Analyses and Studies
Analizy i Studia

CASP
Centre for Analyses and Studies of Taxation
Centrum Analiz i Studiów Podatkowych

No 1 (1) | 20 April 2016 p. 1–21 ISSN 2451-0475

Bank levy in Poland – Advantages and Disadvantages

Habilitated Doctor Dominik J. Gajewski
The Institute of Law at the Warsaw School of Economics (SGH),
Head of the Centre of for Analyses and Studies of Taxation
of the Warsaw School of Economics (SGH).
e-mail: dominik.gajewski@sgh.waw.pl

The article analyses bank levy both from the economic as well as legal perspective. Due to the fact that this tax solution has been applicable from 1 February 2016, its origin and previous projects are also presented, which illustrates the development of taxation of the banking sector in Poland that has been happening over the past dozen or more years.

The bank levy is applicable in many European Union Member States and thus this paper contains a comprehensive comparative analysis of relevant solutions adopted in various states, which allows to see the similarities and differences between them.

The paper is also concerned with the consequences that the bank levy has brought about in Poland. Analysis of its flaws makes it possible to propose changes as well, which would make the provisions of the law more precise.

The bank levy applicable in Poland has also undergone analysis through the prism of tax avoidance. Mechanisms that might encourage tax avoidance, which might certainly impair the effectiveness of this tax, have been delineated.

Keywords: bank tax, tax avoidance

I. Introduction

Bank tax or bank levy was introduced with the act of 15 January 2016 on tax on certain financial institutions[1] and entered into force in Poland on 1 February 2016. Its introduction stirred up a lot of emotions due to the fact that it is a levy that has so far not been applicable in Poland and, moreover, it is imposed on financial institutions (i.e., banks and insurance companies) that have awaken interest particularly in times of heated discussions about a reform of the tax system and securing budgetary revenues.

Bank levy is a solution that has been the subject-matter of conceptual works for more than ten recent years. Analysis of earlier projects will allow to evaluate how the concept of bank tax has evolved. It is also quite significant to compare solutions that were proposed in previous projects with the solutions that have actually been introduced.

[1] Journal of Laws of 2016, item. 68.

And so, the bank tax is not a new concept and although it had been widely believed that this tax regulation should be introduced, it did not happen until 2016. Based on comparative analysis taking into consideration other Member States of the European Union, it is worth noting that we are one of the last countries to introduce this tax. Comprehensive comparison of the structures of the bank tax in individual Member States of the European Union (especially the bank tax that was introduced in Poland) will allow us to notice how profound differences there are between them.

A substantial part of this elaboration is analysis of the bank tax in terms of its structure. It allows to indicate the flaws of the structure that may considerably lower the effectiveness of this tax. On the other hand, elaboration on these flaws may contribute to making claims advocating legislative changes that may turn out necessary.

An important element of this paper is review of regulations of the bank tax through the prism of the possibilities of avoiding it. It is particularly important owing to the fact that the phenomenon of international tax avoidance is also observable in the case of bank levy applicable in the Member States of the European Union. Thus, is it quite significant to present the structures adopted in Poland for the purpose of avoiding paying the bank levy.

An undeniable advantage of the bank tax is the fact that it has been introduced. However, the structure of this tax as well as its low resistance to being avoided by financial institutions may raise numerous doubts and concerns.

II. The Origin of the Bank Levy in Poland

The act of 15 January 2016 on tax on certain financial institutions[2] is the fourth attempt (and the second successful one) to impose taxation on the Polish financial sector (and chiefly the banking sector). There have been two (unsuccessful) relevant parliamentary initiatives of 2010 (authored by the Law and Justice – PiS) and of 2011 (authored by the Democratic Left Alliance – SLD) as well as the (successful) governmental initiative of 2013.

1. Draft Act of the Law and Justice of 2010 (Publication of the Sejm No. 3838)

In accordance with the draft act on tax on certain financial institutions, taxation of assets was intended to apply to[3]: domestic banks, branches of foreign banks, branches of credit institutions, domestic insurance companies, domestic reinsurance undertakings, branches of foreign insurance companies and reinsurance undertakings, the main branches of foreign insurance companies and reinsurance undertakings, and investment funds.

Imposition of taxation of investment funds was, in principle, supposed to be supplementary in character. Taxation of the assets held by banks and insurance companies without taxation of investment funds would lead to banks and insurance companies shifting assets to investment funds and consequently avoiding taxation. It should be highlighted that investment funds, which are legal persons in line with Article 6, section 1, point 20 of the corporate income tax act[4], are exempt from income tax.

Collection of tax was to take place based on the principle of self-estimation by the taxpayers. The deadline for tax prepayments was set to be the 20th day of a calendar month. Following approval of a financial statement for a financial year, taxpayers would be obliged to file tax returns and pay the potential difference between the tax arising from the annual financial statement and the prepayments made throughout the financial

[2] Journal of Laws of 2016, item. 68.

[3] Explanatory statement to the draft act on tax on certain financial institutions (publication of the Sejm No. 3838), 2010.

[4] Act of 15 February 1992 on corporate income tax (Journal of Laws of 1992, No. 21, item 86, i.e., Journal of Laws of 2014, No. 851 as amended).

year. In case of overpayment, it would be used to cover future tax prepayments or reimbursed.

The draft act also contained regulation securing against possible lack of approval of a financial statement till the end of the 6th month after the end of a financial year. In such a case, the tax would be calculated based on a financial statement drawn up by a management body, which the taxpayer would be obliged to deliver to the tax office.

The draft act stipulates exemption from tax of assets worth no more than PLN 10 million. The exemption was proposed in order to protect small banks and insurance companies that had a positive influence on the competition on the market and that might experience financial troubles, if the tax was imposed on them.

It was also proposed to introduce changes in the act of 15 February 1992 on corporate income tax in order to prevent deductions of the said tax from the tax base in corporate income tax.

If the rate was set to be 0.39%, the estimated yearly revenue from the tax would amount to:

1) PLN 4,100 million from bank assets;
2) PLN 538 million from the assets of insurance companies;
3) PLN 405 million from the assets of investment funds;

– that is, PLN 5,043 million in total. Revenue arising from the tax would be state revenue.

2. Draft Act of the Democratic Left Alliance of 2011 (Publication of the Sejm No. 4250)

The draft act on tax on certain financial institutions proposed taxation of assets of some financial institutions between 01 January 2012 and 31 December 2015 with tax on financial institutions[5].

The taxpayers of this tax were supposed to be: domestic banks, branches of foreign banks, branches of credit institutions, domestic insurance companies, domestic reinsurance undertakings, branches of foreign insurance companies and reinsurance undertakings, the main branches of foreign insurance companies and reinsurance undertakings, and investment funds.

The tax rate was to be 0.25% of the tax base. The tax base would be:

1) in the case of banks, domestic insurance companies, domestic reinsurance undertakings, and investment funds: the total assets indicated in the taxpayer's annual financial statement approved in line with Article 53, section 1 of the act of 29 September 1994 on accounting;
2) in the case of branches of credit institutions and branches of foreign banks: the total assets indicated in the taxpayer's approved annual financial statement;
3) in the case of branches and main branches of foreign insurance companies and reinsurance undertakings: the total assets indicated in the taxpayer's approved annual financial statement;

If the taxpayer's annual financial statement was not approved within six months following the end of the taxpayer's financial year, the tax base would be the total assets indicated in the annual financial statement that was compiled.

The taxpayers would be obliged to file a tax return within 30 days from the day the financial statement was approved; and if the financial statement were not approved, the taxpayers would have 30 days to file the tax return starting from the last day on which the financial statement should have been approved in accordance with the provisions of the law.

Th draft act stipulated payment of tax prepayments to the tax office until the 20th day of each calendar month, which amount to 1/12 of the tax calculated based on the last approved annual financial statement (tax return). The obligation to pay in the tax prepayment for the subsequent settlement period would commence on the next month following the month in which the tax return is filed.

Taxation with this tax would not combine with other sources. The tax would not be deductible

[5] Explanatory statement to the draft act on tax on certain financial institutions (publication of the Sejm No. 4250), 2011.

and could not be used to lower the tax base in corporate income tax or personal income tax.

The draft act proposed exemption from tax for banks (and no other financial institution) that would use all their profits to increase own funds.

Introduction of the tax could not serve as basis for changes in the terms and conditions of financial and insurance services rendered on the basis of civil and legal agreements in connection with the act of law coming into force or worsen the terms and conditions of contracts with clients.

The act was to be introduced on 1 January 2012 and the estimated budgetary revenue was expected to amount to about PLN 2 billion a year; the tax was intended to be a source of financing of the operations of the Demographic Reserve Fund.

3. Amendment of the Act on the Bank Guarantee Fund of 2013

The act of 26 July 2013 amending the act on the Bank Guarantee Fund and some other acts[6] introduced a prudence fee intended to increase own fund established in the Bank Guarantee Fund, that is, the stabilisation fund. The above-mentioned amendment reflected the trend that legislation in some Member States of the European Union have followed over the recent years. During the post crisis period, the essence of such activity was shifting the burden of financial support provided to financial institutions from the public sector to the entities operating on the financial market[7].

In accordance with Article 7 of the act of 26 July 2013 amending the act on the Bank Guarantee Fund and some other acts, entities participating in the mandatory deposit guarantee scheme, that is, domestic banks, were obliged to pay the first prudence fee in 2013.

Currently, the prudence fee is calculated based on the total amount of exposures to risk defined in the regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012 and in line with the rules defined on the basis of the provisions of this regulation and the Banking Law Act. Pursuant to the Commission Implementing Regulation (EU) No. 680/2014 of 16 April 2014 laying down implementing technical standards with regard to supervisory reporting of institutions according to Regulation (EU) No. 575/2013 of the European Parliament and of the Council, the total amount of exposures to risk is provided in COREP in template C 02.00 – Own Funds Requirements (CA2), in row 010 (cell reference: CNXX006)[8].

In accordance with resolution No. 16/2016 of the Council of the Bank Guarantee Fund of 23 March 2016 regarding the amount of the prudence fee for the first quarter of 2016 to be paid into the Bank Guarantee Fund by entities participating in the mandatory deposit guarantee scheme, the Council of the Bank Guarantee Fund set the prudence fee for 2016 to be 0.079%[9].

The amendment of the act on the Bank Guarantee Fund also introduced amendment to Article 16, section 1 of the act of 15 February 1992 on corporate income tax, which made payments of the prudence fee not deductible.

III. Comments and Reservations Concerning the Construction of the Bank Tax

1. Article 3 of the Act on Tax on Certain Financial Institutions

As far as estimation of the tax base is concerned, it should be indicated that taxation imposed – with the act of 15 January 2016 on tax on certain financial institutions – on assets of financial in-

[6] Journal of Laws of 2013, item. 1012.

[7] Explanatory statement to the draft act amending the act on the Bank Guarantee Fund and some other acts (publication of the Sejm No. 1045), 2013.

[8] www.bfg.pl, 2016.

[9] The act of 11 March 2016 amending the act on the Bank Guarantee Fund and the act on the functioning of cooperative banks, their associations, and associating banks (Journal of Laws of 2016, item 381) introduced quarterly payments for the Bank Guarantee Fund, including prudence fees.

stitutions is, de facto, tax on the scale of their business. This approach is not related to the level of risk taken by a given institution and a tax base established in such an extensive manner may potentially negatively influence the conditions of running a business by institutions, including the amount of new loans offered. In contrast to the regulations adopted in the majority of the Member States that implemented taxation of the financial sector, the tax that was introduced is neither related to particular risks involved in the financial system nor the earlier support provided to the financial sector. For instance, the prudence fee for the stabilisation fund is calculated based on the total amount of exposures to risk defined in the regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012 ("Regulation No. 575/2013 of 26 June 2013") and in line with the rules defined on the basis of the provisions of this regulation and the Banking Law Act of 29 August 1997, which undoubtedly arises from a bank's activity and risk appetite. Taxation based on the principles provided for in the act of 15 January 2016 on tax on certain financial institutions may cause – owing to the desire to avoid taxation – a shift in the activity undertaken in the sector towards transactions that do not influence the balance sheet total of financial institutions[10].

In the Polish legislation, apart from tax on certain financial institutions, assets as basis for calculation of fees arising from public law have only been used once, that is, in payments for supervision costs. In line with Article 131a of the Banking Law Act of 29 August 1997, banks are obliged to make payments for banking supervision, amounting to the product of the total bank's balance assets and the rate that is no more than 0.024%. The Prime Minister issues a regulation setting the deadlines for making payments, the amount of the payment, and the manner of calculation of payments as well as the manner of covering the costs of banking supervision and participation in costs with the payments, taking into consideration that the effectiveness of the supervision must be ensured.

Adoption of such a tax base means that at least part of the resources of financial institutions will be taxed twice with completely different income taxes. Since it should be noted that some assets are covered by the tax on real estate. In consequence, introduction of tax on certain financial institutions gave rise to a situation where the scopes ratione personae and ratione materiae of the act and the existing act on local taxes and charges will overlap at least partially[11].

2. Article 4, Section 2 of the Act on Tax on Certain Financial Institutions

Branch offices of domestic banks conduct activity on the territories of various Member States of the European Union. In order to support expansion of domestic banks, a possible exemption of the assets of such branches from taxation should be considered, especially in countries where such assets are subject to taxation with bank tax based on the legislation of the receiving states.

3. Article 4, Section 2 of the Act on Tax on Certain Financial Institutions

As far as taxation of assets of branch offices of credit institutions is concerned, there might be objections that there is risk of double taxation of credit institutions that make payments due to such taxation in the Member States of the European Union.

[10] H. Dzwonkowski, *Opinia prawna w sprawie projektu ustawy o opodatkowaniu niektórych instytucji finansowych (druk sejmowy nr 4250)* [*Legal Opinion on the Draft Act on Tax on Certain Financial Institutions (Publication of the Sejm No. 4250)*], Warsaw, 12 January 2016 and *Opinia Europejskiego Banku Centralnego z dnia 12 stycznia 2016 r. o podatku od niektórych instytucji finansowych* [*Opinion of the European Central Bank of 12 January 2016 on Tax on Certain Financial Institutions*] (CON/2016/1).

[11] H. Dzwonkowski, *Opinia prawna...*

4. Article 5, Section 1 of the Act on Tax on Certain Financial Institutions

In line with Article 13, section 1 of the act of 29 September 1994 on accounting, books of account contain collections of book entries, turnovers (sums of entries), and balances, which form:

1) a journal;
2) a nominal ledger;
3) subsidiary ledgers;
4) a trial balance: turnovers and balances on general accounts and balances on subsidiary ledger accounts;
5) a list of assets and liabilities (inventory).

Asset value arising from a trial balance on the last day of each month is not a datum confirmed by the statutory auditor.

The moment the tax base is established should also be taken note of; it is the last day of the month. The right example seems to be a different approach to establishing the base for the calculation of statutory reserves maintained by financial institutions at the National Bank of Poland; the rules concerning the moment it is established and the scope ratione materiae for its estimation were set out in the act of 29 August 1997 on the National Bank of Poland and resolution No. 40/2015 of the Management Board of the National Bank of Poland of 13 August 2015 laying down the rules and mode of calculation and maintenance of statutory reserves. In accordance with Article 38 of the act of 29 August 1997 on the National Bank of Poland, the statutory reserves of banks are part of the monetary funds expressed in the Polish currency and foreign currencies collected on bank accounts, funds obtained from issuance of debt securities, and other funds accepted by a bank, which are refundable, except for funds:

1) accepted from another domestic bank, cooperative savings and credit union, and Krajowa Spółdzielcza Kasa Oszczędnościowo-Kredytowa (the National Cooperative Savings and Credit Union);
2) accepted from a foreign bank based on contracts concluded before the day the act entered into force;
3) obtained from abroad at least two years ago;
4) obtained on the basis of agreements on holding individual retirement accounts and agreements on holding individual pension insurance accounts pursuant to the provisions on individual retirement accounts and individual pension insurance accounts;
5) derived from disposal of mortgage-backed securities with a redemption period of over five years and disposal of covered bonds with a redemption period of over five years.

In accordance with paragraph 2 of resolution No. 40/2015 of 13 August 2015 of the Management Board of the National Bank of Poland, the basis for calculation of statutory reserves for a given month is the arithmetic mean of carrying balances of cash at the end of each month. Considering the above, it should be concluded that the solution for calculating the base of statutory reserves allows to minimize or even eliminate manipulations of the carrying balances of cash, which serve as basis for the calculations.

One should also take note of the threshold amount which is exempt from tax on certain financial institutions. The threshold of PLN 4 billion for banks and PLN 2 billion for insurance companies seems to be very high considering the circumstances prevalent on the Polish financial market, especially considering the threshold of PLN 10 million proposed in the draft act on tax on certain financial institutions authored by the Law and Justice. It should also be pointed out as an example that in Article 39a of the act of 29 August 1997 on the National Bank of Poland, banks, cooperative savings and credit unions, and the National Cooperative Savings and Credit Union lower the amount of the estimated statutory reserves by EUR 500,000 calculated at the mid-market exchange rate published by the National Bank of Poland on the last day of the month when the statutory reserves are estimated and if such a rate is not published on that day – at the last rate published prior to that day.

5. Article 5, Section 4 of the Act on Tax on Certain Financial Institutions

Doubts also arise as to the wording of Article 5, sections 4 and 6 of the act of 15 January 2016 on tax on certain financial institutions, which stipulates that only banks, branches of credit institutions, branches of foreign banks, and cooperative savings and credit unions can lower the tax base by their own funds. Such a solution does not provide for the lowering of tax base by own funds by insurers (which are entities defined in Article 4, points 5-7 of the act of 15 January 2016 on tax on certain financial institutions). The solution does not seem appropriate from the point of view of equal treatment of entities.

6. Article 5, Section 9 of the Act on Tax on Certain Financial Institutions

Certain doubts as to ensuring free movement of capital and adherence to the principles of honest competition may be raised by possible statutory provisions regarding the possibility of deducting exclusively domestic treasury debt securities from the tax base. Taking into consideration the stipulations of Article 7, paragraph 3 of the Framework Agreement of 01 December 1997 between the Republic of Poland and the European Investment Bank regarding the activity of the EBI in Poland, which was ratified on 24 July 1999, and Article 91, sections 1 and 2 of the Constitution of the Republic of Poland – through an interpretation that securities issued by the European Central Bank are treated equally to treasury debt securities, the Minister of Finance took a stance that bonds of the European Investment Bank also serve as basis for deductions[12]. Based on the principle of free movement of capital and non-discrimination, perhaps a solution should also be introduced allowing deduction from tax base of the debt securities of the European Central Bank and the governments or central banks of the Member States of the European Union and the Organisation for Economic Co-operation and Development, except for countries that are restructuring or have restructured their external debt within the last five years.

It also seems legitimate to expand such an exemption on the bonds issued by Bank Gospodarstwa Krajowego[13]. In line with Article 3, section 3b of the act of 14 March 2003 on Bank Gospodarstwa Krajowego, the above-mentioned obligations of the Minister of Finance meet the requirements of state credit protection pursuant to Articles 213-215 of the regulation of 26 June 2013 No. 575/2013. Therefore, it should be noted that the obligations of the Minister of Finance are treated as equal to the guarantees or re-guarantees of State Treasury granted for any exposures of Bank Gospodarstwa Krajowego (including ones arising from issuance of bonds by Bank Gospodarstwa Krajowego). In consequence of recognition of the protection (i.e., guarantees or re-guarantees of State Treasury), Article 3, section 3b of the act of 14 March 2003 on Bank Gospodarstwa Krajowego contains a clear indication that any exposure to Bank Gospodarstwa Krajowego is assigned a risk weight in accordance with the principles stipulated in Article 114, section 4 of the regulation of 26 June 2013 No. 575/2013. Pursuant to the above norm stipulated in this regulation, zero risk weight is assigned to exposures to the central governments and central banks of EU Member States, which are denominated and financed in the national currency of the central government or the central bank. Hence, considering the above-mentioned domestic and EU regulations, any exposure of Bank Gospodarstwa Krajowego denominated and financed in PLN should also be assigned an analogous risk weight.

Perhaps tax base should also be lowered by the value of assets held as covered bonds or at least

[12] Letter of 17 March 2016 of the Minister of Finance to the Vice-President of the European Investment Bank No. DZI.913.48.2016.

[13] Letter of 30 December 2015 of the Chief Executive Officer of Bank Gospodarstwa Krajowego to the Chair of the Senate Committee on Budget and Public Finance, No. DP.064.7.SS.2015.

public covered bonds. In accordance with the act of 29 August 1997 on covered bonds and mortgage banks, mortgage bonds are registered or bearer securities issued based on the receivables of a mortgage bank and backed with mortgages, which oblige a mortgage bank to pay out certain funds to the entitled party. Whereas the public covered bonds are registered or bearer securities issued based on the receivables of a mortgage bank from loans, including the interest due, in part backed by the guarantee or warranty of the National Bank of Poland, the European Central Bank, the governments or central banks of the Member States of the European Union and the Organisation for Economic Co-operation and Development, except for countries that are restructuring or have restructured their external debt within the last five years and the guarantee or warranty of the State Treasury; loans granted to the above-mentioned entities; loans, including the interest due, in part backed with the guarantee or warranty of the units of the local government; and loans granted to the units of the local government. One should also take into account the fact that long-term covered bonds are excluded from the base of "taxation" with the statutory reserves.

7. Article 7 of the Act on Tax on Certain Financial Institutions

There is no construction involving payment of tax each month in the Polish tax law, apart from the tax on certain financial institutions under discussion. It seems more appropriate for the new tax to be settled yearly on the basis of an audited financial statement with monthly prepayments for tax. In the Parliamentary projects on the introduction of tax on financial institutions proposed between 2010 and 2011, the tax was to be settled on a yearly basis with monthly prepayments for tax. The total assets indicated in the unapproved annual financial statement may be different than the total assets indicated in the financial statement approved later. Ultimately, the tax base should be the one indicated in the approved annual financial statement as there is risk that the tax base could be understated, if the approved financial statement stating a higher amount of assets would be of no significance. In accordance with the parliamentary projects of 2010-2011, collection of tax was based on the principle of self-estimation by taxpayers. First, prepayments for tax would be collected as estimated based on the previous annual financial statement and next following approval of the financial statement for the given financial year, taxpayers would be obliged to file a tax return.

8. Articles 10 and 11 of the Act on Tax on Certain Financial Institutions

In accordance with Article 10 of the act of 15 January 2016 on tax on certain financial institutions, any state bank within the meaning of the Banking Law Act of 29 August 1997 is exempt from tax; and Article 11 of this act introduces exemption of entities in liquidation or insolvent and suspended entities as well as ones participating in a recovery programme.

The solutions provided for in Articles 10 and 11 of the act of 15 January 2016 on tax on certain financial institutions may give rise to state aid within the meaning of Article 107, section 1 of the Treaty on the Functioning of the European Union stating that, subject to other stipulations of Treaties, any aid of any kind provided by a Member State or with state funds, which disturbs or might disturb competition by favouring some enterprises or production of some goods is non-compliant with the internal market to the extent in which it influences trade among the Member States. Therefore, support granted to an entity will be considered state aid, if the following prerequisites occur simultaneously:

1) it is granted by the state or from state-owned sources;
2) it causes an enterprise to obtain an economic benefit that it would not obtain under normal market conditions;

3) it is selective in character (as certain enterpriser(s) or production of certain goods are privileged);
4) disturbs or may disturb competition and influences trade among the Member States of the European Union.

In accordance with Article 12 of the act of 30 April 2004 on procedural issues concerning state aid, projects of aid programmes, including ones involving the provision of aid within the framework of group exemptions and individual aid as well as individual aid for restructuring, must be opinionated by the Office of Competition and Consumer Protection. In particular, the said opinion should contain:

1) a stance whether the project stipulates granting state aid;
2) a stance regarding compatibility of state aid with the common market;
3) proposals for changes presented for the purpose of ensuring compatibility of the project with the common market;
4) a stance regarding the obligation for project notification.

By way of issuing a regulation, the Council of Ministers defines the detailed scope of information about the project of an aid programme or a draft act serving as basis for granting individual aid, especially draft decision or agreement as well as information necessary to issue an opinion concerning, in particular, the addressees of the planned aid, its purpose, form, amount, period of availability, and elements that a restructuring plan should contain, taking into consideration the requirements set out by the law of the European Union as regards notification.

Pursuant to Article 16a of the act of 30 April 2004 on procedural issues concerning state aid, if a draft act that is an aid programme devised by an entity other than a public administration body, the competent body (i.e., the Speaker of the Sejm – based on the Rules of Procedure of the Sejm) applies to the Head of the Office of Competition and Consumer Protection for:

1) an opinion of the Office of Competition and Consumer Protection;
2) submission of the project to the Commission for the purpose of its notification;
3) cancellation of project notification before the Commission reaches a decision;
4) making an appeal on behalf of the Republic of Poland against the decision of the Commission to the Court of Justice and the Court of First Instance for cases regarding state aid.

The draft act that is an aid programme is attached to the application for the above-mentioned opinion as well as information necessary to issue the opinion. Proceedings concerning the draft act should be suspended (but the first reading and consideration by Sejm committees could be possible) until notification of the programme by the Commission.

Currently, in the Polish banking sector, Bank Gospodarstwa Krajowego is the only bank operating as a state bank. In line with Article 4 of the act of 14 March 2003 on Bank Gospodarstwa Krajowego, the fundamental objective of the Bank is to support the economic policy of the Council of Ministers, the socio-economic government programmes as well as local authority and regional development programmes.

The above-mentioned statutory determination of the basic objectives of the activity of Bank Gospodarstwa Krajowego, especially supporting the economic policy of the Council of Ministers, may not stand in opposition to the currently applicable provisions of the law, including the solutions aimed at ensuring honest competition or countering monopolistic practices.

As far as Bank Gospodarstwa Krajowego is concerned, the Minister of Finance may pursue a fiscal goal or exercise financial engineering in terms of the budgetary policy with other mechanisms, that is[14]:

1) providing Bank Gospodarstwa Krajowego with funds in the form of cash or treasury securities for maintenance of own funds at the level guaranteeing performance of

[14] Letter of 15 December 2015 of the Chief Executive Officer of Bank Gospodarstwa Krajowego to the Chair of the Public Finance Committee of the Sejm, No. DP.064.6.SS.2015.

the tasks of Bank Gospodarstwa Krajowego as well as an appropriate level of liquidity, which means that liabilities of Bank Gospodarstwa Krajowego are guaranteed/re-guaranteed by the State Treasury.

2) lowing the statutory fund of Bank Gospodarstwa Krajowego by way of contributing funds to the state budget, providing free of charge treasury securities held by Bank Gospodarstwa Krajowego to the State Treasury, and providing free of charge shares that were handed over to Bank Gospodarstwa Krajowego earlier for the purpose of increasing the statutory fund to the State Treasury or another state-owned legal person;
3) transferring net profit of Bank Gospodarstwa Krajowego to the state budget (following annual settlement or as advance payments); currently, the act of 14 March 2003 on Bank Gospodarstwa Krajowego stipulates that the net profit of Bank Gospodarstwa Krajowego may only be used to increase own funds of Bank Gospodarstwa Krajowego, as contribution to the state budget or for other aims defined by the Supervisory Board.

Considering the above, exemption of Bank Gospodarstwa Krajowego from tax should be deemed justified. It is appropriate to indicate, however, that pursuant to Article 14 of the Banking Law Act of 29 August 1997, a state bank may be established by the Council of Ministers by way of regulation based on an application of the Minister of State Treasury, which was opinionated by the Polish Financial Supervision Authority. Regulation of the Council of Ministers concerning the establishment of a state bank defines the name, registered office, scope and sphere of activity of the bank, and its statutory funds, including the funds segregated from the funds of the State Treasury, which become the bank's funds. Thus, it should be considered whether it would not be justified to provide only Bank Gospodarstwa Krajowego with such an exemption and not all state banks (that could possibly be established).

IV. Compulsory Bank Restructuring Fund

One of the important draft acts for financial institutions is the draft act on the **Bank Guarantee Fund, the deposit-guarantee scheme, and a system of mandatory restructuring, which will form the Compulsory Bank Restructuring Fund.** Currently, it is being considered by the Sejm of the Republic of Poland and its final version is being processed (Publication No. 215). The draft act is intended to implement to the domestic law the Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (DGSD) and Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No. 1093/2010 and (EU) No. 648/2012, of the European Parliament and of the Council (BRRD).

In accordance with the provisions of the draft act on the Bank Guarantee Fund, the deposit guarantee scheme, and compulsory restructuring, the Compulsory Bank Restructuring Fund would be established in order to ensure the availability of funds for financing the tasks of the Bank Guarantee Fund as regards compulsory restructuring of banks, investment firms, and branches of foreign banks. Financing of the tasks concerned with compulsory restructuring would particularly encompass financing the following[15]:

1) granting loans or guarantees to an entity subject to restructuring, its subsidiaries, bridge institutions, asset management vehicles, and an acquiring entity;
2) purchasing the copyrights of an entity subject to restructuring;

[15] Explanatory statement for the draft act on the Bank Guarantee Fund, deposit-guarantee scheme, and compulsory restructuring (Publication of the Sejm No. 215).

3) establishing a bridge institution and an asset management vehicle and providing them with own funds necessary due to the scale and outcomes of their activity;
4) satisfying complementary claims;
5) excluding liabilities from cancellation or conversion of liabilities;
6) covering the costs of proceedings in accordance with the compulsory restructuring scheme established by the Bank Guarantee Fund and possible losses of the Bank Guarantee Fund arising from the proceedings.

Compulsory restructuring of banks would be financed by these entities from contributions made at least once a year to the compulsory bank restructuring fund. The base for determining the contributions for financing compulsory restructuring would be the value of liabilities lowered by the amount of own funds and guaranteed funds. Moreover, the risk profile of an entity obliged to make a contribution would also be taken into account when establishing the amount to be contributed. The above base for the contribution towards the compulsory restructuring fund is derived directly from the sources of the EU law. In accordance with Article 103, section 2 of BRRD, contribution from each institution is calculated proportionally to the amount of its liabilities (excluding own funds) lowered by the amount of guaranteed deposits in relation to total liabilities (excluding own funds) lowered by the amount of guaranteed deposits of all institutions that have obtained permission to operate on the territory of a given Member State. Article 13 of DGSD also determines the manner of calculation of contributions towards the deposit-guarantee scheme – the basis for calculation of the contributions towards the deposit-guarantee scheme is the amount of guaranteed deposits and degree of risk that a given member is exposed to. Contributions are calculated proportionally to the risk involved in a member's activity, taking into consideration the risk profiles of the different models of business to an appropriate extent. Due to the changed scope of activity of the Bank Guarantee Fund, the draft act also stipulates making changes in the structure of own funds of the Fund. Among others, the supplementary fund and the stabilization fund are being wound up and their funds will be used to increase the compulsory bank restructuring fund.

When the compulsory bank restructuring fund is introduced, it will become another burden for the sector of financial institutions. One should bear in mind though that banks already make prudence payments. The compulsory restructuring fund will replace the stabilization fund that is currently in place.

V. Conclusions

Taking into consideration analysis of the provisions of the law on bank tax and the draft introducing a fee to be made towards the compulsory bank restructuring fund, the following conclusions can be drawn:

1) When harmonizing the fees imposed on the banking system, the EU law assumes that the base for calculating burdens is the liabilities, and it is linked with the risk profile of the business conducted by a given entity. The vast majority of European States also introduce solutions consisting in linking the tax base with the risk profile of the business;
2) Serious doubts arise in connection with using the unaudited monthly data as a base as well as monthly rates of final (and not advance) taxation;
3) High exemption thresholds, the fact that the tax base can only be lowered with state treasury securities as well as exemption ratione materiae of all state banks and entities undergoing a restructuring programme may be seen as solutions that disturb or may disturb competition on the common market;
4) Poland is one of the few Member States of the European Union that has introduced a construction in which the tax base is assets. The overwhelming majority of the states uses liabilities as the tax base.

Table 1. Implementation of BRRD and the burden arising from the bank tax

Country	Has BRRD been implemented	Introduction of the bank tax
Austria	YES	YES
Belgium	PARTIALLY (complete implementation is planned in spring 2016)	YES
Bulgaria	YES	NO
Croatia	YES	NO
Cyprus	YES	YES
The Chech Republic	YES	NO
Denmark	YES	YES
Estonia	YES	NO
Finland	YES	YES
France	YES	YES
Greece	YES	YES
Spain	YES	YES
the Netherlands	YES	YES
Ireland	YES	NO
Lithuania	YES	NO
Luxemburg	YES	NO
Latvia	YES	YES
Malta	YES	NO
Germany	YES	YES
Poland	IMPLEMENTATION IN PREPARATION (there are already regulations regarding the stabilization fund in Poland)	YES
Portugal	YES	YES
Romania	YES	YES
Slovakia	YES	YES
Slovenia	PARTIALLY (complete implementation is planned in spring 2016)	YES
Sweden	YES	YES
Hungary	YES	YES
Great Britain	YES	YES
Italy	YES	YES

Source: *Banking Union – State of play of implementation,* the Council of the European Union, 2016 and own work.

5) Poland is one of the last few states that have not implemented BRRD yet.

It also seems justified to cite the stance of the European Central Bank expressed in the Opinion on the draft act on tax on certain financial institutions. The European Central Bank consistently advocates that introduction of a tax on certain financial institutions should be considered in connection with two goals:

1) ensuring a balanced distribution of costs arising from potential bankruptcy of financial institutions between taxpayers and the financial sector;
2) mitigation of risk created by financial institutions.

The European Central Bank stated that: "*Imposing any ad hoc taxes on banks for general budgetary purposes should be preceded by a thor-*

Table 2. Bank tax in the Member States of the European Union

Country	Year of introduction	Rate	Tax base	Exemptions	Tax deductible cost	Revenues from taxes
Austria	2011	0.09%-0.11% (> EUR 20 billion)	Debt capital	Capital, insured deposits, some other liabilities Tax allowance EUR 1 billion	Yes	Central budget Stabilisation Fund (2012-2017)
Belgium	2012	0.035%	Debt capital	Capital, insured deposits	Yes	Stabilisation Fund
Cyprus	2011	0.15%	Debt capital	Only deposits are taxed	No	Central budget Stabilisation Fund
Denmark	2011	10.3%	Deductibles	Only remuneration fund is taxed	No	Central budget
Finland	2013	0.125%	Risk-weighted assets	Tax base is risk-weighted assets and so some assets are weighed with a < 100% factor	No	Central budget
France	2011	0.539% (gradual reduction to 0.141% in 2019)	Minimum capital requirement	Tax allowance EUR 500 million	Yes	Central budget
Greece	1975	0.6%	Assets	Only loan portfolio is taxed	no date	Central budget
Latvia	2011	0.072%	Debt capital	Capital, guaranteed deposits, mortgage bonds, subordinated liabilities	Yes	Central budget
Spain	2001	0.3%-0.57%	Debt capital	Only deposits are taxed	no date	Budget of autonomous regions
the Netherlands	2012	0.022%-0.044%	Debt capital	Capital, insured deposits Tax allowance EUR 20 billion	No	Central budget
Germany	2011	0.02%-0.06% 0.0003%	Debt capital Derivative instruments	Capital, insured deposits Tax allowance EUR 200 million	No	Stabilisation Fund
Poland	2016	0.0366% monthly	Assets	Capital, treasury securities Tax allowance PLN 4 billion	No	Central budget
Portugal	2011	0.01%-0.085% 0.001%-0.0003%	Debt capital Derivative instruments	Capital, insured deposits Derivatives serving as collateral	No	Central budget

Country	Year of introduction	Rate	Tax base	Exemptions	Tax deductible cost	Revenues from taxes
Romania	2011	0.1%	Debt capital	Total taxation of liabilities lowered by guaranteed liabilities	Yes	Special Compensation Fund
Slovakia	2012	0.2% (0.4% between 2012 and 2014)	Debt capital	Capital, subordinated debt, intragroup long-term liabilities	Yes	Stabilisation Fund (aim: 1.45% of the assets of the sector)
Slovenia	2011	0.01%	Assets	Exclusions based on the dynamics of provision of credit to enterprises	No date	Stabilisation Fund
Sweden	2009	0.036%	Debt capital	Capital, subordinated debt, intragroup debt	Yes	Stabilisation Fund
Hungary	2010	0.53% > HUF 50 billion (0.31% since 2016) 0.15% < HUF 50 billion	Assets	Interbank loans Loans for financial corporations	No	Central budget
Great Britain	2011	0.21% 0.105% for long-term liabilities (since 2015)	Debt capital	Capital, insured deposits Tax allowance GBP 20 billion	No	Central budget
Italy	2010	10% (bonuses)	Increase of CIT (by 0.75 percentage points) and bonuses for the managerial staff	-	No	Central budget and the fund (tax on bonuses)

Sources: Pawłowicz, 2015 [after]: OECD, legislation, regional offices of Deloitte, Internet articles [after:] *Rentowność sektora bankowego w Polsce* [Profitability of the Banking Sector in Poland], the Congress of Retail Banking, November 2015; https://www.kpmg.com/TH/en/IssuesAndInsights/ArticlesPublications/Documents/2012/268729%20Bank%20Levy%20V10%20HR%20AW%2018Jul12.pdf, http://www.pwc.be/en/financial-services-newsalert/2013/bank-levies-proposed-update-june-2013.pdf http://www.bloomberg.com/news/articles/2015-04-21/hungary-to-cut-bank-tax-0-31-of-total-assets-in-2016-varga, http://www.reuters.com/article/2014/11/06/germany-banks-regulator-idUSFWN0SW02Q20141106, http://budapesttimes.hu/2015/02/14/government-to-cut-bank-levy-buy-erste-stake/; https://www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Working_Papers/Series_13/BankLevydata.pdf, Opodatkowanie aktywów *sektora finansowego* [Taxation of the Assets of the Banking Sector], Report of the Sobieski Institute, 2015.

ough analysis of potential negative consequences for the banking sector to ensure that such taxes do not pose risks to financial stability and the provision of credit, which could eventually adversely affect growth in the real economy." What is more: "*The proposed tax's structure may give financial institutions an incentive to change their risk profile by restructuring their portfolios in favour of riskier products, by making use of off-balance sheet activities and/or by transferring their assets abroad*[16]."

VI. Bank Tax and the Phenomenon of Tax Avoidance

1. Bank Tax and the Phenomenon of Tax Shifting

If one takes a look at the practices of financial institutions in the recent months, one may notice the phenomenon of bank tax shifting. Inherently, tax shifting is related to taxpayers' behaviours. A taxpayer protects himself against the tax burden and strives to make it as low as possible. One of the possible solutions in this respect is shifting part of the burden to another entity. Such actions distort the tax policy that is being followed since the configuration of the tax burdens imposed on particular groups of taxpayers changes. From the point of view of state authority, the phenomenon of tax shifting is undesirable[17]. One of the types of this phenomenon is tax shifting forward. It means that the burden of taxation is shifted from the entity subject to taxation to the client by way of increasing the commission (i.e., fees) so as to iron out the tax that has been imposed. Of course, it is not necessarily the whole burden that is shifted but it could be part of the burden. And so not all but part of the tax is shifted to the buyer of the goods.

Observing the common phenomenon of financial institutions increasing commissions and fees imposed on their clients between October 2015 and February 2016, one may most definitely equate it with the phenomenon of shifting bank tax forward[18]. The policy of increasing commissions and fees reached its peak when it became clear what costs banks will need to incur in connection with the introduction of the bank tax. These were frequently actions taken ahead of time – the commissions and fees have already been increasing since October 2015. One should also note that individual institutions follow varied policies of increasing prices.

Contrary to the legislator's intentions, the phenomenon of bank tax shifting has allowed financial institutions to shift the burden of this tax obligation towards their clients. Through such actions financial institutions strive to lower the fiscal burden arising from the bank tax imposed on them and in some cases even to avoid it. Bank tax shifting by financial institutions towards clients is an undesirable phenomenon from the point of view of the state as well as the interests of the clients of banks.

2. "Artificial Shifting of Credit Portfolio among Different Bank Branches"

An important phenomenon that should be seen as a classic symptom of aggressive bank tax avoidance is the practice of financial institutions referred to as "artificial shifting of credit portfolio among different bank branches". The essence of the practice is activity of banks that have branches within their structure or companies with equity links within the group. The tax base of the bank levy in Poland is the assets of financial institutions. The policy of tax optimisation consists in lowering assets for tax purpos-

[16] *Opinion of the European Central Bank…*

[17] H. Dzwonkowski (ed.), *Prawo podatkowe* [*Tax Law*], Warsaw 2010, p. 19.

[18] The full minutes of the meeting of 9 February 2016 of the Public Finance Committee with the members of the boards of financial institutions (i.e., banks) No. 31 http://orka.sejm.gov.pl/zapisy8.nsf/0/F734AF0B6EF4F1E4C1257F6100509035/%24File/0027008.pdf; http://www.bankier.pl/wiadomosc/Te-banki-nie-podniosly-marz-kredytow-mieszkaniowych-7312253.html.

es. Undoubtedly, the credit portfolio of financial institutions has a considerable influence on the level of assets. A possible practice of financial institutions in this respect may be to sign credit agreements between bank's client – and not with the domestic bank as before – and the branch (or related company) of the bank that has a registered office in a state where there is no bank tax, it is lower or it will not be calculated because the tax base is different. Of course, such activity will only be reasonable in dealings with corporate clients and ones that will agree to make such operations with branches in other countries. It also seems that such activity is quite simple in operational terms and it may benefit not only the bank (by allowing it to avoid the bank tax) but also the client who will, e.g., be offered lower commission on the loan in the branch in another country.

And so, activity concerned with "artificial shifting of the credit portfolio among different bank branches" is a manifestation of aggressive tax optimization. This phenomenon also has another aspect. Indubitably, decreasing the costs of obtaining credit will make the clients of banks interested in such an "offer" and they will be seeking credit institutions (banks) that will be able to make such an operation. Those will be banks that have foreign branches or companies with equity links in other countries with more "beneficial" tax burdens. In such a case, banks (financial institutions) that do not have foreign branches will find themselves in a much worse position. That will mostly be the case with domestic financial institutions with lower share capital (shareholder capital). Such a practice may result in harmful competition among financial institutions.

3. Treasury Securities versus Tax Avoidance

In accordance with the provisions of the act on tax on certain financial institutions[19], tax base can be lowered by the value of assets held as treasury securities[20], which will lower the amount of bank tax due (i.e., conversion of taxed assets into untaxed ones). Obviously, such a provision may not stir controversy as long as it is used by banks to carry out their investment policy. Whereas this regulation may give rise to considerable controversy owing to the possibility of using it for aggressive tax avoidance. An interesting case is when a bank decides to purchase treasury securities of appropriate value on the last day of the month, which will lower the tax base for taxation with the bank tax. Then, it will sell the same bonds on the next day and hence relieve the assets that have not been subjected to taxation. It will be very difficult for the fiscal audit bodies to prove that such an operation is a manifestation of illegal tax avoidance. One should bear in mind that the objective of a bank is to deal in money through, among others, purchasing treasury bonds even for a short period of time – such as one day.

Doubtlessly, the sudden increase in demand for purchasing treasury bonds in 2016 should be associated with this phenomenon. Furthermore, for the first time (in five years) domestic banks have purchased more treasury bonds than foreign investors, which was an investment of PLN 35 billion in 2016[21]. In 2016, the Ministry of Finance observed the phenomenon of a rapid increase in the share of treasury securities in banks' portfolios. This is reflected in the data stating that in 2007-2009 banks increased their portfolio by PLN 66.3 billion; in 2013-2015 by PLN 80 billion and between January 2016 and February 2016 (i.e., within 2 months) – by PLN 39 billion[22]. Undeniably, from the point of view of servicing state debt, the increase in demand for treasury securities is a positive phenomenon. One should bear in mind though that this tendency will be very adverse for the state from the point of view of a decreasing level of its revenues.

---

[19] Article 5, Section 9 of the Act on Tax on Certain Financial Institutions.

[20] Within the meaning of Article 95, Section 1 of the act of 27 August 2009 on public finance (Journal of Laws of 2013, item 885, as amended).

[21] Data obtained from the Ministry of Finance.

[22] Data obtained from the Ministry of Finance

Unquestionably, the construction of the bank tax will influence the policy of banks in terms of their long-term strategy. Both treasury securities (which are exempt from taxation) and credits (that are not subject to exemption) are bank assets. Perhaps banks will face a dilemma between investing in safe non-taxed treasury securities or grant credits that, on the one hand, are taxed with the bank levy and, on the other hand, are burdened with economic risk. Regardless of a strategy that a bank will choose, it will affect the cost of granting credits to clients.

4. Recovery Programme

Recovery programmes implemented by banks may also serve to avoid bank tax. In line with the act on tax on certain financial institutions, being subjected to such a programme would completely exempt a bank from the new tax. The banking law states that it is compulsory to devise and implement a recovery programme, if a balance-sheet loss is incurred or even if there is risk that it might be incurred[23].

The construct of a recovery programme may be used in order to avoid bank tax. It is also of significance that numerous largest domestic banks[24] have a possibility to show negative result in the fourth quarter of 2015 or the first quarter of 2016. Taking into consideration the estimated potential of the largest banks as well as the bank tax rate, the level of a bank levy for these banks may be tantamount to an expense of PLN 40 million to over PLN 200 million per year[25].

5. Technique of Tax Base Estimation

A serious weakness of the bank tax, which may influence its collectability is the constructional solutions. One of the most important objections is concerned with the technique of estimation of the tax base. In accordance with the act, tax is to be estimated based on the trial balance. However, rules that would allow to precisely define these matters have been singled out neither for financial institutions (banks) nor insurance companies. One should take note of the fact that in each financial institution there are thousands of accounts with turnovers that should be subjected to estimation of the tax base for the purposes of bank tax. There are no regulations that would define the techniques of estimation.

It is also significant that there is another problematic issue – the technique of estimation of the tax base as far as assets expressed in foreign currencies are concerned. The accounting records are held in Polish. Whereas in accordance with the act, assets (expressed in a foreign currency) should be estimated based on the exchange rate set on the last but one day of the month. So far – for accounting purposes – they had been estimated based on the exchange rate set on the last day of the month. Hence the taxpayer will be obliged to make calculations one more time (i.e., twice a month).

6. Influence of Bank Tax on Bank Deposits

In accordance with the provisions of the act on tax on certain financial institutions, tax base can be lowered by the value of assets held as treasury securities, which in effect lowers the bank tax due. Through this provision of the law, the legislator intended not to discourage banks from possessing state debt. Its profitability is currently so low that it would not only not pay off to purchase it but, on top of that, banks might be getting rid of it, which would lead to commotion on the market. Currently, there are over PLN 171 billion in banks' portfolios[26].

Considering the above, there are two options. The first will result in banks striving to naturally adjust their asset structure through increasing the share of non-taxed treasury bonds in

[23] In 2016, BOŚ Bank announced that it was working on a recovery programme. BPH was also carrying out a recovery programme earlier.

[24] PKO BP, Pekao SA, mBank, BZ WBK, ING, Handlowy.

[25] Data: Dziennik Gazeta Prawna of 28/03/2016.

[26] Data obtained from the Ministry of Finance

this structure. In consequence, taxation with the bank levy will be lower. However, it will be tantamount to a substantial decrease in profitability, especially of short-term bonds. Analysing the market between February and March 2016, one might notice a considerable increase in demand for treasury securities and the highest drop in profitability is observable with respect to 5- and 10-year bonds. One should not associate this with banks' activity though as they see purchasing of this type of securities as too risky. Banks definitely prefer investing in short-term (up to 2-year) bonds; long-term treasury securities are not preferred due to being a too risky investment. The reasons for a decrease in profitability of long-term bonds, which has been observable recently, should be sought after in the improvement of the atmosphere on the global debt market. One should bear in mind that there is still demand for bonds on the German market, and our market is quite strongly correlated with the German one. It is also significant that the Polish debt may be perceived more positively due to the anticipation of a drop in interest rates[27].

If banks decide to adjust the structure of their assets in accordance with the need for lowering taxation, it may cause disturbances on the market. This might manifest itself with a dramatically increased demand and adequately decreased supply. Foreign institutions might be disposing of their bonds, and domestic insurance companies as well (since bonds held by insurers are not exempt from taxation). It could cause a decrease in profitability, but trading might not be a consequence of that.

The second option is that it is likely that on the last day of the month (when the tax base is estimated), the interbank market will come to a halt. Banks will not decide to accept money in a form of short-term deposits, among others, from other banks. Although it is the assets that are taxed and not the liabilities (i.e., deposits); in practice acceptance of any deposit means that money arrives in the bank and they need to be made use of somehow. Even if they are only credited to an account in the National Bank of Poland; they will become a taxable asset. On the other hand, each bank that would decide to make such a deposit in another bank must record it in the balance sheet as an asset[28].

Hence a problem arises – what will be the interest rate for such a short-term deposit (such as overnight). Tax is calculated on a specific day and the rate applies to the whole month. And so, if a deposit is held for one day only, the interest rate imposed on it should be around 13-14 percent in order to take into account the tax.

It is also possible that in hopes of discouraging others from making one-day deposits banks will be offering lowered or even negative interest rates on the turn of the month[29]. In effect, banks' activity will drop to very low levels, which has already been observable in the first months of applicability of the bank tax.

It is a noticeable practice of banks to discourage other institutions from making transactions by offering them very low prices – e.g. the Warsaw Interbank Offer Rate (WIBOR) for overnight transactions dropped to 0.59% from 1.29% the day before. The observable strategy of banks is minimization of losses. The funds that were in the banks were mostly credited to accounts in the National Bank of Poland and to a deposit by the end of the day. In consequence, the balance of funds in the National Bank of Poland increased to PLN 43.3 billion from PLN 22.8 billion on the previous day (on the current account) and to PLN 5.8 billion from PLN 2.3 billion (as deposit by the end of the day)[30].

Not only did rates for deposits on the the last day of the month drop significantly but also rates for deposits accepted on other days were considerably reduced – to 1% since acceptance of deposits in banks is additional liquidity. If they are not used to grant a loan, the easiest way to recover the interest paid to the client is to pur-

[27] M. Chądzyński, *Podatek bankowy. Pierwsze starcie* [*Bank Levy. First Clash*], Dziennik Gazeta Prawna, No. 38 of 25 February 2016.

[28] *Ibid.*

[29] *Ibid.*

[30] Data obtained from the National Bank of Poland.

chase NBP bills. In times when the bank levy had not been applicable yet, profit from the bills was 1.5% per year – that is, theoretically the interest rate on deposits could be offered up to this level. However, currently bills offer just a little more than 1% of real profit – as the tax rate on assets is 0.44% yearly. In consequence, bank levy results in decreased interest rates and banks will be adjusting the prices of the deposits they offer to this level. For in the long run, they will not be able to escape overliquidity. This effect is already visible in short-term rates on deposits accepted on the day of settlement – but this adjustment will extend on other types of deposits over time.

It may thus be expected that rates on deposits for corporate customers and financial institutions will be dropping to the level of 1%. It is noticeable that this process has begun with short-term deposits accepted on the turn of the month, but it extends on the medium- and long-term ones as well.

A solution for banks could be the policy of investing excess funds in treasury bonds. It would be justified owing to the fact that assets in the form of treasury bonds are not subject to taxation with the bank levy. One should bear in mind though that banks have limits on these types of investment and they have probably already reached them. In December 2015, the value of bonds and treasury bills in bank portfolios was PLN 171.5 billion and in January 2016 it was already PLN 179.5 billion[31]. The main purchasers of treasury bills were domestic banks.

As far as the decrease in interest rates on deposits is concerned, the "action" promised by banks and consisting in revision of their loan offer is also relevant. Banks will most likely decide to stop offering the loans that offer the lowest margin as the bank levy will lower it even further. Banks will certainly need to take into consideration the consequences of the introduction of the bank tax (0.44%) when setting their credit spread.

The effects of bank tax will definitely influence the provision of credits by banks, which may slow down at least in many market sectors. Therefore, additional deposits may turn out less needed, which will prompt banks to lower rates on deposits.

[31] Data obtained from the National Bank of Poland.

VII. Final Conclusions

Undoubtedly, it should firmly be concluded that the bank levy in Poland is needed or even necessary. Poland is one of the few Member States of the European Union that decided to introduce this regulation so late. Hence, it was justified to introduce it much earlier.

The construction of the bank tax introduced in Poland raises considerable doubts. Especially when it comes to taxation of assets on a monthly basis. These doubts may arise both over the fact that its construction is susceptible to being avoided and that only few countries in the European Union decided to introduce such a mechanism. Undeniably, it is thought-provoking that the legislator did not take into account the experience of countries that have introduced this tax earlier.

There are also other noteworthy doubts and concerns as regards the construction of the bank tax, which were presented in this elaboration and which influence the value of this construction.

The Ministry of Finance's estimations of the expected revenues from this tax should also be a cause for concern. In particular, in the context of constructional flaws allowing to considerably reduce the effectiveness of this tax. In the first – quite optimistic version of the Ministry of Finance – the estimated revenues from bank tax in 2016 were expected to be PLN 6,500-7,000 billion. Eventually, the estimated revenue from this tax is to reach PLN 5 billion in 2016 (between 1 February and 31 December). Considering the effectiveness of the solutions allowing financial institutions to minimize payment of this tax, it is very likely that the expected revenues will not be generated at the level estimated by the Ministry of Finance.

It can be worrying that expert firms are working on instruments and constructions that will facilitate "temporary" lowering of the value of assets at the end of each month, which will minimize taxation of financial institutions. It is particularly relevant with respect to institutions that operate as international groups of companies. Domestic institutions that do not have branches in other countries, and much less companies with equity links, definitely have fewer possibilities in this respect. Analysing the experiences of countries that have introduced bank tax earlier, one may not rule out that financial institutions will follow a strategy consisting in expanding their international structures for the purposes of tax optimisation. The above may disturb the competition balance between banks that have an extensive international organizational structure and banks that only operate as domestic entities.

The remarks and reservations presented above should inspire the decision-makers to perform thorough analysis of the regulations and introduce possible changes that could influence not only the quality but also the effectiveness of the act of law in question. Particular attention should be paid to the possibility of avoidance of this tax, especially by financial institutions operating as international groups. Currently, the construction of the bank levy is not resistant to aggressive and creative tax optimisation.

Bibliography

Banking Union – State of play of implementation, the Council of the European Union, 2016.

M. Chądzyński, *Podatek bankowy. Pierwsze starcie* [Bank Levy. First Clash], Dziennik Gazeta Prawna, No. 38 of 25 February 2016.

Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJEU L 173 of 12/06/2014, p. 149).

Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No. 1093/2010 and (EU) No. 648/2012, of the European Parliament and of the Council (OJEU L 173 of 12/06/2014, p. 190).

Dzwonkowski H., *Opinia prawna w sprawie projektu ustawy o opodatkowaniu niektórych instytucji finansowych (druk sejmowy nr 4250)* [Legal Opinion on the Draft Act on Tax on Certain Financial Institutions (Publication of the Sejm No. 4250)], Warsaw, 06 July 2011.

H. Dzwonkowski (ed.), *Prawo podatkowe* [Tax Law], Warsaw 2010.

Opinion of the European Central Bank of 12 January 2016 on tax on certain financial institutions (CON/2016/1).

Opodatkowanie aktywów sektora finansowego [Taxation of the Assets of the Banking Sector], Report of the Sobieski Institute, 2015.

Pawłowicz L., *Stanowisko Instytutu Badań nad Gospodarką Rynkową wobec opodatkowania banków w Polsce* [Stance of the Research Institute for Market Economy on Taxation of Banks in Poland], Instytut Badań nad Gospodarką Rynkową, Gdańsk 2015.

Letter of 15 December 2015 of the Chief Executive Officer of Bank Gospodarstwa Krajowego to the Chair of the Public Finance Committee of the Sejm, No. DP.064.6.SS.2015.

Rentowność sektora bankowego w Polsce, [Profitability of the Banking Sector in Poland], the Congress of Retail Banking, November 2015.

Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012.

Commission Implementing Regulation (EU) No. 680/2014 of 16 April 2014 laying down implementing technical standards with regard to supervisory reporting of institutions according to Regulation (EU) No. 575/2013 of the European Parliament and of the Council.

The full minutes of the meeting of 9 February 2016 of the Public Finance Committee with the members of the boards of financial institutions (banks) No. 31 of 09 February 2016.

Resolution No. 26/2015 of the Council of the Bank Guarantee Fund of 25 November 2015 on the amount of a prudence fee for 2016 to be paid in to the Bank Guarantee Fund by entities participating in the mandatory deposit guarantee scheme.

Resolution No. 40/2015 of the Management Board of the National Bank of Poland of 13 August 2015 laying down the rules and mode of calculation and maintenance of statutory reserves.

Act of 15 February 1992 on corporate income tax (Journal of Laws of 2014, item 851, as amended).

Act of 29 September 1994 on Accounting (Journal of Laws of 2013, item 330, as amended).

Act of 29 August 1997 on Banking Law (Journal of Laws of 2015, item 128, as amended).

Act of 29 August 1997 on the National Bank of Poland (Journal of Laws of 2013, item 908, as amended).
Act of 14 March 2003 on Bank Gospodarstwa Krajowego (Journal of Laws of 2014, item 510, as amended).
Act of 30 April 2004 on procedural issues concerning state aid (Journal of Laws of 2007, No. 59, item 404, as amended).
Act of 27 August 2009 on public finance (Journal of Laws of 2013, item 885, as amended).
Act of 26 July 2013 amending the act on the Bank Guarantee Fund and some other acts (Journal of Laws of 2013, item 1027).
Act of 15 January 2016 on tax on certain financial institutions (Journal of Laws of 2016, item 68).
Act of 11 March 2016 amending the act on the Bank Guarantee Fund and the act on the functioning of cooperative banks, their associations, and associating banks (Journal of Laws of 2016, item 381).
Explanatory statement to the draft act on tax on certain financial institutions (publication of the Sejm No. 3838), 2010.
Explanatory statement to the draft act on tax on certain financial institutions (publication of the Sejm No. 4250), 2011.
Explanatory statement to the draft act amending the act on the Bank Guarantee Fund and some other acts (publication of the Sejm No. 1045), 2013.
Explanatory statement for the draft act on the Bank Guarantee Fund, deposit-guarantee scheme, and mandatory restructuring (Publication of the Sejm No. 215), 2015.
www.bankier.pl, accessed on 15 March 2016.
www.bfg.pl, accessed on 31 March 2016.
www.bloomberg.com, accessed on 15 March 2016
www.budapesttimes.hu, accessed on 15 March 2016.
www.gazetaprawna.pl, accessed on 31 March 2016.
www.kpmg.com, accessed on 15 March 2016.
www.nbp.pl, accessed on 15 March 2016.
www.mf.gov.pl, accessed on 31 March 2016.
www.orka.sejm.gov.pl, accessed on 15 March 2016.
www.pwc.be, accessed on 15 March 2016.
www.reuters.com, accessed on 15 March 2016.
www.sbs.ox.ac.uk, accessed on 15 March 2016.

CASP
Centre for Analyses and Studies of Taxation
Centrum Analiz i Studiów Podatkowych

· PUBLISHER ·
Centre for Analyses and Studies of Taxation SGH · Al. Niepodległości 162 · Warsaw 02-554 · Poland
Dominik J. Gajewski (General Editor) · Grzegorz Gołębiowski · Tomasz Grzybowski (Managing Editor)

· CONTACT ·
analysesandstudies@sgh.waw.pl · analysesandstudies.sgh.waw.pl · casp.sgh.waw.pl