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Significant Worsening of the Bank's Financial Standing and the Tax on Certain Financial Institutions

Znaczące pogorszenie sytuacji finansowej banku a podatek od niektórych instytucji finansowych

SUMMARY

The subject of this article was the analysis of the impact of a significant deterioration of the bank's financial standing on the obligation to pay the tax on certain financial institutions. The assessment that a significant deterioration of the financial situation has occurred results in the creation of obligations and rights towards the bank not only under banking law but also tax law. On the one hand, the bank is obliged to implement a rehabilitation plan. On the other hand, the bank obtains the right to be exempted from the tax on certain financial institutions. In this respect, difficulties emerge for group recovery plans. The plans may be drawn up both for bank holdings and for cooperative banking mutual solidarity systems. The research problem discussed herein boils down to the assessment of whether a significant deterioration of the situation of one of the member banks of the aforementioned corporate structures results in the initiation of the group recovery plan. Adopting such a hypothesis means that all the banks covered by the group recovery plan, regardless of their financial situation, would be exempted from the tax on certain financial institutions. The purpose of this study was to prove the claim that the exemption from the tax on certain financial institutions applies only to banks that have implemented recovery plans due to a significant deterioration of their financial situation. In view of the directive to keep the legal order consistent and coherent, banks that have not experienced a significant deterioration of their financial situation will not be entitled to take advantage of the tax exemption. Therefore, the interpretation of the provisions of the Act on the tax on certain financial institutions must cover the objective of the exemption, namely counteracting the deteriorating situation of unprofitable operators.

Keywords: banks; tax on certain financial institutions; tax exemption; early intervention; recovery plans

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INTRODUCTION

The subject of this study is to analyse the impact of a significant deterioration of the bank's financial standing on the obligation to pay the tax on certain financial institutions. The legislature has used the normative phrase "significant worsening of the bank's financial standing" in the banking law norms. However, it failed to assign a legal definition to this phrase. Banks are obliged to develop and update rehabilitation plans in case of such a situation. On the other hand, the Polish Financial Supervision Authority (KNF) is obliged to undertake actions aimed at assessing the financial position of banks, including examination of the solvency, assets quality, financial liquidity, and financial results achieved by banks[1]. The assessment that a significant deterioration of the financial situation has occurred results in the creation of obligations and rights towards the bank not only under banking law but also tax law. On the one hand, the bank is obliged to implement a rehabilitation plan. On the other hand, the bank obtains the right to be exempted from the tax on certain financial institutions.

In this respect, difficulties emerge for group recovery plans. The plans may be drawn up both for bank holdings and for cooperative banking mutual solidarity systems. The research problem discussed herein boils down to the assessment of whether a significant deterioration of the situation of one of the member banks of the aforementioned corporate structures results in the initiation of the group recovery plan. Adopting such a hypothesis means that all the banks covered by the group recovery plan, regardless of their financial situation, would be exempted from the tax on certain financial institutions.

The purpose of this study is to prove the claim that the exemption from the tax on certain financial institutions applies only to banks that have implemented recovery plans due to a significant deterioration of their financial situation. In view of the directive to keep the legal order consistent and coherent, banks that have not experienced a significant deterioration of their financial situation will not be entitled to take advantage of the tax exemption. Therefore, the interpretation of the provisions of the Act on the tax on certain financial institutions must cover the objective of the exemption, namely counteracting the deteriorating situation of unprofitable operators.

[1] See Article 133 (2) (1) of the Act of 29 August 1997 – Banking Law (consolidated text Journal of Laws 2019, No. 0, item 2357), hereinafter: the Banking Law.

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SIGNIFICANT DETERIORATION OF THE BANK'S FINANCIAL SITUATION AS A BASIS FOR THE IMPLEMENTATION OF THE BANK'S RECOVERY PLAN

The phrase "significant worsening of the bank's financial standing" has been used in Article 133c (2) (1) and Article 141m (1) of the Banking Law. The operative part of the norm expressed in the first of the above-mentioned provisions comprises the obligation to develop a supervisory assessment scheme for the bank by the Polish Financial Supervision Authority. The supervisory assessment scheme covers banks with respect to which the results of the audit and supervisory assessment, including the results of stress tests, indicate the existence of a considerable risk of deterioration of their financial position or the infringement of the provisions governing their operation.

On the other hand, the norm requiring the national bank to draw up a rehabilitation plan may be deduced from the second provision mentioned. Such a plan shall specify the measures to be taken in the event of a significant deterioration of the financial situation of the bank in the event of a threat to financial stability, a difficult macroeconomic climate or other events having an adverse effect on the financial market or the bank[2]. Each bank, pursuant to Article 141m (1) of the Banking Law, is required to draw up a recovery plan. An individual rehabilitation plan should specify measures in the event of significant worsening of the bank's financial standing. However, the obligation to prepare an individual rehabilitation plan shall not apply to a domestic bank that operates within the holding structures specified in the provisions of Article 141n (1) and Article 141o (1) of the Banking Law. These are banks that are part of a domestic or foreign banking holding, a financial holding, a mixed, hybrid[3] or solidarity mutual protection system[4]. In such a case, the Polish Financial Supervision Authority is entitled, under the aforementioned provisions, to grant consent to the drawing up of a group rehabilitation plan for the indicated corporate structures[5].

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[2] See M. Urban-Theocharakis, *Sporządzanie i wdrażanie planów naprawy banków*, LEX/el. 2017.

[3] For more detail, see U. Banaszczak-Soroka, P. Zawadzka, *Nadzór nad rynkami finansowymi*, [in:] *Rynki finansowe. Organizacja, instytucje, uczestnicy*, red. U. Banaszczak-Soroka, Warszawa 2014; P. Szczęśniak, *Zakres nadzoru finansowego sprawowanego przez Komisję Nadzoru Finansowego*, [in:] *Prawo finansowe. Wybrane zagadnienia*, red. A. Hanusz, Warszawa 2019, pp. 507–508.

[4] On cooperative banking mutual solidarity protection systems, see R. Theissen, *EU Banking Supervision*, The Hague 2014, pp. 805–812; T. Stern, *Regulating Liquidity Risks within "Institutional Protection Schemes"*, "Beijing Law Review" 2014, Vol. 5(3), DOI: https://doi.org/10.4236/blr.2014.53020, p. 211 ff.; R. Mroczkowski, *System ochrony instytucjonalnej. Szanse i zagrożenia dla banków spółdzielczych w Polsce*, „Monitor Prawa Bankowego" 2015, nr 5, p. 47 ff.; M. Burzyńska, *Instytucjonalny System Ochrony. Pierwsze doświadczenia europejskie*, „Monitor Prawa Bankowego" 2016, nr 1, p. 48 ff.

[5] On corporate structures, see J. Lic, S. Włodyka, *Umowy (porozumienia) organizacyjne*, [in:] *System Prawa Handlowego*, t. 5: *Prawo umów handlowych*, red. M. Stec, Warszawa 2017, p. 22 ff.

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However, the legislature has not defined the term "significant worsening of the bank's financial standing" on which the implementation of the rehabilitation plan depends. Legislature's failure to define the term may result in interpretative problems. This is so because it is not possible to precisely determine the designatum of the term. However, the choice of such a measure of legislative technique ensures the flexibility of legal regulations and restricts their excessive detail[6]. As a result, the scope of interpretation is extended for the supervisory authority and the bank, on which the implementation of the rehabilitation plan depends.

The normative term "significant worsening of the bank's standing" is an expression composed of two elements. The first element is the name of an abstractly presented financial phenomenon, i.e. the worsening in the bank's standing. The second element, on the other hand, allows for an estimation of the scale of the phenomenon. The term "significant worsening of the bank's standing" can, therefore, be considered as an estimative (evaluative) term[7]. The financial phenomenon referred to by the legislator in the construct of this estimative term is indirectly described in Article 142 (2) of the Banking Law. Based on this regulation, it is possible to determine the content of the objective basis for the said estimative term. The descriptive part of the legal norm resulting from this provision contains exemplary conditions that may affect the financial situation of a bank. Pursuant to Article 142 (2) of the Banking Law, a materially deteriorating situation of a bank may be related to a balance sheet loss or a risk of such loss. Furthermore, the emergence of risk of insolvency or loss of liquidity, or deteriorating liquidity and solvency may indicate a significant deterioration of the bank's financial situation[8]. Moreover, the growing extent of leverage referred to in Article 4 (1) (93) of Regulation No. 575/2013 or the number of bad loans or credits also are indicators of a significant deterioration in the financial standing of the bank[9].

The second structural element of the term in question requires an estimate of the scale of a phenomenon of deterioration of the bank's situation. This is about significant worsening of financial standing. Characteristically, the descriptive part of the legal norm under Article 142 (2) of the Banking Law uses interchange-

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[6] See A. Hanusz, *Klauzule generalne w ordynacji podatkowej*, „Państwo i Prawo" 2016, z. 8, p. 3.

[7] Broadly on estimative (comparative) terms, see R. *Odesłania, klauzule generalne, luzy decyzyjne*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2001, nr 1–2, pp. 224–225; P. Borszowski, *Elastyczność a zwrot szacunkowy „ważny interes podatnika" w konstrukcji umorzenia zaległości podatkowych*, [in:] *Instytucje prawnofinansowe w warunkach kryzysu gospodarczego*, red. W. Miemiec, K. Sawicka, Warszawa 2014, p. 190 ff.; L. Leszczyński, *Zwroty ocenne w wykładni prawa administracyjnego*, [in:] L. Leszczyński, B. Wojciechowski, M. Zirk-Sadowski, *Wykładnia w prawie administracyjnym*, Warszawa 2015, p. 340 ff.

[8] See Article 142 (2) (2) *in medio* of the Banking Law.

[9] See Article 142 (2) (2) *in fine* of the Banking Law.

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ably the adjectives "significant" (in Polish: *znaczący*) and "material" (in Polish: *istotny*). Therefore, the linguistic meaning of these terms should be taken into account. According to the merely linguistic meaning, "significant" means 'playing an important role or testifying to something'[10]. The word "material" is understood 'to be something essential and meaningful'[11]. The expression of the comparative assessment is based on the Polish Financial Supervision Authority and the bank on, among other things, the information obtained during the supervisory assessment of the bank. The supervisory review and evaluation include identification of the size and nature of the risk the bank is exposed to, an assessment of the quality of process risk management or an assessment of the number of capitals to cover the risk arising from the activities of the bank and the management of the bank[12].

A significant excess in quantitative or qualitative indicators defining the bank's financial standing results in the creation of rights and obligations on both the bank's and the supervisory body's side. Pursuant to the provision of the legal norm of Article 142 (2) of the Banking Law, the bank's board of management is obliged to ensure the implementation of the rehabilitation plan once the bank's financial standing is subject to significant deterioration. This provision applies *mutatis mutandis* to banks which are members of corporate structures where a group rehabilitation plan has been developed. The decision to implement the group plan is to be taken by the bank which is the original parent entity of the group or the entity which manages the solidarity mutual protection system[13].

On the other hand, the Polish Financial Supervision Authority is authorised to submit, by a decision, two claims of a property nature to the bank's board of management. First, the supervisory body is entitled to require the bank to implement the rehabilitation plan, including to undertake the activities specified therein or to update it, if the conditions for this implementation differ from those adopted as of the moment of drawing up the rehabilitation plan. Second, the Polish Financial Supervision Authority may require that the bank undertakes within a specific time limit activities set out in the updated plan, in order to meet the requirements referred to in Article 142 (1) of the Banking Law or improvement of the financial standing.

[10] *Słownik języka polskiego PWN*, https://sjp.pwn.pl/szukaj/znacz%C4%85cy.html [access: 10.10.2019].

[11] *Nowy słownik poprawnej polszczyzny PWN,* ed. A. Markowski, Warszawa 2003, p. 296.

[12] See Article 133a (2) of the Banking Law.

[13] See P. Szczęśniak, *Grupowy plan naprawy dla systemów solidarnościowych banków spółdzielczych*, „Bezpieczny Bank" 2019, nr 1, p. 72.

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REHABILITATION PLANS AND THE EXEMPTION FROM THE TAX ON CERTAIN FINANCIAL INSTITUTIONS

Early intervention measures, including the implementation of the rehabilitation plan, allow for counteracting the deteriorating situation of the bank. These regulations aim at maintaining financial stability of the domestic financial market. Early intervention measures in the bank are designed to prevent the need to initiate forced restructuring proceedings[14]. During the period of implementation of the rehabilitation plan, the profit earned by the bank shall, in accordance with Article 142 (7) of the Banking Law, first be allocated to cover the losses and then to increase the bank's equity.

In addition, the legislature provided for exemption from the tax on certain financial institutions for banks implementing their rehabilitation plans. The exemption in question is, therefore, of a systemic nature since it is regulated by a statute and applies to all entities that meet the conditions for granting it[15]. Pursuant to Article 11 (2) (1) of the Act of 15 January 2016 on the tax on certain financial institutions[16], taxpayers covered by the implemented recovery plan are exempt from tax. The norm derived from that provision does not distinguish which kind of rehabilitation plan is concerned. Where the Act does not specify this, it should be assumed that the norm refers to both an individual and a group rehabilitation plan.

The right to use the exemption in question may be applied provided that two conditions are met. The first condition is that the bank must implement the rehabilitation plan[17]. The second condition is the exceeding of quantitative or qualitative indicators determining the financial standing of the bank, which can be effectively monitored and after the achievement of which the actions specified in the rehabilitation plan can be taken[18]. Pursuant to the aforementioned provision, the application of the tax exemption is possible if the two conditions mentioned above are met cumulatively. Therefore, exceeding the quantitative or qualitative indicators, and thus the implementation of the rehabilitation plan by the bank will result in the creation of an entitlement to exemption from the tax on certain financial institutions. Hence, the legislature exempts from taxation only those entities in respect of which the conditions set out in Article 11 (2) (1) of the Act of 15 January 2016

[14] See Recital 40 of the Preamble of the Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (OJ L 173/190).

[15] See K. Cień, *Konstrukcja podatku*, [in:] *Prawo finansowe…*, p. 223.

[16] Journal of Laws 2019, item 1836 as amendend.

[17] See Article 11 (2) (1) of the Act of 15 January 2016 on the tax on certain financial institutions in conjunction with Article 142 (2) of the Banking Law.

[18] See Article 11 (2) (1) of the Act of 15 January 2016 on the tax on certain financial institutions in conjunction with Article 141m (3) (2) of the Banking Law.

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on the tax on certain financial institutions. Therefore, the exemption concerned is of a subjective character, as the legislature exempts a certain category of entities due to their objective properties[19].

The legislature has made conditional the application of the tax exemption on a proper assessment of the bank's financial standing. Despite the need to assess whether the bank's situation has deteriorated significantly, the assessment made by the bank must not be arbitrary. The rehabilitation plan, pursuant to the provision of Article 141m (3) (2) of the Banking Law, covers quantitative or qualitative indicators of financial situation, the degree of which should be monitored by the bank. However, the very rehabilitation plan developed by the bank is to be approved by the Polish Financial Supervision Authority by way of a decision[20]. Although obtaining the right to exemption from the tax on certain financial institutions depends on the decision of the taxpayer itself, i.e. the bank, it is apparently not an arbitrary decision. This indicates the systemic nature of the analysed exemption, which does not depend on the discretion of the tax authority, but on statutory conditions[21].

Importantly, the tax exemption is applicable regardless of the legal actions undertaken by the Polish Financial Supervision Authority. The right to exemption, despite the doubts expressed in the judicature, arises already at the time of the notification of the Polish Financial Supervision Authority of a significantly deteriorating financial situation of the bank[22]. Such notification, pursuant to Article 142 (2) of the Banking Law, must be submitted by the bank's management board. Consequently, on the date on which the conditions entitling to the tax exemption emerged, the tax duty would not be transformed into a tax obligation. As a result of exemption despite the existence of a tax duty, there will never be a tax liability[23]. Due to the monthly settlement periods for the tax on certain financial institutions, the exemption is applicable for the month in which the bank's board of management has notified the Polish Financial Supervision Authority of a significantly deteriorating financial situation[24].

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[19] On the subjective exemption, see L. Kurowski, M. Weralski, *Prawo finansowe*, Warszawa 1969, p. 109.

[20] See Article 141q (1) of the Banking Law.

[21] On the exemption of a systemic nature, see K. Cień, *op. cit.*, p. 223.

[22] Similarly: judgement of the Voivodeship Administrative Court in Warsaw of 24 November 2017, III SA/Wa 3476/16. Other view, manifestly wrong, is expressed in the individual interpretation of the Finance Minister's of 10 August 2016, IPPB3/4510-539/16-5/MS.

[23] More broadly, see A. Hanusz, *Podatek od nieruchomości*, [in:] *Źródła finansowania samorządu terytorialnego*, red. A. Hanusz, Warszawa 20155, p. 51 and the literature cited therein.

[24] According to Article 8 (1) of the Act of 15 January 2016 on the tax on certain financial institutions, taxpayers are obliged, without a request from the competent tax authority, to submit tax declarations to the competent head of the Revenue Office on a specific form and to calculate and pay the tax to the account of the competent Revenue Office for monthly settlement periods at the latest on 25th of the month following the month the tax relates to.

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At the same time, it must be noted that, even though the correct quantitative or qualitative indicators of financial situation are maintained, the Polish Financial Supervisory Authority is authorised to require the bank to implement the rehabilitation plan. The supervisory authority's power applies where the conditions for implementation of the rehabilitation plan differ from those adopted when drawing up the rehabilitation plan. However, in such a situation the bank will not be entitled to tax exemption from the tax on certain financial institutions. Although the condition of implementation of the rehabilitation plan is fulfilled, the second condition, namely achieving the degree of indicators referred to in Article 141m (3) (2) of the Banking Law, is not met[25].

As already mentioned, apart from individual rehabilitation plans, banks brought together in corporate structures may be entitled to develop group rehabilitation plans[26]. This applies both to banks operating as part of a domestic or foreign banking holding, a financial holding, a mixed, hybrid or solidarity mutual protection system for cooperative banks. The group rehabilitation plan replaces, but does not rule out, individual rehabilitation plans for banks located in these corporate structures.

A group rehabilitation plan is not the sum of individual rehabilitation plans of the banks that make up a group or solidarity system[27]. This is so because the group plan is a forecast in the event of a significant deterioration in the financial standing of the group considered as an organisational and equity whole. Group rehabilitation plans, as pointed out in Article 7 (1) second sentence of the BRR Directives consist of a rehabilitation plan for the group, not for its individual members. The plan in question should, therefore, be considered as a functional whole providing security to the structures of the group. If the crisis situation concerns a significant part of this structure, then a group rehabilitation plan may be launched. Otherwise, there would be a praxeological contradiction between legal norms. The exceeding of quantitative or qualitative indicators of financial standing by a bank which is a member of the group cannot, therefore, trigger the launch of a group rehabilitation plan. Adoption of a different position than that presented above is not reasonable from the point view of rules of teleological and functional interpretation. Exceeding the quantitative or qualitative indicators determining the financial situation by an individual bank may not affect the situation of the entire group. Therefore, launching a group rehabilitation plan whenever the quantitative or qualitative indicators

[25] However, under Article 141m (4) of the Banking Law the bank is entitled to request an update of the rehabilitation plan by specifying a lower level of indicators that will result in the obligation to implement the rehabilitation plan. The update of the rehabilitation plan shall take place at least once a year and after a significant change in the organisational or legal structure, financial standing or any other event affecting the assumptions taken in the rehabilitation plan and implementation of that plan.

[26] See Article 141n (1) and Article 141o (1) of the Banking Law.

[27] Cf. P. Szczęśniak, *Grupowy plan…*, p. 68.

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are exceeded by a specific bank which is a group member would have a negative impact on the proper functioning of the banking market, its stability, security and, above all, confidence in that market. At the same time, the implementation of the group rehabilitation plan, in the presented situation would mean the granting of the right to exemption from the tax on certain financial institutions to all the banks or insurance and reinsurance companies constituting the group. In view of the above, the significant worsening of the financial standing of an individual bank forming part of a bank group or solidarity system, does not entail the right to the implementation of a group rehabilitation plan, and thus the granting of an exemption from the tax.

Which is important, the Polish Financial Supervision Authority is authorised to limit, by way of decision, the subjective or objective scope of the group rehabilitation plan[28]. The limiting of the group rehabilitation plan in subjective terms means that selected banks forming the group structures will be required to develop an individual rehabilitation plan[29]. Only then would a significant deterioration in the financial standing of such an entity result in the obligation to implement the rehabilitation plan and granting the right to exemption from the tax on certain financial institutions.

CONCLUSION

The relationship between a significantly worsening financial standing of a bank and the liability for the tax on certain financial institutions is a complex issue. The occurrence of such a situation in the bank causes legal consequences not only under banking law but also tax law. This is so because the legislature's objective is to counteract the deteriorating situation of the bank, which may adversely affect the financial stability of the national financial market. A significant deterioration in the financial standing of a bank entails the implementation of a rehabilitation plan. During the period of implementation of this plan, the profit earned by the bank shall first be allocated to cover the losses and then to increase the bank's equity. To achieve the objective of counteracting the deteriorating standing of the bank, the legislature also has provided for an exemption from the tax on certain financial institutions for banks that implement their rehabilitation plans. This exemption is, therefore, intended to support the recovery of the bank. However, this is only about banks with reduced capacity to bear the burden of taxation. Thus, the exemption does not cover profitable entities. This indicates the systemic and subjective nature of the exemption. It should be assumed, for the law as it stands now, that the exemption from the tax on certain financial institutions covers only

[28] See Article 141o (1) of the Banking Law.
[29] Cf. P. Szczęśniak, *Grupowy plan…*, p. 70.

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entities in which their financial situation has deteriorated substantially and additionally a rehabilitation plan has been implemented therein. In the case of group recovery plans, it should be postulated for the currently applicable law to take into account the financial standing of a banking holding or a solidarity system of protection taken as an organisational and legal whole. The problems of a single bank do not allow the assumption that a significant deterioration in the financial standing has occurred in relation to the whole group. The obligation to assess the individual situation of the bank thus limits the scope of the subjective exemption from the tax on certain financial institutions. The legislative technique adopted by lawmakers and, hence, the use of the estimative term "significant worsening of the bank's financial standing" ensures an appropriate link between the law and the changes occurring in social relations.

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STRESZCZENIE

Przedmiotem niniejszego opracowania była analiza wpływu znaczącego pogorszenia sytuacji finansowej banku na obowiązek uiszczania podatku od niektórych instytucji finansowych. Ocena, że doszło do znaczącego pogorszenia sytuacji finansowej, powoduje powstanie obowiązków i uprawnień wobec banku nie tylko na gruncie prawa bankowego, lecz także prawa podatkowego. Z jednej strony po stronie banku powstaje obowiązek wdrożenia planu naprawy, z drugiej zaś bank uzyskuje uprawnienie w postaci zwolnienia z podatku od niektórych instytucji finansowych. Trudności w omawianym zakresie pojawiają się w związku z grupowymi planami naprawy. Plany mogą być tworzone zarówno dla holdingów bankowych, jak i systemów solidarnościowych banków spółdzielczych. Podjęty w pracy problem badawczy sprowadza się do oceny, czy znaczące pogorszenie się sytuacji jednego z banków, będącego częścią wymienionych struktur koncernowych, powoduje uruchomienie grupowego planu naprawy. Przyjęcie takiej hipotezy oznacza, że wszystkie banki objęte grupowym planem naprawy, niezależnie od ich sytuacji finansowej, byłyby zwolnione z podatku od niektórych instytucji finansowych. Celem opracowania było udowodnienie twierdzenia, że zwolnienie z podatku od niektórych instytucji finansowych dotyczy tylko banków, które – ze względu na znaczące pogorszenie sytuacji finansowej – wdrożyły plany naprawy. Z uwagi na dyrektywę spójności i niesprzeczności treściowej porządku prawnego banki, w których nie doszło do znaczącego pogorszenia sytuacji finansowej, nie będą uprawnione do skorzystania ze zwolnienia podatkowego. Wykładnia przepisów ustawy o podatku od niektórych instytucji finansowych wymaga zatem uwzględnienia celu zwolnienia, którym jest przeciwdziałanie pogarszającej się sytuacji nierentownych podmiotów.

Słowa kluczowe: banki; podatek od niektórych instytucji finansowych; zwolnienie podatkowe; wczesna interwencja; plany naprawy