

Bologna, 22<sup>nd</sup> March 2022

**TO:** European Commission (DG GROW- DG Internal Market, Industry Entrepreneurship and SMEs)

**TOPIC:** **EU NOTIFICATION PROCEDURE - DRAFT ACT PREVENTING USURY (UD286)**

**Information supporting the applicability of art.6 (4), Directive 2015/1535.**

Established in 1988 in Bologna (Italy), CRIF has a global presence, operating over 4 continents (Europe, America, Africa and Asia) in more than 40 Countries through more than 80 companies.

CRIF is a leader company for retail credit management and lending support solutions, acting as a leading group in continental Europe in the banking information sector. At EU level, CRIF is operating in 14 Member States, including Poland, and it is recognized as one of the main operators on an international level for integrated business and commercial information and credit and marketing management services.

As key operator in highly regulated sector, we monitor national and European legislative evolutions.

In this regard, we are writing due to our concerns related to Draft Act on amending certain Acts in order to prevent usury (hereinafter Polish Draft) notified by Polish Department Responsible on 27.12.2021, as it contains technical provisions within the meaning of Directive (EU) 2015/1535, particularly referred to credit market and related services.

We would like to provide our remarks to contribute to your considerations and findings, supporting the request for the postponement of the adoption of the Polish Draft accordingly to art. 6(4) of Directive 2015/1535, based on the overlapping between the Polish Draft and the Proposal for a Directive of the European Parliament and of the Council on consumer credits (hereinafter CCD revision proposal) announced by EU Commission to European Parliament and Council – as per COM (2021) 347 final, 2021/0171(COD), published on 30.06.2021.

### **Fully harmonization**

As stated in the Explanatory memorandum, the CCD revision proposal should be intended as a full harmonization instrument: the proposed article 42 on level of harmonization and article 43 on imperative nature of the Directive confirm it. Considering its provisions, **Member States shall not be entitled to have in place other provisions in relation to the areas covered by the Directive insofar as it contains harmonized provisions in those areas.** It is recalled in the Legislative proposal, in particular:

**Recital 13)** *Full harmonization is necessary in order to ensure that all consumers in the Union enjoy a high and equivalent level of protection of their interests and to create a well-functioning internal market. Member States should therefore not be allowed to maintain or introduce national provisions diverging from other than those laid down in this Directive, unless otherwise provided in this Directive. However, such restriction should only apply where there are provisions harmonized in this Directive. Where no such harmonized provisions exist, Member States should remain free to maintain or introduce national legislation.*

**Art. 42 (1) Level of harmonization.** *Insofar as this Directive contains harmonized provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive unless provided otherwise in this Directive.*

The proposal is still under discussion at EU Parliament and Council, with no possibility to define at this stage its final provisions. **Considering the current CCD revision proposal and the Draft , it emerges a clear overlapping on key topics, as we will explain in the next section, which support our request to consider the applicability of art. 6(4) of the Directive 2015/1535/EU.**

## **Overlapping and future potential breaches**

### **Scope**

Art. 2 (2), let. c) represents a relevant change introduced by the CCD revision proposal, which will include in its scope also loans below EUR 200 and loans in the range between EUR 75,000 and EUR 100,000.

Polish Draft covers loans below EUR 200 and loans in the range between EUR 75,000 and EUR 100,000, considering that loans between EUR 75,000 and EUR 100,000 are currently regulated by Polish Civil Code.

This clear overlapping will represent one of the main reasons to be considered for the postponement of the adoption of the Polish Draft. As remarked in Recital 14) of the EC proposal: the definitions contained in this Directive determine the scope of harmonization. The obligation on Member States to implement this Directive should therefore be limited to its scope as determined by those definitions, clarifying that the provisions could be applied in additional areas –as happened with Directive 2008/48/EC- in order to ensure a better consumer protection.

**In this specific context, from the procedural perspective – the Polish Draft covers the same exactly matter which is covered by the abovementioned proposal for a directive, accordingly to art.6 (4) of the Directive 2015/1535/EU.**

### **Definition: creditor and related parties**

In the Polish Draft as per art. 59 (a) of a Consumer Loan Act (hereinafter CLA) a loan institution may operate only in the form of a joint-stock company, with minimum share capital of the loan institution shall be PLN 1 000 000.

The definition is covered in art. 3 (2) of CCD Revision proposal: creditor' means a natural or legal person who grants or promises to grant credit in the course of his or her trade, business or professional, with no reference to specific legal form or the amount of share capital.

**In this regard, it should be considered an overlapping and a potential future breach with CCD revision proposal.**

Additionally, definition of a related party is introduced to the CLA by the Polish Draft. According to proposed art. 5(3a) of the CLA a related party is a related party within the meaning of Commission

Regulation (EC) No 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council. Next, the Polish Draft amends art. 36c of the CLA by adding “a related party” to it. As a consequence it will be established in art. 36c of the CLA that where a creditor **or an entity affiliated to it (related party)** has granted further loans to a consumer who has not fully repaid the loan within 120 days of the date on which the first loan is disbursed: a) the total amount of the loan, for the purpose of establishing the maximum amount of non-interest loan costs, is the amount of the first of the loans, and b) non-interest loan costs cover the sum of non-interest costs of all loans granted within this period.

Amending art. 36c of the CLA as proposed in the Polish Draft means a factual extension of creditor’s definition preview in CCD revision proposal. In addition, it imposes additional procedures for the purposes of creditworthiness assessment (art.18, CCD revision proposal) which will have to be implemented by creditors to check loans granted by related parties too, with potential increase of efforts and costs at creditors’ side, reduction in consumer access to credit and undermining a high and equivalent level of protection of EU community consumers protection.

## CAPS

The new article 720 (1 and 2) of Polish Civil Code and amendments to art. 36a of the CLA introduced by Polish Draft regarding the right to claim interest and non-interest costs and its calculation methods represent an overlapping and a potential future breach with CCD revision proposal.

In particular regarding article 3, p. 5, 6, 7 which refer to ‘total cost of the credit to the consumer’, ‘total amount payable by the consumer’ and ‘annual percentage rate of charge’ or ‘APR’. The EU proposal refers to APR and not to “non-interest cost”, as a consequence the total caps – as described in art. 31- and the calculation of the APR represent a significant difference between the two legislative texts, both from a legal and technical perspective. In addition, Polish Draft introduces two different formulas to the CLA which is not covered by the CCD revision.

This divergent approach could undermine the effectiveness of EU proposal measures, with reference to one of its main aims: **the approximation of national rules regarding the establishment and functioning of the internal market, by creating a high level of consumer protection and by helping the internal market function smoothly, accordingly to art. 169 TFEU, as recalled in the Explanatory Memorandum of the CCD revision proposal.**

## Information obligation

The Polish Draft refers to information obligation, through the introduction of Article 720 (4) in the Civil Code Act which establishing that the creditor shall inform the borrower in an unambiguous and comprehensible manner of the total non-interest costs, the amount of interest, and the amount of interest which they are required to pay in connection with the conclusion of the agreement.

In this regard, the proposed art. 10(3) by EC introduces a wider obligation in order to give consumers personalized pre-contractual information on the basis of the Standard European Consumer Credit information form, in addition to which they are to get a Standardized European Consumer Credit Overview one-pager outlining the key features of the credit in question, to help them compare different offers. In this regard, the creditor shall specify not only the information on APR (art.10(3), let. g) and borrowing rate (10 (3), let.f), but a wider items to properly inform the consumer. With dedicated provisions applicable for specific categories of credit agreements, as referred in art. 11.

As stated in the Explanatory Memorandum, the purpose is to ensure that consumers see all the essential information to guarantee its safeguard.

**As a consequence, the provisions highlighted in the Polish Draft insist on a topic covered by EU Commission, and – in addition- represent a future potential breach with it.**

### **Early repayment**

According to Polish Draft, considering the introduction of art. 720 (5) in Polish Civil Code in the event of early repayment of the loan, no interest may be claimed for the remaining period until the end of the period for which the loan was granted under the agreement. If the loan is repaid prior to the deadline as stipulated in the agreement, the non-interest costs incurred shall be reduced by the costs which relate to the period by which the term of the agreement has been reduced, even if the borrower incurred these costs prior to the repayment

The issue is covered in art. 29(2) of the CCD revision proposal which sets out the right for consumers to discharge their obligations before the due date and- in the case of full or partial early repayment- the consumer is entitled to a reduction in the total cost of the credit, while the creditor is entitled to a fair and objectively justified compensation for possible costs directly linked to early repayment of the credit.

**As emerged, the CCD revision proposal deals with the topic – in addition to this, the absence of the reference to compensation for creditor in the Polish Draft could represent a future potential breach with it.**

### **Creditworthiness assessment**

The Polish Draft introduces a new art. 10 (a) in the Consumer Loan Act of 12 May 2011, (CLA), referring to obligations to collect a statement of consumer's income and expenditure, establishing that the granting of consumer loan should be subject to a positive assessment of creditworthiness

The CCD revision proposal covers the issue, mainly in article 18 and 19.

In more details, article 18 requires the creditors or the provider of crowdfunding credit services to assess the consumer's ability to repay the credit, considering the consumer's interest and based on necessary and proportionate information on the consumer's income and expenses and other financial and economic circumstances, such as evidence of income or other sources of repayment, information on financial assets and liabilities, or information on other financial commitments, without exceeding what is strictly needed to perform such an assessment. It also requires that credit is made available to consumers where the result of the creditworthiness assessment indicates that the obligations resulting from the credit agreement or from the agreement for the provision of crowdfunding credit services are likely to be met in the manner required under that agreement unless in specific and justified circumstances. Moreover, when the creditworthiness assessments is based on automated processing, including profiling, consumers have the right to request and obtain human intervention on the part of the creditor, a meaningful explanation of the assessment of creditworthiness, and express his or her point of view and to contest this creditworthiness assessment. In addition, Article 19 (on databases) introduces provisions to ensure that creditors or providers of crowdfunding credit services are able to access information from relevant databases on a nondiscriminatory basis.

As a consequence, we consider the creditworthiness procedure are extensively covered in the CCD revision proposal, adding that in this regard, a potential breach in the art.10 (a) of CLA should be considered, particularly related to:

- obligations to collect consumer's statement which is different than "evidence" covered by the CCD revision proposal;
- positive creditworthiness assessment is the condition for granting the loan while the CCD revision proposal states that where the result of the creditworthiness assessment indicates that the obligations resulting from the credit agreement are not likely to be met in the manner required under that agreement- so with a negative result-, the creditor or the provider of

crowdfunding credit services may exceptionally make credit available to the consumer in specific and well justified circumstances, such as when they have a long-standing relationship with the consumer, or in case of loans to fund exceptional healthcare expenses, students' loans or loans for consumers with disabilities, as refereed in art. 18 (4) and further specified in Recital 47, expressing individual evaluation;

- related to the previous point, the Polish Draft refers to detailed consequences in case of granting the loan without positive creditworthiness assessment which are not mentioned explicitly by the CCD revision proposal.
- obligation to attach consumer's statement to the loan agreement which is not required by the CCD revision proposal- where the focus is on a complete informative to consumers, as stated in art. 18 (5,6 and 7).

**The new art. 10 (a), par.8 of the CLA as proposed in the Polish Draft specifies that provisions of art. 10(a) of the CLA shall not apply to lenders which are banks or cooperative savings and credit unions granting consumer loan.**

### **Additional considerations**

In addition to the abovementioned issues, it is relevant to consider the **potential barriers to free movement of services which could emerge**, given that Polish Draft discriminates lenders which are not banks or cooperative savings and credit unions.

Firstly, it is relevant to point out that the new art. 10 (a), par.8 in the Polish Draft specifies that provisions of art. 10(a) of the CLA shall not apply to lenders which are banks or cooperative savings and credit unions granting consumer loan, determining a discrimination towards some categories of credit providers.

In addition, it should be addressed the decreased caps on maximum non-interest credit costs, considering that activity of banks and cooperative saving and credit unions is funded by a variety of other financial products to consumers and organizations.

There is also a topic related to the introduction of rule that resources dedicated to the granting of consumer credit by lending institutions cannot originate from collection of pecuniary resources of other natural persons, legal persons or organizational units without legal personality, also by issuing bonds or other debt instruments or from undocumented sources (new art. 59ca of the CLA).

These additional considerations should be read in conjunction with the main topics examined in the previous section. In particular, the postponement of the adoption of the Polish Draft emerge as consistent, considering the CCD revision proposal by EU Commission, in order to guarantee an effective harmonization in this specific area and – in general terms- accordingly to the principle of sincere cooperation between the Union and the Member States, in full mutual respect, as stated in art. 4 (3) of Treaty of European Union.

We hope that the above considerations could be helpful in your assessment and evaluation, confirming that we are at your disposal to support with any other additional information you will consider useful for the scope of this procedure.

Kind regards,