PERMISSIBILITY OF APPROVAL AND OTHER FEES IN CONSUMER LOAN CONTRACTS IN SERBIA

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Abstract

Foreign-owned banks from the European Union dominate Serbia's financial landscape. However, one of the controversies in the banking sector in the last decades has been approval and similar fees in loan contracts. The aim of this paper is to take a look at this issue through the lens of a consumer. Since there is no official data on the aggregate amount of processing, approval and similar fees in thousands of lawsuits against banks, the methodology in this research is largely based on the analysis of relevant legal acts and case law. A minor part is the statistical analysis of the context of the consolidation process in the banking sector in the last decade. The research has found multiple issues in the application of the rule of law in regard to consumer loans. Not only did banks prepare loan contracts with provisions that allowed them to deduct one-off payments of approval and similar fees from a loan amount, but customers may have paid for approving, disbursing and managing a loan twice or even multiple times. There were also cases showing that the process of approving a loan did not meet the requirements of providing the customer with adequate information in a pre-contractual phase, leading to questions on transparency and the balance between a bank and its customer. Future research would benefit from quantitative data about the amount of approval and similar fees in lawsuits and the exact number of lawsuits against banks in this respect.

Keywords*: banks, consumers, loan contracts, Serbia, EU acquis*

1 Introduction

Bank lending in Serbia has grown considerably over the last two decades (European Banking Authority, 2020). Banks have charged their customers with various fees for approving, processing, disbursing and/or managing those loans. However, all is not well in this respect is reflected in thousands of lawsuits against banks filed by their clients since 2000. According to the opinion of the Supreme Court of Cassation of Serbia (hereinafter: SCC Court) there have been at least a hundred thousand lawsuits (SCC Court, 2021).

The legislation in Serbia stipulates that all costs related to a loan contract must be included in an effective interest rate. What an effective interest rate is, how it is calculated and how it relates to a borrowing interest rate in a loan contract are crucial terms for a customer. There may be differences in legal and economic definitions of an interest rate and/or what banks regard as finance charges, for example, various costs and fees, vis-à-vis the pure interest charge. More than fifty years ago Thomas (1968) stated that finance charges were, - from a borrower's viewpoint, a part of the effective cost of borrowing and can therefore be represented by a single interest rate. The controversy about interest and an effective interest rate in loan contracts is obviously not new.

Approval and other fees charged by banks in addition to a nominal interest rate have been an issue in most countries of the European Union. For instance, the German Federal Supreme Court for Civil Matters (*Bundesgerichtshof*) decided in two cases in 2017 that provisions in standard contracts of banks concerning the payment of management or loan administration fees by the borrower were invalid under German law, irrespective of whether the borrower was a consumer or a company (Van Bevern, 2019). There is also significant case law related to approval and management fees in loan contracts at the Court of Justice of the European Union (case law Kiss and CIB Bank, C-621/17; Matei, C-143/13; Kásler and Káslerné Rábai, C-26/13 and others).

The aim of this research is to examine the application of the rule of law from a specific viewpoint by focusing on the fact that approval and similar fees were being levied as one-off payments, in addition to monthly repayments of a loan. Regional academics have focused on various legal interpretations of relevant regulations in this respect (Ignjatić, Ilić, 2018); the consequences of nullity and termination of a loan agreement (Knežević, Stoiljković, 2021); and a wider presentation of the problem of costs on processing loans (Todorović, 2018). However, none of these researchers looked at the key issue: why consumers had to pay approval and other fees as one-time payments at the time of having a loan approved by the bank when the legislation in Serbia clearly stipulated that all fees and costs pertaining to a loan had to be calculated and charged via effective interest rate only. An average consumer could assume that those approval and similar fees would be charged via interest payments in monthly installments. From a consumer's point of view, these one-off payments, in addition to the monthly interest, could not be in line with the law.

This paper is structured as follows. Chapter 2 outlines the methodology and research questions. The context of the banking sector is briefly explained in chapter 3. That is followed by the presentation of legal framework in chapter 4. Case law and legal opinions of the highest court in Serbia are outlined in chapter 5. Chapter 6 discusses the problem and the implications for a consumer. The final chapter elaborates on the findings of the research.

2 Methodology and Key Research Questions

The research methodology is built on relevant legal texts and case law that has been available on the websites of courts and other authorities in Serbia and the EU. The research approach to the analysis of legal and other sources was centered on the review of relevant legislation and case law in Serbia and the EU, institutional reports, academic studies, statistical data and other sources. Reports, case law and data were extracted from the websites of international and national authorities, particularly the SCC Court of Serbia, the European Banking Authority, European Central Bank and the National Bank of Serbia.
The website of the SCC Court provides thousands of cases on its website and its databases. Entering a query "processing credit" and setting a certain time limit in the search icon, for example between 2021 and 2023, the website returns almost 1,300 cases. However, not all are about lawsuits on approval and other fees in consumer loans from the particular perspective that is the focus of this research.
Since there is no official data on the number of lawsuits against banks and there is no official data on the aggregate amount of fees collected by banks from customers who sued their banks in this respect in the last decade, the quantitative part of the analysis is focused only on the context of the consolidation of banks in the last ten years in Serbia.

Key questions in this research are:

1. Were processing and approval fees that banks charged to their clients as one-off payments included in the calculation of an effective interest rate in a pre-contractual phase?
2. How did those one-off payments relate to the monthly interest based on a nominal borrowing interest rate that had to adequately correspond to an informatively effective interest rate from a pre-contractual phase?
3. Did customers pay for the same service twice or even multiple times?

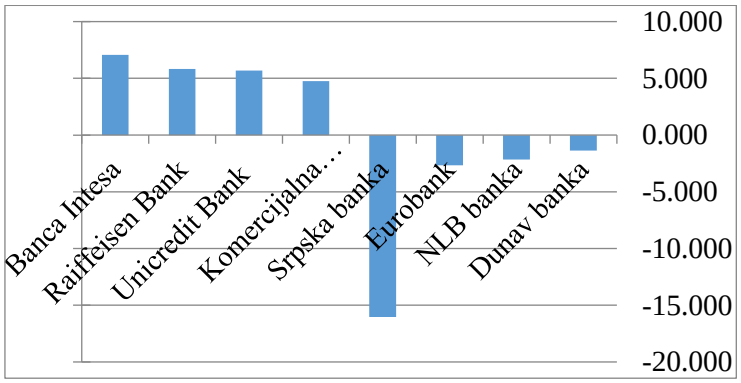
Banks advertise various borrowing interest rates and typically provide information on effective interest rates. There is a significant difference between a nominal borrowing interest rate and an effective interest rate in consumer loan contracts. A nominal borrowing interest rate is typically lower than an effective

interest rate. From a consumer perspective, an effective interest rate is the most important interest rate because it enables comparison of loans across products and across different banks. Most importantly, an effective interest rate provides the true picture of financial cost of a loan because it typically includes all costs relating to a loan. These may include approval fees, special charges and similar. In other words, a loan with a lower nominal borrowing interest rate may actually have a higher effective interest rate if it has higher additional non-interest costs. Hence, an effective interest rate is that interest rate that helps a customer make an informed decision about borrowing from a bank.

3 The Context

According to some international reports, it was foreign banks that introduced modern banking practices and better access to credit in Serbia (Barisitz and Gardo, 2008). Interest-related income remains the most important source of revenue generation in banks (European Central Bank, 2017). If the credit environment is sluggish, there are challenges for banks to generate revenues (Dewatripont, Rochet and Tirole, 2010). That is also true if there is strong competition and too many banks. In 2010 Serbia had 33 banks but by 2020 their number was reduced to 26. That number fell further to 24 as of the end of June 2021 and reached 22 banks in October 2022 (Narodna Banka Srbije, 2022).
The consolidation in the banking sector was influenced by competition, profitability issues, digitalization and other reasons. Out of 29 banks in 2014, ten largest banks in Serbia held 76.4% of the total assets (Table 1). Due to high competition, the market remained fragmented (European Central Bank, 2017). In 2014, out of the first four banks with the highest net profit, three were foreign-owned banks, Banka Intesa, Raiffeisen Bank and Unicredit Bank. Only one domestic bank, the state-owned Komercijalna Banka, was in the group of the highest profit (Figure 1).

Figure 1: Banks with the highest net profit/net loss on 31 December 2014, bln RSD



Source: National Bank of Serbia, 2022

At the end of 2014 the share of foreign banks in capital (bln RSD) was 74.8% while the share of domestic banks according to the same criterion was only 25.2% (Table 1).

Table 1: Number of banks as of 31 December 2014

Ownership of banks	**Number**	**Assets (RSD bln)**	**Share**	**Capital (RSD bln)**	**Share**
Domestic Ownership:	8	758	25.6%	155	25.2%
State-owned	6	571	19.3%	97	15.7%
Private	2	187	6.3%	58	9.5%
Foreign ownership:	21	2,210	74.4%	459	74.8%
Italy	2	738	24.9%	160	26.1%
Austria	3	440	14.5%	98	16.0%
Greece	4	418	14.1%	92	14.9%
France	3	304	10.2%	46	7.5%
Other	9	310	10.4%	63	10.3%
Total banking sector	29	2,968	100%	614	100%

Source: National Bank of Serbia, 2022

In the continuation of the consolidation process, the number of banks in Serbia fell to 27 banks in the beginning of 2019. The ten biggest banks held 78.0% of the total assets at the end of the first quarter of 2019 (Table 2).

Table 2: Top banks as of 31 March 2019 compared to December 2014

December 2014		**March 2019**	
Top 10 banks based on the total assets criterion:	*Share*	*Top 10 banks based on the total assets criterion:*	*Share*
Banca Intesa	15.9%	Banca Intesa	15.2%
Komercijalna banka	13.7%	UniCredit Bank Srbija	11.3%
UniCredit Bank Srbija	8.9%	Komercijalna banka	10.6%
Raiffeisen Bank	7.5%	Societe Generale Srbija	8.2%
Societe Generale Srbija	7.5%	Raiffeisen Bank	7.7%
Agroindustrijsko komercialna Banka AIK Banka	5.8%	Banka Postanska stedionica	6.0%
Eurobank	4.9%	Erste Bank Novi Sad	5.5%
Vojvodjanska Banka Novi Sad	4.1%	Agroindustrijsko komercialna banka AIK Banka	5.5%
Hypo Alpe-Adria-Bank	4.0%	Eurobank	4.5%
Banka Postanska stedionica	3.8%	Vojvodjanska Banka Novi Sad	3.5%

Source: National Bank of Serbia, 2022

The consolidation of the banking sector in Serbia became more visible after the beginning of the global financial crisis in 2008. However, that did not considerably change the ownership structure in terms of foreign vis-à-vis domestic banks. Foreign-owned banks that continued to dominate the financial system in Serbia held about six sevenths of banking system assets in 2021 (European Commission, Serbia Report 2022).

The share of foreign banks in capital that reached 74.8% in 2014 rose in the next five years to 75.6%. On the other hand, the share of banks in domestic ownership fell according to the same criterion and reached 24.4% at the end of the first quarter of 2019 (Table 3).

Table 3: Number of banks as of 31 March 2019

Ownership of banks	**Number**	**Assets (RSD bln)**	**Share**	**Capital (RSD bln)**	**Share**
Domestic ownership:	7	935	24.7%	166	24.4%
State-owned	5	607	17.7%	98	14.4%
Private	2	266	7.0%	68	10.0%
Foreign ownership:	20	2,857	75.3%	516	75.6%
Italy	2	1,003	26,5%	176	25.8%
Austria	2	501	13,2%	85	12.4%
France	2	417	11.0%	58	8.5%
Hungary	2	218	5.7%	44	6.5%
Other	12	719	19.0%	153	22.5%
Total banking sector	27	3,793	100%	682	100%

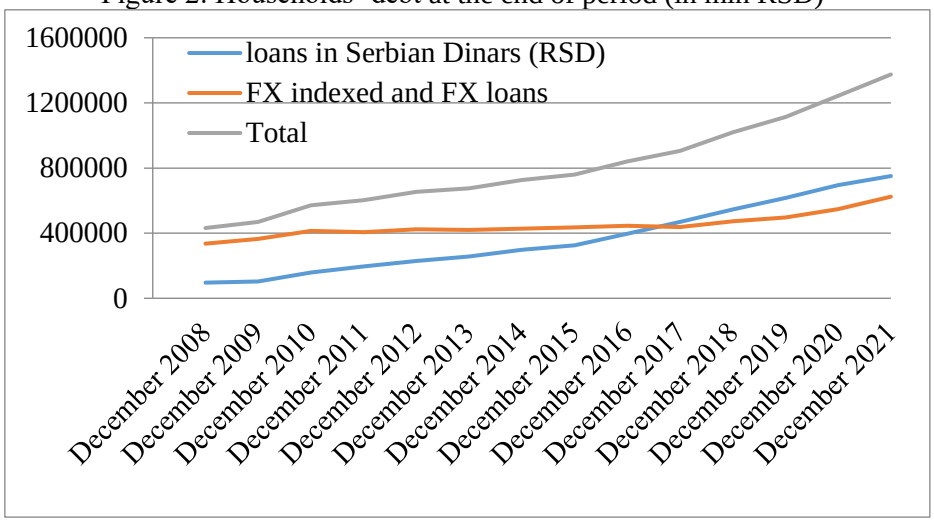
Source: National Bank of Serbia, 2022

The sale of the state-owned Komercijalna banka to Nova Ljubljanska Banka (NLB) from Slovenia at the end of 2020 was the last[1] significant ownership change in regard to foreign-owned banks. That sale was agreed between Serbia and the International Monetary Fund (IMF) as part of the privatization strategy for state-owned banks in Serbia. Komercijalna banka was the third largest bank in Serbia by assets and the largest remaining state-owned bank. By transferring 395 million euro from Nova Ljubljanska Banka to the Serbian budget in December 2020 the privatization of Komercijalna banka was completed (European Commission, Serbia Report 2022).

The consolidation in the banking sector and the gradual improvement of macroeconomic situation, together with the global and regional recovery of economic activity after the global financial crisis, the stabilization of the financial conditions, rising employment and an increase in domestic and foreign direct investment have influenced an increase in loans to households over the years (Figure 2).

[1] At the time of writing this paper

Figure 2: Households' debt at the end of period (in mln RSD)



Source: National Bank of Serbia, 2022

The growth of loans denominated in foreign exchange currency has remained stable since 2010 (Figure 3) but increased in 2021 relative to the growth of loans in domestic currency (RSD), probably reflecting the uncertainties with respect to the Covid-19 outbreak.

4 Legal Framework

The key law providing basic rules, principles and obligations in all contracts in Serbia is the Law on Obligations. In regard to the relationship between a lender and a borrower this law does not explicitly mention any other cost except interest (Law on Obligations, 1978). The law defines interest in Section XXXV in Article 1065 which states:

> "*The loan contract obliges the lender to make available to the borrower a sum of money in the agreed amount for a limited or unlimited period, for a certain purpose or without a defined purpose, while the borrower is obliged to pay agreed interest owed and, at the due date, to repay the loan made available as per agreed in the contract.*"

A logical interpretation of the Article 1065, -from a consumer's point of view, - is that interest a borrower agrees to in a loan contract is based on an interest rate that is equivalent to an effective interest rate which includes all costs and fees as the only and true price of a loan. The Law on Banks of 2005 which provides rules with respect to the operations of banks stipulates in Article 43 that banks have the right to charge certain costs when concluding a loan contract with a customer (Law on Banks, 2005). Further, this article states that the National Bank of Serbia is mandated with the task of defining the method of calculating costs, interest rates and fees for banks' services with respect to loans and other services provided by banks to their customers.

The Decree of 2006 concerning the unique method of calculating and announcing the effective interest rate on deposits and credit sets the basic rules on the calculation of an effective interest rate. It must include a nominal interest rate, all fees and costs charged to a customer at the time of approval of a loan and all fees and costs that are known on the day of the calculation of credit (Decree about the unique method, 2006). The above information has to be clearly stated in an offer so that a consumer understands the relevant obligations. When signing a loan contract, a bank must provide a client with a copy of the plan of repayment and an overview of all the elements of the repayment of the credit. The overview must contain all information included in the calculation of the effective interest rate and all data that are not included in the effective interest rate.

The National Bank of Serbia in 2009 published the Decree on methods and procedures of banks for implementing general terms and conditions in relation to their clients, together with the Guidelines (Narodna Banka Srbije, 2009). The decree puts an obligation on a bank to advertise its products and services in a clear and understandable manner and to be unambiguous about which costs are those that a customer must pay. Compared to the decree of 2006, this decree provides detailed information on the calculation of an effective interest rate. It also sets the exact content of the form of an offer that must be presented to a consumer prior to signing a contract. The first two pieces of information in the Guidelines in the Attachment 2 are a nominal interest rate and an effective interest rate, followed by information about the credit, which under item 16, states that data included in the calculation of an effective interest are: i) amount of loan; ii) repayment period in months; iii) nominal interest rate, annual percentage to two decimal points; iv) sum of all interest during the repayment of credit; v) sum of all costs and fees that a customer has to pay during the approval and realization of the credit and vi) amount of the repayment installment (annuity).

In 2011 the National Bank of Serbia further published a Decree on conditions and method of calculating effective interest rate and the format and content of a form that a consumer has to receive (Decree on conditions, 2011). This decree focuses on warnings of the risk of taking a loan in foreign currency or with a variable interest rate. Before signing a loan contract, a bank must, -together with the copy of the contract,- provide the customer with an overview of all mandatory elements of the contract in a format as specified in Annex 2. It must also provide a plan of repayment of the loan as set in the Annex 3 of this decree. The column 15(8) in the Form 1b of the Annex states "Other payments/costs" which are costs for processing a loan application; yearly fee for administering the loan; costs for disbursing the loan to the borrower; costs for the unused part of the loan; costs for opening and administering the bank account, if the bank account has to be opened in order to approve a loan; costs for the insurance, if insurance is a condition to get a loan; and other costs based on auxiliary services needed to get a loan, for instance, costs related to register a mortgage in the cadastral office. According to the provision of Article 12(13), a bank must, -in

addition to an overview of all mandatory elements of the contract,- also provide a plan of repayment in line with the relevant form in a table/column overview.
The Law on the protection of financial service consumers effective from 2011 stipulates that the National Bank of Serbia sets the rules and conditions about how banks calculate an effective interest rate in a loan contract (Law on the Protection of Financial Service Consumers, 2011). An effective interest rate must be calculated in a uniform manner so that customers can compare the same financial products and services across various providers. A yearly effective interest rate shows the sum of all costs of a loan that has to be paid by the borrower (Article 2/21). According to Article 17(4) an offer to a customer has to be presented on a particular form and has to state, among other things, an effective interest rate and the full amount that the consumer has to pay. This information is outlined by a numerical example which includes all items (point 8), as well as the type and amount of all fees and costs that are the obligation of a consumer.
After examining all relevant legal texts in Serbia it is clear that charging approval and processing fees by banks was completely legal. It is also clear, looking at the legislation, that all those fees should have been included in an effective interest rate. Hence, a logical interpretation from a consumer's point of view is that all those fees should have been paid via interest rate. In other words: via monthly annuities. There was no national legislation stipulating that certain fees, such as approval and similar fees, should be paid as one-off payments. It is thus surprising, looking at the case law in Serbia over the last fifteen years that legal professionals, judges, attorneys, academics, banks and banking and consumer associations had very opposing views about this. Since consumer protection is held high at the Court of Justice of the European Union, one would expect that an EU candidate such as Serbia would follow the spirit of the EU *acquis* in this respect. However, that does not seem to be the case.

5 Legal Opinion and Case Law

5.1 Legal opinion of the SCC Court in 2018 and in 2021

Consumers, lawyers and judges may struggle to fully comprehend how the effective interest rate is calculated and how that interest rate corresponds to the nominal borrowing interest rate in a loan contract, especially, -as in this case in Serbia,- if some fees and costs were set to be charged as one-off payments. Financial literacy in regard to understanding the effective interest rate is not problematic only in Serbia and the region, it has been an issue in the EU as well (Cwynar, 2022).
On 22 May of 2018, the SCC Court issued its opinion on the permissibility of charging approval and processing fees for administering a loan contract. The SCC Court held that a bank had a right to charge fees for those banking services (Visoki Kasacioni Sud, 2018). Further, contract clauses on approval and similar fees are not null and void, if a bank's offer provided clear and unambigous

information about the full amount of loan costs and if all those costs were included in the calculation of an effective interest rate. In its opinion in 2018 the SCC Court confirmed that a bank "has the right to charge for its services; hence the paragraph of a loan contract that stipulates the obligation of a borrower to pay all costs of the loan, is valid under the condition that the offer of the bank was unambiguous and clear in terms of information and data provided to the borrower with respect to all costs of the loan" (Visoki Kasacioni Sud, 2018). In the second paragraph of its 2018 opinion, the SCC Court states that the cost of the bank's processing and disbursing a loan to a borrower as well as all other costs that the bank charges in relation to a particular loan should be presented as a percentage value and can be charged only through the calculation of the effective interest rate.

This line of SCC Court's argumentation was followed in SCC Court's revision decisions after May 2018. By way of example, the revision decision no. 2091/2021 from 20 May 2021 referring to the rulings of lower court in Kraljevo (P 217/20) and higher court in Kraljevo (Gz. 548/20). The SCC Court in its revision decision ruled that the cost of the bank's processing and disbursing a loan to a borrower as well as all other costs that the bank charges in relation to a particular loan had to be presented as a percentage value and calculated and charged only through the effective interest rate. Since it could be inferred that a one-off payment of 2% of a loan value called "processing loan application" was not included in the effective interest rate both lower courts and the SCC Court found that this contract provision was therefore null and void.

On 16 September 2021, the SCC Court published an "additional statement" to its opinion of 2018. This "supplement" to the opinion from 2018 stated that a bank was not obliged to prove the structure and amount of each cost included in the aggregate sum of costs of a loan disclosed in an offer which the borrower accepted when signing a loan contract (SCC Court's Opinion, 2021). The SCC Court also published a press statement on its website explaining that supplemented opinion aims to achieve the harmonization of the court case practice (SCC Court's Press statement. 2021).

The SCC Court's opinion in September 2021 did not change in regard to how approval, processing and similar fees should be calculated and charged (i.e. via effective interest rate only). However, the SCC Court failed to provide clarification and guidance on the key issue: that all costs for approving and disbursing the credit, that should have been stated in an Overview and a Repayment plan as part of the contract documentation, are included in the effective interest rate which adequately corresponds to the borrowing interest rate in a loan contract. The SCC Court in its Opinion of September 2021 could have provided instructions to courts to undertake a simple check by appointing financial experts explaining a nominal borrowing interest rate in a loan contract, what this interest rate included and how it related to an effective interest rate in cases when banks required from their customers to pay some charges up-front, before disbursing the loan. That would have clearly established if everything

was in line with the law and whether or not certain contract clauses were indeed null and void.

5.2 Case Law before 16 September 2021

Until 16 September 2021 lower courts in Serbia largely ruled that charging costs of processing and approving a loan as a percentage of the loan amount in addition to monthly annuities was not legal. Such clauses were found null and void (Ignjatić and Ilić, 2018). That can be found in numerous lawsuits before September 2021; see for example decisions of the lower and higher court in Novi Pazar, no.P 1358/20 and Gz 651/21, respectively. The bank in this lawsuit was UniCredit Bank Srbija. In a similar case ProCredit Bank Srbija in 2014 concluded a contract which in one of its provisions stated that"the borrower agrees that a bank at the time of transferring a loan to the borrower, keeps for itself 2% of the approved loan amount for processing this loan" (see decisions of lower and higher courts in Leskovac, no.P 574/18 and Gz. 2206/20, respectively).

The first important court decision with respect to the approval and administering fees in loan contracts is generally considered to be the Supreme Court's revision decision 295/99 from 19 January 2000 (Todorović, 2018). In this case a bank charged its customer 15% annual interest rate and, in addition, it charged 3.5% as a processing fee. The Supreme Court's opinion was that it was not legal to charge a loan-processing fee as a percentage of the loan amount, together with the annual rate of 15%. The position of the Supreme Court was that while banks had the right to charge loan-related processing fees, those fees could not depend on the amount of a loan nor be charged as a percentage of the amount of the loan.

The decision of the higher court in Sombor on 15 March 2017 is also interesting because in its ruling Gz. 320/17 the court based its argumentation on the Article 1065 of the Law on Obligations. The court stated that banks could charge only for outside services, while internal costs of banks such as approval and administrative costs of a loan must be included in the interest rate which is the only allowed price of a loan.

Similar arguments were applied by the SCC Court. In order to understand SCC Court's decisions and argumentation between May 2018 and September 2021, the case of Addiko bank is presented below.

Addiko Bank – revision decision by SCC Court no. 3214/2020 on 4 November 2020

On 27 March 2017 a customer concluded a contract with Addiko bank for a loan of 1,000,000 RSD (around 8,500 eur). The loan had to be returned in 108 monthly annuities (9 years). According to Article 8(1) of the loan contract this customer had to pay to the bank an approval fee of 0.5% of the approved loan amount on the day of transferring the loan to the customer. Before signing the contract on 27 March, the bank provided the customer with an offer on 24

March 2017. The contract given to the customer contained the Plan of repayment of the credit and the Overview of essential elements of the contract, according to which:

i.) Customer had to repay the loan in the amount of 1,594,796.35 RSD (around 13,000eur)
ii.) Effective interest rate was 11.68%
iii.) Approval fee was 5,000 RSD (around 40eur)
iv.) Fee for "keeping the credit line" was 10,800 RSD (around 80eur)

The judgement by the lower court in Pancevo was that the customer was in an unequal position vis-à-vis the bank because the bank provided him with a standardized form of a contract which he had no possibility to influnce but had to accept it and pay an approval fee without an explanation of what this fee related to and how it was calculated. The court established that this practice of a bank was against the principle of conscientiousness and honesty, the key principle set by the Law on the Obligations in Article 12. Therefore, the court found this contract clause null and void (Presuda Osnovnog suda u Pančevu, 2019).

The Addiko Bank filed an appeal and the higher court in Pančevo overturned the decision of a lower court on 28 January 2020 (Presuda Viseg suda u Pančevu 2020). The higher court judged that the bank had the right to charge approval fee since the Overview of key elements of the contract and the Repayment plan had clearly stated the approval fee of 5,000 RSD. Since the customer signed the agreement, the court stated that it could not be inferred that there were unclear and ambiguous information or that the principle of conscientiousness and honesty from the Law on Obligations was violated. The customer applied for a revision of this decision at the SCC Court which in its judgement (Presuda Visokog Kasacionog suda, 2020) overturned the decision of the higher court in Pancevo.

The SCC Court ruled that banks had the right to charge various fees according to the national legislation, but those fees had to be a part of an effective interest rate, as stipulated by the Law on the protection of consumers of financial services and the Decree of the National Bank of Serbia. The SCC Court found that even though the customer had been presented, -in a precontractual phase,- an offer with the effective interest rate 11.68% and the whole amount that had to be paid to the bank, what was missing was an Overview, in the representative case, of all elements used as a basis for that calculation. Most importantly, what was missing was information whether the approval fee was included in the effective interest rate in line with the legal obligation of the bank in regard to the pre-contractual phase. Since that was not the case, the SCC Court therefore decided that the bank had to return to the customer the amount of approval fees and other costs and pay legal and other costs.

5.3 Case Law After 16 September 2021

After its legal opinion of 16 September 2021, the SCC Court rulings in revision decisions took a different line of argumentation. The focus of justification of the SCC Court largely did not focus on the requirement that all fees and costs should have been included in the effective interest rate. The main argument was that a customer agreed to a one-off payment and authorized a bank to charge a customer with administrative/approval/processing fees. Since a customer signed an offered loan contract, this customer knew the obligations pertaining to this loan. The SCC Court's arguments after 16 September 2021 therefore focused on the third paragraph of its own legal opinion from 16 September 2021 which stated that banks had no obligation to prove the structure of approval and disbursement fees (Table 4).

Table 4: Examples of SCC's revision decisions after 16 September 2021

	Date	SCC Court's arguments	Result
SCC Court's revision decision 4896/21	September 30, 2021	The SCC Court ruled that UniCredit Bank Srbija had no obligation to prove to the customer the structure of approval and disbursement fees. The Court did not even mention the effective interest rate as a key piece of information in the loan contract. The revision decision did not elaborate on why approval and similar fees were charged as one-off payments and how that corresponded to the borrowing interest rate and monthly annuity.	The customer had to pay to UniCredit Bank Srbija 54,000 RSD for legal costs in regard to the revision procedure
SCC Court's revision decision 5657/21	October 27, 2021	The SCC Court ruled that Credit Agricole Banka Srbije had no obligation to prove to the customer the structure of approval and disbursement fees. The Court stated that the effective interest rate was stated in the documentation provided to a customer before signing the contract. The revision decision did not elaborate on why approval and similar fees were charged as one-off payments and how that corresponded to the borrowing interest rate and monthly annuity.	The customer had to pay to Credit Agricole Banka Srbije 12,000 RSD for legal costs in regard to the revision procedure
SCC Court's, revision decision 5623/21	November 10, 2021	The SCC Court ruled that UniCredit Bank Srbija had no obligation to prove the structure of approval and disbursement costs. The Court in its decision did not even mention the effective interest rate. The revision decision did not elaborate on why approval and similar fees were charged as one-off payments and how that corresponded to the borrowing interest rate and monthly annuity.	The customer had to pay to UniCredit Bank Srbija 42,000 RSD for legal proceedings for revision procedure

SCC Court's, revision decision 9028/21	January 19, 2022	The SCC Court ruled that OTP Banka Srbija had no obligation to show or prove the structure of approval and disbursement costs. The revision decision did not elaborate on why approval and similar fees were charged as one-off payments and how that corresponded to the borrowing interest rate and monthly annuity.	The customer had to pay to OTP Banka Srbija 62,400 RSD for legal costs in regard to the revision procedure
SCC Court's, revision decision 8297/21	February 23, 2022	The SCC Court ruled that UniCredit Bank Srbija had no obligation to show or prove the structure of approval and disbursement costs charged. The Court did not even mention the effective interest rate. The revision decision did not elaborate on why approval and similar fees were charged as one-off payments and how that corresponded to the borrowing interest rate and monthly annuity.	The customer had to pay to UniCredit Bank Srbija 45,000 RSD for legal costs in regard to the revision procedure

Source: Author's compilation of case law available online, 2022

Although in Serbia there was no national legislation that would obligate banks to specify banking services related to approval, disbursement, processing and/or management costs, Serbia, as an EU candidate country, should have considered EU legislation, especially the Directive 93/13 in this respect (Council Directive 93/13/EEC, 1993). According to this directive, also called the Unfair Contract Terms Directive, the nature of the services actually provided must be understood or inferred from the contract so that a customer is not misled in any way and can establish that there is no overlapping of different charges in terms of services offered by the bank and charged to a customer.
An example of a change in argumentation in SCC Court's decisions after its own legal opinion on 16 September 2021 in one of lawsuits against UniCredit Bank Srbija is presented below.

UniCredit Bank Srbija - revision decision by SCC Court no. 4896/21 on 30 September 2021
On 30 April 2014 a customer concluded a contract with this bank for 450,000 RSD (around 3,800 eur) to be returned in 41 monthly annuities. According to the Article 9(1) of the contract, the customer was obligated to pay:

i.) Approval fee 1.5% of the loan amount which was 6,750 RSD on the day of signing the contract
ii.) 0.5% fee for "following the credit for the unpaid principal amount":
   a. 1,697.99 RSD on 5 May 2015
   b. 1,045.92 RSD on 5 May 2016
   c. 337.79 RSD on 5 May 2017

The basic court in Nis found that paragraphs 1 and 2 of Article 9(1) were null and void (Presuda osnovnog suda u Nišu, 2018). The bank appealed to the

higher court in Niš which in its decision (Presuda Višeg suda u Nišu, 2021) upheld the decision of the lower court.

In its revision decision on 30 September 2021 the SCC Court ruled that all of the above mentioned costs were known to the customer who had accepted to pay them by signing the loan contract with the bank. The SCC Court stated that the bank had no obligation to prove the structure of costs nor whether such costs really existed in regard to the mentioned fees (Presuda Visokog Kasacionog suda, 2021). The SCC Court decided that the contract clause on the mentioned fees was not null and void and ordered the customer to pay 54,000 RSD to the bank for the costs of legal proceedings. When comparing this judgement of the SCC Court to the judgement of the same court a year before (see Addiko case), one can note that there is no mention of an effective interest rate at all.

Case law available online on the SCC Court's website shows that Komercijalna banka appears in most lawsuits compared to other domestically-owned banks (in the period when it was still a domestic and state-owned bank). On the other hand, the UniCredit Bank Srbija appears in most lawsuits with regard to foreign-owned banks. One of the likely reasons is related to the fact that UniCredit Bank Srbija practiced multiple one-off charges, not just one-off charge such as approval fee at the time of approving a loan. In addition to approval fee, Unicredit bank charged the customer with a "following the loan" fee in the subsequent years. For instance, according to the SCC Court's revision decision no. 5481/2021 from 20 October 2021 in a lawsuit against UniCredit bank Srbija, a customer concluded a contract on 31 May 2013 for 1,000,000 RSD (around 8,500 eur) and according to the Article 9(1) of the contract the customer was obligated to pay:

i.) Approval fee 1.5% of the loan amount which was 15,000 RSD on the day of signing the contract

ii.) 0.5% fee for "following the credit for the unpaid principal amount" yearly:
   a. 4,497.14 RSD on 6 June 2014
   b. 3,807.45 RSD on 5 June 2015
   c. 2,639.57 RSD on 7 June 2016
   d. 2,354.93 RSD on 6 June 2017.

Therefore,in addition to monthly annuities that contained interest in the borrowing interest rate (that should have adequately corresponded to the effective interest rate), this customer was required to pay multiple one-off payments: in the year of approving the loan ("approval cost" in 2013) and the subsequent years 2014, 2015, 2016 and 2017 for following the unpaid amount of the loan ("costs for following the loan"). It is not clear if these fees were included in the effective interest rate or not and how they were incorporated in monthly annuities that should have contained all costs related to a loan.

The SCC Court in its revision decision ruled that the contract clause on the mentioned fees was not null and void and ordered the customer to pay 52,500 RSD to the bank for the costs of legal proceedings. The key argumentation of

the SCC Court was that all of the above mentioned costs were known to the customer who had accepted to pay them by signing the loan contract with the bank. The argument was that the bank had no obligation to prove the structure of costs nor whether such costs really existed. In this revision decision the SCC Court did not mention effective interest rate at all. There was also no mention that all of the above costs should have been included in the effective interest rate (Presuda Vrhovnog Kasacionog suda, 2021a).

6 Consumers' Point of View and Implications

When a bank prepares a loan offer with all fees and costs and gives it to a consumer to review it, that consumer cannot influence an offer by, for example arguing that approval fees or other fees are too high and therefore not acceptable. Consumers apply for a loan when they are forced to solve some financial problems. A customer's position vis-à-vis a loan offer is "take it or leave it". Thus, when banks offer their clients standardized loan agreements with the set amount of the approval and similar fees, a customer is not able to negotiate that. An approval fee of 20 eur might not be a lot of money for a bank, but from a consumer's perspective in Serbia where average monthly salary was below 500 eur for most of the last twenty years, that was not a negligible sum.
From a legal perspective it is crucial that all parties involved in a loan contract understand what an effective interest rate is. From the consumers' perspective, when they decide to apply for a loan, the information they typically seek is how much it will cost and what they are paying for. According to some sources (Knežević, Stoiljković, 2021) consumers in Serbia were charged with approval and similar fees twice; once via one-off payment and second time via interest in monthly annuities. Courts in Serbia largely did not check what was actually charged to consumers although there are some notable exceptions. For example, a lawsuit against ProCredit Bank Srbija and SCC Court's revision decision no.4909/21 from 30 September 2021. In this case a financial expert who specialized in banking, stated that approval and similar fees had not been paid twice, once as a one-off payment and secondly via monthly annuities.
From a consumer point of view, "approval" and similar fees are unfair, because with those fees a bank passes on to consumers its own operating costs. According to the EU case law, which EU candidate countries should consider in their domestic application of law, such a clause can lead to a significant imbalance in the parties' rights and obligations to the detriment of the consumer (see for example EU case law, joined cases C-84/19, C-222/19 and C-252/19). Another question is why some banks charged those approval, processing and/or disbursement fees as the percentage of the loan amount because, referring to the EU case law, the basis for management charges (such as approval or processing fee) is different from the basis used for the calculation of interest (EU case law joined cases C-84/19, C-222/19 and C-252/19). According to the EU case-law, services provided in return to a disbursement fee should be known

in order to ensure that those services are not overlapping and are not charged for twice (see for example EU case law C-224/19 and C-259/19) or even multiple times.

After the SCC Court "supplemented" its 2018 with the new opinion in September 2021, banks started sending SMS messages or letters to their customers (including to those who have already won at lower courts) and suggested to them to refrain from further lawsuits against the banks (N1, 2022). The Association of Serbian Banks called on to all consumers who had sued their banks to refrain from further legal demands because banks would then not ask for the repayment of the costs they already had in legal proceedings. In other words, banks would then not initiate appeals against those clients to return the money they had already received from banks (Association of Banks of Serbia, 2021). According to some reports, at the end of 2021 and the beginning of 2022, customers who have won at lower courts and had received the banks' return of the approval and management/administrative fees, started to get revisions of their cases according to which they had to return that money to banks in eight days, without the possibility of appeal (Moj NoviSad, 2022). The General Secretary of the Association of Serbian Banks stated that any customer who had received such a revision, could turn to a bank and try to negotiate some leeway. His attitude was that banks' clients should refrain from their legal demands, which a large number of customers did (Danas, 2022).

Some academics pointed out that it was not clear what approval and similar costs actually covered. Račić (2020), for instance believes that a bank must not include unfair clauses in loan contracts with customers and "justify" those clauses by arguing that they are in line with banks' business policy and terms and conditions of a bank.

Despite the fact that the SCC Court in its opinion from 16 September 2021 emphasized that nothing changed vis-à-vis its opinion from 2018, the reaction of attorneys, associations of consumers, association of banks and general public gave an impression that there was significant room for interpretation that added to legal uncertainty. Legal certainty exists when the law is clear, stable, respected by people and national authorities and is non-retroactive (Neuhaus, 1963). Trust in law does not allow contradictory solutions to a particular legal question relating to the same situation (Popelier, 2008).

Why did these approval and disbursement fees have to be paid separately from monthly annuities? It is not clear how then the effective interest rate (from the pre-contractual phase) corresponded to the borrowing interest rate in a loan contract so that a consumer could ascertain that there was no overlap between various costs or the services which the customer had to pay as pointed out by EU case law C-621/17, paragraph 43.

The structure of "clear and unambiguous data on loan costs" that was the focus of the SCC Court's opinion in 2021 was not the key issue in all lawsuits. The key issue was that all those approvals and similar fees should have been included in the total price of the loan and should have been included in monthly annuities. The key issue was to establish that consumers were not charged the same costs multiple times.

7 Conclusion

The answer to the first key question in this research is that case law shows that in some instances banks could not prove they had informed their customer of all costs and fees in a pre-contractual phase (e.g. SCC Court's revision decision against UniCredit Bank Srbija no. 4737/2021 from 30 September 2021; or SCC Court's revision decision against Komercijalna banka no. 3573/2021 from 14 October 2021). In certain cases, banks could not prove that those costs were included in the calculation of an effective interest rate in a pre-contractual phase. Banks had the right to charge approval and similar fees for providing loans to their customers, but only via the effective interest rate. That was clearly confirmed by both SCC Court's opinions in 2018 and 2021. There was no legal provision in the Serbian legislation that would require customers to pay for approval and similar fees separately, as one-off payments.

Even if banks believed it was legal to charge approval and similar fees outside of the interest in monthly annuities, the sum of those approval and other fees together with monthly interest in monthly annuities over the time-frame of a contract should have adequately corresponded to the effective interest calculated and presented to a customer in a pre-contractual phase. That has largely not been checked by courts.

Therefore, the answer to the third question is that it remains unclear whether in those thousands of lawsuits against banks customers paid for the same banks' services (approving, disbursing, "following" a loan) twice or even multiple times.

Moreover, from a consumer's perspective, a contractual term which imposes on a consumer non-interest credit costs, including costs of the lender's economic activity, may be regarded as unfair. That is particularly important if the formulation of these costs is confusing to a consumer with respect to the obligations and the economic consequences of those terms. This is not just about legality and transparency, it is also about fairness.

Finally, a chaotic approach to the rule of law with attorneys threating strikes after the second SCC Court's opinion in 2021, a bank association issuing "ultimatums" to bank customers, the highest court producing controversial revision decisions, not to mention messages from banks advising their customers to withdraw lawsuits against them, all this has a negative impact on legal certainty of consumers and trust in the national institutions in Serbia.

The limitation of this research is that it is largely based on the analysis of the legislation and case law. The research would benefit from quantitative data about the aggregate amount of approval and similar fees in all lawsuits. That data would shed additional light on answers to key questions in this research. As of February 2023, these data are still not officially available by authorities in Serbia.

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