

POLAND

Investment rules of the world

About

At DLA Piper, we have one of the largest finance and projects teams in the world with more than 600 dedicated lawyers and an established local law firm network. We share knowledge and skills in debt instruments, debt securities, funds, derivatives and portfolios, as well as energy, infrastructure and other projects, across Europe, the Middle East, Africa, Asia Pacific and the Americas.

When and wherever we work for you on finance and investment deals and projects, you can rely on our international platform; we are backed by the network and resources of one the largest and most-connected business law firms in the world.

We enjoy being part of your team, bringing experience across sectors, borders and financial products, supporting you on first-of-a-kind deals, in new markets and to grow.

With global perspective, we can help you to realize your financial strategy in whichever markets you do business.

Investment Rules of the World

With input from across our global network, this guide covers key legal topics for different financial activities and projects and gives you an overview of the points you may consider when initially looking at financing or investing in particular jurisdictions. Please [contact us](#) if you would like to discuss any legal issues or solutions for your business. We also welcome your feedback about this guide via investmentrules@dlapiper.com.



Poland

Last modified 06 December 2019

Capital markets and structured investments

Issuing and investing in debt securities

Are there any restrictions on issuing debt securities?

There are restrictions on offering and selling debt securities under both Polish and EU law.

Unless certain exclusions or exemptions apply, it is unlawful to offer debt securities to the public in Poland or to request that they are admitted to trading on a regulated market operating in Poland, unless an approved prospectus has been made available to the public.

The Prospectus Directive sets a standard for selling restrictions on offers of debt securities. These restrictions are aimed at preventing breaches of:

- the rules on financial promotion; and
- the rules on accepting deposits.

Last modified 6 Dec 2019

What are common issuing methods and types of debt securities?

The most common types of debt securities issued in Poland are bonds issued on a stand-alone basis or under a program.

Many different types of debt securities are offered in Poland. Some common forms include:

- debt securities characterized by the type of interest or payment such as fixed-rate securities, floating/variable-rate securities, and zero-coupon securities;
- bonds;
- mortgage bonds;
- public securities;
- bank securities; and
- subscription warrants.

Last modified 6 Dec 2019

What are the differences between offering debt securities to institutional / professional or other investors?

The [Prospectus Directive](#) does not make a distinction between professional and other investors for the purposes of its disclosure requirements, but it does include different disclosure regimes by reference to the minimum denomination of a single security.

If the denomination of the securities is equal to or above €100,000 (or the equivalent in another currency), the 'wholesale' rules apply. If the denomination is under €100,000, the 'retail' rules apply. Additional disclosure requirements apply for retail securities.

Last modified 6 Dec 2019

When is it necessary to prepare a prospectus?

Under the [Prospectus Directive](#), unless an exemption applies, it is necessary to publish a prospectus where there is an offer of securities to the public or an application for the securities to be admitted to trading on a regulated market.

An offer would not be deemed to have been made to the public if it is made solely to qualified investors, addressed to fewer than 150 persons (other than qualified investors) per European Economic Area state, or where the minimum denomination per unit is at least €100,000.

If the offer is deemed not to be made to the public, a Prospectus Directive compliant prospectus may still be required if an application is made for the securities to be admitted to trading on a regulated market. An exemption from both the offer to the public and the admission to trading on a regulated market is needed to avoid having to publish a prospectus.

Last modified 6 Dec 2019

What are the main exchanges available?

The Polish debt capital market includes:

- the main stock exchange market organized by the Warsaw Stock Exchange (WSE);
- NewConnect – an alternative stock exchange market organized by the WSE; and
- Catalyst – a bonds market.

The Main Market of the WSE is a regulated market for the purposes of the [Markets in Financial Instruments Directive](#) (MiFID), so issuers on the Main Market are subject to the requirements of a number of EU Directives, including the Market Abuse Regulation, [Market Abuse Directive](#) and the [Transparency Directive](#). Securities listed on the Main Market can be passported to other European Economic Area markets in order to access international investors.

NewConnect is an alternative stock exchange operated by the WSE, allowing smaller companies to float shares. The exchange is conducted outside the regulated market as a multilateral trading facility. Compared to the main market of the WSE, NewConnect offers lower costs for floated companies, simplified entrance criteria, and limited reporting requirements. It is also characterized by higher risk and in turn a higher rate of return.

The bond market operates on transaction platforms of the WSE and BondSpot, jointly organized by Catalyst, which comprises four trading platforms:

- two platforms operated by the WSE (a regulated market and an alternative trading system) are dedicated to retail investors; and
- two platforms operated by BondSpot (regulated market and ATS) are dedicated to wholesale investors.

All platforms support trading in non-treasury debt instruments: municipal bonds, corporate bonds, and mortgage bonds. The Catalyst's architecture ensures that the market can accommodate issues of different sizes and parameters and serve the needs of different investor groups: wholesale and retail investors, institutions, and individuals.

The rules of trading on the regulated markets and in the alternative trading systems are identical and the only differences apply to block trades. Execution of transactions on all Catalyst markets is guaranteed by the National Depository for Securities. Issuers are bound by reporting requirements, including current and periodic reports.

Last modified 6 Dec 2019

Is there a private placement market?

Poland has an active private placement market. There is no dominant standard for documentation.

Last modified 6 Dec 2019

Are there any other notable risks or issues around issuing or investing in debt securities?

Issuing debt securities

Issuers are required to take responsibility for prospectuses for debt securities. Misleading statements in, or omissions from, any applicable offering document can give rise to both civil and criminal liability under Polish law. Poland has various statutory investor protection provisions relevant to liability for an inaccurate offering memorandum. There are also general fraud statutes and liability may also arise for deceit, negligent misstatement or misrepresentation.

Investing in debt securities

With respect to changes of the terms and conditions of issue, there are various requirements with respect to consent that aim at protecting investors. For instance, a change of the terms of conditions of issue requires a resolution of the bondholders' meeting and consent of the issuer. Resolutions of a bondholders' meeting concerning amending the qualified provisions of the terms and conditions of issue have to be adopted by a majority of three-fourths of votes, and in the case of bonds admitted to trading on the regulated market or introduced to the alternative trading system, resolutions concerning amending the qualified provisions of the terms and conditions of issue require the consent of all the bondholders present during the bondholders' meeting. Moreover, resolutions of the bondholders' meeting concerning the reduction of the nominal value of bonds require the consent of all the bondholders present during the bondholders' meeting.

MIFID II Directive

Poland has implemented the MIFID II Directive, thus forcing the investment firms offering securities to disclose whom they represent while offering securities and limiting their possibility to charge commission and receive remuneration from the securities issuers.

Enhanced oversight of non-public securities trading

Following the Act of 9 November 2018 on amendment of certain acts in connection with strengthening the supervision over the financial market and protection of investors, all bonds (corporate bonds, bonds of security and closed-end investment fund certificates) offered by the Polish issuers or in Poland need to be dematerialized, meaning that bonds cannot be in the form of a printed document, but need to be registered with the National Securities Depository (Krajowy Depozyt Papierów Wartosciowych or KDPW). They will exist only as an entry in the KDPW computer system, as is the case of securities traded on the Warsaw Stock Exchange.

Last modified 6 Dec 2019

Establishing and investing in debt / hedge funds

Are there any restrictions on establishing a fund?

Generally

Establishing a fund, offering fund securities, and operating a fund are regulated activities under the Investment Funds and Alternative Investment Fund Managers Act.

Under Polish law, funds can be established in the form of an open-ended investment fund, a special investment fund, a closed-ended investment fund, or an alternative investment company. Open-ended investment funds are compliant with the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive. Closed investment funds and alternative investment companies are Alternative

Investment Funds (AIFs). An investment fund is formed by the Investment Fund Company (*Towarzystwo Funduszy Inwestycyjnych*), which manages and represents the fund in its relations with third parties. The establishment of a public fund requires the consent of the Polish Financial Supervisory Authority.

Investment funds are subject to registration in the Investment Funds Register.

Collective investment schemes

Collective investment schemes are regulated under the UCITS Directive, which has been implemented in Poland. UCITS operate in Poland in the form of open-end investment funds.

Last modified 6 Dec 2019

What are common fund structures?

Common forms of funds include open-ended funds, closed-ended funds, special open-ended investment funds, and alternative investment companies, Undertakings for Collective Investments in Transferrable Securities (UCITS) and non-UCITS funds.

Last modified 6 Dec 2019

What are the differences between offering fund securities to professional / institutional or other investors?

Retail funds

Open-ended retail funds must be either authorized by the Polish Financial Supervisory Authority (PFSA) (if domiciled in Poland), or recognized by the PFSA (if domiciled in another jurisdiction). Funds that are 'recognized' by the PFSA in this context mostly comprise Undertakings for Collective Investments in Transferrable Securities (UCITS) funds established in other jurisdictions.

Retail funds, including UCITS, are subject to substantial regulatory oversight and restrictions, including obligations with regard to independent custodian/depository arrangements for assets, investment and borrowing power specifications (for open-ended retail funds), concentration requirements, and other matters.

Institutional/professional funds

Closed-ended funds are generally established as Polish closed-ended investment funds or Polish/offshore limited partnerships.

Non-retail funds that are offered in Poland generally fall into the category of Alternative Investment Funds and are therefore subject to the [Alternative Investment Fund Managers Directive](#) regime in relation to authorization of the manager/fund, marketing arrangements, reporting, governance etc.

Last modified 6 Dec 2019

Are there any other notable risks or issues around establishing and investing in funds?

Establishing funds

Managing investment funds is a regulated activity under the Act on Investment Funds and is therefore subject to authorization by the Polish Financial Supervisory Authority.

Last modified 6 Dec 2019

Managing and marketing debt / hedge funds

Are there any restrictions on marketing a fund?

Selling restrictions

Generally, offering securities or units of funds in Poland is covered under the Act on Public Offerings and the Act on Investment Funds.

Undertakings for Collective Investments in Transferable Securities (UCITS)

UCITS, including those established in Poland, have an EU passport which enables fund promoters to create a single product for marketing in all EU member states. Upon the completion of the appropriate notification procedure, a UCITS established in one member state can be sold in any other member state of the EU.

A UCITS intending to market in another member state must complete and submit to its home regulator a notification including certain specified information, including copies of key investor documents. The home regulator then completes a notification file which is sent in a regulator-to-regulator transmission, following which the UCITS can be sold in the other member state.

Alternative Investment Funds (AIFs)

Under the [Alternative Investment Fund Managers Directive](#), marketing is defined as: a direct or indirect offering to or placement with investors domiciled or with a registered office in the EU of units or shares in an Alternative Investment Fund (AIF) at the initiative of the Alternative Investment Fund Manager (AIFM) or on behalf of the AIFM that manages the AIF.

An AIFM may only market an AIF to EU investors if it is authorized to do so by a relevant EU regulator. Subject to certain conditions, registration with one EU regulator allows marketing to professional investors across the EU under an EU passport or if it complies with national private placement regimes (where available).

Reverse solicitation and the regulation of ‘marketing’

Applicable in the context of professional investors, this is a sensitive area in Poland and Europe generally. The [Alternative Investment Fund Managers Directive](#) generally continues to permit professional investors to invest in Alternative Investment Funds based on their own initiative (reverse solicitation); however, the EU is currently reviewing this area and may impose tighter requirements.

In Poland, the Polish Financial Supervisory Authority (PFSA) has provided general guidelines on marketing for investment funds. The guidelines are not binding but they provide a framework for operating within the law. According to the Investment Funds Act, the PFSA can impose financial sanctions on a fund that is operating contrary to fair marketing rules.

Last modified 6 Dec 2019

Are there any restrictions on managing a fund?

Fund management in Poland is regulated under the Act on Investment Funds and Alternative Investment Fund Managers and is supervised by the Polish Financial Supervisory Authority (PFSA). The PFSA is responsible for supervising funds, fund managers and those marketing funds. It is prohibited for any legal or natural person to perform regulated activities, such as fund management, without authorization.

Under the regulations there are various restrictions on manager structure/compensation and profit-sharing arrangements and any manager that is subject to the remuneration rules must apply those rules proportionate to its size, internal organization and scope and complexity of activities.

Under EU law, Alternative Investment Fund Managers (AIFMs) are also subject to regulation under the [Alternative Investment Fund Managers Directive](#) and managers of Undertakings for Collective Investments in Transferable Securities (UCITS) are subject to certain requirements under the [Undertakings for Collective Investment in Transferable Securities Directive](#).

The registration of such entities involves a significant authorization process. The application must include:

- for the manager – information on senior personnel (must be suitable persons etc), organizational structure, policies and procedures, remuneration practices; and
- for each fund – investment strategy, constitutional documents, depositary information and disclosure requirements.

However, AIFMs can be exempted from full regulation on certain grounds, including managing assets under €500 million where the assets are not leveraged and investors have no redemption rights for five years, and managing assets under €100 million including assets acquired through leverage. Exempted managers do not need a permit from the PFSA to operate but they still have to register in the Alternative Investment Company Register.

Last modified 6 Dec 2019

Entering into derivatives contracts

Are there any restrictions on entering into derivatives contracts?

Unless an exemption or exclusion applies, a person entering into a derivatives contract by way of doing business in Poland (such as a dealer) will ordinarily have to be authorized under the Trading in Financial Instruments Act, if the transaction is one of the specified activities, such as:

- options;
- futures;
- contracts for difference; or
- rights to or interests in investments.

One of the key exclusions to the requirements above applies to persons that deal in derivatives for risk management purposes.

The [European Market Infrastructure Regulation](#) applies to all derivatives transactions and requires that transactions be reported to regulators and that transactions between dealers be cleared or subject to other risk mitigation techniques such as initial margin and variation margin requirements.

Last modified 6 Dec 2019

What are common types of derivatives?

Derivatives contracts are entered into in Poland for various reasons, including hedging, trading and speculation.

Derivatives may be traded over-the-counter or on an organized exchange.

The main types of derivatives contracts are:

- forwards;
- futures;
- swaps; and
- options (call options and put options).

The Polish market for financial derivatives, although still fairly young, is high on the list of European markets. This is mainly due to the turnover on futures contracts, the most important derivative instrument listed on the Warsaw Stock Exchange, on the WIG 20 index.

Globally, the biggest influence on the financial market is attributed to instruments related to interest rates, which account for around 85% of the overall turnover. In Poland, this market is still very small and undeveloped. The largest turnover is generated on the over-the-counter (OTC) market in forward rate agreements and swaps.

Individual investors are not interested in speculation related to interest rates, and institutional investors conduct transactions on the OTC market. The situation is similar with respect to the currency derivatives market, where transactions, most commonly futures and options, are based on Polish currency.

Last modified 6 Dec 2019

Are there any other notable risks or issues around entering into derivatives contracts?

Since the global financial crisis in 2007-to-2008, derivatives – and particularly over-the-counter derivatives – have attracted significant regulatory attention. The European Commission has sought to:

- enhance transparency by requiring the provision of comprehensive information on over-the-counter derivative positions;
- reduce counterparty risk by increasing the use of central counterparty clearing; and
- improve the management of operational risk by increasing the standardization of derivatives contracts.

As a result, the derivatives market has seen and continues to see the introduction of a significant amount of new regulation and this has led to substantial compliance costs for market participants.

Last modified 6 Dec 2019

Debt finance

Lending and borrowing

Are there any restrictions on lending and borrowing?

Lending

The grant of loans is not a regulated activity. However, lenders that grant loans must comply with civil law provisions relating to loans and collateral.

Consumer loans are subject to a range of regulatory requirements that do not apply to unregulated loans. For example, there are particular restrictions around how:

- the loans are marketed, originated and sold;
- lenders administer the loans on an ongoing basis; and
- to deal with borrowers who fall behind with their payments.

There is a set of regulations which defines caps on interest and non-interest costs that may be charged by lenders in connection with consumer loan agreements.

The EU Mortgage Credit Directive (2014/17/EU) is being implemented into Polish law through adoption of the Act on Mortgage Credit (*Ustawa o kredycie hipotecznym*). The Act on Mortgage Credit will apply the above-mentioned restrictions to mortgage credits.

In addition, regulated credit agreements have specific requirements around how the agreement is drafted and formatted and what information must be included.

Borrowing

While borrowers are generally not regulated, it is advisable for borrowers to consider whether they are subject to consumer credit regulations.

Last modified 6 Dec 2019

What are common lending structures?

Lending in Poland can be structured in a number of different ways to include a variety of features, depending on the commercial needs of the parties.

A loan can either be provided on a bilateral basis (a single lender providing the entire facility) or on a syndicated basis (multiple lenders each providing parts of the overall facility).

Syndicated facilities by their nature involve more parties (such as agents and trustees that fulfil certain roles for the financing parties), are more highly structured, and involve more complex documentation. Larger financings will typically be done on a syndicated basis with one member of the syndicate taking the lead in coordinating and arranging the financing.

Loans will be structured to achieve specific objectives, eg term loans, working capital loans, equity bridge facilities, project facilities and letter of credit facilities.

Loan durations

The duration of a loan can also vary between:

- a term loan, provided for an agreed period of time but with a short availability period;
- a revolving loan, provided for an agreed period of time with an availability period that extends nearer to the maturity of the loan and which may be redrawn if repaid;
- an overdraft, provided on a short-term basis to solve short-term cash flow issues; or
- a standby or a bridging loan, intended to be used in exceptional circumstances when other forms of finance are unavailable and often attracting a higher margin.

Loan security

A loan can either be secured, unsecured or guaranteed. For more information, see [Giving and taking guarantees and security](#).

Loan commitment

A loan can be committed, meaning that the lender is obliged to provide the loan if certain conditions are fulfilled.

Loan repayment

A loan can be repayable on an amortizing basis (in instalments over the life of the loan), or scheduled (usually meaning the loan is repayable in full at maturity).

Last modified 6 Dec 2019

What are the differences between lending to institutional / professional or other borrowers?

Lending to institutional/professional borrowers is subject to less regulatory oversight and so less burdensome from a compliance perspective.

Last modified 6 Dec 2019

Do the laws recognize the principles of agency and trusts?

Trusts are not recognized under Polish law.

Polish law provides for certain types of agencies that may be used in financing transactions, eg pledge administrator (*administrator zastawy*) or mortgage administrator (*administrator hipoteki*), who will act on behalf of the secured parties.

In addition, the concept of the parallel debt is recognized by the Polish courts.

Last modified 6 Dec 2019

Are there any other notable risks or issues around lending?

Generally

Loan agreements and other finance documents are subject to general contractual principles.

Specific types of lending

Polish law regulates consumer credit activities. For more information, see [Regulated activities – authorization](#).

STANDARD FORM DOCUMENTATION

Most Polish law syndicated finance transactions are governed by documentation based on recommended forms published by the [Loan Market Association](#) (LMA).

Last modified 6 Dec 2019

Are there any other notable risks or issues around borrowing?

Borrowers face a number of systemic risks such as regional or national recessions, regional or national house price declines or national increases in interest rates. In response to the recent foreign currency loan crisis (the Swiss franc mortgage loans), i.e. mortgages which are denominated or indexed in a currency other than PLN the Act on the Borrowers Support was changed in 2019 by forming a separate Restructuring Fund, which will be used for voluntary restructuring of loans in foreign currency.

Borrowers should be aware of the potential implications of the EU's [Bank Recovery and Resolution Directive](#) (BRRD) (implemented in Poland by the Act of 10 June 2016 on the Bank Guarantee Fund, Guaranteed Deposit Scheme and Mandatory Restructuring), which outlines certain measures for dealing with failing financial institutions.

The BRRD applies to financial institutions incorporated in the European Economic Area (EEA), but does not apply to EEA branches of non-EEA incorporated entities.

Article 55 of the BRRD gives authorities the power to 'bail in' the obligations of failed EEA financial institutions and also postpone the enforcement of early termination rights against the affected institution. 'Bail in' describes a variety of write down and conversion powers, such as the power to convert certain liabilities into shares or cancel debt instruments. In the case of EEA law contracts, including Poland, such powers override what the contracts say. In the case of non-EEA law contracts, there are requirements to incorporate such provisions into these contracts.

Last modified 6 Dec 2019

Giving and taking guarantees and security

Are there any restrictions on giving and taking guarantees and security?

Some of the key areas affecting the giving of guarantees and security are:

Capacity

It is important to check the constitutional documents of a company giving a guarantee or security, as they often provide that corporate authorization is required in connection with granting a guarantee or security.

Actio pauliana

If a third party has gained a benefit as a result of a legal transaction effected by a debtor to the detriment of its creditors (ie where the debtor became insolvent or became insolvent to a greater extent as a result of the transaction), each of the creditors may demand that

the transaction be recognized as ineffective, if the debtor consciously acted to the creditors' detriment and the third party knew or with due diligence could have known about it (and it is alleged that the third party knew that the debtor acted to the creditors' detriment, if the third party remains in a permanent or close economic relationship with the debtor) or the third party obtained the benefit free of charge.

Insolvency and restructuring

Guarantees and security may be at risk of being set aside under Polish insolvency and restructuring laws if the guarantee or security was granted by a company a certain period of time prior to the onset of insolvency or restructuring proceedings.

Financial assistance

A joint-stock company may, directly or indirectly, finance the acquisition of or subscription for the shares that it issues, in particular by making loans, providing advance payments, or creating security, provided that the financing is granted on market terms and after the solvency of the debtor has been checked, the acquisition or subscription is for a fair price, the financing is made from the reserve capital created by the company for that purpose, and the financing is based on and is within the limits set out in an earlier resolution of the general assembly of the company. In the case of a limited liability company, the shareholders may not receive, under any title, any payments from the company's assets needed to fully finance the share capital.

Last modified 6 Dec 2019

What are common types of guarantees and security?

Common forms of guarantees

Guarantees can take a number of forms.

A particular distinction worth remembering is between a performance guarantee and a payment guarantee:

- Performance guarantee is a term used to describe both performance bonds (in the context of trade finance) and 'see to it' guarantees (in other contexts):
 - A performance bond describes a financial undertaking used to protect a buyer against the failure of a supplier to deliver goods or perform services in accordance with the terms of a contract. The issuer of the bond undertakes to pay to the buyer a sum of money if the seller fails to deliver the goods or perform the contracted services on time or in accordance with the terms of the contract.
 - A 'see to it' guarantee is a promise by the guarantor to see to it that the primary obligor fulfils its obligations under the primary contract. If the primary obligor fails to fulfil its obligations under the primary contract, the guarantor will be in breach of its obligations under the guarantee.
- A payment guarantee is narrower in scope than a performance guarantee as it only covers the payment of money rather than other contractual obligations.

Common forms of security

Polish law provides for real and personal security interests.

Personal security interests include:

- suretyship;
- guarantee; and
- statement on submission to enforcement.

The following types of security interest *in rem* can be created under Polish law:

- a pledge (under Polish law a distinction can be made between a registered pledge, a civil pledge and a financial pledge);
- a mortgage;

- a security assignment of receivables; and
- a security transfer of assets.

Different types of security are suitable for securing different types of assets.

Under Polish law, it is possible to grant security over all of the moveable assets and rights of a Polish company or over individual assets. Granting security over all of a company's assets may be achieved by the establishment of a registered pledge. However, real property cannot be encumbered with a pledge. The only security interest that can be established over the real property is a mortgage.

Last modified 6 Dec 2019

Are there any other notable risks or issues around giving and taking guarantees and security?

Giving or taking security

Some documents creating security interest have to be executed in a special form, for instance:

- Statement on granting a mortgage has to be executed in the form of a notarial deed (there are certain statutory exceptions to this rule).
- Agreement for the establishment of a civil pledge over shares has to be executed in writing with signatures certified by a notary.
- Security assignment agreement and security transfer of assets have to be executed with a certified date.

Once granted, security often needs to be properly perfected before it is valid against third parties. Perfection formalities range from having the secured asset delivered to the security holder, registration of the security, and notice being given to third parties. For instance, registered pledges and mortgages have to be registered in the relevant registers.

Like guarantees, for a certain period after a new security interest has been granted (known as the hardening period), it is at risk of being set aside in certain circumstances under insolvency and restructuring laws.

In the case of a guarantor that is a limited liability company, the shareholders may not receive, under any title, any payments from the company's assets needed to fully finance the share capital.

For more information, see [Tax issues – stamp taxes](#).

Last modified 6 Dec 2019

Financial regulation

Law and regulation

What are the main laws and regulations that apply to entities that are involved in finance and investments generally?

Generally

Act of 23 April 1964 – Civil Code (*Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny*) (civil code)

Act of 29 August 1997 – Banking Law (*Ustawa z dnia 29 sierpnia 1997 r. – Prawo Bankowe*) (banking law)

Act of 29 July 2005 on Public Offering, the Conditions Governing the Introduction of Financial Instruments to Organized Trading, and on Public Companies (*Ustawa z dnia 29 lipca 2005 r. o ofercie publicznej i warunkach wprowadzania instrumentów finansowych do zorganizowanego systemu obrotu oraz o spółkach publicznych*) (public offering and public companies)

Act of 29 July 2005 on Trading in Financial Instruments (*Ustawa z dnia 29 lipca 2005 r. o obrocie instrumentami finansowymi*) (financial instruments trading)

Act of 15 January 2015 on Bonds (*Ustawa z dnia 15 stycznia 2015 r. o obligacjach*) (bond issue and trading)

Act of 21 July 2006 on Financial Markets Supervision (*Ustawa z dnia 21 lipca 2006 r. o nadzorze nad rynkiem finansowym*) (financial markets supervision)

Act of 29 July 2005 on Capital Markets Supervision (*Ustawa z dnia 29 lipca 2005 r. o nadzorze nad rynkiem kapitaowym*) (capital markets supervision)

Act of 27 July 2002 – Foreign Exchange Law (*Ustawa z dnia 27 lipca 2002 r. – Prawo dewizowe*) (foreign exchange)

Act on Payment Services dated 19 August 2011, implementing Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market of 27 July 2002 – Foreign Exchange Law (*Ustawa z dnia 27 lipca 2002 r. – Prawo dewizowe*) (foreign exchange)

Act on Settlement Finality in Payment and Securities Settlement Systems and on the Rules on Oversight of these Systems dated 24 August 2001, implementing Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems

Consumer credit

Act of 12 May 2011 on consumer credit (*Ustawa z dnia 12 maja 2011 r. o kredycie konsumenckim*) (consumer credit)

Mortgages and mortgage credit

Act of 6 July 1982 on Land and Mortgage Registers and on Mortgage (*Ustawa z dnia 6 lipca 1982 r. o księgach wieczystych i hipotece*) (land and mortgage registers and mortgage)

Act of 23 March 2017 on Mortgage Credit and Supervision of Mortgage Credit Brokers and Agents (*Ustawa z dnia 23 marca 2017 r. o kredycie hipotecznym oraz o nadzorze nad pośrednikami kredytu hipotecznego i agentami*) (mortgage credit) (NB The act enters into force on 22 July 2017.)

Corporations

Act of 15 September 2000 – Code of Commercial Companies (*Ustawa z dnia 15 sierpnia 2000 r. – Kodeks spółek handlowych*) (company law)

Funds and platforms

Act of 27 May 2004 on Investment Funds and Alternative Investment Funds Management (*Ustawa z dnia 27 maja 2004 r. o funduszach inwestycyjnych i zarządzaniu alternatywnymi funduszami inwestycyjnymi*) (general investment funds law)

Other key market legislation

Act of 10 June 2016 on Bank Guarantee Fund, Guaranteed Deposit Scheme and Mandatory Restructuring (*Ustawa z dnia 10 czerwca 2016 r. o Bankowym Funduszu Gwarancyjnym, systemie gwarantowania depozytów i przymusowej restrukturyzacji*) (guaranteed deposit scheme)

Bank Recovery and Resolution Directive (2014/59/EU) (recovery and resolution)

Capital Requirements Regulation (Regulation (EU) 575/2013) (capital requirements)

European Market Infrastructure Regulation (Regulation (EU) 648/2012) (derivatives)

Market Abuse Regulation (Regulation (EU) 596/2014) (market abuse)

REGULATION (EU) 2019/452 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (the screening of investments from non-EU countries (foreign direct investment) that may affect security or public order).

Last modified 6 Dec 2019

Regulatory authorization

Who are the regulators?

The Polish Financial Supervision Authority (*Komisja Nadzoru Finansowego*) supervises financial markets, including banking, capital markets, insurance market, pension market, financial conglomerates, electronic money institutions, payment institutions and payment service bureaus, as well as cooperative savings and credit unions.

The Polish Financial Supervision Authority carries out the licensing, regulatory, control and disciplinary function. The PFSA issues licenses for banks, cooperative banks, domestic payment institutions, insurance and reinsurance undertakings, open pension funds, investment funds or investment companies. The PFSA may impose financial penalties provided for by the law and withdraw license held by a financial institution. It may also issue individual recommendations for a specific entity or recommendations or guidelines aimed to affect the entire financial market sector. The PFSA analyses reports submitted by financial institutions on running basis and assesses whether they satisfy legally defined capital requirements. The scope of competence of the PFSA also includes carrying out control procedures in supervised entities.

Last modified 6 Dec 2019

What are the authorization requirements and process?

In relation to performing banking activities, the PFSA has to be informed by the competent supervisory authorities of a home Member State about the types of operations to be performed by a credit institution.

Brokerage activities may be commenced by a foreign investment firm in Poland after the PFSA has been notified by the competent supervisory authority that has granted the investment firm license to perform brokerage activities, of the planned commencement of such activities.

EU payment institution or EMI (electronic money institutions) may commence cross-border activities in Poland after the PFSA has been informed by the competent supervisory authorities of a home Member State about a name, a registered seat, an address and types of payment services to be performed by such institution.

A firm must apply to the Polish Financial Supervision Authority for the relevant type of regulatory authorization.

The application fee depends on the type of application and ranges from PLN600 (approx. €140) to PLN13,000 (approx. €3,000). The application fee for the authorization of banking activity is equal to 1% of the share capital of the bank.

Authorized firms and individuals are listed in registers maintained by the Polish Financial Supervision Authority (eg register of investment firms or register of foreign investment funds).

Last modified 6 Dec 2019

What are the main ongoing compliance requirements?

Threshold conditions (such as having adequate financial resources and compliance arrangements in place) are an ongoing compliance requirement for authorized firms.

Failure to comply with the threshold conditions and more detailed regulatory rules can result in sanctions being imposed on firms and regulated individuals, as well as the loss of regulated status.

Last modified 6 Dec 2019

What are the penalties for failure to be authorized?

In principle, a person who performs a regulated activity without being authorized, or without having an exemption from the duty to be authorized, commits a criminal offence and may be fined or imprisoned.

Last modified 6 Dec 2019

Regulated activities

What finance and investment activities require authorization?

Generally

A person must not carry on a regulated activity in Poland unless authorized or exempt from the duty of authorization (known as the general prohibition).

Regulated finance and investment activities include:

- banking;
- insurance;
- payment services;
- securities brokerage and trading;
- investment funds; and
- pension funds.

Consumer credit

Consumer credit activities are subject to certain statutory requirements in Poland. Loan companies which are not banks or credit institutions are not required to be authorized in order to grant consumer credits. However, it is a prerequisite for such loan companies and for loan intermediaries to obtain an entry in the register of loan institutions or, respectively, the register of loan intermediaries maintained by the Polish Financial Supervision Authority.

According to the Act of 12 May 2011 on Consumer Credit, a consumer loan is a loan granted to a consumer which is not exceeding PLN255,550 (approx. €59,000).

Last modified 6 Dec 2019

Are there any possible exemptions?

There are two types of exclusions permitting the performance of regulated activities without authorization:

General exclusions

Certain persons may carry on a regulated activity without being authorized, for instance EU-based payment institutions do not require authorization to conduct business activity within the scope of authorization granted by their domestic regulator.

Specific exclusions

For each type of regulated activity there are a number of specific exemptions that could also apply, for instance banks may conduct certain securities trading activities without securities trader license.

Last modified 6 Dec 2019

Do any exchange controls or other restrictions on payments apply?

Foreign exchange regulations are included in the [Act of 27 July 2002 – Foreign Exchange Law](#) and secondary legislations issued on the basis thereof.

There are certain restrictions on payments that apply in the case of non-Bilateral Investment Treaties (non-BIT) countries or countries that do not have agreements on partnership and cooperation, association agreements or other similar agreements, which would oblige Poland to enable the free flow of capital.

In addition:

- Importing or exporting domestic or foreign currency must be declared in writing to customs officials if the value of the currency exceeds the equivalent of €10,000 (this restriction does not apply in the Schengen area). Customs officials can also demand the presentation of imported or exported currency regardless of its value.
- International money transfers and domestic settlements relating to foreign exchange dealings shall be made with the intermediation of authorized banks or payment institutions or electronic money institutions authorized to provide payment services. In the case of making settlements within the country, they may also use payment services bureaus if the amount of transfer or settlement exceeds the equivalent of €15,000. This obligation does not apply to cases in which a party to the settlement is an authorized bank, a domestic payment institution, a branch of a EU payment institution, a domestic electronic money institution, or a branch of an EU electronic money institution.

Compliance with EU rules on payments (EU Payments Regulation and the Transfer of Funds Regulations) must be ensured.

Anti-money laundering and tax considerations may also need to be taken into account.

Last modified 6 Dec 2019

What are the rules around financial promotions?

A financial promotion is a communication of an invitation or inducement to engage in investment activity made by a person in the course of business. Only authorized persons are allowed to offer investment products and advise on engagement in investment activities.

It is a criminal offence for an unauthorized person to communicate a financial promotion.

Exemptions

Exemptions include intra-group financial promotions or free-of-charge financial advice given in the ordinary course of business.

Last modified 6 Dec 2019

Entity establishment

What types of legal entity are generally used to undertake financial or investment activity?

Generally

The most common types of legal entities are limited companies and limited partnerships.

Limited companies take the form of limited liability companies and joint-stock companies, both of which are corporate bodies with separate legal personality.

Joint-stock companies can be either private or public, depending on whether their shares are offered to the public.

Limited partnerships are similar to limited companies in many ways, with the main difference being that they are formed by partners whose relationship is governed by a private agreement rather than having shareholders and directors.

Funds

Investment funds are legal persons which may take the form of open-ended investment funds, special open-ended investment funds, or closed-ended investment funds. Alternative investment companies (*Alternatywna Spółka Inwestycyjna*) may take the form of limited companies or limited partnerships, provided that the sole general partner is a limited company.

Fund managers (*Towarzystwa Funduszy Inwestycyjnych*) take the form of joint-stock companies.

Last modified 6 Dec 2019

Is it possible to conduct lending or investment business through a branch or establishment?

Yes.

A foreign company can conduct lending or investment business in Poland through a branch office (*oddzia*), but this does not create a separate legal entity.

The branch office's scope of activity must be exactly the same as that of the foreign company's.

Opening a branch office through which a regulated activity will be carried out requires regulatory authorization, as in the case of a branch office of a bank. A credit institution with its registered office in the EU is exempted from this requirement and may start operating through a branch office or on cross-border basis following a notification to the Polish Financial Supervision Authority.

Another possibility for a financial institution to conduct business in Poland involves setting up a representative office (*przedstawicielstwo*). As with a branch office, a representative office is not a separate legal entity. However, the only activities that may be carried out by a representative office are the promotion and marketing of a foreign company.

Last modified 6 Dec 2019

FinTech

FinTech products and uses

What are the most common technology products and FinTech applications used or being developed in the finance and investment marketplace?

Peer-to-peer funding platforms and marketplace lending

There is no strict definition for marketplace lending given the wide variety of entrants and financing techniques involved. The principal characteristics of new marketplace lenders, however, would include:

- operating from or through a non-bank lending platform established as a specialist corporate or special purpose vehicle (SPV) based structure;
- applying technology to leverage and optimize the lending platform and user experience; and
- connecting borrowers and lenders through the platform rather than applying funding arising from a wider deposit-based relationship.

Marketplace lending is available to address most forms of traditional bank funding products. Recently products have included:

- consumer loans;
- student lending products; and
- small and medium-sized enterprises (SME) lending.

HOW ARE MARKETPLACE LENDING PLATFORMS FUNDING THEMSELVES?

Marketplace lending includes peer-to-peer (P2P) type structures often operated through an electronic platform provider as well as crowdfunding and also direct to retail financing mechanisms. The increase in demand for credit through these marketplace platforms has also been appealing to larger pools of available capital, such as private equity and venture capital funds as well as institutional sponsors. Funding platforms will now often be backed by institutional finance in addition to, or rather than, individual investors on a traditional P2P basis.

Blockchain, smart contracts and cryptocurrencies

WHAT IS BLOCKCHAIN?

Blockchain provides a new approach to holding and authenticating data. It is a database operating through distributed ledger technology in which data is recorded on computers, by way of a P2P mechanism, based on pre-agreed consensus algorithms in the applicable participating network. It is a form of database where data is stored in the chain in either fixed structures called 'blocks' or algorithm functions called 'hashes'.

Each block includes unique features such as its unique block reference number, the time the block was created and a link back to the previous block. Each block is reviewed by a number of nodes and the block is only added to the database if the node reaches consensus that the block only contains valid transactions. Content includes digital assets and instructions which reflect the transactions and parties to those transactions. The ability to track previous blocks in the chain makes it possible to identify transactions back to the first ever transaction completed, enabling parties to verify and establish the authenticity of the assets in the latest block. This makes blockchain exceptionally accurate and secure.

Specialist users on the system apply advanced computing software to identify time stamped blocks, verify the accuracy of the blocks using sophisticated algorithms and add the verified blocks to the chain. As the number of participants increases, the replication of the data over a wider base makes it harder for any person to alter the data in the chain. Any attempted addition or modification to the information on a block needs to be approved by all users in the network and verification of any block can only happen through a 'proof of work' process. This process requires vast amounts of computing power, making it practically impossible to insert fake transactions into a block.

As a result, the data is identified and authenticated in near real-time, providing a permanent and incorruptible database sufficiently robust to operate as a store of value (eg in the case of cryptocurrencies such as bitcoin) or providing an indisputable record for example relating to securities transfer.

Blockchain is a decentralized system, created and maintained by users of the network rather than being dependent on any central or third party intermediary. It may be public and open ('permissionless' or 'unpermissioned') or structured within a private group ('permissioned').

Permissionless blockchains include bitcoin and ethereum, in which anyone can set up a node that, once authorized can validate, observe and submit transactions. The identities of the participants are not known (other than the unique and random identities known as an 'address'). Permissioned ledgers restrict participation in the network and only the specific participants are given access and are known within the network. The network is private, and only organizations that have been authorized can participate and view transactions.

In Poland, a Polish accelerator of blockchain technology is working on the potential use of blockchain to support sectors such as:

- public administration (controlling the circulation of documents, digital identity and traceability of public assets);
- the health service; and
- the oil and gas sector.

WHAT ARE SMART CONTRACTS AND DECENTRALIZED AUTONOMOUS ORGANIZATIONS (DAOS)?

Developments in blockchain are also providing an ability to transfer and rely on instructions verified within the electronic system in the form of so called 'smart contracts'. These contracts have been converted into code and are then executed and enforced by the blockchain network on the occurrence of an event. This reduces the need for intermediaries to collect, store and act on communicated information.

Smart contracts are essentially pre-written computer codes which are stored and replicated on distributed ledger platforms such as blockchain. Execution takes place over the network, eliminating the need for intermediary parties to confirm the transaction, leading to self-executing contractual provisions. These contracts can be as simple as moving a balance from one account to another or advanced, more-complex interactions with the outside world using so called 'Oracles'. With Oracles the contract code consults with a service outside

of the blockchain network to make a decision. This may entail receiving a confirmation that an event has occurred, such as payment, which automatically executes a further step in the contract, such as the transfer of an asset, which might be in digital form or by delivering instructions to a person or warehouse to release the asset for delivery.

Smart contracts have not been formally classified as a manner of executing an agreement and therefore they are not regulated under Polish law. However, a declaration of will which constitutes an agreement may be expressed by any behavior which manifests the intent of a party to the agreement in a sufficient manner, including a disclosure of such intent by electronic means. Accordingly, agreements executed based on smart contracts technology are allowed, as long as they clearly demonstrate the intent of the parties.

It should be noted that certain types of agreements need to be entered into in a specific form (for instance in a written form or in a form of a notarial deed). In such a case, application of smart contracts technology will not be possible.

DAOs are essentially online, digital entities that operate through the implementation of pre-coded rules. These entities often need minimal to zero input into their operation and they are used to execute smart contracts, recording activity on the blockchain. DAOs can be particularly challenging to regulate, depending on their software engine, the nature of transactions they are completing or other unique features. Questions of ownership and responsibility for resulting acts of DAOs can also be brought to question if any technical issues arise with their operation.

WHAT IS A CRYPTOCURRENCY?

The European Central Bank definition of a cryptocurrency is that it is a digital representation of value that is neither issued by a central bank or public authority nor necessarily attached to a fiat currency, but is issued by natural or legal persons as a means of exchange and can be transferred, shared or traded economically. The oldest and best-known cryptocurrency is bitcoin (itself based on the bitcoin platform) although many other cryptocurrencies now exist. For example, the most widely-known alternatives to bitcoin include ether based on the ethereum platform and litecoin (these cryptocurrencies are now actively traded with a large developing infrastructure for holding, pricing and exchanging currency). A Polish cryptocurrency – polcoin (PLC) – was created in 2004.

Initial coin offerings and token-based products

WHAT IS AN INITIAL COIN OFFERING (ICO)?

ICOs are a form of digital currency or token using blockchain technology. ICOs are often a means by which funds are raised for a new blockchain or cryptocurrency venture (the market for ICOs is currently booming). ICOs come in a wide variety of forms and may be used for a wide range of purposes. Some forms of ICOs may be directed at customers or suppliers as a form of loyalty program or a form of access or purchasing power (preferential or otherwise) in respect of assets of the issuer's business. Other forms may be more focused on raising initial funding. It is essential to examine the legal and regulatory basis for any ICO, as an unauthorized offering of securities is illegal and may result in criminal sanctions in a number of jurisdictions. Legal analysis of the underlying token will determine if it should be treated as a specified investment or form of regulated security or is more appropriately a form of asset that is not itself subject to the regulatory regime.

Typical attributes provided by tokens will include:

- access to the assets or features of a particular project;
- the ability to earn rewards for various forms of participation on the platform; and
- prospective return on the investment.

Key aspects to consider will include the:

- availability and limitations on the total amount of the tokens;
- decision-making process in relation to the rules or ability to change the rules of the scheme;
- nature of the project to which the tokens relate;
- technical milestones applicable to the project;
- basis and security of underlying technology;
- amount of coin or token that is reserved or available to the issuer and its sponsors and the basis of existing rights;

- quality and experience of management; and
- compliance with law and all regulatory requirements.

The nature of the business and the purpose and structure of the token offering will typically be set out in a white paper available to potential purchasers.

Artificial intelligence and robo advisory systems

Automated financial advice tools, also known as 'robo advisors' are software tools driven by artificial intelligence (AI) that provide a variety of investment advice services from portfolio selection to personal finance planning. The systems are generally operated on a platform /personal dashboard basis; a user can input a set of personalized data to be processed by the AI algorithms which produce optimized outcomes around specified parameters. Although generally of application in the asset management sector, AI and automated advice tools also impact in the banking and private wealth advisor sectors; the implications include decreased human involvement, although recent trends have included a growth in popularity of hybrid structures which combine AI and human inputs.

Data analysis and cloud computing

Cloud computing enables delivery of IT services through internet-based tools and applications, rather than direct connection to a physical server. Cloud-based storage makes it possible to save masses of data to remote servers, accessible through the internet rather than by way of a physical connection. With the vast data processing and storage capabilities offered by cloud computing technology and virtually no infrastructure barriers to entry, there are a number of applications in building and running FinTech businesses and the technology has had a significant impact in recent years.

The cloud computing market is developing rapidly in Poland.

Last modified 6 Dec 2019

Are there any restrictions, specific laws, regulations or procedures that apply to FinTech products?

General financial regulatory regime

Due to the variety of products and legal constructions used in the FinTech industry, there is no one legal act in Polish law that comprehensively regulates this area. Depending on the specific product, the main pieces of legislation that need to be taken into consideration are:

- the Payment Services Act, which constitutes the legal framework for all types of payment services, including the issuance of payment instruments, e-money, and payment transactions;
- the Civil Code, which constitutes the main source of regulations referring to contracts in general, but also to certain specific agreements (eg loan agreements) – it also covers consumer law issues;
- the Consumer Credit Act, relevant for credit facilities and loans granted to consumers;
- the Consumer Rights Act, relevant if services are provided to consumers remotely;
- the Act on Anti-Money Laundering and Combatting the Financing of Terrorism; and
- the Foreign Currencies Act, which should be taken into account where currency conversion is involved in a given service.

Other pieces of legislation that may be of importance to providers of FinTech products include the Act on Personal Data Protection, the Act on the Provision of Services Online and the Act on Trade in Financial Instruments.

Furthermore, as FinTech products may be offered by regulated entities, certain legislation regarding the provision of services by such entities should also be taken into consideration, eg the Banking Law, the Act on Insurance and Reinsurance Activity, and the Act on Investment Funds and Alternative Investment Funds Management.

The recommendations of the Polish Financial Supervision Authority (*Komisja Nadzoru Finansowego*) constitute an important soft law complement to Polish legal regulations and in many cases will be applicable to the providers of FinTech products.

Electronic payments platforms and regulation of peer-to-peer lenders

ELECTRONIC PAYMENT PLATFORMS

The main piece of legislation that regulates electronic payment platforms is the Payment Services Act. The act lays down rules governing the provision of payment services, including the acquisition of payments carried out over the Internet using electronic payment platforms. The scope of the act encompasses:

- the conditions for the provision of payment services, in particular regarding the transparency of contractual provisions and information obligations with respect to the payment services;
- the rights and obligations of the parties resulting from the contracts on performance of payment services as well as the liability of providers of payment services;
- the principles governing the operation of payment institutions; and
- the basis of operation of the market of domestic payment transactions via payment cards and payment schemes.

PEER-TO-PEER LENDERS

Despite the fact that peer-to-peer lending systems exist in Poland, no specific legal regulations covering this type of business have been implemented. Accordingly, provisions of the Civil Code relating to loan agreement and contracts in general will be applicable to these types of services.

Regulation of payment services

The Payment Services Act is also the main piece of legislation regulating the provision of payment services. As noted above the provisions of the act include:

- the conditions for the provision of payment services, in particular regarding the transparency of contractual provisions and information obligations with respect to the payment services;
- the rights and obligations of the parties resulting from the contracts on performance of payment services as well as the liability of providers of payment services;
- the principles governing the operation of payment institutions; and
- the basis of operation of the market of domestic payment transactions via payment cards and payment schemes.

It should also be mentioned that a draft amendment to the Payment Services Act is currently in the legislative process. It is aimed at implementing Directive (EU) 2015/2366 (the Second Payment Services Directive). The purpose of the Second Payment Services Directive is to create uniform legal provisions in European Union member states concerning:

- reinforcement of consumer rights in the payment services area;
- reinforcement of the supervisory role of the European Banking Authority;
- promotion of the newest mobile and internet payment services; and
- enhancement of the security of payment services.

In addition, the role of Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions should also be mentioned. Together with the Second Payment Services Directive, it includes provisions that limit fees in relation to consumer credit and debit cards and it also forbids retailers from imposing extra charges for the use of cards.

Application of data protection and consumer laws

The REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC

(General Data Protection Regulation) and Act on the Protection of Personal Data of 10 May 2018 is the generally applicable act in Poland, which has to be observed by FinTech businesses. It regulates the principles of data processing, the security of personal data, the registration of data files, and the transfer of personal data to a third country.

The Consumer Rights Act of 30 May 2014 regulates the obligations of the trader when contracting with the consumer, the procedure for the consumer to exercise his/her consumer rights, and the rules for concluding remote contracts with consumers (e-commerce).

The Consumer Credit Act of 12 May 2011 includes regulations and procedures for concluding consumer loan agreements, the lender's and credit intermediary's obligations in relation to pre-contractual information and the obligations of the consumer, lender and credit intermediary in connection with the executed consumer loan agreement as well as the sanctions for the failure to meet the lender's obligations.

The Polish Civil Code includes general principles for executing agreements with consumers, which are also applicable to FinTech businesses.

Money laundering regulations

The money laundering regulations which are applicable to FinTech businesses are included in the Act on Anti-Money Laundering and Counter Terrorism Financing; it lays down principles and procedures for counteracting money laundering and the financing of terrorism. It provides for the application of specific restrictive measures against natural and legal persons, as well as the obligations of entities involved in financial transactions connected to the collection and transmission of information related to such transactions.

Last modified 6 Dec 2019

What type of funding arrangements and incentives are available to FinTech businesses?

Early stage

The FinTech industry is developing very well in Poland; however, some, barriers still remain. Polish law does not include specific provisions which would facilitate provision of FinTech services or development of FinTech businesses at the early stage of their operation. Moreover, there remain certain difficulties in obtaining financing of FinTech startups.

SEED INVESTMENT

Seed investment is mostly used in the establishment of and early investments in a business. The vast majority of Polish FinTech startups indicate that the main source of funding at the early stage of their business activity comes from their founders' budget.

So-called business angels are an increasingly popular solution to finance FinTech startups. A business angel is a person who has his/her own capital and who wants to use it to finance new companies and new ideas. In exchange for their capital, business angels receive a minority stake in the company. In Poland there are a number of associations of business angels, including Lewiatan Business Angels or the Network of the Business Angels, 'Amber'. Many FinTech startups cooperate with these associations.

CROWDFUNDING

Crowdfunding is a type of social financing and is one of the most popular solutions to finance startups in Poland. There are many crowdfunding platforms which provide an opportunity to present new projects and raise funds, including beesfund.com, odpalprojekt.pl, findfunds.pl.

ACCELERATORS

In Poland there are many incubators or accelerators that offer financial support for startups. The most popular is the 'Start in Poland' program, financed by European Union funds, which offers PLN 3 billion for initial investments in startups. The program is under the auspices of the Polish Ministry of Development.

Venture capital and debt

The financing of FinTech startups by venture capital funds, being investment funds that acquire private equity stakes in such startups using the money of investors (mainly Polish banks) is one of the most important sources of financing for FinTech startups in Poland. It should be noted however that it is targeted primarily at early-stage FinTech businesses.

Warehouse and platform funding

At this time there are no public examples of Polish FinTech companies using warehouse or platform funding as a source of financing for the purpose of developing their business.

Senior bank debt and capital markets funding

SENIOR BANK DEBT FUNDING

As a general rule, senior bank debt is available to FinTech businesses. In practice however, at the early stage of their activity, obtaining senior debt funding may prove to be difficult. It stems from the high risk encumbering FinTech startups as well as lack of property which might secure the repayment of credit facility or loan.

CAPITAL MARKETS FUNDING

Raising funds through the capital markets, in particular listing shares on the Warsaw Stock Exchange, is available to FinTech businesses. In practice, only companies that are well established in the Polish market (such as eCard S.A.) have been able to raise capital via this method of funding.

Incentives and reliefs

The FinTech market in Poland is developing rapidly, but at the same time the legal and financial regulations are not supportive of new developments. Moreover, the government is not providing sufficient support for startups, which is needed due to the risk-averse approach of investors and entrepreneurs. There are no special incentives or reliefs directed solely at FinTech startups.

However, in 2017 the so-called Small Act on Innovation came into force. The act introduces a new tax relief for startups connected with the research and development sector.

Last modified 6 Dec 2019

Portfolio sales

Loan transfers and portfolio sales

What are common ways of buying and selling loans?

Buying and selling loans is very common in Poland.

A loan can be sold on an individual basis or packaged up with other loans and sold as a portfolio pursuant to overarching terms.

The most common ways of selling loans are as follows:

- **assignment** – the transfer of rights only, not obligations (subject to any contractual or statutory restrictions, assignment can be done without the consent of the debtor); and
- **sub-participation** – the transfer of the economic interest in a loan without changing the legal relationship between the existing parties (sub-participation involves the buyer taking on a double credit risk, both on the seller as well as the borrower).

The form and content of the transfer documentation will depend on the nature of the loan assets being sold.

Last modified 6 Dec 2019

What are the main considerations when transferring a loan and related security?

There are a number of issues to consider before transferring a loan or portfolio of loans. These issues are often covered as part of a due diligence exercise by the seller's legal advisors. Some of the key considerations include:

- **confidentiality** – whether the seller of the loan is allowed to disclose information relating to the loan to a potential purchaser;
- **data protection** – whether there is any personal data or other restricted information in the loan that should not be disclosed to a potential purchaser;
- **lender eligibility** – whether there are any restrictions concerning the type of entity to which the loan can be transferred;
- **undrawn commitments** – whether there are any continuing obligations for further funding or other material obligations on the part of the lender that may fall upon the transferee or reduce claims made by the transferee;
- **transfer mechanics** – whether there are any steps that need to be taken to transfer the loan in accordance with its terms; and
- **consent** – whether a transfer requires the consent of or notification to any other parties.

Last modified 6 Dec 2019

Projects

Financing / investing in energy / infrastructure

To what extent are energy and infrastructure assets publicly or privately owned?

Generally

Most of the energy and infrastructure assets are publicly owned by local government bodies, government bodies, or state-owned companies.

Key sectors are considered below.

Energy

The gas and electricity industries in Poland are generally run by state-owned companies. Most of the generation, distribution and supply services are provided by six main companies, the biggest five of which are publicly listed but controlled by the State Treasury. All transmission assets are state-owned and cannot be purchased by private investors.

The oil industry is mainly run by two publicly listed companies that are controlled by the State Treasury. In the field of selling oil to consumers there are many private companies, including international groups.

The Energy Regulatory Office is the principal body with responsibility for regulating the energy sector in Poland.

Other infrastructure

TELECOMS

Telecommunications networks in Poland are privately owned by a number of companies, including service providers.

Postal services are mainly run by the state-owned company *Poczta Polska*, but there are also private companies operating in this sector.

The Office of Electronic Communications is the regulator of the Polish post and telecommunications sectors.

RAIL

Typically, light rail assets (such as trams and associated track) are owned by local public transport authorities. Certain elements of light rail projects may be outsourced to the private sector. Heavy rail infrastructure in Poland is mostly owned by the state-owned *Polskie Koleje Państwowe* (PKP) Group. The exceptions are the railway electrification grid and railway sidings, which are owned by private entities.

The rail sector is regulated by the Office of Rail Transport.

ROADS

Roads, bridges and tunnels are owned by the state or by local authorities. The public sector may outsource the construction, operation and maintenance of some assets to the private sector.

Some motorways are privately owned and their functioning is heavily regulated.

AVIATION

The main aviation infrastructure in Poland is mostly indirectly owned by the state or by local authorities. Services connected with the functioning of airports are partly provided by private entities. Air carriers are both state-owned and private. All aviation activities are heavily regulated. The Civil Aviation Authority is the aviation regulator in Poland.

PORTS

The main port infrastructure is mostly indirectly owned by the state or by local authorities. Additional infrastructure such as warehouses is also owned by private entities.

HOSPITALS

Most hospital infrastructure is owned by public bodies. Some hospitals are private and their activities are heavily regulated.

EDUCATION

Most schools are owned by local authorities, but there are also private schools. Higher education in Poland is generally provided by the state but there are many private entities.

WAREHOUSES

Warehouses are mostly owned by private entities and operate on a commercial basis.

DEFENSE

Typically, defense assets are owned by the Polish Armed Forces. Some manufacturers of defense-related products are state-owned and some are private.

WASTE

The waste sector (waste services and waste infrastructure) is indirectly owned by local authorities and by private companies.

WATER

Rivers are treated as public property, not as commercial goods, and are maintained by the state and local authorities. Water services (including sewerage), depending on the town, are provided by private sector companies or local authorities.

Last modified 6 Dec 2019

Are there special rules for investing in energy and infrastructure?

Generally

There is a specific regime governing and restricting investment in energy or infrastructure projects in Poland. In some cases, the relevant minister can block the buying or selling of some class of assets or companies on the grounds of an overriding public interest such as public security. Some companies that own infrastructure assets are also obligated to perform some activities connected with public security, such as preparing emergency plans.

Energy and infrastructure investments may be subject to legislative or regulatory control, such as merger control rules.

As regards the planning and implementation of the underlying energy or infrastructure project (in which an investment is to be made), the legal or regulatory position relevant to the project must be considered. For example, a project involving development on land will require planning permission or a development consent order. Additionally, a project may require environmental authorizations, permits and/or sector-specific regulatory consent decisions or licenses. Environmental impact assessments may also be required.

Energy

The energy market in Poland has a complex and heavily regulated system of arrangements between suppliers, generators, transmitters and distributors. In particular, there are complex arrangements in respect of licencing, subsidies, and demand/charging mechanisms with suppliers, customers and the grid operator. These are subject to change and regular updates, which means that investors need to have a good understanding of the current framework and the potential directions in which the market may move. Investors need to understand how changes in technology may impact the overarching regulatory framework and *vice versa*.

Investors should also consider whether the acquisition of any interests in the energy sector (at an entity or asset level) would cause any issues with any license conditions or the granting of specific subsidies. In particular, if a breach of those conditions could lead to the revocation of a license that might make the potential target less attractive or viable. In Poland, unbundling and Third Party Access (TPA) principles are in force.

There are public policy mechanisms (adopted through legislation) which are used to incentivize investment in distribution and generation, especially in renewable energy sources.

Other infrastructure

There are specific sectoral provisions concerning other infrastructure. The relevant provisions depend on the specific project.

Telecommunications and transport infrastructure are especially heavily regulated, mostly by sectoral acts like the Telecommunications Law and the Rail Transport Act. For example, there is a complex regulatory environment in the telecommunications sector including issues such as access and interconnectors. The industry is largely in private hands, therefore investors should consider if any permits, consent decisions or licenses will be affected by their interest. The rail sector also has an extensive and complex regulatory framework with respect to practical and operational issues. Key areas include certification for train use and fare regulation. Depending on how an investor wishes to invest in a project (specifically, what type of entity or asset), there is a varying degree of difficulty in entering into an existing project.

Last modified 6 Dec 2019

What is the applicable procurement process?

Public procurement in Poland is, for the time being, in most instances governed by the Public Procurement Law Act, which is based on EU Directives.

The key principles are that contracts procured by the public sector must be awarded fairly, transparently and without discrimination on the grounds of nationality, and that all potential bidders must be treated equally.

Investing in energy and infrastructure

Public procurement is relevant where the Polish government, or a branch thereof, is seeking to outsource the delivery of a new project. On an infrastructure project, a potential investor would have to bid on its own or as part of a consortium to deliver the overall deal which could include design, build, operation, maintenance, and financing of the relevant energy or infrastructure asset. The relevant procurement legislation applies to certain public bodies, including central government departments, local authorities, the police and fire authorities, and the National Health Fund. A regulated procurement is required where certain financial thresholds are met. On most

major infrastructure projects (where limited exclusions do not apply), it is likely that those thresholds will be met, therefore a regulated procurement would be necessary.

In most cases, the public sector will need to publish a contract notice in the [Office Journal of the European Union](#) (OJEU) and typically run one of the following procedures:

- **Open procedure** – This is suitable for easy-to-evaluate projects and bidders simply submit an offer in response to the OJEU notice. Changes to the tender and negotiations are not permitted.
- **Restricted procedure** – There is a shortlisting of at least five bidders following an expression of interest stage and then the bidders submit their offers. Again, no negotiation is permitted (other than to clarify and finalize the contract terms).
- **Competitive dialogue** – This is the most common procedure for complex infrastructure projects and involves a shortlisting of at least three bidders who are invited to enter dialogue with the public sector contracting party to develop detailed solutions which are acceptable for the public sector. Clarifications and further negotiations are allowed following the final tender, but only to confirm the financial and other commitments in a bidder's offer.
- **Competitive procedure with negotiation** – This is sometimes described as a hybrid procedure because it allows dialogue with bidders but also allows the public sector contracting party to award a contract on the basis of an initial tender (or further stages), but clarifications and negotiations are not allowed after the final tender.

However, an investor may choose to seek to invest in a project (by acquiring an interest in a private sector partner) that has already been procured and is already operational. Typically, such investments are controlled by contractual mechanisms (particularly on publicly procured projects) within the original awarded contract rather than by procurement regulations themselves.

Depending on the structure of the deal, any acquisition of an interest or variation to the existing project may have procurement-related considerations that need to be borne in mind.

Financing energy and infrastructure

On a publicly procured contract, the public sector contracting party may have prescribed requirements concerning the funding arrangements. Following entry into the contract, the main tool for controlling the financing is that, typically, on project finance deals, a refinancing of the senior debt will require the consent of the public sector contracting party.

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What are the most common forms of funding / investing in energy and infrastructure?

The principal forms of private sector funding/investment in energy and infrastructure in Poland (including in relation to public-private partnerships) are as follows.

Funding

Common forms of funding in energy and infrastructure include:

- loans made on a corporate finance basis (balance sheet debt);
- loans made on a project-finance basis (to a special purpose project company) on medium- to long-term bases – such loans may later be syndicated to other funders;
- bond finance;
- mezzanine debt (in some sectors);
- refinancing of the debt in operational projects; and
- asset financing (this is particularly relevant in the rail sector).

Funding/funding products can also, sometimes, be provided by the European Investment Bank and export credit agencies.

Investing

Common forms of investing in energy and infrastructure include:

- 'equity' investment in special purpose vehicles or entities that may have a portfolio of interests, ie share capital and subordinated sponsor loans; and
- secondary market investment in operational projects (acquisition of 'equity').

Last modified 6 Dec 2019

Restructuring

Enforcement and sanctions

When can there be regulatory investigations?

When the Polish Financial Supervision Authority considers that an authorized firm or regulated individual may have breached compliance requirements, it will launch a formal investigation. This may result in regulatory sanctions.

Last modified 6 Dec 2019

What regulatory penalties may apply?

The Polish Financial Supervision Authority may, among others, impose a financial penalty or withdraw the regulated status of the firm and /or regulated individuals. The regulator will publicize these penalties.

Last modified 6 Dec 2019

What criminal penalties may apply?

Following a formal investigation, the regulators have the power to impose administrative and criminal sanctions for the following unlawful acts:

- insider dealing and misleading statements and practices;
- breaches of the Money Laundering Regulations; and
- conducting regulated activities when not authorized.

Last modified 6 Dec 2019

Tax

Tax issues

Are stamp, registration, transfer or other similar taxes applicable?

Are there stamp, registration, transfer or other similar taxes payable on the advance, transfer or assignment of a loan?

GRANT (ADVANCE) OF A LOAN

Yes, loan agreements (and amendments to such agreements, if they result in an increase of the principal) may be subject to the tax on civil law transactions (TCLT) at 0.5%. As a rule, loans granted by financial institutions and entities whose business activities are to provide finance are not subject to TCLT (as they are exempt from value added tax in relation to such transactions).

A loan agreement is subject to TCTL, if:

- the rights arising out of the loan agreement are exercised in the territory of Poland (where the loan is granted by a company not resident in Poland this condition is not fulfilled); or
- the rights arising out of the loan agreement are exercised outside of the territory of Poland but the borrower has its place of residence or registered office in Poland, and the loan agreement was executed in Poland.

Loans granted by a shareholder to a company (limited liability company or joint-stock company) are exempt from TCTL.

The TCTL obligation arises when the loan agreement is executed. Generally, the tax base is the amount or value of the loan (principal). If the principal is to be paid in tranches and the total amount of tranches is not known (eg because the agreement does not specify the total principal amount), the tax is due in relation to a given tranche once it is paid out. The borrower is obliged to calculate and pay TCTL within 14 days from executing the loan or receiving the tranche of the loan.

TRANSFER (ASSIGNMENT) OF A LOAN

A transfer (assignment) of a loan may be subject to TCTL; where this is the case, the tax rate is 1%. The acquirer of the debt is liable to pay the TCTL.

There is no TCTL in the case of the subrogation of loans.

TCTL does not apply to the assignment of a loan agreement if at least one of the parties is subject to or exempt from value added tax in relation to the assignment.

Are there stamp, registration, transfer or other similar taxes payable on the taking, transfer or assignment of a mortgage, debenture or other security?

There are court fees involved in the registration of registered pledges and mortgages in the relevant registers. Stamp duty is payable if the application to register a security is filed by an attorney-in-fact. Additional court fees are payable if any amendments to the registered pledges or mortgages are registered. In each case, the fees are not significant.

Notarial fees are involved when any security interest is executed in a form of notarial deed (eg mortgage) or with signatures certified by the notary (eg civil pledge over shares in a limited liability company) or with date certified by the notary (eg security assignment or security transfer of assets). In any case, the notarial fees are capped at PLN 10,000 (approx. €2,350).

The establishment of a mortgage is subject to TCTL. The tax rate is 0.1% of the amount of the secured debt if it is possible to determine the amount of such debt or PLN 19 (approximately €5), if the debt is of an amount which is not capable of being determined.

The TCTL obligation arises upon submission of a declaration on the establishment of a mortgage or conclusion of an agreement for the establishment of a mortgage. The tax base is the value of debt secured. The person submitting a declaration of intent concerning the establishment of a mortgage is liable to pay the TCTL.

Are there stamp, registration, transfer or other similar taxes payable on the issue, transfer or assignment of a debt security (eg a bond)?

Generally, this depends on the type of debt securities and entities involved.

As a rule, a sale agreement relating to shares and stocks in a Polish company is subject to TCTL, as these stocks and shares are considered as rights exercised in the territory of Poland.

Sales of bonds will be subject to TCTL if they constitute rights exercised in Poland or if the acquirer is resident in Poland and the transaction is concluded in Poland. Usually, it is accepted that bonds are exercised where the creditor (ie the seller) is resident, but bond documentation should be analyzed in this respect on a case-by-case basis.

The TCTL is calculated as 1% of the market value of the shares/stocks/bonds. The tax is to be paid by the acquirer.

The following sales are exempt from TCTL:

- sales to investment companies and foreign investment companies;

- sales via investment companies or foreign investment companies (eg brokerage houses);
- sales as part of an organized trading; and
- sales outside organized trading by investment companies and foreign investment companies, if those rights were acquired by those companies under organized trading.

No stamp, registration, transfer or other similar taxes payable are payable on the issue of bonds.

Last modified 6 Dec 2019

Do tax authorities take priority on enforcement?

On the enforcement of security, do tax authorities take priority over secured lenders or secured debt security holders (eg secured bond holders)?

There is no general rule of priority entitling the tax authorities to take priority over secured lenders or secured debt security holders during enforcement proceedings. Any priority is determined on the basis of general rules provided by law. For example, in the case of a compulsory mortgage established in favor of the State Treasury and a mortgage securing the rights of secured bond holders, it is the relative position of the mortgages which determines which mortgage is executed in the first place and therefore takes priority. If the mortgage securing the bonds was determined as the mortgage with first position, then this mortgage will be treated as executed before the compulsory mortgage of the State Treasury and will take priority.

Notwithstanding the above, in the case of bankruptcy of a debtor, the law distinguishes certain categories of liabilities that should be paid by the bankrupt entity in a given order. In this respect, liabilities owed to tax authorities may be privileged – that is they are paid just after liabilities owed to employees and before liabilities owed to other unsecured creditors.

Last modified 6 Dec 2019

Is withholding tax on interest payments applicable?

Is there withholding tax on interest payments under a loan?

In principle interest paid under a loan to an entity which is not resident in Poland is subject to withholding tax.

Payments of interest to entities resident in Poland (but not individuals) are not subject to withholding tax.

If so:

What is the rate of withholding?

The general withholding tax rate on interest paid to entities which are not resident in Poland is 20%.

What are the key exemptions?

Interest payments to entities not resident in Poland may be exempt from withholding tax under the EU Interest and Royalties Directive as implemented under Polish law, provided that certain conditions are met. The withholding tax rate may be also reduced or eliminated based on relevant double tax treaty (DTT) concluded between Poland and the recipient's country of residence under certain conditions. Under most DTTs the withholding tax rate is limited to 10% or 5%. Some DTTs provide for a 0% withholding tax rate. Moreover, a number of DTTs provide for exemption applicable to interest payable to banks.

However, the Polish withholding tax (WHT) regime has been substantially amended with the 2019 corporate income tax reform. Under the new rules, WHT becomes obligatory for certain cross-border payments (including interest). Even when a lower rate or an exemption is available, for example under a bilateral tax treaty entered into by Poland, the WHT has to be withheld in full by the withholding agent based on Polish domestic law and remitted to the relevant tax authority. The tax authority may provide a refund after it has verified the right of the non-resident taxpayer to benefit from a reduced rate or an exemption. There are also alternative procedures which may allow to mitigate WHT (a description of these procedures can be found here).

In principle, the changes affect cross-border payments exceeding PLN2 million annually paid to a non-resident taxpayer.

Would the same analysis apply to interest payments under a debt security (eg a bond)?

Yes, the comments outlined above are applicable to interest payments under a debt security (like bond). However, with respect to new obligatory WHT, such WHT regime is excluded in case of receivables received by non-residents due to interest or discount on bonds issued by the State Treasury/BGK and offered on foreign markets

Last modified 6 Dec 2019

Are foreign lenders and debt security holders subject to tax on interest payments?

Will the lender be taxed on interest payments under a loan in the jurisdiction of the borrower (other than by way of the application of withholding taxes (if any)), assuming the lender is not otherwise resident in that jurisdiction for tax purposes (eg by virtue of incorporation, residence or local branch)?

No.

Would the same analysis apply to interest payments under a debt security (eg a bond)?

Yes.

Last modified 6 Dec 2019

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