Commercial laws of Poland

An assessment by the EBRD

February 2014
# COMMERCIAL LAWS OF POLAND
## AN ASSESSMENT BY THE EBRD

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Legal system

Constitutional and political system

The National Assembly adopted the Constitution of Poland in April 1997. The Constitution establishes a bicameral parliament that exercises legislative power in the country. The parliament comprises a lower chamber with 460 seats, the “Sejm,” and an upper chamber with 100 seats, the Senate. The term of office in both chambers is four years. Senators are elected on the basis of votes in each electoral district, whereas elections to the Sejm are based on national proportional representation.

Polish citizens elect the President by direct vote for a five-year term. The President is the head of state with responsibilities that include ratifying international agreements, ensuring observance of the Constitution, and commanding the Polish armed forces. The President can also issue certain regulations and executive orders, and may return new legislation to the Sejm for reconsideration, after which the legislation would require a three-fifths majority to become law.

The Council of Ministers is responsible for internal affairs and foreign relations. The President nominates the Prime Minister, who then proposes the composition of the Council of Ministers and submits a programme for approval in the Sejm. Responsibilities of the Council of Ministers include implementing statutes, supervising administrative authorities, issuing regulations, drafting the budget, and ensuring internal and external security.

Judicial system

The Constitution sets out the basic principles of the judicial system. Judges are appointed for life by the President based on the recommendation of the National Council of the Judiciary. The National Council of the Judiciary safeguards the independence of courts and judges.

Poland’s judiciary comprises courts of general jurisdiction (“common courts”) dealing with civil, commercial and criminal matters, as well as specialised courts for administrative cases. The common courts consist of first instance “district” courts and “regional” courts. The latter also act as second instance courts for judgments of district courts, while appeals over judgments of regional courts lie to courts of appeals and then to the Supreme Court. Common courts are organised by chambers (“divisions”), with commercial matters being heard by specialised commercial divisions within district and regional courts, and civil divisions within courts of appeals and the Supreme Court. For administrative courts the structure is two-tiered, with regional administrative courts being the courts of first instance, appeals from which lie to the Supreme Administrative Court.

The National Council of the Judiciary is responsible for making recommendations to the President concerning judicial appointments and for safeguarding judicial independence. It is composed of 25 members, most of whom are judges. The National School for Judges and Prosecutors is responsible for professional development and qualification of judges, and offers a range of subjects as part of its initial and continuous training programme. Judicial training and special examinations are prerequisites to a judge’s appointment.

EU membership has been a positive factor in enhancing efficiency of the judicial system. However, problems still exist. According to the EBRD / World Bank Business Environment and Enterprise Performance Survey, the slow pace of court proceedings is considered to be the major problem, with only 12% of Polish respondents considering that the court system is sufficiently fast. Enforceability of court judgments is another significant problem, with only a third of business respondents believing court judgments can be effectively enforced. Concerns also persist about corruption and lack of impartiality.

Overall, two thirds of businesses surveyed believed courts posed an obstacle to doing business.

A number of measures have been taken to address these concerns. In relation to the speed of justice, an innovative “e-court” has been developed and launched as a pilot in the regional court in Lublin. It considers cases exclusively on the basis of electronic submissions. In addition, the number of professional judges has increased significantly in recent years, whilst at the same time measures have been taken towards reducing the number of courts and rationalising and improving court administration. Efforts have also been made to tackle concerns about corruption, including introducing stricter control over the administration of the court system and more regular assessments of judges’ work.

Poland has made significant progress towards implementing an effective judicial system, however there is much room for improvement. Measures to strengthen contract enforcement and judicial capacity could include: providing further systematic and specialised training for judges in commercial law matters and procedures to promote timeliness among litigants; and elaborating the rules on judicial conduct and conflict of interests, which are currently rather broadly formulated.
**Recent developments in the investment climate**

Poland has continued to record relatively strong growth. A well supervised banking system and fiscal consolidation have further improved investor risk perceptions and attracted capital inflows into local equity and government bond markets. Weaker indicators in early 2012 have nevertheless led to a significant downward revision in growth expectations. The government has initiated important fiscal reforms. These include measures to improve the state pensions system and prevent a further increase in public debt.

Privatisation volumes have been substantial. The four-year programme to 2011 was met in terms of revenue targets, and a new programme for another 300 companies has been announced. The state’s stake in the country’s largest bank, PKO, has been reduced to a minority one, though the state continues to exercise management control.

A long-standing challenge is to develop more sustainable private financing mechanisms in infrastructure, adopting best practice on public-private partnerships (PPPs). EU structural funds will be more focused and more constrained in future years, in particular given the budget constraints of local governments. There has been only limited progress in mobilising private finance for infrastructure through PPPs. In the roads sector two attempts to launch tenders for motorways under the PPP framework were unsuccessful and were cancelled. PPPs encountered major difficulties in relation to open and transparent tendering and during implementation (for example, with regard to land acquisition, cost overruns and a lower than expected traffic) which explained a lack of interest from private investors.

**Freedom of information**


The Act allows anyone to demand access to public information, public data and public assets held by public bodies, private bodies that exercise public tasks, trade unions and political parties. The requests can be oral or written. The bodies must respond within 14 days.

The law sets out categories of public information including internal and foreign policy, information relating to the structure of legal entities, operational activities of public organisations, public data such as official documents and positions, and public assets. There are exemptions for state secrets and confidential information as protected by a law, personal privacy and business secrets.

Appeals of denials of access are made under the Code of Administrative Procedure initially internally and then to a court. The Office of the Commissioner for Civil Rights Protection (the Ombudsman, established in 1988) has also been active in promoting the law as a means for improving legal structures. The Ombudsman called for greater transparency in his 2004 report, stating that it should be given priority over the privacy of public officials.

A very important aspect of the Act is the duties placed on public bodies to publish information about their practices and policies. The law requires that each create a Public Information Bulletin to allow access to information via the internet.

In 2011 the Polish Parliament approved several changes to the law, some of which relate to exemptions to disclosure of certain categories of information including that emanating from the State Treasury, relating to international agreements, court proceedings and tribunals. Observers and FOI activists asked for the President not to sign these amendments. In response to these demands the Polish Constitutional Tribunal annulled the amendments in 2012.
Commercial legislation

The EBRD has developed and regularly updates a series of assessments of legal transition in its countries of operations, with a focus on selected areas relevant to investment activities. These relate to investment in infrastructure and energy (concessions and PPPs, energy regulation and energy efficiency, public procurement, and telecommunications) as well as to private-sector support (corporate governance, insolvency, judicial capacity and secured transactions).

Detailed results of these assessments are presented below starting with infrastructure and energy and going into private sector development topics.

The completed assessment tools can be found at www.ebrd.com/law.

Infrastructure and Energy

Concessions and PPPs

An earlier PPP Law of 2005 has been widely criticised and was replaced by the Act on Public-Private Partnership of 19 December 2008 (the “PPP Law”). One of the objectives of the new act was to improve the public-private partnership system in Poland, in particular by harmonising with other laws which may apply in the scope of concessions/PPP. Concessions are also regulated by the new Act on Concession for Works or Services of 9 January 2009 (the “Concession Law”). In addition there exist sectorspecific laws covering PPP and Concessions, e.g. the Toll Motorway and Road Fund Law and the EURO 2012 Law.

The PPP Law and the Concession Law have substantially changed the legal landscape for concession and PPP in Poland since the past 2007/8 EBRD assessment. The legal framework has largely been made comparable with the requirements of the EC Directives and look to conform with the latter. There are, however, a number of areas that although are regulated seemingly in conformity with the EC Directives still leave gaps and therefore, room for improvement.

There remains some uncertainty with the security issues necessary for the financing, in particular, the concept of step-in right is not well known to the PPP Law. The ability of public authorities to provide financial or economic support for the implementation of PPP project seems unclear, thus questionable. In addition, Poland has yet to ratify the 1965 Washington Convention on the Settlement of Investment Disputes (ICSID).

There have been developments in terms of institutional infrastructure. In particular, in 2008 there was a PPP Centrum established with the objective to promote public-private partnership in Poland. This is a non-profit governmental agency that accumulates and disseminates international PPP best standards and practice in Poland. In addition there exists a PPP Platform in the form of a Task Force whose aim is said to provide support for project implementation, training, stakeholders networking and initiate and support pilot public-private partnership projects. The Ministry of Regional Development as well as the National Directorate for Roads both have specialist PPP Departments while the Ministry of Economy holds a register of PPP projects. However, a national operational PPP Unit seems to be missing in the country.

Despite the relative novelty of the PPP framework in Poland, there have been about approximately two dozen projects prepared and are at different stages of implementation in practice in recent years on the basis of the PPP Law.

According to a recent EBRD Assessment of the PPP laws in its countries of operations the Polish laws are in “medium compliance with the best international standards”, however, missing just three percentage points to be in “high compliance” (see Chart 1). Similarly the system was ranked as “medium effectiveness” for their practice (see Chart 2).

There is no explicit PPP policy that would provide for a long term commitment vis a vis PPP in Poland, set out its principles and institutional framework. It should be useful to have developed one, in addition to developing a project pipeline, in order to make a stronger statement to sponsors and financial institutions.
Chart 1 – Quality of the PPP legislative framework in Poland

Note: The extremity of each axis represents an ideal score in line with international standards such as the UNCITRAL Legislative Guide for Privately Financed Infrastructure projects. The fuller the “web”, the more closely concessions laws of the country approximate these standards.

Source: EBRD 2012 PPP Legislative Framework Assessment (LFA)
Note: The extremity of each axis represents an ideal score, that is, a fully effective legal framework for PPPs.

Source: EBRD 2012 PPP Legal Indicator Survey (LIS).

Energy

Electricity

Poland performs reasonably well overall and at expected levels. The recent EBRD energy law reform dimensions assessment project has shown that regulatory independence, transparency and tariff structure are the key strengths of the country’s electricity framework, while public service obligations and market framework are its key weaknesses (see Chart 3).

As of 1 July 2007, Poland’s electricity market was fully liberalised and it was respectively ranked 6th and 7th in the EU in terms of generation and consumption (2008). The state-controlled PGE is still the most dominant player in generation and wholesale supply, whereas the distribution sector appears to be more diversified. PGE made its debut on the Warsaw Stock Exchange on 6 November 2009, as a result of an Initial Public Offering (IPO) of 15% of its shares. More IPOs are expected. Although formally open, the gas market is still extremely concentrated, with the incumbent, PGNiG S.A., having a de facto monopoly position in import, production, distribution and supply.

In the distribution sector there are 20 Distribution System Operators (DSOs), 14 of which are legally separate companies (formerly part of entities that carried out both distribution and supply), the remaining being small local operators with less than 100,000 customers. The regional DSOs are all controlled by vertically integrated electricity groups, two of which are foreign entities (i.e. RWE and Vattenfall). The generation segment has a medium level of concentration, with the three largest groups owning around 45% of capacity. PGE is still the most dominant player in generation and wholesale supply. On the wholesale market, bilateral contracts (short and medium term) cover more than 90% of the trade. A small number of transactions are concluded on the Energy Stock Exchange and on virtual energy trade platforms.

Access rules and charges are applied ex-ante and details are published. Non-discriminatory access to the network is required in accordance with EU directives and implemented through the grid codes. Disputes that may arise in relation to access denial are settled by ERO.
Gas
Poland performs reasonably well overall with respect to its gas market. The gas market was fully liberalised as of 1 July 2007. The recent EBRD energy law reform dimensions assessment project has shown that regulatory independence, transparency and network access are the key strengths of the country’s gas framework, while private sector participation and market framework are its key weaknesses (see Chart 4).

Although formally open, the gas market is still extremely concentrated, with the incumbent, PGNiG S.A., having a de facto monopoly position in import, production, distribution and supply. Poland produces about 30% of its own gas and relies on imports for the remainder of its needs. Imports come predominantly from Russia, but also from Germany, Norway and Central Asian countries.

In 2003, within the holding structure of PGNiG, six bundled distribution undertakings were legally separated and transformed in DSOs; their trading and retail supply commercial lines were subsequently integrated into PGNiG. As of January 2009, the vast majority of household consumers are still supplied by PGNiG; the situation is the same on the wholesale market where it enjoys a market share of about 98%. Besides PGNiG, there are only small distribution companies, with less than 100,000 customers, which typically purchase gas from the incumbent and sell it to end-users through their own local distribution networks.

Since July 2005, the single transmission system operator nationwide is OGP Gaz-System S.A. (Gaz-System), which is an entity with unbundled ownership, entirely controlled by the State Treasury. In September 2006, Gaz-System was transformed into a joint-stock company and entered into a long-term operational lease agreement with PGNiG in respect of transmission assets. Gaz-System, which currently owns about 20% of the assets, will gradually take over the entire ownership.

Non-discriminatory Third Party Access to the transmission system and distribution system is guaranteed by law. ERO is responsible for
regulating it and settling disputes concerning access refusal. Transmission and distribution grid codes are in force.

**Chart 4 – Quality of energy (gas) legislation in Poland**

Note: The spider diagram presents the sector results for Poland in accordance with the benchmarks and indicators identified in an assessment model. The extremity of each axis represents an optimum score of 100 that is full compliance with international best practices. The fuller the “web”, the closer the overall regulatory and market framework approximates international best practices. The results for Poland are represented by the green area in the centre of the web.

Source: EBRD 2011 Energy Sector Assessment

### Energy efficiency/renewable energy


The Policy, , reflects the country’s long-term strategy for the broader energy sector in line with the EU energy acquis. The Policy sets forth the development of the use of renewable energy sources (RES), including biofuels, as one of the country’s key objectives and puts forward appropriate targets. Specifically, a target of 15% of the renewable energy share of the final gross energy consumption by 2020 with at least 10% share of the transport sector is set out in line with the acquis.

The Energy Law was adopted in 1997 (the “Energy Law”) and several times amended, most recently in 2010, as part of the country’s continuous efforts to align its legislation with the EU acquis and in particular, the Third Energy Liberalisation Package. In respect to renewable energy, the Energy Law introduces certain guarantees for investors, such as the procedure for connection to the grid, support schemes, and respective obligations of the distribution system/transmission system operators. Few implementing regulations related to the procedure for issuing certificates of origins or for biomass usage, have been adopted. The system of issuing, obtaining and trading green certificates by RE operators constitute a key part of the support scheme for producers. Green certificates are issued by the energy regulator and are traded on a secondary market independently from the generated energy from RES.

The Polish law is currently in the process of fundamental changes with respect to the general approach towards the RE sector and respective regulatory and support mechanisms. As a result of the contemplated reform, the Energy Law is
supposed to be replaced by a three-piece package comprising the Renewable Energy Sources Law (the “RES Law”), the Gas Law as well as a new Energy Law. The reform is planned to be completed in the middle of 2013. The European Commission has already referred Poland to the European Court of Justice for failure to implement on time the Renewable Energy Directive (2009/28/EC).

Poland signed the Kyoto Protocol to the United Nations Framework Convention on Climate Change on 15 July 1998 and ratified it on 13 December 2002, with a 6.2% reduction commitment for 2012. The commitment has already been largely met and will likely result in a big surplus of allowances that Poland could trade with other countries.

The current policy framework for the energy efficiency (EE) sector of Poland is set forth by the Policy. Improving energy efficiency is one of the country’s priorities under the Policy, with the main objectives being maintaining zero-energy economic growth, i.e. economic growth without increasing demand for primary energy and consistent lowering of energy consumption of the Polish economy to reach the EU-15 level.

The adoption of the Energy Efficiency Law in 2011 significantly upgraded the legal framework for the EE sector. The Energy Efficiency Law has introduced a system of white certificates certifying reductions in energy consumption. A tender for obtaining white certificates was launched for the first time at the end of 2012. From 1 January 2013, all utilities selling electricity, natural gas and heat to customers (among others) have obligations to hold white certificates.

The Energy Efficiency Law introduces a requirement for energy utilities to provide customers with a comparison of the current electricity consumption for the same period in the previous year. The energy utilities will also be required to provide information on the average electricity consumption of other customers (within the same customer’s group), energy efficiency measures and technical characteristics of energy-efficient appliances.

The RES Law is currently under consideration by the Polish parliament, with the aim of finally transposing the EU renewable energy requirements into the national level and ensuring sustainable energy prices in the long run. The draft RES Law focuses on providing a fifteen-year guaranteed support scheme for RE operators, with levels of support depending upon the type of energy generation technology and the installed capacity. Another new feature of the draft RES Law is imposed limits on the right of RE producers to acquire certificates of origin if the produced energy is sold at a price higher than 105% of the inflation indexed purchase price. Further, the draft RES Law provides that the substitution fee will no longer be indexed every year and thus, the certificates’ value may be decreased at least by the rate of inflation. Finally, the draft RES Law introduces a new mechanism for determining the guaranteed price for green energy which cannot exceed the average sale price for power in the market announced by the head of the Polish energy regulatory authority and therefore may to a large extent vary from the fair market value. The investors’ community has already expressed concerns about some of the contemplated provisions.

The primary objective of the legislators and regulator in the EE sector should be further aligning the legal and regulatory framework with EU requirements with respect to all sectors of the economy. In line with the Second National Energy Efficiency Plan approved in February 2012, further to the Energy Efficiency Law, a number of measures and programmes have been considered and are being implemented in order to achieve the national energy efficiency targets, for example, in the housing sector, establishment of a “Thermo-modernisation and Repairs Fund”, in the public sector, introduction of a Green Investment Scheme aimed at energy management of public utilities and certain public finance sector entities, as well as introduction of financing instruments promoting investment into the public, industry and SME sectors. Information campaigns promoting an increase in energy efficiency awareness among various market participants across a number of sectors are being considered and implemented.

In the renewable energy sector, all efforts of the country with respect to the RE sector should be focused on implementing the EU Renewable Energy Directive, in order to avoid further delays, penalties and reputational risks. The uncertainty created by the lack of a stable primary framework is increasing RES investors’ legal risk and has deterred sector development. At the same time, the micro scale use of RES (i.e. use of RES at the household level) shall be implemented. The support system shall aim for the reduction of costs of the green certificates scheme.

In the energy efficiency sector, Poland has undertaken significant efforts to introduce an effective policy and regulatory framework for the EE sector, and has achieved some very good progress in this respect. However, further effort needs to be made to ensure that the right incentives have been put in place for increasing energy efficiency in all sectors and reducing the country’s reliance on coal. Further promotion of ESCO model and EnPC contracting will be required in order to attain the country’s goal in achieving high energy savings in both the public and the private sectors.

Establishment of an ESCO fund would be an appropriate measure to support these measures. Public awareness campaigns should be part of the country’s efforts towards promoting energy efficiency at the household level.

Overall, Poland should focus on transposing the EU Third Energy Liberalisation Package, including the
Renewable Energy Directive, into national law. The country has made substantial progress towards creating a well-functioning EE sector, though further efforts need to be focused on promoting private investment, putting in place necessary implementation arrangements and ensuring appropriate capacity.
Public procurement

Public procurement in Poland is regulated by the Public Procurement Law (the PPL), Act of 29 January 2004, the consolidated text was published in the Journal of Laws of the 25th June 2010 (Dz. U. of 2010, No. 113, item 759) and secondary legislation (Prime Minister Decrees and Law Enforcement Decrees).

In the EBRD 2010 assessment Polish PPL scored medium to high compliance and in principle provides for a modern and comprehensive regulation in accordance with the EU PP Directives. The PPL clearly promotes transparency, integrity, and competition in public procurement (average 80% compliance rate); however it’s less comprehensive when it comes to efficiency instruments and enabling eProcurement processes. Tender procedures are still conducted traditionally, on paper in Poland and there is limited use of modern purchasing techniques: the reason is that PPL permits it but there are no secondary and tertiary legislation as well as standard documents for contracting entities to implement these policies. Poland has a good institutional framework, with an independent regulatory body and an independent dedicated review and remedies system, compliant with the EU requirements on procedural fairness. In addition, the PP framework follows the principle of proportionality, distinguishing short and long term contracts, small and high value contracts as well as providing for different procurement procedures suitable for different contract types; legislation balances administrative and civil aspects of the public procurement framework well.

The major weakness of the regulatory framework is a lack of uniformity of local procurement practice, resulting from frequent and minute changes to the regulation and complexity of the law, bureaucracy in pre-qualification and eligibility check. There are no general prequalification instruments or suppliers list, central purchasing is under regulated and small scale, with no efficiency gains at the moment since framework agreements are not utilised in practice. Similarly, procurement efficiency instruments in the pre-tendering and post-tendering phases are not incorporated and there is no reliable market information about public contracts. In certain aspects the PPL is outdated: electronic communication is not mandatory and the PPL does not require procurement monitoring and administration.

Under the Bank’s operation, the EBRD Procurement Policies and Rules may not be imposed, as there is a low to medium procurement risk in conducting procurement under the local system.

In spite of harmonisation with the EU policies and high compliance in several areas, the Polish legislation on public procurement could be modernised and simplified to suit better intensive investment needs in Poland. An eProcurement reform should be implemented in the central and regional government, to improve efficiency and economy of procurements, since at the moment only individual contracting entities in the utilities sector benefit from cheaper and easier e-tendering procurement procedures. Communication and tender submission rules are clearly outdated and there is no legal framework for enabling contracting entities utilising modern purchasing techniques in practice. Integrity and accountability of the public procurement decision-making could also be improved in practice, since the monitoring system is outdated and procurement records can be manipulated. The local procurement practice survey revealed gaps in institutional capacities: level of implementation of the anticorruption safeguards and efficiency instruments is very heavily dependent of internal procurement capacity of individual contracting entities.

In the 2010 assessment Poland scored medium to high compliance with international best practice (see Charts 6 and 7) and quality of national regulatory framework has not improved since. PLL embraces transparency and competition principles; however, the regulation is not most modern in the EU and the EBRD region, and its complexity makes procedures time-consuming and bureaucratic.

The public procurement law in Poland is harmonised with the EU policies and highly compliant with best practice in several areas, but it needs modernisation to embrace eProcurement. The regulatory framework is not covering all procurement stages and needs further development in terms of standard documents and guidance for contracting entities to correctly implement public procurement policies in practice.
Chart 6 - Poland’s quality of public procurement legislation

Note: The chart shows the score for the extensiveness of the national public procurement laws. The scores have been calculated on the basis of a questionnaire on legislation that is developed from the EBRD Core Principles for an Efficient Public Procurement Framework. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each Core Principles benchmark indicator. The bigger the “web” the higher the quality of legislation.

Source: EBRD 2011 Public Procurement Assessment
Note: The chart shows the score for the effectiveness of the national public procurement laws. The scores have been calculated on the basis of a questionnaire on legislation that is developed from the EBRD Core Principles for an Efficient Public Procurement Framework. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each Core Principles benchmark indicator. The bigger the “web” the higher the effectiveness of the legislation.

Source: EBRD 2011 Public Procurement Assessment

Telecommunications

The main legal basis for electronic communications regulation is the Telecommunications Act 2004, as amended. The most recent amendments were made to accommodate the 2009 revisions to the European Union (EU) framework, following infringement proceedings by the European Commission. Those proceedings were withdrawn in February 2013.

Poland is a member state of the EU, with fully liberalised electronic communications markets. The market is very competitive with seven mobile network operators (Polkomtel, PTC, PTK, P4, Mobyland, CenterNet, Aero2) and a number of alternative operators competing with the incumbent (Telekomunikacja Polska – TP) in fixed telephony and broadband. Fixed-line penetration reaches around 22 per cent of the population, one of the lowest within the region and significantly below the EU27 average of 40 per cent. Mobile penetration, however, is similar to regional average. Fixed broadband reaches about 17 per cent population, similar to regional average, though mobile broadband is significantly higher at more than 40 per cent population, nearing the EU27 average. In the cable sector, consolidation continues with the biggest cable operator (UPC) increasing its market share to 33 per cent by acquiring its competitor (Aster). This has also increased UPC’s market share in fixed broadband to around 27 per cent. The total market share of new entrants in fixed broadband market is c. 70 per cent, with the fixed incumbent reduced to c. 30 per cent. Fourth Generation mobile/LTE services have already been commercially launched in a number of urban areas.

While electronic communications is an important contributor to the Polish economy in itself, it is the sector’s role as an engine of growth and development across all sectors of the economy that makes continued implementation of the ever evolving EU framework critical as a means of attracting the investment necessary to install next generation technologies. As EBRD maintains two significant investments in the electronic...
communications sector in Poland it is keen to see a transparent, more predictable and EU-compliant regulatory regime maintained as a means to enhance the attractiveness of the sector to private investors and the security of their investments.

The main reform efforts are understood to be centred on continuing vigorous implementation of the most recent EU framework (2009).

In common with most EU peers, among Poland’s challenges into the future is keeping pace with the evolving EU framework and ensuring its effective implementation as part of the EU Digital Agenda. Of particular importance in this respect are the regulatory enablers surrounding Poland’s initiatives on broadband, including the 2008 government “Strategy for the Development of the Information Society in Poland until 2013” and the long-term strategy “Poland 2030. The EBRD’s recent Assessment has found the framework for telecommunications to be largely in line with international standards, with some deficiencies though in the legal framework, fees and taxation as well as market conditions for wireless services.

Chart 5: Comparison of the overall legal/regulatory risk for telecommunications in Poland with international practice

Key: Extremities of the chart = International best practice
Note: The diagram shows the quality of the legal framework as benchmarked against international standards (European Union). The extremity of each axis represents an ideal score of 100 per cent, that is, full compliance with international standards. The fuller the “web”, the closer the overall telecommunications legal framework of the country approximates these standards.

Source: EBRD 2012 Electronic Communications Comparative Assessment.
Private Sector Support

Access to finance


In Poland most types of assets can be used as collateral. Real estate can be charged by a mortgage, ships by a maritime mortgage, and movable assets and rights by a non-possessorial registered pledge, a possessory civil law pledge, a security transfer of ownership, or a security assignment of rights. However, the availability of options does not mean that there are no areas for improvement or better to say fine tuning of the legal system as it still does not always adequately support commercial activities.

According to the Law on Registered Pledge and the Pledge Register of 6 December 1996 (as amended) non-possessorial pledge over movable things and rights is established by registration of the pledge agreement in the pledge register maintained by the relevant court. Registration may only be made after the filing of an application in writing, to which the pledge agreement must be attached. The court reviews the application and there is even a possibility of scheduling hearings.

A future or conditional obligation may be secured by a registered pledge only up to the maximum amount provided for in the pledge agreement. Both present and future movable assets and rights (accounts receivables, lease rights, IP, etc.) can be pledged by registration. A floating charge (in the form of a registered pledge) is possible over the overall assets of an entity (including current and future assets), except for real estate which can be charged only by a separate mortgage. Bank accounts are commonly charged by registered pledge which apart from registration requires mandatory notification to the bank or by financial collateral if the conditions based on the type of subjects involved are met (limiting its usage generally to financial institutions). Pledge over accounts receivable is also common and widely spread, however practitioners find that it is difficult to establish security over future receivables due to the strict requirement of identification of future receivables, i.e. the necessity to identify the debtor and a legal relationship between the borrower and the lender. Depending on the type of securities, there exists some additional perfection requirements (next to registration), such as a notification to a broker keeping the securities account or a notification to the company and an entry into shareholders book or depositing share certificates for non-dematerialised shares.

A claim secured by a registered pledge can be transferred without the registered pledge. However, if the claim is transferred together with the registered pledge, the registered pledge is effectively transferred only if re-registration of the registered pledge occurs, where the purchaser is entered in the pledge register as the new pledgee. The bankruptcy hardening periods do not recommence as a result of this re-registration.

A registered pledge can be enforced through regular court enforcement proceedings. (the court enforcement office (bailiffs) seize the pledged property and then arrange for its sale), taking over ownership of the pledged asset (if this is provided for in the registered pledge agreement, and the pledged asset consists of financial instruments entered in a securities account, funds in a bank account, property that is commonly traded on commodities markets, or property, the market value of which, or the means of determining the market value of which, was determined in the registered pledge agreement). To enforce a registered pledge through takeover, the lender must notify the borrower of its intention to take over the property after which borrower has seven days to satisfy the secured claim or the title over pledged assets passes automatically to the pledgee. Since 4 April 2009, an Ordinance of the Minister of Justice regulating procedures for the sale of registered pledges subject by way of a public tender offer has made it possible for items subject to a registered pledge to be sold by public tender carried out by a Notary Public or a bailiff appointed by the pledgee. However, this procedure is considered as not very tested in practice, and generally considered not to be lender friendly one.

A mortgage is established on its entry in the land and mortgage register maintained by the court with jurisdiction over the local area where the property is located, with retrospective effect from the date the motion to register the mortgage was filed (the registration process takes up to six months). The mortgage application to the court must be accompanied by a statement of the owner or the perpetual usufructuary of the real estate regarding the establishment of the mortgage. This statement must generally be made in the form of a notarial deed, although a non-notarised statement in writing is sufficient if the lender (mortgagor) is a Polish bank or a Polish branch of a credit institution. A mortgage can secure a future claim but the maximum amount must be identified. A claim secured by a mortgage can be transferred without the mortgage. However, if the claim is transferred together with the mortgage this claim is effectively transferred only if mortgage re-registration occurs, that is, the purchaser is entered in the land and mortgage register as the new mortgagee. The bankruptcy hardening periods do not
advances, bank guarantees and other guarantees as secrecy in the scope needed to extend loan information subject to the obligation of banking institutions authorised by statute to extend loans to collect, process and provide to other banks and of commerce, may establish institutions authorised by statute to share the information considered to be bank secrets. Section 4 of the mentioned Article prescribes that banks, together with banks chambers of commerce, may establish institutions authorised to collect, process and provide to other banks and institutions authorised by statute to extend loans information subject to the obligation of banking secrecy in the scope needed to extend loans, cash advances, bank guarantees and other guarantees as well as to the extent necessary for the assessment of credit risk of a customer. This basically provides a legal basis for the establishment of credit bureaus in Poland. Provision of information is subject to a written authorisation of the data subject which has to define the scope of data to be disclosed. Apart from this general authorisation to set up a credit information processing entity arising from the Banking Law the activities of Polish credit bureaus are also regulated by the Protection of Personal Data Act and the Act on the provision of business information and the exchange of economic data. There are a few private bureaus operating on a competitive basis in Poland with a satisfactory penetration rate.

With respect to factoring, the Polish Banking Law defines that an undertaking other than a bank or credit institution, whose basic activity generating most of its income consists of business activity involving the provision of services related to the acquisition and disposal of claims is a financial institution. However, apart from that the provision of factoring services does not require a special authorisation and is not subject to specific supervision by the financial services authorities. The transfer of receivables is based on the Civil Code provisions on transfer of receivables which are made on the bases of a general or individual written agreements and notification of the debtor. Both electronic assignments and assignments of future receivables (if specifically identified) are possible. The contracting parties can agree to prohibit the assignment of receivables and assignments made against such prohibition are considered to be null and void. Neither the UNIDROIT Convention on International Factoring (1988) nor United Nations Convention on the Assignment of Receivables in International trade (2001) has been ratified in Poland.

With respect to leasing, apart from classification of companies providing leasing services as financial institutions leasing is not regulated as a financial service in Poland and does not entail special authorisations or is subject to specific supervision. However, the leasing agreement is regulated separately by the Civil Code as an agreement under which a lessor undertakes to purchase an asset from a given seller and release it to the lessee for use. Under such an agreement the lessee undertakes to pay the lessor a financial consideration in agreed instalments, at least amounting to the price or consideration borne by the lessor for the purchase of the asset. The lease contract is deemed invalid if it is not concluded in writing. Throughout the duration of the contract, the lessor remains the legal owner of the asset.

Improving access to finance, especially for SMEs, is an important part of the EBRD’s mission. However, we are not aware of current reform activities.
The Pledge registration system could be modernised in to a “notice” system which enables immediate registration of information as presented by the parties, and immediate access to all registered information by any member of the public. Such a notice system would eliminate any requirement for judicial review of registration applications or examination of pledge according to the context of their transaction and provide the public with real-time access to all registered information via the internet and a user-friendly search engine. The processes for registration of mortgages in the mortgage registers should be made faster.

Capital markets

The Polish Financial Supervisory Authority (the “PFSA”) is the main regulatory body supervising both primary and secondary debt capital markets activity in Poland. The PFSA was established in 2006 and replaced two regulatory bodies overseeing the capital markets and insurance undertakings and pension funds. In addition, the Ministry of Finance (the “MoF”) has certain jurisdiction relating to the debt capital markets. For example, the MoF has the powers to issue decrees with respect to the operation of capital markets.

The Civil Code contains certain basic rules applicable to the issuance and transferability of securities. In addition, the primary Polish debt securities market laws and regulations are contained in the Act on Public Offering and Conditions Governing the Introduction of Financial Instruments to Organized Trading and Public Companies dated 29 July 2005 (the “Public Offering Act”) and the Act on Trading in Financial Instruments dated 29 July 2005, as well as related secondary legislation. Among other things, these acts implement into Polish law the relevant EU directives pertaining to the capital markets. Bonds are specifically regulated by the Act on Bonds dated 29 June 1995. Further, there are other regulations specific to other types of debt securities. For example, covered bonds are regulated by the Act on Covered Bonds and Mortgage Banks dated 29 August 1997 (the “Covered Bonds Act”).

The Warsaw Stock Exchange (the “WSE”) is the main operator of regulated markets and multilateral trading facilities in Poland where debt securities are also listed. The WSE was established in 1991. Trading and listing is regulated by detailed regulations and rules of operation set forth by the WSE’s governing bodies. The WSE is supervised by the PFSA.

The legal framework governing capital markets is robust. Polish regulations have adopted both Basel I and Basel II capital adequacy frameworks. The local debt capital markets of Poland function well in many areas. For instance passporting of securities, as established in the Public Offering Act generally works well and is used by debt issuers in Poland, contrary to other EU member states where implementing passporting is sometimes problematic.

The regulations of pension funds, insurance companies and open-ended investment funds (which are active and important players on the Polish financial markets) encourage these entities to invest in debt securities issued by the State Treasury, municipalities, and also securities listed on a regulated market in Poland (primarily the WSE).

However, we see that there are some legal and regulatory limitations impacting the development of a capital market in Poland. There are legal and regulatory, including taxation, issues that hamper the issuance of covered bonds; currently universal banks are not allowed to issue covered bonds, which can only be issued by specialised banks.

Further, a transfer of collateralised loans is complicated and each transfer needs to be re-registered in the court relevant to the seat of the underlying assets; there are 360 courts dealing with registration and the time for registration varies among such courts. A simplified process of transferability of collateralised loans would be essential to facilitate long term funding of the mortgage loan portfolio as well as encourage asset-based securities issuances. The appropriate legislative and regulatory framework providing for the swift transfer of loans secured by a mortgage or, to a lesser extent, the registered pledge would facilitate covered bond issuance or securitisation transactions.

The Polish capital market is a sector that EBRD wants to support, in particular from an investor’s perspective. It has invested in bonds issued by Polish banks in 2011 and 2012. The same year, EBRD has invested in asset backed securities issued by Getin Noble, a Tier 2 Polish bank.

There is on-going reform but with a very limited progress. Last year, the PFSA established three working groups focusing on the development of capital markets: a working group on mortgage bonds, a working group on asset backed securities and a working group on other capital market matters. The Polish Banking Association is involved in the work of these groups and the work of such groups remains on-going and inconclusive. The EBRD is engaged in discussions and has suggested recommendations for capital market development.

The Polish capital market legal framework is very well developed. However, there are some legal, regulatory and policy issues that remain to be solved with the aim of enhancing further development of the Polish capital market. One of the examples is the issue of transfer of collateralised loans, which discourages the issuance of mortgage backed securities and mortgage bonds. There are also taxation issues that have a negative impact for the issuance of structured products.
Overall, Poland’s relatively well developed financial system and capital markets (including underlying legislation) provide a strong base on which further improvements can be made. Money and government bond markets are among the most developed in the EBRD region and there is a well capitalised and liquid stock exchange.

Corporate governance

The corporate governance framework in Poland is comprised of the Commercial Partnerships and Companies Code, enacted on 15 September 2000 (CPCC); the National Court Register Act, dated 20 August 1997; the Banking Act of 29 August 1997; the Law on the Public Trading of Securities, dated 21 August 1997; and the Accounting Act, dated 29 September 1994, all as amended.

On 7 July 2007, the Warsaw Stock Exchange (WSE) adopted a corporate governance code applicable to companies listed on the WSE, titled “Best Practices of WSE Listed Companies”. The Code is based on the “comply or explain” mechanism, which requires listed companies to issue an annual declaration stating whether or not they comply with the code and explaining the reasons for any non-compliance. The Code has been updated a number of times, with the latest 2013 edition becoming effective on 1 January 2013. The Code aims at enhancing transparency of listed companies, improving the quality of communication between companies and investors, and strengthening protection of shareholders’ rights, including those not regulated by legislation.

The 2007 EBRD Corporate Governance Sector Assessment, in which the quality of corporate governance legislation in force in November 2007 was assessed, found Poland to be in “medium compliance” with the OECD Principles of Corporate Governance, showing some shortcomings especially in the legislation detailing the rights of shareholders and the responsibilities of the board (see Charts 8 and 9). However, the amendment to the CPCC, transposing the EU Directive on the Exercise of Certain Rights of Shareholders in Listed Companies, addressed some of the weaknesses thereby improving the framework.

The ownership of companies listed on the WSE, which embrace the two-tier board system, tends to be highly concentrated in family structured companies, state and public authorities, as well as financial and non-financial companies. Companies with major governmental ownership tend to have very strong management board and not so strong or influential supervisory board, which weaken proper oversight over management.

Under the CPCC, shareholders have the right to appoint and remove members of the supervisory board and can have the authority to appoint the management board. The latter provision might weaken the role of the supervisory board and leave it with no real leverage for meaningful oversight of management. The Code recommends that at least two members of the supervisory board are independent. The definition of independence refers to the EC Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board.

No investee companies’ corporate governance related suits have been reported.

The observance of the “comply or explain” principle could be improved. All listed companies are required to disclose to the public their annual report and compliance statement regarding adherence to the corporate governance principles, but the WSE does not have any formal mechanisms to assess the explanations provided and there are no legal enforcement mechanisms. It was reported that only 230 out of 368 listed companies submitted their compliance report to the WSE for 2008. Of these, many disclosed non-compliance with the requirement to form an audit committee, they did not publish information on corporate websites, and did not carry out self-evaluation of the supervisory boards.

Despite an explicit law provision requiring public companies to establish an audit committee, with at least one independent member having knowledge and experience in the area of finance and accounting, many audit committees do not seem to be independent in practice and do not have the necessary expertise to perform their duties. The recent guidance prepared by ACCA and the Polish Institute of Directors on “Best Practices of Audit Committees in Poland” is a step in the right direction to ensure a more effective role of the committee, provided that it is properly implemented.

Overall, Poland has made significant progress in introducing and enhancing its corporate governance framework. However, while the new Code is a step forward for corporate governance in Poland, its implementation still faces challenges.
Chart 8 – Quality of the Corporate Governance Legislative Framework in Poland

Note: the extremity of each axis represents an ideal score, that is, legislation fully in line with the OECD Principles of Corporate Governance; the fuller the 'web', the better the quality of the legislative framework.

Source: EBRD Corporate Governance Assessment 2007
Insolvency

The Bankruptcy and Restructuring Law dated 28 February 2003 (as amended) (the “Bankruptcy Law”). The Bankruptcy Law contains (i) a single court-led procedure, enabling either the liquidation of the bankrupt debtor’s estate or the preservation of the debtor’s business through a composition arrangement; and (ii) an out-of-court debtor-led recovery procedure, aimed at achieving a composition between the debtor and its creditors.

The EBRD’s Insolvency Sector Assessment (the "Assessment") completed in late 2009 concluded that the Polish law provisions were of medium quality (see Chart 10). After the Assessment, Poland amended its Bankruptcy Law, removing some of the previous shortcomings, such as the lack of clarity around the ‘liquidity’ or ‘cash flow test’ (one of the grounds for opening insolvency proceedings) and the lack of statutory clarity surrounding the initiation and completion of the out-of-court recovery procedure. The benefit of the procedure is that it will stay the declaration of bankruptcy and enforcement of debts for up to four months. Nevertheless the out-of-court recovery procedure is restricted to debtors who are only threatened by insolvency or who are in a state of minor insolvency (with unpaid debts not exceeding 10% of the overall value of assets and which are overdue for not more than three months). The Ministry of Justice is currently discussing reforms which will broaden access to recovery proceedings for businesses in financial difficulty (see below).

The 2009 reforms to the Bankruptcy Law clarified the position on creditor voting on the composition plan and introduced, along the lines of the US Chapter 11 reorganisation procedure, the possibility of a ‘cramdown’ or imposition of a majority creditor vote on a dissenting class of creditors, subject to the condition that creditors in the dissenting class receive at least as much as they would have otherwise received in a liquidation. The reforms also clarified the position with respect to set-off, enabling the issuance of the full ISDA netting opinion for Poland.

Insolvency law is cross-sector and affects all sectors where the EBRD has either an equity or a debt stake. Moreover, it impacts on the willingness of creditors generally to invest in the country and therefore also to enter into joint ventures with the EBRD.

The last major reform to the Bankruptcy Law took place in 2009. It is understood from discussions
with the Ministry of Justice that a fundamental reform is being considered, which would replace the Bankruptcy Act with an entirely new piece of legislation. The reform proposals are being developed with the benefit of the UNCITRAL legislation guide and a report by the World Bank on the Polish insolvency law system and aim to offer a range of recovery-focused options to debtors in financial difficulties. A reduction of State privilege in insolvency proceedings is also under consideration.

Like many other countries, Poland is considering further reforms to its insolvency legislation to strengthen the possibility of recovery for businesses in financial difficulties. The proposals under consideration by the Polish Ministry of Justice are inspired by international best practice. Nevertheless it will be important to ensure that the insolvency law framework does not become overly complex.

Poland has made significant improvements to its Bankruptcy Law, inspired by international best practice and has some of the main tools of a modern insolvency law. Further improvements to its Bankruptcy Law are envisaged.
Chart 10 – Quality of insolvency legislation in Poland

Note: the extremity of each axis represents an ideal score, that is, legislation fully in line with international standards such as the World Bank’s Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, the UNCITRAL Working Group’s “Legislative Guidelines for Insolvency Law”; and others. The fuller the ‘web’, the better the quality of the legislative framework.

Source: EBRD Insolvency Sector Assessment 2009