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Taxation of Financial Institutions in Europe

Patrycja Nowak

Warsaw, Poland

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RGW Rocławski Graczyk i Wspólnicy

Adwokacka Spółka komandytowa

ul. Mochnackiego 4

02-042 Warszawa / Poland

Tel. (+48-22) 883 62 50
Tel. (+48-22) 883 62 51
Tel. (+48-22) 883 62 52
Fax (+48-22) 658 45 82
www.rgw.com.pl
p.nowak@rgw.com.pl

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Introduction

In the context of the economic and financial crisis, the taxation of financial institutions is a matter of high importance. It is more and more commonly accepted that the financial sector should make a fairer contribution, this sector having been under-taxed to date given the exemption from VAT of most financial services.

It should be noted that this matter is also important from the economic and business point of view. Financial institutions are an element of the financial market, and the transactions in which they take part generate significant amounts of money.

The importance of this matter is indicated by the many proposals for taxation of financial institutions that have come into effect in many European Union (EU) countries. The European Commission has also taken strong actions aimed at introducing taxation of financial transactions.

When analyzing the taxation of financial institutions, taxation of financial instruments should not be forgotten, as well as the double taxation and the mechanisms for its avoidance.

The main aim of this article is to describe the rules for taxation of financial institutions and financial instruments in Europe.

Chapter 1 presents legal definitions of the term “financial institutions” according to the Polish and European law.

Chapter 2 presents general rules for taxation of financial institutions in Poland according to the European law. Among the financial institutions, banks take a special place, therefore the focus herein will be on their significance and role. In this chapter, there are presented detailed rules of taxation of financial institutions, particularly banks.

Chapter 3 presents the proposals made by the EC and IMF which are a clear and strong reaction to the effects of the recent crisis.

1. Financial institutions- definitions according to the European and Polish law.

The term ‘financial institutions’ is not uniform. The European legislation provides that the term relates to all legal entities, institutions of credit, investment and insurance character providing financial services on market terms. Article 1(5). of the Directive 2000/12/EC of The European Parliament and the Council of 20 March 2000 relating to the start and conduct of the business of credit institutions[1] limits the meaning of this term to entities that are neither credit institutions nor investment firms, and whose basic business is to provide financial services listed exhaustively in the directive as being subject to mutual recognition between countries. This separation is justified by the need to adopt the definitions of certain terms for the purposes of a given legislative act. In doubtful cases, the meaning of this term must be precisely determined on the basis of comprehensive analysis of a given actual and legal state.[2]

Provisions of the Polish law concerning legal definitions of ‘financial institutions’ are also non-uniform. The broadest one we will find in the Art.12(1) of the Act of 4 September 1997 on the Branches of Government Administration[3] whereby a branch of financial institutions is competent in matters of banks, insurance companies, mutual funds and other financial institutions as well as the functioning of the financial market. This term applies only to legal entities with their seat in the territory of the Republic of Poland.

Another definition attributed to this term is contained in Article 4(7) of the Code of Commercial Partnerships and Companies of 15 September 2000 (hereinafter CCPC)[4]. The Code of Commercial Partnerships and Companies counts banks, funds (mutual funds, investment funds, pension funds), companies of such funds, insurance companies and brokerage houses among financial institutions – those with their seat in the territory of the Republic of Poland or another member state of the Organization for Economic Co-operation and Development. All these definitions describe financial institutions in broad sense and apply to those legal entities that are not financial institutions within the meaning of Article 1(5) of the Directive 2000/12/EC or Article 4(1)(7) of the Banking Law Act.

The Banking Law Act contains a definition which is modeled on the provisions of Article 1(5) of the Directive 2000/12/EC. This definition applies to the exclusion of the term ‘bank’ and ‘credit institutions’ from its subjective scope - it was significant due to the fact that in case of the European regulation credit institutions are subject to exclusion and the term ‘bank’ has a narrower subjective scope than the term ‘credit institution’. The definition does not correspond fully with the European solution, because of activities listed in Article 4(1) of the

[1]http://eurlex.europa.eu/Notice.do?mode=dbl&lang=en&ihmlang=en&lng1=en,pl&lng2=bg,cs,da,de,el,en,es,et,fi,fr,hu,it,lt,lv,mt,nl,pl,pt,ro,sk,sl,sv,&val=236965:cs&page

[2]E.Fojcik-Mastalska , J.Sokalski, *Dyrektywa 2000/12/EC z Dnia 20 Marca 2000 Roku W Sprawie Podejmowania i Prowadzenia Działalności Przez Instytucje Kredytowe,*Prawo Bankowe Nr 7-8, 2002 r., availableat: http://lex.pl/czasopisma/pb/dyrektyw.html,

[3]Journal of Laws 2007, No. 65, heading 437, amended.

[4]Journal of Laws 2000, No. 94, heading 1037, amended.

Banking Law Act. A share of those activities in the income from an enterprise determines whether a given entrepreneur can be classified as a financial institution. Annex I to which the Directive 2000/12/EC refers allows financial institutions (among other things) to grant loans (mortgage and consumer). Such a solution was not acceptable in Poland, due to the fact that granting loans as a banking operation in the strict sense has been exclusively attributed to banks.[5]

2. Taxation of financial institutions in Poland

2.1. Operating principles of financial institutions in accordance with the Banking law

In Poland, there are two significant legal acts which have been a breakthrough in the Polish commercial banking: The Banking Law and the Act of 29 August 1997 on the National Bank of Poland. These acts reintroduced a two-tire banking system that replaced the monobank model which had been functioning for 40 years. The model of a monobank is a one-step banking system. It is typical of countries with command-and-quota socialist economy. Another type is a two-tier model of a banking system. The key characteristic of this system is the isolation of the function of an issuer from the services rendered to the public. Therefore, in this model, a division exists between the central bank and a commercial bank.

During the nineties, activities of the Polish commercial banks were kept within certain limits by the central bank- the National Bank of Poland (NBP). The scope of NBP activity was very broad and encompassed not only operations reserved for central banks, such as issuing the national currency of the Republic of Poland, extending and refinancing loans to banks, taking deposits from banks, dealing with monetary settlements, managing foreign exchange operations or providing banking services for the state budget. In some areas, the central bank competed with newly established commercial banks influencing their range of activity. These areas included: operating bank accounts in foreign currencies for domestic and foreign entities, accepting deposits, extending credits and loans.[6] Nowadays, the role of the National Bank of Poland is connected with the development of domestic banking system and financial market. Functions of banks determine their role in the market. Generally, banks are intermediaries on the financial market but also act as depositories or guarantors.[7]

The Banking Law of 29 August 1997 provides for the two-tier banking system. In Poland, specialization takes various forms: mainly functional and regional. Specialized banks are

[5] B. Smykla, *Prawo bankowe., Komentarz.,* Warszawa 2011, p 210.
[6] W.L. Jaworski, *System bankowy i jego otoczenie*" [in:] *Bankowość.Podręcznik akademicki*,ed.by W.L. Jaworski and Z. Zawadzka, Warszawa, 2001, p 56.
[7] *Perspektywy rozwoju bankowości i rynków finansowych w Polsce do roku 2007,* Synteza , IbnGR, Gdańsk , 2003, p.201.

characterized by a limited scope of activity, types of operations and customers. One type of a specialised bank has been established by a legal act – the mortgage bank. Competitors of mortgage banks are commercial banks. The competitive advantage and strong position of commercial banks is a result of loans being financed with cheap deposits.[8]

Article 5 of the Banking Law Act sets out the object of activity of banks. The term ‘banking operation’ is not normatively uniform. Its types may widely differ. Due to the objective character, two types of banking operations can be distinguished: banking operations in the strict sense (core banking activities, or basic banking activities), and banking operations in the broad sense (additional). Their ‘banking’ character depends on whether they are carried out (by a bank) in accordance with Article 2 of the Banking Law Act. Banking operations are conducted as a part of economic activity of banks. This term should be interpreted in accordance with its normative definition contained in Article 2 of the Act of 2 July 2004 on Freedom of Economic Activity.[9] According to this article, banking operations are an example of service activity for profit, conducted in an organized and continuous manner. The term “services provided by credit and financial institutions” functioning in the territory of Europe, so-called financial services, includes banking operations as well as operations provided for in Article 6 of the Banking Law Act. The legislator’s use of non-uniform terms of imprecisely specified meaning leads to interpretative doubts which may be used by the banks for broadening their privileges.

2.2. Basic rules of the income tax system.

Article 1 of the Corporate Income Tax Act (further CITA) regulates the subjective scope of the tax, including legal persons amongst its taxpayers and specifies the type of the tax, prescribing that income is the tax base. Income can be reduced by deductions listed in the Act. An intrinsic characteristic of income tax is a reduction in gross income by tax deductible expenses. Any exceptions to this rule, especially those provided for in Article 16 of the CITA should be interpreted strictly so as to minimize exceptions to the main rule. Taxpayers of the CIT are legal persons as well as share-holding companies in organization.[10] In accordance with Article 33 of the Polish Civil Code (hereinafter: the CC)[11], legal persons shall be the State Treasury and those organizational entities upon which special provisions of law confer legal personality. Those regulations relate closely to banks which in accordance with the Banking Law Act, are “legal persons, established in accordance with the applicable laws,

[8] J.K.Solarz, Rozwój systemów bankowych (in.:) *Studium bankowości*, Fundacja WIB, Warszawa,1998, p.70.
[9] Journal of Laws 2004, No. 173, heading 1807, amended.
[10] A. Mariański ,W. Nykiel, *Komentarz do ustawy o podatku dochodowym od osób prawnych*, ODDK, 2011, p.3.
[11] Act of 23 April 1964, Journal of laws No. 16, heading 93, amended.

operating under authorization to perform banking transactions involving any risk for the funds entrusted to the bank and repayable in any way."[12]

The CITA sets out the rules for taxation of banks that under the Polish law, are legal persons. In general, they do not differ from the rules for taxation of other legal persons. Article 6 of the CITA lists the entities that are subject to a subjective exemption, those include the National Bank of Poland. The entities listed in that article do not file a tax return. The subject of taxation with income tax is the income, regardless of the type of source of income, from which it has been derived. In case a taxpayer has incurred a loss in a tax year, their income in the following five tax years may be lowered by the amount of that loss, given that the amount the income is lowered by in any of those years may not exceed 50% of the amount of the loss (article 7 of the CITA). As regards exemptions (Article 17 of the CITA), objective exemptions are provided for in the CITA, including those for taxpayers such as public benefit organizations. In the case of such taxpayers, only the income allotted to the fulfillment of those statutory aims is subject to exemption from tax.[13]

The tax base consists of the income received by a legal person (the revenue lowered by deductible costs) in a given tax year, with the possibility of making certain deductions presented in the table.

	Type of deduction	Amount of deduction
1.	Donation allotted to:	
	a) the benefit of public benefit organizations (art.18(1)1 CITA) b) donations for the purposes of religious cult (art.18(1)7 CITA)	- equal to the amount of the donation, however no more than the amount representing 10% of the income - equal to the amount of the donation, however no more than the amount representing 10% of the income The total of the deductions under points a) and b) in 2011 may not exceed the amount representing 10% of the income.
2.	Deduction on account of the purchase of new technologies.	Up to the amount of 50% of the expenses paid for the purchase of a new technology, specified in accordance with art. 18b(4, 5) CITA.

[12] Act of 29 August 1997, Journal of Laws 2002, No. 72, heading 665, amended.
[13] M. Buczna., Ustawa o podatku dochodowym od osób prawnych, WoltersKluwers, 2008, p.156.

3.	Deduction resulting from redemption of loans (referenced in art.18(1)6 CITA	- in banks – 20% of the sum of redeemed loans

Table 1: Deduction from tax base in Corporate Income Tax [14]

One of the deductions mentioned in the table relates to banks only. According to Article 18(1)(6), the tax base is an income after a deduction of 20% of the amount of loans. In order for the lost loans to be considered while settling the tax base, they should be qualified as lost and included in the deductible costs.

The tax rate is 19% of the tax base subject to Article 21 and 22. Taxpayers and withholding agents do not file tax declarations during a tax year, but are obligated to make advance payments. This is also the case when the income tax is collected using a lump-sum method. During the tax year, taxpayers can also calculate the tax advance payments on a simplified form (art. 25(6-10) CITA). The payment of an advance is then dependent on the input tax specified in the tax return filed in the year preceding the given tax year or the return filed in the year preceding the given tax year by two years.

Taxpayers are obligated to file a declaration regarding the amount of income (loss) derived in a tax year until the end of the third month of the following year and until that date pay the input tax or the difference between the input tax from the income specified in the declaration and the sum of advance payments due for the period from the beginning of the year (Article 27 CITA).[15]

2.3. Value added tax

The Goods and Services Tax Act does not contain special regimes for banks. The Article 43 VATA includes exemptions which significantly affect VAT taxation of banking activities. Exemptions from the value added tax have been introduced for various reasons. Some activities are exempted from taxation as they are conducted for the common good and common interest, where the third sector helps the activity of the state. In other cases it would be difficult to specify the taxable base, therefore exemption was the better solution (e.g. financial intermediary services).[16] The wide range of exemptions from the value added tax, and sometimes even their existence, is criticized. The reason is that the exemptions disturb

[14] http://www.vat.pl/odliczenia_cit_zestawienie_rodzajow_i_limitow_1580.php.
[15] http://www.mf.gov.pl/index.php?const=3&dzial=134&wysw=4&sub=sub1
[16] W. Markowski, *ABC VAT-u*, Markus, 2011, p.112.

the logic of the value added tax mechanism (taxation-deduction), complicate tax returns, disturb outsourcing of the services and raise the cost of goods and services.[17]

It must be mentioned that the Goods and Services Tax Act of 11 March 2004 does not introduce any special VAT regime for banks. However, it must be underlined that Article 43 of the VAT Act provides for exemptions which significantly affect VAT taxation of banking activities. One of the VAT taxable activities is the rendering of services and legal persons (e.g. banks) are taxable persons. Thus, banking services, financial services rendered by banks and financial institutions remain within the scope of VAT, but are exempted with some exceptions. The VAT exemption applicable to some services rendered by banks and financial institutions results in these institutions not having the right to deduct input VAT if purchases are connected with these exempted services.

According to Article 43 of the VAT Act in the wording as of 1 January 2011, the following financial services are exempted[18]:

a) services of granting loans and intermediary services in the rendering of services of granting loans,
b) services in the area of guarantees and any other financial- and insurance transaction securities and intermediary services in the area of rendering those services,
c) services in the area of depositing monetary means, account management, monetary transactions of any kind, money transfers, debts, checks and bills of exchange, as well as intermediary services in the rendering of those services,
d) services the object of which are financial instruments that are mentioned in the Trading in Financial Instruments Act of 29 July 2005, with the exclusion of the storage of those instruments and their management, as well as intermediary services in that area,
e) services that are an element of financial services listed in Articles 43(1)7, 37-41 of the Act, one that is a separate unit on its own and is suitable and indispensable in rendering a service subject to exemption according to Articles 43(1)7 and 37-41 – this exemption does not apply to services that are an element of intermediary services.[19]

According to Art 43(1)12 of the VAT Act, subject to exemption from tax are, among other things, services of managing investment funds and capital insurance funds. The management shall be understood as:

1) asset management;
2) distribution of participation units;
3) creating and management of registers of participants;

[17] V. Lenoir, *April 1954 - April 2004. VAT Exemptions: The Original Misunderstanding*, European Taxation 2004, nr 10.

[19] Ustawa z 29 października 2010 r. o zmianie ustawy o podatku od towarów i usług - Journal of Laws 2010, No. 226, heading 1476, amended.

4) maintaining accounts and records of assets;
5) storage of assets.[20]

The definition mentioned above does not cover many necessary activities such as the appraisal of shares. These are, as a rule, performed by external companies, as they require specialist knowledge and equipment. These companies have to calculate VAT that cannot be deducted by the financial institutions using their services as their basic activity is exempt from tax. For the institution, it is an additional cost. This solution is a source of many problems for the financial sector. Moreover, it is incompliant with the EU regulations which clearly appears from the judicature of the Court of Justice of the European Union. In the *Abbey National* ruling of 4 May 2006 (C-169/04)[21] it has been stated that the definition of management includes administrative activities, administrative management services and among those fund accountancy services, including appraisal of shares (certificates).[22]

Another incompliance of the Polish VAT laws with the 2006 directive has been revealed after the amendment introduced in 2011.[23] This amendment has introduced new regulations in the area of services subject to exemption from VAT. It has to be mentioned, that in relation to financial services subject to exemption from VAT, reference was made to the Act of July 29, 2005 on the trading in financial instruments.[24] The provisions of this act do not apply to shares in companies. As a result, services the object of which are shares (e.g. in limited liability companies), are not subject to exemption, although the VAT directive provides for such an exemption.[25] After numerous statements, the Ministry of Finance has remedied this oversight by introducing a retroactive VAT exemption for financial services associated with shares in companies. While introducing new regulations regarding available VAT exemptions, the need has been forgotten for a suitable modification of Article 90(6) of VATA, that indicates which transactions exempt from VAT are not included in the calculation of the VAT indicator,. This provision still refers to Article 43(1)37-41 of the VATA, thus not accounting for ancillary transactions associated with shares in companies (this exemption has been introduced not into the VATA, but into the executive regulation). As a result, the Polish VAT provisions are still incompliant with the VAT directive.[26]

It should be underlined, that when the national regulations are incompliant with a clear and precise provision of the directive, which is more beneficial for the taxpayer, the EU provisions may be directly applied.

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[20] Art 43(8) of Vat Act
[21]Judgement of the Court of Justice of the European Union of 4 May of 2006, Case C-169/04, available at: http://dokumenty.e-prawnik.pl/orzecznictwo/unia-europejska/c-16904-abbey-national.html
[22]http://www.taxfin.pl/artykul,1479,Zmiana_zakresu_zwolnienia_z_VAT_uslug_finansowych_-_nowe_watpliwosci_w_swietle_Dyrektywy_VAT.html
[23] Ustawa z 29 października 2010 r. o zmianie ustawy o podatku od towarów i usług - Journal of Laws 2010, No. 226, heading 1476, amended.
[24] Journal of Laws 2005, No. 183, heading 1538, amended.
[25] art.135(1)f of Vat Directive 2006.
[26]http://www.taxfin.pl/artykul,1479,Zmiana_zakresu_zwolnienia_z_VAT_uslug_finansowych_-_nowe_watpliwosci_w_swietle_Dyrektywy_VAT.html

One of the most common financial services is granting loans. Activities of that nature are subject to exemption from the goods and services tax. Insurance services are also financial intermediary services. They have also been benefiting from the tax exemption. It is accordance with suitable regulations of 2006 directive, which treats insurance and reinsurance transactions, including these executed by brokers and insurance agents, as services subject to exemption from taxation under the conditions set out by a member state.

Under the Polish law, financial transactions are subject to exemption to an extent much broader than that of the 2006 directive. An example which shows the lack of compliance of the Polish VAT provisions with the EU provisions are the above-mentioned insurance services. The Polish statute provides an exemption for the most of services associated with insurance, while only the services the subject of which is granting insurance security should be subject to the exemption.

The EU law, however, provides solutions for the taxpayers to be protected from the consequences of local regulations incompliant with those provisions. Entities have the possibility of directly applying the provisions of the directive without application of the incompliant local provisions. According to the judicature of the European Court of Justice (further CJEU), a provision of the directive has to be mandatory and precise enough for direct application. The taxpayers can as well use the local provisions incompliant with the directive, if they are preferable. The entitlement to direct application of the directive in order to limit the rights of taxpayers, if the provisions have not been properly implemented in local law, may not be enjoyed by state authorities, such as tax authorities. According to the judicature of the CJEU a provision incompliant with the directive cannot serve as a basis for taking a decision unfavorable to a taxpayer.

2.4. Differences between tax treatment of non-resident banks and tax treatment of domestic banks

The Corporate Income Tax Act regulates the scope of tax liability of corporate income taxpayers according to their tax residence. Article 3 of the CITA divides taxpayers into two categories: those liable to pay tax on the entirety of their income regardless of where the income has been generated (in the doctrine referred to as ‘residents’), and other taxpayers, i.e. those liable to pay tax only on income generated in the territory of the Republic of Poland (referred to as ‘non-residents’). The criterion for this division is the location of the seat or head office of these entities. If it is in the territory of the Republic of Poland, they are treated as residents and are subject to full tax liability. If it is not in the territory of the Republic of Poland, they are treated as non-residents and are only subject to limited tax liability.[27]

[27] A.Mariański ,W. Nykiel, *Komentarz .....*, *op. cit.,* p. 21.

In principle, being subject to full tax liability means, for a taxpayer, the taxation in Poland of the whole of their income, i.e. all income generated by them both from Polish and foreign sources. Taxpayers subject only to limited tax liability (taxpayers who are not Polish residents) are only liable to pay tax on income generated in the territory of the Republic of Poland.[28]

The rules for determination of the tax residence are usually regulated in Article 4 of the agreements for the avoidance of double taxation, based on the OECD Model Tax Convention. In this convention, there is a rule according to which the residence of an entity (one that is not an individual) is determined considering the place of management or another criterion of similar nature. These subjects are taxed on the whole of their income in the given state. For other entities (in accordance with Article 4(1) of the OECD Model Tax Convention) the only income subject to taxation in a given state is one from sources in that State or capital situated therein.[29]

According to the double taxation agreements interest is considered as a so-called passive income, subject to withholding tax. This means that the entity deriving income from interest can pay the tax in two countries: the country of the source (the country from which the interest is paid, where the tax is collected by the entity paying the interest) and the country of their tax residence. Applicable agreements point out to what amount the source country can collect the tax and the method for the avoidance of double taxation to be used in the country of residence in order to avoid the juridical double taxation. The Polish tax law also contains provisions regarding the matter of withholding tax. Most of all the Article 21 of the CITA, according to which interest paid by Polish taxpayers to non-residents is subject to taxation with a 20% lump-sum tax, unless at the moment of payment the payer has a certificate of residence of the beneficiary of the interest – then, they are entitled to the use of a rate resulting from an applicable double taxation agreement (usually 5 or 10%).

In most cases, taxation of dividends takes the form of withholding tax. It means that it is collected by the company making the payment of a dividend, the company serving as the withholding agent. The moment of payment of a dividend is also the moment of collection of the tax. This mechanism of collection of the tax by the withholding agent is meant to ensure the security of collection of the tax which is important especially in the cases of dividend payment to foreign persons – should the withholding agent not collect the tax its collection would be difficult as the beneficiary (the taxpayer) is located outside of the Polish tax jurisdiction. The problem of double taxation arises when the dividends are paid by a Polish company to a beneficiary from another country. The fact is that both the country in which the seat of the company paying the dividend is located, and the country in which the place of

[28]K. Koperkiewicz-Mordel, W.Chróścielewski ,W. Nykiel, *Polskie prawo podatkowe podręcznik akademicki*, Difin, 2006, p.89.

[29] K. Bany, *Modelowa Konwencja w sprawie podatku od dochodu i majątku*, WoltersKluwer business, Warszawa 2010, p.103.

residence or the seat of the beneficiary is located are interested in collecting tax on income associated with the payment of the dividend.[30]

Three tax regimes are possible according to the form of dividend payment to legal persons: a standard rate, preferential rate and the exemption from withholding tax. If the recipients of dividends are legal persons, the tax base is the gross amount of the dividend, and the tax rate is 19%. In the case of dividends paid to legal persons, there is a possibility of using an exemption from withholding tax. Provisions of the CITA provide that income from dividends is subject to exemption from income tax, if all the conditions set out in the CITA are met.[31]

In the situation where the conditions entitling to exemption are not met and Poland has signed with the country of the beneficiary a double taxation agreement, preferential rate of withholding tax is applicable. The condition for application of the rates resulting from such an agreement in the case of dividends is that the withholding agent obtains the certificate of residence of the taxpayer. Therefore, if beneficiaries of such dividend have their seat in another country and they document it with a suitable certificate, applying a preferential rate resulting from a suitable agreement, is correct.[32]

3. Cross-border transactions of financial institutions

For many years economists have been putting forward proposals for taxation of financial institutions. The world financial crisis which started in 2007 showed the need to look for new solutions that will make it possible to save the economy and obtain large amounts of money.

One of them is the proposal for an EU system of taxation of financial transactions, a draft of which was presented by the European Commission. A bank tax has been also introduced in Hungary, Germany and Sweden, and from 2012 is in force in Slovakia. In other countries, Poland among them, some proposals of introducing such a tax are being put forward.

Those proposals establish various models: from taxation of bonuses- received by employees of financial institutions to a tax supposed to be regularly paid by financial institutions on financial accounts or the value of assets.[33] The discussions on the EU level and in different countries alike (in Poland among them) are a reason to tackle the issue of this tax, and the reasons for its introduction and its consequences.

[30] M. Zasilewska, *Umowy o unikaniu podwójnego opodatkowania. Komentarz*, Wolters Kluwer, 2011, p.193.
[31] http://e-prawnik.pl/biznes/prawo-podatkowe/podatek-dochodowy-od-osob-prawnych/artykuly/opodatkowanie-dywidend-i-innych-dochodow-z-tytulu-udzialu-w-zyskach-osob-prawnych-strona-4.html
[32] M. Zasilewska, *Umowy o unikaniu* ...., op.cit., p. 204.
[33] http://www.gf24.pl/index.php/wydarzenia/17-kraj/4344-podatek-niebankowy--propozycje-rozwiza.html

3.1. Theoretical possibilities with regard to taxation of financial institutions

In 1978, James Tobin, later a Nobel Prize winner, suggested imposing a tax on short-term currency speculations. The rate of this tax would be between 0.05 and 1%. All transactions basing on the exchange of one currency for another were to be subject to this tax. Its aim was to prevent currency speculations by making currency exchange more expensive.[34] The tax that he proposed was supposed to prevent currency speculations and the income from this tax was to be allotted to aid for Third World countries. Thanks to that, different countries could abolish duties and open their markets. According to his idea, it could be possible to maintain both free trade and control of supply of money by national central banks.[35]

Every tax is an intervention in the market process and disturbs the structure of placement of resources in the society. It changes also the condition of the market. This is not different in the case of the Tobin tax. Moreover, such a low tax would be unlikely to discourage currency speculations, especially because the profits derived from such speculations are very high. Although the Tobin tax seems low, it has to be noted, that the income tax, for example, in the beginning did not have a very high rate either. When it was first introduced in Great Britain in 1798, it had the rate of 10% for income higher than £200, an income lower than £60 was not subject to taxation, and an income between £60 and £200 was taxed with an increasing tax rate lower than 10%. The average income was, at the time, around £20. At the moment, in most countries the income tax rate amounts to several dozen per cent. It can be suspected that in some years after introducing the Tobin tax, its rate would also increase.[36]

Introducing the Tobin tax would lead to obtaining great financial means. A significant amount of research has been carried out in order to indicate the income that could be derived from the Tobin tax. It is a common belief that a lower tax would generate the greatest income as, considering the size of the market, it would not have a negative impact on its functioning. The tax rate of 0.05% would generate $50-100 billion a year.[37]

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[34]H. Patomaki , *Democratising , Globalisation the leverage of Tobin Tax*, Zed Books Ltd., USA 2001, available at:http://books.google.pl/books?id=iDuIl0wSzKMC&printsec=frontcover&hl=pl#v=onepage&q&f=false

[35]G.Gandolfo, *International Finance and Open Economy Macroeconomics,* Springer-Verlag, Germany 2002, available at http://books.google.pl/books?id=F9Xr1_MXjwkC&pg=PA416&dq=tobin+tax&hl=pl&sa=X&ei=EgIGT76tHYKS8gPcrJjPAQ&ved=0CGEQ6AEwCA#v=onepage&q=tobin%20tax&f=false

[36]J.Michie, J. Grieve Smith, *Global instability: the political economy of world economic governance*, Taylor&Francaise-Library 2005, available at:http://books.google.pl/books?id=YxyuqCkzLJ8C&printsec=frontcover&hl=pl#v=onepage&q&f=false

[37] H. Siebert, *The world economy: a global analysis,*Taylor &Francais e- Library 2007, available at: http://books.google.pl/books?id=Gtnl2qWixtQC&pg=PA236&dq=tobin+tax&hl=pl&sa=X&ei=AwwGT_GaD8TD8QPizp3FAQ&ved=0CFQQ6AEwBjgU#v=onepage&q=tobin%20tax&f=false

The opponents of the Tobin tax also draw attention to the problem of tax evasion. However, given the low tax rate, it is believed that the will and tenacity for evading this tax will be very low. Political willingness to tax currency turnover and introduce the necessary legal safety measures is needed to ensure payment and legally sanction their evasion. Thanks to the electronic nature of the currency market, evasion of the Tobin tax would be difficult as each transaction can be meticulously traced.[38]

It is also very important that the current idea of the Tobin tax is not identical to the original proposals. The 70s solution was focused on a global taxation of currency transactions in order to stop currency speculations.[39]

The main intention of the tax was to move the control over the economy from the private banks back to the state and the government. The goal was to be accomplished by reducing the size of the currency market, using a tax that would make any currency speculations unprofitable. The Tobin tax has evolved from its original form for several reasons.[40]

Firstly, the currency market is now 70 times the size it was when Tobin presented his idea, while it also has become the most profitable market of the world.

Secondly, the now-suggested tax rate is much lower than the original Tobin's idea (1%), because the profit margin on currency transactions is much lower than when the idea of the tax was first created.[41]

In addition, a two-threshold tax on currency transactions is a widely accepted idea for a method to avoid future currency crises.[42]

The idea of a two-threshold tax is called a Spahn's variant of the Tobin tax. The second threshold is sometimes described as a tax overload and should effectively rule out profitability of devaluation actions.[43]

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[38] *Issues in global governance: papers written for the Commission on Global Governance*, available at:http://books.google.pl/books?id=QtPLgN_hsIsC&pg=PA426&dq=tobin+tax+pros+and+cons&hl=pl&sa=X&ei=Xg0GTOLEMzb8QPXldHEBA&ved=0CD4Q6AEwAw#v=onepage&q=tobin%20tax%20pros%20and%20cons&f=false

[39] A.C. Michalos, *Good taxes: the case for taxing foreign currency exchange and otherfinancial transactions*, Science for Peace, 1997, available at:http://books.google.pl/books?id=ah7Y49IhTNEC&pg=PA2&dq=tobin+tax+advantages&hl=pl&sa=X&ei=uJIHT--NBs3x8QPig_yzAQ&ved=0CDoQ6AEwAg#v=onepage&q=tobin%20tax%20advantages&f=false

[40] H. Siebert, *The world economy: a global analysis,* Taylor & Francais e- Library 2007, available at: http://books.google.pl/books?id=Gtnl2qWixtQC&pg=PA236&dq=tobin+tax&hl=pl&sa=X&ei=AwwGT_GaD8TD8QPizp3FAQ&ved=0CFQQ6AEwBjgU#v=onepage&q=tobin%20tax&f=false, p.236.

[41] J. Norberg, *In Defence of Global Capitalism,* Academic Foundation, India 2005, available at:http://books.google.pl/books?id=VpnmwhBneTcC&pg=PA247&dq=tobin+tax&hl=pl&sa=X&ei=wpkHT6exKYeZ8gOgzuirAQ&ved=0CEoQ6AEwBQ#v=onepage&q=tobin%20tax&f=false

[42] H. Siebert, *The world…, op.cit*., p.236.

[43] H. Patomaki , *Democratising , Globalisation the leverage of Tobin Tax*, Zed Books Ltd., USA 2001, available

3.2. International proposals on bank taxation – the proposal by the European Commission

On 28 September 2011, the European Commission published a proposal of a common EU system of financial transactions taxation (hereinafter: FTT).[44] The Commission treats the proposal as a complement to Council Directive 2008/7/EC of 12 February 2008[45] concerning indirect taxes on the raising of capital.[46] The Commission's proposal suggests that the tax should be in force in all EU member states and should be imposed on all transactions between financial institutions if at least one of the parties is in the EU. Turnover of securities and obligations is to be taxed with the rate of 0,1% and turnover of derivatives with the rate of a 0,01%.[47] As a result, 85% of the financial transactions between financial institutions would be subject to taxation.[48] According to the Commission's proposal, EU citizens and enterprises will be free from taxation. Bank loans, insurance agreements, mortgages and other financial activities performed by individuals or small enterprises, are also not subject to taxation.[49]

For the Commission's proposal to come into effect in the EU, it needs acceptance from the Council of the European Union. After a discussion regarding the Commission's proposal between all member states, the Commission has put it forward during the G20 summit in Cannes in November 2011. They have, however, failed to achieve an agreement regarding the taxation of financial transitions. The president of France has expressed his hopes that such a tax would be imposed in the EU member states the following year. He stated that 'France would fight for it', although there were differences in G20's countries opinions.[50] An agreement regarding co-operation in the area of fighting dodging taxes in international transactions was signed. According to the supporters of the agreement, it can bring tens of billions of dollars to the government. The signatories – including the USA, China, Russia,

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at:http://books.google.pl/books?id=iDuIl0wSzKMC&printsec=frontcover&hl=pl#v=onepage&q&f=false, p.183.

[44] Proposal for a Council Directive, 2011/0261 (CNS) of 28 September 2011, available at: http://ec.europa.eu/taxation_customs/resources/documents/taxation/other_taxes/financial_sector/com%282011%29594_en.pdf

[45] Council Directive, 2008/7/EC of 12 February 2008 OJ L 46 of 21 February 2008.

[46] http://ec.europa.eu/taxation_customs/taxation/other_taxes/financial_sector/index_en.html

[47] The Commission Proposal for a Council Directive on a common system of FTT COM(2011) 594 of 28 September 2011, available at: http://ec.europa.eu/taxation_customs/resources/documents/taxation/other_taxes/financial_sector/ftt_proposal_en.pdf

[48] http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1085&format=HTML&aged=0&language=PL&guiLanguage=en

[49] http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/640&format=HTML&aged=0&language=PL&guiLanguage=en

[50] http://biznes.gazetaprawna.pl/artykuly/563004,szczyt_g20_jest_porozumienie_dotyczace_placenia_podatkow_w_transakcjach_miedzynarodowych.html

Germany, Japan and India have, in this agreement, covenanted to share information and co-operate in the area of auditing.[51]

The proposal of a common EU system of FTT put forward by the Commission at the G20 summit remains in accordance with earlier EU legislation. It also corresponds with the policy of balancing the expenses on rescuing the bank system of many EU member states.

News services reporting on the Commission's proposal often fail to mention to the public that individuals and enterprises will not be subject to this regulation. The costs may however be offloaded on the clients so the new tax can burden the recipients. The intention is to burden banks with the costs of fighting the crisis. This is because they have used a great amount of public aid.[52]

As it was mentioned before, the Commission's proposal is a result of decisions made by the EU earlier. The idea of taxation of the financial sector on EU level is being analyzed in the Commission for a long time in the context of preparation of the concept of multiannual financial framework. The Commission has published a proposal for imposing a tax on financial transactions as a source of new assets for the EU budget. The Commission's idea was to involve the financial sector in the efforts to revive the EU economy.[53] Starting in 2009, the Commission has consulted on the topic of the taxation their partners from the G20 group. The Commission treats its proposal in the area of taxation of financial transactions as a continuation (supplement) to the Council Directive 2008/7/EC of 12th February 2008 concerning indirect taxes on the raising of capital.[54]

[51]http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1085&format=HTML&aged=0&language=PL&guiLanguage=en

[52]*Financial Transaction Tax: Making the financial sector pay its fair share, European Commission - press release*, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1085&format=HTML&aged=1&language=EN&guiLanguage=en

[53] Proposal for a Council Directive, 2011/0261 (CNS) of 28 September 2011, available at: http://ec.europa.eu/taxation_customs/resources/documents/taxation/other_taxes/financial_sector/com%282011%29594_en.pdf on a common system of financial transaction tax and amending Directive 2008/7/EC

[54] Taxation papers – *Innovating financing at a global level*, European Commission Working Paper, 2010 available at: http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/economic_analysis/tax_papers/taxation_paper_23_en.pdf

3.3. Financial Stability Contribution – another possibility of taxation of financial institutions

It is important to adjust the special taxation of the financial institutions in the form of a Financial Stability Contribution[55] (hereinafter: FSC) in order to achieve the best overall effect and results of this tax. Therefore, in order to get to an ideal tax, many factors are to be taken into account. In this section, the recommendation of a design of an optimal FSC is to be given and the reasons are to be explained.

First of all, there are issues regarding the taxpayer. The taxpayer shall be defined according to the transactions this company conducts as its business purpose. It is important to include every transaction that is relevant to the system and that increases the system risks. Apart from the core banking deposit and lending system, every transaction (especially the transactions on the financial markets) actually increases the system risks and so the range of the transactions relevant to the system and the determination of the taxpayer shall be relatively broad. Therefore it is important to include not only financial institutions like banks to the category of taxpayers, but also insurance companies and investment service companies. In other words, every company that operates on a stock exchange or participates in potentially risky transactions with other legal entities should be subject to the FSC. This would effectively mean determination of a taxpayer according to the scope of his activities.[56]

Another possibility is to create more favorable conditions for the financial institutions solely taking deposits and granting loans. Consequently, all other activities will be outsourced to independent subsidiaries, parent companies or companies of the same holding group. However, only the financial institutions that are engaging exclusively in the core banking deposits will be subject to the rules of deposit securitization. Thus, the special economic role of financial institution splits and subsequently the system relevance of financial institutions engaging in risky transactions sinks, which contributes to the system risk sinking. In other words, the economically important banking business (managing the savings of the population) shall be limited to the financial institutions engaging in the core banking activities. On the one hand, these financial institutions are subject to the deposit securitization. On the other hand, the risk of their failure considerably decreases with the risky transactions outsourced. This would justify a personal tax exemption for financial institutions engaging only in the core banking business and not creating high system risks. Moreover, the personal tax exemption would lead to more favorable conditions for the investors, because the financial institution would not be subject to the tax expense. Financial institutions engaging in

[55] FSC - tax on financial institutions' balance sheets (most probably on their liabilities or possibly on their assets) whose proceeds would most likely be used to create an insurance fund to bail them out in any future crisis rather than making taxpayers pay for bailouts.
[56] IMF „*A fair and substantial contribution by the financial sector*" Final report for the G-20, June 2010, p. 5, 25 et seq., 50.

risky transactions shall not be offered any bailouts, so that the individual investors can have their deposits secured if they opt for the low risk investment, but need to be prepared for an eventual loss in case they decide to invest in risky financial transactions.[57]

Secondly, the financial institutions shall not be given a legal right to claim future bailouts or future state interventions in the market. As already discussed above, this would act as an incentive for risk-taking because the financial institutions will have their existence secured. The financial institutions, just like any player in the economy, shall be responsible for their entrepreneurial decisions. It is not the general treasury (and consequently, all of the taxpayers) who should bear the risk of false decisions of the financial institutions.

Thirdly, the tax revenue should be a part of the general revenue of the state budget. Since there shall be no legal claim, it is really not important if the funds paid by the financial institutions are attributed to a special fund or not. In this case, the traditional legal understanding of a tax should prevail.

There are significant reasons for including the tax income to the general revenue. The fund should not invest the money contributed in order to avoid the risk that these funds are invested in junk bonds or loans that cannot be repaid. So it is clear that the funds shall remain in the security fund. However, in this case, they would be constantly devalued by inflation because they are not invested, so there is no interest rate that may compensate for the inflation rate.

Furthermore, these funds could be used by state authorities as a part of the government spending. The government spending that is not following the ideal common interest can be seen as investment because the state gets future remuneration in the form of tax revenue. But the question of title empowering the state to dispose of the money and manage these funds is not clearly solved. Thus, the stability fund is more of a psychological phenomenon than a useful solution. Risky transactions shall also be taxed additionally. It was proposed in this thesis that only financial institutions engaging in risky transactions are to be subject to the FSC. Therefore, the risks are already covered by the general taxation. On the one hand, the additional taxation should concentrate on off-balance sheet transactions and other transactions that are not covered by the general FSC. On the other hand, extremely risky financial transactions even if they are a part of the balance sheet total (junk bonds, bad debts) are to be taxed additionally. However, this is justified by the tradeoff between risk and revenue, so that highly risky transactions will offer high profits.[58] A tax rate extensive enough shall discourage the financial institutions from these particularly risky transactions because the revenue shall sink considerably. Also this is not a FTT because it is only levied on financial institutions, not on all natural and legal persons. It is important that the special taxes are legally and economically borne by the financial institutions, not by individual customers or

[57] KPMG, *Proposed bank levies - comparison of certain jurisdictions*, Edition VIII, November 2011, p. 4.

[58] Campbell/Viceira *The Term Structure of the Risk-Return Trade-Off Financial Analysts Journal Volume 61 Issue 1* (2005) p.34-44.

investors. This can be secured by legally stipulating the maximum bank charges for customers as well as the minimum interest rate for deposits and the maximum interest rate for credits in the banking laws. By this treatment, the financial institutions lose the possibility to avoid paying the taxes based on the system risks they are causing from their own profit. Strictly, it is the financial institutions that cause the system risks in the economy of a state, not individual investors. Therefore it is a “fair and substantial contribution” of the financial sector that is sought, not of the individual investor.[59] Surprisingly, these rules do not need to be introduced globally and are not so easy to avoid. The competition on the global market shall be maintained, so in case the domestic financial institutions do not offer favorable conditions, they risk a loss of their customers who may decide to invest abroad. In case of interest rate agreements, the financial institutions risk extensive fines and other penalties based on the antitrust law.[60]

Also here the problem of double taxation can be an issue. Regarding the Model Convention of the Organisation for Economic Co-operation and Development (OECD) , the same can be said for the FSC. The FSC is the tax that is probably easiest to subsume under the OECD MC. As it is a contribution that is levied on the balance sheet total less certain positions (asset- or liability side), it can be compared with a kind of corporate income tax. It is definitely a tax on the income or assets of a financial institution which is covered by the OECD MC.

3.4. Summary

As we can see the topic of taxation of financial institutions is a matter of high-importance. Financial institutions are part of the financial sector and the transactions in which they take part generate significant amounts of money. The importance of this matter is indicated by many proposals for taxation of financial institutions that were implemented in many European Union (EU) countries. The European Commission has taken actions aiming at introducing taxation of financial transactions. The EU proposal refers to the Tobin tax – an idea that has arisen at the end of the 70s.

The topic of taxation of financial institutions is very controversial, like every attempt at introducing a new tax. The opponents of the financial transactions tax claim that the direct result of its introduction would be a very easy escape of the most of easy to tax capitals and transactions to the outside of the EU. Even the EU Commission presents this initiative as a start to a global reform which will be continued by others. It will be difficult to arouse international enthusiasm in this matter.

[59] This is being addressed in the IMF, *A fair and substantial contribution by the financial sector*, Final report for the G-20,June 2010.
[60] Hofko Das *Stabilitätsabgabegesetz Verfassungsrechliche Grenzen der osterreichischen Bankensteuer Zeitschrift fur Verwaltung* 2011/1508, pg. 938.

The European Commission assumes that introducing this tax (Financial Transaction Tax-FTT) would in a longer term lower the GDP by 0.5% - to 1.8%. For an initiative supposed to be a new budget income source in the times of expanding crisis, introducing the financial transactions tax may be a means capable of having a result opposite to that intended.

The European Commission Communication on supporting developing countries coping with the crisis of 8 April 2009 is also worth noting. It relates to the commitment taken on by some of the EU member states to grant aid to EU banks, amounting to €3 trillion. According to this commitment, €2,3 trillion would be the amount of financial guarantees. €300 billion would be used for recapitalization of banks, and €400 billion would be allotted to reorganizational programs.

It should be mentioned that Poland, along with Slovakia, Romania, Lithuania, Estonia and Bulgaria, did not undertake to give any help to the banks of their countries, believing that many foreign banks are active there, and the local ones are in good financial condition. Only until the end of May of 2009, 50 decisions to assist banks were taken and 23 repair programs were introduced in the EU.

The costs of aid to banks have no connection with the expected benefits from introducing the taxation. The estimated income from the financial transactions tax is about €60 billion a year. It would, therefore, take 50 years for the income from the tax to cover the cost of the aid to the banks.

In the context of FTT, an interesting solution is preference given to the worldwide proposal for an FTT over the EU proposal. Firstly, the problem of the susceptibility to other instruments and other territories is solved. Secondly, in the FTT treaty there was stated that low rates will ensure the market function. Moreover, a broad tax base as proposed including potential substitutes would reduce also the distortions of an FTT. Fourthly, on a less common but equally important consideration is the moral aspect of a global FTT, particularly whether the proceeds of such a tax could be used to promote greater distribution of wealth and economic equality throughout the world.

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