



OPINION OF THE EUROPEAN CENTRAL BANK
of 16 July 2009
on the legal framework for cooperative savings and credit unions
(CON/2009/60)

Introduction and legal basis

On 4 May 2009 the European Central Bank (ECB) received a request from the Marshall of the Polish Parliament for an opinion on a draft law on cooperative savings and credit unions and on amendments to certain other laws (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 will regulate credit unions active in Poland, i.e. SKOK credit unions (spółdzielcze kasy oszczędnościowo-kredytowe). For this purpose, the draft law will replace the current Law on SKOK credit unions of 14 December 1995 (hereinafter the ‘current Law on credit unions’)³. SKOK credit unions form a distinct segment of the Polish financial sector. They are entitled to offer similar consumer banking services to those offered by ordinary credit institutions (banks⁴), with exception of certain types of mortgage credit⁵. However, under the current Law on credit unions, SKOK credit unions are not regulated and supervised by the Financial Supervision Commission

¹ Parliamentary Print No 1876 of 19 March 2009.

² OJ L 189, 3.7.1998, p. 42.

³ *Dziennik Ustaw* (Dz. U.) of 4 January 1996 No 1, Item 2.

⁴ Credit institutions registered in Poland are legally referred to as ‘banks’ (this legal term does not cover SKOK credit unions). The term ‘credit institutions’ under Polish law only relates to European Economic Area (EEA) credit institutions from outside Poland. Non-EEA credit institutions are referred to under Polish law as ‘foreign banks’ (Article 2, Article 4(3) and Article 4(1)(17) to (20) of the Law on banking of 29 August 1997 (consolidated text: Dz. U. of 12 June 2002 No 72, Item 665, hereinafter, the ‘Law on banking’)).

⁵ See Article 21 of the current Law on credit unions; cf. judgment of the Polish Constitutional Tribunal of 24 March 2009 (Case No K53/07).

(FSC), the Polish financial supervisory authority, but instead by a statutory central association of individual SKOK credit unions, the National SKOK⁶. The draft law will substantially modify these arrangements by giving the FSC powers to regulate and supervise the SKOK system. The FSC will exercise its new powers in relation to the SKOK system, *inter alia* by: (i) issuing prudential regulations for the SKOK system; (ii) licensing new individual SKOK credit unions and conducting on-site inspections of them⁷; and (iii) supervising the National SKOK, in particular as regards the operation of ‘stabilisation fund’ which insures the deposits held with the SKOK system⁸. The National SKOK will retain certain regulatory powers in relation to individual SKOK credit unions, in particular as regards making prudential recommendations and exercising control competences in this respect⁹. Nevertheless, the FSC will be exclusively competent to enforce binding corrective measures and to institute rehabilitation or liquidation procedures in relation to individual SKOK credit unions on its own initiative or at the request of the National SKOK¹⁰. The FSC will also have powers to suspend the governing bodies of the National SKOK if they fail to comply with the FSC’s recommendations¹¹. Further substantial changes introduced by the draft law relate to the conversion of credit unions into regular banks, which will be obligatory for credit unions exceeding a specified amount of own funds, introduction of rules regarding the voting power of individual SKOK credit unions in the National SKOK, limitations on the activities of the National SKOK, etc.¹²

- 1.2 The draft law also amends certain other laws, including the Law on Narodowy Bank Polski of 29 August 1997¹³ (hereinafter, the ‘Law on NBP’). In particular, the proposed amendment to Article 42 of the Law on NBP provides that SKOK credit unions will be eligible to obtain refinancing credit from NBP under the same conditions as regular credit institutions established in Poland¹⁴.

2. ECB comments

2.1 *Obligation to maintain minimum reserves with the central bank*

The draft law maintains the current arrangements under which SKOK credit unions are not subject to the obligation to hold minimum reserves with NBP. The ECB makes the following observations in this respect.

6 See Articles 34, 35(5)-(6) and (9), 36 and 39-43 of the current Law on credit unions.
7 See Articles 58 and 59(1) and Articles 6-8, 19, 37, 60, 65, 67, and 78(1) of the draft law.
8 See Articles 58 and 59(2) and Articles 47, 49(3)-(4), 53, 66-67, 76(1)-(2) and 78(2) of the draft law.
9 See Articles 40-42, 61-64, 67-68 of the draft law.
10 See Articles 68(2) and 69-75 of the draft law.
11 See Articles 76(3) and 77 of the draft law.
12 See Articles 9-10, 41, 46(2) and 54 of the draft law.
13 Consolidated text: Dz. U. of 1 April 2005 No 1, item 2.
14 See amendments introduced by Article 85(4) of the draft law.

- 2.2 In past opinions adopted at the request of other Member States¹⁵, the ECB has consistently maintained that the Eurosystem's minimum reserves obligations apply, *inter alia*, to credit unions that fulfil the functional criteria of a 'credit institution' as defined in the Recast Banking Directive¹⁶. This definition, which is recalled in the Eurosystem's minimum reserves rules¹⁷, specifies that credit institutions are undertakings whose business is to receive deposits or other repayable funds from the public and to grant credit for their own account. The ECB is aware that specified types of credit unions are exempt, for prudential supervision purposes, from the scope of application of the Recast Banking Directive¹⁸ and that the national law provisions of the Member States may establish special regulatory regimes in relation to such credit unions, separate from the general regulation of banking activities¹⁹. However, such exclusions or variations introduced in the area of prudential supervision do not automatically exclude any entities which fulfil the functional criteria of a 'credit institution' from the Eurosystem's reserve requirements, which, in line with the Article 19.1 of the Statute of the European System of Central Banks and of the European Central Bank, constitute a monetary policy instrument and hence have a different function than prudential supervision²⁰. Consequently, exemptions provided for as part of the Eurosystem's minimum reserves regime²¹ do not follow the same pattern as exemptions from the prudential rules introduced by the Recast Banking Directive (one element of such exemptions from the Eurosystem's minimum reserves regime is a lump-sum allowance benefiting, in particular, small credit institutions, irrespective of their legal form²²).
- 2.3 In this context, the ECB notes that SKOK credit unions fulfil the abovementioned functional criteria of a 'credit institution' (and will continue to fulfil them under the draft law), namely that they: (i) receive deposits 'from the public' within the meaning of the Recast Banking Directive, i.e. receive deposits from natural or legal persons²³; and (ii) grant credit for their own account²⁴. Consequently, in line with its previous opinions²⁵, the ECB considers that SKOK credit unions will be subject to the Eurosystem's minimum reserves requirements when Poland adopts the euro. Such

15 See paragraphs 10-14 of ECB Opinion CON/2005/8 (Lithuania), paragraph 3.1 of ECB Opinion CON/2006/4 (Cyprus) and paragraphs 10-17 of ECB Opinion CON/2006/11 (Latvia) (All ECB opinions are available on the ECB website at www.ecb.europa.eu/ecb/legal/opinions/html/index.en.html.)

16 See Article 4(1)(a) of 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).

17 See Article 2(1) of Regulation ECB/2003/9 of 12 September 2003 on the application of minimum reserves (OJ L 250, 2.10.2003, p. 10).

18 See Article 2 of the Recast Banking Directive.

19 The current Law on SKOK credit unions is an example of such a special regulatory regime (which will generally be maintained by the draft law).

20 Such as contributing to the stabilisation of the money market interest rates and the enlargement of the banking system's structural liquidity shortage (cf. paragraph 14 of the ECB Opinion CON/2006/11).

21 See Article 2.2 of Regulation ECB/2003/9.

22 See Article 5.2 of Regulation ECB/2003/9.

23 As opposed to inter-bank deposits. A statutory condition requiring members of individual SKOK credit unions to have a 'professional or organisational' relation with each other (Article 6 of the current Law on credit unions; Article 11 of the draft law) does not constitute an impediment in this respect; cf. paragraph 16 of ECB Opinion CON/2006/11.

24 See Article 3.1 of the current Law on credit unions and Article 3 of the draft law.

25 See paragraph 14 of ECB Opinion CON/2005/8 and paragraphs 10 and 17 of ECB Opinion CON/2006/11.

requirements, and the sanctions related to them²⁶, will apply directly by the operation of Community law.

- 2.4 Irrespective of the above, the earlier imposition of the minimum reserves requirements on SKOK credit unions under national law may enable the harmonisation of Polish law with the Eurosystem's requirements in this respect, which would facilitate the introduction of euro in Poland. The earlier inclusion of SKOK credit unions in NBP's minimum reserves regime would seem advisable in particular in connection with the draft law's proposal to treat SKOK credit unions as eligible for accessing central bank liquidity (as discussed in paragraph 2.6). Extension to the SKOK credit unions of one of the central bank's monetary policy instruments, i.e. the liquidity support provided by way of refinancing credit, should be accompanied by the application of the minimum reserves obligations, as a complementary monetary policy instrument that is structurally linked to liquidity providing operations²⁷.
- 2.5 In view of the above considerations, the ECB would welcome the harmonisation of the Polish legal system with the Eurosystem's minimum reserves requirements by the inclusion of SKOK credit unions in the NBP's minimum reserves regime²⁸. At the same time, the ECB considers that both the holding of minimum reserves and access to the refinancing credit may be organised for SKOK credit unions on the basis of a collective transfer mechanism administered by the National SKOK²⁹.
- 2.6 *Central bank refinancing credit and compliance with the monetary financing prohibition*

Amendments to Article 42 of the Law on NBP introduced by the draft law provide that SKOK credit unions will be eligible to receive refinancing credit from NBP in the same manner as ordinary credit institutions (banks). The ECB would like to make the following general comment on the current wording of this article of the Law on NBP, as it may apply to both SKOK credit unions and regular credit institutions. In the past ECB's Convergence Reports the ECB has expressed concerns that certain elements of the Article 42 of the Law on NBP, taken together with the relevant provisions of the Law on banking, might suggest that NBP refinancing credit may be available to insolvent credit institutions³⁰. The ECB considers such cases of central bank solvency

²⁶ See Article 7 of Council Regulation (EC) No 2531/98 of 23 November 1998 concerning the application of minimum reserves by the European Central Bank (OJ L 318, 27.11.1998, p. 1) and Regulation ECB/1999/4 of 23 September 1999 on the powers of the European Central Bank to impose sanctions (OJ L 264, 12.10.1999, p. 21).

²⁷ Systemic liquidity shortage enlarged by minimum reserves obligations contributes to increasing the demand for central bank refinancing which, in turn, makes it easier for the central bank to steer money market rates through liquidity-providing operations (cf. 'The monetary policy of the ECB', 2nd edn. 2004, p. 79, published on the ECB's website at www.ecb.int).

²⁸ See paragraph 3.1 of ECB Opinion CON/2006/4, as well as, in relation to different matter, paragraph 2 of ECB Opinion CON/2007/28 (Poland) and paragraph 2.3 of ECB Opinion CON/2008/53 (Poland).

²⁹ See Article 38.3 of the Law on NBP allowing collective holding of minimum reserves by cooperative banks.

³⁰ See the ECB's Convergence Report of May 2008, p. 244, and the ECB's Convergence Report of December 2006, p. 228, which in particular refers to: (i) Article 70(2) of the Law on banking together with Article 42(7) of the Law on NBP (conditions under which NBP may extend refinancing credit to an uncreditworthy borrower); (ii) Article 142(1) of the Law on banking together with Article 42(3) of the Law on NBP (conditions under which NBP may grant refinancing credit for the purpose of implementing a programme of bank rehabilitation); and (iii) Article 42(6) of the Law on NBP (conditions for possible termination of NBP's refinancing facility in the event of the worsening of the financial situation of the recipient).

support to be incompatible with the safeguards laid down in the Treaty regarding a central bank's capacity to perform its tasks, as expressed in Article 101(1) of the Treaty and in the implementing secondary legislation³¹. As already noted in the ECB's Convergence Reports, clearer safeguards are needed in Article 42 of the Law on NBP to exclude expressly any solvency support to financial institutions and to avoid any incompatibility of this Article with the monetary financing prohibition. The ECB reiterates this recommendation in the present opinion.

2.7 *Supervisory framework and central bank powers to collect information*

The ECB welcomes the new supervisory framework introduced in relation to the SKOK system, which attributes supervisory and regulatory responsibilities for SKOK credit unions to the FSC. This should help to maintain fair competition between different participants in the Polish financial market as well as to complement the safety net of the SKOK system, including elements to be provided for through implementing acts issued under the draft law (e.g. in the area of deposit insurance). As regards the competences to be exercised by the National SKOK³², the ECB recommends that any overlap with the competences allocated to the FSC should be avoided.

2.8 Moreover, with respect to the tasks to be assigned to NBP as regards regulation of the liquidity situation and refinancing of the SKOK credit unions, creating conditions for their development, assessing their operation and opining on legislation related to them (in parallel to similar tasks assigned to NBP in relation to regular credit institutions)³³, the ECB considers that any such assignment of new NBP tasks should be based on the assessment that NBP has resources commensurate with such new tasks. In particular, in line with its earlier opinion³⁴, the ECB recommends that, in view of the new liquidity regulation task which NBP is to exercise vis-à-vis SKOK credit unions, NBP should be given commensurate powers to obtain all relevant information, if need be by way of direct SKOK reporting to NBP.

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

Done at Frankfurt am Main, 16 July 2009.

[signed]

The President of the ECB

Jean-Claude TRICHET

31 See in particular 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), which prohibits central bank financing of public sector obligations vis-à-vis third parties; see the ECB's Convergence Report of May 2008, p. 24, and the ECB's Convergence Report of December 2006, p. 30.

32 See, e.g., Articles 64-65 of the draft law.

33 See amendments introduced in Article 3(2) points (5)-(6), Article 17(4)(5) and Article 21(4) of the Law on NBP by Article 85(1)-(3) of the draft law.

34 See paragraph 3 of ECB Opinion CON/2008/53.