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Fintech 2020

A practical cross-border insight into fintech law

Fourth Edition

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Addison Bright Sloane
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Anderson Mōri & Tomotsune
Astana International Financial Centre
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Uría Menéndez – Proença de Carvalho
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Group Publisher
Rory Smith

Publisher
James Strode

Sub Editor
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Contributing Editors:
Rob Sumroy and Ben Kingsley
Slaughter and May

Expert Chapters

Q&A Chapters

Poland


Andrzej Foltyn


Maciej Zajda


Katarzyna Biarda

Domański Zakrzewski Palinka sp. k.

1 The Fintech Landscape

1.1 Please describe the types of fintech businesses that are active in your jurisdiction and the state of the development of the market. Are there any notable fintech innovation trends of the past year within particular sub-sectors (e.g. payments, asset management, peer-to-peer lending or investment, insurance and blockchain applications)?

2019 was another year of dynamic growth for the fintech industry in Poland. A significant increase in the number of start-ups and an expanded customer and service base of existing entities resulted from a number of different factors.

First of all, the amount of funds engaged in the venture capital market was many times greater than in previous years and for the first time in the history of Poland, it significantly exceeded PLN 1 billion. Undoubtedly, one of the biggest beneficiaries of the growth in both the number of transactions and the average ticket were fintechs. The number of venture capital funds, funds available through public entities, and the involvement of the largest foreign players guarantee that the market will be fueled by an appropriate amount of cash.

The second element which, in our opinion, is of significance for the development of the fintech industry is the great interest in the subject on the part of financial institutions, including banks in particular.

The Polish banking sector has for years boasted an openness to new technologies and has been a pioneer of innovative products and services on a global scale. Currently, we are observing a very large opening of most of the largest banking entities not only to internal innovations but, above all, to independent fintechs and people and ideas related to fintechs. The banks have dynamically operating units responsible for market research, acquisition of innovations and offering banking resources to verify the most promising undertakings. 2019 was a breakthrough year, mainly due to the first direct investments (equity) in leading fintech companies in the market. Undoubtedly, it is the banks targeting (mainly but not exclusively) payment services and personal finance management solutions and companies that give the fintech industry in Poland the leading edge. Furthermore, the banking sector is one of the most innovative Polish sectors investing considerable resources in modern technologies in areas such as biometrics, AI including *machine learning*, *Robotic Process Automation*, *cloud computing* or de-centralised databases based on DLT/*blockchain technology*.

Another dynamically growing fintech area is all kinds of services related to raising capital – in 2019, a special focus was on share crowdfunding. Leading representatives in this sector – crowdfunding platforms – conducted a dialogue with the Polish Financial Supervision Authority ("PFSA") concerning the legal basis and admissibility of this type of activity. It seems that the position they reached will allow for even more efficient implementation of business assumptions and continuation of successful activities. In this area, the intensive development of undertakings in the area of loans and borrowings, including crowdlending, should also be indicated.

As every year, significant undertakings could be observed in the areas of currency exchange, brokerage services and insurtech. This time, there were relatively few novelties in the areas that were leading the way in previous years, i.e. blockchain, cyber-security and cryptography, but this seems to be only a temporary phenomenon, and solutions based on cloud computing and Distributed Ledger Technology promise to be the main driving forces for 2020 in Poland.

Generally, after years abounding in very fundamental changes in the legal system governing the activity of fintech (including Payment Services Directive ("PSD2"), General Data Protection Regulation ("GDPR"), AML4 Directive, AML5 Directive and MiFID2 Directive), last year gave some respite to existing companies. It helped to better use the Polish potential, i.e. qualified staff, still relatively low salaries, a relatively large market and openness to innovations in financial services.

Unfortunately, the consequences of the COVID-19 pandemic, unknown today, make us believe that the year 2020, despite excellent prospects, may witness a very significant slowdown in the financial services sector. However, we should suspect that it will suffer less compared to other areas of the economy.

1.2 Are there any types of fintech business that are at present prohibited or restricted in your jurisdiction (for example cryptocurrency-based businesses)?

Generally, no fintech business is prohibited in Poland. However, it is important to bear in mind that the National Bank of Poland

("NBP") and the PFSA in July 2017 voiced critical opinions concerning virtual currencies and risks they involve. In its statement, NBP referred to the European Central Bank and the European Banking Authority ("EBA"), which spoke with concern or cautiousness as to virtual "currencies", identifying a number of threats in their operation and development. NBP and PFSA also pointed out that financial institutions should be very careful when undertaking and conducting cooperation with virtual currency traders, in particular, given the risk that they may be used for money laundering and terrorism financing. Furthermore, the PFSA, in its statement on 6 June 2018, noted that: "In the Polish legal system there are no regulations that would prohibit the operation of cryptocurrency exchanges or points of exchange, which means that it is not prohibited to operate a cryptocurrency exchange or point of exchange in Poland, and therefore, it is legal." Nevertheless, both the PFSA and the NBP discouraged investors and warned about risks of investing in virtual currencies. Entities organising such exchanges have been put on the list of PFSA warnings.

2 Funding For Fintech

2.1 Broadly, what types of funding are available for new and growing businesses in your jurisdiction (covering both equity and debt)?

Fintech in Poland can benefit from various types of financing, both equity and debt. There are no restrictions in this respect. The choice of the appropriate form of funding depends, of course, on the type of activity conducted by fintech, and on the sector in which it intends to operate. The possible forms of funding include in particular:

1. funding with private equity and venture capital funds;
2. European Union subsidies;
3. support by various acceleration programmes (public and private);
4. loans from banks, lending companies and private investors (including business angels);
5. government support programmes; and
6. crowdfunding/crowdlending.

Fintech businesses can participate in various acceleration programmes, incubators and other fintech subsidy programmes organised, e.g. by the National Center for Research and Development, the Polish Development Fund in cooperation with Bank Gospodarstwa Krajowego or the State Agency for Enterprise Development, which operate four accelerators specialising in the fintech industry. Their partners, i.e. technology recipients, include large financial institutions such as banks and insurance companies – both from Poland and abroad. The aim of this programme is to enable a start-up to establish direct cooperation with a large corporation and test ideas in the infrastructure of a given recipient. Polish and foreign venture capital funds are becoming increasingly important equity providers. In 2019, their investments exceeded PLN 1 billion (over EUR 250 million), recording huge growth dynamics compared to the previous year.

It is worth adding that from a tax perspective, capital funding will be subject to civil transactions tax ("PCC") at the rate of 0.5% of the value of the company's share capital increase. In the case of debt financing, the interest paid will be tax deductible, taking into account regulations on thin capitalisation. Moreover, interest paid to foreign tax residents may be subject to withholding tax in Poland.

2.2 Are there any special incentive schemes for investment in tech/fintech businesses, or in small/medium-sized businesses more generally, in your jurisdiction, e.g. tax incentive schemes for enterprise investment or venture capital investment?

Some Fintech businesses in Poland may take advantage of certain tax facilities, in particular:

1. Polish legislation provides for mechanisms to support research and development ("R&D") activities, which can also be used by fintech businesses. The use of these tools allows one, first of all, to deduct expenses incurred for this type of activity from the tax base twice and, moreover, to tax income obtained from certain intellectual property rights resulting from R&D work at a lower 5% tax rate;
2. the Polish CIT Act provides for a tax relief for alternative investment companies ("ASI"), i.e. companies which collect funds from a number of investors in order to invest them in the interest of those investors, in accordance with a specific investment policy involving exemption of ASI from taxation on income obtained from the sale of shares (stocks) provided that they hold at least 10% of shares in the capital of a given company for at least two years; and
3. as of 1 January 2019, a lower CIT rate of 9% applies to small and new enterprises subject to meeting statutory requirements (e.g. taxpayers' revenues cannot exceed the equivalent of EUR 120,000 in a tax year). This solution is also available to fintech businesses.

2.3 In brief, what conditions need to be satisfied for a business to IPO in your jurisdiction?

IPO is regulated, as in the entire European Union, by Regulation 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market ("the Regulation").

In addition to the provisions resulting from the Regulation, public offerings conducted in Poland fall under the ambit of the Act on Public Offering of 29 July 2005 (the "Act on Public Offering"). In November 2019, new provisions of the Act on Public Offering concerning additional reporting requirements (the so-called "gold plating") for public offerings came into effect, which, in the light of the Regulation, do not require the preparation of information documents. According to Polish law:

1. a public offering of securities requires preparing and making available to the public a document containing basic information about the offering, including financial information and information on the purpose, the underlying risk elements and about the issuer if, as a result of the offering, the issuer's or the offeror's proceeds range from EUR 100,000 to EUR 1 million;
2. a public offering of securities requires a memorandum (which is governed by article 19 of the Regulation) to be prepared and made available to the public if, as a result of the offering, the issuer's or the offeror's proceeds range from EUR 1 million to EUR 2.5 million; and
3. a public offering of securities directed to less than 150 natural or legal persons (other than qualified investors) requires an information memorandum to be prepared, approved by the PFSA and made available to the public (the memorandum is governed by article 19 of the

Regulation accordingly) only if the number of persons to whom it is directed, together with the number of persons to whom public offerings of securities of the same type were directed in the previous 12 months, exceeds 149.

Securities are admitted to trading on a regulated market by way of an administrative decision issued by the PFSA, referring to the consent to conduct a public offering, and subsequently by way of consent of the entity operating the regulated market, i.e. the Warsaw Stock Exchange (the "WSE") to start the listings. Proceedings regarding approval of the information document are conducted via an obligatory intermediary – an investment firm – and include the obligation to execute an agreement with the National Depository of Securities, which registers deposited securities.

Apart from the main market, the WSE also operates an alternative trading system, NewConnect, which is aimed at smaller entities with significant growth potential, which seek equity between several hundred thousand and several million PLN and often conduct activities in innovative sectors (based on intangible assets, including fintech). Admitting to trading on the NewConnect market entails fewer formalities and lower costs, and issuers are not bound by some of the provisions of the MAR Regulation.

It is worth noting that in July 2019, the NewConnect market received the PFSA permit and was awarded the status of a SME Growth Market (within the meaning of MiFID2), and thus become one of the few markets that enjoy this status, among such markets as the London Stock Exchange AIM, AIM Italia, Zagreb Stock Exchange and Nex Exchange.

2.4 Have there been any notable exits (sale of business or IPO) by the founders of fintech businesses in your jurisdiction?

At the end of 2019, Centrum Rozliczeń Elektronicznych Polskie ePłatności S.A. ("PeP"), which is the fastest growing and most active entity in the sector of non-cash payments on the Polish market, finalised the acquisition of all shares in BillBird S.A., a company providing services as National Payment Institution ("NPI") since 2012. Apart from BillBird, PeP has so far also acquired NeoTu, PayUp, PayLane and plans to acquire TopCard. There are plans for PeP to be taken over by Rementi Investments, a subsidiary of the Danish Nets group. The transaction value is estimated at EUR 405 million.

It is also worthwhile to mention DataWalk S.A., which debuted on the Warsaw Stock Exchange in February 2019 with an IPO worth PLN 10.07 million. DataWalk S.A. is a Polish high-tech company developing the DataWalk analytical platform based on its own technology, which allows the combination of large volumes of data in dispersed sets. The DataWalk platform is used in the financial and insurance sector to detect fraud, prevent money laundering or analyse and monitor business processes.

3 Fintech Regulation

3.1 Please briefly describe the regulatory framework(s) for fintech businesses operating in your jurisdiction, and the type of fintech activities that are regulated.

The variety and innovativeness of fintech solutions means that each solution requires its own regulatory analysis. In general, the better part of innovative solutions in Poland is introduced by banks and payment institutions.

In Poland, the laws most often analysed in the fintech context include the **Act on Payment Services of 19 August 2011**, which after the amendment of 10 May 2018, implemented Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market ("PSD2"). Said act is the fundamental legal act for all fintech solutions in the area of payments, which provides for the following forms of business activities:

1. a National Payment Institution ("NPI") is an entity which provides payment services (accepting cash deposits and withdrawing cash from a payment account, performing payment transactions, providing electronic money transfer services, issuing payment instruments, etc.) and requires a long and formalised process for obtaining PFSA permits;
2. a Small Payment Institution ("SPI") is an entity, which provides similar services to NPI, but has a less formalised process for entry in the register, which lasts from three to six months. An entrepreneur can conduct its business activity as a SPI only in the Republic of Poland. Moreover, the total average amount of payment transactions from the last 12 months executed by a SPI cannot exceed EUR 1.5 million per month. SPIs are a simplified alternative to a NPI, which is very often used by entities from the fintech sector;
3. a Payment Services Bureau ("PSB") is an entity which requires entry in the register of the PSB and whose payment services activity consists solely in the provision of a money transfer service. PSB activities are regulated and can only be performed in Poland. The average total amount of payment transactions from the last 12 months carried out by the PSB cannot exceed EUR 500,000 per month; and
4. an electronic money institution is an entity whose activity is based on issuing electronic money. To operate as an electronic money institution, a PFSA authorisation is required. In April 2019, the Polish-British fintech Billon received the first PFSA permit in Poland to conduct business as an electronic money institution. Billon issues electronic money based on blockchain technology.

PSD2 extended the catalogue of payment services to include an account information service ("AIS") and a payment initiation service ("PIS"). According to Polish regulations, the provision of payment initiation services requires the PFSA's authorisation to operate as a NPI, while the provision of only the account information service requires an entry in the relevant register kept by the PFSA. Recently, more and more fintech businesses have decided to obtain an entry in the Polish register of providers of account information services.

Other frequently analysed regulations in the fintech context are:

(i) the Act on Consumer Credit of 12 May 2011, which regulates extending consumer loans or facilities, and intermediation in such activities;
(ii) the Act on Consumer Rights of 30 May 2014, which contains a special chapter devoted to financial services provided remotely;
(iii) the Act on Counteracting Money Laundering and Terrorist Financing of 1 March 2018 ("AML Act"). This act applies mainly to various types of financial institutions or participants in financial transactions, but sometimes it also applies to fintech providers; and
(iv) the Act on Trading in Financial Instruments of 29 July 2005, which governs the principles, procedures, and conditions for undertaking and conducting operations in the scope of trading in financial instruments, the rights and obligations of entities participating in the trading, and the related supervision.

It is also essential to comply with statements taken by regulators, such as the PFSA, which can have a major practical impact on any fintech solution.

3.2 Is there any regulation in your jurisdiction specifically directed at cryptocurrencies or cryptoassets?

Not presently. Cryptocurrencies or cryptoassets are not specifically regulated under Polish law. There is no general definition of cryptocurrencies/cryptoassets under Polish law. The only regulation in Polish law that addresses the concept of cryptocurrencies is the Act on Counteracting Money Laundering and Terrorist Financing of 1 March 2018 ("AML Act"). The AML Act specifically defines "virtual currency" which is: "*a digital representation of value, which is not a legal tender issued by central banks, an international unit of account, electronic money, financial instrument, promissory note or cheque and is exchangeable in commercial transactions for legal tender and accepted as a medium of exchange, and also may be electronically stored or transferred or may be the subject-matter of electronic trading.*"

The latest changes concerning cryptocurrencies resulting from the AML Act include:

1. a registration requirement for entities providing currency exchange between virtual and fiduciary currencies and providers of virtual currency accounts. The register is kept by the Minister of Finance;
2. a penalty of **PLN 100,000** imposed on an entity conducting virtual currency activity for failing to obtain an entry in the register of virtual currency activity;
3. the register of virtual currencies includes:
   (i) a registration number and date;
   (ii) a first name and surname or business name;
   (iii) a number in the business register of the National Court Register if a number has been assigned, and a tax identification number ("NIP");
   (iv) an indication of the services provided;
   (v) information on suspension of operations; and
   (vi) information on cessation of virtual currency activity;
4. a no criminal record requirement for natural persons trading in virtual currencies;
5. a competence requirement for natural persons trading in virtual currencies. The competence requirement is met if:
   (i) training or a course covering legal or practical issues related to virtual currency activity is completed; and
   (ii) conducting virtual currency activity for a period of at least one year,
   is confirmed by appropriate documents; and
6. a requirement for entities trading in virtual currencies **to apply financial security measures** also for occasional transactions worth the equivalent of EUR 1,000 or more carried out using virtual currency.

New regulations governing cryptocurrency trading are also likely to be introduced in 2020.

In December 2019, the PFSA announced that it would set out its position on payment tokens and that it would also deal with security and utility tokens in subsequent months. The PFSA wants to classify tokens and to assign to them different definitions to be written into Polish law. The new regulations are to be flexible so that they can be adapted to new instruments emerging on the market. In addition to the classification, the PFSA is to decide how the trading of cryptocurrencies should work. The PFSA is to consider organising token trading infrastructure that will include intermediaries, investors, and cryptocurrency custodians. However, there is no precise information on potential regulations on trading in virtual currency in Poland.

Polish tax law provides for separate regulations on taxation of cryptocurrencies trading. According to these regulations, the tax rate for cryptocurrencies is 19% of the tax base. Income or losses from these activities are not combined with other income and cannot be settled jointly with income or losses from other activities. Moreover, the rules of cryptocurrency taxation adversely affect the taxation of these investments. Firstly, taxpayers are not entitled to settle tax losses on the disposal of the cryptocurrencies in subsequent years. Secondly, the costs of acquisition of a given cryptocurrency are not settled at the time of its sale, which is the rule in the case of investment activities, but on an ongoing basis as they are incurred. As a result, the financial result of a given cryptocurrency investment is taxed separately in two different tax years. Thus, taking into account other cryptocurrency taxation principles indicated above (no possibility of settling tax losses and combining them with other income), if, in the year of acquisition of a given cryptocurrency, a taxpayer does not simultaneously sell cryptocurrencies of at least the same value, it will not effectively be able to settle the entire expenditure incurred on the investment in the cryptocurrencies for tax purposes.

3.3 Are financial regulators and policy-makers in your jurisdiction receptive to fintech innovation and technology-driven new entrants to regulated financial services markets, and if so how is this manifested? Are there any regulatory 'sandbox' options for fintechs in your jurisdiction?

Financial regulators and policy-makers are receptive to fintech innovation and technology-driven new entrants, which is, *inter alia*, manifested by:

(i) The works of the Special Task Force for Financial Innovation in Poland, which was created on the initiative of the PFSA Office, the Ministry of Finance and the Ministry of Economic Development in response to the dynamic development of new technologies on the financial services market. The objective of the Task Force is to identify legal, regulatory and supervisory barriers to the development of financial innovations in Poland and to propose solutions and actions that could eliminate or limit the identified barriers.

(ii) The Innovation Hub Programme for supporting the development of financial innovation under which the PFSA conducts a dialogue with fintech companies and provides them with appropriate explanations on the submitted enquiries, thereby supporting the development of modern technologies in the financial market while maintaining security and adequate client protection. The Programme is addressed to two groups of fintech companies: (i) entities planning to start activity in the segment of the financial market under the PFSA's supervision (e.g. start-ups) which have an innovative product or service based on modern information technology (IT); and (ii) entities supervised by the PFSA which plan to implement an innovative product or service based on modern information technology (IT).

(iii) The "Digital Development Agenda" ("*Cyfrowa Agenda Rozwoju*"), an action plan issued on 19 December 2019 by the PFSA Office concerning, among other things, modern technologies, innovation and cyber security. What is important is that the PFSA Office, having in mind not only the support for financial innovations created by supervised entities, but also the support for start-ups that do not yet have a permit, plans to develop and launch a test environment (sandbox) and enable entities to test their own solutions in selected technologies (e.g. DLT, API interfaces).

According to the Regulatory Sandbox, the PFSA Office is trying to develop a legal tool to test new fintech solutions in accordance with the law. On 26 February 2020, the PFSA issued a

statement regarding regulatory changes to the project "Feasibility study on innovative technological solutions in Poland #FinTech #SupTech #Sandbox" (supported by the European Commission and European Bank for Reconstruction and Development):

> "*The "Sandbox" sector will make recommendations for mechanisms and practices existing in other countries that could support the development of the fintech sector in Poland, in particular related to the creation of a regulatory sandbox, aiming at supporting innovative solutions in financial services and entities operating in the sandbox. The planned works are also intended to assess the possibilities of implementing a regulatory sandbox in Poland, providing a space where new participants can test innovative services.*"

On 23 January 2020, the PFSA Office issued ***Communication on information processing by supervised entities using public or hybrid cloud computing services*** in which it recognises the lack of standardisation in the use of cloud services in relation to the same information categorised by supervised entities in the financial sector, which may lead to significant differences in the assessment of technological risk, thus leading to an increase in sector risk. The PFSA Office has defined a reference model for cloud services as the following set of rules described in this communication: (i) guidelines for application; (ii) guidelines for classification and assessment of information; (iii) guidelines for risk assessment; (iv) the minimum requirements for cloud-based information processing; and (v) the rules for notification of cloud-based information processing, or of the intention to start cloud-based information processing, to the PFSA Office. In reference to the above PFSA communication, on 19 March 2020, the Polish Bank Association published a standard for the implementation of information processing in the cloud, "Polish Cloud", indicating what tasks, procedures, processes and analyses a bank should carry out and document in order to prepare the organisation for cloud services, including application guidelines, guidelines for information classification and assessment, guidelines for risk assessment, minimum requirements for information processing in the cloud and rules for informing the PFSA about the intention to process or about processing information in the cloud.

3.4 What, if any, regulatory hurdles must fintech businesses (or financial services businesses offering fintech products and services) which are established outside your jurisdiction overcome in order to access new customers in your jurisdiction?

The activity of foreign fintech businesses in Poland depends on the type of business activity and on the permits to provide certain services. Any regulated fintech business having its registered office in the territory of EU Member States may conduct regulated activity in Poland under a single licence. Thus, fintech businesses holding a licence (e.g. for the provision of payment services or investment activities) in one of the EU Member States may provide their services in Poland once they fulfil additional requirements, including, for example, informing the supervisory authority in their country of origin about their planned activity in Poland and providing the information required by the PFSA:

(i) through a branch;
(ii) as cross-border activity; or
(iii) through an agent,

in the scope covered by the authorisation issued by the competent supervisory authorities of its home country.

On the other hand, fintech businesses that do not have their registered office in any of the EU Member States are not allowed to operate in any of the above forms. In such a case, in order to start regulated activity in Poland, as a rule, an appropriate PFSA permit is required. However, entities which do not have a registered seat in any of the EU Member States may create and run representative offices on the territory of Poland. The scope of their activity may only include advertising and promotion of a foreign entrepreneur.

The activity of foreign companies in Poland is also regulated by the Act on the Rules for Participation by Foreign Undertakings and Other Foreign Persons in Trade in the Republic of Poland of 6 March 2018.

4 Other Regulatory Regimes / Non-Financial Regulation

4.1 Does your jurisdiction regulate the collection/use/transmission of personal data, and if yes, what is the legal basis for such regulation and how does this apply to fintech businesses operating in your jurisdiction?

Data collection and processing is strongly regulated by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ("GDPR") and additionally by the Polish Act on Personal Data Protection of 10 May 2018. Data controllers must inform data subjects of numerous details regarding data processing, and be prepared to answer to requests for data access, rectification, erasure, and objection to processing or data portability. Controllers must also ensure that every subcontractor that gets access to their personal data ensures sufficient security and, in most cases, also signs a contract related only to personal data processing.

4.2 Do your data privacy laws apply to organisations established outside of your jurisdiction? Do your data privacy laws restrict international transfers of data?

The Directive 95/46/EC ("GDPR") applies to all controllers that either offer goods or services to persons within the European Union or monitor their behaviour within the EU (this may include monitoring Internet activity). Almost every transfer of data outside the European Economic Area must be legally secured by one of the legal mechanisms listed in the GDPR, including an agreement based on the European Commission Standard Contractual Clauses or Binding Corporate Rules approved by a European Data Protection Supervisory Authority. Also, several countries are recognised as providing enough security in data processing by the EU. These countries are: Andorra; Argentina; Canada (commercial organisations); the Faroe Islands; Guernsey; Israel; Isle of Man; Japan; Jersey; New Zealand; Switzerland; Uruguay; and the United States of America (only within the Privacy Shield framework).

4.3 Please briefly describe the sanctions that apply for failing to comply with your data privacy laws.

The Directive 95/46/EC ("GDPR") requires all controllers to fulfil several obligations both towards the data subjects (duty to inform on data processing, to answer to requests, etc.) and the relevant data protection supervisory authorities (such as keeping data processing registers and reporting any serious personal data breach to the authority within 72 hours of detection). The maximum fine for violation of the obligations towards the data subjects is EUR 20 million or 4% of the global annual turnover in the previous financial year, whichever is higher. A violation of the obligations towards the authority may be subject to half

of these maximum amounts. However, so far, the highest fine in Poland was EUR 660,000 and was imposed for a very serious data protection security breach.

4.4 Does your jurisdiction have cyber security laws or regulations that may apply to fintech businesses operating in your jurisdiction?

The Act on the National Cybersecurity System of 5 July 2018 ("ANCS") has been in effect in Poland since 28 August 2018. It implements Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the EU ("NIS Directive"). The ANCS applies to operators of essential services ("OES"). The types of entities that can be considered OES and the list of essential services are specified in an administrative regulation on the list of essential services and the significance of a disruptive effect of the incident for the provision of the essential services of 11 September 2018. This regulation indicates the following types of entities in the banking and infrastructure of the financial markets sector:

(i) the credit institution referred to in art. 4(1)(17) of the Banking Law of 29 August 1997;
(ii) the domestic bank referred to in art. 4(1)(1) of the Banking Law of 29 August 1997;
(iii) the branch of a foreign bank referred to in art. 4(1)(20) of the Banking Law of 29 August 1997;
(iv) the branch of a credit institution referred to in art. 4(1)(18) of the Banking Law of 29 August 1997;
(v) the cooperative savings and credit union within the meaning of the Act on cooperative savings and credit unions of 5 November 2009;
(vi) the entity operating a regulated market referred to in art. 14(1) of the Act on trading financial instruments of 29 July 2005; and
(vii) the entity referred to in art. 48(7) of Act on trading financial instruments of 29 July 2005.

The administrative regulation defines the essential services provided by the above-mentioned types of entities and the significance of a disruptive effect of the incident for the provision of the essential service. If these criteria are met, i.e. the entity provides the service and the disruptive effect is met, then the provisions of the ANCS will apply to the above entities.

Moreover, the PFSA issued Recommendation D on the Management of Information Technology and ICT Environment Security at Banks on the grounds of Article 137 of the Banking Law of 29 August 1997. The purpose of this Recommendation is to notify banks of the PFSA's expectations regarding prudent and stable information technology and ICT environment security management, in particular regarding management of risk associated with these areas. All banks should follow these recommendations.

The PFSA also issued a communication regarding the processing of information in a public or hybrid cloud by supervised entities. This communication supplements and details the selected recommendations in the field of the outsourcing described, among others in Recommendation D referred to above.

4.5 Please describe any AML and other financial crime requirements that may apply to fintech businesses in your jurisdiction.

According to the Act on Counteracting Money Laundering and Terrorist Financing of 1 March 2018 ("AML Act"), any obliged institution (including fintechs) must appoint a management responsible for the fulfilment of obligations specified in the AML Act and an employee at the management level in charge of ensuring compliance of the company's activity and employees with the AML Act (i.e., an AML Officer).

In addition, under the AML Act obliged institutions are required to:

(i) apply financial security measures towards its customers;
(ii) implement an internal AML procedure and ensure that persons who have AML responsibilities participate in training programmes concerning the fulfilment of such responsibilities;
(iii) inform the General Inspector for Financial Information ("GIIF") about, *inter alia*, payment received or a payout made of cash in excess of the equivalent of EUR 15,000 or transfer made of an amount exceeding the equivalent of EUR 15,000 within seven days of the transaction date;
(iv) notify the GIIF of a reasonable suspicion that a specific transaction or specific assets may be subject to money laundering or terrorist financing or notify the competent public prosecutor of a reasonable suspicion that assets involved in a transaction or deposited in an account originate from and may be related to another offence;
(v) take special restrictive measures that involve freezing assets and/or not providing assets to entities included on lists of the United Nations or GIIF; and
(vi) keep, for five years, copies of documents and information obtained as a result of taking financial security measures and evidence and records of transactions made.

4.6 Are there any other regulatory regimes that may apply to fintech businesses operating in your jurisdiction?

Apart from the above regulations, fintechs may also be governed by:

1. regulations on consumer protection, including the Act on Consumer Rights of 30 May 2014 and the Act on Handling Complaints by Entities of the Financial Market and on the Financial Spokesman of 5 August 2015; and
2. regulations on electronic services, including the Act on Providing Services by Electronic Means of 18 July 2002.

These legal acts apply in particular to the provision of financial services by electronic means and the conclusion of a contract remotely with a consumer concerning financial services. In such a case, the trader will be subject to a number of reporting obligations, which it will have to fulfil towards the consumer. An entrepreneur who is a service provider of a service through which financial services are provided by electronic means is also obliged to lay down the regulations for the provision of services by electronic means and make them available to the recipient before the services are provided.

5 Accessing Talent

5.1 In broad terms, what is the legal framework around the hiring and dismissal of staff in your jurisdiction? Are there any particularly onerous requirements or restrictions that are frequently encountered by businesses?

The basic requirement for employment is an employment contract, which is regulated in the Labour Code:

(i) for a trial period – it may only be concluded once (for a given type of work) for a maximum term of three months;
(ii) for a definite term – a maximum of three such contracts may be concluded for a maximum total term of 33 months; and

(iii) for an indefinite term – this is concluded indefinitely and its termination requires a justification.

During the recruitment process, it is necessary to comply with the principles of personal data protection as set out in the Labour Code and in the General Data Protection Regulation ("GDPR"); only limited data may be requested.

An employment contract may be terminated:

(i) by mutual agreement of both parties;

(ii) by termination by either party – it is necessary to comply with a notice period (some employees are subject to special protection against termination and their employment contracts cannot be terminated during the protection period (e.g. pregnant women, women on maternity leave, employees in pre-retirement age)); and

(iii) without notice – by the employee or the employer (e.g. due to a serious violation of the basic duties by the employer/employee).

There is a possibility of employment on the basis of civil law contracts: a mandate contract; a specific task contract; or B2B. These contracts should be used with caution as the authorities may classify them as employment contracts, which entails additional costs.

Each of the possible employment forms entails different tax consequences. In the case of employing an employee based on an employment contract, income earned by the employee is taxed on a progressive scale of 17% and 32%, with the higher tax rate applicable to income exceeding PLN 85,528. In the case of a B2B contract, however, taxpayers may choose to tax their income at a flat 19% tax rate.

Employment on the basis of B2B contracts is a common market practice in the financial sector, but it should be stressed that in such cases it is essential that the rights and obligations of the parties in the contract are properly defined. Indeed, the tax authorities can verify the legal relationship between the parties and then classify the contract as an employment contract for tax purposes. The choice of such form of employment should therefore be made for legitimate business reasons.

5.2 What, if any, mandatory employment benefits must be provided to staff?

All employers are obliged to pay employees for their vacation leave (for 20 or 26 days) and for a certain number of days of inability to work due to illness (up to 33 days per year).

Depending on the status of employment, employers are obliged to establish a company social benefit fund or pay holiday pay to employees. These benefits may be waived with the consent of the trade union or employee representative.

Currently, depending on the state of employment, and ultimately, all employers are to be required to establish Employee Capital Plans – a voluntary long-term savings scheme for employees and some other employees.

Additionally, it is market practice to offer other voluntary benefits to employees, depending on their position, e.g. private life insurance, medical card, sports card, telephone, computer, car, etc.

5.3 What, if any, hurdles must businesses overcome to bring employees from outside your jurisdiction into your jurisdiction? Is there a special route for obtaining permission for individuals who wish to work for fintech businesses?

An employer does not have to fill any additional formalities when employing people from the EU, EEA, Switzerland and Great Britain (in the latter case until the end of 2020).

Other people must have a work permit (there are exceptions to this rule, but they are rare). The permit is applied for by the employer, it is issued for a fixed term of up to three years and can be renewed. The permit procedure takes about three months.

Professionals such as, e.g., a specialist in the development of IT systems, computer networks, databases, an application programmer, a database designer or administrator, a network and multimedia application designer and a computer systems analyst are exempt from one of the stages of permit procedure. There are no regulations that apply to companies in a particular sector in general.

6 Technology

6.1 Please briefly describe how innovations and inventions are protected in your jurisdiction.

Innovations and inventions are protected in Poland under the Industrial Property Law. The Patent Office of the Republic of Poland grants, e.g., patents for inventions and protection rights for utility models. Inventions that are new (not part of the state of the art), have an inventive step, are suitable for industrial application and are patentable. The protection right for utility models is granted for solutions of a technical nature which are new and suitable for industrial application. The solution must concern the shape or construction of an object of a permanent form or an object consisting of functionally related parts in a permanent form. The holder of a patent or protection right has the exclusive right to use the invention or utility model in a profit-making or professional manner on the entire territory of the Republic of Poland.

Works are protected in Poland under the Copyright and Neighbouring Rights Act. The author acquires copyright from the moment of establishing the work, even in an unfinished form. Computer programs are also considered to be works, which, however, cannot be protected by patent.

Technical, technological, organisational or other information of economic value to the enterprise is protected as a business secret provided that the entrepreneur takes due care to maintain its confidentiality.

6.2 Please briefly describe how ownership of IP operates in your jurisdiction.

In Poland, the right to obtain a patent for an invention or a utility model is vested in the author. The patent term is 20 years and the protection right for a utility model is 10 years. The term is counted from the date of filing the application with the Patent Office. The patent and the right of protection are transferable and inheritable.

The author of the work has the economic and non-economic copyrights (including the right to mark the work with his or her name, the right to inviolate the content and form of the work, the right to decide on the first making available of the work to the public). Generally, economic rights expire 70 years after the author's death; they are transferable and inheritable. Non-economic rights are non-transferable and do not expire.

If the inventor of an invention or utility model has made it as part of his duties under an employment relationship or other contract, the right of registration is vested in the employer or the ordering party unless the parties have agreed otherwise. The employer whose employee created the work as part of his duties under the employment relationship acquires, upon acceptance of the work, the author's economic rights within the limits resulting from the purpose of the employment contract and the consistent intention of the parties. In the case of a computer program, the employer acquires the rights without the obligation to accept it.

6.3 In order to protect or enforce IP rights in your jurisdiction, do you need to own local/national rights or are you able to enforce other rights (for example, do any treaties or multi-jurisdictional rights apply)?

An invention and utility model must be registered for protection. Poland is a party to the European Patent Convention and the Patent Cooperation Agreement; therefore, a European or international patent application may also be filed under Polish jurisdiction. Under the Patent Cooperation Agreement, a utility model can also be obtained in Poland.

No registration of the work is required to obtain copyright protection. Protection in Poland is awarded to works:

(i) whose author or co-author is a Polish citizen, a citizen of an EU Member State or the EFTA;
(ii) that have been published for the first time on the territory of Poland or simultaneously in Poland and abroad;
(iii) that were published for the first time in Polish; and
(iv) that are protected under the Berne Convention, the WIPO Treaty or the TRIPS Agreement.

6.4 How do you exploit/monetise IP in your jurisdiction and are there any particular rules or restrictions regarding such exploitation/monetisation?

A beneficiary of a patent, protection right or copyright may derive benefits therefrom by:

1. transferring it to another person by way of a contract;
2. granting a licence; or
3. establishing a registered pledge.

These contracts must be in writing in the case of an agreement transferring rights or granting an exclusive licence, or in any form in the case of a non-exclusive licence. In the case of patents and protection rights, any changes must be disclosed in the Register of the Patent Office in order to be effective against third parties. Copyright agreements should list the different forms of exploitation where the transfer takes place. In the case of computer programs, the transfer of the right to the source code must be clearly indicated in the contract.

In Poland, IP Box applies, i.e. preferential taxation of income obtained from the sale of products or services manufactured on the basis of intellectual property rights, such as a patent, utility model protection or copyright to a computer program. The relief applies to entrepreneurs who conduct research and development activity directly related to the creation, development or improvement of such rights.

Both copyrights and industrial property rights are limited by permitted use. If a product is marketed in Poland, the EU or EFTA countries according to a patent or utility model or a copy of the work, the right is exhausted.

Andrzej Foltyn specialises in M&A transactions and gives regulatory advice to the financial institutions sector, particularly banks, investment companies and other regulated entities.
Andrzej has many years' experience in transactions in the banking sector and in the financial sector on the public and private market (debt and equity). He is co-author of the Act on Public Trading in Securities, the Bonds Act and other similar laws. He was an adviser during legislative work on the Act on Commodity Exchanges. He has handled, as strategic adviser and negotiator, some of the biggest transactions carried out by leading entities on the financial market both in Poland and abroad.

Domański Zakrzewski Palinka sp. k.
Rondo ONZ 1
Building Rondo 1 – 21st floor
00-124 Warsaw
Poland

Tel: +48 22 557 76 11
+48 602 128 220
Email: andrzej.foltyn@dzp.pl
URL: www.dzp.pl

Maciej Zajda specialises in financial institutions, capital markets and corporate law. He provides regulatory advice to Polish and foreign financial institutions and fintechs, e.g. investment firms, banks and payment institutions. He advises public companies on internal corporate services on a daily basis.
Maciej also advises on capital market issues such as admitting companies to public trading, acquiring significant shareholdings, running public tender offers, and issuers' reporting obligations.
He takes part in projects involving company restructuring (e.g. acquisitions, share purchases and enterprise purchases), taking responsibility for matters relating to the public trading in securities and corporate matters. He is responsible for drawing up due diligence reports and drafting main agreements for transactions on the public and private market, mainly in the financial and innovative technology sector.

Domański Zakrzewski Palinka sp. k.
Rondo ONZ 1
Building Rondo 1 – 21st floor
00-124 Warsaw
Poland

Tel: +48 22 557 94 31
+48 660 440 345
Email: maciej.zajda@dzp.pl
URL: www.dzp.pl

Katarzyna Biarda specialises in M&A and financing transactions and regulatory advice to Polish and foreign financial institutions and fintechs, in particular banks, payment institutions and lending institutions. She assists clients in proceedings before the Polish Financial Supervision Authority, such as those aimed to obtain authorisation to conduct regulated activity in Poland. She participates in corporate restructuring projects and domestic and international transactions involving financing and establishing legal security for claims. Katarzyna prepares due diligence reports and provides day-to-day corporate services to public and private companies.

Domański Zakrzewski Palinka sp. k.
Rondo ONZ 1
Building Rondo 1 – 21st floor
00-124 Warsaw
Poland

Tel: +48 22 557 76 96
+48 506 128 579
Email: katarzyna.biarda@dzp.pl
URL: www.dzp.pl

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