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THE SOCIAL PILLAR OF SUSTAINABLE DEVELOPMENT IN THE CONSUMER CREDIT MARKET: DOES THE TRADER TURN INTO A GUARDIAN OF SOCIAL VALUES?

SPOŁECZNY FILAR ZRÓWNOWAŻONEGO ROZWOJU
NA RYNKU KREDYTÓW KONSUMENCKICH: CZY PZEDSIEBIORCA
STAJE SIĘ STRAŻNIKIEM WARTOŚCI SPOŁECZNYCH?

The article focuses on the social pillar of sustainable development in relation to the consumer credit market. Unfair practices in this market can lead to an increase in poverty, social exclusion, and inequality, thus having a direct impact on societal well-being and sustainable development. The article aims to assess the impact of the social pillar of sustainable development on the concept of public interest, which encompasses social values and justifies interventions in that limit economic freedom in the consumer credit market. For the social pillar of sustainable development in this market, the articulation of the 'sustainable lending' postulate in the new Consumer Credit Directive is significant. The pursuit of 'sustainable lending' requires reconciling the public interest with the economic interests of entities in the consumer credit market, which involves balancing the interests of financial institutions and society as a whole. This involves not only lessening the discrepancies between the interests of the financial institutions and those of the consumer who concludes the agreement, but also reducing the divergence between the interests of the financial institutions and the interests of society at large. The regulatory legal instruments introduced in the EU Consumer Credit Directive may contribute to achieving the social values that constitute the social pillar of sustainable development. The scope of the legal changes demonstrates that not only political actions but also decisive legislative measures are being undertaken to protect the values associated with the social pillar of sustainable development.

Keywords: sustainable development; sustainable lending; consumer credit; consumer; public interest

Artykuł koncentruje się na społecznym filarze zrównoważonego rozwoju w odniesieniu do rynku kredytów konsumenckich. Nieuczciwe praktyki na tym rynku mogą prowadzić do wzrostu ubóstwa, wykluczenia społecznego i nierówności, a zatem mają bezpośredni wpływ na dobrostan

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społeczeństwa i zrównoważony rozwój. Celem artykułu jest ocena wpływu społecznego filaru zrównoważonego rozwoju na treść istotnego interesu publicznego, który wyraża wartości społeczne i którego ochrona stanowi uzasadnienie ingerencji w wolność działalności gospodarczej na rynku kredytów konsumenckich. Dla realizacji społecznego filaru zrównoważonego rozwoju na tym rynku istotny jest postulat „zrównoważonego udzielania kredytów” wyrażony w Nowej Dyrektywie. Implementacja postulatu „zrównoważonego udzielania kredytów” wymaga łagodzenia sprzeczności między interesem publicznym a interesami ekonomicznymi podmiotów działających na rynku kredytów konsumenckich, co przejawia się w dążeniu do równoważenia interesów instytucji finansowych z interesami społeczeństwa jako całości. Regulacyjne instrumenty prawne wprowadzone w Nowej Dyrektywie mogą przyczyniać się do realizacji celów społecznych, które składają się na społeczny filar zrównoważonego rozwoju. Zakres zmian prawnych potwierdza, że podejmuje się nie tylko działania polityczne, lecz także konkretne działania legislacyjne w celu ochrony wartości związanych ze społecznym filarem zrównoważonego rozwoju.

Słowa kluczowe: zrównoważony rozwój; zrównoważone udzielanie kredytów; kredyt konsumencki; konsument; interes publiczny

I. INTRODUCTION

The concept of sustainable development rests on a balance between the environmental, economic, and social pillars, but the significance and objectives of the latter remain vague (Dempsey, 2011; Murphy 2012). Dismissing or marginalizing the social pillar in debates on sustainable development makes it conceptually ‘elusive’ (Thin, 2002), partly because it has not been precisely formulated in legal terms. The political and economic priorities adopted gear the activity of public authorities mainly towards economic growth and environmental protection, as these bring rapid economic outcomes. This is not the case with social investments, which, requiring long-term changes, result in the marginalization of social issues. Achieving social objectives necessitates both the involvement of public authorities and active engagement on the part of traders, who are willing to invest in sustainable development when change translates into financial benefits. In effect, social aspects may be treated by traders either as an additional burden or as an integral component of their business strategy.

Overcoming barriers, which includes raising awareness of the importance of social aspects of sustainable development, cannot be accomplished without policies that focus on long-term economic goals and a socially responsible approach, or without regulations deriving from such policies, by virtue of which social values may be implemented. Knowledge deficits concerning the social aspects of sustainable development require particular efforts from international institutions and national bodies. When formulating sustainable development goals and directions to achieve them in development strategies, one increasingly highlights ambitious economic and environmental priorities,¹

¹ UN, Transforming our world: The 2030 Agenda for Sustainable Development, A/RES/70/1, 25 September 2015; European Commission, The European Green Deal, COM(2019) 640 final, Brussels, 11 December 2019.

while recognizing the need to define social objectives more clearly. However, in order to respond more effectively to challenges such as poverty, social exclusion, or inequality, one should expect initiatives that take social values into account in decision-making processes (also by traders) with a view to protecting the general society-wide good. Consumer protection in the consumer credit market is a notable example of such a sphere.

Consumer protection has been given much attention by the EU legislator, with a number of legislative initiatives launched in recent years aimed at adapting consumer law regulations to the realities arising from the digital and ecological transformations.² These regulations represent an important step in the implementation of the pillars of sustainable development. Although the EU legislative solutions at the intersection of consumer protection and sustainable development place environmental protection at the fore,³ the content of the most recent legal acts applicable to the consumer financial market is highly relevant to the realization of the social pillar of sustainable development. The actions of EU institutions demonstrate the increasing significance of social values – they not only set political goals but also establish legal norms with a strong social focus.

In the new consumer credit directive,⁴ the EU legislator emphasizes social challenges such as tackling consumer over-indebtedness. Apart from introducing supervisory instruments in the financial market (Fedorowicz & Zalewicz, 2024), the phenomenon is addressed by means of new requirements placed on the entities operating in the consumer credit market, the application of which is justified by the protection of the public good. At present, the rationale behind counteracting such issues in the course of lawmaking and the application of the law invokes the protection of the individual interests of consumers and the general interests of the public, which is in line with the pursuit of sustainable development.

Analysis of the legal solutions provided for in the New Directive shows that the social values which inform the content of public interest – in particular, consumer protection – contribute to a change in the expectations of public authorities towards creditors and credit intermediaries. This, in turn, translates into an increasing number of obligations that such entities have towards consumers. This legislative line is vital for the social pillar of sustainable development, which the EU legislator refers to as ‘sustainable lending’

² Communication from the Commission to the European Parliament and the Council, New Consumer Agenda, Strengthening Consumer Resilience For Sustainable Recovery, COM(2020), 696 final.

³ Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information; Directive (EU) 2024/1799 of the European Parliament and of the Council of 13 June 2024 on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828.

⁴ Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC (hereinafter ‘New Directive’).

(Recital 33 of the New Directive). The legislator intends to accomplish this objective through a catalogue of obligations imposed on the entities in the consumer credit market, directly affecting the scope of their freedom of economic activity. Therefore, it is crucial to determine which values stemming from the social pillar of sustainable development ultimately guide the action of public authorities, determining the content of the important public interest in the consumer credit market that justifies interference with economic freedom. The ever more extensive legal framework surrounding the sustainable lending policy – in the effort to implement the social pillar – will be analysed comparatively, in terms of the obligations of creditors and credit intermediaries, drawing on the legal solutions in the previous credit directive⁵ and the New Directive. Further insights will also be based on an empirical desk study, the results of which reveal current challenges in the consumer credit market.

II. PUBLIC INTEREST AND THE IMPLEMENTATION OF THE SOCIAL PILLAR OF SUSTAINABLE DEVELOPMENT

In a free market economy with a salient social component,⁶ the function of the state (and, consequently, the function of the law) is not exclusively limited to creating conditions that foster economic development by enabling self-regulating market mechanisms to operate. The state's activity within the economy is justified by the need to determine appropriate (fair) relations between the participants in economic life and to shape the economic order in a manner that ensures that social needs are met (Strzyczkowski, 2023).

Law is not only a vehicle for economic goals, but also for specific social goals that respond to the current policy of the public authority. Consequently, the organization of economic processes within the adopted legal order that guarantees economic rights and freedoms should create the conditions for free enterprise through appropriate means and legal instruments for influencing the economy, whereby the various interests of its participants – traders and consumers alike – are taken into account. Therefore, protection of the fundamental values of the free market economy, including economic freedom and competition, should be examined in terms of the permissible scope of restrictions on economic activity that the protection of the public interest calls for. Indeed, the goal of the state (Zimmermann, 2022) is to act in the public interest, which is why the lawmaker introduces legal instruments that, aimed at protecting the public good, restrict the interests of market actors and, consequently, interfere in the sphere of freedom.

⁵ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (hereinafter 'Previous Directive').

⁶ See Article 3 TEU and Article 20 of the Constitution of the Republic of Poland, Journal of Laws of the Republic of Poland, 1997, No. 78, item 483.

Public interest is an open-ended criterion in public law. In the process of reconstructing the normative grounds of a decision to apply administrative law, a public administration body will go beyond the arguments directly anchored in legal regulations (Komierzyńska & Zdyb, 2016), citing the protection of the public interest to justify its action. In this case, the autonomy of the interpreter who applies the law means that they are free to lend appropriate substance to the public interest clause, but this cannot be a wholly arbitrary act. It must be informed by the system of universally recognized values and the objectives of the state, which together determine the content of public interest (Kokocińska, 2019; Wyrzykowski, 1986). If such goals and values are volatile, the notion of public interest has to be constantly redefined, interpreted anew in a specific social and political context (Blicharz, 2004) and considered in reference to a specific area of life (Zimmermann, 2022). In doing so, the key principle of pursuing the interests of the entire community is maintained, whilst respecting the interests of the individual (Zimmermann, 2007). In the case in question, the current legal environment must be examined in the social and political context resulting from global priorities and international commitments.⁷ Its key element is the pursuit of sustainable development, including the realization of the objectives of its social pillar.

Within the social pillar of sustainable development, one seeks to improve the quality of life, ensure social justice, equity, and social integration, uphold equal rights and respect for human rights, and counter marginalization and social exclusion. The consumer credit market has the potential to support social Sustainable Development Goals such as combating poverty (Goal 1), ensuring the well-being of society (Goal 3), promoting equal access to goods and services (Goals 5 and 10), and supporting responsible consumption (Goal 12). The premises of this pillar are indeed reflected in the regulatory regime of consumer credit. Above all, the new approach to responsible and fair lending involves sustainable social development by ensuring fairness, equal access to credit, and counteracting consumers' over-indebtedness. Consumer protection is the principal element of the social pillar in the consumer credit market. It involves preventing consumer over-indebtedness and reducing social inequalities, which should be supported by a responsible approach from financial institutions offering consumer credit. Financial inclusion is another important element of the social pillar of sustainable development, as all citizens, regardless of their social status, should enjoy equal access to financial services – including consumer credit – while not being exposed to any discrimination. This responsible approach to lending has a broader significance than merely protecting the economic interests of the consumers. It serves to build a fairer and more resilient financial system that supports sustainable development in all its aspects.

⁷ UN, Transforming our world: The 2030 Agenda for Sustainable Development, A/RES/70/1, 25 September 2015; European Commission, The European Green Deal, COM(2019) 640 final, Brussels, 11 December 2019.

Thus defined, the Sustainable Development Goals in their social pillar and the values deriving from them influence the legislative directions adopted in consumer law. In effect, it breaks with the previous approach of the EU and the national lawmakers, who prioritized the relationship between economic growth and the condition of the environment to the exclusion of the impact of these two spheres on society. The pursuit of sustainable development (as an obligation arising under international law) has become a permanent element of the state policy and its public affairs management system, which is reflected in the legal acts adopted within the framework of the economic system in place (Strzyczkowski, 2016). Sustainable development is at the heart of the economic system (Article 5 of the Constitution of the Republic of Poland), where economic growth is circumscribed by the need to ensure the welfare of the society and to protect the environment. As such, it justifies (as an objective based on certain values) the creation of rules (laws), which include the injunctions and prohibitions pertaining to specific behaviours, and which are enforced by public authorities for the sake of important public interest. However, as the Polish Constitutional Tribunal observes, the notion of public interest 'must not be treated as a concept that offers the legislator the opportunity to treat it in an arbitrary manner, as it is not a blanket term. It is incumbent on the legislator to identify its content taking into account constitutionally protected values and standards.'⁸

In the case analysed here, it is a system of values on which the social market economy is founded (Kokocińska, 2018), where the freedom of economic activity constitutes a value of particular importance (Kiczka, 2015). This freedom may conflict with other values, and their pursuit may in certain situations require changes to the disadvantage of the individual (here: the trader). Such actions need to be justified by an important public interest, without excessive interference in the sphere of freedom of economic activity. The adopted legal solutions should be rational and adequate given the purposes for which the interference takes place. The Polish Constitutional Tribunal underlined that the freedom of economic activity is not absolute and may be limited, albeit only in a statutory form and only in view of an important public interest,⁹ further noting that 'when limiting the rights of an individual, it is necessary to abide by the principle requiring one to weigh the import of the public interest that the limitation of a given right serves and the import of the interests infringed by such a limitation.'¹⁰ The Sustainable Development Goals and the values derived from them 'fill' the content of the important public interest of consumer protection. Public interest constructed in this manner is, according to the legislator, a sufficient justification for the restriction of the freedom of economic activity.

⁸ Judgment of the Constitutional Tribunal of 25 September 1999, K 23/98, OTK 1999, no. 2, item 25.

⁹ Judgment of the Constitutional Tribunal of 26 April 1995, K 11/94, OTK 1995, Part I, item 12.

¹⁰ Judgment of 26 April 1999, K 33/98, OTK ZU 1999, no. 4, item 71.

The limits of freedom of economic activity are determined by the need to protect the public interest, the content of which, as previously indicated, evolves (Stawicki et al., 2016). So far, the restriction of the freedom of economic activity in consumer trade has served to ensure contractual balance between the trader and the consumer, so as to achieve a situation in which the weaker party to the contract (the consumer) is not utterly dependent on the conditions imposed by the stronger contracting party (the trader).¹¹ In the light of the New Directive, the expectations with respect to actors in the consumer financial market – seen as institutions of public trust – are greater; and beyond the obligation to consider the interests of the consumer in the contracting process, they also entail a role in achieving objectives of a general public nature (Recital 81), such as preventing consumer over-indebtedness and ensuring equal access to credit.

III. THE LEGAL INSTRUMENTS FOR THE PURSUIT OF GENERAL SOCIAL OBJECTIVES IN THE NEW CONSUMER CREDIT DIRECTIVE

Consumer credit is an important element of the economy. The consumer's ability to borrow money enables markets to function more efficiently and stimulates economic growth (Cherednychenko, 2017). Furthermore, responsible practices in the consumer credit market have the potential to contribute to the Sustainable Development Goals such as fighting poverty, ensuring social well-being, and promoting responsible consumption. However, practices that seek to maximize credit sales are an obstacle to achieving those goals. The negative consequences of pursuing growth may be ultimately borne by the consumers in the financial market when the product is designed to maximize profit for the financial institution rather than meet the needs of the consumer (Cherednychenko et al., 2019). Sales models based on consumer credit with deferred payment may adversely affect not only the consumer's living situation, but also the environment, as they trigger patterns of excessive production and consumption. Consequently, repeated abuses in this market may culminate in issues impacting the entire public. A 2023 study shows that consumer credit is the main source of consumers' over-indebtedness in the European Union.¹² Meanwhile, the proportion of over-indebted households in the EU between 2020 and 2032 is projected to increase from 8.8% in 2020 (17.2 million households) to 11.3% in 2032 (22.1 million; Study on over-indebtedness, p. 11). The problem of over-indebtedness, in turn, translates into the extent of poverty and the declining welfare of society.

¹¹ Judgment of the Constitutional Tribunal of 13 September 2005, K 38/04, OTK-A 2005, no. 8, item 92.

¹² European Commission, Study on European consumers' over-indebtedness and its implications. Final report, June 2023, p. 71 (hereinafter 'Study on over-indebtedness').

The EU legislator seeks to counteract the dangers of practices in the consumer credit market through legislative measures which restrict the freedom of economic activity. So far, the principal objectives of statutory interference with the freedom of economic activity in the financial market have been to counteract abuses of market power by financial institutions in their relations with the consumers, ensuring stability in the financial market and security for depositors and investors (Jurkowska-Zeidler, 2017). The protection of the values and the social goals which determine the content of important public interest in the consumer financial market has a dynamic effect on the entities operating in this market.

Legal instruments should serve to mitigate the tensions and contradictions between the public interest and the economic interests of financial market actors. For this reason, it has been a common approach in consumer law regulations to adhere to the concept of responsible lending (Cherednychenko, 2017). In line with this concept, entities operating in the consumer credit market are required to take into account not only their interests, but also the interests of their counterparty (consumer) by promoting responsible credit practices.

In the recitals of the New Directive, the EU legislator takes a more far-reaching approach by endorsing not only responsible, but also sustainable lending (Recital 33), which, given the premises of sustainable development, should be understood as granting credit in a manner that allows for both the interests of the other party to the financial product contract, as well as for implications of such a contract for the society and the environment. This reorientation of policy towards sustainable finance at the EU level is dictated by the internationally voiced expectations, according to which the financial sector is to play a key role in sustainable development (Cherednychenko, 2017). Cherednychenko (2020) sees sustainable consumer financial contracts as instruments that enable consumers to meet their financial needs and that are beneficial – or at least cause no harm – to Europe's economic, social and environmental sustainability. Furthermore, the proposed concept of sustainable development with respect to consumer financial contracts assumes that such contracts not only serve the individual interests of the consumers, but also support long-term needs of the economy, society, and the environment.

This change of direction in the New Directive was motivated by the findings from empirical research, which assessed the Previous Directive,¹³ since it demonstrated that the legal protection of the consumer in the financial market had hitherto been illusory in many areas (Jurkowska-Zeidler, 2017). The premise of the Previous Directive (Recital 19) was that the pre-contractual information obligation towards the consumer would enable the latter to make an informed decision, that is, based on full knowledge of the facts. However, according to the research, the limited level of financial literacy among consu-

¹³ Evaluation of Directive 2008/48/EC on credit agreements for consumers. Final Report, European Commission, February 2020 (hereinafter 'Evaluation of Directive 2008/48/EC').

mers often causes them to enter into financial agreements whose terms they do not comprehend (Evaluation of Directive 2008/48/EC, p. 101).¹⁴ Furthermore, consumers often find it difficult to understand crucial information about credit, such as interest rates and the annual percentage rate ([APR]; Evaluation of Directive 2008/48/EC, p. 65). Thus, the paradigm of protecting the consumer through adequate information has proved insufficient. The nature of the financial market – including the substantial complexity of financial products – means that it is often insufficient for a financial institution to fulfil its pre-contractual information obligation for the consumer to fully understand the terms and conditions of the agreement. The European Commission's study highlighted that consumers encounter difficulties when confronted with the terms of their agreements, notably where the creditor uses the specialized language (Evaluation of Directive 2008/48/EC, p. 60), which is usually employed in all financial contracts.¹⁵

The New Directive attempts to address these problems and challenges. The recitals indicate that the legal framework should ensure that creditors and credit intermediaries take into account the interests of consumers, including their possible vulnerability and difficulty with understanding the product (Recital 76). The New Directive revises the role of creditors and credit intermediaries who, by fulfilling a broader set of obligations in consumer trade, are not only expected to ensure consumer protection within the legal relationship, but also, through proactive attitude, pursue the broader social objective of preventing consumer over-indebtedness (Recital 81). Such a legal framework is designed to ensure sustainable lending, that is, an approach in which the financial institution is guided not only by the interests of the other party to the financial product contract, but also by the social and environmental consequences of the agreement.

The idea behind the regulatory regime shaped by the Previous Directive was to oblige Member States to take appropriate (effective) measures so as to promote responsible practices at all stages of credit agreements, including the obligation to warn consumers of the risks involved in default or over-indebtedness (Recital 26). It explicitly follows from the New Directive that not only public authorities, but also creditors have a role to play in preventing over-indebtedness (Recital 81). That objective and increased consumer protection are clearly the two primary goals of the New Directive, as illustrated in Recital 62.

The above shows that sustainable development and its goals have a considerable potential to influence the content of the legislation governing the consumer credit market. The economic pillar of development manifests itself in the pursuit of economic growth through consumer credit. The means thus

¹⁴ Report on the Digitalisation of Short-term, High-Cost Consumer Credit, FinCoNet, 2017; Study on consumers' attitudes towards Terms and Conditions (T&Cs), European Commission, 2016.

¹⁵ Changes in this area will probably occur with the implementation of Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services.

raised by consumers often go towards the purchase of goods or services, and increased sales drive economic growth. In the current economic system, economic activity (in which financial institutions also engage) is often informed by the structural growth imperative (Borusiak, 2023; Hickel, 2020), for which no limit has been defined. Such an approach may then encourage socially and environmentally harmful activities (Stern, 2006), because economic progress is declaratively said to contribute to the welfare of humanity (Gorynia, 2018) while simultaneously posing a legitimate risk of overexploitation of environmental resources. For this reason, representatives of the doctrine speak of the need to devise an alternative to the currently applicable principles of the socio-economic system (Borusiak, 2023). One such alternative is sustainable lending, in which not only economic, but also social and environmental considerations influence the final decision to grant credit. Sustainable lending creates great opportunities for countering consumer over-indebtedness and excessive consumption.

The obligations of financial institutions to implement sustainable lending apply at every stage of their business activities. According to Article 32 of the New Directive, creditors and credit intermediaries are to act honestly, fairly, and transparently, recognizing the rights and interests of the consumer while developing the credit product, advertising it, granting credit, intermediating credit, providing advice or ancillary services, and performing the credit agreement. What follows is a comparison of how the Previous Directive and the New Directive regulate the obligations of financial institutions with regard to credit advertising, assessment of consumer's creditworthiness, advisory services, and the identification of consumers facing repayment difficulties. The aim is to demonstrate the increasing public-law interference that affects the freedom of economic activity in the consumer credit market.

Article 8 of the New Directive not only establishes new requirements that pertain to advertising credit agreements, but also introduces explicit prohibitions on advertisements with specific content. Under the new regulation, advertisements for credit agreements are to contain a clear and prominent warning designed to make the consumers aware that borrowing costs money, worded as 'Caution! Borrowing costs money' or an equivalent formulation (Article 8(1) of the New Directive). In addition, advertising for credit products must not suggest that credit will improve the consumer's financial situation, serve as a substitute for savings, or raise a consumer's standard of living (Article 8(7)(a) and (c)). Advertising which implies that outstanding credit agreements or registered credit in databases have little or no influence on the assessment of a credit application is also prohibited (Article 8(7)(b)). Moreover, Member States are empowered to prohibit advertisements for credit which emphasize the ease or speed of obtaining it, offer grace periods exceeding three months for repaying credit instalments, or state that a discount is conditional upon entering into a credit agreement (Article 8(8)).

In this respect, the regulation underwent a substantial modification, as Article 7 of the Previous Directive did not lay down any prohibitions on credit advertisements with a specific content, but merely required that selected

terms of the credit agreement be mentioned in the advertisement. As stated in Recital 33 of the New Directive, the new obligations on credit advertising are intended to reduce the mis-selling of credit to consumers who cannot afford it and to promote sustainable lending. In this manner, the EU legislator acts on the findings concerning the effectiveness of the Previous Directive, which demonstrated that the provisions of the Directive are repeatedly breached at the advertising stage, and that even if advertising is transparent and presents true information, there is a legitimate risk that consumers will not understand the information it contains (Evaluation of Directive 2008/48/EC, p. 62). The new regulations also appear to aim at eliminating marketing strategies that have been deployed in the market to promote high-interest credit in particular, underscoring the benefits of obtaining money immediately through such means. As noted in the report evaluating the Previous Directive, such practices may encourage impulsive decisions and consequently increase the risk of consumer over-indebtedness (Evaluation of Directive 2008/48/EC, p. 156).

The above attests to a change of direction in the obligations imposed on financial institutions to ensure that marketing communications do not exploit consumers' vulnerability and, at the same time, possess educational value. The new provisions concerning advertising may have an acute impact on a market that strives to maximize credit sales, where advertising is evidently a major tool for driving sales. The prohibitions set out in Article 8(7) and (8) of the New Directive may lead to the withdrawal of financial products whose advertising has hitherto relied on what is now prohibited content. For example, it is highly likely that a ban on advertising financial products with a grace period of more than three months will result in a decline in the volume of agreements concluded with consumers of such products, and may consequently lead to their withdrawal from the market.

Given all the obligations referred to in Article 8 of the New Directive, it may be conjectured that the new regulation will alter the nature of consumer credit advertising, as advertising communications are expected to evolve into informative and educational messages. After all, the EU legislator has granted creditors only a limited scope to encourage consumers to take out credit through advertising, while at the same time focusing on the educational significance of such messages. This, in turn, testifies to a significant degree of public-law interference in the freedom of economic activity in the consumer credit market, which goes far beyond the framework adopted in the Previous Directive.

Another problem diagnosed through empirical research is the failure to assess consumer creditworthiness, as reported by one in ten consumers participating in the survey carried out for the European Commission (Evaluation of Directive 2008/48/EC, p. 69). As a result, two-thirds of the consumer protection bodies in EU Member States believe that the provision requiring creditors to assess the consumer's creditworthiness is not effective enough to ensure that consumers are adequately protected (Evaluation of Directive 2008/48/EC, p. 71). This state of affairs is due to increased demand and the hi-

gher availability of credit, as well as the speed with which it is granted. These factors have caused credit application procedures to become less stringent in formal terms, and the reliability of the consumer creditworthiness assessment has diminished as a result (Study on over-indebtedness, p. 188). The identified infringements may give rise to abuses, especially when granting high-interest credit to consumers who are likely to default on payments (Hililamo, 2010).

The pertinent provision of the New Directive makes it clear that creditworthiness assessment is to be carried out in the interests of the consumer, in order to prevent irresponsible lending practices and over-indebtedness, as well as to take due account of factors relevant to verifying the consumer's chances of fulfilling their obligations under the credit agreement (Article 18(1)). The manner of such an assessment is described in greater detail than in Article 8 of the Previous Directive, as the legislator specifies the sources of information to be used in the process, or requires that creditworthiness assessment procedures be established and their application documented (Article 18(4)). In addition, unlike the Previous Directive, the New Directive makes the provision of credit to the consumer conditional on a positive outcome of the creditworthiness assessment (Article 18(6)). The EU legislator has also adapted the creditworthiness assessment obligation to the challenges of the digital world. Specifically, in cases where the creditor uses automated personal data processing, the consumer has the right to request and obtain human intervention and to receive information from the creditor, as set out in Article 18(8) (a–c) of the New Directive. In summary, the new obligations to investigate consumer creditworthiness more broadly than in the Previous Directive restrict the freedom of financial institutions in terms of the entities with which they may conclude a consumer credit agreement.

A particular feature of the contractual relationship in a consumer credit agreement is that the financial institution (creditor or credit intermediary) is required to be mindful of the interests of the consumer. Here, according to both the Previous and the New Directive, the consumer is to be provided with explanations so that they are able to assess whether the proposed credit agreement is suited to their needs and financial situation. In the New Directive, providing explanations has been explicitly formulated as an obligation of the creditor (or, where applicable, the credit intermediary) and conveyed in a separate Article 12, which shows how important such explanations are for the conclusion of the credit agreement. In Article 12, the obligation to provide an adequate explanation is not confined to 'applicable cases' and, in the light of a literal and purposive interpretation of the provision, it should apply to any consumer seeking consumer credit.

In contrast to Article 5(6) of the Previous Directive, Article 12 of the New Directive clearly asserts that the explanations should be provided free of charge prior to the conclusion of the credit agreement. Fulfilling the obligation to provide pre-contractual explanations every time a consumer credit agreement is concluded is extremely important from the standpoint of sustainable lending. Fair dealing on the part of financial institutions at the pre-contractual stage can increase the consumer's chances of understanding the terms of the

agreement, assessing those terms in the light of their needs and financial capabilities and, consequently, making an informed decision on whether to conclude the agreement. Thus, providing explanations to any consumer interested in entering into a consumer credit agreement promotes the systemic prevention of over-indebtedness.

Another obligation, which bears on sustainable lending and simultaneously affects the freedom of activity of financial institutions, concerns the knowledge and competence required of the staff who represent the creditor and credit intermediaries. The extent of the required knowledge and competence is defined broadly in Article 33(1) in relation to the manufacturing, the offering and the granting credit agreements, the carrying out of credit intermediation activities and the provision of advisory activities, as well as in relation to consumer rights in the area of their trade. This obligation is closely linked to the obligation to provide pre-contractual explanations to the consumer. In objective terms, to provide explanations to the consumer in a fair and reliable manner, the knowledge and expertise of the professional involved is indispensable.

Compared with the Previous Directive, the provisions of advisory services represent a certain novelty. The EU legislator recognizes the risks associated with the provision of such services to consumers, if only in view of the importance that consumers attach to the use of the terms 'advice' and 'advisors' (Recital 50), and the credibility they attribute to the recommendations made by advisors. In order to ensure a high degree of transparency of such services, the New Directive provides for separate obligations towards consumers in this respect. According to Article 3(17) of the New Directive, 'advisory services' means personal recommendations to a consumer in respect of one or more transactions relating to credit agreements, and that constitute a separate activity from the granting of credit and credit intermediation activities. The New Directive distinguishes between transaction-specific advice (Article 16) and its particular category, debt advice (Article 36). Transaction-specific advisory services are to be provided only by creditors and, where applicable, credit intermediaries (Article 16(6)), whereas debt advisory services are to be offered by independent professional operators. According to Article 3(22) of the New Directive, 'debt advisory services' means personalized assistance of a technical, legal, or psychological nature provided by independent professional operators who are not, in particular, creditors or credit intermediaries, in favour of consumers who experience or might experience difficulties in meeting their financial commitments.

If creditors or credit intermediaries offer the provision of advisory services, they are subject to additional information obligations towards consumers, as outlined in Article 16 of the New Directive. Thus, according to Article 16(1), Member States shall ensure that the creditor and, where applicable, credit intermediary clearly inform the consumer – in the context of a given transaction – whether or not an advisory service is being provided or may be provided to the consumer. When providing such a service, the creditor or credit intermediary must act in the best interests of the consumer (Article 16(3)(d) New

Directive), whilst relying on the information about the consumer's financial situation, preferences, and objectives in respect of the credit agreement, so as to be able to recommend credit agreements that are suitable for that consumer. The assessment of the consumer's financial situation and needs as part of the advisory service should include reasonable assumptions about the risks faced by the consumer during the term of the recommended credit agreement (Article 16(3)(b)). Given the goal of preventing over-indebtedness, it is crucial that the creditor or credit intermediary providing advice be obliged to warn the consumer where the credit agreement is likely to involve specific risks for the consumer due to their financial situation. Consequently, the EU legislator has established a rigorous framework within which advisory services may be provided to consumers.

From the standpoint of tackling over-indebtedness, attention should also be drawn to the new regulation on debt advisory services. According to Article 18(9) of the New Directive, the creditor is obliged – where appropriate – to refer the consumer to readily accessible debt advisory services if their credit application is rejected. Under the new regulation, the creditor must offer the consumer debt advisory services, if such are available, in the event that the consumer regularly overdraws their overdraft balance (Article 25(2) of the New Directive). While the transaction-specific advisory services referred to in Article 16 of the New Directive may be provided by creditors or credit intermediaries themselves, debt advisory services should be provided by independent entities. Recital 81 of the New Directive states that the purpose of debt advisory services is to assist consumers who experience financial difficulties and suggest how they may repay their outstanding debt to the maximum possible extent, while maintaining a decent standard of living and preserving their dignity.

Advisory services should be personalized and may encompass legal advice, money and debt management, as well as social and psychological support (Recital 81 of the New Directive). The services in question are therefore highly relevant for the social pillar of sustainable development, as they aim to mitigate the decline in the quality of life among persons facing over-indebtedness. Given the considerably limited financial resources of the over-indebted consumer, Article 36(1) sets out that debt advisory services should be provided at 'only limited charges', which, in principle, should only cover operating costs (Recital 81 of the New Directive). This has a significant impact on the restriction of freedom of activity: first, creditors and credit intermediaries are not allowed to provide debt advisory services and, second, the providers should have the best interests of the consumer in mind when determining their compensation, rather than their own profit, and the compensation should be commensurate to their knowledge and experience.

The regulation concerning debt advisory services has been correlated with a new obligation for creditors. Namely, according to Article 36(2), creditors should introduce and apply procedures and policies to identify consumers who experience financial difficulties at an early stage. This obligation stems from the premise that creditors have a role to play in preventing over-indebtedness

by means of early detection and support for consumers experiencing financial difficulties (Recital 81 of the New Directive). Thus, the creditor's concern for the consumer's best interests has been significantly underscored and formulated as an obligation enduring throughout the actual relationship with the consumer: from the pre-contractual stage to the conclusion of the credit agreement. Given the full extent of the obligations incumbent on the creditor (and, often enough, on the credit intermediary), it can be concluded that their role is undergoing an ongoing transformation – from that of a contracting party to one increasingly defined by duties of care toward the client-consumer and sensitivity to broader social concerns.

IV. CONCLUSIONS

The 2008 Consumer Credit Directive provided for several obligations resting with financial institutions, whose fulfilment was to ensure a high level of consumer protection and safety in the financial market. The recitals of that legislation emphasized the need to promote responsible practices at all stages of the credit agreement (cf. Recital 26). The results of empirical research assessing the effectiveness of the solutions adopted in the Previous Directive, along with the growing international importance of the concept of sustainable development, ultimately prompted the EU legislator to realign its regulatory approach to the consumer credit market. In effect, the New Directive not only calls for responsible, but also sustainable lending. That objective entails the need to mitigate the contradictions between the public interest and the economic interests of the entities in the consumer credit market. This involves not only lessening the discrepancies between the interests of the financial institutions and those of the consumer who concludes the agreement, but also reducing the divergence between the interests of the financial institutions and the interests of society at large.

The legislator has opted for a regulatory paradigm in which public objectives are pursued through provisions of private law. The normative solutions thus introduced broaden the catalogue of obligations which restrict the freedom of economic activity in the name of protecting public goods. The entities operating in the consumer credit market are obliged to avoid practices that have a negative impact on the society on a micro- and macroeconomic scale. These obligations span educating consumers, warning those for whom a credit agreement may pose a specific risk due to their financial situation, and applying procedures for early detection of consumers who experience financial difficulties.

In the context of increasing social inequalities and ruthless striving for infinite economic growth, the need to approach consumer law more broadly than before – not only as a law that ensures the protection of consumers' interests, but also as a tool which serves society-wide interests – is increasingly emphasized. Consequently, it is believed that consumer law has the potential to

play a significant role in solving some of the world's most pressing issues (Van Loo, 2023). As awareness of the importance of the social pillar of sustainable development grows, the extent of the changes introduced by the New Directive confirms that one undertakes not only political action but also decisive legislative steps to protect the associated values. The social pillar of sustainable development is inherent to the public interest, the scope of which is evolving. As a result, expectations regarding how creditors (and credit intermediaries) organize their services are also changing, leading to a broader catalogue of requirements that, on the one hand, restrict the freedom of economic activity and, on the other, elevate traders to the status of 'guardians' of values.

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