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In carrying out the above considerations relating to the concept of creditworthiness and its impact on the conclusion and performance of obligations under a credit agreement, it should first be noted that the legal norms relating to the issue of determining creditworthiness by a bank, as regulated by the provisions of the Banking Law, have not changed substantially since 1989, when, still under the previous political system in Poland, the provisions of the Banking Law were enacted, which initiated the operation of commercial banks. At that time, these provisions still referred to state-owned banks which, however, were already independent and self-financing entities with legal personality, operating based on the provisions of the act and their statutes[1]. Since the enactment of these provisions, essentially uninterrupted over the following years, although slightly changed, the definition of creditworthiness has been maintained, as well as most of the norms related to both the concept of creditworthiness and the conditions under which a bank grants credit. Also, the scope of the obligations imposed on the borrower by the banking law relating to enabling the bank to assess creditworthiness, including through the provision, at the bank's request, of information and documents necessary for the bank to make this assessment and to control the use and repayment of the credit has not changed much. Also, doctrine and case law have all along emphasized the administrative-legal aspect of the bank's obligation to carry out a creditworthiness assessment, which conditioned the granting of credit. However, this condition did not have a civil law character and, as emphasized in the doctrine, as it only served to protect the bank's deposits, its possible non-performance or undue performance by the bank resulted only in the bank's liability at the administrative level, within the framework of the supervision exercised by the authorized banking supervision authorities, but this circumstance did not have any impact on the sphere of civil law relations between the parties to the credit agreement.

[1] Article 2(1) of the Act of 31 January 1989. Banking Law.

Recently, the concept of the merely administrative nature of the obligation to assess creditworthiness has been subject to criticism, which is caused, inter alia, by regulations introduced at the EU level relating to the protection of consumer rights, including through the introduction of civil law sanctions for breach of the obligation to assess creditworthiness. There is also a growing body of case law which points to the civil law consequences of a bank's breach of its obligation to assess creditworthiness. There is a growing emphasis in the regulations and case law on the purpose of the obligation to assess creditworthiness, which is not to protect deposits, as this purpose is served by regulations on capital requirements or solvency ratios, but rather to prevent over-indebtedness of consumers and the idea of responsible lending. Responsible lending is understood as the creation of mechanisms for responsible behaviour by all participants in the consumer credit market, which is also intended to foster consumer confidence in the credit services market, including creditors and credit intermediaries, and to increase consumer safety in the credit market. Only secondarily is the assessment of creditworthiness intended to safeguard the interests of the bank as depositor of deposits placed with the bank.

The emergence of new legal provisions on consumer credit and mortgage credit agreements which implemented into the Polish legal order the directives adopted at the Community level, though not entirely correct transposition of the directives to the extent relating to the issue of creditworthiness assessment and its effect on credit agreements, gives rise to further legal uncertainties in respect of the implementation of the obligation to assess creditworthiness and its impact on the conclusion and performance of a credit agreement. These doubts arose not only as a result of the use of a different conceptual apparatus used in these regulations, but also the introduction of regulations which, on the one hand, do not fully correspond to the provisions contained in the directives, and, on the other hand, to a certain extent conflict with the provisions already in force in the Banking Law.

In addition to the inconsistency in the legislature's consistent approach to nomenclature in the various acts regulating the granting of credit by banks, there is also a noticeable divergence in the provisions of the Banking Law itself, which is strongly noticeable in the case of the granting of loans and cash loans by a bank. Even though both of these banking activities have similar functions and purposes, the legislator treats them completely differently in terms of regulation. Indeed, regarding the conclusion of loan agreements by the bank, the legislator did not choose to introduce a general reference that would allow the application of the provisions on the granting of loans by the bank also to the conclusion of money loan agreements by the bank. Pursuant to Article 78 of the Banking Law, the provisions on credit

apply accordingly to loan agreements only to the extent that they relate to the security of repayment and the interest rate of the loan. This means that there is a very narrow reference that allows the regulations of the Banking Law relating to loans to be used in the case of loan agreements to a very limited extent. The legislator's idea behind the adoption of such a solution when enacting the Banking Law was that banks were mainly to provide financing in the form of loans (as a banking activity *sensu stricto* - reserved exclusively for banks), and the conclusion of money loan agreements was to constitute only a margin of banks' activities (banking activities *sensu largo*). Meanwhile, in practice, loan agreements constitute a significant part of the agreements concluded by banks - in principle, each bank in Poland in its offer has credit products based on the construction of a loan agreement. The high popularity of the use of this form of financing by banks is mainly because it is advantageous for borrowers, who, unlike in the case of a loan agreement, do not have to indicate the purpose for which the loan funds are used. In the case of a loan agreement, the purpose of the loan constitutes the *esentialia negoti* of the agreement, and the bank not only has the right to control the use of the loan, but if the loan is used contrary to this purpose, may restrict the lending or even terminate the agreement. The construction of the loan agreement also allows for greater freedom to set the conditions related to its granting and repayment. Due to the content of Article 78 of the Banking Law, when concluding a loan agreement the bank is not obliged, inter alia, to apply the provisions relating to the obligation to assess creditworthiness, which means that a cash loan granted by the bank may also be granted to a person who not only lacks creditworthiness, but also is not required to establish security for the loan repayment, or to demonstrate a programme of activity which would show that the borrower will have the ability to repay the loan in the future.

In the case of loans which simultaneously meet the requirements to be deemed consumer loans, pursuant to Article 9(4) of the Consumer Credit Act and Article 78a of the Banking Law, all provisions of the Banking Law will be applied to the extent not regulated in the Consumer Credit Act. This regulation has the effect that if a cash loan is granted to a consumer and does not exceed PLN 255,550, then all provisions of the Banking Law will be applied to the extent not regulated in the Consumer Credit Act, and if the value of the loan is higher or the borrower is not a consumer, then the provisions of the Banking Law will be applied to such loan to a very limited extent. The situation changes even more when the loan granted by the bank will be secured by a mortgage. In such a case, if such an agreement is concluded with a consumer and thus meets the conditions for it to be considered a mortgage loan, then neither the provisions on consumer loans nor the provisions of the Banking Law will apply to such a loan - with

certain exceptions - but the provisions of the Mortgage Loan Act will apply in full to such a loan agreement.

It is also worth noting that the provisions of the Banking Law relating to loans will not apply at all to other agreements where also on the part of the bank, credit risk arises or may arise. These will primarily include bank guarantee agreements, surety agreements, which are very popular in practice, or other agreements of a credit nature such as leasing agreements. In the case of these types of agreements, although they also involve or may involve the provision of funds by the bank in the event of their execution and thus generate a certain credit risk,

such agreements do not result in obligations on the part of the bank as in the case of credit agreements, in particular, there is no obligation on the bank to assess the borrower's creditworthiness before entering into such agreements.

In view of the above arguments, there is currently no argument to defend the hitherto prevailing theory of the merely administrative-legal nature of the bank's obligation to assess creditworthiness, which is only intended to protect the bank's deposits.

The application of the provisions of the Banking Law on creditworthiness, mainly due to the rather limited scope of the legal norms relating to them, as well as by the legislator's use of different conceptual apparatus relating to banks' obligations in this respect, causes significant practical problems related to their application. Recommendations issued by the Polish Financial Supervision Authority, due to the fact that they do not have a normative character but are only a kind of delineation of good practices applied by banks, do not guarantee the application by banks of a uniform approach to these obligations, especially since recommendations refer only to those loans that are concluded with consumers. Recommendations do not therefore constitute general directives and standards of conduct relating to creditworthiness, as a universal concept applicable to all borrowers and all loans granted by banks (let alone loans, as mentioned above). In addition, the positions addressed to banks by the Office of the Polish Financial Supervision Authority relating to creditworthiness do not have any support in the provisions of the Banking Law, and thus their recognition and application by banks in the process of assessing creditworthiness has no legal value. Indeed, insofar as the Commission is authorized under Article 137(1) pt. 5 of the Banking Law to issue recommendations on good practices for prudent and stable management of banks, UKNF no longer has such powers. Also, the scope of the positions communicated by the UKNF to banks exceeds the authority expressed in Article 137(1) pt. 5 of the Banking Law, since on this basis the UKNF may not issue instructions relating to the application of rules other than those arising from Article 70 of the Banking Law

for the individual assessment of a borrower's creditworthiness, in particular the scope of the information analyzed or the date on which such assessment is to be made. The same applies to the bank's authorization to adopt simplified models related to the assessment of credit risk to assess whether the borrower will become creditworthy within a certain period of time. The Banking Law does not provide for any authority for banking supervisors to influence the determination of elements relating directly to the bank's individual credit risk assessment. There is also no justification for such possible positions to also apply to the banks' lending policies, to the extent that they affect the individual assessment of a borrower's creditworthiness.

In order to establish the essence of the concept of creditworthiness for the purposes of this work, it was necessary to start from a historical background, describing how the approach to establishing creditworthiness in banking law has evolved, as well as to establish the characteristics and types of credit agreements currently used by banks. An attempt was also made to define the concept of creditworthiness based on the provisions of the Banking Law, as well as the Consumer Credit Act and the Mortgage Credit Act. Due to the fact that the concept of creditworthiness is of an abstract nature and is related to the bank's estimation, on the basis of the information and documents in its possession, of the probability associated with the borrower's failure to meet the obligation to repay to the bank the amount of funds under the loan made available by the bank, increased by the interest due to the bank, as well as the estimation of the probability of the deterioration of the creditworthiness so established, which threatens the performance of this credit obligation, it was necessary to carry out an analysis of how the process related to the assessment of creditworthiness or its monitoring may proceed. It was also necessary to refer to legal considerations arising from EU directives and the case law of both the Court of Justice of the European Union and the jurisprudence of national courts relating to credit agreements.

As the law does not regulate the issue of creditworthiness and, in principle, each bank independently develops the applicable credit procedures on the basis of which it carries out its creditworthiness assessment, it was necessary to analyze the methods used by banks to establish creditworthiness, including through the use of credit ratings and credit scoring as well as profiling.

In order to develop procedures related to the determination of borrowers' creditworthiness, banks draw on both the existing body of legal science and economic science, as well as on the extensive experience of the banking sector and the recommendations and positions of banking supervisory authorities. Both the way in which banks assess creditworthiness and the

information used in the process have changed significantly in recent years. Banks have moved away from the manual, written analysis by bank credit analysts, which was still common until recently, who, on the basis of information and documents provided by the borrowers, made calculations and prepared credit analyses, which formed the basis for determining creditworthiness. Nowadays, it is common for banks to use IT systems that automatically analyze financial, behavioural and statistical data on the borrower, much of which does not come from the borrower, but from the bank's databases, which are further supplemented with data retrieved by the bank from other databases, in particular data from other banks or lenders, which are made available to each other on the basis of Article 105(4) of the Banking Act. For this reason, not only the way in which the bank carries out the assessment of the borrower's creditworthiness changes, but also the nature of the entire process changes, as well as the information used to carry it out. This change also affects the development of legislation, which is particularly noticeable at Community level and in relation to consumers. Changes in the law in this area have led to the enactment of new regulations relating mainly to consumer credit and mortgages, in which the emphasis on consumer protection and the idea of responsible lending is increasingly noticeable. Creditworthiness assessment itself is also understood not so much as serving to protect banks' deposits, but primarily as a means of limiting over-indebtedness of borrowers. For this reason, the legal obligation imposed on borrowers to carry out a creditworthiness assessment is secured by the sanctions laid down to counteract irresponsible lending, especially without a creditworthiness assessment.

At present, the provisions of the Banking Law do not indicate how a bank should properly determine creditworthiness, what criteria it should consider, and on the basis of what information and data this determination is made. The statutory definition of the concept of creditworthiness itself, contained in Article 70(1) of the Banking Law, merely indicates that it is the borrower's ability to repay the loan together with interest on the dates specified in the agreement. At the same time, the provisions of the Banking Law, apart from the general definition, do not impose any obligations on the bank, based on which the bank would be obliged to specify in detail in the credit agreement the procedure and manner of determining creditworthiness. Also, among the elements of the credit agreement listed in Article 69(2) of the Banking Law, the legislator did not indicate that an indispensable element that should be included in the credit agreement is the specification of the procedure and manner in which the bank assesses creditworthiness, as well as the documents and information on the basis of which such creditworthiness was carried out. The lack of specification in the provisions of the Banking Law of more detailed norms relating to creditworthiness, including with respect to the

documents and information on the basis of which such creditworthiness was carried out, in view of the fact that, in practice, there is also no reference to this information in credit agreements, results in the fact that, in principle, it is difficult to determine objectively whether the bank has made such an assessment correctly, especially when the bank considers that the borrower has lost this capacity.

Creditworthiness under the Banking Law is not only of key importance for the conclusion of a credit agreement, as the bank, in accordance with the provisions of the Banking Law, makes the granting of a credit agreement conditional on creditworthiness, but is also of vital importance for the performance of the obligations under the credit agreement. In particular, the loss of creditworthiness is one of the prerequisites that entitles the bank to either reduce the amount of the credit granted or to terminate it by the bank pursuant to Article 75(1) of the Banking Law. In view of the fact that creditworthiness is an abstract concept that is not regulated in detail in the provisions of the Banking Law, in the absence of specific provisions in the credit agreement in this regard, the exercise of these powers by the bank may either encounter great difficulties or be considered an abuse of the bank's powers. The provisions of the Banking Law should impose obligations on the bank to have procedures in place which specify the procedure and manner in which the assessment of creditworthiness is carried out, as well as specifying the information and documents on the basis of which the creditworthiness assessment is carried out. The procedures and information should be available to borrowers so that they can verify whether the bank's assessment has been carried out correctly. Currently, only the provisions of the Act of the Mortgage Credit Act obliged the bank to establish and apply procedures and specify the information on the basis of which the creditworthiness assessment is made. However, the provisions of the Act do not oblige the bank to make available or at least inform the borrower of these procedures and information in a way that would enable the borrower to become aware of them.

Reliable and comprehensible information on how the bank determined creditworthiness is the basis for ensuring a balance between the parties to the contractual relationship. The borrower has the right to obtain information not only on the outcome of the creditworthiness assessment but should also be able to obtain information on what factors were taken into account by the bank, on the basis of which information the bank made the assessment and from what sources the information was taken by the bank. Currently, admittedly, pursuant to Article 70a of the Banking Law, banks are obliged to provide information to a person applying for a loan concerning the bank's assessment of the applicant's creditworthiness, however, such information is provided only upon request, which must be submitted by the

person applying for credit, and therefore without such a request the bank is not entitled to provide such information. It also follows from the wording of the provision that it applies only to the person who applies for the credit and is therefore not the borrower, which means that, in principle, the information can be provided before the credit is granted.

The analysis of the concept of creditworthiness carried out in the context of this work shows that this concept is central to the conclusion and performance of obligations of a credit agreement. Despite the rather limited regulation of this issue in the law, the objective set out in this thesis of attempting to approximate both the definition of this concept and the methods relating to the determination of this capacity in banking practice, has been achieved. This dissertation presents the historical background to the enactment of the law on creditworthiness, as well as the factors that have shaped banking practice and influenced the development of appropriate activities related to the assessment of creditworthiness. In addition, an insightful interpretation of the basic issues that are related to the related to the concept of creditworthiness and which are contained in the provisions of the Banking Law and the Consumer Credit Act and the Mortgage Credit Act. In the course of the dissertation, it was shown that, despite the application by banks of the provisions of the Banking Law to the extent relating to creditworthiness, as well as the recommendations of the Financial Supervision Commission, the approach to creditworthiness differs depending on the type of credit agreement, the parties to this agreement or the practice in individual banks.

In the chapter devoted to the interpretation of the concept of creditworthiness, conclusions are drawn relating to the fact that, depending on the type of credit agreements, which may additionally be subject to separate legislation and in relation to different borrowers, the concept of creditworthiness may be interpreted differently. Also, the rights and obligations of borrowers related to both allowing the bank to carry out financial and economic assessment activities and to control the use and repayment of the credit, as well as to the obligation to provide information and documents in this regard at the bank's request, are defined differently. The lack of detailed provisions leads to the fact that there are broad possibilities on the bank's side, which in principle allow the bank unilaterally to assess whether the borrower is capable or not. This leads to the bank being unjustifiably granted an essentially unilateral power to terminate the loan agreement as a result of a finding that the borrower is not creditworthy. The conclusions drawn from the analysis of the issue relating to the determination of the concept of the borrower's creditworthiness under the provisions of the Banking Law, allow for the identification of individual areas that are the most problematic in the context of the impact of creditworthiness on the conclusion and performance of obligations under a credit agreement.

It seems that the individual parts of the dissertation form a coherent whole, allowing to obtain basic information on the concept of creditworthiness, the ways of determining it, as well as the factors that influence its determination, as well as to explore the development of this concept in banking practice. This dissertation may serve as a starting point for a further in-depth analysis of the various solutions relating to the impact of the assessment of creditworthiness on the conclusion and performance of obligations under a credit agreement.