POLSKI ZWIĄZEK INSTYTUCJI POŻYCZKOWYCH

Position on non-compliance of a 'bill amending certain acts to counter usury' with EU law (notification number: 2021/900/PL)

About the Submitter

The Polish Association of Loan Institutions **(PZIP) is an association of employers** who jointly want to change the image of the non-bank loan industry and agree that it is worth to promote and apply the highest business and ethical standards. The domain of companies associated with PZIP is the provision of quick, short-term loans and installment loans via the Internet. PZIP was established to represent the industry in public debate and contacts with decision-makers in order to develop wise legislative regulations.

PZIP brings together the majority of the non-bank online loan market in Poland and a large representation of non-financial entrepreneurs building the loan market infrastructure. PZIP members are companies that apply and promote the highest business and ethical standards, which care about building trust in the non-bank loan industry. The distinguishing feature of the companies associated in the Association is to put the customer at the centre of their activities by providing professional, convenient and accessible services.

PZIP is registered in the **Transparency Register** of the European Parliament, the Council of the EU and the European Commission under **number 685873935918-08**.

I. INTRODUCTION

On 30 November 2021, the Polish government adopted a government bill amending certain acts to counter usury (hereinafter referred to as the '**Bill**') and submitted the Bill to Parliament on the 28th of December 2021.

On the 27th of December 2021, the Bill was notified to the European Commission **(notification number: 2021/900/PL)** under Directive 2015/1535/EU of the European Parliament and the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and on rules of Information Society services (hereinafter referred to as '**Directive 2015/1535**'). Bearing in mind the definition of "technical regulation" contained in the Article 1(1)(f) of Directive 2015/2135, which is *'technical regulation' means (...) rules on services (...) the observance of which is compulsory, de jure or de facto, in the case of (...) provision of a service (...) in a Member State (...),* **the provisions contained in the Bill are certainly technical regulations and as such should be notified.**

The Bill provides for the introduction of significant systemic changes in the area of consumer credit, including significantly decreased limits on maximum non-interest credit costs, extension of the procedure for examining the creditworthiness of borrowers prior to conclusion of a consumer credit agreement and introduction of unclear, far-reaching and unprecedented requirements for non-bank loan institutions, which also provide for their coverage by supervision by the Polish Financial Supervision Authority (in Polish: *Komisja Nadzoru Finansowego*) (hereinafter referred to as the '**PFSA'**).

The Bill constitutes a continuation of work carried out in connection with an analogous bill prepared and notified to the European Commission on 28 June 2019 (notification number 2019/313/PL), which was heavily criticised by many entities (bodies, associations, companies) during consultation at that time. **Current governmental work on the Bill unjustifiably did not include any form of public consultation** and, by doing so, did not allow the stakeholders, in particular the consumer credit providers, to express their views on the proposed changes**.** Such expedited manner of proceeding on draft laws is envisaged for extraordinary situations, as it omits public consultation, i.e. a fundamental standard of the law-making process in a democratic state of law. At the same time, it is clear that such an extraordinary situation, which could justify the government's accelerated way of procedure, does not exist in the case of the subject matter covered by the Bill (i.e. consumer credit).

By this submission, the Submitter wishes to draw attention of the Commission to the fact that **if the Bill is adopted in its current form, it will violate various aspects of EU law and may distort functioning of the internal market.** In particular, the Bill violates:

1. Article 56 of the Treaty on the Functioning of the European Union (hereinafter referred to as the '**TFEU'**) which guarantees the freedom to provide services,
2. Directive 2008/48/EC on credit agreements for consumers (hereinafter referred to as the '**Consumer Credit Directive'**),
3. Article 4(3) of the Treaty on European Union (hereinafter referred to as the 'TEU') by introducing laws that overlap with and may render it impossible to achieve the objectives set out in the proposal for a Directive on consumer credits repealing and replacing the Consumer Credit Directive (2008/48/EC) (hereinafter referred to as the '**CCD2'**), which is currently worked on by EU institutions.

In light of the below remarks on non-compliance of the Bill with EU law as well as ongoing work on the proposal for the CCD2 at the EU level, **the Submitter respectfully requests the Commission to:**

1. **announce its finding that the draft technical regulation enshrined in the Bill concerns a matter covered by a proposal for a directive** (here: CCD2) presented to the European Parliament and Council in accordance with Article 288 TFEU (Article 6(4) of Directive 2015/1535) – as further explained in point II below; **<u>or</u>**
2. **issue a detailed opinion to Poland, within the meaning of Article 6(2) of Directive 2015/1535, and request Poland to bring the Bill into conformity with EU law –** as will be shown below, the Bill may create obstacles to the free movement of services within the internal market. Therefore, Poland should be obligated to postpone adoption of the Bill for four months from the date of Commission receipt of the communication referred to in Article 5(1) if the Commission delivers a detailed opinion within three months of that date.

II. FURTHER WORK ON THE BILL IN LIGHT OF THE PROPOSAL FOR THE CCD2 (SUSPENSION PERIOD AND VIOLATION OF THE PRINCIPLE OF SINCERE COOPERATION)

1. Suspension of all legislative work (standstill) on the Bill in light of the proposal for the CCD2

On 30 June 2021, the European Commission adopted the proposal for the CCD2, which is currently being discussed within the Council of the European Union. The aim of the CCD2 is to provide better protection for consumers from irresponsible lending practices, particularly those online. The proposal for the CCD2 envisages changes, in particular, on extension of the scope of the Consumer Credit Directive, obligation of Member States to set caps on interest rates, the annual percentage rate of charge or total cost of credit as well as indication that creditworthiness assessments should be carried out on the basis of information on financial and economic circumstances that are necessary, sufficient and proportionate. Taking into account the Bill's contents, it is clear that **the scope of the Bill and that of the proposal for the CCD2 <u>overlap significantly</u> and aim to regulate the exact same area**, i.e. consumer credit.

It is therefore our view that the period of suspension of all legislative work (standstill) on the Bill in question should be set pursuant to Article 6(4) of Directive 2015/1535/EU of the European Parliament and the Council of 9 September 2015 laying down a procedure for the provision of information on technical regulations and rules of Information Society services. According to this provision, Member States are obligated to postpone adoption of a draft technical regulation for 12 months from the date of Commission receipt of the communication referred to in Article 5(1) of this Directive if, within the three months following that date, the Commission announces its finding that the draft technical regulation concerns a matter covered by a proposal for a directive, regulation or decision presented to the European Parliament and the Council in accordance with Article 288 TFEU. The standstill period can be extended to 18 months if the Council adopts a position at first reading during that period (Article 6(5) of Directive 2015/1535/EU).

Given the above, the Submitter's request in point I of this position is entirely legitimate.

2. Non-compliance of the Bill with the principle of sincere cooperation (article 4(3) of the TEU) in light of the proposal for the CCD2

Regardless of the arguments presented in point 1 above, it must also be emphasised that the Polish government's **work on the Bill in the context of EU level work on the proposal for the CCD2 violates the EU principle of sincere cooperation.**

Pursuant to the principle of sincere cooperation (Article 4(3) of the TEU), which is one of the foundations of the EU, the EU and Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. This principle implies that a Member State shall facilitate achievement of EU tasks and refrain from any measure that may jeopardise attainment of EU objectives.

The Submitter considers that by introducing the Bill as currently drafted Poland acts contrary to the principle of sincere cooperation (Article 4(3) of the TEU).

Poland, as an EU Member State, is fully aware of legislative work at the EU level to revise the Consumer Credit Directive, which has taken place since 2020, and the content of the CCD2 (the proposal was sent to national parliaments, according to Protocol (No 2) on the application of principles of subsidiarity and proportionality).

The CCD2, although not yet adopted, constitutes a product of the REFIT Review of the Consumer Credit Directive and aims at reducing consumer detriment and risks of taking out loans in a changing market, facilitating cross-border provision of consumer credit and boosting competitiveness of the internal market[1].

Contrary to obligations arising from the principle of sincere cooperation, Poland, despite awareness of the proposal for the CCD2 and its main objectives and assumptions, decided to propose the Bill which in its current form jeopardises attainment of objectives set out in the proposal for the CCD2, as well as in Article 56 of the TFEU (for remarks regarding non-compliance of the Bill with Article 56 of the TFEU, see point III below).

This is of particular importance because **the CCD2, similarly as the Consumer Credit Directive, is designed as a full harmonisation instrument in the areas it covers**. Full harmonisation implies that insofar as a directive contains harmonised provisions, Member States cannot maintain or introduce provisions in their national law that diverge from those laid down in a directive. In particular, this means that Member States cannot introduce rules that are stricter than those set in a directive, but should simply implement its provisions in national law. Full harmonisation significantly limits Member State implementation freedom in such manner that national legislators cannot adopt solutions other than those directly provided in a directive, unless such directive states otherwise. In other words, a directive sets a certain standard (pattern) that cannot be modified in a national implementation act.

The Bill, if enacted in its current wording, will jeopardise attainment of objectives set out in the proposal for the CCD2. The Bill is likely to trigger irreversible changes to the financial services market in Poland and thereby render CCD2 objectives and measures impossible to implement. Polish legislation, which must be aware of such consequences, deliberately puts attainment of these objectives at risk, thus acting contrary to the principle of sincere cooperation.

[1] Please see part on impact assessment of the explanatory memorandum on the proposal for the CCD2.

III. NON-COMPLIANCE OF THE BILL WITH THE FREEDOM TO PROVIDE SERVICES (ART. 56 OF THE TFEU)

In this position the Submitter will show that entry of the Bill into force will introduce measures contrary to the freedom to provide services enshrined in Art. 56 of the TFEU, which together with three other fundamental freedoms guarantees functioning of the European Union internal market.

The Submitter aims to clearly demonstrate that the Bill will infringe this most fundamental principle of the EU law irrespective of whether the Consumer Credit Directive or the CCD2 is in force on the date of its adoption and entry into force. In other words, expiry of the suspension period referred to in point II should not allow the Polish government to proceed with the Bill (as it stands) as it will still, regardless of the current EU regulatory environment for consumer credit (i.e. Consumer Credit Directive vs. CCD2), violate EU primary law (Art. 56 of the TFEU).

It is established case law of the Court of Justice of the European Union (hereinafter referred to as the '**CJEU**') **that 'Article 56 TFEU requires not only the elimination of all discrimination** on grounds of nationality against providers of services who are established in another Member State, **but also the abolition of any restriction on the freedom to provide services,** even if that restriction applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less attractive the activities of a service provider established in another Member State where it lawfully provides similar services'[2].

The concept of a 'restriction' within the meaning of Article 56 of the TFEU is interpreted broadly and covers national measures which are liable to dissuade an undertaking from offering their services in another Member State, from opening a branch in that Member State or oblige it to re-think its business policy and strategy, if it wants to continue operations in that Member State[3].

The prohibition of restrictions encompasses not only the prohibition of issuing such provisions of national law in Member States that discriminate (directly or indirectly) against service providers or recipients from other Member States residing in the host country (i.e. based on nationality), but **also such provisions which, while not formally discriminating against service providers or recipients from other Member States residing in the host country, nevertheless hinder them from exercising the freedom to provide services**.

First, changes proposed in the Bill may have an indirect discriminatory effect toward providers of services (creditors) who have their main establishment in another Member State or whose main source of capital is from another Member State. In this case, it is important for the Commission to also consider the nationality of ownership (based on

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[2] See judgments in *Berlington Hungary and Others*, Case C-98/14, EU:C:2015:386, par. 35, *Sporting Exchange*, C-203/08, EU:C:2010:307, par 23 and case-law cited, and *HIT and HIT LARIX*, C-176/11, EU:C:2012:454, par 16).

[3] *DKV Belgium*, C-577/11, EU:C:2013:146, paras. 34-36.

the origin of capital) of non-bank consumer credit providers mainly affected by the Bill (as discussed below). This is particularly important because **discrimination under Article 56 of the TFEU may consist not only of discrimination based on the seat of a company or its head office, but also the origin of capital financing company operations**. In this context, **a significant group of non-bank consumer credit providers is foreign-owned (i.e. has a high share of foreign capital) in contrast to banks and SKOKs, which are mostly Polish-owned**.

Therefore, national measures such as those set out in the Bill that discriminate against service providers owned or financed by companies from other Member States **amount to a restriction within the meaning of Art. 56 of the TFEU and should be prohibited, even if such discrimination can be considered indirect and covert**[4]. The Bill is in fact liable to impede or render less attractive the activities of such service providers (here: non-bank consumer credit providers).

It follows from CJEU case law that such discrimination does not need to be overt and that '**rules of equal treatment prohibit not only overt discrimination based on nationality, but also all covert forms of discrimination** which, by applying other distinguishing criteria, in practice achieve the same result'. Moreover, the CJEU holds that **national legislation, which on its face is non-discriminatory, can constitute indirect discrimination** contrary to Article 56 TFEU if it targets companies that are "mainly established in other Member States'[5].

A restriction through discriminatory measures can only be justified on grounds of public policy, public security or public health (Art. 62 in connection with Art. 52 of the TFEU). **No such permissible justification applies in this case.** In particular, the notion of "public policy" is interpreted narrowly in CJEU case law and the CJEU has rarely accepted restrictions to freedom to provide services on this basis[6]. In principle, restrictions based on the public policy premise can only be permitted in situations where there is a genuine and sufficiently serious threat to a fundamental interest of society and even in such case they must satisfy the strict proportionality test discussed below and are subject to CJEU control. According to an explanatory memorandum to the Bill[7], the purpose of the Bill is to 'undertake comprehensive and coordinated action [...] aimed at eliminating the pathology of granting loans of a usurious nature'. Such objective does not fall under notions of 'public policy' or 'public security' and as such cannot be considered a genuine and sufficiently serious threat to any fundamental interest of society.

Second, even if measures to be introduced by the Bill are considered non-discriminatory (which the Submitter contests), they would fail a strict legal test laid down by the CJEU

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[4] Clean Car Autoservice v Landeshauptmann von Wien, Case C-350/96, EU:C:1998:205, par. 27.

[5] *Berlington Hungary and Others*, Case C-98/14, EU:C:2015:386, par. 38-41.

[6] *ERT, Case C-260/89, EU:C:1991:254.*

[7] Explanatory memorandum to the Bill, dated 15 November 2021, p. 1:

https://legislacja.rcl.gov.pl/projekt/12352450/katalog/12822994#12822994.

making it possible for a Member State to justify restriction of freedom to provide services. Under CJEU case law applying this test, the scope for Member States to impede freedom to provide services is extremely limited. The CJEU has on multiple occasions confirmed that derogations from freedom to provide services must be construed narrowly[8].

According to this test, non-discriminatory restrictions on freedom to provide services are only permissible if all of the following conditions are met: 1) a restriction must be justified by an overriding reason in the public interest; 2) a restriction must be appropriate for securing attainment of the objective it pursues; and 3) a restriction must not go beyond what is necessary to attain its objective (proportionality test).

Even if one accepts that the aim of the Bill in the form of 'eliminating the pathology of granting loans of a usurious nature' is an overriding reason in the public interest, two other conditions will not be met.

In pursuit of this objective, the Bill introduces several measures aimed at restricting commercial freedoms of creditors operating on the Polish market, which, however, are not appropriate for securing attainment of the sought objective. First, all these measures, as will be shown below, will not eliminate the granting of loans of a usurious nature. In particular, **the Bill ignores the fact that impeding the business of non-bank consumer credit providers will place consumers in a 'grey area'** and will expose them to even greater risks that the Bill aims to eliminate. Second, evidently **the measures also fail the proportionality test because they go far beyond what is necessary to attain their objective**. This is particularly justified in light of the Consumer Credit Directive and the CCD2, which pursue a similar objective but impose far less onerous restrictions than those proposed by the Bill (for discrepancies between the proposal for the CCD2 and Consumer Credit Directive and the Bill, see discussion below).

In light of the above, **national measures proposed in the Bill will infringe freedom to provide services enshrined in Art. 56 of the TFEU and cannot be justified by any means under EU law.**

IV. ANALYSIS OF THE MOST IMPORTANT PROPOSED CHANGES TOGETHER WITH THEIR ASSESSMENT FROM AN EU LAW PERSPECTIVE

1. Obligation to obtain the borrower's declaration of income and expenditures and verification of such declaration

The Bill provides for a new obligation to collect a statement from the borrower on income and expenditures, as well as to verify information in this statement in the manner

[8] *Dickinger and Ömer*, Case C-347/09, EU:C:2011:582, par. 82; *Commission v Italy*, Case C-465/05, EU:C:2007:781, par. 49.

specified in the Bill[9]. At the same time, it is proposed to **exempt banks and cooperative savings and credit unions** (hereinafter referred to as '**SKOKs**') **from this obligation.**

The proposed legislative solution is contrary to Article 8(1) of the Consumer Credit Directive to the extent that it introduces a requirement for a potential borrower to submit a statement of income and expenditures subject to verification.

Article 8(1) of the Consumer Credit Directive requires Member States to introduce national provisions to ensure that a creditor, before the conclusion of a credit agreement, assesses a consumer's creditworthiness **on the basis of sufficient information obtained from the consumer where applicable, and, if necessary, on the basis of information obtained from a relevant database**.

This means that the obligation of a consumer to submit additional documents or statements and their further verification by the creditor should not be unconditional (as indicated by the terms '**on the basis of sufficient information**' and '**where applicable**'). The CJEU confirmed this in Case C-449/13 in which it stated that '[Article 8(1)] affords the creditor a margin of discretion for the purposes of determining whether or not the information at its disposal is sufficient to demonstrate the consumer's creditworthiness and whether it must check that information against other evidence'.

Meanwhile, the Bill stipulates that the above unconditional obligations apply in every situation of non-bank consumer credit providers concluding a consumer credit agreement, which is clearly not in line with the Consumer Credit Directive's effect of full harmonisation.

What is more, the above documents or statements presented by the consumer, together with documents regarding their verification, will need to be attached to a consumer credit agreement.

Although the Consumer Credit Directive does not explicitly prohibit Member States from determining the list of documents/statements collectively constituting a consumer credit agreement, it does provide (in Article 10(2)) an exhaustive list of information that must be included in a consumer credit agreement, including its appendices that constitute an integral part of the agreement itself. Article 10(2) of the Consumer Credit Directive clearly indicates what information should be included in such a contract and there is no document on this list related to verification of the borrower's creditworthiness. The same goes for the proposal for the CCD2, which (in Article 21(1)) also does not envisage such element of a consumer credit agreement. In particular, Article 10(2)(u) of the Consumer Credit Directive and Article 21(1)(u) of the proposal for the CCD2, in so far as they require other contractual terms and conditions to be indicated by a creditor in a consumer credit agreement (to the extent that such additional terms are applicable in a given situation) cannot 'be interpreted as permitting Member

[9] A creditor (non-bank consumer credit provider) will be required to verify consumer claims by referring to documents presented by the consumer, prepared by the employer, public administration authorities or data collected by business information offices or bank database institutions (cf. proposed Article 10a (3) of the Consumer Credit Act).

States to impose in their national legislation an obligation to include information in a credit agreement other than that required under Article 10(2) of [the Consumer Credit Directive]'[10] and Article 21(1)(u) of the proposal for the CCD2.

Moreover, **documents presented by a consumer may originate from various sources and may contain protected legal information (such as data covered by banking secrecy or consumer personal data), whereby their inclusion in the consumer credit agreement may not guarantee an adequate level of their protection.**

The above points lead to the conclusion that **the draft provisions violate Article 22(1) of the Consumer Credit Directive to the extent that it is subject to maximum and full harmonization.** Moreover, based on the current wording of the proposal for the CCD2, **the Bill will also prove non-compliant with this newly proposed EU legislation once it is adopted.**

Furthermore, introduction of the above additional obligations (as well as consequences of their breach, which will be further discussed below) may significantly impede a consumer credit business in Poland by entities from other Member States. This will follow from unjustified differentiation between the legal situation of banks or SKOKs and non-bank consumer credit providers (many of whom are foreign-owned entities) by excluding the former from the obligation to obtain and verify the above documents (banks and SKOKs therefore have more flexibility in terms of sources of information on a consumer's financial situation in a creditworthiness assessment). Exemption of banks and SKOKs deteriorates the legal situation of non-bank consumer credit providers, who, as a result of the Bill, will be required to face higher administrative costs and take many additional, often paid, actions to obtain and verify statements of potential borrowers.

Adoption of such a solution is, therefore, contrary to the EU principle of equality expressed in Article 2 of the TEU and as such is at the same time a restriction within the meaning of Article 56 of the TFEU to the extent that it limits the functioning of non-bank consumer credit providers from other European Union Member States on the Polish market.

2. Granting of consumer credits to creditworthy consumers exclusively

The Bill requires that a creditor make the granting of consumer credit conditional upon a positive creditworthiness assessment of a consumer.

At the same time, it is proposed that banks and SKOKs are not subject to this limitation and retain an option, in limited circumstances, to grant credits to those consumers who are not creditworthy. In other words, the only market players to be covered by such unconditional limitation are non-bank consumer credit providers.

[10] *Home Credit Slovakia, a.s. v Klára Bíróová*, C-42/15, EU:C:2016:842, par. 56-59.

The proposed limitation is patently contradictory to both the Consumer Credit Directive and the proposal for the CCD2.

The former act (in Article 8(1)) requires that 'before the conclusion of the credit agreement, the creditor assesses the consumer's creditworthiness on the basis of sufficient information'. This provision was implemented in the Polish legal system and is widely recognised to mean that a prospective negative creditworthiness assessment does not prevent a creditor from granting a consumer credit.

The proposal for the CCD2 (in Article 18(4)) explicitly allows for granting of consumer credit (in exceptional circumstances) to those consumers not assessed as creditworthy by a given creditor by stating that 'where the result of the creditworthiness assessment indicates that the obligations resulting from the credit agreement or agreement for the provision of crowdfunding credit services are not likely to be met in the manner required under that agreement, the creditor or provider of crowdfunding credit services <u>may exceptionally make credit available to the consumer in specific and well justified circumstances</u>'.

The Submitter appreciates the importance of consumer creditworthiness assessment, especially in light of CCD2 goals i.e. to reduce consumer detriment. Notwithstanding the above, the Submitter points out that the proposed legislative solution, which provides for an unconditional prohibition imposed on non-bank consumer credit providers to grant consumer credits to those consumers, who are not creditworthy: (i) is irreconcilable with European Union law in this exact regard, (ii) contradicts the above EU principle of equality insofar as it does not apply to banks and SKOKs and (iii) may in specific situations be prejudicial to consumers. It therefore violates and will violate Article 56 of the TFEU, the CCD and the proposal for the CCD2 in its current wording.

3. Consequences of granting consumer credit in violation of obligations set forth in points 1 and 2 above

The Bill introduces severe consequences for those consumer credits found to be non-compliant with new requirements, but at the same time **limits those consequences selectively to non-bank consumer credit providers**. It states that if consumer credit was granted but at the same time the procedure for accepting and verifying the borrower's statement was not observed or if the borrower, in accordance with declarations or information obtained by the creditor, was in arrears in repayment of another pecuniary liability (irrespective of the default amount) of more than 6 months the consumer credit was not used for repayment of this charge, then:

- the sale of receivables from this consumer credit agreement either by assignment or other means is invalid,
- pursuing a claim is only admissible after the date of full repayment of the earlier liability, its expiration or after the court legally decides that this obligation does not exist,

whereby the above prohibitions on transferring and recovering a claim will not interrupt limitation periods applicable to non-bank consumer credit provider claims.

Therefore, as a result of the proposed provisions, **non-bank consumer credit provider rights to pursue claims in court will be significantly endangered**. In particular, it is not clear how creditor compliance or non-compliance with the statutorily imposed verification process will be assessed. This is alarming considering that there is no currently available credit register with consolidated information on all consumer debts, no legislative proposal exists to establish such a register and there is no practical opportunity for a non-bank consumer credit provider to verify information provided by a customer in respect of his debt with 100% certainty. Since the Bill does not introduce any threshold on the amount of unpaid debt that could trigger the above consequences, the risk of inability to verify such information is very high. Therefore, **current wording of the Bill may effectively result in paralysis of non-bank consumer credit providers,** who will be severely punished for not observing the statutory requirements set out in the Bill, but at the same time will not have means to ensure compliance with them.

The unjustified exemption from the above sanctions regime of banks and SKOKs should all the more be emphasised (also critically assessed by the Chairman of the Office of Competition and Consumer Protection[11]). This unwarranted differentiation violates the EU principle of equality and at the same time decreases non-bank consumer credit providers' ability to compete with other consumer creditors.

Therefore, leaving aside the fact that the Bill introduces sanctions for non-compliance with legal arrangements that are in themselves incompatible with the Consumer Credit Directive, **the Bill provides for a clearly disproportionate and discriminating sanction that may effectively eliminate one group of service providers from the market** (to the detriment of market competitiveness itself and of Polish consumers). It is highly doubtful that no other (less restrictive and non-discriminating) measures are available to Polish lawmakers.

Consequently, the proposed legislative solution:

- **is incompatible with Article 23 of the Consumer Credit Directive,** which explains that provisions on sanctions applicable in case of a breach of national provisions adopted pursuant to the Consumer Credit Directive should provide for effective, **proportionate** and dissuasive sanctions and, therefore, is contrary to Article 22 (1) of the Consumer Credit Directive to the extent that it sets out the full harmonisation principle of the Consumer Credit Directive,

- **violates the EU principle of equality,**

- **violates Article 56 of the TFEU** as it provides for a measure that is not appropriate to achieve its objective.

[11] Position of UOKiK re. the Bill dated 3 November 2021: dokument530228.pdf (rcl.gov.pl)

4. Maximum non-interest credit costs

The Bill provides for new strikingly low limits on maximum non-interest credit costs.

In accordance with the law currently in force, the limit on non-interest credit costs is calculated on the basis of the total amount of credit. It is the sum of two elements. The first element (**25%**) is fixed for a given amount of credit. The second element (**30%**) is variable, depending on the length of credit period expressed in days. Both elements (**55% in total**) were established after an analysis of market behaviour of entrepreneurs in Poland. Viability thresholds in terms of costs incurred by lenders were taken into account in accordance with the analysis when setting currently applicable cost limits (the proposed limits in fact reflected rather low average costs then incurred by lenders)[12].

In other words, **the cost calculation formula <u>currently in force</u> was developed as a rational and reasonable compromise,** taking into account socio-economic realities of the Polish consumer lending market.

The Bill seems to completely disregard an analysis conducted by lawmakers only six years ago and introduces new non-interest cost limits that are nearly three times lower (**10% + 10%**) compared to limits currently in place. Furthermore, the limit on maximum non-interest credit costs for loans up to 30 days is set at only **5%** of the total amount of consumer credit.

The new decreased limits introduced by the Bill are far too low and are completely inadequate in terms of costs actually incurred by lenders in connection with granting consumer credits. In accordance with the analysis, when setting currently applicable non-interest cost limits the total costs of a loan advanced for a period of one year vary **from 49.5% to 76% of the loan amount**, whereas average costs borne by lenders from the micro-lending segment **range between 26% and 38% of the loan amount**[13].

Decreasing current already rather low cost limits even further not only makes it impossible for lenders to operate at zero profit, but actually makes it impossible for them to operate in the lending industry at all.

At the same time, it is evident that neither banks nor SKOKs will feel the (financial) impact of draft provisions so significantly, because their activity is funded by a variety of other financial products to consumers and organizations. This is not the case for specialised non-bank consumer credit providers. In light of the above, **the proposed decreased caps on maximum non-interest credit costs constitute a discriminatory measure targeting non-bank consumer credit providers i.e. market players operating in Poland of which a large group belongs to foreign capital groups.** The

[12] See justification to the Act of 5 August 2015 amending the Act on Financial Market Supervision and certain other acts, which introduced the current limits: [Druk nr 3460 (sejm.gov.pl)]

[13] Ibidem.

proposed legislative solutions are therefore clearly contradictory to Article 56 of the TFEU, which sets out the EU principle of freedom to provide services.

5. Unclear limitations as to sources of financing loan institutions

The Bill introduces a novel restriction as to sources of financing non-bank consumer credit providers. Namely, according to the draft wording:

*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 organisational units** without legal personality, **also by issuing bonds or other debt instruments** or from undocumented sources.*

The explanatory note accompanying the Bill does not clarify the intended meaning and effects of this provision. It only states that it had to be included as a consequence of subjecting non-bank consumer credit providers to supervision by the PFSA (please see point 6 below for more detail), which is a very vague explanation of the proposed measure. One can only assume that the government's intention behind this novel restriction was to protect investors from excessive investment risk. If that is, in fact, the case, then it should be noted that the proposed restriction seems not only excessive, but also superfluous in light of the fact that **the issue of suitability of financial instruments for particular groups of investors is already regulated on the EU level by MiFID**[14]. MiFID already requires that the distributors of financial instruments offer instruments that are suitable in terms of their clients' risk profiles. Taking into account the EU-level rigid framework for dealing in financial instruments and the distributors obligations stemming therefrom, a complete ban on an entire class of financial instruments is unwarranted and excessive, to say the least.

The proposed measure appears to be partially based on that currently in place in the Banking Law[15] which penalises those market players who conduct banking activity without a license and which already applies to non-bank consumer credit providers. Although it is clear that non-bank lenders cannot take deposits and finance loans as in the case of banks, the proposed regulation seems to have much broader scope. It intends to prohibit collection of funds not only from the public (as envisaged in Article 9(1) of the CRD IV[16]), but also use of other legal instruments such as loans, bonds or other debt instruments that could be used to finance business by e.g. professional, institutional investors or even shareholders. In this context, **it is particularly disturbing that the Bill explicitly forbids financing of lending activity through bond issuance, which (until now) was a standard and acceptable market practice in Poland and also in**

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[14] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (hereinafter referred to as '**MiFID**')

[15] Banking Law Act of 29 August 1997 (hereinafter referred to as the '**Banking Law**').

[16] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (hereinafter referred to as the '**CRD IV**').

Europe. The proposed limitation is so broad that **it covers bond placements in other European countries**, regardless of intended type of bond holder, thus additionally undermining developments on the common capital market.

As Polish law already provides for a general prohibition of banking activity without a license, the proposed amendments can be interpreted as either:

- superfluous and thus redundant (if viewed as repeating and clarifying the prohibition arising under the Polish Banking Law); or
- introducing a new prohibition in addition to that in the Polish Banking Law that in an unprecedented way limits the ability to finance business. As a result of this interpretation, operations of non-bank consumer credit providers would be restricted to a much greater degree than in relation to other market players, who would only have to contend with restrictions in the Polish Banking Law.

Neither of the two possible interpretations of the Bill's aim in this respect is compatible with EU principles of proportionality and equality. **The regulation clearly does not meet requirements of the principle of legal certainty and as such is bound to fail the proportionality test and thereby is non-compliant with Article 56 of the TFEU.**

Moreover, **it discriminates non-bank consumer credit providers vis-a-vis other market participants in Poland** (operating in other areas of business) by requiring them to abide by two similar yet disjointed prohibitive sets of rules whose mutual dependencies are obscure and unpredictable.

Considering the wide scope of the discussed limitation, **it seems that actual intent was not to regulate the activity of non-bank consumer credit providers, but rather to undermine their financing sources and thus eliminate this type of business by proposing a regulation rendering this type of activity simply unprofitable**. Such severe steps by the Polish government could jeopardise many investments by European entities in Poland and in fact lead to indirect expropriation of such investors.

6. Supervisory powers of the PFSA

Another important element of the proposed regulation is introduction of a solution mandating activities of non-bank consumer credit providers to be supervised by the PFSA. The proposed scope of PFSA supervision of such non-bank consumer credit providers coupled with respective obligations imposed on those non-bank market players whose business operations are radically different from those of banks or SKOKs (who are entitled to hold deposits for their clients) is overly far-reaching and disproportionate to the objective it pursues i.e. supervising and enforcing compliance of non-bank consumer credit providers with the law.

The Bill not only proposes that the PFSA becomes the supervisory body for non-bank consumer credit providers, but also equips it with the same supervisory powers as it holds in relation to banks and SKOKs (for example, the ability to impose fines or remove an institution from the register of loan institutions, thus proscribing such entity from continuing lending business activity in Poland). It follows from the Bill that the PFSA may apply sanctions, inter alia, if a lending institution is found to engage in activities in breach of the CCA[17] or in contravention of conditions set therein. Such wording (apart from the fact that the difference between activities in breach of the CCA and in contravention of the CCA is unclear) leads to unwarranted supervisor discretion in imposing penalties and sanctions.

Moreover, the Bill imposes cumbersome reporting obligations of non-bank consumer credit providers towards the PFSA, whose scope (information on concluded agreements, granted credits, number of clients) does not seem to be in any way justified given the aim of planned PFSA supervision of such entities i.e. ensuring compliance of lending activities with the CCA.

The Bill also imposes an additional cost on non-bank consumer credit providers, namely a fee to cover **supervisory costs at the maximum amount of 0.5% of total revenues from lending** and not less than EUR 5,000. **This fee at the proposed level constitutes yet another form of discrimination of non-bank consumer credit providers compared to, for example, banks for whom supervisory costs are calculated on the basis of total assets** (value of loans granted) and not total revenues and at a maximum rate of **0.024%.** Moreover, banking regulations do not set a minimum threshold for such fees as will be the case for non-bank consumer credit providers if the Bill enters into force. Given the clearly less complex nature of activity pursued by non-bank consumer credit providers compared to banks, it is disproportionate and discriminatory to encumber these market players with more onerous supervisory costs compared to those borne by banks.

In addition, **after the introduction of proposed changes to Polish law, there will actually be two public authorities with almost the same supervisory powers controlling and supervising non-bank consumer credit providers** – the PFSA and Chairman of the Competition and Consumer Protection Office (hereinafter referred to as the '**UOKiK Chairman**). Considering the wide scope of competences of these two authorities, especially with regard to the protection of consumer rights and interests listed in the Bill and in regulations governing the role of the UOKiK Chairman, **it cannot be ruled out that their supervisory competences will overlap and allow differing views and assessments from two independent public sources, which will negatively affect the sense of legal certainty among entrepreneurs in Poland**. It is the Submitter's view that assessment of non-bank consumer credit provider compliance with provisions implementing the Consumer Credit Directive already exercised by the UOKiK Chairman is absolutely sufficient given the limited area of business (i.e. consumer credit) in which non-bank consumer credit providers are usually involved. Therefore, the PFSA should only have an auxiliary role in this respect and should not have additional and typically regulatory authority toward non-bank consumer credit providers, especially where supervised activities concern a sphere of consumer protection (the UOKiK Chairman's domain). Moreover, the UOKiK Chairman critically assessed this

[17] The Consumer Credit Act of 12 May 2011 (hereinafter referred to as the '**CCA**').

proposal by arguing that provisions proposed in the Bill would result in overlapping competence of his office and the PFSA, which could result, inter alia, in one infringement being covered by proceedings conducted by both authorities[18].

Since non-bank consumer credit providers are already supervised by the UOKiK Chairman and do not expose their customer deposits to risk, the PFSA should not treat them as banking institutions, particularly as regards information obligations, sanctions and bearing of supervisory costs. As a result, insofar as the Bill provides for additional supervision of non-bank consumer credit providers by the PFSA in the current shape, it should be assessed as disproportionate and discriminatory.

V. ASSESSMENT OF THE EFFECTS OF THE PROPOSED REGULATIONS ON THE FINANCIAL MARKET

The proposed solutions will have **significant negative impact on the financial market** in Poland, but also the EU financial services market as a whole given the interdependence between Member State markets.

First, the introduction of changes in the area of maximum non-interest credit costs will entail **a significant reduction in the viability of non-bank consumer credit providers in Poland** (already heavily affected by COVID-19 and related temporary decrease in maximum non-interest credit costs). This will most likely put an end to the non-bank consumer credit provider sector. **Virtually all non-bank lending offers will be withdrawn from the market on grounds of the business not being viable**. Meanwhile, banks and SKOKs will not be compelled to do likewise as they will practically not feel the (financial) impact of the draft provisions so significantly. This is because their profit comes from a variety of other financial products available to both retail and corporate clients, which is not the case for specialised non-bank consumer credit providers.

What is more, **the above limitation on maximum non-interest credit costs will be coupled with an unclear and discriminatory prohibition on available sources of lending activity financing.** The Submitter wishes to once again emphasise that the prohibition of financing of non-bank consumer credit providers through issuance of bonds and other debt instruments would be an unprecedented and clearly discriminatory measure targeted at one particular group of financial services providers. This would also paralyse the activities of such entities in Poland.

The highly probable decrease in supply of consumer credits and loans offered by non-bank consumer credit providers will not be accompanied by a decrease in demand for such services on the part of consumers. **The disappearance of non-bank consumer credit providers will be followed by growth in informal and pawnshop lending** to consumers, who will not be eligible for consumer credit at banks or SKOKs. The supply

[18] Position of the UOKiK on the Bill dated 3 November 2021: dokument530228.pdf (rcl.gov.pl)

gap will be replaced by new capital of unknown origin, thus creating a 'grey area' of lending with **direct impact on an increased crime rate**.

As mentioned above, consumer credit services in Poland, in addition to non-bank consumer credit providers, are also provided by banks and SKOKs. As a side note, the two largest Polish banks also operating in the consumer credit and loan sector belong to the State Treasury, so **the Bill may also result in unlawful state aid within the meaning of TFEU provisions, which risks distorted competition on the internal market** by favouring of certain undertakings (in particular, those supported by the state) over those targeted by the Bill. Although the Bill does not explicitly indicate any support for banks, including banks belonging to the State Treasury, market conditions that will most likely be triggered as a result of the proposed changes will justify the claim that these entities may benefit most from the proposed changes in law. Therefore, such a legislative proposal is clearly not in line with both the principle of competitiveness expressed in the TEU and EU state aid rules set out in the TFEU**.** A possible market exit of such non-bank undertakings will detrimentally limit the credit offer available to consumers. Importantly, these risks which may **distort competition on the internal market and affect trade between Member States** are not addressed (or deliberately omitted) by authors of the Bill.

VI. SUMMARY

As explained in detail in this position, solutions proposed in the Bill are **contrary to EU law, in particular, the Consumer Credit Directive and the proposal for the CCD2** in its current wording to the extent that they transgress allowable freedom of Member States in shaping national provisions on consumer credits to consumers. This is particularly evident in those parts of the proposal that relate to an obligation to obtain a borrower's declaration of income and expenditures and verification of such declaration, granting of consumer credits to creditworthy consumers exclusively and the consequences of violating the newly proposed rules. Moreover, the Bill introduces various legislative solutions that are **irreconcilable with the EU principle of equality** as they impose certain restrictions on non-bank consumer credit providers exclusively, while exempting other market players from their application without any objective reason. To the extent that the Bill introduces disproportionate, discriminatory and unclear measures in relation to non-bank consumer credit providers, it will **violate the EU principle of freedom to provide services expressed in Article 56 of the TFEU**.

The introduction of provisions proposed in the Bill on the maximum non-interest cost limit for consumer credit, prohibition relating to external sources of financing as well as additional obligations imposed on consumer credit providers **will adversely affect the financial market in Poland with no benefit to consumers.** By lowering the limit of maximum non-interest costs, many non-bank consumer credit providers in Poland will no longer be economically viable. At the same time, the business situation of the largest banks, including those owned by the State Treasury will improve as a result of amendments envisaged by the Bill. Such situation may lead to significant competition distortions in the future. In the long term, exemption of some market players from restrictive obligations regarding verification of borrower statements and consequences of non-compliance therewith should also be assessed from the perspective of regulations on unlawful public aid within the meaning of EU law. Bearing in mind that some discriminated operators (non-bank consumer credit providers) active in Poland come from pan-European capital groups, **the effects of the proposed changes will be felt in other Member States as well as on the internal market as a whole**.

Disappearance of non-bank consumer credit providers will be to the detriment of Polish consumers, who will be deprived of a diversified and competitive market offer. What is more, **consumers without high creditworthiness will no longer have a legal and safe financing source** (such customers are often deemed to be too risky by traditional credit providers i.e. banks and SKOKs), which will translate into development of a so-called 'grey' area of lending and a usury underground.

Due to non-compliance of the Bill with EU law at various levels (as presented above), the Submitter predicts that **Poland will fail to fulfil its obligations under EU Treaties if it adopts the Bill in its current form**. As a consequence, the Commission would be compelled to initiate an infringement procedure against Poland under Article 258 TFEU for violation of EU law. However, such ex-post intervention may not bring expected results. Given the multiplicity of negative market consequences that the Bill is likely to cause, the Commission should take appropriate measures already at this stage before irreversible distortions to the internal market ensue.