THE IMPACT OF THE MORTGAGE CREDIT DIRECTIVE 2014/17 IN POLAND

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Summary

1. The emergence of a real estate market after Poland's 1990 shift to a market economy.

The development of the Polish real estate market began after the commencement of political and economic reforms in 1990 that redirected Poland to a path of democracy and a market economy. Unfortunately, economic transformation was not accompanied by a developed housing policy and the state of the real estate market left a lot to be desired. Soon after the transition to a market economy it was noted that as of 1994 the shortage of dwellings was approximately equal to 1.6 million and that at the rate of construction achieved in 1993 it would take at least 18 years to erect the required number of dwellings (units/flats).[1] The number of units per 1000 persons nationwide amounted to 283 in 1988 and to 297.6 in 1995, whereas in Western Europe this was as high as 400.[2] Throughout the 1990s housing construction was well below the needs[3] due to high inflation and the lack of developed market institutions and legal regulations. According to OECD studies, in 2002 the housing shortage, which reflects the difference between the number of households and the number of available dwellings, still amounted to almost a million units.[4]

The Polish real estate market was lacking developed financing mechanisms that would stimulate the construction of new real estate. Banks did not have adequate procedures of handling requests for mortgage credit and were further discouraged from involvement on the real estate market by high returns yielded by State Treasury bonds and credits not connected with the real estate market. Additionally, banks had difficulties in properly assessing the risks of long-term credits due to uncertain levels of real interest rates and future incomes of borrowers.[5] Consequently, mortgage

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[1] O. Kapliński, T. Thiel, 'Evaluation of multi-family housing systems in Poland' (1995) 13 *Construction Management and Economics* 291, 291-292.

[2] Blunt, Muzioł-Węcławowicz, , 'Improved Management of the Existing Stock – the Case of Poland' (1998) 5 *Housing Studies* 697, 698.

[3] See G. Panek, *National Report for Poland,* TENLAW: Tenancy Law and Housing Policy in Multi-level Europe (project funded from the European Union's Seventh Framework Program for research, technological development and demonstration under grant agreement no. 290694), 6-9, available at http://www.tenlaw.uni-bremen.de/reports/PolandReport_09052014.pdf

[4] OECD, *OECD Economic Surveys: Poland,* (Paris, OECD Publishing, 2008), 108.

[5] E. Kucharska Stasiak, *Nieruchomość w gospodarce rynkowej,* (Warszawa, PWN, 2006), 181.

financing did not develop on a significant scale until after the year 2000.[6] From the year 2001 onwards the State had almost completely withdrawn from subsidizing residential construction and this coincided with serious reforms of the housing co-operative sector which up until that time had been the major provider of multi-family housing estates[7]. This meant that buyers of residential real estate would have to rely on market instruments to secure financing for the purchase of houses and flats.

The situation on the housing market began changing with the beginning of the new millennium. The real estate market was strongly influenced by positive stimuli in the form of an increasing gross domestic product, growing wages, a stable, low level of inflation, the decrease of interest rates in Poland and in Switzerland, and the appreciation of the Polish currency value in relation to foreign currencies. Furthermore, the accession of Poland into the European Union in 2004 made the Polish real estate market competitive among the EU States and opened possibilities of additional investment from foreigners (developers as well as private persons).[8] After the year 2000 interest rates began decreasing from two digit numbers to one digit ones, with one of the lowest levels achieved in 2006, when the National Bank of Poland reference rate[9] decreased to 4% from the level of 19% in 1999.[10] Decreasing interest rates finally made bank loans accessible to citizens and banks began competing for clients, offering low interest rates and friendly lending procedures. At the end of 1996 bank loans for the purchase of residential real estate constituted only 5.1% of household loan/credit debts, whereas at the end of 2006 this number was as high as 42,5%.[11]

In 2002 the Polish mortgage credit market was 66% larger than in 1999. An even higher growth was noted on the residential mortgage credit market which grew by

[6] J. Łaszek, 'Recent Developments in the Housing Market in Poland' (2011) summer *Housing Finance International* 6, 7.
[7] I. Foryś, 'Zmiany strukturalne kredytów mieszkaniowych w Polsce' (2012) 26 *Studia i Prace Wydziału Nauk Ekonomicznych i Zarządzania Uniwersytet Szczeciński* 53, 54.
[8] M. Wąsewicz, 'Rynek nieruchomości mieszkaniowych i jego finansowanie' (2010) 2 *Annales Universitatis Mariae Curie-Sklodowska Lublin – Polonia* 557, 558.
[9] This is the minimum money market intervention rate, the yield on 7-day NBP money market bills.
[10] M. Lissowska, J. Szufler, 'Cykl mieszkaniowy a system bankowy – przypadek Polski' (2012) 88 *Prace i Materiały Instytutu Rozwoju Gospodarczego SGH* 85, 98.
[11] I. Foryś, 'Zmiany', 56.

almost threefold when compared to 1999.[12] The year 1999 was also the first year in which residential mortgage credits granted to physical persons/consumers, exceeded those granted to businesses (51% to 49%). In 2002 this ratio was 72% to 28%.[13] The growing availability of mortgage credit and the visible activity of private developers that became noticeable after the year 2000 was a welcomed improvement, as it opened the possibility to buy houses and apartments in new built developments, which offered more functional and aesthetically pleasing housing solutions. After 45 years of a totalitarian government and an inefficient economy, with an insufficient supply of residential units, the residential market began expanding with the help of mortgage credit.

The dynamic increase of mortgage credit activity of banks directed mainly towards private purchasers of residential real estate produced an increased demand for housing units, with the supply side not being able to react quickly enough due to lengthy procedures of obtaining building permission as well as to the duration of the construction process itself. This inevitably led to increased prices on the residential real estate market and attracted more buyers who were afraid that further growth of prices would exclude them from the market.[14] In the years of 2002-2009 the increase in prices of residential real estate exceeded the increase of gross wages for households, forcing them to rely on credit in order to purchase residential real estate.[15] The highest boom of mortgage credit loans for buyers of residential premises took place in the years 2006-2008, when foreign currency (predominantly CHF currency) credits dominated the mortgage credit lending market and banks concentrated on increasing their share in the residential credit market at the cost of properly assessing and charging for risk connected with the granted credits.[16]

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[12] M.A. Olszak, Wybrane aspekty rozwoju rynku kredytów hipotecznych w Niemczech i w Polsce, (2004) 182 *Materiały i Studia* 1*,* 50.
[13] Ibidem, 33.
[14] M. Lissowska, J. Szufler, 'Cykl', 98.
[15] M. Wąsewicz, 'Rynek', 562.
[16] M. Willmann, 'Wpływ rekomendacji nadzorczych na kształtowanie się rynku kredytów mieszkaniowych w Polsce' (2013) 1 *Naukli o Finansach* 204, 210.

2. The housing situation and housing preferences.

In Poland the predominant form of tenure concerning homes has always been private owner occupation.[17] This is probably due to tradition and also to the need to react to the communist era, when private ownership was politically discouraged, although in Poland private ownership of real estate was never abandoned.[18] The popularity of home ownership as opposed to other forms of tenure regarding residential real estate is also connected with the difficult history in the XVIIIth, XIXth and XXth centuries, and the general social and economic situation. Ownership is still regarded as the best and safest option, particularly, since traditionally low labour mobility and strong family ties have resulted in persons remaining in their hometowns or nearby.

According to the Central Statistical Office of Poland almost 82% of households are owner occupiers of their homes and out of this figure 10.9% are homes encumbered by a mortgage.[19] These numbers include not only the right of ownership but also the cooperative proprietary right to a unit which, technically speaking, is a limited real right within a housing cooperative. The right is however transferrable *inter vivos* and *mortis causa*, may have its own register (the equivalent of a land register), and may be encumbered by a mortgage,[20] therefore for statistical purposes holders of this cooperative right have also been classified as owner occupiers.

In a slightly earlier study of the Central Statistical Office of Poland it was indicated that physical persons are owner occupiers of 64.1 % of homes, whereas holders of the cooperative proprietary right to a unit are in possession of 15.4% of dwellings.[21] The above numbers show that approximately 17% to 20% of households rely on renting to satisfy their housing needs. It may also be useful to note that 45.2 % of households live in single family, detached houses and 40.1% live in multifamily homes (apartment blocks), however these numbers are very different when one compares the situation in

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[17] A.C. Blunt, A. Muzioł-Węcławowicz, 'Improved Management of the Existing Stock – the Case of Poland' (1998) 5 *Housing Studies* 697, 697.

[18] See also M. Habdas, *Property and Trust Law Poland,* International Encyclopaedia of Laws (Alphen aan den Rijn,NL, Kluwer Law International, 2015) 38-40, 54-55

[19] Central Statistical Office, *Living* (2014) 52-53.

[20] See also M. Habdas, *Property,* 142-148.

[21] Główny Urząd Statystyczny, *Mieszkania. Narodowy Spis Powszechny Ludności i Mieszkań 2011 /Housing. National Census of Population and Housing/ (*Warsaw, Statistical Information and Elaborations, 2013) 25.

cities and in rural areas. In the cities, 59.4% of households live in multifamily houses, while in the countryside this type of accommodation accounts for only 4.1%. In rural areas the situation is opposite to the one described in the cities, as 82.8% of households live in single family, detached houses.[22]

In comparison with the EU-28 average the share of owner occupation in Poland is rather high and the share of leases is quite low. According to Eurostat data, 70.6 % persons in the EU-28 lived in owner-occupied dwellings, whereas renting accounted for 29.4% (18.5 % were tenants with a market price rent, and 10.9 % tenants in reduced-rent or free accommodation). It was also noted that more than half of the population in each EU Member State lived in owner-occupied dwellings in 2012, but the range was very wide, starting with 53.2 % in Germany and ending with 96.6 % in Romania. [23]

In Poland, housing affordability, defined as the number of the annual gross salaries required to buy a standard-sized new dwelling (70 m^2) is low, as it takes 7.4 years to acquire the mentioned new dwelling. In countries with affordable own housing (Denmark, Germany and Portugal) this figure is 2 - 3.5 years, whereas in countries with relatively affordable own housing (Belgium, the Netherlands, Ireland, Spain and Austria) this ranges from 3.6 to 5.6 years.[24] After the global crisis began in 2007, mortgage lending has been substantially reduced in Poland. In 2012 the number of mortgage loans granted to physical persons was 15% lower than in 2011, while their aggregate value was seven times lower than their value in 2011.[25]

Poland, like many other Central European Countries, is lacking a greater differentiation among legally and economically accessible forms of satisfying the citizens' housing needs, since ownership remains the prevailing option and the rental market is underdeveloped, risky to private landlords and too costly for self-governments. The government is still devoting most of its efforts to programs supporting the acquisition of home ownership (e.g. Family in Its Own Home – public financial assistance in

[22] Central Statistical Office, *Living conditions of families in Poland* (Warsaw, Statistical Information and Elaborations, 2014) 51-52.
[23] <http://ec.europa.eu/eurostat/statistics-explained/index.php/Housing_statistics>
[24] D.R. Rogerova et al., *Property index. Overview of European Residential Markets European housing 2013*, 3rd edn (Czech Republic, Deloitte Real Estate, 2014) 13.
[25] Instytut Rozwoju Miast, *Informacje o mieszkalnictwie. Wyniki Monitoringu za 2012r. /Information on housing. Monitoring results for 2012/* (Kraków, IRM, 2013) 89.

mortgage credit repayment for young families and single parents, discontinued in 2012 but generating government expenditure until 2021 now substituted by A Dwelling for the Young – planned to run from 2014 to 2018, offering public financial assistance of up to 30% in making the down payment necessary to obtain a bank loan secured by a mortgage and in repaying some of the loan) thus focusing only on young persons who have a chance of obtaining a loan and promoting their early dependence on long term loans which impede their mobility. The needs of lower income groups or those who need greater mobility to find employment are still disregarded. Government assistance in acquiring home ownership has influenced the real estate market and the credit market, by contributing to speculative market behaviours. Additional money that families were obtaining from the government allowed developers to raise market prices and this in turn increased demand for real estate as well as mortgage credit, because potential buyers did not want to wait with purchases in fear of further price increases.

3. The mortgage credit market at the onset of the global financial crisis.

The onset of the global financial crisis associated with the bankruptcy of the American investment bank Lehmann Brothers in September 2008 also influenced Poland and coincided with a steady decrease of the gross domestic product which in 2009 amounted only to 1,8%. Such a low level of the gross domestic product brought about the increase of unemployment and consequently difficulties of households in timely loan repayments.[26] Nevertheless Poland did not experience a severe recession mostly because banks did not employ securitization (due to inadequate legal regulations) as a means of obtaining additional financial resources from subprime mortgages.[27] Still the situation was serious, when it was realized to what extent Polish banks are exposed to default on foreign currency loans (mostly CHF) they so aggressively offered in previous years neglecting to properly assess the creditworthiness of borrowers and to take into account and adequately inform their clients of the currency risk. However households

[26] A. Bień, 'Stabilność system bankowego w Polsce w okresie kryzysu finansowego' (2011) 109 *Studia i Prace Kolegium Zarządzania i Finansów* 16, 18-19.
[27] M. Lissowska, J. Szufler, 'Cykl', 109.

managed to retain their ability to pay the CHF mortgage credit instalments due to the Swiss National Bank's decision to lower interest rates, which mitigated the negative effects of CHF value increase. Additionally at the end of 2008 the value of credits granted to the nonfinancial sector noticeably exceeded the value of deposits that sector brought to the banks. It was also feared that foreign banks experiencing severe problems due to the global crises would attempt to obtain financial support from daughter banks in Poland.[28]

In the meantime, as early as March 2006 the Polish Supervision Authority for Banking (currently the Polish Financial Supervision Authority) introduced Recommendation S[29] that was to be implemented by the banks by 1st July 2006. From that moment banks were obliged to offer borrowers bank loans in Polish currency as the first possibility and only when the borrower rejected that offer were they allowed to offer a foreign currency loan. The borrower had to issue a written statement that he/she is aware of the additional risk such a loan poses. The banks were also obliged to assess creditworthiness based on interest rates applied to domestic currency loans and to assume the sum to be borrowed is 20% higher than the actual loan to be granted.[30]

Although these measures indicated that the Polish Supervision Authority for Banking intended to limit the growth of loans denominated in foreign currency, its supervision efforts did not bring about the desired result and lax lending practices, particularly with relation to foreign currency loans, continued until the end of 2008, fuelled by consumer optimism, undiminished demand and growing competition among commercial banks.[31] It should also be noted that at the time Recommendation S was issued it was not viewed as beneficial to households. Politicians, economists (e.g. the

[28] A. Bień, 'Stabilność', 19-22.
[29] The legal status of recommendations issued by KNF is highly debatable, in particular whether they bind the banks. However it cannot be denied that these recommendations are issued by KNF on the basis of art. 137 point 5 Banking Law Act 1997 and in practice carry a lot of weight since KNF is responsible for supervision of the financial market and has legal instruments that it may employ towards banks (e.g. financial penalties), cf. T. Czech, 2009 'Charakter prawny rekomendacji Komisji Nadzoru Finansowego', *Przegląd Prawa Publicznego* 11, 63-80; D. Maoeniak, 2015 'Rekomendacje i wytyczne KNF– dialog nadzorowany, czyli „miękkie prawo" z twardym skutkiem', *Prawo asekuracyjne* 2*,* 10.
[30] The Polish Supervision Authority for Banking, *Rekomendacja S dotycząca dobrych praktyk w zakresie ekspozycji kredytowych zabezpieczonych hipotecznie*, (KNB, Warszawa, 2006), 18.
[31] M. Willmann, 'Wpływ', 210.

Adam Smith Centre), media, and consumer organizations (along with the Office for Competition and Consumer Protection) argued that it violates free competition and its objective is to increase banks' revenues by making less expensive, foreign currency loans more difficult to obtain, forcing borrowers to take out more expensive, domestic currency loans.[32] Thus the tendency to take out foreign currency loans was not simply a cheap option taken by persons who wished to save money at the cost of a high risk as it was widely advocated, supported and justified by numerous professionals in the economic, media and academic world.

In December 2008 the Polish Financial Supervision Authority (*Komisja Nadzoru Finansowego – KNF*)[33] introduced Recommendation S (II) that was to be applied from 1st April 2009. Its purpose was to introduce more awareness of risks connected with foreign currency loans among borrowers by obliging the banks to more clearly and consistently inform the clients in writing about the risks of currency value fluctuations, the risks connected with the variable interest rate, and the influence of the currency spreads on the actual value of loan instalments.[34] KNF noted that the market boom of residential investment, mortgage credit and purchases of residential real estate in the years 2006-2008 has endangered the stability of the banking system that had very little experience with such intense mortgage credit activity and had no adequate procedures to properly assess, monitor and manage risk connected with mortgage credit. Therefore KNF additionally introduced various requirements of proper risk assessment and implementation of procedures allowing banks to properly assess, monitor and manage risk connected with mortgage credit, in particular by analysing the risk of changes in currency values, interest rates, and the value of real estate securing the credit.[35]

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[32] Cf KNF, Przypomnienie publicznej dyskusji o kredytach walutowych, 10 March 2015; https://www.knf.gov.pl/Images/przypomnienie_publicznej_dyskusji_CHF_tcm75-40728.pdf

[33] The Polish Financial Supervision Authority began operating on 1st Jan. 2008 and replaced the previous Polish Supervision Authority for Banking (Komisja Nadzoru Bankowego) pursuant to provisions of the act of 21 July 2006 on the supervision of the financial market.

[34] KNF, Resolution 391/2008, *Rekomendacja S* (II) *dotycząca dobrych praktyk w zakresie ekspozycji kredytowych zabezpieczonych hipotecznie,* (KNF, Warszawa, 2008), 26-28, points 5.1.1. – 5.1.12.

[35] E. Wiszniowski, 'Przydatność wartości rynkowej nieruchomości przy badaniu ryzyka kredytowego wg rekomendacji s (ii) komisji nadzoru finansowego' (2010) 4 *Świat Nieruchomości* 54, 54-55.

From 2009 onwards banks in Poland slowly began adjusting to new national and international economic surroundings, realizing that the aggressive mortgage lending policies, particularly in CHF currency, have negatively influenced their financial stability. They turned to promoting deposits by offering relatively high returns and visibly reduced lending activity, including mortgage credits. In 2009 the value of credits granted to households and businesses increased by 26.5 billion PLN whereas in 2008 that increase was 147.2 billion.[36] Granting foreign currency credits, particularly in CHF currency was noticeably limited and slowly being completely abandoned, although in 2010 banks promoted foreign currency loans in Euro, with every fourth residential mortgage credit being granted in that currency.[37] Further requirements concerning increased requirements for assessing creditworthiness as well as the required LtV ratios[38] were introduced by KNF in the third amendment of its Recommendation S (III), which came into force partly on the day of its enactment (i.e. 25th Jan. 2011) and completely on 1st January 2012 (see below).

4. The current mortgage credit situation

According to data compiled by the Bureau of Credit Information (*Biuro Informacji Kredytowej- BIK*)[39] as of 30 June 20016 there are 2,187 million active residential bank loans, however only with respect to 1,4% of those loans there is a default in repayment exceeding 90 days. Currently 899 thousand Poles are repaying 529 thousand residential bank loans denominated in Swiss Franks (CHF).[40] The National Bank of Poland (*Narodowy Bank Polski – NBP*) estimates that residential bank loans denominated in foreign currency (CHF bank loans account for 82% of the value of

[36] A. Bień, 'Stabilność', 26-27.
[37] M. Kisiel, '10 lat boomu hipotecznego w Polsce: najważniejsze momenty', http://www.bankier.pl/wiadomosc/10-lat-boomu-hipotecznego-w-Polsce-najwazniejsze-momenty-7272974,7.html
[38] These could still be established independently by banks based on their own analyses concerning the expected level of money recovery from instruments applied to secure credit, however at no more than 80% if the bank could not support their LtV levels by adequate data.
[39] BIK has been established on the basis of art. 105 s. 4 BLA according to which banks acting jointly with bank chambers of commerce may establish an institution authorized to process and make available information to banks and other institutions statutorily authorized to grant credits and loans under certain conditions laid down in the Act.
[40] BIK, 'Mieszkania finansowane kredytami frankowymi – stan na 30.06.2016 r.', p. 1, https://www.bik.pl/informacje-prasowe/-/article/2016-09-07-najnowsze-dane-o-kredytach-w-chf

foreign currency loans) account for 46,3% of residential bank loans granted to households.[41] There are practically no new foreign currency bank loans granted, due to problems that lenders have experienced with repaying CHF bank loans after the steady rise of the value of Swiss currency in relation to Polish currency. 70% of currently active CHF bank loans were granted in the years 2006 – 2008. It is also estimated that in universal banks, assets in the form of residential mortgage credits make up from 40 to 50% of the total asset base which indicates a change of the banking business model.[42]

95% of CHF lenders and 96% of domestic currency lenders have only one residential bank loan, which confirms that these loans were taken in order to satisfy personal housing needs and not for investment purposes.[43] The overall repayment of residential bank loans is satisfactory. Even for bank loans exceeding 700 000 PLN (approximately 175 000 Euro) the default rate is about 10,9% for domestic currency bank loans and 3,7% for CHF bank loans.[44] KNF estimates that at the end of 2015 the portfolio of commercial banks contained 35,6 thousand endangered mortgage loans for residential immovables (as opposed to 37,7 thousand at the end of 2014) out of which 19,5 thousand were domestic currency loans and 16 thousand were foreign currency loans. Taking into account the families of lenders, this denotes about 100 – 150 thousand persons who are experiencing problems with repaying their loans.[45] Although the above figures concerning bad/endangered bank loans for the purchase of a dwelling do not indicate an immediately tragic situation for the banks or the citizens, it must be noted that relatively low percentages of bad credit are influenced by the fact that some banks have sold (assigned) these loans (so they are no longer on their books) and

[41] NBP, 'Raport o stabilności systemu finansowego. Lipiec 2015', p. 39-40, http://www.nbp.pl/systemfinansowy/rsf072015.pdf
[42] KNF, Próby rozwiązania problemu związanego z portfelem kredytów CHF. Materiał na Forum Bankowe 2015', Warszawa 2015, https://www.knf.gov.pl/Images/prezentacja_Forum_Bankowe_11-03-15_tcm75-40763.pdf
[43] BIK, 'Mieszkania', 3, 7.
[44] Ibidem, 5.
[45] KNF, 'Raport o sytuacji banków w 2015 r.', p. 66-67, available at http://www.knf.gov.pl/Images/RAPORT_O_SYTUACJI_BANKOW_2015_tcm75-47215.pdf.

have simultaneously increased the activity of granting new loans. Therefore in reality, the situation is more serious than figures may indicate[46].

NBP currently points out that accessibility of bank loans for the purchase of a dwelling will decrease because of the required LtV level of 85%. Moreover, KNF has recommended that creditworthiness should be calculated with reference to household expenses at least at the level of minimum social welfare. Meanwhile, in half of bank loans granted in 2014 banks have accepted household costs at a level equal to or lower than social welfare.[47] In the current Recommendation S (June 2013), KNF has introduced the requirement of LtV not exceeding 80%, for bank loans for residential real estate, with the exception of loans granted between the beginning and end of 2016, when an LtV of 85% may be accepted. Exceptionally, within that period an LtV of 90% may be accepted if the excess of 85% is adequately insured and secured.[48] In addition, the notion of Debt to Income ratio was introduced and banks are required to decide on the acceptable level of this ratio for potential borrowers (recommendation 9 of the Recommendation S 2013) and take it into account during the process of assessing creditworthiness. This allows banks considerable freedom in determining DtI ratios, however it is recommended that if DtI exceeds 40% for a person who earns no more than the average wage in a given region or 50% for a person who earns at least the average wage in a given region extra caution must be observed if the bank intends to grant a loan. In such situations the bank and the client must be aware of the extra risk, with the bank informing the client of his/her limited future possibility of accumulating any savings or being able to afford large expenditures.[49]

5. Legal aspects of mortgage credit

The most popular and widespread credit secured over an immovable is the mortgage credit (*kredyt hipoteczny*). From a legal point of view it is a bank loan contract,

[46] KNF, 'Raport 2015', 68.
[47] NBP, 'Raport o stabilności systemu finansowego. Luty 2016', p. 41, available at http://www.nbp.pl/systemfinansowy/rsf022016.pdf
[48] KNF, Resolution 148/2013 *Rekomendacja S dotycząca dobrych praktyk w zakresie zarządzania ekspozycjami kredytowymi zabezpieczonymi hipotecznie*, Warszawa 2013, p. 31-32.
[49] KNF, Recommendation S 2013, recommendation 9, see points 9.1-9.5.

regulated in article 69 of the Banking Law Act 1997 (BLA),[50] which is derived from the loan contract, defined in article 720 of the Polish Civil Code (PCC)[51]. In a bank loan contract, the bank assumes the obligation to make a specified amount of money available to the borrower for a time specified in the contract and for a specified purpose, and the borrower assumes the obligation to use the money according to contractual provisions, return the used amount of money with interest in designated payment times, and to pay a commission charge on the granted bank loan. The contract may be characterized as consensual, causal, in which both parties have mutual obligations, and consideration is given. Also the lender in a bank loan contract must be an entity, which according to Polish law fulfils the criteria of a bank (article 2 and 5 BLA). The borrower, on the hand, may be a business or a consumer.[52] The loan contract is non-gratuitous, because interest on the borrowed capital must always be paid, however according to art. 69 s. 2 point 9 BLA, the commission is not an obligatory element of the contract.[53] It also follows from art. 69 s. 2 point 5 BLA that the interest to be paid must be specified in a precise manner. If the interest rate is variable, changes must be made according to indicated indices that are objective and not determined unilaterally by either party to the contract.[54]

The legislator enumerates the elements that must be specified in the bank loan contract. These are as follows: 1) the parties to the contract; 2) the amount and the currency of the loan; 3) the purpose for which the loan was granted; 4) the principles and date of repaying the loan; 4a) in cases of loans denominated in or indexed to a foreign currency – detailed methods of ascertaining the manner and dates of determining the exchange rate on the basis of which the amount of the loan, its instalments and conversion into the currency paid out to the borrower are calculated (point 4a added in 2011); 5) the percentage rate of the loan and bases for its

[50] Act of 29 August 1997consolidated version Dz.U.2015, item 128, with subsequent amendments.
[51] Act of 23 April 1964, Dz.U.64, no.16, item 93 with subsequent amendments.
[52] For more see S. Kalus, M. Habdas, ‘Bank loan contracts in Polish law – the legal position of the borrower’ in M. Kenny, J. Devenney, L. Fox O’Mahony (eds) *Unconscionability in European Private Financial Transactions. Protecting the Vulnerabl*e, Cambridge University Press – Cambridge 2010, 290-292.
[53] B. Paxford in H. Gronkiewicz-Waltz (ed) *Prawo bankowe. Komentarz,* C.H. Beck – Warszawa, 2013, 242-243.
[54] G. Sikorski, *Prawo bankowe. Komentarz,* C.H. Beck – Warszawa 2015, 203.

amendment; 6) the manner of securing the loan; 7) the scope of bank's rights concerning monitoring the use and the repayment of the loan; 8) the date and manner in which the loan is made available to the borrower; 9) the amount of commission if the contract requires it to be paid; 10) conditions under which amendments and dissolution of the contract may be made. In 2011 a new section number 3 was added to art. 69 BLA. Pursuant to that section in cases of loans denominated in or indexed to a foreign currency, the borrower may pay the loan instalments or repay the loan in part or in full directly in that currency. The bank loan contract should specify conditions of opening and maintaining an account for accumulating the foreign currency and conditions of making payments with the use of that account. Performing this obligation by the bank cannot be connected with additional costs to the borrower (art. 75b BLA).[55]

The 2011 amendments mentioned above were the result of unfair practices employed by banks with respect to foreign currency mortgage credits (for more on unfair contract terms see below). The intention of the lawmaker was to oblige banks to precisely specify matters concerning the exchange rates and the manner in which they are set and to allow borrowers to purchase foreign currency without the bank's involvement. The introduced provisions are mandatory and cannot be altered by contractual clauses. They relate not only to loans granted after the amendment came into force, but also to loans granted before that time to the extent they have not yet been repaid.[56] Unfortunately the requirement stated in point 4a is too general, because apart from obliging banks to state how exchange rates are to be calculated it does not introduce any requirements concerning admissible manners of calculation. In practice, the problem with setting exchange rates concerns unfair methods of calculating them more than not specifying rules of such calculation in the contract. Therefore the lawmakers has fallen short of providing true protection of borrows in cases of foreign currency loans.[57]

[55] The 2011 amendments to BLA came into force on 26 Aug. 2011 pursuant to the act of 29 July 2011 on the amendment of BLA and other acts, Dz.U. 2011, no. 165, item 984.
[56] For more cf. T. Czech, 'Spłata kredytu udzielonego w walucie obcej lub indeksowanego do waluty obcej', (2011) 11 *Monitor Prawa Bankowego* 63 et seq.
[57] B. Paxford, in *Prawo*, 240-241.

Another important matter connected with bank loans is the assessment of creditworthiness. According to the exact wording of art. 70 s. 1 BLA: *The bank makes granting the bank loan dependent on the creditworthiness of the borrower. Creditworthiness denotes the ability to repay the borrowed capital together with interest at dates specified in the contract. At the bank's demand, the borrower is obliged to supply documents and information necessary to assess his/her creditworthiness*. It follows from the above that banks have an obligation to assess creditworthiness and cannot grant a loan if the assessment does not yield a positive result. If in such circumstances the loan is granted, the bank violates the law.[58] Exceptionally, pursuant to art. 70 s. 2 BLA, the bank may grant a loan to a person who does not possess creditworthiness under the condition that a special form of securing the loan is instituted and a plan of repairing the borrower's finances is presented, ensuring the attainment of creditworthiness within a specified period.

Since granting a loan despite the lack of creditworthiness is a violation of the law, it is important to consider the effect of concluding a bank loan in such circumstances. In academic writings there seems to be agreement that violating this rule does not lead to the nullity of the contract pursuant to art. 58§1 of the Polish Civil Code (PCC).[59] According to that provision, an act in law which violates the law or is aimed to circumvent the law is null and void, unless a special provision introduces a different effect, in particular that in the place of null and void clauses, indicated statutory provisions find application. It is argued that art. 70 BLA is a public law provision which only places a public law obligation on the bank and its violation only causes public law and not private law consequences.[60] In essence the former are the possibility of the KNF to employ certain measures (financial penalties, possibility of removing or suspending members of the bank's management board, limit the bank's commercial activities, renounce the permission to create a bank and put it into liquidation).

[58] W. Gonet, 'Szczególny sposób zabezpieczenia wierzytelności banku jako przesłanka finansowania podmiotów niemających zdolności kredytowej, (2009) 4 *Przegląd Sądowy* 68, 69.
[59] Act of 23 April 1964, consolidated version Dz.U. 2014, item 121, as amended.
[60] W. Gonet, 'Szczególny', 69; A. Kawulski, *Prawo bankowe.Komentarz,* Lexis-Nexis – Warszawa, 2013, p. 348; G. Sikorski, *Prawo,* 205; Z. Ofiarski, *Prawo bankowe,*Wolters Kluwer – Warszawa, 2013, p. 504; similiar opinion: P. Bielski, 'Glosa do wyroku Sądu Najwyższego z dnia 14 maja 2002 (V CKN 1667/00), (2004) 4, *Rejent* 131, 139-140.

Private law effects of violating a public law provision are accepted when it can be ascertained that the purpose of a public law provision is to prevent the conclusion or a particular content of an act in law (contract).[61] If the intention of the lawmaker and the purpose of the public law provision is to eliminate the creation of a private law relationship of a given content or if it is aimed at protecting the interests of the parties to a contract as well as of third parties, then violating public law provisions my indeed cause nullity pursuant to art. 58§1 PCC.[62] If, however, the public law provision is not aimed at preventing the creation of specified private law relationships, then violating those provisions will result only in consequences prescribed in public law and will not influence the validity of a private law contract.[63]

Consequently, in order to determine whether violating the requirement set out in art. 70 BLA effects contract nullity under art. 58§1 PCC it is necessary to ascertain the purpose of that article and whether it is in fact aimed at preventing the creation of private law relationships in cases where the borrower's creditworthiness has been negatively assessed. It is not disputable that the requirement to assess creditworthiness of the borrower is aimed at protecting the interest of the bank, its owners as well as other clients, because it prohibits lending money to persons who cannot pay it back and thus endanger the financial situation of the bank.[64] It may also be argued that the main purpose of art. 70 BLA is not to protect the bank and its interests, but to protect owners of bank deposits, because their money is jeopardized if the bank takes unnecessary risks.[65] In general, the aim of art. 70 BLA is to improve the safety of the banking system.[66]

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[61] Z. Radwański, A. Olejniczak, *Prawo cywilne – część ogólna*, C.H. Beck – Warszawa, 2015, p. 287; P. Machnikowski in E. Gniewek, P. Machnikowski (eds) *Kodeks cywilny. Komentarz*, C.H. Beck – Warszawa, 2014, 141.

[62] P. Sobolewski in K. Osajda (ed) *Kodeks Cywilny. Komentarz. Tom I. Przepisy wprowadzające. Część ogólna. Własność I inne prawa rzeczowe,* C.H. Beck – Warszawa, 2013, 643.

[63] Z. Radwański, 'Treść czynności prawnej', in Z. Radwański (ed.) *System Prawa Prywatnego. Tom 2. Prawo cywilne – część ogólna,* C.H. Beck, PAN – Warszawa, 2008, p. 235.

[64] W. Pyzioł in E. Fojcik-Mastalska (ed.) *Prawo bankowe. Komentarz,* Lexis Nexis – Warszawa, 2007, LEX el, commentary to art. 70, par. 2.

[65] J. Molis, 'Kontrola zdolności kredytowej na tle prawa bankowego' (2001) 4 *Transformacje Prawa Prywatnego* 9, 10-11; Z. Ofiarski, *Komentarz,* 504.

[66] W. Gonet, 'Szczególny', 68; P. Tereszkiewicz, *Obowiązki informacyjne w umowach o usługi finansowe*, Wolters Kluwer – Warszawa, 2015, LEX el. chapter 2.5.2.1.

It is surprising why the above arguments stop short of including the interests of borrowers, since the safety of the banking system also denotes trusting the bank, as a highly professional institution of public trust,[67] to act in an honest, fair and professional manner in accordance with the best interest of the client.[68] Obviously acting in that interest does not occur when the bank, neglecting to assess or properly assess the borrower's creditworthiness, grants a loan that with high probability will result in the over-indebtedness or even the bankruptcy of the borrower. It would be difficult to speak of the safety of the banking system, if its clients were to fear that banks would offer them products they in fact could not afford instead of offering them products suited to their needs and financial situation.

If one agrees that banks are institutions of public trust and that art. 70 BLA is introduced to further the safety of the banking system and its clients, then one must agree that its role is also to prevent concluding contracts with borrowers that have no creditworthiness. This aim of including the obligation to decline credit when there is no creditworthiness is also clear from Directive 2008/48. According to ECJ, the creditor's obligation, prior to conclusion of the agreement, to assess the borrower's creditworthiness is intended to protect consumers against the risks of over-indebtedness and bankruptcy. This obligation contributes to attaining the objective of ensuring that all consumers in the European Union enjoy a high level of protection of their interests and of facilitating the emergence of a well-functioning internal market in consumer credit. The need to assess creditworthiness is a means of ensuring the effective protection of consumers against the irresponsible granting of credit agreements which are beyond their financial capacities and which may bankrupt them.[69] This role of creditworthiness assessment has been reiterated in Directive 2014/17, where it is discussed particularly in recitals 22 and 57. Since in Polish law consumer credits are, if they are granted by banks, simultaneously bank credits (bank

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[67] A. Janiak, 'Bank jako instytucja zaufania publicznego', (2003) 2 Glosa, 17 et seq.; Supreme Court judgment of 8 July 2016, I CSK 570/15, LEX no. 2112303; Supreme Court judgment of 19 Sept. 2013, I CSK 651/12, LEX no. 1396293.

[68] Supreme Court judgments of: 5 Oct. 2012, IV CSK 166/12, LEX no. 1228619; 16 Feb. 2012, IV CSK 225/11, LEX no. 1163927; 9 Nov. 2012 r., IV CSK 284/12, LEX no. 1283989.

[69] Case C-565/12, ECLI:EU:C:2014:190, par. 42 and 43; Case C-449/13, ECLI:EU:C:2014:2464, par. 27 and 28

loan contracts),[70] banks must apply BLA provisions concerning bank loan contracts, as well as special provisions on consumer credit. Therefore it is illogical hold that, contrary to EU law, creditworthiness requirements are not aimed at preventing the conclusion of private law contracts in situations where the borrower has no creditworthiness and thus accept that violating the obligation to assess creditworthiness only produces public law consequences.

Unfortunately this opinion is not reflected in academic writings or in court judgments.[71] Courts simply repeat the opinion expressed in academic writings referred to above, without analysing its correctness. Therefore in practice it would be difficult to claim the nullity of contract pursuant to art. 58 §1 PCC based on the violation of art. 70 BLA. Paradoxically, the bank is expressly given the possibility of rescinding the bank loan contract or lowering the amount of the loan if the borrower loses his/her creditworthiness (art. 75 s. 1 BLA). This makes it even more difficult to accept that the bank's obligation to deny the loan where there is no creditworthiness only matters within public law regulations and does not influence the private law relationship.

In this context it should be noted that failing to deny the bank loan to a person who has no creditworthiness (or granting a loan in excess of creditworthiness) should bring about bank's tortious liability. Since it is not contested that pursuant to art. 70 BLA the bank is obliged to assess the borrower's creditworthiness and to deny the bank loan if this assessment is negative, then violating this obligation fulfils the criterion of illegality (unlawfulness) and indicates the bank's fault, at least in the form of negligence. This opens up the possibility to claim compensation for loss caused by receiving a loan that should not have been granted or should have been granted in a lower amount. This liability would, pursuant to art. 415 PCC, be based on the tort of causing someone loss through one's own faulty behaviour. If one accepts that art. 70 BLA creates not just an obligation of the bank, but an obligation of the bank towards the borrower, then the bank's liability could be based on contractual liability pursuant to art. 471 PCC. Again,

[70] G. Sikorski, *Komentarz*, 199, Z. Ofiarski, *Ustawa o kredycie konsumenckim. Komentarz*, Wolters Kluwer – Warszawa, 2014, LEX el, commentary to art. 1, point 1.

[71] Confirmation that the bank's obligation to deny credit where there is lack of creditworthiness may be found in e.g. Court of Appeals in Warsaw judgment of 7 May 2014, VI ACa 945/13, LEX no. 1469473; District Court in Kielce judgment of 11 June 2014, II Ca 452/14, LEX nr 1511361.

there have been no court judgments or academic writings supporting this possibility and it seems that the question of the obligation to assess creditworthiness and abstain from granting loans in cases of negative assessments has been oversimplified and unjustifiably removed from the sphere of private law.

The bank loan, particularly the so called mortgage credit is most frequently employed to finance the purchase of an immovable and it is often secured on that immovable, however it may also be secured on a different immovable that is owned by the borrower or by a third party who agrees to the encumbrance. Although residential immovables may be mortgaged in order to secure loans other than for the purchase or renovation of real estate (e.g. security for a loan to start up or expand a business), the dominating tendency is for mortgages over residential immovables to secure loans granted in order to purchase that residential immovable.

It is also possible to create a joint mortgage, that is a mortgage that encumbers more than one immovable. It may be created by contracting parties, who agree that a given debt will be secured by one mortgage created over two or more immovables (contractual joint mortgage, article 76 s. 3 Land Register and Mortgages Act 1982 - LRM[72]). The essence of a joint mortgage, is that the secured creditor may choose from which immovable he shall satisfy his claim. He may choose to satisfy his claim from one of the immovables encumbered, a few of them, or all of them and specify the amount he wishes to recover from the execution sale of a given immovable (article 76 s. 2 LRM). It is obvious, that joint mortgages are an attractive means of securing the interests of creditors, particularly, when the encumbered properties differ in function/use. The debtor, however, should be aware of the fact, that a joint mortgage often leads to the overprotection of the creditor, especially when the amount of the debt is low when compared to the value of the mortgaged immovables. In such cases the mortgage is onerous and unnecessarily weakens the debtor's legal position with relation to third parties.[73] Currently, according to art. 68 LRM if the mortgage is excessive, the owner of the mortgaged immovable may demand decreasing the sum of

[72] Act of 6 July 1982, consolidated version Dz.U.2016, item 790.
[73] Malarewicz, A. 2006. 'Hipoteka łączna jako zabezpieczenie kredytu hipotecznego', *Prawo bankowe* 2, 71-2; for more see Kalus, Habdas, Bank, 296-300.

the mortgage. The excessiveness of the mortgage must be assessed *ad casu*, however it arises when there is a substantial disproportion between the debt and the sum of the mortgage.[74] A mortgage only ensures that the creditor will be able to recover his money from an execution sale of the encumbered immovable, regardless of its owner and with priority to other personal creditors of the debtor (article 65 LRM) and an out-of court recovery of money due is not permissible.

Simultaneously with the mortgage, the bank also secures the credit by other means, the most common ones being: the bill of security (a blank bill) and a cession of borrower's claims towards an insurance company in case of damage to the mortgaged real estate. The latter security is connected with the fact that banks require the mortgaged immovable to be insured against destruction and damage for the whole period of the loan.

6. Problematic lending practices and bad credits

Problems with repayment and bad bank loans are a result of various irresponsible lending practices that, as has been explained in points 1 and 3 above, were visible on the residential mortgage credit market, with culmination (but by no means termination) in the years 2006-2008. The first problem is granting loans with a very high LtV ratio. Currently, when taking into account the monetary value of the granted residential bank loans (not the number of these loans) 13% of the loans were granted with LtV exceeding 120%, 21% were granted with LtV between 100-120%, 23% were granted with LtV from 80-100%. Only 43% of the loans were granted with LtV not exceeding 80%. When one considers the number of bank loans, 631,9 thousand have an LTV exceeding 80%, out of which over 229,4 thousand have an LtV exceeding 100%. This means that lenders who default on their loan will lose their home and still owe an unpaid portion of the debt.[75] In a recent judgment, the Supreme Court has explained that even if the bank loan was denominated in foreign currency but the loan instalments were to be made in Polish currency, the owner of the mortgaged

[74] Supreme Court judgment of 9 Feb. 2012, III CSK 181/11, LEX no. 1212786 and of 28 Oct. 2010, II CSK 218/10, LEX no. 672682.
[75] KNF, 'Raport 2015', 67-68.

immovable who is not the borrower, should, in case of default by the borrower, pay the lender in Polish currency.[76]

Another widely implemented practice was assuming a very low increase in the interest rate on the loan despite the fact that the loan is usually granted for a period of 20-30 years. Since virtually all residential bank loans have a variable interest rate, neglecting to reflect possible increases in the interest rate over the years caused increased creditworthiness of potential lenders. Additionally, both borrowers and banks accepted very low estimates of household expenses, even below social welfare minimums calculated by adequate authorities. Furthermore, banks granted lengthy bank loan repayment periods which often included periods of retirement (27,8% of the overall number of granted residential bank loans) and sometimes exceeded even the reasonably expected life of a person.[77]

As early as 2008, the Office of Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumenta – UOKIK*) noted that unfair contract terms were present in bank loan contracts secured by a mortgage of all banks and that this phenomenon was widespread.[78] The most common unfair contract terms concerned the following matters:

- indicating minimum but not maximum fees for various bank activities connected with operating the loan,
- banks collecting more than one payment for one activity (e.g. making a balloon payment requires a written amendment of the contract and a fee is collected for both preparing the amendment as well as for making the balloon payment),
- banks collecting fees for heightened risk before an effective establishment of a mortgage (while waiting for its entry in the land register) even after the mortgage has been established and there is no more additional risk,
- banks collecting fees for sending a notice of contract termination,

[76] Supreme Court judgment of 29 April 2015, V CSK 445/14, LEX nr 1751291.
[77] KNF, 'Raport o sytuacji banków w 2014 r.', p. 77-81, http://www.knf.gov.pl/Images/RAPORT_O_SYTUACJI_BANKOW_2014_12_tcm75-41472.pdf
[78] UOKiK, *Raport z kontroli wzorców umownych kredytów hipotecznych*, Warszawa 2008, p. 10

- banks not indicating reasons and the frequency of demanding inspections of the encumbered real estate with respect to its physical state as well as value (so the lender may be forced to provide at his own cost valuations of the immovable and to deal with repeated on-site inspections of the immovable),
- banks introducing changes in their regulations and fees impacting the loan agreements for very general reasons (e.g. due to changes of parameters in the economy or the competition environment)
- banks not indicating clearly what exchange rates and why they will use for loans denominated in foreign currencies, particularly banks ensuring that they can set their own internal exchange rates without any recourse to objective parameters,
- banks collecting fees of unspecified amount for various payment reminders, phone conversations with the client in case of default, on-site inspections or banks not defining procedures and situations in which these activities may be undertaken by the bank,
- banks not indicating transparent reasons enabling them to terminate the bank loan contract,
- banks introducing a presumption that bank correspondence has been effectively served on the lender after a prescribed time (e.g. 5 days from the date of the letter, even if the bank has not actually posted that letter within that time),
- allowing the banks to change the level of a fixed interest rate,
- introducing the requirement of the lender to open a savings account in that bank,
- introducing interest rates referenced to indexes resulting from borrowing rates among a small group of creditors
- making the lender pay for insurance cover bought by the bank and in the interest of the bank.[79]

Many controversies relate to foreign currency loans, particularly ones denominated in CHF. Banks have been notorious for introducing wide currency spreads and employing the following unfair practices: no proper information about the influence of the currency spread on the level of the loan repayments, complete freedom in the range

[79] Ibidem, p. 10 et seq.

of the currency spread, changing the currency rate on the day the payment becomes due, employing separate currency rates for mortgage loans only.[80] In order to alleviate some of the problems caused by currency spreads the legislator introduced in 2011 (as mentioned in point 5 above) a new provision in BLA, namely s. 3 of art. 69 which enabled foreign currency borrowers to pay the instalments in foreign currency that they themselves purchased at market prices and to avoid the inflated currency exchange rates set by banks.[81] Through the same amendment the legislator added point 4a to s. 2 of art 69 BLA in pursuance to which the bank loan contract in foreign currency must contain detailed regulations on how and when currency exchange rates are calculated.

The above problems have also been the object of numerous court judgments, in which the courts agreed that setting currency exchange levels by the bank must find justification in objective and consistently applied criteria and cannot be based on exchange tables the bank sets unilaterally without taking into account specified and objective indices.[82] A similar position has been accepted with relation to changes in the variable percentage rate of the bank loan. It has been held that contractual clauses which allow to change the variable rate must specify objective indices which allow to change the variable rate and must also stipulate by how many points that rate will change if indicated indices change.[83]

Although the courts now agree that changes in currency or variable interest rate levels are allowed only if the bank loan contract contains adequate, concrete and objective conditions for that change, there is less uniformity as to the effects of including such a clause in the contract. A controversial judgment was issued by the Supreme Court on 14 May 2015 in a case concerning a class action brought against a bank by 1247

[80] A. Jurkowska-Zeidler, 'Asymetria ryzyka a zasada sprawiedliwości społecznej na tle problemu kredytów we frankach szwajcarskich', (2016) XXXV *Gdańskie Studia Prawnicze* 131, 136-137.
[81] For more see T. Czech, 2011 'Spłata kredytu udzielonego w walucie obcej lub indeksowanego do waluty obcej.' *Monitor Prawa Bankowego* 11*,* 63-79.
[82] Court of Competition and Consumer Protection judgment of 14 Dec. 2010 r., XVII AmC 426/09, LEX nr 1211561; Court of appeal in Łódź judgments of 30 April 2014, I ACa 1209/13, LEX nr 1496006 and I ACz 1424/13, LEX nr 1491105.
[83] Supreme Court judgment of 21 Dec. 2011, I CSK 310/11, LEX nr 1108504; Regional Court in Szczecin judgment of 7 Nov. 2014, I C 554/14, www.orzecznictwo.ms.gov.pl; similarly Supreme Court judgment of 11 Sept. 2014, III CZP 53/14, LEX no. 1504875.

borrowers (all consumers) who had been granted mortgage credit. In the contract template the bank employed an unclear formula for changing the variable interest rate, which qualified it as an unfair contract term. This should cause that clause to be null and thus from the moment of contract conclusion not binding the clients pursuant to art. 385^1 §1 and §2 PCC. However the court held, that completely removing the binding force of the disputed clause would convert a variable percentage rate loan to a fixed percentage rate loan and thus completely change the type of the loan granted. In the court's view such an effect is too far reaching and cannot be justified by the fact that an unfair contract term existed. Therefore the court decided that the clause is only ineffective in so far, as it grants the bank the possibility to change the interest rate according to subjective criteria. The bank is however entitled to change the percentage rate using rational, economically justified and objectively verifiable criteria.

The solution accepted by the court is difficult to accept without reservations. It is true, that the effect of holding the unfair contract term as void would in fact cause the bank loan contract to be a fixed interest rate loan. However, since the clause contained no reference to any objective criteria, it is artificial to keep its force and allow the bank to change the rate according to economically verifiable data that are not specified. In effect, the plaintiffs will have to prove with respect to interest already paid, by how much the bank exceeded the objectively justified interest rate increases (this will have to involve an expert opinion) and with respect to future interest rate increases, the plaintiffs will again have to resort to court if they disagree with the criteria employed by the bank to calculate the interest rate increase. It difficult not to notice that the court violated art. 385 §2 PCC pursuant to which ambiguous clauses are to be interpreted in favor of the consumer as well as art. 385^1 §1 PCC because the remains of the clause make the consumer dependent on the bank and the criteria it chooses to change the interest rate.[84]

Contrary to the above, the District Court in Warsaw in a judgment of 22 Aug. 2016[85] held that unfair contract terms concerning ambiguities of setting exchange rates for

[84] T. Czech, 'Odpowiedzialność banku za stosowania abuzywnej klauzuli zmiennego oprocentowania', (2016) 6 *Monitor Prawa Bankowego* 56, 60-61.
[85] III C 1073/14, Monitor Prawa Bankowego 2016/11/9-30.

foreign currencies are void and cannot be retained in the contract in a different shape. Since without the void contract terms the contract is impossible to perform, the court held that that the whole contract is void. This denotes that parties should return what they have obtained. It should be noted that the borrower obtained Polish money and not foreign currency, so the bank will receive the sum it paid out in Polish currency. It remains to be seen whether this judgment will be upheld by the Court of Appeals.

In a different judgment concerning the manner of calculating foreign currency exchange rates the Supreme Court on 19 March 2015[86] held that the plaintiffs have no legal interest to request court determination that a bank loan clause which contains an ambiguous manner of calculating foreign currency exchange rate is an unfair contract term. The court explained that the introduction in 2011 of point 4a into art. 69 s. 2 BLA which applies to new loans as well as unpaid portions of old loans solves the plaintiffs' problem, as they can request the bank to make the clause in question more specific in order to fulfil new statutory requirements. For this reason approaching the court to ascertain the unfairness of the questioned contract term is unjustified. Again it must be pointed out that the Supreme Court has failed to duly consider the claim. It is true that with respect to loan instalments already paid, the plaintiffs should be claiming the return of sums in excess of an objective currency exchange rate (as required by art. 69 s. 2 point 4a BLA) and therefore cannot bring a "weaker" claim to determine that a contract clause is unfair. However the situation is different with respect to future instalments. Article 69 s. 2 point 4a BLA is not a basis to demand that the court oblige the bank to change the bank loan contract, because it does not contain information as to how the contract should be changed, i.e. it does not contain the wording of the clause that should substitute the unfair clause. Also, the bank cannot unilaterally change the wording of the disputed clause. Therefore, the court should have held that for future instalments the clause is unfair and consequently void and in its place one can apply art. 358 §2 PCC pursuant to which the proper exchange rate is the average exchange rate published by the National Bank of Poland.[87]

[86] IV CSK 362/14, LEX nr 1663827.
[87] T. Czech, 'Kontrola abuzywności klauzuli walutowej w umowie kredytu', (2015) 10 *Monitor Prawa Bankowego* 14, 24-28.

The courts have also refused to accept that loans indexed to or denominated in foreign currency are unfair, dangerous and violate rules of social coexistence, therefore they cannot be held to be null and void pursuant to art. 58 §2 PCC. In a judgment of 18 April 2016[88] the District Court in Warsaw explained that the bank loan contract denominated in foreign currency is not an excessively complicated contract and does not contain elements that could be treated as unclear to a consumer who takes basic care to protect his/her interests. This type of contract does not pose risks other than normal risks commonly associated with the fluctuations in the value of foreign currency. These risks connected with exchange rates of currencies and spreads applied by banks are to be borne by the borrower in return for obtaining credit at a much lower interest rate than credit in domestic currency. If the plaintiff had called upon the doctrine of mistake, proving the circumstances surrounding contract conclusion and being misled into choosing a foreign currency loan, then it would have been possible to consider nullifying the contract, however the facts of the case did not support such a qualification of the claim. The court also made reference to ECJ judgment of 3rd Dec. 2015,[89] which considered whether transactions effected by a credit institution, consisting in converting amounts expressed in a foreign currency into the domestic currency for the purpose of calculating the amount of a loan and repayment instalments in accordance with clauses on exchange rates contained in a loan agreement, may be classified as 'investment services or activities' within the meaning of Article 4(1)(2) of Directive 2004/39.[90] The ECJ concluded that such transactions are restricted to converting the amounts of the loan and the monthly instalments denominated in the foreign currency in question (the currency in which payment obligations are to be met) into the domestic currency (the currency in which the payments are actually made), on the basis of the exchange rates for the purchase and sale of the foreign currency. Consequently, those transactions serve no other function than to be the manner of performing the fundamental payment obligations under the loan agreement, consisting in the lender's making the capital available and the borrower's repayment of the capital together with interest. Those transactions do not

[88] III C 275/15, Monitor Prawa Bankowego 2016/10/3-11.
[89] C-312/14, ECLI:EU:C:2015:794.
[90] Ibidem, par. 53.

have as their purpose the completion of an investment, as the consumer is seeking only to secure funds with a view to purchasing a consumer good or a service, not, for example, to manage a foreign exchange risk or speculate on a currency’s exchange rate.[91]

The above show that serious problems arise with regard to foreign currency mortgage credit. It seems that the courts lean towards the interest of the banks and adopt a very restrictive and formal interpretation of private law provisions. This means that even when the borrower wins a case, he/she does not achieve a satisfactory result because of limitations contained in the court judgment. It also seems that there is still no common understanding as to what foreign currency loans denote in economic terms and therefore it is controversial whether the consumer should not be protected because he/she wished to take advantage of the lower percentage or whether this lower percentage rate is still no justification to hidden bank profits connected with currency exchange transactions, which are not a part of the loan contract and yet were sold as such. Also, it is surprising to see that a number of questionable lending practices, like excessive lending, no proper creditworthiness assessments, no proper information about currency risk, clear disregard of reasonable assumption (e.g. to cost of day to day living accepted at levels below the social minimum) etc. have not in any way been seen as a circumstance for which the bank may be held liable in tort or in contract or on the basis of doctrine of mistake or even exploitation.

7. Difficulties in implementing Directive 2014/17

Poland has not transposed Directive 2014/17, even though work on its implementation started in late 2014 and was intensified in 2015 and 2016. Currently Poland does not have comprehensive or unified provisions on credit which is secured on immovables, however there are acts which to a various degree find application to these matters. They are as follows: BLA, act of 12 May 2011 on consumer credit[92] (transposing Directive 2008/48), act of 21 July 2006 on supervision of the financial market,[93] LRM,

[91] Ibidem par. 56-57.
[92] consolidated version Dz.U.2016, item. 1528.
[93] Consolidated version Dz.U.2016, item. 174.

PCC, KNF Recommendation S 2013 (on good practices in managing mortgage loans), as well as KNF Recommendation T (on good practices in managing the risk of retail credits).[94]

Initially it was decided that implementing Directive 2014/17 would be done by enacting a new act on credit agreements for consumers relating to residential immovable property that would cover all issues regulated by the Directive.[95] After a written opinion of the Legislation Council operating next to the Prime Minister, where it was pointed out that it would be more consistent and understandable if all consumer credits, even ones relating to residential property, were regulated within the already existing act on consumer credit, it was decided not to draft a separate act concerning credits for consumers relating to immovables.[96] Consequently a new draft of assumptions for the future act was prepared and it related to the amendment of the Consumer Credit Act 2011 and the enactment of a new act on the activities of credit institutions and credit intermediaries. The latest version of these assumptions was made on 14 Dec. 2015 and was published on the website of the governmental centre of legislation.[97] On 16 Dec. 2015 the Minister of Finance requested that a draft of an act be made on the basis of these assumptions.

This resulted in further work on the needed legislation and on 4 June 2016 a draft (dated 25 May 2016) of a new act (the Mortgage Credit Act) was published on the Legislation Council website.[98] The name of the draft act indicates that the legislator decided to abandon the solution of incorporating provisions on credits relating to immovables within the Consumer Credit Act 2011 and of enacting a separate act concerning the activities of credit institutions and credit intermediaries. Instead, it was decided to return to the initial idea of enacting a separate act that would cover all

[94] KNF Resolution 59/2013, 26 Feb. 2013, Dz. Urz. KNF 2013 r. item 11.
[95] See draft of assumptions for the draft of the act on credit agreements for consumers relating to residential immovable property from 6 Feb. 2015, available at http://radalegislacyjna.gov.pl/sites/default/files/dokumenty/projekt_zalozen_o_kredytach_zwiazanych_z_nieruchomosciami_0.pdf (hereafter referred to as Draft Assumptions)
[96] Rada Legislacyjna, 'Opinia o projekcie założeń projektu ustawy o kredytach związanych z nieruchomościami z dn. 15 May 2015', available at http://radalegislacyjna.gov.pl/dokumenty/opinia-z-15-maja-2015-r-o-projekcie-zalozen-projektu-ustawy-o-kredytach-zwiazanych-z
[97] http://legislacja.rcl.gov.pl/docs//1/12269251/12275762/12275763/dokument201169.pdf
[98] http://legislacja.rcl.gov.pl/docs//2/12286052/12355934/12355935/dokument224225.pdf

issues mentioned in the Directive 2014/17. The most current development is the publication on 14 Oct. 2016 of the newest version of the draft act (draft of 14 Oct. 2016)[99] which is now entitled: the act on mortgage credit and supervision of credit intermediaries and agents.[100] The draft act is accompanied by a written explanation of the draft act and the solutions accepted therein.[101]

In the mentioned written explanation of the draft act it is noted that the act is aimed at comprehensively regulating credits relating to immovables. The legislator has opted for extending the scope of the act beyond the Directive requirements (according to recital 13),[102] as the act defines the mortgage credit as credit secured by a mortgage (regardless of whether the credit relates to residential immovable property or other types of property) and to all credits granted to:

- buy, construct, reconstruct, or extend a house or a residential condominium unit,
- buy a cooperative proprietary right to a unit, or
- buy land for the purpose of residential development (single or multifamily)

if the above are not connected with economic or agricultural activity (art. 4 s. 1). Simultaneously, the act is to regulate the principles and the mode of concluding mortgage credit contracts (art. 1 point 1), but the latter are defined as contracts on the basis of which the lender grants mortgage credit to a consumer or promises to grant such credit (art. 3 s. 1). It has also been determined that lenders who may grant mortgage credits are only banks and certain cooperative savings institutions,[103] because they are subject to the supervision of the KNF. This greatly reduces the risk consumers would face if mortgage credits could be granted by unsupervised entities active on the financial market. This measure is viewed as consistent with EU freedoms, because its objective is to secure the public interest which encompasses the protection

[99] Hereafter referenced as Draft Act 14 Oct 2016.
[100] https://legislacja.rcl.gov.pl/docs//2/12286052/12355940/12355941/dokument249734.pdf
[101] See the link to: uzasadnienie projekt ustawy o kred. hipotecznym 14.10.2016.docx at https://legislacja.rcl.gov.pl/projekt/12286052/katalog/12355940#12355940 (hereafter referenced as: Uzasadnienie)
[102] Uzasadnienie, p. 4
[103] Art. 4 point 3 and art. 5 Draft Act 14 Oct 2016.

of consumers.[104] Consequently non-bank institutions, i.e. non-bank lending institutions operating on the domestic market as well as non-bank lending institutions operating in EU Member States are excluded from granting mortgage credits.

The draft act will also introduce amendments to the Consumer Credit Act 2011, because, as pointed out by the European Commission, it does not transpose Directive 2008/48 correctly with regard to selected issues. This has also been reflected in practice, where the interpretation of the total cost of credit varies, the information requirements concerning the cost of credit have not been uniformly applied, the pre-contractual obligations of credit institution have not been defined precisely enough and this created difficulty in making credit offers easy to compare. Transposing Directive 2014/17 is therefore also aimed at correcting mistakes in the transposition of Directive 2008/48[105]. The effect of the transposition should be to further strengthen the position of the consumer on the market of consumer credits, increasing the transparency and precision of provisions on consumer credits, increasing the comparability of information on credit offers.

The Directive also introduces completely new frames of regulating activities of credit intermediaries and agents (appointed representatives) offering mortgage credits to consumers. Among others, it introduces the obligation to license (art. 47 ff) and register (art. 59 ff) credit intermediaries and agents, the requirement for those entities to have civil liability insurance, and the need to supervise those entities. This undoubtedly increases the supervision tasks of the Polish Financial Supervision Authority – KNF who will be responsible for monitoring credit intermediaries and agents (art. 66 ff). Monitoring the performance of the lenders' obligations towards consumers will be performed by the Office of Competition and Consumer Protection. It is also proposed not to employ the possibility of exemptions offered by art. 3 s. 3 and to transpose the Directive in its full extent.

[104] Uzasadnienie, p. 6-7.

[105] The European Commission initiated the EU Pilot scheme (5103/13/SNC), however currently it has expressed the intention to start infringement proceedings against Poland.

In art. 6 the Directive introduces the need to promote measures that support the education of consumers in relation to responsible borrowing and debt management, in particular in relation to mortgage credit agreements. This issue has not been addressed directly in the act, however it seems natural that the promotion of responsible lending will have to be carried out by the Office of Competition and Consumer Protection.

The requirements of staff remuneration set out in art. 7 of the Directive are to a large extent met by KNF resolution 258/2011 of 4th Oct. 2011 which introduces the obligation to separate the activities of selling credits from activities connected with assessing risk.[106] Despite this fact, the legislator has introduced more specified requirements based on art. 7 of the Directive, as well as ones connected with ensuring proper skills and knowledge (art. 9) of the staff. This seems to be a noticeable improvement to the current situation, since there are basically no requirements or standards or even market practices which require documenting skills in the credit sector.

In the new act the legislator introduces requirements concerning credit intermediaries and agents.[107] They are obliged to complete identified education and training requirements, including an exam for credit intermediaries and agents (art. 49). For credit intermediaries, the exam is organized by KNF and consists of 50 test questions, out of which 35 have to be answered correctly in order to pass the exam (art. 52 s. 8-9). Detailed provisions on the examining procedure will be set out in subordinate legislation. The exam for agents (appointed representatives) is to be organized by the credit intermediary and not by KNF. Persons who have a master degree in law or economics are exempt from the exam. The legislator introduces an interim period until 21 March 2019 during which confirmation of skills and knowledge will be presumed on the basis of documenting a 5 year period of work on concluding mortgage credit agreements, their distribution, and on mortgage credit intermediary services (art. 82).

[106] A. Nierodka, 2014 ‘Nowe otoczenie regulacyjne dla kredytów hipotecznych’ *Monitor Prawa Bankowego* 4, 89.
[107] The legislator uses the term agent and not ‘appointed representative’ because from a linguistic and legal point of view it is a better alternative bearing in mind the Polish language and legal system.

All credit intermediaries and agents are subject to a mandatory civil liability insurance (art. 54).

The legislator takes advantage of art. 22 s. 4 of the Directive and does not allow the use of the terms advice/advisor or similar terms when the advisory services are being provided to consumers by lenders or tied credit intermediaries/agents (art. 25 s. 2). The exception provided in art. 22 s. 6, second subparagraph is not seen as justified and it has not been introduced. It is assumed that lenders or tied credit intermediaries/agents may be tempted to prefer credits of entities they are connected with and this may be misleading and not be beneficial to the consumer.[108]

Due to serious problems lenders are facing in connection with CHF mortgage credits, the draft act in art. 6 introduces a ban on granting such credit to persons whose majority of income is not received in the foreign currency in question or whose majority of assets are not valued in that currency. Also, according to art. 30 the consumer is entitled to pay mortgage credit instalments directly in the foreign currency of the credit and the lender cannot require the consumer to purchase foreign currency from indicated entities (art. 30). This solution repeats but also specifies the rule already introduced in art. 69 s. 3 BLA in August 2011.

In advertising a new element will be the inclusion of a representative example and additional information about the extra risk of variable interest rate credit (which is the typical credit relating to residential property). This has been reflected in art. 8 and art. 7 s. 5 of the draft act, respectively. The draft act requires, among other things, that the font and the time of displaying information about the credit is adequate for the consumer to be able to read it (art.7 s. 1 point 3). Additional information about the risk of foreign currency credit and variable interest rate credit must be included in the advertisement in an understandable and visible manner (art. 7 s. 4-5).

In relation to **general information** art. 10 s. 1 specifies a list of 15 pieces of information that must be given to the consumer. Credit institutions must also publish internal regulations concerning mortgage credit on their websites (art. 10 s. 2). The lender,

[108] Uzasadnienie, p. 12-13.

credit intermediary or agent cannot charge any fees for complying with the statutory information requirements (art. 10 s. 3). Throughout the duration of the mortgage credit contract the lender, credit intermediary or agent are obliged to clearly and precisely explain to the consumer all matters connected with the contract. They are forbidden to charge any fees for such explanations (art. 29 s. 2-3). Poland does fall within the scope of art. 14.5, (uses the 'old' ESIS template) however it plans to **implement the new ESIS** in its entirety after a *vacatio legis* period lasting until 31 Dec. 2017.

Initially, in draft assumptions for transposing the Directive it was accepted that the 14 day reflection period would run from the day the consumer received a binding offer, however at any moment within that time the offer could be accepted upon a written request of the consumer. The binding offer would have to meet requirements of the civil code (art. 66§1|) i.e. contain essential information concerning the contract. The right of withdrawal was to be 14 days, regardless of whether the contract was made in through the internet or in the premises of the credit institution or the credit intermediary.[109] Currently, the new draft contains the **right of withdrawal** within 14 days from concluding the contract. If the mortgage credit agreement did not contain all information specified in art. 19, the 14 days begin to run from the moment all information required has been delivered to the consumer. A template of withdrawal from the contract is to be given to the consumer at the time of contract conclusion, with the name and the address of the lender already filled in (art. 42).

The cooling off or reflection period for withdrawal is a new a desirable solution in the Polish legal system, however it is questionable whether the new ESIS, which is very long and uses difficult language, will in fact be a better solution than the equivalent template now in use.[110] In addition, the lender, credit intermediary or agent cannot require the consumer to conclude the mortgage credit contract before the lapse of 14 days from delivering the credit decision (art. 14 s. 4), which implies that the consumer may choose (is allowed) to do so himself.

[109] See draft of assumptions for the draft of the act on credit agreements for consumers relating to residential immovable property from 6 Feb. 2015, 31-32
[110] Nierodka, 'Nowe', 92-93.

Tying practices are to prohibited except for accounts used solely to collect money used to repay the credit, to service the credit or as security for the credit, however such an account will have to be maintained free of charge (art. 9 s. 1). The consumer may be obliged to insure the credit and assign his/her rights to the lender under that insurance contract, provided that the consumer has the possibility to insure the property with any insurer, not necessarily the one recommended by the lender, as long as that insurer offers the minimum scope of insurance required by the lender (art. 9 s. 2). The lender may also require the consumer to have an insurance policy for the mortgaged immovable (art. 9 s.3). **Bundling practices** are allowed, however the lender is obliged to inform the consumer that the credit is also available without the additional financial products or services and to simultaneously present the consumer with ESIS, which contains information on the mortgage credit without any additional services (art. 9 s. 5-7).

Introducing **APRC** information in the pre contractual stage is already familiar on the basis of the Consumer Credit Act 2011 but the new Directive extends this information to credits relating to residential property. Art. 17 s. 5 and art. 17 s. 6 of the Directive have been reflected in draft act art. 20, particularly s. 6 and 7. The draft act also requires that the lender ensures a uniform manner of calculation APRC for credits covered by the act (art. 20 s. 4).

The **creditworthiness assessment** needs to yield a positive result. This rule is already present in art. 70 s.1 of BLA with small exceptions in art. 70 s. 2 BLA. In addition, KNF recommendations include rules on assessing creditworthiness (Recommendation S). If the consumer falsified information or misrepresented his situation the bank may utilize the institution of mistake which would lead to nullifying the contract. KNF may also impose penalties on banks which violate the law. The above BLA provisions and KNF regulations apply to banks, but not to other types of lenders. Therefore the draft act contains similar solutions relating to creditworthiness, however they will apply to all lenders, credit intermediaries and agents whose activities are covered by the act.

In the draft act, the requirement to assess **creditworthiness** is included in art. 21. It is to be based on information given by the consumer as well as on data compiled by the lender, data from bases created pursuant to art. 105 s. 4 BLA,[111] and data available from the bureau of economic information on the basis of an act of 9 April 2010 on the availability of economic information and the exchange of economic data.[112] Article 70 BLA finds direct application. Lenders are obliged to introduce procedures, identify information necessary to assess creditworthiness, and duly document the assessment process (art. 21 s. 6). It must, however be noted, that neither art. 70 BLA nor art. 21 of the draft act contain more precise information on what should be the leading indicators in the assessment of creditworthiness. In art. 70 s. 1 BLA it is only generally stated, that creditworthiness denotes the ability to repay the borrowed capital together with the due interest on that capital. More precise requirements are contained in Recommendation S, where banks are obliged not only to consider documents presented by the consumer and to use various data bases kept by lenders, but also take into account typical costs of household expenditures and the total level of the consumer's financial obligations.[113]

The consumer is protected if creditworthiness was not assessed correctly by the bank. In such a situation, the bank cannot terminate or amend the contract unless it is beneficial to the consumer and he/she has agreed to the termination or amendment. This does not apply if the consumer purposefully declined to reveal information or revealed false information necessary to assess creditworthiness (art. 22 s. 1-2). Nevertheless, the provision of incomplete information by the consumer is not a bases for contact termination (art. 22 s. 3), as it is the lender who should ensure that sufficient information has been collected to assess creditworthiness.[114]

Similarly to art. 70 s. 1 BLA, mortgage credit may only be granted if the creditworthiness assessment shows that the consumer will be able to repay the borrowed capital together with interest at a specified within the contract time (art. 23

[111] e.g. the already mentioned Bureau of Credit Information
[112] Consolidated version: Dz.U. 2015, item 1015, with subsequent amendments.
[113] KNF, Recommendation S, recommendation no. 8
[114] Uzasadnienie, p. 11-12.

s. 1). The lender must inform the consumer that declining to reveal information necessary to assess or verify creditworthiness will result in not granting the mortgage credit (art. 23 s.3). If the lender declines to grant the credit loan because of information contained in the consulted data bases, the lender is obliged to provide to the consumer with information on the results of data bases searches and indicate which data bases were used. The information is provided without undue delay and free of charge (art. 24 s.2).

As has already been mentioned, Poland has a developed property valuation profession and the MRP regulates the process of valuation and the activities of valuers. The legislator has correctly concluded that these provisions meet all the requirements of the Directive, therefore all valuations shall be performed according to the provisions already in force, i.e. the MRP by professional real estate valuers (art. 21 s. 8-10). It should be noted that they use a valuation standard dedicated to the valuation of immovables for the purpose of securing claims,[115] which has been acknowledged by the Minister of Infrastructure and its use is therefore obligatory (1997 Management of Real Estate Act (MRP)[116] - art. 175 s. 6 MRP in connection with art. 175 s. 1 MRP). In the draft act the definition of the market value is established with reference to art. 151 s. 1 MRP (art. 4 point 22) and thus a uniformity of valuation basis is observed within the legal system.

Art. 23 of the Directive is an important provision that will help to eradicate unfair lending practices of banks. Its content is already reflected in court judgments (see part 2) and also since 1 July 2014 on the basis of Recommendation S, banks are not lending in currencies that are not the currencies of the lender's income. The legislator in art. 16 obliges lenders, credit intermediaries and lenders to observe **good practices of mortgage credit lending**. The mentioned entities must introduce internal procedures of verifying whether staff remuneration is clear and transparent, takes into account consumer interests and procedures of verifying the proper execution of information

[115] Available at http://www.pfsrm.pl/sites/default/files/Wycena%20dla%20zabezpieczenia%20wierzytelno%C5%9Bci%20%5BDziennik%20Urz%C4%99dowy%20MI%20Nr%201%20z%20dnia%208.01.2010%20r.%5D.pdf

[116] Act of 21 Aug. 1997, consolidated version Dz.U. 2015, item 1774, with subsequent amendments.

requirements and of remunerating personnel responsible for assessment of creditworthiness (art. 16 s. 1). It is also clearly stated in art. 16 s. 3-5 that remuneration rules must allow the staff to act in the consumer's best interest, in particular it cannot be dependent on achieving specified sales levels. Furthermore, credit intermediaries and agents are obliged to inform consumers whether they are tied (and to whom) or independent and what remuneration they receive from the lender depending on the successful conclusion of the credit contract (art. 17 s. 2-4).

Variable interest rates dependant on indexes set by a small group of creditors would most likely not be an "objective index" (see judgments in point 6 above). The scale of problems with setting indexes by banks in a manner that amounted to unfair contract terms will need to result in a rather restrictive transposition of art. 24. In the draft act the legislator has only rewritten art. 24 of the Directive without further developing these provisions (art. 20 s. 2-7).

Provisions on **early repayment** laid down by art. 25 of the Directive will improve consumer protection, because currently not all credit agreements allow for early repayment or balloon payments, and if so it is often connected with additional fees. To this extent the draft act contains a separate chapter on early repayment. The consumer has been granted the right to early repayment of a part or the whole credit at any time before the expiry of the credit agreement (art. 38 s. 1). The total cost of the mortgage credit must be decreased by interest rate payments and other costs which would be due for the period after the early repayment (art. 39 s. 1). The lender may, however, charge a fee for early repayment, but a maximum level is determined by a formula included in art. 40 s. 5. The mentioned fee is only admissible if repayment is made before the lapse of 36 months from contract conclusion in the case of a variable interest mortgage credit and before the lapse of the first instalment period, in the case of fixed interest mortgage credit (art. 40 s. 2-3). The fee cannot exceed a level determined by a formula in art. 40 s.5.

The draft act also contains provisions aimed at minimising the threat of an execution sale of the mortgaged immovable. If the borrower defaults on an instalment, the lender requests a payment and sets an additional time limit of minimum 14 working days. In the request, the lender informs the borrower that he/she has 14 days from receiving the request to ask for restructuring the mortgage credit. The bank should allow for restructuring if it is justified by the consumer's assets (art. 33 s. 1-3). If the request for restructuring mortgage credit is denied the lender provides a written, detailed explanation of the reasons for rejecting the request (art. 34). Before instigating proceedings to recover the money due, the bank is obliged to allow the consumer at least 6 months to sell the encumbered immovable. If proceeds from the sale do not cover the debt, the bank either allows the repayment in instalments or agrees to remove the mortgage from the land register in return for establishing a different type of security for the claim (art. 35).

Monitoring the real estate market is done mainly through published reports of NBP and the Polish Statistical Office.

8. Unresolved issues

Implementation of the Directive must be seen as an improvement of the current situation in areas mentioned above as it introduces new mechanisms designed to minimize irrational lending and is aimed at strengthening the position of the borrower. Nevertheless it does not resolve issues of loans which have already been granted and it does not take a clear stand on private law consequences of granting an excessive loan in comparison with the borrower's creditworthiness. There are no rights of pre-emption which would allow the borrower to buy the bank's loan claims before they are sold to a different entity, even though a bank loan may only be granted by a bank. Unfortunately once granted it does not have to be operated by a bank. This is a serious inconsistency which should have been addressed by the lawmaker in order to protect home buyers.