



OPINION OF THE EUROPEAN CENTRAL BANK

of 6 August 2010

on amendments to the legal framework for the deposit-guarantee scheme

(CON/2010/64)

Introduction and legal basis

On 8 July 2010 the European Central Bank (ECB) received a request from the Polish Ministry of Finance for an opinion on a draft law (hereinafter the 'draft law') amending the Law of 14 December 1994 on the Bank Guarantee Fund¹ (hereinafter the 'Law on the Bank Guarantee Fund').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the third and sixth indents of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions², as the draft law relates to Narodowy Bank Polski (NBP) and to the rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft law

1.1 The draft law amends the legal framework for the operation of the national deposit-guarantee scheme operated by the Bank Guarantee Fund (hereinafter the 'Fund')³. The purpose of the amendment includes, but is not limited to, the transposition of Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay⁴ into the Polish legal system by amending, *inter alia*, the Law on the Bank Guarantee Fund and the Law on Narodowy Bank Polski of 29 August 1997⁵ (hereinafter the 'Law on NBP'). In line with Article 1(2) of

¹ Consolidated text: *Dziennik Ustaw* (Dz. U.) of 4 June 2009 No 84, item 711.

² OJ L 189, 3.7.1998, p. 42.

³ Participation in the deposit-guarantee scheme operated by the Fund is mandatory for all banks established in Poland, including cooperative banks, but not for the Polish version of credit unions operating on the basis of the Law of 14 December 1995 on cooperative savings and loan associations (Dz. U. of 4 January 1996 No 1, Item 2). Branches of non-EU banks must, and branches of EU credit institutions may, be covered by the scheme to the extent that their home country schemes do not ensure deposit guarantees at the level established in Polish law (Articles 2(3) and 2b of the Law on the Bank Guarantee Fund).

⁴ OJ L 68, 13.3.2009, p. 3.

⁵ Consolidated text: Dz.U. of 1 April 2005 No 1, item 2.

Decision 98/415/EC, this opinion does not concern provisions of the draft law that have the transposition of the Directive 2009/14/EC into national law as their exclusive purpose.

- 1.2 The draft law amends the provisions of the Law on the Bank Guarantee Fund and of the Law on NBP that relate to the financing sources of the Fund and to the extension of short-term credit to the Fund by NBP. In this respect, the draft law: (a) clarifies the procedure and order of priority according to which the various financing sources, including short-term credit from NBP, are drawn on by the Fund⁶; and (b) expands the criteria under which short-term credit is granted by NBP, to include a requirement that any such credit should cover urgent needs of the Fund⁷.
- 1.3 The ECB has already been consulted on several amendments to the Law on the Bank Guarantee Fund which introduced extensive adjustments to the method of financing, governance and supervision of the Fund⁸.

2. Compliance with the monetary financing prohibition

- 2.1 Funding arrangements for national deposit-guarantee schemes must comply with the monetary financing prohibition under Article 123 of the Treaty. This provision prohibits, *inter alia*, the granting by the national central banks (NCBs) of overdraft facilities or any other type of credit facility to the public sector, including a facility in the form of financing public sector obligations vis-à-vis third parties⁹. Compliance with the monetary financing prohibition requires that the short-term transfers from an NCB to a national deposit-guarantee scheme may only be performed subject to strict criteria¹⁰. As most recently expressed in the ECB's Convergence Report of May 2010 'the costs of financing deposit guarantee schemes and investor compensation schemes must be borne, respectively, by credit institutions and investment firms themselves. National legislation which provides for the financing by an NCB of a national deposit insurance scheme for credit institutions or a national investor compensation scheme for investment firms would be compatible with the monetary financing prohibition only if it were short term, addressed urgent situations, systemic stability aspects were at stake, and decisions were at the NCB's discretion'¹¹.

⁶ See amendments introduced in Articles 7(2)(4) and 15(6) of the Law on the Bank Guarantee Fund by Article 1(4) and Article 1(5) of the draft law.

⁷ See Article 16a(5) of the Law on the Bank Guarantee Fund, introduced by Article 1(6) of the draft law, which replaces the rules contained in the present Article 34 of the Law on the Bank Guarantee Fund, as repealed by Article 1(15) of the draft law.

⁸ See Opinions CON/2007/26, CON/2008/5 and CON/2008/32. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

⁹ See Article 1(1)(b)(ii) of Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty (OJ L 332, 31.12.1993, p. 1).

¹⁰ See the ECB's Convergence Report December 2006, p. 30; the ECB's Convergence Report May 2008, p. 24; paragraphs 11 to 14 of Opinion CON/2001/32; paragraphs 11 to 13 of Opinion CON/2005/50; paragraphs 2.1 to 2.3 of Opinion CON/2007/26; paragraphs 2.2 to 2.8 of Opinion CON/2008/5; paragraphs 2.2 to 2.4 of Opinion CON/2008/32; paragraph 3.2 of Opinion CON/2008/69; paragraph 3.1 of Opinion CON/2009/10; and paragraph 2.2 of Opinion CON/2009/51.

¹¹ See the ECB's Convergence Report May 2010, p. 25.

- 2.2 In this regard, the ECB notes that the proposed Article 16a(5) of the Law on the Bank Guarantee Fund sets out that ‘After exhausting the resources referred to in [other sections of the Law on the Bank Guarantee Fund] and occurrence of a threat to the financial stability, with a view to covering urgent needs of the Fund, Narodowy Bank Polski may, at the request of the Fund’s Management Board, grant the Fund the short-time credit as referred to in Article 15(6) [of the Law on the Bank Guarantee Fund], provided that adequate collateral is ensured’. The ECB welcomes these amendments as they had been specifically recommended to the Polish authorities in previous ECB opinions¹² and convergence reports¹³. The ECB also welcomes the maintenance of the reference to the provision of adequate collateral by the Fund as an additional requirement for granting short-term credit by NBP, as also previously suggested by the ECB¹⁴.
- 2.3 Furthermore, the ECB recommends introducing a legislative correction in proposed Article 16a of the Law on the Bank Guarantee Fund. Under the currently proposed wording, the reference to short-term credit from NBP appears in two separate sections of this Article. The first reference is in section four where NBP’s short-term credit is indirectly indicated as one of the ‘other sources referred to in Article 15’, which are to be activated after the resources referred to in the three preceding paragraphs have been exhausted. The second reference is in section five where NBP’s short-term credit is identified as a source of financing to be activated after the resources referred to in the first four paragraphs of Article 16a have been exhausted. This dual reference might result in an incorrect interpretation of the proposed provisions following which NBP’s short-term credit may be used before all other financing sources have been exhausted. The ECB recommends that the final version of the draft law clarify these provisions, for example by explicitly excluding NBP short-term credit from the cross-reference to Article 15 contained in section four of Article 16a, with a view to ensuring that NBP’s short-term credit unambiguously remains the ‘last-resort’ source of financing of the Fund¹⁵, only granted in compliance with the strict criteria specified in the ECB’s convergence reports.
- 2.4 As the result of a further amendment introduced by the draft law, Article 43 of the Law on NBP will include a reference to the proposed Article 16a(5) of the Law on the Bank Guarantee Fund. The ECB understands that under the amended provisions NBP will retain full discretion in assessing if the statutory criteria for granting short-term credit to the Fund are met, and, if this is the case, whether to grant such credit. It is indeed essential for compliance with the monetary financing prohibition that the legal framework ensures that NBP is able to make its decision at its own discretion and in an independent manner.

12 See footnote 8.

13 See ECB’s Convergence Report December 2006, p. 229; the ECB’s Convergence Report May 2008, p. 244; and the ECB’s Convergence Report May 2010, p. 255.

14 See paragraph 2.5 of Opinion CON/2008/32.

15 See paragraph 2.6 of Opinion CON/2008/5.

3. Exchange of information between NBP and the Fund

- 3.1 The draft law broadens the sources of information that the Fund may use in assessing the financial soundness of the credit institutions benefiting from the Fund's coverage. Under the amended Law on the Bank Guarantee Fund: (a) NBP and the Financial Supervision Commission are required to inform the Fund about the financial status of the credit institutions, including actions undertaken in the case where a balance sheet loss or a solvency threat arises¹⁶; and (b) the Financial Supervision Commission is required to inform the Fund about: (i) facts relevant to the assessment of the proposed plans for the use of the Fund's financial assistance¹⁷; and (ii) circumstances that may lead to the activation of the Fund's payout guarantees¹⁸. The Fund has the right to request further information relevant to its tasks from NBP, the Financial Supervision Commission and other enumerated public authorities¹⁹. At the same time, the Law on the Bank Guarantee Fund does not include any legal basis for the Fund to provide information that it has collected to other authorities, such as NBP²⁰.
- 3.2 In a previous opinion, the ECB recommended that 'it is important to maintain channels for timely central bank access to information concerning financial market participants, relating in particular to crisis situations. Such access to prudential information, as possessed, *inter alia*, by the Fund, will allow NBP to properly perform its financial stability role'²¹. The ECB recommends that the draft law introduces an explicit legal basis for an agreement allowing for the sharing with NBP of information in the Fund's possession that is relevant to financial stability and that is needed by NBP to: (a) fulfil its own financial stability mandate²²; and/or (b) determine whether granting short-term credit to the Fund is appropriate in view of the 'occurrence of a threat to the financial stability' under proposed Article 16a(5) of the Law on the Bank Guarantee Fund.
- 3.3 Moreover, the ECB understands that any information sharing arrangements involving the Fund and NBP will be subject to confidentiality safeguards laid down in the agreement entered into between NBP and the Fund²³. In this context, the internal confidentiality standards applicable within the Fund under Article 38(10) of the Law on the Bank Guarantee Fund should be strengthened so as to incorporate confidentiality obligations applicable specifically to the members of the Fund's staff and governing bodies, similar to those set out in other sectoral legislation²⁴.

¹⁶ See Article 38(3) of the Law on the Bank Guarantee Fund.

¹⁷ See Article 38(1) of the Law on the Bank Guarantee Fund.

¹⁸ See Article 38(3a) of the Law on the Bank Guarantee Fund, introduced by Article 1(17) of the draft law, which transposes the amendment introduced in Article 10(1) of Directive 94/19/EC by Article 1(6) of Directive 2009/14/EC.

¹⁹ See Article 38(4) of the Law on the Bank Guarantee Fund.

²⁰ See Article 38a(2) of the Law on the Bank Guarantee Fund. The Fund may share the possessed information, subject to reciprocity and confidentiality safeguards, with counterparty deposit-guarantee schemes in the European Economic Area (see Article 38c in connection with Article 2b(2) of the Law on the Bank Guarantee Fund).

²¹ See paragraph 3.3 of Opinion CON/2008/32.

²² See Article 3(6a) of the Law on NBP.

²³ Entering into such an agreement is based on Article 38(5) of the Law on the Bank Guarantee Fund.

²⁴ See in particular Article 55 of the Law on NBP and Article 16 of the Law on supervision of the financial market (Dz. U. of 4 September 2006 No 157, item 1119); cf. paragraph 15 of the Annex to the Regulation of the Council of Ministers of

This opinion will be published on the ECB's website.

Done at Frankfurt am Main, 6 August 2010.

[signed]

The President of the ECB

Jean-Claude TRICHET