

POLAND – Full Answers

1. Provision of banking services by a foreign bank, without a local licence, on cross border basis

1.1 To what extent can a foreign bank (which is not locally authorised) provide the services listed in 1.3 (on a cross border basis) to local retail customers, commercial clients and wholesale counterparties?

A third country foreign bank (the “FB”) (contrary to credit institutions and non-EU EAA banks) may not provide banking services on a cross-border basis under Polish law. The FB may operate after establishing a branch or a representative office. For the sake of clarity, there are certain provisions under Polish law which may be interpreted in a way that allows the FB to promote its services on a cross-border basis. However, such promotion has to be objectively considered as “intermittent”, and within Polish territory: (i) no negotiations can be carried out, (ii) no contracts can be executed, (iii) no orders or instructions related to the services may be accepted, (iv) and no advisory services may be provided. Notwithstanding these general rules, regulatory risk still cannot be excluded, therefore such activity should be considered as rather incidental.

1.2 Where local authorisation or licensing is required, are there any useful exemptions?

There are no exceptions from the rules described above under Polish law.

1.3 To what extent can a foreign bank (which is not locally authorised) promote the services below locally? Where there are restrictions on promotion, are there any useful exemptions?

- **Deposit taking and payment services/provision of bank accounts;**
- **Lending (either secured, e.g. on land/real estate, or unsecured) and other forms of finance such as trade finance;**
- **Originating/purchasing/selling debt participations (secured or unsecured), such as syndicated loans or securitised debt obligations.**

Subject to the respective comments above, the FB may not locally promote services described above prior to obtaining a licence from the Polish Financial Supervision Authority (the “PFSA”) regarding establishing a branch (fully operational capability, including marketing and promotional services) or a representative office (operational capability limited to marketing and promotional services). A licence for establishing such branch or representative office specifies all operational (including marketing and promotional) rules under

the scope of its licence granted in its home country, including any potential restrictions imposed by the PFSA.

1.4 Can a foreign bank establish a local representative office to promote such services where these are to be conducted by the bank on a cross border basis (and not by the local office)?

No, please see the answers to other parts of question no. 1 above.

2. Provision of investment services from home country without a local license

2.1 To what extent can a foreign bank or investment firm (which is not locally authorised) provide the services below to local retail customers, commercial clients and wholesale counterparties? Are there any useful exemptions?

Subject to the comments regarding the FB promotion in answer to question no. 1 above, a third country investment firm ("IF") may not provide investment services (including activities described below) on a cross-border basis under Polish law. An IF incorporated outside EU but within an OECD or WTO member state may provide its services in Poland through a branch or a representative office. A branch of the IF may be established under licence from the PFSA, which may be granted after consultation with the home country supervisor under the relevant arrangement on exchange of information for supervisory purposes. No licence can be granted if: (i) information for supervisory purposes is limited or may not be collected by the PFSA, and/or (ii) capital requirements provided by Polish law are not met by the branch and/or by the parent in the home country. A representative office of the IF may be established under the relevant provisions of the act on trading in financial instruments and in accordance with the relevant provisions under the Polish act on freedom of business activity in Poland. The relevant notification has to be submitted to the PFSA. There are no exceptions from the rules described above under Polish law.

2.2 To what extent can a foreign bank or investment firm (which is not locally authorised) promote the services below locally? Are there any useful exemptions?

- **Dealing in/buying/selling investments (as principal or as agent)**
- **Investment advice**
- **Discretionary management**

No, please see the answers to [previous] question... above.

3. Local rules

3.1 When a foreign bank/investment firm enters into an agreement with a local customer, are there any restrictions on the contract being governed by foreign law and the courts of the foreign country having exclusive jurisdiction (i.e. is the contract required to be governed by local law and/or must the local courts have jurisdiction)?

In accordance with Polish law and subject to international arrangements with third countries, the parties may choose another law to govern their contractual relations, and such choice has to be respected, although a Polish court may not grant recognition to a foreign jurisdiction due to: (i) the clause on preserving public order, which generally means compliance with most elementary provisions and concepts of Polish law (e.g. observance of constitutional rights of Polish citizens) and (ii) incompliance with EU and Polish

legislation on consumer protection (provisions excluding Polish jurisdiction are generally not allowed when dealing with consumers, and consumers may take action before the court competent for their domicile). However, scenarios (i) and (ii) above should be considered as very unlikely and applicable to dealing with individuals only.

4. Regulatory appetite for foreign banks

4.1 What is the attitude of your national regulatory authority to cross border business and the presence of foreign banks?

While the FB may not perform any cross-border activity in Poland (please see the answer to question no. 1 above), the presence of the FB in Poland is not restricted (as of 31 December 2013, out of 59 banks (including branches of 28 credit institutions) registered in Poland, 43 had 100% foreign capital). However, the PFSA tends to impose additional compliance requirements on other foreign entities (e.g. credit institutions) operating in Poland (e.g. compliance with guidelines on consumer protection guidelines or regulatory arbitrage).

4.2 Is it generally more common for foreign banks to operate locally through a branch or a subsidiary, or both (and does this depend on the activities the bank carries out)?

No branch of the FB is currently registered in Poland. Current market practice shows that many FBs which are present in Poland perform their activities through representative offices or subsidiaries. Please note that the PFSA is known to actively encourage newcomers to operate in the local market through subsidiaries under its supervision.

4.3 Is it mandatory, in any situation, to operate through a branch or subsidiary?

An FB may operate through a representative office. However, a representative office of an FB performing any activity exceeding marketing and promotion services will be expected to apply for a licence from the PFSA, and to establish a branch or a subsidiary under the PFSA's supervision.

4.4 What are the benefits/disadvantages of operating through a branch or subsidiary?

Establishing a subsidiary is time-consuming and may take up to a year. On the other hand, establishing a branch should not take more than several months, although the operational capability of a branch is limited by the scope of the FB's domestic licence and (depending on the scale of the intended activity) may be limited by additional restrictions and/or requirements imposed by the PFSA. In both scenarios a licence from the PFSA has to be obtained.

5. Establishing a branch

5.1 Does a branch have rights/recognition to trade in other countries

A branch of an FB has the same rights/recognition to trade in other countries as the FB, as it is not a separate legal entity distinct from the FB, therefore the right to perform respective activities in other countries is limited to the extent of the FB's licence (e.g. relevant licence/approval have to be obtained to perform activities within territory of the other EU member state). The same applies to a branch of an IF.

5.2 How is a branch regulated?

Subject to certain exceptions (e.g. approval of the Minister of Finance for establishing such branch or supervision of such branch on the basis of a specific arrangement between the PFSA and the relevant regulator from the home country), Polish law on banking and investment services applies equally to

domestic banks and branches of an FB (in respect to banking activity), as is the case for domestic investment firms and branches of an IF (in respect to investment activity).

6. Establishing a subsidiary

Pursuant to the Polish banking law, a subsidiary of an FB may be established in the form of a joint-stock company under a licence from the PFSA. The PFSA's approval specifying licensed banking activities can be granted to the subsidiary after certain documents and information have been examined by and/or agreed with the PFSA (e.g. details of the executives and funds structure etc.). The subsidiary has to meet and comply with certain requirements (e.g. amount and quality of the funding capital), and observe the relevant provisions of Polish law (e.g. laws related to consumer protection, corporate governance, and regulatory reporting). A similar licence mechanism and principles are provided for establishing a subsidiary of an IF.

7. Supervision

7.1 Which national regulatory authority authorises, regulates and supervises foreign banks/investment firms/subsidiaries in your jurisdiction?

The Polish Financial Supervision Authority (in Polish: "Komisja Nadzoru Finansowego").

7.2 Is there any split in supervision between the local regulator and the foreign/home regulator – e.g. in the case of locally authorised branch?

No. Subject to a specific arrangement between the PFSA and the home regulator, the PFSA holds exclusive supervision over a Polish branch or a representative office of an FB. In the case of an IF, the PFSA holds supervision pursuant to the relevant arrangements with the home country regulator.

8. Individuals

8.1 Where a local branch or subsidiary is established and (if applicable) authorised, are individuals personally regulated and/or liable to fines?

Individuals violating certain provisions of Polish banking law may be exposed to administrative, civil and/or criminal liability irrespective of whether they are employees (contractors) of a Polish bank/investment firm, a representative office of the FB/IF or a branch of the FB/IF.

8.2 Does this extend to individuals overseas/in the home country?

Yes. Polish law provides extraterritorial civil and criminal liability for violation of certain provisions of Polish banking law, although, as a matter of practice, recognition and enforcement of Polish judgements might be an issue, and it all depends on the relevant international arrangements.

8.3 Which officers and employees are subject to local vetting, and are the owners/controllers subject to local vetting?

In the case of an FB, the PFSA's approval is required for the appointment of a director of a branch and a director's deputy. In the case of an IF, at least two executives are required to have higher education, more than three years of relevant experience, and a good standing. The respective applications to the PFSA have to provide relevant information in respect of such individuals. No information regarding parent executives/owners/controllers needs to be disclosed in the application unless the PFSA requests it.

208732448

This report is for general purposes and guidance only and does not constitute legal or professional advice and should not be relied on or treated as a substitute for specific advice relevant to particular circumstances. For legal advice, please contact your main contact partner at the relevant CMS member firm. If you are not a client of a CMS member firm, or if you have general queries about Law-Now or RegZone, please send an email to: law-now.support@cmslegal.com so that your enquiry can be passed on to the right person(s).

All Law-Now and RegZone information relates to circumstances prevailing at the date of its original publication and may not have been updated to reflect subsequent developments.

CMS Legal Services EEIG (CMS EEIG), has its head office at: Barckhausstraße 12-16, 60325 Frankfurt, Germany. The contact email address for CMS EEIG is info@cmslegal.com, its Ust-ID is: DE 257 695 176 and it is registered on Handelsregister A in Frankfurt am Main with the registration number: HRA 44853. CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices.

CMS EEIG member firms are:

CMS Adonnino Ascoli & Cavasola Scamoni, Associazione Professionale (Italy); CMS Albiñana & Suárez de Lezo S. L. P. (Spain); CMS Bureau Francis Lefebvre S. E. L. A. F. A. (France); CMS Cameron McKenna LLP (UK); CMS China (China); CMS DeBacker SCRL / CVBA (Belgium); CMS Derks Star Busmann N. V. (The Netherlands); CMS von Erlach Poncet Ltd (Switzerland); CMS Hasche Sigle Partnerschaft von Rechtsanwälten und Steuerberatern mbB (Germany); CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH (Austria); CMS Russia and CMS Rui Pena, Arnaut & Associados RL (Portugal).

For more information about CMS including details of all of the locations in which CMS operates please visit: www.cmslegal.com.
© CMS Legal 2015. All rights reserved.