioned decisions of the Higher Court in Sombor. Essentially, the Court took the position that all internal services must be included in the interest, deriving that position from Article 1065 ZOO. As we shall see, the Court of Appeals in Belgrade confirmed this decision in the second instance proceedings.

The subsequent actions of the courts were probably also influenced by the letter of the National Bank of Serbia dated 5 July 2017, which was, as stated therein, a reaction to the numerous complaints addressed at the National Bank requesting the commercial banks "to compensate the damages incurred based upon collected loan processing fees". Invoking Article 19 paragraph 1 Item 12 of the Law on Protection of Financial Services Consumers, which prescribes that the type and amount of all fees payable by the loan user are an essential term of the loan agreement, in its letter the NBS, even though it stated that in principle the bank is free to, within the boundaries of public order, determine the type and amount of fees and expenses, recommended that such fees and expenses should be determined in a fixed nominal amount and not as a percentage of the principal amount of the loan, because in the latter case the same service is paid for differently by different loan users. The letter also pointed out that "the price of the loan should primarily be determined by the interest rate", and that the loan processing fee should be "a reflection of the actual costs incurred by the bank while establishing the contractual relation and during it", in order for everything to be in accordance with Article 1066 ZOO.

Even though it publicly emerged at a significantly later date (in the first half of March 2018, see http://rs.n1info.com/a371176/Biznis/Efektiva-Potvrda-da-banke-ne-mogu-da-naplate-obradu-kredita.html), in considering this issue we must take into consideration the decision of the Supreme Court of Cessation Rev. 1655/2017 dated 1 November 2017, by which a revision was adopted, thereby annulling the decisions of the lower instance courts, which, amongst other issues, denied the request to declare the clause on loan processing fee invalid and to refund the amount paid on the basis of the loan processing fees. As for the reasons for annulling these decisions, the Supreme Court of Cessation did not make itself completely clear, mentioning only that "for the time being" it could not accept the conclusion of the lower instance courts that the loan processing fee is a part of the loan price, because the price of loan, according to Article 1065 ZOO, is the interest, so it cannot see the basis upon which the lower courts concluded that such fee is the part of the price. Even though there were claims that the Supreme Court of Cessation has, by this decision, definitively and clearly taken its position on the issue of validity of the clause on the loan processing fee, such conclusion obviously does not stem from the text of that decision.

Chronologically, the next decision is the one by the Higher Court in Jagodina Gž No. 2106/17 dated 5 December 2017, which confirmed the decision of the Third Primary Court in Belgrade stating that the clause on loan processing fee is valid under the law. The plaintiff in this case claimed that the clause on the loan processing fee (amounting to 1.5% of the loan principal) is invalid because it is in breach of the good commercial customs, because the costs are determined as a lump-sum and lastly because it is contrary to the provision of Article 103 ZOO. The first instance court established that the fee is determined in a clear manner, that the plaintiff was aware of it at the time of the execution of the contract, hence that there is no breach of Article 103 of ZOO. Confirming the first instance decision, the Higher Court in Jagodina took over, almost verbatim, the reasoning contained in the published decision of the Commercial Court of Appeals from 2013. Nevertheless, this decision contains some reservation in respect of the

bankama (Sl. glasnik RS br. 107/2005, 91/2010 i 14/2015) u članu 43 izričito pominje mogućnost jedinstvenog načina obračuna i objavljivanja troškova, kamata i naknada bankarskih usluga, iz čega proizlazi da je naknada bankarskih troškova dozvoljena i standardna praksa u oblasti bankarskih usluga po osnovu kreditnih poslova. Isti zaključak sud izvodi i iz odredaba čl. 19 Zakona o zaštiti finansijskih usluga. Najposle, sud je konstatovao i da je ovakvo ugovaranje u skladu s pravom EU, polazeći od Uredbe 2008/48/EC, čak i u slučaju da je klijent banke potrošač (a tim pre ako nije), te da se radi o opšteprihvaćenom standardu ugovaranja u oblasti bankarskih kredita, poznatim pod nazivima *loan processing fee* i *loan application fee*. Nalazeći da je, kod poslovnih kredita, uobičajen iznos ove naknade oko 2,5%, sud je utvrdio da je ugovaranje ove naknade pomenuto kao standardna praksa i u godišnjem izveštaju *European Banking Authority* (EBA). Najposle, sud je naveo i podatke o uobičajenoj visini ove naknade u regionu, koje na svom sajtu objavljuje Udruženje banaka Srbije, a koja se kreće od 1-1,5%, uvećano za određeni fiksni iznos. Tom analizom sud je došao do zaključka da ugovorena naknada od 0,4% u konkretnom slučaju ne narušava načelo ekvivalencije uzajamnih davanja u smislu člana 15 ZOO. Najposle, sud je zaključio da je ova odredba predstavljala deo opštih uslova poslovanja banke i da je jasno i precizno uneta u ugovor o kreditu, koji je tužilac svojim potpisom svesno prihvatio, što isključuje povredu načela autonomije volje.

Analiza predstavljene sudske prakse srpskih sudova

Kad je reč sudskoj praksi domaćih sudova opisanoj u prvom delu, ono što najpre „bode oči" nekome ko se akademski bavi pravom jeste činjenica da su gotovo sve odluke donete bez ikakvog uzimanja u obzir odredaba Zakona o zaštiti korisnika finansijskih usluga ili opšteg Zakona o zaštiti potrošača, bez obzira na to da li je zauzet stav da je odredba o naknadi troškova obrade kredita punovažna ili ništava. To jeste donekle razumljivo kod odluka privrednih sudova, jer oni po prirodi stvari ne primenjuju tzv. „potrošačko pravo" jer sude privredne sporove, mada u pogledu konkretnog pitanja razmatranje odredaba Zakona o zaštiti korisnika finansijskih usluga nije bez smisla, iako se taj zakon na konkretan pravni odnos ne primenjuje (uostalom, primer za to je hronološki poslednja odluka Privrednog suda u Nišu, koji nije mogao da izbegne ovo pitanje jer se na taj zakon pozvala tužena banka, odnosno njen advokat). Kod odluka sudova opšte nadležnosti, to najblaže rečeno čudi. Izuzetak predstavlja jedino hronološki poslednja odluka, koja je, u obrazloženju, u obzir uzela kako odredbe Zakona o zaštiti korisnika finansijskih usluga tako i odredbe Zakona o bankama. Zbog toga je veći deo argumentacije koja postoji u domaćoj sudskoj praksi vezan za ZOO, kao opšti zakon čije odredbe uređuju i ugovor o kreditu kao imenovan ugovor.

Čak i letimičan pogled na iznete argumente u prilog stava o ništavosti odredbe o naknadi troškova obrade kredita pokazuje da ti argumenti ne mogu da prežive iole ozbiljniju analizu. Osnovni argument jeste da je ta odredba ništava „jer je suprotna članu 1065 ZOO". Član 1065 ZOO glasi „Ugovorom o kreditu banka se obavezuje da korisniku kredita stavi na raspolaganje određeni iznos novčanih sredstava, na određeno ili neodređeno vreme, za neku namenu ili bez utvrđene namene, a korisnik se obavezuje da banci plaća ugovorenu kamatu i dobijeni iznos novca vrati u vreme i na način kako je utvrđeno ugovorom". Ovaj član definiše tzv. objektivno bitne elemente ugovora o kreditu kao imenovanog ugovora (o podeli ugovornih elemenata Živković, 2006, 33-35), odnosno osnovne obaveze ugovornih strana iz ovog ugovora. Objektivno bitni elementi imenovanih ugovora služe razlikovanju tih ugovora od njima sličnih, i posledica su tipizacije pojedinih posebnih ugovora. Navedenim članom se nigde ne zabranjuje banci da, pored kamate, ugovori za sebe i druga davanja od korisnika kredita, naravno pod uslovom da se poštuju ograničenja slobode ugovaranja. Pored objektivno bitnih elemenata, načelo slobode ugovaranja dozvoljava stranama da, u okviru prinudnih propisa, javnog poretka i dobrih običaja, ugovore i brojne druge odredbe. To, uostalom, proizlazi iz odredbe člana 1066 st. 2 ZOO, koji glasi „Ugovorom o kreditu utvrđuje se iznos, kao i uslovi davanja,

claims that the amount of the fee was determined as a lump-sum, and that it is, therefore, unclear what it includes, because it emphasizes that such claims have not been substantiated by the expert findings, without going into the legal relevance of such claims should they have been proven.

The decision of the Court of Appeals in Belgrade Gž No. 5061/17 dated 14 December 2017 confirmed the mentioned decision of the Third Primary Court in Belgrade dated 18 May 2017, and thus a final verdict of this court determined that the clause on the loan processing fee is legally invalid. As for the reasoning, it is almost verbatim taken from the decisions of the Higher Court in Sombor, with one addition - the position that the cause of invalidity is not only the provision of Article 1065 of the ZOO, but also the provision of Article 47 of the ZOO, because the subject matter of the obligation is not determined.

Chronologically the newest is the first instance decision of the Commercial Court in Niš 3 P 784/17 dated 1 February 2018. While presenting this decision one should bear in mind the fact that it has been passed in a period in which, as opposed to the previous one, the issue of legality of loan processing fee has become highly exposed in the media, as a result of the public statements of "Efektiva" on the one hand, and of the Association of Serbian Banks and the NBS, on the other hand. It seems that due to this exposure the representatives of both parties (especially the defendant bank), and more importantly the court itself, approached this issue much more seriously and, thus, offered the increasingly comprehensive argumentation than in the previous proceedings in which this issue was deliberated. The lawsuit in this case was filed on 22.11.2017, when this issue was already in the center of public attention, and newspaper articles on illegality of the clause on the loan processing fee were also submitted as evidence. The amount of the loan processing fee in this particular loan agreement, which was, as evidenced by the competence of the commercial court, not concluded with a consumer but rather between a bank and a company, was set at 0,4%. The plaintiff claimed that the clause is invalid based upon Article 103 ZOO, invoking the decision of the Supreme Court of Serbia from 2000 and the decision of the Court of Appeals in Belgrade as of 14 December 2017. The defendant emphasized that Article 1065 ZOO does not exclude the possibility for the contractual parties to, within the boundaries of the freedom of contract, willfully agree to other clauses, claiming that there is no breach of Article 103 ZOO which is confirmed by numerous examples of case law, and invoking the published decision of the Commercial Court of Appeals from 2013. The defendant also invoked the position of the NBS, as the financial sector regulator, that the loan processing fee is allowed, as well as Article 19 of the Law on Protection of Financial Services Consumers which provides that all other costs of the loan, other than interest, must also be included in the agreement and taken into consideration when calculating the annual percentage rate of charge, which testifies to the fact that the clause on the loan processing fee is allowed in loan agreements with consumers, and therefore even more so in non-consumer loan agreements. Essentially, the defendant pointed out that the bank is allowed to shift its costs to the loan user in a way which does not violate the principle of equivalence. The court in this case determined the existence of the incoherent case law related to this issue (this is why the judge has, on 5 March 2018, filed a Request for Solving a Disputed Legal Issue to the Supreme Court of Cessation), and subsequently took the position that the claim by the plaintiff that the clause is invalid based upon Article 103 in relation to 1065 ZOO is "manifestly wrong" because it rests on a false premise that everything that is not explicitly allowed is forbidden. The court further found that the Law on Banks (Official Gazette of the RS Nos. 107/2005, 91/2010 and 14/2015) in its Article 43 explicitly mentions the possibility of a single manner of calculation and publication of costs, interests and fees for banking services, which means that the compensation of operating costs of a bank is allowed and represents a standard practice in the area of banking services related to loan agreements. The Court derived the same conclusion from the provisions of Article 19 of the Law on Protection of Financial Services Consumers. Lastly, the court determined that this contractual clause is in accordance with the EU law, starting from Directive 2008/48/EC, even if the client of the bank is a consumer (and even more so if he is not), and that such clauses are a

korišćenja i vraćanja kredita", iz čega jasno proizlazi mogućnost ugovarača da predvide različite uslove davanja kredita, što uključuje i mogućnost da se dogovori obaveza korisnika kredita da davaocu kredita naknadi troškove obrade kredita. Iz člana 1065 ZOO nikako ne proizlazi da je „banka ima pravo samo na stvarne troškove koji su nastali iz kreditnog odnosa", kako je navedeno u odluci Vrhovnog suda Srbije iz 2000. godine i ponovljeno u odlukama Višeg suda u Somboru. Ovo pre svega jer odredba člana 1065 ZOO o troškovima bilo koje strane u kreditnom odnosu uopšte ne govori, a posebno ne govori o „stvarnim troškovima". Doduše, ugovorne bi strane mogle ugovoriti da primalac kredita davaocu naknadi „stvarne troškove" kredita, u kom slučaju bi primalac kredita davaocu dugovao one troškove koje ovaj može dokumentovati, odnosno dokazati. Međutim, ako ugovornici dogovore određeni paušalni iznos, bilo kao fiksni, bilo kao procenat od glavnice, bilo kombinovano, tako da se taj iznos duguje *na ime* troškova obrade kredita, onda se navedeni iznos duguje nevezano od toga da li u konkretnom slučaju ti troškovi postoje i, ako postoje, da li se po visini poklapaju s određenim paušalnim iznosom. U suprotnom bi volja strana bila izneverena, i otvorio bi se put nesavesnim ugovornicima da naknadno umanjuju svoje ugovorom preuzete obaveze dokazujući da iznos koji je paušalno dogovoren na ime naknade određenog troška ne odgovara stvarnom trošku koji je nastao za drugu stranu. Ovo bi ugrozilo primenu svih postojećih tarifa koje u sebi sadrže paušalno određene iznose naknade troškova, a bilo bi suprotno i fundamentalnom načelu *pacta sunt servanda*, odnosno da ugovorne strane treba da ispune svoje ugovorne obaveze onako kako glase (član 17 ZOO; ovo je i osnovno pravilo tumačenja ugovora, član 99 stav 1 ZOO). Zbog toga je pogrešna cela linija argumentacije u odlukama Višeg suda u Somboru koja je išla za tim da se veštačenjem utvrdi da li postoje troškovi na koje se odnosi paušalno određena naknada i da li su oni „ekonomski opravdani". Najjednostavnije rečeno, član 1065 ZOO uopšte nije podoban da odredbe ugovora o kreditu o kojima ne govori učini ništavim, jer taj član ništa ne zabranjuje, već samo definiše objektivno bitne elemente ugovora o kreditu. To sasvim jasno proizlazi i iz člana 1066 st. 2 ZOO. Izvući iz odredbe člana 1065 ZOO stav da banke u ugovorima o kreditu imaju pravo da naplaćuju samo kamatu nije samo jezički i logički neodrživo, već je evidentno suprotno brojnim odredbama drugih zakona koji uređuju bankarsko poslovanje i detaljnije definišu elemente ugovora o kreditu, poput člana 19 Zakona o zaštiti korisnika finansijskih usluga ili člana 43 Zakona o bankama.

Osećajući da argument „ništav jer je suprotan članu 1065 ZOO" nije dovoljno dobar, neki tužioci su tvrdili da je posredi zelenaška odredba, ili odredba zabranjena članom 103 ZOO, ili ništava kao neodređena zbog člana 47 u vezi sa članom 105 ZOO. Ove argumente, međutim, s izuzetkom pozivanja na član 47 ZOO, nije prihvatio nijedan sud, ni oni koji su našli da je odredba ništava ni oni koji su našli da je odredba punovažna (oni su ove argumente izričito odbili). U pogledu zelenaške odredbe, nije nezamislivo da ceo ugovor o kreditu, a ne samo ova odredba, bude pogođen sankcijom ništavosti ako su ispunjeni uslovi da bi se on kvalifikovao kao zelenaški, ali radi se o nizu dodatnih uslova koje treba dokazati, što će biti teško kad se radi o bankarskom poslovanju (a ne uzimanju zajma od „zelenaša"). Stvar isto stoji i ako bi se dokazala neka mana volje ili prekomerno oštećenje, ali ovde je prilično jasno da za to nisu ispunjeni uslovi, niti su to tvrdili tužioci. U pogledu tvrdnje da je odredba zabranjena po članu 103 ZOO, koji glasi „Ugovor koji je protivan prinudnim propisima, javnom poretku ili dobrim običajima je ništav ako cilj povređenog pravila ne upućuje na neku drugu sankciju ili ako zakon u određenom slučaju ne propisuje što drugo", sudovi su jasno (i ispravno) stali na stanovište da odredba o obavezi naknade troškova obrade kredita nije suprotna ni prinudnim propisima, ni javnom poretku, ni dobrim običajima. Čak ni sudovi koji su našli da je ugovor ništav jer je suprotan članu 1065 ZOO najčešće nisu to izričito povezivali s članom 103 ZOO, u smislu da je član 1065 ZOO prinudni propis, pa da je onda naknada troškova obrade kredita ništava s pozivom na član 103 ZOO, jer je suprotna prinudnom propisu iz člana 1065, što je inače moglo da se očekuje u tim obrazloženjima. Najposle, u vezi s argumentom iz odluke

generally accepted standard in loan agreements, known under the name of *loan processing fee* and *loan application fee* (the English terms were used in the Serbian original of the decision). Finding that, in commercial loan agreements, the usual amount of this fee is around 2.5%, the court determined that contracting this fee is mentioned as standard practice in the annual report of the *European Banking Authority* (EBA). Lastly, the court quoted the data on the usual amount of this fee in the region, which are published at the website of the Association of Serbian Banks, ranging between 1-1.5%, increased by a certain fixed amount. This analysis led the court to the conclusion that the agreed fee in the amount of 0.4% in this particular case is not violating the principle of equivalence of mutual performances in the sense of Article 15 ZOO. At the very end, the court concluded that this clause was a part of the general terms and conditions of the bank, and that it was inserted in the loan agreement in a clear and precise manner, which was conscientiously accepted by the plaintiff by signing the agreement, therefore excluding the possibility of a breach of the principle of the freedom of contract.

Analysis of Presented Case Law of the Serbian Courts

Regarding the case law of domestic courts that has been presented above, the first thing that comes to mind to a person that deals with the law from an academic perspective is the fact that almost all decisions were passed without any consideration of the provisions of the Law on Protection of Financial Services Consumers or the general Law on Consumer Protection, regardless of whether the decision was that the disputed clause on loan processing fee is valid or invalid. This is, to some extent, understandable when it comes to the decision of commercial courts, because they inherently do not apply the so-called "consumer law" because they deal with commercial disputes, yet in respect of the particular issue, the consideration of the provisions of the Law on Protection of Financial Services Consumers is all but senseless, even if this law does not apply to the concrete dispute (besides, a good example for that is the chronologically last decision of the Commercial Court in Niš, which could not avoid considering this because the defendant bank, i.e. its attorney, invoked this law). In respect of the decisions of courts of general competence, this makes one wonder, to say the least. The exception is only the chronologically last decision, which has, in its reasoning, considered not only the provisions of the Law on Protection of Financial Services Consumers, but also the provisions of the Law on Banks. Therefore, most of the arguments that exist in domestic case law are related to the ZOO, as the general law the provisions of which regulate the loan contract as a nominated contract.

Even a superficial view at the arguments put forward in favor of invalidity of the clause on the loan processing fee testifies that these arguments cannot survive any comprehensive analysis. The basic argument is that such a clause is invalid "because it is contrary to Article 1065 ZOO". Article 1065 ZOO reads: "By a contract of loan the bank shall assume the obligation to place at the disposal of a loan beneficiary a specific amount of money, for a definite or indefinite period of time, and for specific purpose or without such purpose, while the beneficiary shall assume an obligation to pay to the bank the stipulated interest and repay the received amount of money, at the time and in the way determined by the contract". This Article defines the so-called objectively essential terms of the loan contract as a nominated contract (on division of contractual terms see Živković, 2006, 33-35), i.e. the basic obligations of both parties from this contract. The objectively essential terms of nominated contracts serve to distinguish such contracts from the ones that are similar, and are a consequence of certain particular contracts becoming typical. The quoted Article in no place forbids the bank to stipulate some other obligations of the loan user apart from the interest, of course in line with the existing limits of freedom of contract. Apart from the objectively essential terms, the principle of freedom of contract allows the parties to, within the limits of the mandatory law, public policy and good faith, stipulate numerous other contractual clauses. After all, this stems from the provision of Article 1066 para. 2 ZOO, which reads: "The following shall be specified by a loan contract: the amount,

Apelacionog suda u Beogradu iz decembra 2017. godine, da odredba o naknadi troškova obrade kredita nije određena jer se ne zna na šta se tačno ti troškovi odnose, pa je otud ništava po članu 47 ZOO, valja imati na umu da je predmet ove obaveze isplata novčanog iznosa, te da je taj iznos određen bilo kao fiksni, bilo kao procenat od iznosa glavnice kredita, bilo kao kombinacija ova dva metoda, pa je sasvim očigledno da je predmet obaveze, u smislu člana 47 ZOO, određen, odnosno odrediv. Pitanje određenosti moglo bi se postaviti ako bi strane predvidele da korisnik banci treba da naknadi neke troškove, bez navođenja paušalnog iznosa koji se plaća na ime naknade, i to samo ako se pravilima tumačenja ne bi moglo utvrditi na koje se troškove takva odredba odnosi. Onog momenta kad je iznos naknade kvantifikovan kao paušal, argument neodređenosti otpada.

U sudskim odlukama u kojima je utvrđena ništavost odredbe o naknadi troškova obrade kredita još se pominju i povreda načela savesnosti i poštenja iz člana 12 ZOO, te povreda načela jednakosti uzajamnih davanja iz člana 15 ZOO. Nijedan od tih navoda nije detaljnije obrazložen - po svemu sudeći povredom načela savesnosti i poštenja se smatra naplata tzv. unutrašnjih troškova banke od klijenta, odnosno njihovo „prevaljivanje" na klijenta, o čemu bi moglo biti reči ako bi se radilo na prikriven i netransparentan način (malim neuočljivim slovima na dnu opštih uslova i slično), ali ne može biti reči ako je jasno, precizno i transparentno ugovoreno, i ako je korisniku kredita bilo jasno predočeno šta će i koliko da plati na ime naknade za troškove obrade kredita. U pogledu povrede načela ekvivalencije u dvostrano obaveznim, odnosno teretnim ugovorima, sudovi, prvo, potpuno prenebregavaju drugi stav člana 15 ZOO koji predviđa da se zakonom uređuje u kojim slučajevima narušavanje ekvivalencije povlači pravne posledice, što zapravo znači da ova odredba nije neposredno primenjiva već da je ona osnov za primenu nekih drugih odredbi (o prekomernom oštećenju, zelenaškom ugovoru itd). Otud sud ne bi mogao da se pozove na član 15 ZOO ako želi da obrazloži stav o ništavosti odredbe o naknadi troškova obrade kredita, već, ako nađe da je načelo ekvivalencije zaista povređeno, mora da se pozove na neke od odredaba koje za posledicu povrede načela ekvivalencije predviđaju sankciju ništavosti, što nije bio slučaj. Drugi problem s pozivanjem na ovu odredbu jeste činjenica da se povreda načela ekvivalencije, po pravilu, ne utvrđuje za svaki element ugovora pojedinačno, već se odnosi na celokupan ugovor, pa bi u tom smislu nalaz morao biti da je kod ovih ugovora korisnik kredita previše platio za korist koju ima od odobrenog kredita, ako se uzmu u obzir kamata i sve naknade i troškovi koji padaju na njegov teret. Imajući u vidu da se svi ti troškovi i naknade uzimaju u obzir prilikom izračunavanja efektivne kamatne stope, te da ovu, u krajnjoj liniji, određuje stanje na tržištu, povreda ekvivalencije mogla bi se utvrđivati ako je efektivna kamatna stopa znatno viša od tržišne u trenutku zaključenja ugovora, a i tada bi za ništavost ugovora morali biti ispunjeni dodatni uslovi (za prekomerno oštećenje ili zelenaški ugovor). Čak i ako bi se povreda ekvivalencije suzila samo na pitanje naknade za troškove obrade kredita, sve dok je iznos ove naknade oko uobičajenih 2-2,5% od glavnice, povrede ekvivalencije zapravo nema; moglo bi je biti tek ako se grubo prekorače uobičajene granice, a i tada bi to vodilo (delimičnoj) ništavosti samo uz ispunjenje dodatnih uslova.

Zbog svega navedenog nesumnjivo je da, bar kad je reč o argumentaciji sadržanoj u navedenim odlukama domaćih sudova, prednost treba dati argumentima koje navode sudovi koji zastupaju stav da je odredba o naknadi troškova obrade kredita punovažna. Ove odluke polaze od načela slobode ugovaranja (član 10 ZOO), i nepostojanja niti opšteg (član 103 ZOO) niti posebnih osnova za utvrđivanje ništavosti ove odredbe. Kao što je gore objašnjeno, nijedan od posebnih osnova na koje su se pozivale stranke u postupku i sudovi koji su našli da je odredba o naknadi troškova obrade kredita ništava, nije ispunjen, pa valja uzeti da je ova odredba punovažna.

Sopstvena analiza pitanja dozvoljenosti odredbe o naknadi troškova obrade kredita

Poslednji deo slagalice, međutim, predstavlja razmatranje koje ne uzima u obzir samo argumentaciju koju su dosad isticali

terms and conditions of initiating, utilizing and repaying the loan", from which it is clear that the parties have the possibility to stipulate different terms of conditions of granting the loan, which includes the possibility to stipulate the obligation of the loan user to pay the loan processing fee to the bank. Article 1065 most certainly does not prescribe that "the bank has only the right to the expenses that actually occurred due to the lending relation", as claimed in the decision of the Supreme Court of Serbia from 2000, and repeated in the decisions of the Higher Court in Sombor. This primarily because the provision of Article 1065 does not refer to any expenses of either party in the lending relation, and especially does not refer to the "actual expenses incurred". Admittedly, the parties could stipulate that the loan user is to compensate the bank for the "actual costs" incurred related to the loan, in which case the loan user would owe the compensation for those costs that the bank can prove. However, if the parties agree to a lump sum, be it as a fixed amount, as a percentage from the principal of the loan, or combined, so that this amount is owed as a compensation of the loan processing costs, then such amount is owed irrespective of whether in the concrete case these costs actually exist and, if they do, whether their actual amount equals the said lump sum in the concrete case. Otherwise, the will of the parties would be let down and twisted, and the route would be wide open for the malicious parties to subsequently reduce their contractually accepted obligations by proving that the amount that was stipulated as a lump sum to cover some costs does not equal the actual costs incurred by the other party. This would endanger the application of all existing tariffs which contain clauses on compensation of costs by a lump sum, and would also contradict the fundamental principle that *pacta sunt servanda*, i.e. that the contractual parties should perform their contractual obligations as they are stipulated (Article 17 ZOO; this is also the basic rule of interpretation of contracts, Article 99 para. 1 ZOO). Therefore the whole line of argumentation in the decisions of the Higher Court in Sombor, which followed the line of determining, by expert findings, whether the costs covered by the loan processing fee exist and whether they are "economically justified" is fallible. To put it simply, Article 1065 ZOO is not at all capable of making the clauses of the loan contract which it does not refer to invalid, because that Article does not forbid anything, but rather defines the objectively essential terms of the loan contract. This quite clearly stems from Article 1066 para. 2 ZOO. To extract from Article 1065 ZOO the position that the banks have only the right to charge interest based on loan contracts is not only semantically and logically unsustainable, but is also evidently contrary to the numerous provisions of other laws which pertain to banking operations and define the terms of the loan contract in more detail, such as Article 19 of the Law on Protection of Financial Services Consumers and Article 43 of the Law on Banks.

Sensing that the argument "invalid because it is contrary to Article 1065 ZOO" is not good enough, some plaintiffs claimed that this clause is usurious, or that it is invalid under Article 103 ZOO, or invalid due to vagueness (as unspecified) under Article 47 ZOO related to Article 105 ZOO (on partial invalidity). These arguments, however, with the exception in regard of invoking Article 47 ZOO, were not accepted by any of the courts, be it those that found the clause invalid be it those that found it fully valid (they explicitly rejected these arguments). Concerning the claim that the clause is usurious, it is not beyond imagination that the whole loan agreement, and not only this clause, is sanctioned by nullity if the conditions for it to be classified as usurious are met, but that would require a lot of additional conditions to be proven, which should be exceptionally difficult in case of banking operations (and not borrowing from "loan sharks"). The same applies in the case of the deficiencies in the will of the parties or *laesio enormis*, but here it is quite clear that the conditions for this were not met, nor have the plaintiffs claimed so. In respect of the claim that the clause on loan processing fee is contrary to Article 103 para. 1 ZOO, that reads: "A contract contrary to compulsory regulations, public policy or fair usage shall be void unless the purpose of the rule violated refers to another sanction, or unless the law provides for something else in the specific case", the courts have clearly (and rightfully)

oni koji su tražili utvrđivanje ništavosti i sudovi koji su usvajali takve zahteve (a koja, kao što je pokazano, nije dovoljna za taj zaključak), već i sve druge moguće argumente. Pojednostavljeno govoreći, treba ispitati da li bi argumentacija i linija zaključivanja nemačkog BGH bila primenjiva i u okvirima domaćeg prava. Da bi se sprovela ova analiza, prvo treba razlikovati situacije u kojima je naknada troškova obrade individualno ugovorena, što je u praksi izuzetno retko, od situacija u kojima je ova naknada predviđena opštim uslovima poslovanja banke, što je redovno slučaj. Potom je potrebno napraviti i razliku u pogledu toga je li konkretan ugovor o kreditu zaključen s potrošačem (u smislu propisa o zaštiti korisnika finansijskih usluga i o zaštiti potrošača uopšte) ili je posredi komercijalni ugovor o kreditu (ugovor u privredi).

Ako se radi o zasebno, pregovorima utvrđenoj naknadi koja nije deo opštih uslova poslovanja banke, smatram nespornim da odredba proizvodi pravno dejstvo, razume se osim ako bi bili ispunjeni uslovi za poništaj u smislu mana volje, prekomernog oštećenja, zelenaškog ugovora, prividnog ugovora i sl. Ugovaranje naknade u uobičajenom iznosu, bilo fiksnom, bilo u procentu od glavnice, bilo kombinacijom tih metoda, svakako nije zabranjeno domaćim pravom. Uostalom, to nije zabranjeno ni u jednoj državi Evrope, uključujući i Nemačku, i proizlazi iz temeljnog načela slobode ugovaranja. Dakle, posebno ugovorena naknada troškova obrade kredita, mimo opštih uslova poslovanja banke, punovažna je.

Kad je reč o redovnoj situaciji, u kojoj je odredba o naknadi troškova obrade kredita deo opštih uslova poslovanja („tarifa“) banke, bitno je razlikovati da li je posredi „potrošački“ ili „nepotrošački“ ugovor o kreditu. Na „nepotrošačke“ ugovore o kreditu primenjuje se, naime, samo opšti ugovorni režim koji sadrži ZOO, dok se na „potrošačke“ primenjuju i posebni propisi o zaštiti potrošača - prvoredno Zakon o zaštiti korisnika finansijskih usluga a potom i opšti Zakon o zaštiti potrošača (bilo kad na njega povodom konkretnog pitanja upućuje Zakon o zaštiti korisnika finansijskih usluga, bilo mimo toga, kao *lex generalis* u oblasti zaštite potrošača). Pošto sam već izneo stav da je dogovaranje ove odredbe svakako dozvoljeno van opštih uslova poslovanja, u središte razmatranja dolaze upravo odredbe o opštim uslovima.

Podsećanja radi, odredba o naknadi troškova obrade kredita u Nemačkoj je proglašena ništavom zahvaljujući sledećem sledu argumenata i zaključaka: ova odredba deo je opštih uslova poslovanja banke; ona ne predstavlja ni glavnu protivprestaciju (to je kamata), ni prestaciju za neke druge usluge korisniku kredita, već se radi o dodatku na cenu kredita posredstvom „prevaljivanja“ troškova koji nastaju kao troškovi radnji koje banka preduzima u sopstvenom interesu, a ne u interesu korisnika kredita, usled čega ovakva odredba podleže sadržinskoj kontroli opštih uslova od strane suda i može biti utvrđena njena ništavost i mimo slučaja kad je nejasna ili nerazumljiva; dispozitivne zakonske odredbe predstavljaju „pravednu meru“ raspodele obaveza i interesa između strana u imenovanim ugovorima u očima zakonodavca; menjanje ove raspodele obaveza (prevaljivanje tereta troškova) posredstvom opštih uslova poslovanja jedne strane suprotno je načelu savesnosti i poštenja, nepravično je i preterano je teško za drugu stranu pa su takve odredbe opštih uslova zato ništave, s pozivom na § 307 BGB, koji u prevodu glasi: “(1) Odredbe u opštim uslovima poslovanja su bez dejstva, ako, protivno zahtevima savesnosti i poštenja, saugovarača korisnika stavljaju u nesrazmerno nepovoljan položaj. Nesrazmerno nepovoljan položaj može takođe da proizađe i iz činjenice da odredba nije jasna i razumljiva. (2) U slučaju sumnje, smatra se da nesrazmerno nepovoljan položaj postoji ako 1. odredba nije u skladu sa bitnim osnovama zakonskog uređenja, od kojeg se odstupa, ili 2. se odredbom u toj meri ograničavaju bitna prava ili obaveze, koje proizlaze iz prirode ugovora, da je ugroženo postizanje svrhe ugovora. (3) Stavovi 1. i 2. kao i §§ 308. i 309. važe samo za odredbe opštih uslova poslovanja, kojima se dogovaraju pravila koja odstupaju od zakonskih odredbi ili ih dopunjuju. Ostale odredbe mogu biti bez dejstva prema stavu 1., 2. rečenica u vezi sa stavom 1., 1. rečenica.” (prevod autora). Ovo važi kako za „potrošačke“ tako i za „nepotrošačke“ ugovore o kreditu.

took the position that the clause on the loan processing fee is not contrary to compulsory regulations, neither to public policy nor fair usage. Even the courts that found the clause to be null and void because it is contrary to Article 1065 ZOO have, most often, not related that with Article 103 ZOO, in the sense that Article 1065 is a compulsory provision that makes the clause on loan processing fee invalid based upon Article 103 ZOO due to it being contrary to mandatory provision of Article 1065, which could have been expected in the reasoning of those decisions. Lastly, related to the argument put forward in the decision of the Court of Appeals in Belgrade from December 2017, that the clause on loan processing fee is not specified because it is not clear what this fee refers to, which makes it null under Article 47 ZOO, one should bear in mind that the subject matter of this obligation is payment of a certain sum of money, and that this amount is specified either as a fixed amount, as a percentage of the loan principal or as a combination of these two methods, so it is quite obvious that the subject matter of the obligation, in the sense of Article 47 ZOO, is specified, i.e. specifiable. The issue of specification could come into play if the parties would stipulate that the loan user should pay the bank for some of its expenses, without specifying the lump sum payable in lieu of such compensation, and even that only in case when applying the rules of interpretation could not determine which expenses this clause referred to. The moment the amount of the loan processing fee is quantified as a lump sum, the argument of non-specificity falls out.

The court decisions that determine that the loan processing fee clause is null and void also mention the violation of the principle of good faith prescribed by Article 12 ZOO, and the violation of the principle of equivalence of mutual consideration prescribed by Article 15 ZOO. None of these claims are elaborated in any detail - it appears that charging the so-called "internal costs" of the bank from a loan user, i.e. "shifting" them to the client, is considered as violation of the good faith principle, which could be the case if it were done in a concealed and non-transparent manner (for instance, by using small-print letters at the bottom of general terms and conditions), but not in the cases when it was contracted clearly, precisely and transparently and if the overall cost of the loan processing fee was clearly presented to the loan user. As for the violation of the principle of equivalence in bilaterally binding, i.e. onerous contracts, the courts, firstly, fully oversee the second paragraph of Article 15 ZOO, which prescribes that the cases where violation of this principle invokes legal consequence shall be determined by the law, which actually means that this provision is not directly applicable but rather a basis for the application of some other provisions (on *laesio enormis*, usury etc.). Therefore, the court should not be able to invoke Article 15 ZOO in order to substantiate its position that the clause on the loan processing fee is invalid, but rather, if it actually finds the principle of equivalence to have been breached, it must invoke some of the articles that provide for the sanction of nullity for the case of equivalence principle breach, which was not the case. The second problem with invoking this provision is the fact that a breach of equivalence, as a rule, is not determined in respect to each individual part of the contract, but rather in respect of the contract as a whole, so therefore the finding must be that in these contracts the loan user has paid too much for the benefit s/he gains by the granted loan, taking into consideration the interest as well as all other fees and expenses paid by the loan user. Bearing in mind that all these fees and expenses are taken into consideration during the calculation of the annual percentage rate of interest, and that this rate is, *in ultima linea*, determined by the market conditions, the breach of equivalence could be determined if the annual percentage interest rate is significantly above the market rate at the time of execution of the contract, and even then in order to determine the nullity of the contract further conditions must be fulfilled (for *laesio enormis* or the usury). Even if the breach of equivalence would be narrowed down only to the issue of the loan processing fee, as long as its amount is around the usual 2-2.5% of the loan principal, there is actually no breach of equivalence; a breach could occur only if the usual limits were gravely exceeded, and even then it would lead to (partial) nullity only if further conditions were met.

Odredbe ZOO o opštim uslovima poslovanja (članovi 142 i 143) značajno se razlikuju od odredaba nemačkog BGB. U Nemačkoj je pravo opštih uslova poslovanja bilo razvijano u sudskoj praksi s pozivom na § 242 BGB, a potom, od 1977. godine, uređeno posebnim zakonom, Zakonom o uređenju prava opštih uslova poslovanja (*AGB-Gesetz*), čiji je materijalnopravni deo docnijim reformama 1. januara 2002. godine inkorporisan u tekst Građanskog zakonika (BGB). Formalni deo postao je poseban Zakon u tužbi za propuštanje (*Unterlassungsklagegesetz*, UKlaG), koji je na snagu stupio takođe 1. januara 2002. Ipak, i ZOO sadrži pravilo o ništavosti pojedinih odredbi opštih uslova poslovanja, član 143, koji glasi: „(1) Ništave su odredbe opštih uslova koje su protivne samom cilju zaključenog ugovora ili dobrim poslovnim običajima, čak i ako su opšti uslovi koji ih sadrže odobreni od nadležnog organa. (2) Sud može odbiti primenu pojedinih odredbi opštih uslova koje lišavaju drugu stranu prava da stavi prigovore, ili onih na osnovu kojih ona gubi prava iz ugovora ili gubi rokove, ili koje su inače nepravične ili preterano stroge prema njoj". Prvi stav ovog člana odnosi se na odredbe opštih uslova koje su u gruboj nesaglasnosti sa zaključenim ugovorom i dobrim poslovnim običajima, i ove odredbe pogađa sankcijom ništavosti. Ono što se kod nas u doktrini obično naglašava, a što je za jednu državu s polu-planskom socijalističkom privredom 1978. godine zaista bilo sasvim revolucionarno, jeste ovlašćenje suda da utvrdi ništavost takvih odredbi čak i ako su opšti uslovi koji ih sadrže odobreni od nadležnog (upravnog) organa (Perović, 1981, 224; Đorđević i Stanković, 1987, 199-200, Radišić, 1990, 1990, 95-96; Vilus, 1983, 431-439). Drugi stav ovog člana nešto je drugačiji, pa za odredbe opštih uslova o kojima je tu reč predviđa da im sud može odbiti primenu, što je nijansiranije rešenje, jer zapravo ne znači ništavost, već ovlašćenje sudu da odbije zahtev zasnovan na takvoj odredbi opštih uslova. U ishodu, ovakve odredbe opštih uslova stvaraju, zapravo, prirodne obligacije, jer u slučaju da ih obavezno lice dobrovoljno ispuni one nisu ispunjene bez osnova i ne mogu se tražiti nazad, ali poverilac ne može ishodovati ispunjenje sudskim putem. Za ovu temu od značaja može biti samo poslednja kategorija odredbi opštih uslova poslovanja o kojima govori stav 2, a to su inače nepravične i preterano stroge odredbe. Ako bi se uzelo da odredba o naknadi troškova obrade kredita predstavlja takvu odredbu (da ne bude zabune, ja smatram da po našem pravu ona nije takva), to ponovo ne bi bilo od značaja za postojeće sudske postupke. Ovi se postupci, naime, ne vode po tužbama banaka koje traže isplatu ove naknade, kad bi sud mogao da odbije primenu ovih odredaba s pozivom na to da su nepravične ili preterano stroge prema korisniku kredita. Korisnici kredita su, u gotovo svim slučajevima, ovu naknadu platili već prilikom stavljanja kredita u tečaj, dakle odmah, a kako za ovakve odredbe ZOO ne predviđa sankciju ništavosti već mogućnost suda da odbije primenu tih opštih uslova ako bi neki zahtev bio zasnovan na njima, na osnovu nje nije moguće utvrditi da su ovakve odredbe ništave, i potom zasnovati kondikcijski zahtev iz neosnovanog obogaćenja. U ovoj se tački naše pravo opštih uslova poslovanja u ZOO i ono iz nemačkog BGB bitno razlikuju. Dakle, kao osnov za ništavost preostaje samo stav 1 člana 143 ZOO, pa se odluka svodi na odgovor na pitanje da li je odredba o naknadi troškova obrade kredita, u iznosu od oko 2% glavnice (dakle, vrednosti celokupnog ugovora), „protivna samom cilju zaključenog ugovora ili dobrim poslovnim običajima". Cilju ugovora o kreditu bilo bi protivno, recimo, da se ne plaća kamata, da se glavnica ne mora uopšte vratiti, da se kamata duguje i za deo glavnice koji još nije pušten u tečaj ili za otplaćeni deo glavnice, dakle cilju ugovora o kreditu bile bi protivne odredbe koje neposredno izvrću i menjaju bitne elemente ugovora o kreditu predviđene članom 1065 ZOO. Imajući u vidu da član 1066 ZOO izričito predviđa da se uslovi davanja kredita određuju ugovorom o kreditu, te pomenute odredbe člana 43 Zakona o bankama i člana 19 Zakona o zaštiti korisnika finansijskih usluga, čini se da nije sporno da jedna ovakva odredba nije suprotna samom cilju ugovora o kreditu, jer osnovne obaveze iz tog ugovora, stavljanje kredita na raspolaganje i vraćanje glavnice sa kamatom ostavlja nedirnutim. Što se dobrih poslovnih običaja tiče, držim da je jasno da odredba o naknadi troškova obrade kredita nije suprotna ovim običajima, već je, naprotiv,

All of this demonstrates that there is no doubt, at least taking into consideration the arguments contained in the analyzed case law of domestic courts, that the arguments put forward by the courts taking the position that the clause on the loan processing fee is valid absolutely prevail. These decisions have the starting point in the principle of freedom of contract (Article 10 ZOO), and the lack of either general (Article 103 ZOO) or specific grounds for determining invalidity of this clause. As it was explained above, none of the special grounds for nullity, invoked by the parties to the proceedings and the courts that found this clause to be invalid, actually stand, so one should take this clause to be valid.

Additional Analysis of the Issue of Legality of the Loan Processing Fee Clause

The last piece of the puzzle, however, is a (re) consideration of the issue that does not restrict itself to the arguments put forward by those seeking declaration of nullity and the courts that accepted such claims (which, as demonstrated, are not enough for such conclusion), but also all the other possible arguments. To put it simply, one needs to verify whether the arguments and line of reasoning of the German BGH would also be applicable within the framework of the domestic law. In order to perform such analysis, one must firstly distinguish the situations in which the loan processing fee is individually stipulated, which is extremely rare in commercial practice, from the situations in which the clause on the loan processing fee is a part of general terms and conditions, i.e. tariffs of a bank, which is regularly the case. Subsequently, a further distinction should be made in respect of whether the particular loan agreement is concluded with a consumer (in the sense of legislation pertaining to the protection of financial services consumers and to the general consumer protection) or whether it is a commercial loan agreement (commercial, non-consumer contract).

If the loan processing fee is individually agreed by negotiations, outside the context of the bank's general tariffs, in the author's view there is no doubt that such clause is valid, naturally except in the cases when the special conditions for nullity in terms of will deficiencies, *laesio enormis*, usury, simulation and the like are met. Contracting this fee in a usual amount, be it fixed, a percentage of the loan principal or a combination of the two methods, is by all means not forbidden under the domestic law. Moreover, this is not forbidden in any country in Europe, including Germany, and stems from the fundamental principle of the freedom of contract. Thus, the individually contracted loan processing fee, which is not the part of the general terms and conditions of a bank, is legally valid.

In respect of the most common situation, when the clause on the loan processing fee is a part of the bank's general terms and conditions ("tariffs"), one needs to distinguish whether the loan agreement is a "consumer" or a "non-consumer" one. In the case of "non-consumer" loan agreements only the general contractual provisions pursuant to ZOO are applied, while in respect of "consumer" loan agreement the special regulations on consumer protection apply as well - primarily the Law on Protection of Financial Services Consumers and the general Law on Consumer Protection (either when the Law on Protection of Financial Services Consumers refers to it or without such referral, when it applies as *lex generalis* in the area of consumer protection). Given the fact that the author has already put forward the position that stipulating this clause outside of the context of general terms and conditions is by all means allowed, the focus of the analysis now shifts to the legal provisions of the general terms and conditions.

It is worth reminding that the clause on loan processing fee has been declared invalid in Germany after the following line of arguments and conclusions: this clause is the part of general terms and conditions of a bank; it is neither a main consideration (the interest is), nor a consideration for some other services rendered to the loan user, but rather an addition to the price of the loan through shifting the incurred costs as the costs of activities undertaken by the bank in its own interest, and not in the interest of the loan user, therefore this clause is subject to the content control of the general terms and conditions by the court and its invalidity may be determined even if it is not unclear or incomprehensible; in the

sasvim uobičajena. Dovoljno je samo pogledati godišnje izveštaje *European Banking Authority* (EBA), organa EU nadležnog za nadzor bankarskog sektora, kao i izveštaje nacionalnih udruženja banaka da bi se zaključilo da je ova naknada uobičajena i veoma česta, pa bi bilo potpuno neispravno tvrditi da je suprotna dobrim poslovnim običajima. Naplaćivanje ove naknade na ovaj način (unapred u vidu procenta, fiksnog iznosa ili kombinacijom ovih metoda) namesto kao dela kamate zapravo ima vrlo racionalno ekonomsko opravdanje, i vodi tome da klijenti u zbiru plaćaju na ime ove naknade manje nego kad bi ona bila uračunata u kamatu (pre svega zbog izostanka kreditnog rizika i s njim povezane premije na rizik, ali i zbog diskontovanja novčanih tokova banke i korisnika kredita različitim stopama) (Begović, 2018, 6-8). Zbog toga je razdvajanje naknade troškova, s jedne, i cene kapitala u užem smislu (kamate), s druge strane, koje ukupnu cenu kredita čini dvo- odnosno višekomponentnom, zapravo deo dobrih poslovnih običaja, a ne suprotno takvim običajima.

Kao zaključak se nameće stav da je po srpskom ZOO, nasuprot nemačkom BGB i na njemu zasnovanoj sudskoj praksi nemačkih sudova, odredba o naknadi troškova obrade kredita **punovažna** s tačke gledišta prava o opštim uslovima poslovanja. U tom smislu, držim da je našem pravu bliže rezonovanje austrijskog OGH, koji je takođe našao da ova odredba, po austrijskom pravu, nije suprotna samoj svrsi ugovora o kreditu, niti zahtevima savesnosti i poštenja, niti je preterano teška za korisnike kredita, razume se ako se kreće u okvirima uobičajene visine.

Preostaje još analiza posebnih propisa o zaštiti potrošača kao mogućem osnovu za utvrđenje ništavosti odredbe o naknadi troškova obrade kredita, kad se radi o kreditima s potrošačima. Opštim uslovima poslovanja posvećena su dva člana Zakona o zaštiti korisnika finansijskih usluga, članovi 9 i 10. Njima je predviđena dužnost banke da opštim uslovima poslovanja obezbedi primenu dobrih poslovnih običaja, dobru poslovnu praksu i fer odnos prema korisnicima, kao i da oni moraju biti usklađeni s propisima, a izričito je predviđeno i da se tarife naknada banke smatraju opštim uslovima poslovanja. Takođe su predviđeni uslovi za inkorporaciju opštih uslova u smislu njihove dostupnosti i objavljivanja, kao i dužnost banke da pruži korisniku objašnjenja odredaba opštih uslova. Od značaja bi mogla biti i odredba člana 41 tog zakona koja govori o nepoštenoj poslovnoj praksi i nepravičnim ugovornim odredbama, predviđajući nadležnost Narodne banke Srbije da utvrdi njihovo postojanje, kao i ovlašćenje Narodne banke Srbije da naloži prestanak njihove primene i izrekne novčanu kaznu onim bankama koje primenjuju nepoštene poslovne prakse i nepravične ugovorne odredbe. U pogledu definicije nepoštene poslovne prakse i nepravičnih ugovornih odredbi ovaj zakon upućuje na zakon kojim se uređuje zaštita potrošača, dakle na opšti Zakon o zaštiti potrošača. Za temu kojom se bavim od posebnog značaja je član 43 Zakona o zaštiti potrošača, koji se odnosi na nepravične ugovorne odredbe. Prema ovom članu, nepravične ugovorne odredbe su ništave, a nepravična ugovorna odredba je svaka odredba koja, protivno načelu savesnosti i poštenja, ima za posledicu značajnu nesrazmeru u pravima i obavezama ugovornih strana na štetu potrošača. Po ovom članu, da li je neka odredba ugovora nepravična ili ne određuje se na osnovu sledeća četiri kriterijuma: prirode robe ili usluga na koje se ugovor odnosi; okolnosti pod kojima je ugovor zaključen; ostalih odredbi istog ugovora ili drugog ugovora sa kojim je ugovor u vezi; načina na koji je postignuta saglasnost o sadržini ugovora i načina na koji je potrošač obavešten o sadržini ugovora. Član 44 istog zakona nabraja odredbe koje se uvek smatraju nepravičnim. To su sledeće odredbe, koje za predmet ili posledicu imaju: 1) isključenje ili ograničenje odgovornosti trgovca za slučaj smrti ili telesnih povreda potrošača usled činjenja ili nečinjenja trgovca; 2) ograničenje obaveze trgovca da izvrši, odnosno preuzme obaveze koje je u njegovo ime ili za njegov račun preuzeo punomoćnik, odnosno nalogoprimac ili povezivanje obaveze trgovca da izvrši, odnosno preuzme obaveze koje je u njegovo ime ili za njegov račun preuzeo punomoćnik, odnosno nalogoprimac sa uslovom čije ispunjenje zavisi isključivo od trgovca; 3) isključenje ili ograničenje prava potrošača da pokrene određeni postupak ili da upotrebi

eye of the legislator, the default rules of the law are the "just measure" of the division of mutual obligations between the parties to the nominated contracts; changing this division (shifting the burden of costs) through the general terms and conditions of one party is deemed a violation of the good faith principle, it is unjust and excessively onerous for the other party so such clauses of the general terms and conditions are therefore invalid, by invoking § 307 BGB, which as translated reads: "(1) Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible. (2) An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision 1. is not compatible with the essential principles of the statutory provision from which it deviates, or 2. limits the essential rights or duties inherent in the nature of the contract to such an extent that the attainment of the purpose of the contract is jeopardized. (3) Subsections (1) and (2) above, and sections 308 and 309 apply only to the provisions in the standard business terms on the basis of which arrangements derogating from legal provisions, or arrangements supplementing those legal provisions, are agreed. Other provisions may be ineffective under subsection (1) sentence 2 above, in conjunction with subsection (1) sentence 1 above." (translation by the German Federal Ministry of Justice and Consumer Protection in cooperation with juris GmbH). This applies both to the "consumer" and "non-consumer" loan agreements.

The provisions of ZOO on general terms and conditions (Articles 142 and 143) significantly differ from the provisions of the German BGB. In Germany, the law on the general terms and conditions of business was developed through the case law of the courts that relied upon § 242 BGB, and thereafter, starting from 1977, it was regulated by a separate statute, the Law on Regulation of General Terms and Conditions of Business (*AGB-Gesetz*), the substantive provisions of which were, by subsequent reforms, as of 1 January 2002 incorporated in the text of the Civil Code (BGB). The procedural provisions became a separate statute, the Law on Actions for Injunction (*Unterlassungsklagegesetz*, UKlaG), that also came into force on 1 January 2002. However, the ZOO also contains the rule on nullity of individual clauses of general terms and conditions, i.e. Article 143, which reads: "(1) Provisions of the general terms and conditions shall be null and void if contrary to the very purpose of the contract which is concluded, or to the fair business usage, even after such general terms and conditions containing them have been approved by the competent agency. (2) The court may deny application of specific provisions of the general terms and conditions precluding the other party to raise demurrers, or of those on the ground of which such party is left without contractual rights or loses time limits, or those which are otherwise unjust or excessively strict towards such party". The first paragraph of this Article pertains to the clauses of general terms and conditions that are in grave contradiction to the executed contract and fair usage, and such clauses are sanctioned by nullity. What is usually emphasized in the legal writings in Serbia, and what was indeed quite revolutionary for a country with the semi-administrative economy in 1978, is the authorization given to the court to declare the invalidity of such clauses even though the general terms and conditions containing them were approved by the competent (administrative) body (Perović, 1981, 224; Đorđević and Stanković, 1987, 199-200, Radišić, 1990, 1990, 95-96; Vilus, 1983, 431-439). The second paragraph of this Article is somewhat different, and provides for the provisions to which it pertains that the court may *deny their application*, which is a more nuanced solution, because it, in fact, does not imply nullity, but rather the authorization of the court to deny a claim based upon such a provision of the general terms and conditions. As a result, these provisions of general terms and conditions actually create the natural obligations, because in case the debtor voluntarily performs them, they are not performed without a cause and may not be claimed back, but the creditor cannot achieve court enforcement. For the topic of this paper only the last category of provisions referred to in paragraph 2 is relevant, i.e. provisions that are otherwise unjust or excessively strict. If one took the provisions on the loan processing fee

određeno pravno sredstvo za zaštitu svojih prava, a naročito nametanje obaveze potrošaču da sporove rešava pred arbitražom na način koji je u suprotnosti sa odredbama ovog zakona; 4) sprečavanje ili ograničavanje mogućnosti da se potrošač upozna sa dokazima ili prebacivanje tereta dokazivanja na potrošača u slučaju kada je teret dokazivanja na trgovcu, u skladu sa zakonom; 5) određivanje mesne nadležnosti suda van prebivališta, odnosno boravišta potrošača. Nepravičnom ugovornom odredbom po ovom članu smatra se i ugovorna odredba na osnovu koje trgovac ima: 1) isključivo pravo da utvrdi da li su isporučena roba ili pružene usluge u skladu sa ugovorom; 2) isključivo pravo tumačenja ugovornih odredaba. Član 45 tog zakona nabraja odredbe za koje se oborivo pretpostavlja da su nepravične uz mogućnost suprotnog dokaza. To su odredbe čiji je predmet ili posledica: 1) ograničenje ili isključenje prava potrošača prema trgovcu ili trećoj strani u slučaju potpunog ili delimičnog neispunjenja bilo koje ugovorne obaveze trgovca, uključujući ograničenje ili isključenje prava potrošača da prebije potraživanje koje ima prema trgovcu sa potraživanjem koje trgovac ima prema potrošaču; 2) davanje ovlašćenja trgovcu da zadrži sve što je primio od potrošača u slučaju da potrošač povredi ugovornu obavezu ili odbije da zaključi ugovor, ako isto pravo nije garantovano potrošaču; 3) obavezivanje potrošača koji je povredio ugovornu obavezu da trgovcu plati naknadu u iznosu koji značajno premašuje iznos pretrpljene štete; 4) pravo trgovca da jednostrano raskine ugovor u bilo kom trenutku, ako isto pravo nije garantovano potrošaču; 5) pravo trgovca da jednostrano raskine ugovor zaključen na neodređeno vreme bez ostavljanja primerenog otkaznog roka, osim u slučaju ako potrošač ne izvršava svoje ugovorne obaveze; 6) prećutno produženje ugovora zaključenog na određeno vreme, ako je potrebno da potrošač izjavi da ne pristaje na produženje ugovora u roku koji je neprimereno dugačak u odnosu na rok na koji je ugovor zaključen; 7) pravo trgovca da na bilo koji način poveća ugovorenu cenu, ako nije ugovoreno pravo potrošača da u tom slučaju raskine ugovor; 8) obavezivanje potrošača da izvrši sve svoje ugovorne obaveze u slučaju da trgovac ne izvrši svoje ugovorne obaveze u celosti; 9) davanje ovlašćenja trgovcu da prenese svoje ugovorne obaveze na treće lice bez saglasnosti potrošača; 10) ograničavanje prava potrošača da preproda robu ograničavanjem prenosivosti garancije koju je dao trgovac; 11) davanje ovlašćenja trgovcu da jednostrano menja sadržinu ugovornih odredaba, uključujući obeležja robe ili usluga; 12) jednostrana izmena ugovornih odredaba koje su potrošaču saopštene na trajnom nosaču zapisa, saopštavanjem novih odredaba sa kojima se potrošač nije saglasio putem sredstava komunikacije na daljinu. Kako se odredba o naknadi troškova obrade kredita ne može podvesti ni pod jednu tačku članova 44 i 45 Zakona o zaštiti potrošača, preostaje samo analiza opšte odredbe o nepravičnim ugovornim odredbama, uz prethodnu napomenu da Narodna banka Srbije, kao organ koji je po Zakonu o zaštiti korisnika finansijskih usluga nadležan da utvrđuje i sankcioniše nepravične ugovorne odredbe u ugovorima o kreditu, odredbu o naknadi troškova obrade kredita ne smatra nepravičnom, odnosno ništavom (izjava guvernerke NBS Jorgovanke Tabaković od 14. februara 2018. godine, dostupna na https://www.b92.net/biz/vesti/srbija.php?yyyy=2018&mm=02&dd=14&nav_id=1358787).

Pitanje je, dakle, da li je odredba ugovora o kreditu o naknadi troškova obrade kredita takva da, protivno načelu savesnosti i poštenja, ima za posledicu značajnu nesrazmeru u pravima i obavezama ugovornih strana na štetu potrošača, uzimajući u obzir prirodu ugovora o kreditu, okolnosti pod kojima je zaključen, ostale odredbe istog ili povezanog ugovora i načina postizanja saglasnosti o sadržini i načina obaveštavanja potrošača o sadržini ugovora. Polazeći od poslednjeg kriterijuma, jasno je da stroge odredbe Zakona o zaštiti korisnika finansijskih usluga u pogledu obaveza obaveštavanja i informisanja korisnika, kao i objavljivanja tarifa o naknadama, ako su u konkretnom slučaju poštovane, ne govore u prilog zaključku da je ova odredba nepravična. Takođe, čini se da činjenica da se naknada troškova obrade kredita plaća jednokratno prilikom puštanja kredita u tečaj u iznosu koji je po pravilu znatno niži od godišnje kamatne stope onemogućava zaključak da je posledica ove odredbe „značajna nesrazmera u pravima

to fall within that category (to avoid confusion, we emphasize that we do not consider it as such under domestic law), that would again be irrelevant for the existing court disputes. These disputes, namely, are not carried out upon actions of the banks requesting payment of the loan processing fee, in which case the court would be empowered to deny the application of these provisions due to them being unjust or excessively strict towards the loan user. The loan users have, in almost all cases, paid this fee at the time the loan was released, i.e. immediately, and since the ZOO does not provide nullity, but rather the possibility of a denied application for such provisions if some of the claims were based upon them, this provision of ZOO cannot serve as the basis for the declaration of invalidity of such clauses and subsequent claims based on unjust enrichment. At this point our law on general terms and conditions significantly differs from its German counterpart. So, only paragraph 1 of Article 143 remains as a possible ground for nullity, and the decision depends upon whether the clause on the loan processing fee, amounting to around 2% of the loan principal (hence, the value of the whole contract), is "contrary to the very purpose of contract which is concluded, or to the fair business usage". It would be contrary to the very purpose of a loan contract to, for example, prescribe that there is no interest, that the principal need not be repaid, that the interest is due even for the part of the principal which has not been paid out yet or that has already been repaid, which are the examples of the clauses that directly twist and change the essential terms of the loan contract as provided in Article 1065 ZOO. Bearing in mind that Article 1066 ZOO explicitly provides that the conditions for granting loan are determined by the loan contract, and the mentioned provisions of Article 43 of the Law on Banks and Article 19 of the Law on Protection of Financial Services Consumers, it seems beyond dispute that a clause such as the one on loan processing fee is not contrary to the very purpose of the loan contract, because the main obligations arising therefrom, granting of loan and its repayment with interest, remain intact. As for the fair business usage, we believe it to be clear that the clause on the loan processing fee is not contrary to them, but rather quite common and usual. A glance at the annual reports of the *European Banking Authority* (EBA), the EU body competent for the supervision of banking industry, as well as at the reports of national bank associations, suffices to reach a conclusion that this fee is usual and very frequent, so it would be completely wrong to claim that it is contrary to fair business usage. Charging this fee in this manner (in advance as a percentage, as fixed amount or the combination of these methods) instead of charging it as a part of the interest, in fact has a very rational economic explanation, and leads to the clients paying, on aggregate, less for this fee than if it would have been a part of the interest (primarily because there is no credit risk and thereto related risk premium, but also due to discounted money flows of the bank and the loan user by different rates) (Begović, 2018, 6-8). This is why the separation of the loan processing costs, on the one hand, and the price of capital (interest), on the other, which makes the overall loan price bi- or multi-component, is in fact the part of fair business usage, and not contrary to them.

Therefore, the inevitable conclusion is that under the Serbian ZOO, unlike the German BGB and the case law of the German courts based upon it, the clause on loan processing fee is **legally valid** from the point of view of the law on general terms and conditions of business. In that sense, the author finds that the reasoning of the Austrian OGH - which also found that this clause, under the Austrian law, is not contrary to the very purpose of the loan contract, nor to the demands of good faith and fair dealings, and that it is not excessively burdensome for loan users, provided that, understandably, its amount is around the usual amount - is closer to the situation in the Serbian law.

The only remaining part is the analysis of the consumer protection regulations as a possible ground for determination of nullity of the clause on loan processing fee, in case of a consumer loan contract. Two articles of the Law on Protection of Financial Services Consumers are dedicated to the general terms and conditions of business, i.e. Articles 9 and 10. These articles prescribe that a bank is obliged to secure the application of fair business usage, good business practices and fair relation with the users by the general

i obavezama ugovornih strana na štetu potrošača", a pomenute obaveze obaveštavanja i razjašnjavanja sadržane u Zakonu o zaštiti korisnika finansijskih usluga, ako su ispunjene, čine nemogućim zaključak da je banka postupala suprotno načelu savesnosti i poštenja. Najposle, činjenica da je domaći Zakon o zaštiti potrošača usklađen s relevantnom uredbom Evropske Unije (Uredba Saveta 93/13/EEC od 5. aprila 1993 o nepravičnim odredbama u potrošačkim ugovorima i Uredba 2011/83/EU Evropskog parlamenta i Saveta o pravima potrošača od 25.10.2011), a da sudovi u zemljama EU nisu našli da je ova odredba suprotna ovim uredbama, takođe upućuju na zaključak da odredba o naknadi troškova obrade kredita u ugovorima o kreditu nije nepravična ugovorna odredba u smislu člana 43. Zakona o zaštiti potrošača, pa otud nije ništava po tom osnovu.

Sveukupni zaključak ove analize bio bi da je ugovorna odredba o naknadi troškova obrade kredita kao takva **dozvoljena i punovažna** po pravu Republike Srbije, bilo da je predviđena kao deo opštih uslova poslovanja banke bilo kao posebno ugovorena odredba, kako u ugovorima s potrošačima tako i u nepotrošačkim, trgovačkim ugovorima o kreditu, razume se pod uslovom da ne postoji neki uzrok ništavosti nezavisan od tipične sadržine ove odredbe, odnosno pod uslovom da su ispunjeni opšti uslovi punovažnosti kao i posebni uslovi iz propisa o zaštiti potrošača, kako posebnih tako i opštih.

Zaključak

U momentu pisanja ovih redova (april 2018. godine) pitanje dozvoljenosti odredbe o naknadi troškova obrade kredita predmet je načelne rasprave pred Vrhovnim kasacionim sudom. Koliko mi je poznato, krajem marta 2018. godine svoje stavove o ovom pitanju pred VKS su predstavile sudije apelacionih sudova, a sudije Vrhovnog kasacionog suda tek treba da daju svoj pogled na ovo pitanje. Iako je moj stav, nadam se, jasno predočen i dobro argumentovan, to nikako ne znači da će takav stav biti zauzet i od strane vrhovne sudske instance u našoj zemlji. Premda smatram da bi, u vezi s ovim konkretnim pitanjem, bilo jako teško argumentovano zastupati suprotan stav, ne mogu isključiti mogućnost da sam u svojoj analizi nešto prevideo, i da sudije Vrhovnog kasacionog suda mogu zauzeti i suprotnu poziciju. Razume se, za razliku od mog stava koji ni na koji način ne obavezuje, stav Vrhovnog kasacionog suda u rešavanju spornog pravnog pitanja biće u izvesnoj meri formalno, a još više faktički obavezan za niže sudove, i u tom pogledu je praktično neuporedivo relevantniji.

Imajući u vidu mogućnost da Vrhovni kasacioni sud odluči drugačije u odnosu na stav koji sam posle svoje analize zauzeo, smatram umesnim da u zaključku upozorim i na posledice takvog stava, kako one pravne, tako i one vanpravne, ekonomske, da bi donosiocima odluke bilo potpuno jasno šta njihova odluka praktično znači.

Pravno posmatrano, odluka o ništavosti odredbe o naknadi troškova obrade kredita predstavljala bi značajan udarac za pravnu izvesnost u Srbiji i značila bi narušavanje načela slobode ugovaranja kao temeljnog načela na kom počiva institucija ugovora i ugovorno pravo. Imajući u vidu decenijsku praksu naplate naknade troškova obrade kredita, te raniju sudsku praksu koja je godinama stajala na stanovištu da je takvo ugovaranje načelno dozvoljeno, promena sudske prakse bez zakonodavne promene, dakle promena stava sudova zasnovanog na istim zakonskim odredbama kao i raniji suprotan stav, bila bi značajan udarac za pravnu izvesnost upravo zbog retroaktivnog dejstva takve promene sudske prakse. Naime, ako bi srpski zakonodavac odlučio da izrekom zabrani ugovaranje naknade troškova obrade kredita, takva bi zakonska odredba mogla delovati samo *pro futuro*, a sasvim izuzetno bi mogla da ima retroaktivno dejstvo. Ako bi, međutim, sudovi promenili svoju praksu u primeni istog (neizmenjenog) pravnog okvira, to bi pogodilo ne samo ugovore zaključene posle takve promene sudske prakse, već i retroaktivno sve ugovore zaključene pre nje, gde bi granica mogla biti istek roka zastarelosti od 10 godina (inače, u Nemačkoj je odgovarajući rok 3 godine, pa su odlukama BGH bili zahvaćeni samo ugovori o kreditu zaključeni u periodu od 3 godine pre objavljivanja navedenih odluka; uz to, u Nemačkoj doktrina zabrane prevaljivanja troškova putem opštih uslova

terms and conditions, as well as their adherence to the statutory regulations, and it is explicitly determined that bank tariffs are deemed a part of the general terms and conditions. They also prescribe the conditions for the incorporation of general terms and conditions into individual contracts, in the sense of their availability and publication, as well as the duty of a bank to provide the explanations of the provisions of the general terms and conditions to the users. Article 41 of the same Law could also be of significance, for it refers to the unfair business practices and unfair contract terms, providing the competence of the National Bank of Serbia to determine whether such practices, i.e. terms exist, as well as the authority of the NBS to order cessation of their application and fine those banks that applied the unfair business practices and unfair contract terms. When it comes to the definition of unfair business practices and unfair contract terms, this Law refers to the general consumer protection legislation, i.e. to the general Law on Consumer Protection. Article 43 of the Law on Consumer Protection, relating to the unfair contract terms, is of relevance for the analyzed issue. According to this Article, unfair contract terms are null and void, and an unfair term is every term that, contrary to the requirement of good faith, causes a significant imbalance in the rights and obligations of the contractual parties to the detriment of the consumer. According to this article, whether a contract term is unfair or not is determined based upon the following four criteria: nature of goods or services to which the contract relates; circumstances under which the contract is executed; other terms of the same contract or other related contract; the way the agreement on the contents has been reached and manner in which the consumer has been informed on the content of the contract. Article 44 of the same Law lists the terms that are always considered unfair. These are the terms that, as their subject or consequence, have: 1) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of the trader; 2) limiting the trader's obligation to respect commitments undertaken on his behalf by his agents or, conditioning the obligation of the trader to perform or accept the obligation taken over on their behalf by their agent with a particular condition which is at the trader's discretion; 3) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy for protection of their rights, particularly by requiring the consumer to take disputes exclusively to arbitration contrary to the legal provisions of this law; 4) restricting or limiting the evidence available to the consumer or imposing on him a burden of proof which, according to the applicable law, should lie with the trader; 5) determination of local jurisdiction outside of the place of domicile or residence of the consumer. Under this article, a contract term is also deemed unfair if it provides to the trader: 1) the exclusive right to establish whether the delivered goods or provided services are in conformity with the contract; 2) the exclusive right to interpret contract terms. Article 45 of that Law lists the terms which are presumed as unfair, with the possibility to prove the opposite. These are contract terms which have the following subject or consequence: 1) excluding or limiting the legal rights of the consumer vis-à-vis the trader or a third party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations, including the rights of the consumer to offset a debt owed to the trader against a claim which the consumer may have against him; 2) allowing the trader to retain a payment by the consumer where the latter fails to conclude or perform the contract, or refuses to conclude the contract, where the same right is not granted to the consumer; 3) requiring any consumer who fails to fulfil their contractual obligation to pay compensation which significantly exceeds the damage suffered by the trader; 4) allowing the trader to terminate the contract at will where the same right is not granted to the consumer; 5) enabling the trader to terminate an open-ended contract without reasonable notice except where the consumer has failed to perform their contractual obligations; 6) tacit renewal of a fixed-term contract, if it is required that the consumer gives a notice about not accepting the inappropriately long extension of the contract in relation to the period for which the contract has been concluded; 7) allowing the trader to increase the price agreed with the consumer when the contract was concluded without giving the consumer the right to terminate the contract; 8) obliging the consumer to fulfil

postoji vrlo dugo u sudskoj praksi, pa se ne može reći da je posredi bio potpun i iznenadni preokret). Retroaktivnost važenja prava izuzetno je dozvoljena zakonodavcu upravo zbog toga što imanentno narušava pravnu izvesnost, pa se zahteva dokaz da postoji neki značajno pretežniji pravni interes koji u konkretnom slučaju opravdava retroaktivnost. Iako sud nema takvo ograničenje, valja imati na umu da preokret sudske prakse, pošto deluje retroaktivno, značajno narušava pravnu izvesnost. Imajući u vidu da je praksa ugovaranja naknade troškova obrade kredita uistinu dugogodišnja, čak višedecenijska, ovakvo narušavanje pravne sigurnosti ne bi ostalo bez uticaja na reputaciju Republike Srbije kao investicione destinacije, a moglo bi čak poslužiti i kao osnov za pokretanje investicionih arbitraža protiv naše zemlje. Povreda slobode ugovaranja i načela *pacta sunt servanda* ogledala bi se u proširenju granica ništavosti ugovornih odredbi koje bi donela odluka suda o tome da je ugovaranje naknade troškova obrade kredita ništavo. Imajući u vidu moju prethodnu analizu, jasno je da bi obrazloženje ove odluke moralo da pruži neki novi, dosad nepostojeći razlog ništavosti, u smislu novog tumačenja nekih postojećih odredbi naših zakona. Bez obzira na to što ja takav stav smatram pravno nezasnovanim u ovom konkretnom slučaju, zaključak suda o ništavosti ovih odredbi morao bi delovati i znatno šire, pa bi se tako dalo povoda brojnim saugovaračima banaka i drugih likvidnih pravnih subjekata da podnošenjem tužbi pokušaju da naknadno umanje svoje obaveze ili dobiju natrag nešto što su odavno platili. Drugim rečima, ovakva odluka bi verovatno dala povoda za poplavu drugih tužbi kojima bi se tražilo utvrđivanje ništavosti raznih drugih odredaba koje se već godinama smatraju uobičajenim i punovažnim.

Ekonomske posledice ovakve odluke takođe bi bile višestruke. Neposredna posledica, razume se, bila bi obaveza banaka da vrate naplaćeno po osnovu naknade za troškove obrade kredita, što je iznos umanjenja dobiti koji bi pretrpeli, u krajnjoj konsekvenci, akcionari tih banaka, jer oni snose rizik poslovanja banke. Iako nije objavljeno o kolikom se iznosu ukupno radi, prema nekim nezvaničnim kalkulacijama iznos tog gubitka je negde između 150 i 200 miliona evra, za poslednjih 10 godina. Ovaj gubitak akcionari bi svakako pokušali da nadomeste srazmernim povećanjem budućih prihoda, što bi dovelo do porasta kamatnih stopa na domaćem tržištu. Potreba da se troškovi obrade kredita uključe u kamatu imala bi efekat u istom smeru - rast kamatnih stopa, i to, kako je pokazano ranije, ne za iznos koji bi odgovarao iznosu naknade za troškove obrade kredita koja se plaća danas, unapred, već u bitno, ako ne i dvostruko uvećanom iznosu (zbog kreditnog rizika, premije na rizik i diskontovanja novčanih tokova različitom stopom). U krajnjoj liniji, dakle, gubitak bi zapravo bio prenet na buduće korisnike kredita, koji bi morali da plaćaju uvećane kamatne stope. A opšti rast kamatnih stopa za zaduživanje kod poslovnih banaka bi, sa svoje strane, značio smanjenje konkurentnosti domaće privrede u poređenju sa zemljama kod kojih ovog povećanja ne bi bilo (koje nastavljaju da primenjuju uobičajenu odredbu o naknadi troškova obrade kredita kao dozvoljenu), jer bi troškovi zaduživanja bili srazmerno veći. Takođe, opšti rast kamatnih stopa bi morao dovesti do pada stope investicija, budući da bi se umanjio broj investicionih projekata, stoga što, za njihovo započinjanje, očekivana stopa prinosa mora da bude viša od kamatne stope. Iako laicima „naknada troškova obrade kredita" deluje kao naplaćivanje nečega za ništa, strogo ekonomski posmatrano ona zapravo predstavlja najbolju praksu, i to baš naplaćivanje u procentu od glavnice jer se time postiže i redistributivna funkcija među korisnicima kredita, odnosno interno subvencionisanje koje omogućava uspostavljanje „vertikalne jednakosti" (Begović, 2018, 11-12). Razlog za to leži u činjenici da banka, kroz dvokomponentnost cene (troškovi+kamata), razdvaja naknadu svojih troškova od kamate kao cene kapitala (novca) u užem smislu, i svoje troškove naplaćuje odmah prilikom puštanja kredita u tečaj, bez kreditnog rizika, premije na rizik i potrebe diskonta na sadašnju vrednost, koji bi iznos ove naknade inače značajno povećali. Zato ovakva struktura cene kreditne usluge zapravo pogoduje korisnicima kredita, čiji su „ukupni odlivi" niži nego kad bi naknada bila uračunata u kamatu, i zbog toga se radi o tzv. najboljoj praksi kojoj pribegava najveći broj banaka u savremenom svetu.

Dakle, po mom mišljenju i u skladu s napred

all his obligations where the trader has failed to fulfil all his obligations; 9) giving the trader the possibility of transferring his obligations under the contract without the consumer's consent; 10) restricting the consumer's right to resell the goods by limiting the transferability of any guarantee provided by the trader; 11) enabling the trader to unilaterally alter the terms of the contract including the characteristics of the product or service; 12) unilaterally amending contract terms communicated to the consumer in a durable medium through contract terms to which the consumer has not consented through the means of remote communication. Since the clause on the loan processing fee cannot be considered as any of the terms listed in Articles 44 and 45 of the Law on Consumer Protection, only the analysis of the general provision on unfair contract terms remains, with the preceding note that the National Bank of Serbia, as the body that is authorized to determine and sanction the use of unfair contract terms in loan agreements under the Law on Protection of Financial Services Consumers, does not consider a clause on the loan processing fee an unfair contract term, i.e. does not consider it null and void (statement of the NBS Governor, Ms Jorgovanka Tabaković as of 14 February 2018, available at https://www.b92.net/biz/vesti/srbija.php?yyyy=2018&mm=02&dd=14&nav_id=1358787).

Therefore, the question is whether the clause on the loan processing fee in the loan contract is such a contract term that, contrary to the requirements of good faith, causes a significant imbalance in the rights and obligations of the contractual parties to the detriment of the consumer, taking into consideration the nature of the loan agreement, circumstances of its execution, other terms of the concerned or related contract, and the way of reaching the agreement on the contents and manner of informing the consumer about the contents of the contract. Starting from the last criterion, it is clear that the strict provisions of the Law on Protection of Financial Services Consumers in respect of the obligation to inform the users and to publish the fee tariffs, if they were respected in the concrete case, do not speak in favor of determining that this clause is unfair. Also, it seems that the fact that the loan processing fee is payable as a one-off advance payment at the moment of disbursement of the loan, in the amount that is, as a rule, significantly lower than the annual interest rate excludes the conclusion that this clause causes "significant imbalance in the rights and obligations of the contractual parties to the detriment of the consumer", and the mentioned obligations to inform and clarify contained in the Law on Protection of Financial Services Consumers, if performed, make the conclusion that the bank acted contrary to the requirement of good faith impossible. Lastly, the fact that the domestic Law on Consumer Protection is harmonized with the relevant EU directives (Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and Directive 2011/83/EU of European Parliament and Council on the consumer rights of 25.10.2011), and that the courts in the EU countries did not find this clause to be contrary to these directives, also leads to the conclusion that the clause on the loan processing fee is not an unfair contract term in the sense of Article 43 of the Law on Consumer Protection, and that it is, thus, not invalid on those grounds.

The overall conclusion of this analysis would thus be that the contractual clause on loan processing fee is, as such, **permitted and legally valid** under the laws of the Republic of Serbia, irrespective of whether it is provided as part of the general terms and conditions of a bank or agreed individually, both in loan contracts with consumers and non-consumers (in commercial loan contracts), understandably under the condition that there is no other ground for nullity independent from the typical contents of this clause, i.e. provided that all the general conditions for validity as well as special conditions for validity foreseen in consumer protection legislation (bot special and general) are met.

Conclusion

At the time these lines are written (April 2018), the issue of legality of the clause on loan processing fee is a subject of principle consideration at the Supreme Court of Cessation. To the best of our knowledge, in late March 2018 the judges of the appellate courts have presented their views concerning this issue in front of the Supreme Court of Cessation, and the judges of the Supreme Court of Cessation are yet to take

izvedenom analizom, odredba ugovora o kreditu o obavezi korisnika kredita da banci naknadi troškove obrade kredita je, per se (dakle, mimo drugih razloga za nepunovažnost), po važećem pravu Republike Srbije **punovažna** i to bez obzira na to je li korisnik kredita potrošač ili nije, i bez obzira na to je li odredba predviđena opštim uslovima ili je individualno ugovorena. Ako bi Vrhovni kasacioni sud zauzeo suprotno stanovište u postupku koji je pred njim trenutno u toku, to bi, što se zainteresovanih strana tiče, imalo pozitivne posledice za sve korisnike kredita u poslednjih 10 godina koji su ovu naknadu platili, i koji bi je mogli tražiti nazad s kamatom, i negativne posledice za banke koje bi pretrpele znatan poslovni gubitak. Valja međutim imati na umu da bi takva odluka imala i niz negativnih posledica po opšti interes, kako pravnih tako i ekonomskih.

the position regarding this issue. Even though our position has been presented clearly and is well substantiated, this in no way means that the same position shall be taken by the supreme judicial instance in Serbia. Despite the author's opinion that, related to this issue, it would be extremely difficult to validly substantiate the opposite position, we cannot exclude the possibility that an oversight has been made in the analysis, and that the judges of the Supreme Court of Cessation may take the opposing position. Naturally, unlike the author's position which is in no way legally binding, the position of the Supreme Court of Cessation in resolving the disputed legal issue shall be, to the certain extent formally, but even more importantly, *de facto* mandatory for the lower courts, in that sense being incomparably more relevant.

Bearing in mind the possibility that the Supreme Court of Cessation decides differently from the position the author took after the analysis presented in this paper, it might be appropriate to use the conclusion to warn about the consequences of that different position, both legal and non-legal, economic consequences, in order to make perfectly clear to the decision-makers what their decision would practically mean.

From the legal point of view, the decision that the clause on loan processing fee is null and void would strike a serious blow to legal certainty in Serbia, and it would be contrary to the principle of freedom of contract, which is a fundamental principle upon which the very institution of contract and contract law are based. Having in mind the decade long practice of contracting the loan processing fee, as well as the previous case law which for decades took the position that such contracting is allowed and principally valid, the change of position in case law without any legislative change, that is the change of the position of courts based upon the same, unchanged regulations upon which the opposite position used to be based, would seriously undermine the legal certainty due to the retroactive effect of such change in case law. Namely, if the Serbian legislator would decide to explicitly forbid contracting the loan processing fee, such statutory provision could only have a *pro future* effect, and only quite exceptionally could have a retroactive effect. If, however, the courts would change their position in the application of the same (unchanged) legal framework, it would affect not only the contracts executed after such a change in case law, but also, retroactively, all contracts executed beforehand, where the limit could be the expiration of statute of limitation of 10 years (for the sake of comparison, this deadline in Germany is 3 years, so only loan contracts executed during the three years prior to the publication of the mentioned BGH decisions were affected; moreover, in Germany the doctrine on the ban on shifting the burden of costs by means of general terms and conditions existed in case law for a very long time, so it is incorrect to argue that it was a complete and abrupt turnover in case law). The retroactive effect of statutory provisions is allowed to the legislator only exceptionally exactly because of its inherent violation of the legal certainty, hence a proof of a significantly prevailing interest, which in concrete case justifies retroactivity, is required. Even though the courts do not have the same limitation, one should bear in mind that a turnover in case law, given its retroactive effect, significantly violates legal certainty. Bearing in mind that the commercial practice of contracting the loan processing fee has genuinely lasted for years, even decades, such violation of legal certainty would not leave the reputation of the Republic of Serbia as an investment destination intact, and could even serve as a cause for initiation of investment arbitration against Serbia. The breach of the freedom of contract and the *pacta sunt servanda* principle would be reflected in the extension of the scope of nullity of contractual terms, which would be a consequence of the court decision that the loan processing fee clause is invalid. Taking the previous analysis into account, it is clear that the reasoning of such court decision would have to provide for a new, until now not existing cause of nullity, in the sense of a new interpretation of some existing provisions of the Serbian laws. Irrespective of the author's opinion that such position is legally fallible in this concrete case, the conclusion of the courts on nullity of these clauses would also have to have a wider effect, and would thus incite numerous clients of the banks and other financially liquid legal entities to take them to court in an attempt to subsequently reduce their obligations or receive

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back payments made a long time ago. In other words, such decision would probably cause a flood of lawsuits requesting the declaration of nullity of various other contractual terms that are for years considered common and legally valid.

The economic consequences of such decision would also be multifold. The immediate consequence, naturally, would be the obligation of the banks to return the money charged on the basis of loan processing fee, which is a loss/reduction of profit that would hit, *in ultima linea*, the shareholders of those banks, because they bear this risk. Even though the overall amount at stake has not been officially published, according to some unofficial calculations the amount of this loss would range somewhere between 150 and 200 million euros, for the last 10 years. The shareholders would most certainly attempt to cover this loss by the increase of future income, which would lead to the increase of interest rates at the domestic market. The requirement to include the loan processing fee in the interest rate would have the same effect - increase of interest rates, and that, as demonstrated before, not only for the amount that would be equal to the amount payable as a loan processing fee today, in advance, but as a significantly (if not double) increased amount (due to the loan risk, risk premium and discount of cash flows at different rates). Ultimately, therefore, the loss would actually be shifted to future loan users, who would have to pay the increased interest rates. The general increase of interest rates for loans from commercial banks would, on its part, mean a decrease of competitiveness of domestic economy in comparison to the countries where this would not happen (which would continue to apply the usual clause on loan processing fee as allowed), because the costs of loans would be relatively bigger. Also, the general increase of interest rates would result in the decrease of the investment rate, because the number of investment projects would decrease, since the precondition for the commencement of such projects is that the expected rate of return must be above the interest rate. Even though the "loan processing fee" seems to the laypersons as if the banks charge something for nothing, from the strictly economic point of view charging it is in fact the best practice, especially in case it is determined as a percentage of the principal amount of the loan, because in that way a redistributive function among the loan users is also achieved, i.e. the internal subsidizing that enables the so-called "vertical equality" (Begović, 2018, 11-12). The reason for that lies in the fact that a bank, through the two-component price (fee + interest), distinguishes the collection of its fees from the interest as the price of capital (money) in the narrower sense, and charges its fees immediately upon disbursement of the loan, without the loan risk, risk premium and the need for discounting it to its present value, all of which would significantly increase its amount. This is why such a structure of the price of the loan service in fact favors the loan users, the "total cash outflow" of which is lower than if it were included in the interest rate, which is why it is in fact the so-called "best practice" applied by most banks in the contemporary world of finance.

Therefore, in the author's opinion and according to the above performed analysis, the contractual clause on the obligation of a loan user to pay to the bank a "loan processing fee" is, taken *per se* (without other possible reasons for invalidity), **valid** under the current laws of the Republic of Serbia, irrespective of whether the loan user is a consumer or not, and irrespective of whether the clause is a part of general terms and conditions or individually agreed. If the Supreme Court of Cessation takes the opposite position in the proceedings that are currently ongoing, that will, as far as the interested parties are concerned, have positive consequences for all loan users in the past 10 years who paid such a fee, and which could request its payback with interest, and negative consequences for the banks, which would suffer a significant business loss. One should, however, bear in mind that such a decision would also have a number of negative consequences for the common interest, both from the legal and economic point of view.