



## Legal Alert

Banking, Finance & Restructuring Department

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A RULING OF THE POLISH CONSTITUTIONAL TRIBUNAL

# Bank Enforcement Order Violates the Constitutional Principle of Equality



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On 14 April 2015, the Polish Constitutional Tribunal (“**Tribunal**”) rendered a ruling stating non-compliance of Article 96(1), Article 97 and Article 98 of the Polish Banking Act of 29 August 1997 (Journal of Laws of 2015, item 128, as amended) (“**Banking Act**”), i.e. the provisions on the Bank Enforcement Order (“**BEO**”), with the Constitution of the Republic of Poland (“**Constitution**”), Case File No. P 45/12 (/s/p-4512). According to the Tribunal, the abovementioned provisions violate the principle of equality under Article 32(1) of the Constitution. However, the Tribunal did not immediately repeal the challenged provisions so as not to interfere with banking transactions, and set a deadline (**1 August 2016**) for the legislator to enact new legislation in this respect.

A banks’ right to issue the BEO without having to conduct examination proceedings before a court has, on many occasions, been criticized by the doctrine, on the ground that this puts a party that is economically stronger in a better position. The aforesaid right was originally vested in the banks in order to ensure that the bank funds are adequately safeguarded.

### TRIBUNAL: NON-COMPLIANCE OF BEO WITH THE POLISH CONSTITUTION

The Tribunal examined a question of law addressed by the District Court in Konin as regards compliance of the provisions on the BEO with the Polish Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court in Konin questioned, among others, the banks’ right to have their receivables recovered in enforcement proceedings without referring them first to judicial examination proceedings. The Court held that this significantly impairs the position of the debtor, causing an imbalance between the parties to a legal relationship: *“This causes members of the public to believe that a legal entity with a high economic power may use such legal measures that put it in a better position with respect to other entities, because of its significant financial capacity”*.

In its ruling, the Tribunal found the Banking Act provisions on the BEO to be in violation of the constitutional principle of equality and admitted that at the time that the BEO is issued, the debtor’s position is very unfavorable, especially due to the fact that the bank is not even legally required to notify the client of a motion being filed by the bank with the court to have the BEO made immediately enforceable. Normally, a client intending to obtain a loan is required to make a statement to the effect that he will voluntarily submit to the enforcement proceedings, if he fails to settle his liabilities. The obligation to notify the client of a motion being filed by the bank with the court to have the BEO made immediately enforceable does not stem from any provision of law, but only from the



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Banking Code of Ethics. However, banks often do not comply with this obligation. According to the Tribunal, *“While the bank and the client should in fact be treated on equal terms, the BEO causes the bank to become an index in causa sue.”*

In the reasons to its judgment pronounced orally, the Tribunal pointed out that, *“The Bank as a creditor and the client as a debtor should be placed in the same positions. Both entities are parties to the same legal relationship”*, while adding that it does not undermine the position of the banks as an institution of public trust, *“The right to issue the BEO is too far-reaching, even though it holds true that the bank is obliged to safeguard the funds of its clients deposited with it.”*

The Tribunal did not accept the arguments put forward by the banks, that when entering into a loan agreement, the debtor executes a voluntary statement on submission to the enforcement proceedings. According to the Tribunal, *“To execute such a statement is a condition for a facility to be extended. Normally, you do not take out a loan because you want to, but rather because you have to.”* Sadly, the client has no choice but to execute a statement on submission to the enforcement proceedings.

#### **New challenges for the banks following the issue of the Tribunal ruling**

The Tribunal ruling triggered a wave of criticism among the banks which argue that it will have an adverse impact on banking activity and, consequently, may lead to an increase in lending costs. This may also cause the banks to seek other (perhaps more expensive) methods for securing loans, such as a notarial statement of submission to the enforcement proceedings. Against this background, the Tribunal ruled that, *“Given the fact that notaries are to safeguard compliance with law, such approach should be of no importance as far as significant loans/facilities are concerned.”* Moreover, it held that the abolishment of the BEO does not incur any risk for the banks, since they may avail of other equally efficient and convenient instruments, such as promissory notes.

The Tribunal ruling is very likely to affect the situation of the banks' debtors. The prospect itself of having the case handled by the common courts will cause the banks to be more prudent and may even cause them to be more willing to enter into negotiations with their debtors.

The banks will be required to demonstrate to a court that the amount claimed is actually owed to them, and the banks' debtors will be afforded the opportunity to question such claim. In addition, a bank's debtors will be able to exercise such general procedural rights which were unavailable to them in the case of the BEO. For example, the debtor will be able to seek a decision dismissing the action on the ground that it violates public policy or, alternatively, a decision allowing repayment of his liabilities to be made in instalments.

Without any knowledge about changes that the Polish legislator intends to make in the future, the banks should already be preparing for the new circumstances to arise. They should review their internal procedures and forms of loan/facility documents in a manner which will allow them to replace the BEO with other legal instruments hedging the risk incurred by the bank. In addition, since the risk incurred by the bank of having their motion to render the BEO immediately enforceable in pending enforcement proceedings, will increase, the banks should expect longer, more complex procedures for asserting their claims, which will also require more lawyers to be retained.

**If there are any issues relating to the TK ruling that raise your concerns or require further clarification or if you require any legal advice of lawyers from the Department of Banking, Finance and Restructuring of Kočański Zięba Rapala & Partners Law Firm, please do not hesitate to contact us.**

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