



Legal Alert

Warsaw | May 2015

Banking, Finance & Restructuring Department

DRAFT AMENDMENTS TO THE POLISH BANKING ACT AND THE CONSUMER CREDIT ACT

Currently, work on draft amendments to the Banking Act of 29 August 1997 (the “**Banking Act**”) and to the Consumer Credit Act of 12 May 2011 (the “**CCA**”) is under way. These draft amendments seek to improve the level of protection of consumers taking out credits and loans in two aspects.

Protection of consumers using financial services offered by consumer credit providers

The government draft legislation amending the Financial Market Supervision Act, the Banking Act, the CCA and certain other acts, as recently adopted by the Council of Ministers, aims to improve the level of protection of consumers who use financial services offered by service providers that are not supervised by the Polish Financial Supervision Authority (KNF) (the “**FMSA Amendment**”).

Key proposed changes:

- extending KNF’s powers to conduct investigation against entities which are reasonably believed to carry out licensed activities without a required license;
- tightening criminal penalties for collecting third party funds without a required authorization thus causing third parties to incur risk;
- enhancing cooperation between KNF and law enforcement agencies (KNF would be authorized to disclose information constituting bank secrecy) regarding notifications of suspicion of committing of an offense submitted by KNF;
- imposing restrictions related to the activity of granting credits and loans to consumers from own resources by specifying the necessary requirements for lending activities to be commenced and carried out;
- reducing consumer credit costs;
- defining the rules for providing lending institutions with access to credit registers and for sharing information on consumer credits.

The FMSA Amendment focuses on eliminating institutions that carry out regulated activities on the financial market without KNF’s authorization, which activities may show signs of fraudulent intent. In order to prevent lending institutions from applying unfair practices, the draft amendment, among others, vests in KNF powers to conduct investigation against entities which are reasonably believed to carry out activities on the financial market without the required authorization and **tightens criminal penalties for collecting third party funds without authorization with a view to causing such third parties to incur risk** by increasing a penalty of imprisonment from 3 to 5 years and a fine from the currently applicable maximum level of PLN 5 to 10 million. The changes are also to lead to an enhanced cooperation between law enforcement agencies and KNF in terms



Szymon Gałkowski
Partner
Banking, Finance &
Restructuring Department
s.galkowski@kochanski.pl



Julia Fabisiak
Associate
Banking, Finance &
Restructuring Department
j.fabisiak@kochanski.pl



Klaudia Szymańska
Associate
Banking, Finance &
Restructuring Department
k.szymanska@kochanski.pl

of submitting notifications of offense related to the financial market operation.

The draft amendment provides for a **definition of a “lending institution”** referring to the CCA which is to be incorporated in the Banking Act. Pursuant to the proposed definition, a lending institution means a lender, i.e. an entrepreneur within the meaning of the Polish Civil Code, which grants or promises to grant to a consumer, in the course of his trade, business or profession, a loan other than in the form of a deferred payment of the price or consideration for the purchase of goods and services offered by him. The definition of a lending institution also applies to entrepreneurs engaged in pawnbroker’s activities to the extent that they grant consumer credit. The definition of lending institutions does not apply to banking sector entities and credit unions which are required to obtain a relevant license to carry out business.

In addition, the draft amendment allows lending institutions to **share information on consumer credit in the non-banking sector** derived from a database kept by the institutions established under Article 105(4) of the Banking Act (credit information bureaus).

Importantly, the draft amendment also envisages a **maximum rate of interest for delay in repayment of consumer credit and interest on interest** (six times the pawn loan rate applied by the National Bank of Poland) – the maximum amount of interest for delay in repayment will also include fees required in connection with a delay in repayment of consumer credit (e.g. debt collection fees). The proposed maximum amount of interest for delay will **apply to all market participants**. This means that it will apply both in dealings between an entrepreneur on one part and a consumer on the other part, and in dealings between two professionals, i.e. between entrepreneurs, as well as between consumers.

In addition, the changes will also consist in **the introduction of a maximum amount of non-interest consumer credit costs** (e.g. debt collection costs). In accordance with the applicable provisions of law, parties to the agreement may decide on the amount, type and rules for charging fees for any arrears in the credit repayment at their own discretion. The amendment provides that a maximum amount of non-interest consumer credit costs of credit should be determined as the sum of 25% of the total credit amount and 30% of the total credit amount per annum and suggests that non-interest consumer credit costs throughout the lending term should not exceed the total amount of credit. It also provides that non-interest costs of credit granted within 120 days from the date of disbursement of the first credit should add up and cannot exceed (in aggregate) the maximum thresholds fixed.

The FMSA Amendment also aims to provide better protection to lending industry customers by laying down requirements related to the activity of granting consumer credit in relevant legislation.

Changes in credits denominated or indexed in foreign currencies granted to consumers

Since February 2015, the Lower House of the Polish Parliament has been working on a parliamentary draft amendment to the Banking Act and the CCA (the “**CCA Amendment**”) regarding, among others, protection of consumers (borrowers) taking out a credit denominated or indexed in a currency other than PLN against the risk of that currency increasing by more than 30% compared to the exchange rate that prevailed on the date the credit was granted, as well as a reduction of the number of remedies available to the lender against the borrower by prohibiting the former from reducing the amount of credit granted to the consumer and terminating a credit consumer agreement due to the consumer’s loss of creditworthiness if the credit proceeds have already been disbursed and the repayment has been secured, at least partially, by mortgage. The draft amendment has not been approved by, among others, the Polish Financial Supervision Authority and the Polish Bank Association.

The CCA Amendment proposes to address the issue of credits denominated in or indexed to foreign currencies, in particular Swiss francs.

The CCA Amendment applies to credits granted to consumers under the CCA and the Banking Act.

Kochański Zięba Rapala i Partnerzy

Metropolitan, Pl. Piłsudskiego 1

00-078 Warsaw, Poland

Tel.: +48 22 326 9600

Fax: +48 22 326 9601

www.kochanski.pl

The main objective of the CAA Amendment is to lay down the rule for mitigating the risk of exchange rate increase for credits denominated or indexed in a currency other than PLN by more than 30% compared to the exchange rate that prevailed on the date the credit was granted. In such case, for the purpose of calculating the principal and interest instalments payable in PLN and taking into account early repayment of all or any part of the credit in PLN, the lender should apply the rate not higher than that prevailing on the date the credit was granted plus 30%.

Another most important aspect of the proposed changes is to reverse, with respect to consumers, the currently applicable rule that the bank may reduce the amount of credit granted or terminate a consumer credit agreement despite timely repayment of installments if timely repayment of credit is threatened due to the borrower's poor financial standing. The bank may consider such threat to exist after it carries out an inspection under Article 74 of the Banking Act. The CCA Amendment proposes to add paragraph 5 to Article 75 of the Banking Act which states that the bank may not reduce the amount of credit granted to a consumer or to terminate a consumer credit agreement due to the borrower's loss of creditworthiness as long as the bank's receivable is even partially secured by mortgage and the loan proceeds have already been disbursed.

A similar rule is introduced by the CCA Amendment for credits which are at least partially secured by mortgage.

Importantly, the proposed changes are to take effect as of the date of entry into force of the CCA Amendment also to any previously concluded consumer credit agreements. This means that, as of the date of entry into force of the CCA Amendment, an increase in foreign currency exchange rate to PLN by over 30% compared to the date the credit was granted will have no impact on principal and interest instalments or the option of early repayment of credits granted to consumers. In such case, the exchange rate prevailing on the date the credit was granted plus 30% will apply.

Legal meaning

The FMSA Amendment primarily seeks to provide better protection to lending industry consumers by eliminating from the market any entities operating without a required license and eradicating the practice of charging exorbitant, unreasonable fees for the credit granted. The proposed amendment also addresses the issue of charging interest for delay in repayment and seeks to reduce debt collection costs that are to be borne by the consumer.

The CCA Amendment proposes to put in place a system solution replacing the borrowers' need to bring a legal action on the basis of the so-called *rebus sic stantibus* (an escape clause) relating to a fundamental change of circumstances and which is an exception to the general rule of *pacta sunt servanda* (promises must be kept) and limiting a consumer debt increase mainly due to changes in the CHF exchange rate. If the CCA Amendment enters into force in the proposed wording, the adverse effects of FX changes in the case of credits denominated or indexed in foreign currencies will be limited.

If any of the issues addressed above raises your concerns or requires further clarification, the lawyers of Kochański Zięba Rapala & Partners are willing to assist you.

Kochański Zięba Rapala i Partnerzy

Metropolitan, Pl. Piłsudskiego 1
00-078 Warszawa, Polska

Tel.: +48 22 326 9600

Fax: +48 22 326 9601

www.kochanski.pl