Problems and Opinions

DOI: 10.26354/bb.7.4.101.2025

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Misuse of Free Credit Sanctions as a Potential Threat to the Banking Sector and Consumers

Absctract

The main objective of the article is to assess the threat of the free credit sanction to both the banking sector and consumers. The sanction of free credit (SKD) leads to depriving the lender of income (such as interest, fees, commissions, premiums, costs, etc.) from the consumer credit granted. If it is applied, the lender loses the revenue due from the credit granted and the borrower is, in principle, only obliged to return the principal of the credit used. In order to familiarise the reader with the issue of SKD, a review of the literature as well as Polish and EU case law was carried out. In the empirical part, on the other hand, an analysis was carried out, based on a comparison of financial data on SKD in individual banks in two periods, i.e. as at 31.12.2023 and 30.06.2024. After an analysis of legislation (in particular Directive 2008/48) and case law, the first hypothesis was confirmed. On the basis of studies of bank data and Poles' attitudes to the withholding of information in the lending process, the second hypothesis was also confirmed, according to which the abuse of SKD poses a threat not only to the banking sector, but also to the beneficiaries themselves – consumers.

Key words: free credit sanctions, credit scam, consument

JEL Codes: G11, G18, G21

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Introduction

Although cases concerning Swiss franc loans still account for a significant proportion of civil court cases, there is a noticeable decline in the number of new cases being brought, in contrast to cases concerning free credit sanctions (SKD), which are increasingly being brought before the courts. SKD is a consumer protection measure provided for in Article 45 of the Consumer Credit Act (Journal of Laws of 2024, item 1497, as amended), in force since 18 December 2011. A borrower may avail themselves of this sanction if the lender violates their obligations as detailed in this Act. According to data from the Polish Bank Association, by the end of 2021, between 100 and 200 such proceedings were pending before Polish courts, but by 2024, the number of SKD cases exceeded 10,000 and continues to show an upward trend. Although the line of jurisprudence has so far been favourable to banks (e.g. 84% of cases won by Bank Millenium as at 30 September 2024), borrowers who are attempting to take advantage of SKD continue to file new lawsuits. Disputes also go beyond the first and second instances, as exemplified by the referral of a question concerning SKD to the Supreme Court by the Regional Court in Poznań (ref. III CZP 3/25) and the influx of cases in this area to the CJEU (e.g. C-714/22) (Leśko, Folwarski 2025).

In order to provide an overview of the issue of SKD, a review of the literature and Polish and EU case law was conducted. In the empirical part, an analysis was carried out based on a comparison of financial data concerning SKD in individual banks in two periods, i.e. as at 31 December 2023 and 30 June 2024.

Given the popularity of SKD in Poland, it seems reasonable to hypothesise that the abuse of free credit sanctions may pose a threat not only to the banking sector, but also to consumers themselves. According to the second hypothesis, it can be concluded that SKD in the Polish legal system does not always meet the condition of proportionality provided for in Directive 2008/48.

1. Characteristics of free credit sanctions

In order to answer the question of how SKD may affect a consumer credit agreement, it is first necessary to define consumer credit itself (Article 3(1) of the Consumer Credit Act, hereinafter referred to as the CCA). It is a credit agreement for an amount not exceeding PLN 255,550 (or the equivalent of this amount), which the creditor grants or promises to grant to the consumer within the scope of its business (Brzozowski i in. 2023, p. 224).

A sole trader entering into a contract directly related to their business activity may also benefit from the protection guaranteed by provisions sanctioning prohibited contractual provisions and their incidental control. Such an entrepreneur will have the status of a consumer if the contract they are challenging is directly related to their business activity and, moreover, the content of the contract indicates that it is not

of a professional nature for the entrepreneur. The connection between the contract and its professional nature may be expressed through a statement included in the content of the contract or established in the context of the entrepreneur's business activity. The scope of the determination is also made, in particular, by comparing its actual scope with the scope indicated in the CEIDG. However, a sole trader may demonstrate that the contract concluded was not of a professional nature for them, regardless of its scope as specified in the CEIDG, e.g. in a situation where the entry in the CEIDG is broader than the activity actually performed by the trader. In such a case, the actual scope of the business activity conducted by the entrepreneur is taken into account, and not the one specified by the formal entry in the register (Balwicka-Szczyrba, Sylwestrzak 2024, p. 764).

In disputes concerning the Consumer Protection Act, the status of a consumer is often questioned by representatives of the defendant banking sector. It is reasonable to assume that if an entrepreneur has concluded a contract as a consumer and not as part of their business activity, they will be subject to the protection afforded to them as a consumer and, consequently, will be entitled to benefit from the Consumer Protection Act. Pursuant to Article 6 of the Civil Code (k.c.), it is the lender, i.e. the bank, that has the obligation to prove that the borrower cannot benefit from consumer status, but it is recommended that a borrower who wishes to benefit from consumer protection actively participate in arguing their status (Kozak, Pilawska, Tomanek 2025, pp. 29–30).

The SKD is regulated in Article 45u.k.k., according to which the consumer is protected when the lender:

- fails to comply with the written form of the credit agreement,
- fails to comply with the formal requirements covered by the agreement,
- exceeds the permissible limit of maximum fees and interest for late repayment of the credit, specified in Article 481 § 21 of the Civil Code, namely twice the statutory interest for late payment, which is twice the sum of the NBP reference rate and 5.5 percentage points),
- exceeds the permissible limit for non-interest loan costs, which is 25% of the loan amount for costs independent of the loan period and 30% of the loan amount for costs dependent on the loan period (Heropolitańska i in. 2021, pp. 536–537).

The formal requirements covered by the agreement include: the date of conclusion of the credit or loan agreement, the amount of the credit or loan, the borrower's or loan recipient's consumer status, and the consumer's declaration of taking advantage of the free credit sanction within a specified period (Kozak, Pilawska, Tomanek 2025, p. 23).

Pursuant to Article 221 of the Civil Code, a consumer is a natural person who performs a legal transaction with an entrepreneur not directly related to their business or professional activity. The decisive factor for granting consumer status is the moment of conclusion of the agreement. Both national and European regulations protect consumers who perform activities for non-commercial purposes, which are

understood as not directly related to their business activity or remaining outside it (Cempura, Kasolik 2020, p. 183).

The free credit sanction (SKD) leads to the creditor being deprived of income (such as interest, fees, commissions, contributions, costs, etc.) from the consumer credit granted. If it is applied, the creditor loses the income due from the credit granted, and the borrower is, in principle, only obliged to repay the principal of the credit used (Czech 2023, pp. 670–715).

However, the free credit sanction does not cover the costs of establishing bank collateral if the consumer is not obliged to pay them under the agreement. These costs are not considered to be the lender's income, therefore they cannot be charged to the bank (Kozak, Pilawska, Tomanek 2025, p. 14). The free credit sanction does not currently apply to mortgage agreements (Czech 2023, p. 671).

The SKD may partially limit the effect of the penalty of invalidity in favour of the consumer in relation to a consumer credit agreement, because according to Article 58 § 1 of the Civil Code, a typical case of a penalty of invalidity could have negative consequences for the consumer, e.g. in the form of an obligation to immediately repay the credit used. Assuming that Article 45 of the Consumer Credit Act does not constitute lex specialis in relation to Article 58 § 1 of the Civil Code, it should be concluded that in the absence of the required elements in the agreement, the agreement may be considered valid but subject to SKD, rather than applying the rigour of invalidity of the agreement (Czech 2023, pp. 670–715). Another important issue related to SKD is the moment of contract performance, as the Civil Code does not define contract performance in Article 45(5). The case law also presents two different views in this regard (Leśko, Folwarski 2025):

1) the one-year period should be counted from the date of performance of the agreement by the creditor, i.e. from the date of disbursement of the loan
2) the one-year period should be counted from the date of performance of the agreement by both parties, i.e. from the date of full repayment of the loan.

The first position is taken, inter alia, by the Regional Court in Warsaw, in case V Ca 2783/23, which interprets Article 45(5) of the Civil Code as the performance of the agreement by one of the parties to the contractual relationship, namely the lender, who pays the borrower the funds constituting the subject of the loan agreement, thereby fulfilling the performance characteristic of the loan agreement.

The Regional Court in Kielce in case II Ca 1590/24, on the other hand, represents the second view, according to which Article 45(5) of the Consumer Credit Act provides for the expiry of the consumer's right to submit a written statement after one year from the date of performance of the agreement, which is not tantamount to the payment of the loan amount by the bank. According to the Regional Court in Kielce, the performance of the agreement should be defined as a state in which all obligations under the consumer credit relationship have been duly fulfilled, including obligations arising under the Act, such as obligations relating to the main performance and ancillary performances, both on the part of the consumer and

the creditor, which are performed voluntarily or compulsorily. A consumer credit agreement is therefore performed on the date on which the consumer has repaid the last amount due under that agreement to the creditor. However, the contract is not performed if one of the parties still has obligations under it, regardless of whether they are specified in the contract or arise by operation of law. The Regional Court in Kielce emphasised that the only moment of performance of the contract is the fulfilment of all obligations arising from the contract, and accepting any earlier date would result in different decisions in the same factual circumstances.

In connection with the important issue of when a consumer's right to use the SKD expires, the Regional Court in Poznań decided to refer this question to the Supreme Court. In addition, the court asked whether it is permissible to stipulate in a consumer loan agreement that interest will also be charged on the part of the loan that was used by the borrower to pay commission. The Supreme Court will thus decide whether banks may charge interest on the costs of loans, in particular on commission. The third question from the Regional Court in Poznań concerned the issue of whether, in a situation where the actual annual interest rate and the total amount to be paid by the consumer were incorrectly calculated in the loan agreement, the sole reason for which was the inadmissible inclusion of interest on non-interest loan costs, such a breach constitutes grounds for applying the SKD. The Supreme Court's answer in this case will regulate the issue of applying SKD in a situation where the incorrect determination of the APR and the total cost of the loan is solely the result of the impermissible charging of interest on the credited costs. The Supreme Court's ruling on the second and third questions of the Regional Court is important insofar as most SKD lawsuits are based on the allegation of interest on costs included in the loan and on the allegation of incorrect calculation of the APR and the total cost of the loan (Leśko, Folwarski 2025).

The CJEU also took a position on SKD in its judgment of 13 February 2025 in case C-472/23. In response to a preliminary question in which a Warsaw district court considered whether the overstatement of the APR due to the unfairness of certain provisions of the agreement constituted a breach of the information obligations under Directive 2008/48, the CJEU ruled that Article 10(2)(g) of Directive 2008/48 on consumer credit agreements must be interpreted as meaning that the fact that the credit agreement specifies an annual percentage rate of charge which turns out to be inflated because some of the terms of that agreement were subsequently found to be unfair within the meaning of Article 6(1) of Directive 93/13 on unfair terms in consumer contracts and therefore not binding on the consumer, does not in itself constitute a breach of the information obligation laid down in that provision of Directive 2008/48. Furthermore, C-472/23 CJEU clearly separated the effects of Directive 93/13 and Directive 2008/48, as it took as a reference point in its considerations the total cost of the credit, which also includes costs that the consumer undertakes to bear on the basis of potentially unfair terms. In this way, the CJEU prevented a chain reaction whereby the calculation of the APRC would be made dependent on the calculation condition contained in Directive 2008/48.

This position of the CJEU leads to the conclusion that the possibility of using the SKD is excluded for the objection most frequently raised in lawsuits by borrowers or assignees of consumer claims (Wandzel, Trzaskowski 2025).

One of the most recent examples of EU case law on the SKD is case C-714/22, in which Profi Credit Bulgaria underestimated the APR in a loan agreement. In its reasoning for the judgment, the CJEU cited Article 23 of Directive 2008/48 in conjunction with its recital 47, which states that although the choice of the system of penalties applicable in the event of a breach of national provisions adopted in accordance with that directive is a matter for the Member States, the penalties thus provided for should be effective, proportionate and dissuasive. The penalties should therefore be sufficiently severe in relation to the seriousness of the infringements they are intended to punish, in particular by ensuring a genuinely dissuasive effect and by complying with the general principle of proportionality. The CJEU took the view that the penalty of depriving the creditor of the right to interest and fees in the event of an APR being indicated which does not include all those costs reflects the seriousness of the infringement committed by the bank and is dissuasive and proportionate. Since the inclusion of the APR in a credit agreement is of significant importance to consumers, the CJEU ruled that the Bulgarian national court may apply ex officio national provisions under which the absence of such information results in the credit being considered interest-free and free of charges, which corresponds to the SKD provided for in the Polish legal system.

There is no doubt that the application of the SKD in the absence of an APR meets the conditions of Article 23 of Directive 2008/48, according to which the sanctions adopted by Member States must be effective, proportionate and dissuasive. Analysing the institution of SKD in accordance with a pro-European and pro-constitutional interpretation, it should be concluded that while these sanctions meet the criterion of effectiveness and have a deterrent effect, they cannot be fully considered to comply with the criterion of proportionality. In certain situations, consumers are given excessive privileges at the expense of creditors (banks – entrepreneurs).

2. SKD and the proportionality requirement under Article 23 of Directive 2008/48

Currently, there is a view in legal doctrine and the banking market that SKD should not be applied to all cases described in Article 45 of the Consumer Credit Act. M. Bednarek gives examples of technical errors, such as typos and obvious calculation errors, as exceptions. As soon as the creditor identifies an error made, for example, as a result of a calculating device malfunction, they should notify the consumer of the error, which follows from the rule of performance of obligations established in Article 354 of the Civil Code. While typos may slightly distort the name or address of the creditor, in the case of calculation errors, greater doubts should be raised – such an error, if not corrected in time, may significantly affect the amount of the liability incurred or the

interest charged on it, which is of significant importance to the consumer. What is more, the consumer may become uncertain about the accuracy of the fees charged by the creditor or even suspect that these fees have been deliberately inflated. It seems worth considering a proposal that only in the case of an error made to the detriment of the consumer, the bank should correct the amount and reduce it to the correct level, and in the case of an error to the benefit of the consumer, it should bear the costs resulting from the error itself. Similarly, the above should be excluded in the opposite situation, where the creditor's details are omitted from the agreement because the consumer is aware of them. However, the free credit sanction should apply to contracts concluded at a distance or outside the bank's premises, because in such cases the consumer's doubts about the creditor's details seem to be fully justified (Bednarek 2009, pp. 20–21).

Both distance contracts and off-premises contracts are defined in Article 2 of the Consumer Rights Act of 30 May 2014. Pursuant to Article 2(1) of the Consumer Rights Act, a distance contract is defined as a contract concluded with a consumer within an organised distance contract system, without the simultaneous physical presence of the parties, with the exclusive use of one or more means of distance communication up to and including the moment of conclusion of the contract. An important requirement for a contract to be classified as a distance contract is that the contract with the consumer must be concluded within the framework of the above-described system, excluding other, primarily traditional, direct methods of concluding contracts. By way of comparison, Directive 2011/83/EU refers to an 'organised system of distance sales and services', which is a broader concept and can be interpreted as a system allowing the trader to perform more activities than just concluding contracts, e.g. performing distance contracts (Kocot, Kondek 2014, p. 9).

On the other hand, a contract concluded outside the business premises (Article 2(2) of the Consumer Protection Act) is defined as a contract between a trader and a consumer concluded (Czech 2016, p. 47):

- with the simultaneous physical presence of the parties in a place that is not the business premises of the entrepreneur (e.g. at the consumer's place of residence),
- as a result of accepting an offer made by the consumer in the circumstances referred to in point 1 (e.g. when the entrepreneur collects offers from consumers at their place of work),
- at the business premises of the entrepreneur or by means of distance communication immediately after establishing individual and personal contact with the consumer at a place that is not the business premises of the entrepreneur, with the simultaneous physical presence of the parties (e.g. when a consumer is invited on the street to the business premises in order to present the entrepreneur's commercial offer),
- during a trip organised by the trader for the purpose or with the effect of promoting and concluding contracts with consumers (e.g. if, during a sightseeing trip, consumers are offered the opportunity to purchase household appliances from a given trader).

For a contract to be considered as concluded outside the business premises, it is essential that both parties are physically present in the same place when performing a specific activity, otherwise the contract will be considered as concluded at a distance (Rogacka-Łukasik 2015, pp. 17–25).

Since Article 30(1)(14) of the Consumer Credit Act introduces the condition 'if the agreement provides for it' into the information obligation, it seems reasonable that there is no need to provide information about loan repayment safeguards if they are not provided for in the agreement. This situation is important because in one of his recent statements on SKD, the vice-president of the Polish Bank Association (ZBP) gave an example of a lawsuit in which there was an allegation of incorrect designation of loan insurance, even though the borrower did not incur any insurance costs, as clearly stated in the agreement (Krupa-Dąbrowska 2024).

This position is also taken by M. Bednarek, according to whom the absence of such collateral in the agreement is tantamount to the lender not requiring it and therefore not having to inform the consumer about it. The question therefore arises as to what happens if it has been agreed that the consumer will provide security, but this information is not included in the agreement. M. Bednarek believes that even in this situation, the possibility of using SKD should be excluded, because the consumer was informed and agreed to the security conditions, and the use of SKD only because this condition was omitted in the agreement would mean excessive formalism or discrimination on the part of the lender (Bednarek 2009, pp. 20–21).

However, such a proposal seems unfounded, because if the contract does not include information about the loan security, in the event of a dispute over the contract, there is no certainty that the bank has fulfilled its information obligation and actually informed the borrower about it. Moreover, in the event of doubts regarding the repayment of the liability and the manner of its settlement, the borrower seems to be deprived of elements of the agreement that are important from their perspective, as they cannot find any information on the agreement form about how the security was established.

The opinion of representatives of the banking community should also be taken into account. A study presented by the president of the Polish Bank Association shows that the allegations raised by so-called compensation law firms are not only disproportionate, but sometimes even absurd. In one of the lawsuits, the bank's reference to the Office of Competition and Consumer Protection (UOKiK) instead of the President of UOKiK was considered to be incorrect information about the supervisory authority.

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supervisory authority. There was also an allegation of a lack of information about the address for electronic delivery, even though the bank was not obliged to provide it. Another violation, according to the law firm, was the bank's reference to the 'Table of Fees and Commissions' instead of describing the fees and costs explicitly in the agreement. The banks were also accused of failing to specify the variable interest rate clause, even though the agreement stated that the interest rate was subject to change depending on the indices determined by the National Bank of Poland, and the bank had informed the consumer what the maximum interest rate was and how high it could be. It can therefore be concluded that the above lawsuits, even if they are dismissed by the court, unnecessarily take up space in an already overcrowded court calendar (mainly due to Swiss franc cases) and, in addition, involve unnecessary costs for the consumer and the bank (Białek 2024, pp. 1–9).

Although the purpose of Article 45 of the Consumer Credit Act is to protect consumers from a lack of information or from false, misleading or fraudulent information, according to M. Bednarek, it should not be used to discriminate against lenders and enforce SKD regardless of the banks' intentions. The question of whether a breach of the conditions set out in Article 45 of the Consumer Credit Act could have negative consequences for the consumer is also important. An important proposal is therefore not to impose sanctions in cases where the creditor has not acted unfairly or unreliably towards the consumer (Bednarek 2009, pp. 20–21). The president of the Polish Bank Association also proposed legislative changes regarding SKD. The first suggestion is to exclude claims under Article 45 of the Consumer Credit Act from free sale in order to limit the participation of compensation companies in court disputes. Similar to M. Bednarek, he argues that a breach of information obligations by the creditor should have a negative impact on the borrower's financial situation and thus have a negative impact on the consumer's decision to conclude the agreement. This would eliminate the above-described lawsuits with absurd allegations, which are brought en masse by paralegal firms seeking easy profits in SKD. Another suggestion is to limit the list of grounds for SKD to only those that are relevant and have a negative impact on the borrower's financial situation, so that consumers' rights are not abused. The ZBP also proposed that sanctions be adjusted in proportion to the significance of the banks' violations and that a fixed rate of legal representation costs be introduced for court cases in the area of SKD, which would be independent of the WPS (Białek 2024, pp. 1–9).

The proposed amendments presented by M. Bednarek and the President of the Polish Bank Association seem to refer primarily to the condition of proportionality mentioned in Article 23 of Directive 2008/48. As a result of the above changes, it would be possible to guarantee a fair outcome of sanctions for the bank for violating the regulations, as a result of which the consumer found himself in an unfavourable financial situation. Depriving the bank of revenue solely on the basis of the condition set out in Article 30(1)(1), consisting in the omission of consumer or bank details from the form, seems disproportionate. The possibility of obvious errors, as pointed out by M. Bednarek, should also be taken into account, as the application of such a severe sanction for them is highly unfair to the bank.

In its latest judgment in Case C-472/23 concerning SKD, the CJEU ruled that Article 23 of Directive 2008/48 on consumer credit agreements, in conjunction with its recital 47, does not preclude national legislation which would provide for a uniform penalty consisting in depriving the creditor of the right to interest and fees, regardless of the individual seriousness of such a breach, insofar as that breach is likely to undermine the consumer's ability to assess the extent of his obligation. However, in recital 49 of the judgment, the Court noted that these penalties should be effective, proportionate and dissuasive, which also means that it is permissible to differentiate penalties depending on the seriousness of the alleged infringement in the case of, for example, the new Consumer Credit Act. such a decision is, however, a matter for the national legislature, which should assess the appropriateness of such differentiation.

Such differentiation would be extremely important given the seriousness of potential banking infringements, which, according to the current wording of Article 45 of the Consumer Credit Act, are treated uniformly. It also seems closer to the principles of proportionality set out in Article 23 of Directive 2008/48. The above considerations may lead to the conclusion that the first hypothesis, indicating a lack of proportionality in the application of SKD on the Polish market, should be confirmed.

3. Abuse of SKD as a threat to the banking sector

The mere abuse by consumers of their rights under the SKD can be considered a violation of the idea of responsible lending. This concept is defined as responsible lending by lenders and responsible borrowing by consumers. In the post-crisis reality, in view of the phenomenon of excessive indebtedness, it ceased to be merely a postulate and became a subject of interest for both EU and, consequently, national legislators. Although 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/ 5, and the Act of 12 May 2011 on consumer credit do not contain a direct reference to the above idea, some of their provisions should be interpreted as prerequisites for its implementation. The idea of responsible lending has become particularly important in the post-crisis period, and compliance with it is crucial to ensure the proper functioning of the financial market, in particular the consumer credit market (Rutkowska-Tomaszewska 2018, pp. 115–124).

Although in Poland it most often refers to the lender's responsibility and their use of unfair market practices (including misselling, exemplified by payday loans), in this case there is a risk of violating the idea of responsible borrowing, i.e. abuse by borrowers who may incur their obligations in an irresponsible and unethical manner.

Table 1. Respondents' attitudes towards withholding information in the lending process

Question	Year	Respondents' answers in %			
		never	sometimes	often	always
Is it morally acceptable to conceal information during the credit process if its disclosure would prevent the loan from being granted?	2018	74,6	21,8	2,2	1,4
	2017	81,9	14,3	1,5	2,3
	2016	83,2	13,6	1,8	1,4

Source: own work based on: G. Borys, R. Manacka, *Creating consumer protection law vs. responsible borrowing on the consumer loan market*, Annales Universitatis Mariae Curie-Skłodowska, sectio H – Oeconomia, Vol. 53, No. 3 (2019), Zielona Góra 2019, pp. 27–28.

According to research by A. Lewicka-Strzałecka (2018), respondents cited dishonesty on the part of lenders (50.8%) as the main reason for accepting the concealment of information in the lending process. 41.3% of respondents considered that the need to satisfy an important need was a sufficient reason, while 7.9% were of the opinion that such action was a socially acceptable standard of consumer behaviour. Among the respondents who chose 'never' as their answer, 55.2% considered that concealing information in the credit process is simply illegal. One-third of respondents cited ethical considerations as the basis for their response, and 12.1% cited the risk associated with concealing information (according to Borys, Manacka 2019, pp. 27–28).

As credit is now widely available and becoming increasingly popular through the emerging model of 'living on credit', consumer demand for credit is on the rise. The goal of borrowers is to obtain credit in a manner that is not always honest and responsible, which is why it is not uncommon for them to omit important information from the bank during the creditworthiness assessment process or to provide information that does not fully reflect the actual situation. According to E. Rutkowska-Tomaszewska, unethical behaviour on the part of borrowers at the pre-contract stage is caused by fear of rejection and financial exclusion, which consists in limiting the use of financial services. Consumers also cite a sense of social exclusion, which they believe is a consequence of financial exclusion, as a reason for providing unreliable information. Despite the consumer embellishing and misrepresenting their financial situation, the bank may still grant the loan, but this carries the risk of the borrower not fulfilling their obligations responsibly and on time. In extreme cases, there may even be a problem with repaying the debt due to a lack of funds (Rutkowska-Tomaszewska 2018, pp. 115–124).

This situation may prompt consumers to look for a solution that would not have too negative an impact on their financial situation (e.g. no need to repay the entire debt as a result of withdrawing from the contract) and could even bring them certain benefits. The ideal solution therefore seems to be the SKD, which in certain cases of

irresponsible borrowing allows only the principal to be repaid, without interest and additional costs, which entails an unjustified loss for the bank.

In order to assess how significant a problem SKDs currently are for banks, the financial data of banks as at 31 December 2023 (annual report) and 30 June 2024 (half-yearly report) were compared.

Table 2. Comparison of SKD data in selected banks

Name of the bank	31.12.2023 r.			30.06.2024 r.		
	Number of cases	Value of dispute in PLN thousand	Provision in PLN thousand	Number of cases	Value of dispute in PLN thousand	Provision in PLN thousand
PKO BP S.A.	1159	20700	no data	1975	41200	no data
Alior Bank S.A.	1219	44100	no data	1703	65700	28000
Millennium Bank S.A.	419	no data	none	683	no data	none
BOŚ Bank S.A.	19	442,07	no data	23	617	none

Source: own study based on annual reports for 2023 and semi-annual reports for 2024 for PKO BP S.A., Alior Bank S.A., Millennium Bank S.A. and BOŚ Bank S.A.

The list of banks reporting information on SKD shows an upward trend in the number of pending cases. The value of disputes is also growing, almost doubling at PKO BP S.A. In most cases, there is no data on the provisions created by the bank for SKD, with the exception of Alior Bank S.A., which in the first half of 2024 set the level of provisions for this item at PLN 28 million. On the other hand, Millennium Bank S.A. and BOŚ Bank S.A. decided not to create a provision for SKD, justifying this with the low probability of cash outflows due to the favourable judgments for banks to date.

4. Abuse of SKD as a threat to consumers

It should be noted, however, that consumers themselves rarely file lawsuits regarding SKD. Most of the plaintiffs are companies that purchase SKD receivables from consumers, which they consider to be a new potential source of income (SKD receivables are purchased for as little as 10–20% of their value) (Białek 2024, pp. 1–9).

According to research by the Polish Bank Association, the SKD institution is increasingly being used as a lever to obtain free capital by various types of debt

purchasing entities and paralegal firms, which file lawsuits en masse in this matter. Aware of this practice, courts are increasingly submitting preliminary questions to the CJEU, wondering whether the court has an obligation to examine ex officio the unfair nature of a contractual term also in the case of a debt assignment agreement concluded by a consumer with a third party, if, in court proceedings, the third party invokes this agreement as the basis for its legitimacy in taking action against the trader who is the consumer's original contractor (Case C-80/24).

Until now, the CJEU has recognised the transfer by a consumer of rights under EU directives to a third party who is not a consumer as permissible, so it is likely to take a similar position in this case. The transfer of a claim by a consumer does not necessarily mean that they waive their rights, so it should be considered reasonable for transfer agreements to be economically advantageous to them in accordance with Directive 2008/48 or Directive 93/13. However, there are examples in EU case law where the CJEU has held that a trader acquiring a consumer claim does not thereby become a consumer and should therefore not be entitled to the procedural protection afforded to consumers (C-173/23). This would therefore mean that in the event of a dispute between two businesses, the Polish national court would be exempt from the obligation to examine ex officio the unfair nature of a contractual provision contained in a consumer debt assignment agreement (Węgrzynowski 2024).

The President of the Polish Bank Association points to the structure of this legal institution, which entitles consumers to seek sanctions for every violation committed by banks, and the activities of compensation companies that exploit the SKD to challenge loan agreements on a massive scale, as the main causes of abuse in the SKD. The President of the ZBP accuses such entities of using the SKD institution solely to maximise their own profits at the expense of consumers. Their activities may destabilise the functioning of the financial market (Bankier.pl 2024).

The entities already mentioned in the article that offer consumers legal assistance in the field of SKD often resort to aggressive marketing (often using social media) to attract customers. These entities are also often characterised by controversial acquisition methods and the use of abusive clauses in debt assignment agreements (Gajda-Kozłowska 2024).

When reviewing the first few offers in an internet search engine, it is easy to see that most companies follow a uniform pattern: they advertise their effectiveness, repeatedly emphasising the free analysis of the borrower's situation, and even guarantee compensation within a maximum of 14 working days from the signing of the agreement. However, there is no standard contract or company procedure, and more details about the services provided can only be obtained by calling the helpline or sending a form to the helpdesk. When reading the company's website, every few paragraphs the reader encounters a flashy, bold and colourful panel with the slogan 'take advantage of free credit with us' 'get rid of credit costs' or 'I want to take advantage of the free credit sanction', referring to the next step, in which the borrower can send their credit agreement to the company.

The president of the Association of Financial Companies in Poland also draws borrowers' attention to the wording used by compensation law firms, which may mislead consumers. Slogans such as 'we will recover at least... for you', 'we will reduce your instalment by...', 'the total financial benefit is...' may prompt consumers to make decisions that they would not have made if they had reliable knowledge about SKD, their own situation and potential costs. The above practices of paralegal firms can therefore be considered misleading within the meaning of Article 5 of the Act on Combating Unfair Commercial Practices. Another, no less controversial issue is the remuneration of paralegals, which is often defined ambiguously in the contract, depriving the client of the possibility of realistically estimating the amount due after winning a court case concerning SKD. At this point, it is worth asking whether the conditions for abuse are met and whether the principle of transparency of the model contract under Article 385 § 2 of the Civil Code has been violated (Czugan 2024).

Although the SKD offers consumers legal protection and a wide range of grounds for exercising it, it also has negative consequences in the form of the risk of abuse of rights and exposure to unfair market practices on the part of paralegal firms and compensation companies. No research will show how many of the cases pending in the SKD are actually based on a valid legal basis and a real violation of regulations by the bank, and how many of them are the mass production of entities that treat consumers and their financial situation instrumentally. Due to often reckless decisions to incur a liability or to obtain it in an unreliable manner, consumers may also expose the bank to losses, which, due to the SKD penalty, loses the opportunity to obtain potential income from the loan granted. Although the practice of creating provisions for SKD is not yet very common, some banks decide to create them, thus temporarily giving up funds that could be used, for example, for investments and incurring the cost of lost opportunities.

Summary

The assessment of the risk associated with SKD is ambiguous. On the one hand, banks fear an increasing number of lawsuits and an unfavourable position of Polish and European jurisdiction, on the other hand, as illustrated by examples of SKD bank reserves for two banks, they do not have adequate reserves, arguing that the probability of cash outflows is low, guided by the favourable case law for the banking sector to date. The risk borne by the consumer is also difficult to estimate unequivocally, as borrowers are exposed to manipulation by companies that purchase SKD receivables and promise high returns. Many consumers are unaware that these are unfair practices and that they may receive only a small fraction of the potential profit of the company to which they sold these debts.

The position of the Supreme Court will be crucial in determining whether SKD may pose a greater threat to borrowers or lenders. This position may reinforce

the current line of jurisprudence, which is favourable to the banking sector, and thus reduce the number of SKD lawsuits. Such a decision would also be consistent with the CJEU's latest approach to SKD cases, which is decidedly sceptical about challenging them. A transparent position of the Supreme Court on this matter would contribute to reducing the number of SKD cases in courts because, as demonstrated in the verification of the first hypothesis, the abuse of free credit sanctions poses a threat not only to the banking sector, but also to consumers themselves, who are exposed to unfair practices by companies purchasing SKD receivables. The second hypothesis, questioning the fulfilment of the condition of proportionality (Directive 2008/48) in lawsuits filed by companies purchasing SKD claims, has been confirmed, hence it is extremely important for the Supreme Court to refer to the principle of proportionality in its latest resolution. This would allow for the establishment of clear criteria that would entitle the use of SKD and eliminate lawsuits based on trivial and disproportionate allegations against creditors.

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