



OPINION OF THE EUROPEAN CENTRAL BANK
of 27 August 2007
at the request of the Polish Minister for Finance
on a draft law amending the Law on the Bank Guarantee Fund
(CON/2007/26)

Introduction and legal basis

On 5 July 2007 the European Central Bank (ECB) received a request from the Polish Minister for Finance for an opinion on a draft law amending the Law of 14 December 1994 on the Bank Guarantee Fund (hereinafter the ‘draft law’)¹.

The ECB’s competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community 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 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 current legal framework for the financing, governance, regulation and supervision of the Bank Guarantee Fund (hereinafter the ‘Fund’), which is a public law body established by statute to manage the national deposit-guarantee scheme in Poland. The Fund’s main tasks include:

- (i) specifying, for a given year, the amount of money to be separated by the banks³ in connection with the obligations to establish a fund for protection guaranteed assets, as well

¹ Consolidated text: Dz.U. of 19 April 2007 No 70, Item 474.

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 variety 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, as amended). 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 of 14 December 1994 on the Bank Guarantee Fund (hereinafter ‘Law on the Bank Guarantee Fund’)). For simplicity, the entities covered by the mandatory deposit-guarantee scheme operated by the Fund are referred to in this opinion as ‘commercial banks’.

as administering the collection of the necessary amounts from such accounts and ensuring pay-outs of the guaranteed deposits in case of their unavailability⁴; and

- (ii) providing repayable financial assistance, under statutorily defined conditions, to commercial banks threatened with insolvency by, among other things, issuing credit facilities, guarantees and endorsements to such commercial banks, acquiring specified types of their loan portfolios and other receivables, or crediting the acquisition of bank shares or stocks⁵.

The Fund's operations are financed by, among others, annual contributions paid by the commercial banks⁶. In addition, NBP has a statutory obligation to subsidise the commercial banks' annual contributions, currently at the level of 50 %⁷.

- 1.2 The draft law is aimed at introducing the following key changes to the model described above:
- (i) changes to the method of financing the Fund, by abolishing NBP's annual contributions and changing the current formula for calculating the commercial banks' contributions⁸; and (ii) changes to the Fund's governance, legal status, regulation and supervision, in particular increasing the competences of the Minister for Finance and limiting the current competences of NBP⁹.

4 Article 4(1) and Articles 21 to 36 of the Law on the Bank Guarantee Fund. Contributions provided by commercial banks, in case of the involuntary liquidation of a bank participating in the scheme, are collected by the Fund and paid into a dedicated account held with NBP, from which the relevant amounts are provided to the liquidator or administrator for the fulfilment of deposit guarantees (Article 28(3) and Article 29(1) together with Article 22(3) of the above Law; and paragraph 33 of the Annex to the Regulation of the Council of Ministers of 28 February 1995 on the adoption of the Statute of the Bank Guarantee Fund (Dz.U. of 6 March 1995 No 21, Item 113, as amended, hereinafter the 'Fund Statute')).

5 Article 4(2) and Articles 19 to 20a of the Law on the Bank Guarantee Fund; paragraph 4 of the Regulation of the Council of Ministers of 22 September 1999 on the trade by the Bank Guarantee Fund in the receivables acquired from banks threatened with insolvency (Dz.U. of 8 October 1999 No 80, Item 904).

6 Hence, the Polish deposit-guarantee scheme represents a mixed model financed both by the *ex post* cover for guaranteed deposits provided by the commercial banks in the event of the involuntary liquidation of a bank, and by a number of *ex ante* sources, which include, in addition to the commercial banks' annual contributions, contributions to the Fund's statutory fund paid in equal parts by NBP and the Minister for Finance, as well as income received by the Fund from its investments in government or NBP securities and from participation units in money market funds (Articles 13(1) to (3), 15, 16(3) and 45 of the Law on the Bank Guarantee Fund; and paragraphs 27 to 31 of the Fund Statute).

7 In 1998 NBP's subsidy covered 30% of the commercial banks' contributions. This was later raised to 40 % for 1999-2000, and 50 % for later years (paragraphs (3a) and (3b), as added to Article 13 of the Law on the Bank Guarantee Fund by the amending laws of 20 February 1997 (Dz.U. of 14 March 1997 No 24, Item 119) and of 6 May 1999 (Dz.U. of 6 May 1999 No 40, Item 399), respectively).

8 Article 1(10)(a) and (b) of the draft law, amending paragraph (1) and adding a new paragraph (1a) to Article 13 of the Law on the Bank Guarantee Fund. At the same time, the draft law proposes abolishing the current general exemption of the Fund from corporation tax obligations; see the amendments in Article 1(12) and Article 2 of the draft law (repeal of Article 18 of the Law on the Bank Guarantee Fund and the related amendments to Article 17 of the Law of 15 February 1992 on corporation tax (consolidated text: Dz.U. of 13 July 2000 No 54, Item 654, as amended)).

9 See the amendments in Article 1(2) to (9), (11) and (14) and (15) of the draft law (amendments to Articles 3(4) and (5), 4(2a) and (3), 6, 7(2) and (3), 8(1), 9(1), 17(3), 34(4), 38(7) and 44 of the Law on the Bank Guarantee Fund and amendments to Article 2(1) of the Law of 23 December 1994 on the Supreme Chamber of Control (consolidated text: Dz.U. of 17 August 2001 No 85, Item 937, as amended)).

2. Financial resources of the Fund

2.1 *Compliance with the monetary financing prohibition*

The ECB recalls its stance on the prohibition on monetary financing, as expressed in the 2006 Convergence Report where the ECB specified that national legislation which provides for the financing by a national central bank (NCB) of a public sector national deposit insurance scheme for credit institutions would not be compatible with the monetary financing prohibition, if it is not short term, does not address urgent situations, systemic stability aspects are not at stake, and decisions do not remain at the NCB's discretion¹⁰. The ECB further noted that: (i) Article 43 of the Law on Narodowy Bank Polski¹¹ and Article 15(6) of the Law on the Bank Guarantee Fund, which give NBP the power to grant credit to the Fund; as well as (ii) Article 13(3b) of the Law on the Bank Guarantee Fund, which provides for annual payment on behalf of NBP to the Fund, are incompatible with the Treaty provisions on monetary financing¹².

2.2 It is proposed that the draft law will abolish the annual subsidies contributed by NBP to the financing of the Fund¹³. It is explained that this proposal is motivated by the need to ensure full compatibility of the Law on the Bank Guarantee Fund with the monetary financing prohibition in Article 101(1) of the Treaty¹⁴. The ECB welcomes this amendment, as the abolition of the annual NBP subsidies will ensure that non-compliance with the monetary financing prohibition in this particular regard will be eliminated.

2.3 However, the second incompatibility with the monetary financing prohibition identified in the Convergence Report in relation to the financing of the Fund (i.e. NBP's right to extend credit to the Fund) is not addressed by the draft law. In particular, Article 15(6) of the Law on the Bank Guarantee Fund provides that one source of financing of the Fund is 'funds from a credit facility extended by NBP on the conditions agreed with the Fund'. In its present form, the Law on the Bank

¹⁰ See the ECB Convergence Report, December 2006, 'Introduction and executive summary', Section 2 ('Compatibility of national legislation with the Treaty'), Subsection 2.4 ('Prohibition on monetary financing and privileged access'), under the heading 'Financial support for deposit insurance and investor compensation schemes', p. 30.

¹¹ Law on Narodowy Bank Polski of 29 August 1997 (consolidated text: Dz.U. of 1 April 2005 No 1, Item 2, as amended).

¹² See ECB Convergence Report, December 2006, Chapter 2 ('Compatibility of national legislation with the Treaty'), Section 7 ('Poland'), Subsection 7.3 ('Monetary financing and privileged access'), p. 229. In the same passage it is pointed out that in its current formulation NBP's right to issue refinancing credit to commercial banks is incompatible with the monetary financing prohibition.

¹³ Article 1(10)(c) of the draft law, repealing paragraphs (3) and (3a) of Article 13 of the Law on the Bank Guarantee Fund.

¹⁴ See the third paragraph of the explanatory memorandum accompanying the draft law, and the second and third paragraphs of the letter of Minister for Finance of 26 July 2007 requesting the ECB's opinion.

Guarantee Fund specifies certain further conditions regarding this source of financing¹⁵. These conditions, however, fall short of ensuring compatibility with the prohibition on monetary financing specified by the Treaty. The Fund is a public law body established by statute to manage the national deposit-guarantee scheme in Poland, hence it qualifies as a body governed by public law within the meaning of Article 101(1) of the Treaty. NBP's extension of credit to the Fund under Articles 15(6) and 34(3) of the Law on the Bank Guarantee Fund and Article 43 of the Law on Narodowy Bank Polski constitutes a 'credit facility' within the meaning of Article 101(1) of the Treaty. Therefore, the ECB considers that these provisions remain incompatible with Article 101 of the Treaty.

2.4 *Calculation of the commercial bank contributions*

The draft law proposes changing the current formula for calculating the annual contributions of commercial banks to the Fund¹⁶. The change is explained as being necessary in order to adapt the Polish deposit-guarantee scheme to the new risk-measurement and capital requirements framework introduced by the Capital Requirements Directives, as recently implemented in Poland¹⁷.

2.5 As already noted by the ECB, deposit protection is an important element of the financial safety net and therefore contributes to safeguarding financial stability¹⁸. Further, according to international standards, sound funding arrangements are critical to the effectiveness of deposit-guarantee schemes and the maintenance of public confidence in the banking system¹⁹. At the same time, Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on

15 The President of NBP may extend credit to the Fund if: (i) the amounts of claims received under the deposit-guarantee scheme exceed the amounts which the commercial banks are obliged to transfer to the Fund in the event of the involuntary liquidation of a bank participating in the scheme (in accordance with rules set out in Articles 15(2), 25(2), 28(2)(2) and 29(1) of the Law on the Bank Guarantee Fund); and (ii) the Fund's own financial resources have been exhausted. The amount of such credit extended by NBP may not exceed half the Fund's receipts from annual contributions payable by the commercial banks. The credit may only be used to fulfill the Funds' task of protecting guaranteed deposits. Any funds recovered by the Fund from the insolvent estates of liquidated commercial banks must be applied in the first place to the repayment of money paid out under NBP's credit arrangements and the restoration of the Fund's assets derived from the contributions of NBP and the Minister for Finance to the Fund's statutory fund (Articles 15(6), 16(2), 34(3) and 35(2) of the Law on the Bank Guarantee Fund; Article 43 of the Law on Narodowy Bank Polski; and paragraph 33(1) and (2)(6) of the Fund Statute).

16 Article 10(13)(a) and (b) of the draft law, amending Article 13(1) and (2) of the Law on the Bank Guarantee Fund. Under the current formula, each commercial bank's contribution is computed as a specified percentage of the risk-weighted balance sheet assets, guarantees and endorsements, as well as certain other risk-weighted non-balance sheet obligations. The draft law proposes to link the level of each bank's contributions not to its risk-weighted assets and obligations but to the level of its capital requirements, as defined under the regime introduced by Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (OJ L 177, 30.6.2006, p. 1) and Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast) (OJ L 177, 30.6.2006, p. 201), hereinafter referred to jointly as the 'Capital Requirements Directives'.

17 The Capital Requirements Directives (see footnote 16) have been implemented in Poland by the Law of 26 January 2007 amending the Law on banking (Dz.U. of 9 March 2007 No 42, Item 272) and by resolutions of the Banking Supervision Commission (Nos 1 to 6/2007 of 13 March 2007). In the ninth paragraph of the explanatory memorandum accompanying the draft law, and in the second and fourth paragraphs of the letter of Minister for Finance of 26 July 2007 requesting the ECB's opinion, it is stated that the changes in the calculation method proposed by the draft law are linked to the implementation of the Capital Requirements Directives.

18 Paragraph 8 of ECB Opinion CON/2005/50 of 1 December 2005 at the request of Národná banka Slovenska on a draft law amending the Act No 118/1996 Coll. on the protection of bank deposits and on amendments to certain laws, as last amended.

19 Financial Stability Forum, 'Guidance for Developing Effective Deposit Insurance Systems', September 2001, point V.4 ('Funding arrangements'), p. 26.

deposit-guarantee schemes²⁰ does not prescribe a method for financing deposit-guarantee schemes, as long as: (i) the costs of financing are borne, in principle, by credit institutions themselves; (ii) the financing capacity of the scheme is in proportion to credit institutions' liabilities; and (iii) the stability of the banking system of the Member State concerned is not jeopardised²¹. Any change to the current system should respect these principles.

3. Governance, regulation and supervision of the Fund

- 3.1 Under the current provisions, the Fund's governing bodies are: (i) the Fund Council, whose members are appointed by the President of NBP, the Minister for Finance and the Polish Banks Association; and (ii) the Management Board, appointed by the Fund Council²². The Council of Ministers, acting on requests of the Minister for Finance in agreement with the President of NBP, has legislative competence over the general regulation of the Fund's activities²³. The Minister for Finance exercises overall supervision of the Fund, based on the criteria of legality and compliance with the Fund Statute²⁴.
- 3.2 The draft law is aimed at making certain changes to the current regime which, among other things, would result in: (i) reducing the number of the Fund Council's members appointed by the President of NBP from four to three, and limiting the role of the President of NBP in the selection of the Fund Council's Chairman²⁵; (ii) eliminating the current requirement for candidates for the Fund's Management Board to have five years professional experience in banking²⁶; (iii) assigning the regulatory powers for the Fund to the Minister for Finance, who will have to seek the opinion of the President of NBP in certain cases²⁷; and (iv) strengthening the supervisory powers exercised

20 OJ L 135, 31.5.1994, p. 5.

21 See the twenty-third recital of Directive 94/19/EC.

22 The President of NBP appoints four members of the Fund Council (until 1998 – three members), the Minister for Finance and the Polish Banks Association each appoint three Fund Council members (Articles 5(1), 6(3) and 9(1) to (3) of the Law on the Bank Guarantee Fund).

23 See Articles 3(4), 4(2a) and (3) of the Law on the Bank Guarantee Fund. Additionally, on specific issues listed in the Law, the regulatory competence is exercised by the Minister for Finance or the President of NBP (see footnote 27).

24 Article 3(5) of the Law on the Bank Guarantee Fund.

25 The Fund Council's Chairman is currently appointed by the Prime Minister on the joint recommendation of the Minister for Finance and the President of NBP; the draft law provides for appointment by the Minister for Finance after consulting the President of NBP (Article 1(6) of the draft law, amending Article 6(2) to (3) of the Law on the Bank Guarantee Fund).

26 Under the proposed provision, candidates would only have to have 'appropriate' higher education and professional experience (Article 1(9) of the draft law, amending Article 9(2) of the Law on the Bank Guarantee Fund).

27 Under the provisions of the draft law, the President of NBP would express a non-binding opinion on draft regulations presented by the Minister for Finance in relation to: (i) the adoption of the Fund Statute; (ii) the conditions for the Fund's trading in the loans acquired from commercial banks threatened with insolvency; (iii) any additional tasks of the Fund concerning the provision of assistance to commercial banks; (iv) the remuneration of the Fund Council's members; and (v) the commercial banks' reporting obligations to the Fund (Article 1(3)(a), (5)(b) and (c), (6) and (14) of the draft law, amending Articles 3(4), 4(2a) and (3), 6(4) and 38(7) of the Law on the Bank Guarantee Fund). Currently, proposals for regulations in the above areas must either be agreed between the Minister for Finance and the President of NBP or they are adopted exclusively by NBP (in the case of regulations referred to under (iv) and (v) above). Additionally, the draft law eliminates the President of NBP's right to give an opinion on draft regulations relating to the emergency rates of commercial banks' contributions to the Fund, as set by the Council of Ministers (Article 1(13) of the draft law, amending Article 34(4) of the Law on the Bank Guarantee Fund).

over the Fund by the Minister for Finance by, among other things, allowing the Minister to request information and documents directly from the Fund's staff and contractors and not merely from the governing bodies of the Fund²⁸. Furthermore, supervision of the Fund by the Supreme Chamber of Control (the state auditing body) is introduced²⁹.

- 3.3 The ECB repeats its earlier observation that central banks are in general in the best position to take on responsibility for financial stability, given their insight into money and financial market developments and their involvement in payment systems and monetary policy operations³⁰. At the same time, deposit-guarantee schemes are a key element of the financial safety net. Therefore, the governance framework should ensure that the important function of such schemes is carried out professionally and efficiently³¹. Moreover, effective coordination with the overall role of central banks in safeguarding financial stability should be ensured. This aim may be achieved through, among other things, maintaining an adequate level of involvement of the central bank in the governance and regulation of the national deposit-guarantee scheme.

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

Done at Frankfurt am Main, 27 August 2007.

[signed]

The President of the ECB

Jean-Claude TRICHET

²⁸ Article 1(4) of the draft law, adding a new Article 3a to the Law on the Bank Guarantee Fund.

²⁹ Under the current rules, the Fund's financial statements are audited by authorised auditors selected by a tender procedure by the President of NBP, having sought the opinion of the Fund Council (Article 17(2) of the Law on Bank Guarantee Fund). In order to allow the parallel exercise of auditing competences by the Supreme Chamber of Control, the draft law proposes to change the definition of the Fund's public law status (Article 1(15) and Article 3 of the draft law, respectively amending Article 44 of the Law on Bank Guarantee Fund and Article 2(1) of the Law of 23 December 1994 on the Supreme Chamber of Control (consolidated text: Dz.U. of 17 August 2001 No 85, Item 937, as amended)).

³⁰ See e.g. paragraph 7 of ECB Opinion CON/2001/10 of 25 May 2001 at the request of the Austrian Ministry of Finance on a draft Federal law establishing and organising the financial market supervisory authority (title shortened). Cf. also Article 3(2)(6) of the Law on Narodowy Bank Polski (see footnote 11 above).

³¹ See Financial Stability Forum, 'Guidance for Developing Effective Deposit Insurance Systems', September 2001, point V.1(c) ('Basic governance arrangements'), p. 19. According to these recommendations, the governing body of a deposit-guarantee scheme should include individuals with the requisite knowledge to allow them to understand the environment in which the scheme operates.