# The Banking Regulation Review

Tenth Edition

**Editor**
Jan Putnis

The Law Reviews

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# THE BANKING REGULATION REVIEW

TENTH EDITION

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**Editor**
Jan Putnis

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# PREFACE

Banking regulation continues to confound the idea that views about how banks should be regulated will eventually settle down to an orthodoxy broadly accepted throughout the world.

Few global banking groups ever considered that a time would come when they would face consistent systems of regulation across the world, and still less that regulators would coordinate their activities in a way that would make life easy for those groups. Legal and compliance professionals who have worked in or with the industry since long before the financial crisis of 2007 to 2009 are generally not surprised by the examples of banking regulation diverging in many jurisdictions: in some ways it marks a return to a time when there can be no certainty that governments and regulators are all facing the same way and pulling in the same direction.

Running a global banking group continues to be a tough exercise, and the possibility of further fragmentation of approaches to regulation around the world risks adding further to the cost bases of these groups. As predicted since the UK electorate voted to leave the European Union in 2016, Europe in particular looks set to become a less cost-efficient and more complex place in which to run a cross-border banking franchise. Indeed this is already the case for the banking groups that have largely completed their Brexit reorganisations, establishing or expanding EU subsidiaries. While this has stimulated banking groups to consider cost cutting and other efficiency measures in connection with their Brexit planning, in many cases these measures scarcely compensate for the inherent inefficiency of requiring additional licensed legal entities through which to conduct business in Europe.

Aside from the largely regional challenge of Brexit, this tenth edition of *The Banking Regulation Review* is published in the midst of a number of industry developments that are challenging regulators and banks alike in all major banking centres.

The challenges are far-reaching and have no central theme, ranging from the continuing revolution in finance stimulated by emerging technologies and the related exploitation of the value of data on the one hand, to the continual revelations of the widespread use of banks for money laundering on the other.

While it is too early to say that the remarkable global consensus that emerged about prudential regulation following the financial crisis is fracturing, it is certainly eroding around the edges, with liberalising tendencies in the United States and even in the European Union.

All of these factors make work as a legal, compliance or risk professional in the sector both more interesting and more perilous than ever before: more interesting because there is so much going on, and more perilous because there seems to be more that can go wrong within banks nowadays, from misallocation of capital to business units that struggle, to whistleblowing and money laundering problems, to catastrophic IT outages.



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Money laundering issues have been particularly prominent in banking in the past year, suggesting that the industry still has a long way to go to tackle this problem. Many of the issues uncovered are legacy in nature, but the industry has much to do to convince regulators and governments that those issues will not recur.

IT problems have led to an increasingly intense debate about what can be done to improve the operational resilience of banks. This is not simply a continuation of the somewhat sterile debate about the incompatibility of many legacy banking IT systems with attempts to modernise risk management and the customer experience. Regulators have realised that operational resilience is a subject that can only be tackled effectively by making two significant changes to the way that this subject has traditionally been viewed. First, operational resilience should be considered in a holistic way, looking not only at banks' own systems but also across the whole of the financial sector at the resilience of the inter-connections between banks, financial market infrastructure and other market participants. Secondly, work on operational resilience achieves little unless it is considered with customers and other end users of services in mind. The resilience of a bank's systems is not a meaningful concept unless it delivers an acceptable level of service to customers and incorporates tolerances for the levels of inconvenience that customers may suffer in the event of extreme disruption, recognising that disruption could originate outside the bank itself.

More immediately, IT challenges in banks expose the need for effective crisis management capabilities. Recovery and resolution planning has helped some banks to develop this expertise, but has been less helpful in this respect than might have been hoped. There is no substitute for more detailed planning for crises than many banks have so far included in their recovery planning. Those who disagree with this view should consider how many banks have performed poorly when crises have hit them, and how many of those banks would have argued beforehand that their systems were adequate to cope with a range of foreseeable adverse scenarios.

Conduct risk remains high up the agenda of most banks. The final report of the Royal Commission into misconduct in the banking, superannuation and financial services industry in Australia was notable outside that country for the familiarity of almost all of its findings. Whatever the ultimate legislative and regulatory response to that report, it is a reminder that banking remains vulnerable to poor conduct unless senior management make good conduct a cornerstone of their strategy and ensure that it is embedded in the incentive arrangements for all staff who have a material influence on customer outcomes.

This edition covers 37 countries and territories in addition to our usual chapters on international initiatives and the European Union. Thanks are due to all of the authors who continue to devote time to this project despite busy schedules. There must be a feeling among many of the authors that banking regulation is a subject that will never settle down; that it will never return to being the rather duller subject that it was before it became a political issue more than 10 years ago.

Thank you also to the partners and staff of Slaughter and May in London and Hong Kong for supporting this book, and in particular to Nick Bonsall, Ben Kingsley, Peter Lake, Emily Bradley, Tolek Petch, Jocelyn Poon, Tamara Raoufi and David Shone.

Finally, the team at Law Business Research deserve as much credit for their patience this year as for their usual work as the publishers of this book. Thank you in particular to Gavin Jordan and Katie Hodgetts. The uncertainties that Brexit has thrown up have left a number of authors wondering what the best time to publish would be, before the realisation dawned that Brexit is likely to be a more protracted process than many envisaged and that therefore



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no one publication date would be better than any other. The other issues noted above look set to run in some form indefinitely.

Perhaps by the time the next edition of this book is published, all will be much clearer, but those of us who are endlessly fascinated by the subject of banking regulation know all too well just how unlikely that is.

**Jan Putnis**
Slaughter and May
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Chapter 30

# POLAND

*Tomasz Gizbert-Studnicki, Tomasz Spyra and Michał Torończak*[1]

## I INTRODUCTION

The Polish economy, like that of other central and eastern European countries, continues to be characterised by a low level of financial intermediation. The assets of the financial sector in Poland amount to only 124 per cent of gross domestic product, compared with 476 per cent in the eurozone. At the same time, the Polish financial sector is heavily dominated by banks, which hold 72 per cent of all financial assets. According to information from the Polish Financial Supervision Authority (PFSA), in January 2019 there were 32 commercial banks operating in Poland, 31 branches of EU credit institutions and 549 cooperative banks. The total assets of the banking sector in Poland amount to approximately 1.9 trillion zlotys, and the sector employs approximately 163,000 people. Generally, Polish banks have remained well capitalised, with capital ratios comfortably beyond the Basel III requirements (with an average capital adequacy ratio of 19.2 per cent).

In recent years, the ownership structure of the Polish banking sector has changed. As a result of a series of merger and acquisition (M&A) transactions, the state has gained or regained influence over new entities, for example Alior Bank and Bank Pekao. This process became known as the 'repolonisation' or domestication of the banking sector. As a result, the importance of Polish investments grew in the banking industry. For the first time since 1999 domestic investors, either state or private, controlled the majority of the assets in the Polish banking sector. However, foreign investors still had control over a significant part of the assets in the Polish banking sector, including 19 commercial banks and all branches of EU credit institutions. The main investments came from Spain, Germany, France and the Netherlands. The Polish State Treasury holds control over eight commercial banks.

The concentration level of the Polish banking sector (i.e., the market share in assets of the 10 largest banks) in 2018 was 71 per cent. The largest Polish bank was state-controlled PKO BP, with a total balance sheet of approximately 324 billion zlotys, followed by Bank Pekao (controlled by the largest Polish insurer, PZU), with a total balance sheet of about 184 billion zlotys, Santander Bank Polska (formerly Bank Zachodni WBK, a member of Santander Group) with a total balance sheet of around 183 billion zlotys, ING Bank Śląski (ING Group), with a total balance sheet of approximately 137.7 billion zlotys, and mBank (formerly BRE Bank, a subsidiary of Germany's Commerzbank) with a total balance sheet of approximately 137.6 billion zlotys.

1 Tomasz Gizbert-Studnicki is a senior partner, Tomasz Spyra is a partner and Michał Torończak is an associate at T Studnicki, K Płeszka, Z Ćwiąkalski, J Górski Spk.



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In 2018, there were few M&A deals in the Polish banking sector. In this context, Austrian Raiffeisen sold its banking business in Poland to BNP Paribas, and Portuguese Millennium acquired Eurobank from Societe Generale. Some activities during 2018 were still focused on the consummation of transactions started the previous year. For instance, in November 2018, Santander Bank Polska finalised a legal and operational acquisition of the retail part of Deutsche Bank's banking business in Poland. The PFSA considers the market to be of an optimal structure, and the regulator will therefore carefully examine its further consolidation. The PFSA may be especially supportive of Polish-owned financial institutions in view of the concept of domestication of the Polish banking sector.

## II THE REGULATORY REGIME APPLICABLE TO BANKS

Pursuant to the legal definition, a bank is a legal person, established in accordance with the applicable laws, operating under an authorisation to perform banking transactions involving any risk for the funds entrusted to the bank and repayable in any way. Under Polish law, banks can be established either as state banks (by the government) or as private banks in the form of a joint-stock company or a cooperative.

Alongside the commercial banks, there are about 35 credit unions operating in Poland. The number is continually decreasing as a result of the intensive restructuring process in this sector. Credit unions merge or are being acquired by other credit unions or banks. In general, the situation of the credit unions sector is difficult and requires intensive remedial actions.

Credit institutions in other EU Member States may provide cross-border financial services in Poland on the basis of the single banking passport, or operate in Poland via a branch. Foreign banks may operate in Poland via a subsidiary (which is formally a separate bank licensed by the Polish regulator) or a branch: the establishment of a branch by a non-EU institution requires an authorisation from the PFSA. Branches of foreign non-EU banks must accede to the Polish deposit insurance system to the extent that the guarantee system in the country of origin does not ensure the disbursement of guaranteed funds within the limits stipulated by Polish law (i.e., the equivalent of €100,000).

Foreign banks and EU credit institutions can open a representative office in Poland. The scope of activities of such an office may consist exclusively of advertising and marketing for the foreign bank or the EU credit institution within the limits specified in the authorisation.

Polish law provides for a list of activities that can be performed exclusively by banks, which comprise:

*a* taking deposits payable on demand or at a specified maturity, and maintaining those deposit accounts;
*b* maintaining other bank accounts;
*c* extending credit;
*d* extending and confirming bank guarantees,
*e* issuing and confirming letters of credit;
*f* issuing bank securities; and
*g* bank monetary settlements.

Banks may also engage in other activities that can be performed not only by banks, such as:

*a* extending cash loans;
*b* operations involving cheques and promissory notes, and operations relating to warrants;
*c* providing payment services and the issuance of electronic money;



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*d* forward transactions;
*e* purchasing and selling debts;
*f* the safekeeping of assets and securities, and the provision of safe deposit facilities;
*g* purchasing and selling foreign currencies;
*h* extending and confirming endorsements;
*i* intermediation in money transfers and foreign exchange settlements;
*j* receiving or acquiring shares and rights attached thereto, shares of other legal persons and participation units in investment;
*k* assuming commitments relating to the issuance of securities;
*l* trading in securities;
*m* swapping debt for a debtor's assets on terms agreed with the debtor;
*n* purchasing and selling real property;
*o* providing financial consulting and advisory services;
*p* providing certification services within the meaning of the regulations on electronic signatures, except for the issuance of qualified certificates used by banks in activities to which they are a party;
*q* intermediation in concluding structured deposit agreements;
*r* providing advisory services in relation to structured deposits;
*s* providing other financial services; and
*t* performing other activities, if permitted by other laws.

Polish law does not provide for the separation of commercial and investment banking. Banks may provide services under provisional underwriting agreements and firm commitment underwriting agreements, or under the execution and performance of other similar agreements on financial instruments and – subject to authorisation by the PFSA – also perform other brokerage services, such as:
*a* accepting and transferring orders to purchase or sell financial instruments;
*b* executing purchase and sell orders of financial instruments for a customer's account;
*c* acquiring or disposing of financial instruments for the bank's account;
*d* managing portfolios that include one or more financial instruments;
*e* investment advice; and
*f* offering financial instruments.

The activities of banks, their branches and their representative offices are supervised by the PFSA. The supervision of activities of a branch or representative office of foreign non-EU banks in Poland, including the scope of examinations and procedures for their performance, may be performed to the extent laid down in an agreement between the PFSA and the supervisory authorities in their home countries. The PFSA is a consolidated supervisor that was created in 2006 as a result of a merger of the securities, insurance, pension system and banking supervisors. The PFSA is in charge of banking, capital markets, insurance and pension scheme supervision, as well as supervision of payment institutions and credit unions. Despite the consolidation, however, the supervisor serves as an umbrella under which cross-regulatory functions are housed, and under which traditional sectoral supervisory units are maintained as separate operating divisions that focus on traditional sectors such as banking, insurance and securities.



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The legal nature of the PFSA changed in 2019. It has become a state legal person instead of an administrative body. This has resulted in more flexible way of dealing with its budget, which is created mainly from contributions paid by supervised entities. The composition of the PFSA has been extended to include new members, such as the representatives of:

*a* the Prime Minister;
*b* the Bank Guarantee Fund;
*c* the President of the Office of Competition and Consumer Protection; and
*d* the minister in charge of supervising intelligence.

The new members of the PFSA mentioned in points (b) to (d) have no voting rights.

The aim of the change was to improve the circulation of information between the state authorities.

The Ministry of Finance and the presidents of the PFSA, the National Bank of Poland (National Bank) and the Bank Guarantee Fund coordinate their actions in the Financial Stability Committee. The Financial Stability Committee is also the competent body for the macroprudential supervision of the financial system and crisis management. In performing its tasks, the Committee cooperates with the European Systemic Risk Board. It is responsible for, inter alia, identifying financial institutions posing material risks to the financial system and the execution of macroprudential instruments, including presenting opinions and issuing recommendations on limiting systemic risk.

## III PRUDENTIAL REGULATION

### i Relationship with the prudential regulator

The objective of banking supervision is to ensure the safety of funds held in banks, and the compliance of the banks with the provisions of law, statutes and their banking licences.

Since 2007, the PFSA has been implementing a risk-based approach to supervision. The goal of the regulator is to develop a harmonised methodology for supervision that would use risk as the major factor in determining priorities and the frequency of supervisory actions. Every department of the PFSA is expected to follow a standardised approach for supervisory assessment based on a set of criteria that specify the risks associated with the activities of supervised entities and provide for more accurate quantification of risks associated with the activities of various capital groups on the Polish market. The harmonised methodology encompasses the method of assessing the risk management and control mechanisms of supervised entities, the compliance of activities of supervised entities with the law and the method for identifying irregularities in business conduct.

Banks are required to submit audited financial statements to the PFSA, on a consolidated and unconsolidated basis, with an auditor's opinion and report. Banks, branches and representative offices of non-EU banks in Poland are also required to:

*a* notify the PFSA of the commencement and cessation of business activity; and
*b* enable authorised PFSA staff to perform their supervisory functions, in particular by:
  - making books of account, balance sheets, records, plans, reports and other documents available to them;
  - allowing them, on receipt of a written request, to make copies of such documents and other information media; and
  - providing explanations to any questions raised.



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Furthermore, banks must provide to the central bank, at the request of the National Bank, the data necessary to assess their financial standing and the risks to the banking system. Those banks that participate in monetary clearing and interbank settlements must also provide the data necessary for assessing the monetary clearing and interbank settlements.

In recent years, the major focus of the PFSA has continued to be the regulation of the retail markets and the marketing of bank products to retail clients. The PFSA has issued specific recommendations with regard to the marketing by banks of structured investment products, the distribution of insurance products (bancassurance) and the selling of long-term deposits formally structured as insurance to avoid capital gains tax.

The past year was also influenced by a discussion concerning the restructuring of mortgage loans denominated in Swiss francs.

Before the financial crisis, most long-term credits extended by banks in Poland (in particular, mortgage loans) were denominated in foreign currencies (Swiss francs or euros) to take advantage of lower interest rates and thus reduce the total cost of the credit; however, as most retail clients earn their wages in Polish zlotys, they are confronted with foreign exchange volatility with almost no possibility of hedging against that risk. To eliminate the foreign exchange risk, apart from the capital adequacy measures, the PFSA requests that:

*a* banks inform their clients about the currency spread and the associated risks, both before and during the credit relationship;

*b* set the exchange rate for the repayment of loans at the same level as for their other customers; and

*c* enable repayment of a loan directly in a foreign currency acquired from a source other than the lending bank.

In the autumn of 2011, Parliament allowed consumers to repay loans and credits denominated in foreign currencies directly in cash in those currencies, and thus limited the additional source of income for banks resulting from currency spreads. However, the issue has become very acute since the sudden rise of the Swiss franc in mid-January 2015, brought about by the monetary policy decisions of the Swiss National Bank, and the resulting substantial increase of the value of loans and credits denominated in Swiss francs.

The issue of mortgage loans denominated in Swiss francs has been vigorously debated since 2015. Banks and lenders have presented their own ideas for resolving the crisis. However, there were so many discrepancies between these parties, in particular regarding bearing costs of planned operations, that they have not managed to reach a compromise. In consequence, there are numerous lawsuits pending before Polish courts in which clients are attempting to invalidate mortgage loan agreements or at least be reimbursed for the bank spreads. At the Regional Court in Warsaw, the cases related to the loans denominated in Swiss francs constituted nearly 30 per cent of all new cases initiated in 2018.

In January 2016, a draft law aimed at regulating the issue of mortgage loans denominated in Swiss francs and other currencies was presented by the Chancellery of the President of Poland (Chancellery). The draft involved the possibility of converting mortgage loans denominated in Swiss francs and other foreign currencies into Polish zlotys at a fair exchange rate, which was to be calculated individually in relation to each mortgage loan agreement, and the reimbursement of borrowers for bank spreads. However, calculations made by the PFSA proved that the proposed law could jeopardise the financial stability of certain banks and would adversely affect the entire Polish banking sector. Therefore, in August 2016, the Chancellery presented another draft law aimed at regulating the issue of



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mortgage loans denominated in Swiss francs and other currencies concentrated primarily on the reimbursement of borrowers for bank spreads. In August 2017, the Chancellery presented yet another draft law aimed at resolving the issue, targeting amendments to the Act on support for borrowers in difficult financial situations, regarding borrowers who took out mortgage loans. Proposed changes included increasing the amount (from 1,500 zlotys to 2,000 zlotys) and length (from 18 months to 36 months) of financial support, reducing the requirements of obtaining support and introducing the possibility of getting a loan in the event of a sale of a credited real property. According to the draft, in the event of a sale of a credited real property, borrowers would be entitled to draw a loan in an amount up to 72,000 zlotys. Moreover, banks that decide to restructure mortgage loans denominated in foreign currencies by converting them into zlotys would be reimbursed for balance sheet differences in mortgage loan values resulting from the restructuring. It remains to be seen what the final shape of this law will be and how it will influence the financial situation of Polish banks.

### ii Management of banks

Following the implementation of the Capital Requirements Directive IV (CRD IV), which entered into force in November 2015, Polish law provides for specific corporate governance requirements for banks. Banks that operate as joint-stock companies are governed by general corporate law with modifications originating from the Banking Law. The supervisory board of a bank must comprise at least five persons, and the management board must comprise at least three. Banks must inform the PFSA of the composition of and any changes to the supervisory or management board. The chair of a bank's management board is in charge of internal audit. It should also be indicated which member or members of the management board are responsible for supervising material risks for the bank's activities. The member or members of the management board should not be supervising the area of the bank's activities that is generating the risk. Moreover, it is not permissible to combine the positions of the president of the management board and the member of the management board in charge of supervising material risk. Further, the division of responsibilities between the members of the management board of a bank should indicate the persons responsible for supervising compliance with laws, internal regulations and market standards, and accounting and financial reporting, including financial control.

Members of a bank's management and supervisory boards should have knowledge, skills and experience relevant to their functions and duties, and give an adequate guarantee of due performance of their duties. In general, the number of functions permitted for members of the management and supervisory boards depends on individual circumstances and the character, scale and degree of complexity of the bank's activities. In the case of significant banks,[2] a member of a management or supervisory board may at the same time perform the duties as a member of no more than one management board and two supervisory boards, or four supervisory boards. In certain situations, the PFSA may give consent to a member to perform duties on one additional supervisory board.

2 Significant banks are those that are significant in terms of size, internal organisation, or type, scope and complexity of conducted business, and that fulfil one of the following conditions: their shares are admitted to trading on a regulated market, or their share in assets, deposits or own funds of the banking sector is not less than 2 per cent; or they are other banks deemed to be significant by the PFSA.



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Certain members of the management board of a bank, namely the chair and those in charge of supervising material risk in the bank's activities, must be approved by the PFSA. Consent may be refused if the candidate, inter alia:

*a* has been convicted of an intentional or fiscal offence;
*b* does not have knowledge, skills and experience relevant to his or her functions and duties;
*c* does not give an adequate guarantee of due performance of his or her duties; or
*d* cannot prove sufficient knowledge of the Polish language. This last requirement can be waived if knowledge of Polish is not necessary for prudential supervision, taking into account in particular the level of permissible risk or the scope of the bank's activities.

The consent of the PFSA is also necessary for the appointment of the manager and deputy manager of a branch of a non-EU bank. The PFSA uses the same criteria as previously described to evaluate candidates. There are no such requirements with respect to the managing personnel of a branch of an EU credit institution or a representative office.

The PFSA may ask the relevant bank authorities (i.e., a meeting of shareholders or the supervisory board) to dismiss a member of its management or supervisory board who does not fulfil the requirements imposed by law. Moreover, the PFSA is entitled to suspend a member of a bank's management or supervisory board until the relevant bank authorities adopt a resolution on his or her dismissal. The PFSA is obliged to dismiss a member of a bank's management board in the event of a conviction for an intentional or fiscal offence, with the exception of offences tried in a private prosecution, or of a failure to inform the PFSA of charges relating to an intentional or fiscal offence, with the exception of offences tried in a private prosecution, within 30 days of the charges being brought.

The articles of association of a bank shall specify the management system, which is a set of principles and mechanisms relating to the decision-making processes and to evaluating banking activities. The management system comprises the risk management system and internal control system. It must include a procedure of anonymous reporting of violations of the laws, internal regulations and ethical standards applicable to the bank (whistle-blowing). The procedure shall provide protection for whistle-blowers against retaliation, discrimination and other possible instances of unfair treatment.

Except for the general duties imposed on bank managers by corporate law, such as the duties of care and loyalty, the Polish Banking Law provides for specific legal and regulatory duties. Members of a bank's management and supervisory boards are obliged to perform their functions honestly and fairly, and to be driven by independent judgements, to provide efficient assessment and verification of making and enforcing decisions connected with the current management of the bank. General corporate law also governs the decision-making process within the bank – as the default rule, the management board has broad discretion with respect to the conduct of the bank's business. However, the internal regulations (in particular the articles of association) can impose restraints and provide that, for example, certain credit commitments need to be authorised by the supervisory board or the shareholders.

With the exception of state-owned banks, Polish law does not contain any restrictions on bonus payments to management and employees of banking groups, and this issue has never been subject to closer scrutiny by the regulator. Unlike in the United Kingdom and the eurozone countries, the topic of bonus payments in the financial industry has been absent from Polish public discourse, and the remuneration of high-level bankers has not been subject



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to public scrutiny. This may be explained by the fact that during the financial crisis, none of the Polish financial institutions needed to be bailed out by the government, and at no time was there a risk of collapse of the financial sector.

As at March 2019, Polish law also does not provide any limitations on the amount of remuneration that the managers of a Polish bank, except for state-controlled banks, can receive. However, it should be noted that following the implementation of the CRD IV, banks are obliged to draw up and implement remuneration policies for the categories of persons whose professional activity has significant effect on the risk profile of a bank. The remuneration policy applies to bank's subsidiaries, and should be in line with the remuneration policy adopted by the dominant entity of the bank. Every year, banks shall provide the PFSA with information about persons whose professional activity has significant effect on the risk profile of a bank, and whose total remuneration for the previous year amounted to at least the equivalent of €1 million. A remuneration committee composed of members of the supervisory board should be established in significant banks. The purpose of the remuneration committee is assessing and monitoring remuneration policies, and supporting bodies of a bank in shaping and implementing these.

### iii Regulatory capital and liquidity

The CRD IV package entered into force on 1 January 2014. The Capital Requirements Regulation (CRR) is directly applicable in Poland, whereas the CRD IV needed to be implemented into Polish law (this occurred in November 2015). Following the implementation of the CRD IV, the relevant provisions of the Banking Law regarding banks' own funds, internal capital and capital adequacy have been amended.

The entry into force of the CRR and the implementation of the CRD IV resulted in material changes in the structure of banks' own funds, which were previously regulated solely by provisions of the Banking Law. Banks must currently maintain own funds defined as the sum of Tier 1 and Tier 2 capital adjusted to the size of the conducted business. Capital instruments and subordinated loans may be qualified as additional instruments in Tier 1 or instruments in Tier 2 after obtaining the consent of the PFSA.

Banks are required to maintain a sum of own funds at a level not lower than the higher of:

*a* the amount resulting from the fulfilment of requirements regarding own funds specified in the provisions of the CRR;[3] or

*b* the amount estimated by a bank to be necessary to cover all identified material risks appearing in the bank's activities and changes in the economic environment, taking into account the expected level of risk (the internal capital).

Banks are obliged to draw up and implement strategies and procedures for estimating and constantly maintaining their internal capital. On the demand by the PFSA, banks are required to provide information regarding the structure of own funds and the fulfilment of requirements and norms specified in the Banking Law and the CRR. In addition, banks are obliged to maintain capital buffers, in particular the safeguarding and countercyclical capital buffer. Additional capital in the form of a countercyclical buffer is collected by banks during

3 Subject to Article 92 of the CRR, banks shall at all times satisfy the following own funds requirements: a Common Equity Tier 1 capital ratio of 4.5 per cent, a Tier 1 capital ratio of 6 per cent and a total capital ratio of 8 per cent.



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a period of economic growth, and is aimed at weakening the credit expansion of banks, which shall result in smoothing fluctuations in the cycle. During an economic downturn, banks will be exempt from the requirement to maintain countercyclical buffer capital, and will be able to use additional capital accumulated during the period of economic growth.

The PFSA may recommend that a bank comply with additional requirements relating to liquidity and own funds, or may order a bank to withhold the payment of dividends until liquidity is restored or normal standards of permissible risk in the bank's activities are achieved. The PFSA is also entitled to impose on a bank additional requirements relating to own funds, or to impose higher factors than were previously adopted in the event of significant irregularities in identifying risk using an internal method of calculating own funds. In January 2019, the PFSA issued recommendations relating to the payment of dividends by commercial banks, pursuant to which only banks meeting supervisory expectations regarding the minimum level of total capital ratio and security capital, and not realising a recovery programme, shall be entitled to pay dividends in the full amount.

Generally, Polish banks were well capitalised in 2018. Own funds of Polish banks increased from 198 billion zlotys at the end of 2017 to 209 billion zlotys at the end of Q3 2018. The total capital ratio of Polish banks increased from 19 per cent at the end of 2017 to 19.2 per cent at the end of Q3 2018.

Poland has not adopted any bank holding regulations that would restrict the permissible activities of bank holding companies. According to information from the European Commission, so far no financial conglomerates have been identified in Poland: the provisions regarding the supplementary supervision of financial conglomerates therefore remain a paper exercise. If a Polish bank operates in a holding company, supervision of that entity is exercised on a consolidated basis. The Banking Law contains a set of default rules on the selection of the consolidated supervisor depending on the type of the holding and the home country of the parent company.

In 2015, the national rules regarding liquidity standards were replaced by the liquidity coverage ratio specified in the CRR and Commission Delegated Regulation 2015/61 of 10 October 2014 to supplement the CRR with regard to the liquidity coverage requirement for credit institutions. Consequently, banks shall currently hold liquid assets, the sum of the values of which covers the liquidity outflows less the liquidity inflows under stressed conditions, so as to ensure that institutions maintain levels of liquidity buffers that are adequate to face any possible imbalance between liquidity inflows and outflows under gravely stressed conditions for a period of 30 days. During times of stress, banks may use their liquid assets to cover their net liquidity outflows. The liquidity coverage ratio was introduced gradually, and reached the target level of 100 per cent as from 1 January 2018.

### iv Recovery and resolution

Following implementation of the Bank Recovery and Resolution Directive (BRRD), which entered into force in October 2016, Polish law requires banks to draw up recovery plans. Each bank that is not operating in a holding (banks operating in holdings will be included in group recovery plans) must draw up a recovery plan, including actions to be taken in the event of a significant deterioration of the bank's financial standing, a threat to the bank's financial standing, a difficult economic situation, or other circumstances that may adversely affect the financial market or the bank's situation. In the case of a breach or the threat of a breach of the provisions regarding the required level of own funds or liquidity measures, the bank's management board is obliged to inform the PFSA and the Bank Guarantee Fund



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thereof and ensure implementation of the recovery plan. The bank's management board shall promptly notify the PFSA and the Bank Guarantee Fund of the above-mentioned violations and ensure implementation of the recovery plan in the event of a material deterioration of the bank's financial standing, such as:

*a* the occurrence of a balance loss or a threat thereof;
*b* a danger of insolvency or loss of liquidity,
*c* an increasing level of leverage; or
*d* an increasing number of loans and credits that are at risk or an increasing concentration of exposures.

The PFSA is entitled, inter alia, to:

*a* impose on a bank's management board the obligation to implement the recovery plan;
*b* restrict the granting of credits and cash loans to a bank's shareholders, members of its management and supervisory boards, and its employees;
*c* impose a reduction of the variable component of the remuneration of a bank's senior management; and
*d* order implementing changes in a bank's business strategy, or amendments to its statutes or its organisational structure.

In the event of a breach or the threat of a breach of the legal provisions regarding the required level of own funds or liquidity measures, the PFSA may establish a curator in the bank to improve the bank's standing or to ensure the effectiveness of the implementation of the recovery plan. The curator's powers include participating in meetings of the bank's authorities and opposing decisions thereof to the competent commercial court. If the implementation of the recovery plan proves ineffective, the PFSA may decide to establish a receivership administration. In that case, the right to adopt resolutions and make decisions in all matters vested by law or by statute with the bank's authorities and governing bodies is transferred to the receivership administrators. However, the PFSA may stipulate that certain actions require its approval. Upon establishing the receivership administration, the supervisory board is suspended, members of the management board are automatically recalled, and previously established commercial proxies and powers of attorney expire. For the duration of the receivership administration, the rights of other bodies of the bank are also suspended. Receivership administrators may close the bank's ledgers and prepare a financial statement of the bank for the day indicated by the PFSA, and adopt a resolution on the coverage of loss for the period ending on that day, and a loss from previous years.

Moreover, the BRRD introduced a compulsory restructuring mechanism. The body responsible for compulsory restructuring is the Bank Guarantee Fund. In performing its functions relating to compulsory restructuring, the Bank Guarantee Fund cooperates with the PFSA, the National Bank and the Minister of Finance. The aims of compulsory restructuring are, inter alia, maintaining financial stability, in particular by protecting confidence in the financial sector; ensuring market discipline; and protecting funds entrusted to banks by their clients. The Bank Guarantee Fund shall draft plans for the compulsory restructuring of each bank that is not part of a group subject to consolidated supervision in a Member State conducted by an authority other than the PFSA (those banks will be included in a group plan for compulsory restructuring). However, banks are obliged to provide the Bank Guarantee Fund with assistance in drafting and updating the plans if the Bank Guarantee Fund requests them to do so. If a bank refuses to provide assistance, the Bank Guarantee Fund is entitled



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to impose a penalty of up to 10 per cent of the projected annual turnover of the bank (but not exceeding 100 million zlotys). It should be noted that following the implementation of the BRRD, banks are obliged to maintain a level of own funds and liabilities subject to redemption or conversion as determined by the Bank Guarantee Fund.

Compulsory restructuring proceedings will be conducted by the Bank Guarantee Fund after receiving information about the threat of insolvency of a bank from the PFSA. During the course of compulsory restructuring proceedings, the Bank Guarantee Fund is entitled to use the following instruments:

*a* the acquisition of an enterprise: the Bank Guarantee Fund is entitled to issue a decision on the acquisition of a bank's enterprise or its organised part by another entity;

*b* a bridge institution: the Bank Guarantee Fund is entitled to set up a bridge institution in the form of a capital company. The aim of the bridge institution's activity would be managing the acquired share rights in a bank under restructuring and exercising the rights thereof, or continuing the activity of the acquired enterprise of the bank under restructuring or its organised part until the disposal to a third party or liquidation thereof;

*c* the redemption or conversion of liabilities: the Bank Guarantee Fund is entitled to:
- redeem or convert liabilities to recapitalise the bank under restructuring;
- redeem or convert liabilities transferred to a bridge institution to equip it with own funds;
- redeem or convert liabilities transferred under the instrument of the separation of property rights; or
- redeem liabilities under the instrument of the acquisition of an enterprise; and

*d* the separation of property rights: the Bank Guarantee Fund is entitled to set up an entity in the form of a capital company and transfer to that newly established entity separated property rights and liabilities of a bank under restructuring or a bridge institution. The separation of property rights is permissible if:
- the liquidation thereof could adversely affect the market situation;
- the transfer thereof is necessary for continuing the activity of a bank under restructuring or a bridge institution; or
- the transfer of property rights shall increase the revenues from those property rights.

If application of the above-mentioned instruments of restructuring does not lead to the disposal of the bank under restructuring, or the application of those instruments is not possible, the bank under restructuring shall be subject to liquidation through insolvency proceedings. During compulsory restructuring proceedings, the right to adopt resolutions and make decisions in all matters vested by law or by statute with the bank's authorities and governing bodies is transferred to the Bank Guarantee Fund. The Bank Guarantee Fund is entitled to appoint an administrator of the bank under restructuring who exercises those powers in its name.

Banks are required to pay contributions to a compulsory restructuring fund, which will be used to finance the actions of the Bank Guarantee Fund under compulsory restructuring proceedings.

The legal framework for the government's bail-in powers in a crisis situation is provided in the Act on recapitalisation of certain institutions and government instruments of financial stabilisation. This Act allows the government to guarantee the increase of own funds by



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a financial institution or to use government instruments for financial stabilisation, which include capital support (a public instrument) and the temporary takeover of an institution by the State Treasury. A guarantee issued by the state is triggered when the shares or bonds issued by a bank are not acquired by the existing shareholders or third parties, and can only be extended if a bank is not threatened by bankruptcy. The government's financial stabilisation instruments may be used in the event of a financial crisis to avoid the liquidation of a bank that is subject to compulsory restructuring proceedings if the application of the compulsory restructuring instruments would be insufficient to avoid adverse consequences for Poland's financial stability or public interest. The use of the capital support instrument involves the State Treasury acquiring or purchasing instruments in a bank's Tier 1 or Tier 2 capital, or the issuance by the State Treasury of a guarantee by a bank to increase its own funds. The temporary takeover of a bank by the State Treasury consists in the transfer of all shares in the bank to a state legal person or a company in which the State Treasury has a dominant position. All this being said, as at March 2019, Polish banks remain well capitalised, and the Act on recapitalisation of certain institutions and government instruments of financial stabilisation has never been tested in practice.

Furthermore, a mechanism pursuant to which a bank that does not meet requirements relating to own funds may be acquired forcibly by another bank, subject to an administrative decision of the PFSA, was re-introduced in 2018. In such case, following a decision of the PFSA, the acquiring bank steps into the rights and obligations of the bank being acquired. The bodies of bank being acquired are dissolved, and previously established commercial proxies and powers of attorney expire. The Bank Guarantee Fund may provide financial support to a bank acquiring another bank.

## IV CONDUCT OF BUSINESS

Banks have to follow consumer protection rules with regard to consumer credit and the distance marketing of consumer financial services, as provided in the laws implementing EU directives. With respect to usury laws, the Polish Civil Code introduces a cap on the maximum amount of interest that can result from a legal act; the interest rate cannot exceed twice the sum of the reference interest rate of the National Bank and 3.5 per cent. The reference rate is currently set at 1.5 per cent, so the maximum annual interest charged by banks cannot exceed 10 per cent. Any agreements to the contrary, or attempts to circumvent the usury law, are null and void. Legislation setting limits on costs other than interest charged on consumers, which is applicable to banks, came into force in 2016. The costs shall not exceed 25 per cent of the amount of borrowed cash, and shall not exceed 30 per cent of the amount of borrowed cash per year. Furthermore, non-interest costs throughout the whole crediting period shall not exceed the total amount of a consumer loan (which also refers to consumer credits advised by banks). However, it should be noted that at the very end of 2016, the Ministry of Justice announced a draft of a law aimed at further reducing permissible amounts of interest rates. Work on the draft has not been finalised, and it remains to be seen what the final shape of that law will be. Moreover, since 2019 banks are allowed to compound interest on long-term credits only with regard to interest accrued after bringing a case to court, unless after the arrears have arisen the parties to a long-term credit agreement have agreed to add the outstanding interest to the debt amount.

As far as the offering of investment services is concerned, banks in Poland must comply with specific provisions resulting from the implementation of the Markets in Financial



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Instruments Directive II (MiFID II), which impose certain pre-contractual disclosure requirements and requirements regarding the suitability of financial products. Banks providing investment services are obliged to provide, inter alia, information to clients or potential clients about such things as their services, financial instruments, and costs and charges, and to obtain the necessary information regarding a clients' knowledge and experience in order to assess the suitability of a financial service or product. The protection of clients is currently even further enhanced than it was after the implementation of the MiFID I. In particular, the pre and post-trade information requirements have been enhanced, and additional financial instruments have been brought within the scope of the MiFID II regime.

Banks, bank staff and other persons involved in the performance of banking operations are subject to far-reaching banking secrecy requirements. As a rule of thumb, information that is subject to banking secrecy may be disclosed when, owing to the nature of a banking operation or the regulations in force, proper performance of the agreement under which the banking operation is performed, or proper execution of activities related to the conclusion and execution of the agreement, are not possible without the disclosure of information that is subject to the secrecy obligation. The Banking Law further provides for a detailed, illegible and poorly drafted catalogue of circumstances in which banking secrets may be divulged to other financial institutions and public authorities. Depending on the circumstances, alongside banking secrecy, banks may also be required to follow general data protection laws that impose restrictions on the disclosure of personal data of retail clients. From May 2018, this includes rules relating to personal data protection resulting from the General Data Protection Regulation (GDPR) (e.g., the right to be forgotten). Failure to obey the regulations relating to personal data protection may result in significant penalties. A regulation imposing an obligation on banks to provide institutions established to collect, process and provide information subject to the obligation of banking secrecy (the most important of which is Biuro Informacji Kredytowej, established by leading Polish banks, and the Association of Polish Banks) with information about their clients' liabilities in the scope needed to extend loans, cash advances, bank guarantees and other guarantees, and to assess the creditworthiness of customers, came into force in 2016. The aim of the regulation is to increase the possibility of assessing the creditworthiness of banks' clients. However, the performance of this obligation is burdensome for banks, as it refers to all liabilities without any exclusions.

Banks are subject to general liability rules in tort and in contract. When assessing the non-performance of obligations by banks, the courts employ a high standard of review and demand that banks act with the standard of care expected from a professional body. Further, the activities of the President of the Office of Competition and Consumer Protection need to be noted: banks are subject to increased scrutiny on antitrust grounds with respect to, inter alia, interchange fees, spreads on foreign currencies and mis-selling practices. New rules required by the President of the Office of Competition and Consumer Protection, pronouncing provisions for standard form contracts to prevent illicit activities and a prohibition of mis-selling of financial services, entered into force in 2016. Moreover, since then, the President of the Office of Competition and Consumer Protection may use a mystery shopper as part of its consumer protection activities.

Pursuant to the provisions of the Act on reviewing complaints by financial market entities and the Financial Spokesman, banks are obliged to review client complaints within 30 days. Only for complaints in especially complicated cases may the review period be



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extended to a maximum of 60 days. In the event of a failure by a bank to comply with provisions relating to reviewing complaints, the Financial Spokesman may impose a penalty of up to 100,000 zlotys.

The Act on tax on certain financial institutions also came into force in 2016, pursuant to which domestic banks, branches of foreign banks and branches of EU credit institutions are obliged, inter alia, to pay additional tax amounting to 0.0366 per cent on the amount of their assets exceeding 4 billion zlotys. This additional financial burden influenced the profitability and rate of return of the Polish banking sector, and resulted in higher costs of conducting banking activities.

## V FUNDING

Banks participating in SORBNET 2 – a real-time gross settlement system operated by the National Bank – may cover their liquidity shortages with intraday credit extended by the central bank. A significant number of commercial banks also participate in the TARGET2 system, directly or indirectly. In 2012, Krajowa Izba Rozliczeniowa, a payment and settlement intermediary created in 1991 on the initiative of the major Polish commercial banks, the National Bank and the Association of Polish Banks, launched a new payment and settlement system, Express ELIXIR, which provides for the immediate processing, all day every day, of wire transfers between the participating banks.

During the financial crisis, interbank lending was heavily disrupted, and it continues to stagnate. To limit the liquidity risk of banks, the National Bank adopted a package of measures aimed at facilitating its requirements for open market operations. In particular, repo transactions between commercial banks and the National Bank may be entered into for longer periods (six months instead of three), and the list of eligible collateral has been extended to include debentures issued by local authorities, mortgage-backed debentures and treasury papers denominated in euros. The National Bank also lowered the mandatory reserve requirements for banks and agreed to repurchase its own debentures prior to their maturity date. Those instruments proved to be sufficient during the crisis, as no bank was forced to ask the National Bank for individual liquidity assistance.

## VI CONTROL OF BANKS AND TRANSFERS OF BANKING BUSINESS

### i Control regime

The regime for the approval of qualifying holdings in Polish banks is fully compliant with the CRD IV. The Banking Law states that an entity that intends to directly or indirectly take up or acquire shares or rights on shares in a domestic bank in an amount that would result in that party being entitled to more than 10, 20, 33 or 50 per cent of the total number of votes at a general meeting or of the share capital of a bank is required to notify the PFSA each time of its intention of taking up or acquiring shares. Moreover, each time an entity intends to directly or indirectly become a dominant entity of a bank in a way other than by taking up or acquiring shares, or rights on shares in a domestic bank in an amount guaranteeing the majority of votes at the general meeting, it is required to notify the PFSA of that intention. The notifying entity may accomplish the intention expressed in the notification when the PFSA does not deliver an objection within 60 working days of the date of receipt of the notification and all required information and documents, or if the PFSA issues a decision on the lack of grounds for filing an objection.



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The PFSA shall file an objection, by way of an administrative decision, against the taking up or acquisition of shares or rights on shares, or becoming a domestic bank's dominant entity if:

*a* the notifying entity has not remedied defects in the notification or in the documents or information enclosed thereto;

*b* the notifying entity did not submit in time the additional information or documents required by the PFSA; or

*c* this is justified by the requirement of cautious and stable management of a domestic bank, or as a result of an assessment of the notifying entity's financial standing.

As far as assessing notifying entities' financial standing is concerned, the PFSA's representatives have made it clear in their public statements that an entity that needs to improve its solvency ratios in its home jurisdiction to meet the Basel III requirements would not be considered favourably by the regulator as a potential acquirer of a Polish bank.

When assessing whether the filing of an objection is justified by the requirement of cautious and stable management of a domestic bank or as a result of the assessment of the notifying entity's financial standing, the PFSA takes into consideration, in particular, commitments regarding the domestic bank, and the prudential and stable management of the bank undertaken by the notifying entity in connection with the conducted procedure. The commitments may vary. For example, they may refer to the positioning of a domestic bank in the structure of a multinational financial group, or to the dual-listing of the shares of the bank's dominant entity on the Warsaw Stock Exchange. Although the commitments are formally made voluntarily, in practice the PFSA often expresses its expectations and suggestions relating thereto. For instance, in 2012, during an assessment of the following acquisitions, the PFSA requested notifications from the purchasers that they undertook to dual list their shares on the Warsaw Stock Exchange. Commitments to this effect were made by Santander in the acquisition of Kredyt Bank, and by Raiffeisen in the acquisition of Polbank. According to the PFSA, the owners of key financial institutions in Poland should also be subject to increased transparency and the capital market information requirements.

Voting rights on shares may not be exercised where those shares or rights on shares are taken up or acquired:

*a* in breach of the obligation of notifying the PFSA;

*b* despite an objection having been filed by the PFSA;

*c* before the end of the period authorising the PFSA to file an objection; or

*d* after the end of the time limit set by the PFSA for the taking up or acquisition of shares or rights on shares.

In the case of the exercising of the powers of a dominant entity of a domestic bank in the aforementioned manner, members of the management board of the domestic bank appointed by the dominant entity, or members of the management board, proxies or persons performing managerial functions at the dominant entity, are not allowed to participate in actions considered to be a representation of a domestic bank; where it is impossible to establish whether any board members have been appointed by a dominant entity, the appointment of the management board shall be ineffective from the day of obtaining the powers of a dominant entity of that domestic bank. In particularly justified cases, if the interests of a domestic bank's customers so require, the PFSA may, inter alia, by way of a decision issued at the request of a shareholder or a dominant entity of a domestic bank, remove the above-mentioned prohibitions.



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In certain cases, the PFSA may decide to prohibit the execution of voting rights on shares of a domestic bank or the execution of the powers of a dominant entity of a domestic bank. This may happen in the event of, inter alia, a failure to respect the commitments made in the proceedings regarding taking up or acquiring shares or rights on shares in a domestic bank, or of becoming its dominant entity. The aforementioned decision may be followed by a decision by the PFSA ordering the disposal of shares of a domestic bank within the fixed period. If a shareholder does not fulfil the obligation to dispose of the shares within the prescribed time, the PFSA is entitled to impose a fine of up to 20 million zlotys on a domestic bank's shareholder who is a natural person, and a fine of up to 10 per cent of his or her annual turnover on a shareholder who is a legal person. Since 2018, the failure to fulfil investors' commitments can also result in a fine up to the value of the shares or rights on shares imposed by the PFSA on a bank's shareholder. In such case, the regulator may order that all payments made by the bank to its shareholders shall be assigned to cover the penalty.

### ii Transfers of banking business

Pursuant to the Banking Law, subject to an authorisation from the PFSA, banks may divide by the transfer of some assets of a bank to an existing or a newly formed domestic bank or an EU credit institution (spin-off or division by separation). The PFSA shall refuse its authorisation if the division may turn out to be detrimental to the sound and prudent management of the bank being divided, the banks to which the assets of the bank being divided are transferred, or if the division may cause substantial loss to the national economy or to the national interest. The division of a bank is considered to be effected as a universal succession and does not require the consent of consumers.

Banks may also use other techniques to transfer part of their business. The acquisition by a bank of a banking enterprise or an organised part thereof requires authorisation from the PFSA. In this case, there is the assignment of the entire contract, and customers' consent may be necessary. Banks may also employ other techniques to achieve capital relief on assets, such as true sale securitisation (i.e., assignment of the individualised claims on a special purpose vehicle. Assignment of claim does not require the consent of the debtor, unless the contract provides otherwise) and synthetic transfer (such an agreement may, however, only be effected with a mutual fund that constitutes a securitisation fund or with a securitisation fund. There is no legal transfer of the underlying assets, so the consent of clients is not necessary). Moreover, Polish law allows for the sale of non-performing loans in a public tender process whereby the banks can publicly disclose to the potential acquirers information that is normally subject to banking secrecy rules.

A bank may only merge with another bank or an EU credit institution with the authorisation of the PFSA. The PFSA shall refuse to authorise a merger if it would lead to a violation of law or the interests of customers of the bank participating in the merger, or if it would jeopardise the safety of funds held in that bank.

## VII THE YEAR IN REVIEW

The financial results of the Polish banks in Q1 to Q3 2018 (11.5 billion zlotys net) were higher than those in the same period of 2017 (10.5 million zlotys). This improvement in the financial results of the banking sector was mainly due to the increase in net interest income combined with a moderate increase in the operational costs of conducting banking activities.



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The Payment Accounts Directive (PAD) came into force in August 2018. The new law introduces a free-of-charge basic payment account designed for consumers who have no other account that allows for making payments. The basic payment account must give consumers access to certain basic services, such as making payments into the account and withdrawing cash from ATMs. Moreover, the new legislation introduced a standard procedure of account switching, and rules on the functioning of websites that compare payment account offers. Following the implementation of PAD, payment account providers are responsible for presenting consumers, at least once a year, a list of fees charged in relation to a payment account during that period. They are also obliged to use, in commercial information and contractual provisions dedicated to consumers, a standardised terminology set out in a list of most representative services linked to payment accounts. A consumer must be provided with a standarised document concerning fees charged by a payment account provider before entering into a payment account agreement. This helps consumers to compare different payment account offers.

The implementation of the Payment Services Directive II (PSD II) into the Polish legal framework took place in June 2018 and became effective in December 2018; this has affected the provision of payment services by banks. The changes included, inter alia, the introduction of new payment services involving third-party providers (account information services and payment initiation services), a reduction of customers' liability for unauthorised transactions from €150 to €50, and a prohibition on card subcharges. In this context, the European Commission delegated regulation regarding regulatory technical standards for strong customer authentication, and common and secure open standards of communication will become applicable from September 2019. This will finalise the process of the implementation of PSD II.

The implementation of the Anti-Money Laundering Directive IV also took place in 2018. This was done by introducing a new Act on Counteracting Money Laundering and Terrorist Financing. This resulted in, among other things:

*a* enhanced measures for local politically exposed persons;
*b* the creation of a central register of beneficial owners;
*c* the extended applicability of the anti-money laundering obligations; and
*d* a much greater emphasis on a risk-based approach to money laundering.

Moreover, the threshold of permitted transactions in cash has been lowered from €15,000 to €10,000.

Recent amendments to the tax law have also influenced the conducting of banking activities. Poland introduced the split payment mechanism based on the assumption that a purchaser of goods and services remits the amount of value added tax (VAT) into a dedicated VAT bank account of the supplier. Therefore, banks are required to keep for non-consumers VAT accounts connected with clearing accounts. The use of the split payment is currently optional; however, this may change in the future. New regulations also imposed on banks new reporting obligations towards the tax authorities.

Following the implementation of the Insurance Distribution Directive, which took place in 2018, the cross-selling of insurance products by banks is regulated primarily by provisions of the Act on insurance distribution. That Act provides for detailed requirements about:

*a* the information that banks acting as insurance distributors must disclose to customers before the conclusion of an insurance contract;



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*b* the rules of cross-selling and bundled products;
*c* the management of possible conflicts of interests between insurers and insurance distributors;
*d* the requirement to improve the professional skills of insurance distributors; and
*e* administrative sanctions that may be imposed on insurance distributors.

The increased number of consumer complaints has also resulted in increased litigation, often in the form of class action lawsuits. In particular, mortgage loans denominated in foreign currencies have become the subject of a growing number of class actions against banks. Many banks are currently facing numerous individual or class action lawsuits regarding the invalidation of mortgage loan agreements denominated in foreign currencies (mostly Swiss francs). Borrowers are demanding that the agreements be invalidated in whole, pronouncing indexation clauses to be abusive, or to be reimbursed for bank spreads. The decisions in such cases vary significantly, and it remains uncertain in which direction the judiciary will finally go. In a judgment issued by the Regional Court in Wrocław, the Court stated that changes of interest on credit cannot be at a bank's absolute discretion. In several other cases, the courts have ruled that indexation clauses in mortgage loans denominated in foreign currencies were null and void. In a judgment issued at the end of 2018, the Regional Court in Łódź stated that high spreads used by a bank to determine the principal amount of credit, and consequently the amount of instalments paid by borrowers, shall be held contrary to good practice and to infringe collective consumer interests. Moreover, the Supreme Court stated in 2018 that the assessment of whether a contractual clause is abusive, shall be made as at the time of conclusion of an agreement. This resolution remains in line with the arguments presented by many creditors in their claims against banks. However, there are also numerous decisions of the courts in which the claims of banks' clients have been dismissed.

The past year also witnessed increased activity by the President of the Office of Competition and Consumer Protection (President), who issued several decisions against banks, claiming that the structure of their banking products was abusive and infringed the collective interests of consumers. In the case of many banks, the regulator found provisions of credit agreements relating to currency spreads used for the repayment of credit to be imprecise and to favour the banks. The President also questioned the high fees charged by several banks for issuing certificates necessary to sue a bank (e.g., certificates regarding the repayment of credit). Furthermore, several banks faced proceedings before the President regarding whether qualifying messages sent through their internet banking systems could be considered as the use of a durable medium. The regulator argued that this could not be considered as the use of a durable medium, because the messages were under the control of the banks and could easily be replaced by them. The regulator also stressed that the messages may not simply be deposited in e-banking systems, but that clients must be informed that this has taken place, which requires action by a bank. The position of the President remains in line with the recent jurisprudence of the Court of Justice of the European Union, which set the criteria of a durable medium. Eventually, the regulator issued several decisions against banks in 2018 stating that the above-mentioned practice infringed the collective interests of consumers. As a result, banks have started work on improving their e-banking systems so that they will meet the expectations of the regulator. Possible technical solutions to be implemented by Polish banks are based on blockchain and WORM technologies.



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In November 2018, the chair of the PFSA resigned following corruption allegations. Jacek Jastrzębski, a former deputy general counsel at the state-controlled bank PKO BP and a professor of law at Warsaw University's Faculty of Law and Administration, has been appointed as the new chair for a five-year term.

Moreover, in 2018 the Polish financial market experienced turbulence resulting from the mis-selling of bonds issued by one of the biggest Polish debt collection companies, Getback. It appeared that the company had been in a much worse financial situation than had been presented to potential investors. Financial institutions that were involved in selling the bonds, which included certain banks, are prone to the risk of administrative sanctions and civil lawsuits.

Also worth mentioning is the fact that in November 2018 the PFSA denied Polski Bank Apeksowy, which was to be the third bank associating cooperative bank (i.e., a bank in the form of a joint-stock company whose shareholders may be only cooperative banks, and that performs certain functions for those cooperative banks), authorisation to commence its business. The decision was justified by the facts that the bank had not been properly prepared in organisational terms to commence the business, and had not been in possession of facilities suitable for the safekeeping of monetary funds and other valuables taking into consideration the scope and kinds of banking activity to be conducted.

## VIII OUTLOOK AND CONCLUSIONS

A big challenge faced by the Polish banking industry in 2019 will be compliance with the new legislation that has recently come into force. The legal and regulatory environment of banking business remains unstable. The conditions for conducting banking business have changed significantly, in particular as a result of the implementation of PAD, PSD II, MiFID II and AML IV, the entry into force of GDPR and changes to Polish tax law.

Conclusive decisions on the final shape of the law aimed at regulating the issue of mortgage loans denominated in Swiss francs can finally be expected in 2019. This will be important for the profitability of banking business in Poland.

Banks in Poland, like those in other countries, are facing increasing competition from various fintech companies, especially in payment services sector. At the same time, some institutions are intensively collaborating with fintech startups, which is resulting in innovations in financial products and services. Banks are also investing in new technologies and developing new solutions, which seems to be a permanent trend.

Further changes in the structure of the Polish banking sector are likely. For example, there have been reports in the press about a possible withdrawal of some multinational financial groups from the Polish market (e.g., Credit Agricole) and a division of BOŚ Bank between Alior Bank and Bank Gospodarstwa Krajowego. Moreover, in January 2019 the merger of two Polish banks, Getin Noble Bank and Idea Bank, controlled by a well-known investor, Leszek Czarnecki, was announced. This may result in the increased consolidation and concentration of the Polish banking sector. At the same time, there will be no merger of two banks, namely Bank Pekao and Alior Ban, controlled by the largest Polish insurer.

In 2019, the priorities and supervisory policy of the new chair of the PFSA shall become known. This will be important for all supervised financial institutions in Poland.



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**Appendix 1**

# ABOUT THE AUTHORS

**TOMASZ GIZBERT-STUDNICKI**

*T Studnicki, K Płeszka, Z Ćwiąkalski, J Górski Spk*

Tomasz Gizbert-Studnicki is a senior partner and co-founder of the firm. He is a tenured professor at the chair of legal theory at the Law Faculty of the Jagiellonian University. Professor Studnicki specialises in banking and corporate law, including M&A deals and their financing. In his practice, Professor Studnicki has represented SPCG's clients in several dozen transactions in this field.

**TOMASZ SPYRA**

*T Studnicki, K Płeszka, Z Ćwiąkalski, J Górski Spk*

Tomasz Spyra is a partner at the firm. He is admitted as a legal adviser in Poland. He advises Polish and foreign banks in the field of banking law, antitrust regulations, large credit facilities, as well as restructurings of receivables and insolvency. He is the author of numerous publications in the field of banking and insolvency law, and a co-author of the leading commentary on banking law. Dr Spyra is also a research fellow in the Polish–German Centre for Banking Law at the Jagiellonian University.

**MICHAŁ TOROŃCZAK**

*T Studnicki, K Płeszka, Z Ćwiąkalski, J Górski Spk*

Michał Torończak is an associate in the firm's banking and finance practice. He is an advocate admitted to the Warsaw Bar of Advocates. Dr Michał Torończak is a lawyer and an economist. He specialises mainly in banking, payment services, and capital markets law. Dr Torończak is the author of publications on banking and financial law.



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**T STUDNICKI, K PŁESZKA, Z ĆWIĄKALSKI, J GÓRSKI SPK**

ul Jabłonowskich 8
31-114 Krakow
Poland
Tel: +48 12 427 24 24
Fax: +48 12 427 23 33
t.spyra@spcg.pl
t.studnicki@spcg.pl
m.toronczak@spcg.pl
spcg@spcg.pl
www.spcg.pl



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