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**PROCEDURES OF SETTING UP A NATIONAL BANK BY A CREDIT INSTITUTION
BASED ON AN EXISTING BRANCH IN POLAND – A SOLUTION TO STABILIZE THE
FINANCIAL MARKET**

Introduction

Treaty on the Functioning of the European Union (TFEU)¹, and particularly the regulations concerning the freedoms of entrepreneurship, services and the flow of capital and payment, is at present the basic source of law as regards EU single financial market. The three freedoms are basic in terms of the ability of businesspeople (banks included) to function on the market. Within the freedom of entrepreneurship banks that have permissions of and are supervised by appropriate bodies of financial supervision from the countries of origin can run business operation in the form of bank operations in branch offices in other EU countries.

The aim of the article is to present a new legal regulation that regards founding by a credit institution a national joint-stock bank set up on the basis of the existing branch of the institution in Poland by means of a non-money contribution of the branch's assets under the conditions defined by the Act on Bank Law²

The article presents legal foundations of setting up a branch by a credit institution within the freedom of business operations. It also discusses the procedure of conversion of a credit institution branch into a joint-stock company (a national bank) and its impact on the financial market.

It should be pointed out that such a procedure is not a conversion of a company in the sense of the term applied by the Code of Commercial Companies³. The term *conversion* in the article should not be associated with the meaning of the term applied in regulations.

¹ Treaty of Lisbon, signed at Lisbon, 13 December 2007 amending the Treaty on European Union and the Treaty establishing the European Community of 25th March 1957, Official Journal of EU C 306 of 17.12.2007, p. 1, later referred to as TEFU.

² Regulated by the Act on Banking Law of 29th August 1997, Journal of Laws 2002, Vol. 72, No. 665 as amended, art. 42a-42f. The provisions are in force since 14.07.2011, introduced on 10th June 2011 by the Amendment of the Banking Law act and some other acts, Journal of Laws 2011, Vol. 134, No 781

³ See: Act on Code of Commercial Companies of 15th September 2000, Journal of Laws 2000, Vol. 94, No. 1037 as amended, art. 551-584¹³. Any commercial partnership can be converted into other commercial partnership, and a civil law partnership can be converted into a commercial partnership. The conversion is based on the principle of continuity (the principle of subject identity of the partnerships in question).

1. Freedom of entrepreneurship in the operation of a credit institution and the principles of a single financial market in EU

The freedom of business operation or the freedom of entrepreneurship is defined in article 49 of the TFEU. According to the article, restrictions on founding companies by nationals of one member state throughout the territory of another state are prohibited. The prohibition includes any restrictions on setting up agencies, branches or subsidiaries by nationals of a given member state that are based on territories of another member state ⁴.

The freedom of entrepreneurship may be primary or secondary in character. Primary freedom means starting business operations independently, while in the case of secondary freedom the self-sufficiency level of company to be found is irrelevant (that concerns setting up subsidiaries, joining companies by purchasing stock or shares, or extending the operation by opening a branch) ⁵.

The freedom of entrepreneurship applies both to natural and legal entities and its objective scope includes all kinds of business operations. The freedom of business (as opposed to the freedom of services) consists in a durable and continuous participation in the economy of the host country. The ban of discrimination is crucial and it may be concluded that the host member state has to treat entities from other EU countries in the same way as its own ones. Thus, the aim of the freedom of business regulations is to guarantee the choice of location of business operations throughout the EU territory to individuals and companies⁶.

EU legal acts that regulate the performance of banking operations by a credit institution are: the TFEU⁷ and the Directive 2006/48/EC of the European Parliament and of the Council relating to the taking up and pursuit of the business of credit institutions ⁸. The Directive regulates the taking up and pursuit of the business by credit institutions and their prudential supervision. According to the directive, a credit institution is a company whose operations consist in the acceptance of deposits and other repayable funds, giving credits for its own account, and the institution of electronic money. The concept of a credit institution is wider

⁴ J. Barcz, A. Michoński (red.), *Traktat akcesyjny. Traktaty stanowiące podstawę Unii. Prawo polskie. Wybór dokumentów*, Prawo i Praktyka Gospodarcza, Warszawa 2003, p. 390.

⁵ K. Wach, *Swoboda przedsiębiorczości w Unii Europejskiej* [in:] H. Brdulak, E. Duliniec, T. Gołębiowski (ed.), *Wspólna Europa. Tworzenie wartości przedsiębiorstwa na rynku Unii Europejskiej*, Oficyna Wydawnicza SGH, Warszawa 2007, p. 2013.

⁶ F. Grzegorzczak, M. Szaraniec (ed.), *Instytucje i usługi finansowe*, LexisNexis, Warszawa 2010, p. 21.

⁷ Treaty of Lisbon, signed at Lisbon, 13 December 2007 amending the Treaty on European Union and the Treaty establishing the European Community of 25th March 1957, Official Journal of EU C 306 of 17.12.2007, p. 1, later referred to as TEFU.

⁸ Directive 2006/48/EC of the European Parliament and of the Council of 14 June 14 relating to the taking up and pursuit of the business of credit institutions, Journal of Laws. L 177 of 30.06.2006.

than the idea of a bank, as it also includes the so called parabanks. However, it excludes from the definition of a credit institution such subjects as central banks and listed by name banks and parabanks that function in particular member states (e.g. BGK bank and savings and credit unions operating in Poland). The concept of a credit institution and their branches has been defined by the Act on Banking Law⁹.

Credit institution, takes the advantage of the secondary principle of freedom of business operations and is entitled to establish in the other member state a separate subject (i.e. a subsidiary) or a branch within which it can pursue bank operations. The functioning of credit institutions as regards setting up a branch on the uniform EU financial market is regulated by three principles: the principle of the single license, the principle of mutual recognition and the principle of home country control.

The observation of the principle does not exclude other forms of co-operation with the host country or its right to pursue supervision in a strictly defined range.

The legal status of a branch of a credit institution includes¹⁰:

- legal incapacity and incompetence, which means that the branch is not an independent legal entity, i.e. it cannot acquire rights and incur liabilities on its behalf,
- the lack of independence in the area of law and administration – the competences of a credit institution will depend, for example, on permission,
- incapacity to perform actions in court proceedings (including insolvency and agreement capacities) – thus a credit institution will be a party to court,
- the status of an employer only when it is empowered by the credit institution (as a division) to acquire independently rights and incur liabilities in the area of labour law,
- separation of assets – a branch is a self-balancing entity, i.e. it has its own accounts, runs the balance sheet and enjoys tax independence.

Although a branch has a certain organizational independence, it does not operate on its behalf and account. It expands its operation only within the existing material and decision bonds with the credit institution. Founding a branch by a credit institution results in establishing an operational centre on the territory of Poland that constitutes an extension of

⁹ Act on Banking Law of 29 August, 1997 Journal of Laws 2002, No 72, 665 art. 14, par. 1, items 17 and 18 as amended..

¹⁰ J. Jacyszyn, J. Rudowicz, *Oddział spółki, tworzenie i funkcjonowanie*, Wolters Kluwer Polska, Kraków 2003, p. 156 and the following; W.J. Katner, *Prawo działalności gospodarczej. Komentarz. Orzecznictwo*, Wydawnictwo Prawnicze LexisNexis, Warszawa 2003, p.149 and the following; M. Szydło, *Charakter prawny oddziałów przedsiębiorców zagranicznych*, „Golosa” 2004, No 12, pp. 19-24; M. Szydło, *Działalność oddziałów przedsiębiorców zagranicznych w Polsce*, „Prawo Spółek” 2004, No 7-8, pp. 70-81.

the main office of the credit institution¹¹. Such branch is permanently affiliated, has its own management and is adequately equipped.

2. Commencing and running operation by branches of credit institutions on the territory of Poland

A credit institution may operate on the territory of Poland through its branch or within the framework of cross-border activities¹². The principles of running business operations by foreigners in the form of branches are regulated by the Act on the Freedom of Business Operations¹³. They are general in character and refer to any foreign business person (in this case to a credit institution) that runs business on the territory of Poland¹⁴. A credit institution may perform operations on the territory of Poland that are defined in Art.5, items 1 and 2 and in Art.6 item 1, points 1-4 and 6 – 8 in of the Act of Banking Law within the range granted by adequate supervising authorities of the state of origin. The object of business operations of a branch in Poland may not be as wide as the one of the main office; it may include only some fraction of the banking operations abroad¹⁵.

A branch of a credit institution may start pursuing bank activities after it is registered in the Register of Entrepreneurs. It may start its operations throughout the territory of Poland at least two months after the Financial Supervision Authority (KNF) receives from the competent supervision authorities of the home state the following data:

- branch's name and address in the Republic of Poland, from where documents regarding its operations can be acquired;
- the plan of activities and particularly the operations that the credit institution is going to pursue, together with the description of the organizational structure of the branch;
- names of people intended to take the positions of the manager and the deputy;
- the value of the credit institution's equity and the capital adequacy ratio.

Within two month following the acquisition of the information, the KNF may point out what requirements have to be met in the course of operating on the territory of Poland for the

¹¹ M. Szaraniec, *Charakter prawny oddziału zagranicznego zakładu ubezpieczeń prowadzącego działalność na terytorium RP* [in:] J. Lisowski (ed.), *Studia ubezpieczeniowe. Społeczno-gospodarcze aspekty funkcjonowania rynku ubezpieczeniowego*, Zeszyty Naukowe 181, Wydawnictwo UE w Poznaniu, Poznań 2011, p. 214.

¹² Act on Banking Law of 29 August 1997, Journal of Laws, 2002, Vol 72, 665 as amended, chap. 2a.

¹³ Act on Freedom of Business Activity of 2 July 2004, Journal of Laws, 2010, Vol. 220, No 1447 as amended.

¹⁴ Act on Freedom of Business Activity of 2 July 2004, Journal of Laws, 2010, Vol. 220, No 1447 as amended., Art. 85-92.

¹⁵ C. Kosikowski, *Publiczne prawo gospodarcze Polski i Unii Europejskiej*, LexisNexis, Warszawa 2010, p. 351.

sake of common well being, particularly the ones regarding consumer protection, business security and law violation.

The KNF must be informed at least one month in advance before any changes regarding the information it previously acquired from the credit institution are made. The changes are valid after the KNF receives an appropriate notice from the competent supervision authorities of the state of origin¹⁶.

The supervision over a credit institution that operates on the territory of Poland through its branch is in principle conducted by appropriate supervision authorities of the state of origin¹⁷.

In the case when the credit institution operating in Poland through its branch does not follow the Polish legal rules :

- the KNF sends written summons to the institution to comply with the Polish regulations and determines deadline for the non-compliances to be eliminated,
- after the deadline expires and the institution fails to react, the KNF notifies competent supervision authorities of the state of origin about the non-compliance.

In the case when despite the measures taken by the appropriate supervision authorities of the country of origin of the credit institution, the branch fails to comply with the rules of the Polish law, or in the case when the measures are inadequate to the infringement of law or they are not applicable on the territory of Poland, the KNF can apply supervision measures given in the Act on Banking Law¹⁸.

To sum up, it has to be stated that a permission of the KNF for a credit institution branch to take up banking operations on the territory of the Republic of Poland is not required. The necessary condition is that the KNF receives an appropriate note from the competent supervision authorities of the state of origin of the credit institution. As a rule, the supervision over the operation of a credit institution on the territory of Poland is performed by the appropriate supervision authorities of the state of origin. However, the KNF is obliged to supervise the branches of credit institutions as regards their cash flow liquidity¹⁹. Moreover, the KNF can take certain measures when the credit institution operating on the territory of Poland does not comply with the legal rules

¹⁶ F. Grzegorzcyk, M. Szaraniec (ed.), *Instytucje...*, op. cit., p. 157.

¹⁷ Act on Banking Law of 29 August 1997. Journal of Laws U. 2002, Vol. 72, No 665 as amended., Art. 141a.

¹⁸ See: Act on Banking Law of 29 August 1997. Journal of Laws U. 2002, Vol. 72, No 665 as amended, Art. 138, para. 3, item 1 and 3, and Art. 141

¹⁹ See: Act on Banking Law of 29 August 1997. Journal of Laws U. 2002, Vol. 72, No 665 as amended, Art.141c, para. 2.

3. Special method of setting up national banks by credit institutions operating on the territory of Poland through a branch

The aim of the provisions is to make it possible to convert a credit institution branch that operates in Poland upon a single license into a joint stock subsidiary of the credit institution. In fact, the procedure consists in the creation of a joint stock national bank based on the existing credit institution branch by means of making a non-cash contribution of all the assets of the branch on the condition that they constitute a company or its organized part (it will particularly concern both fixed assets and financial means to run the operations and the receivables and liabilities resulting from the operations, especially deposits). Thus, a conversion into a national bank may regard a branch of a credit institution that operates a banking company, has the necessary infrastructure and operational ability to start independent operations as joint stock national bank.

Legal rules do not provide for the possibility of taking over the shares of a branch transformed in such a way by an entity other than the credit institution in question (however, after the conversion, the credit institution may sell the shares of the national bank and withdraw its operations from the Polish financial market). From the economical point of view, the creation of such a national bank will only be a change of form in which a particular credit institution is operating on the territory of Poland and not a creation of a new entity – for such cases there is a standard procedure for founding national banks. However, after the conversion the bank will be subject to the rules of company law as it is in the case of other joint stock banks.

Thus, the conversion procedure includes the following operations:

- 1) Credit institution applies for the permission to set up a joint stock national bank based on the existing branch²⁰. The regulations of Art. 30 para. 2 and 4 and Art. 36 of the Act on Banking Law are excluded from the procedures. The exclusion of the regulation of Art. 30 para. 2 and 4 of the Act on Banking Law refers to the limits of the non-cash contribution to the start-up capital and is justified by the procedure of conversion itself as the procedure is carried out by a non-cash contribution in the form of all assets designated to run the operation by the credit institution branch, on the account of the whole share capital of the newly created bank. The exclusion of Art. 36 of the Act on Banking Law, which concerns another permission of the KNF for the bank to commence operation, results from the necessity to take into

²⁰ Act on Banking Law of 29 August 1997, Journal of Laws 2002, Vol. 72, No. 665 as amended, Art. 42a.

consideration the entity's business operational continuity- the bank is set up on the basis of the existing branch of a credit institution and there is no need to grant additional permission to start banking operation.

- 2) The KNF carries out supervision in the branch of a credit institution with the aim to verify its current financial condition²¹. The aim of the supervision is also to help the newly set up bank to pursue business (standard criteria of prudential supervision are applied). The regulation in question provides for an additional prerequisite to refuse the permission, which states that conversion should not cause a “ significant damage to country's economy or the state's vital interests”. It seems that the intention of the legislator was to reduce the danger of financial instability and the dysfunctions of the deposit guarantee system. The prerequisite that entitles the KNF to refuse the permission for the conversion can be interpreted as the public interest proviso as it does not refer precisely to particular prudential aspects of refusal to grant permission to set up a bank.
- 3) The KNF grants permission to open a national bank on the basis of a branch.
- 4) Non-cash contribution of all the elements of the branch assets is made to the newly set up national bank in return for the shares of the bank.
- 5) The national bank is registered in the register of entrepreneurs and the branch of the credit institution is simultaneously deregistered. The registration is obligatory and constitutive. The registration of the national bank is conducted on its application, while the deregistration of the branch is done ex officio²².

As a result of the registration of the national bank to the register of entrepreneurs:

- the newly set up national bank acquires all rights and responsibilities of a credit institution that are related to the operation of the branch (general succession);
- the KNF takes over the supervision over the operations of the newly set up bank (particularly, the bank will have to comply with the standards of cash flow liquidity and acceptable risk determined by the KNF; the bank will have to be granted the KNF's permission to appoint two members of the Board, including the president, and also to change the statutes; moreover the KNF will supervise the acquisition of substantial blocks of shares in the bank);

²¹ Act on Banking Law of 29 August 1997, Journal of Laws 2002, r. Vol. 72, No 665 as amended, Art 42c.

²² See: Act on Banking Law of 29 August 1997, Journal of Laws 2002, r. Vol. 72, No 665 as amended, Art 42e, para.1

- the deposits located in the transformed branch and transferred to the newly set up bank will be protected by the Bank Guarantee Fund.

In the case of general succession, all rights and responsibilities of the credit institutions that are related to the branch operations are transferred onto the national bank. It refers particularly to liabilities and receivables (e.g. resulting from deposits, bank account agreements, bank card agreements, credit agreements) and the rights related (arising from mortgage and other collaterals); however the disclosure of the transfer onto the national bank of the rights disclosed in mortgage registers and other is carried out upon the application of the bank²³.

That also means that permissions, licenses and reliefs that were granted to the credit institution on the basis of the regulations effective in Poland as regards the setting up or operation of the branch devolve into the national bank. That refers both to private and public legal rights and duties. In the case of the administrative and legal succession one has to be careful as some crucial limitations resulting from special provisions may occur. One of the basic pillars of the administrative law is directing the administrative decision to a precisely defined recipient, which results in the inadmissibility of the transfer of such rights by a party²⁴. As a consequence, the range of the administrative and legal succession should be considered *in concreto*²⁵.

Questions concerning the results of the transfer of tax rights and duties are a good example of the above mentioned issue. The superior regulation in this regard is the Tax Ordinance Act²⁶, according to which the bank that was set up by a non –cash contribution of the assets of a credit institution branch that constitute an enterprise or its organized part acquires all the rights provided by the regulations of tax law and the responsibilities of a credit institution that are related to the operations of its branch.

The succession refers equally both to the duties and the rights resulting from the decisions made on the basis of the tax law²⁷.

²³ Act on Banking Law of 29 August 1997, Journal of Laws 2002, r. Vol. 72, No 665 as amended, Art 42e, para.3

²⁴ See: Act on Banking Law of 29 August 1997, Journal of Laws 2002, r. Vol. 72, No 665 as amended, Art 42e, para.2; Cf also Supreme Court's sentence of 8.09.1998 r., sygn. III RN 34/98, OSP 1999, nr 7-8, poz. 132.

²⁵ M. Szaraniec, *Publicznoprawne aspekty przekształceń spółek*, Zeszyty Naukowe AE w Krakowie nr 722, Kraków 2005, p. 177.

²⁶ See: Tax Ordinance Act of 29 August 1997, Journal of Laws 2005, Vol. 8, No 60 as amended, Art. 93a, introduced on 10th June 2011 by the Amendment of the Banking Law act and some other acts, Journal of Laws 2011, Vol. 134, No 781 as amended – in force since 14.07.2011.

²⁷ Tax Ordinance Act of 29 August 1997, Journal of Laws 2005, Vol. 8, No 60 as amended, Art. 93d

In order to preserve the continuity of the operation of the unit as regards the accounting, the application of the regulations of the Accounting Act regarding the change of the legal form of a unit is provided to transform a branch of a credit institution into a national bank²⁸.

A joint stock bank that is set up as a result of the conversion of a credit institution branch is obliged to maintain a minimum 12% solvency ratio for the first 18 months of operation.

In conclusion, it has to be stated that among the most significant effects of the conversion of a credit institution branch into a national bank is the creation of a new national bank and a simultaneous close-down of a credit institution branch, a universal succession of the rights and duties of a credit institution as regards the operations of the branch, the take-over of the supervision upon the newly created national bank by the KNF, and the protection by the Bank Guarantee Fund of the deposits located within the operation of the branch and consequently of the national bank.

Summary

It seems that the regulation of the conversion procedure of a credit institution branch into an independent joint stock company may contribute to maintaining the financial stability of the domestic market. A newly created national bank will be supervised by the KNF and the deposits located there will be guaranteed by the Bank Guarantee Fund. A proper integrity of the supervision process gives a more complete opportunity to assess the entities under supervision and, consequently, to analyze the Polish bank sector in a more precise way.

The solution presented makes it possible for the newly created bank to go public on the Warsaw Stock Exchange, which may provide an additional way to acquire capital for its operation.

The regulation in question may also be beneficial from the point of view of credit institution branches themselves as they will have a chance to become independent of their parent company in case it has financial problems and the branch itself is in good position. As far as the clients of the new national bank are concerned, the conversion should not have a negative effect on them due to the application of the principle of general succession.

At present, there are 20 credit institution branches on the Polish market in relation to which the new regulation can be applied. The possibility to be converted into a national bank is of particular significance in the case of credit institution branches that gained a substantial

²⁸ Accounting Act of 29 September 1994 Journal of Laws 2009, Vol 152, No. 1223 as amended

market share or have a relatively large scale of operation. The branch of the Greek Eurobank Ergasias EFG that is functioning on the Polish market as the Polbank EFG is a good example. In August 2011, upon the application of the Eurobank Ergasias EFG, the Polbank EFG S.A. became a national bank. Afterwards, the Greek Eurobank Ergasias EFG and the Austrian Raiffeisen Bank International AG signed a partnership agreement, on the basis of which their subsidiaries in Poland, i.e. the Polbank EFG S.A. and the Raiffeisen Bank Polska S.A. combined their operation. Then, on 17 April 2012 the KNF stated that there were no grounds for refusing the takeover of the Polbank EFG S.A. shares by the Raiffeisen Bank International AG in the amount exceeding 50% of votes on the shareholders meeting. The sale of shares by the Polbank EFG S.A. in the light of the “Greek crisis” should be considered as a solution that stabilizes the Polish financial market.

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Abstract

The aim of the article is to present a new legal regulation that consists in setting up a joint stock bank on the basis of a branch of accredited institution that operates in Poland by

means of making a non –cash contribution of the assets of the branch in compliance with the rules determined by the Act on Banking Law.