



OPINION OF THE EUROPEAN CENTRAL BANK

of 4 January 2013

on the financial market supervision framework

(CON/2013/1)

Introduction and legal basis

On 23 October 2012, the European Central Bank (ECB) received a request from the Polish Parliament (Sejm) for an opinion on a draft law amending the Law on supervision of the financial market and certain other laws (hereinafter the 'draft law on supervision') and a draft law amending the Law on trading in financial instruments (hereinafter the 'draft law on trading') (collectively referred to as the 'draft laws').

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 sixth indent 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 provisions¹, as the draft law relates 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 laws

The draft laws introduce several changes which, if implemented, would have a significant impact on the regulation of financial services and on the institutional framework for financial supervision in Poland.

1.1 The draft law on supervision proposes the following arrangements.

- (a) The establishment of the Council for the Public Interest in the Financial Market (hereinafter the 'Public Interest Council') as a new consultative body to the Prime Minister. Members of the Public Interest Council are to be appointed by the Prime Minister from among candidates nominated by: (i) professional and non-governmental organisations with an interest in issues relating to financial markets; (ii) national trade unions; (iii) national employer associations whose activities are linked to the operation of the financial markets; (iv) individuals nominated by certain higher education establishments. The competences of the Public Interest Council include: (i) playing a role in selecting members of the Polish Financial

¹ OJ L 189, 3.7.1998, p. 42.

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Supervision Authority (KNF); (ii) monitoring financial market transactions and providers of financial services and reporting on perceived risks to the public interest to the KNF; (iii) submitting an annual report on the KNF's functioning to the Prime Minister.

- (b) The KNF and the KNF Office will be financed from the State budget and no longer from the fees paid by the supervised entities. These supervised entities will make payments to the State budget calculated by reference to the cost of supervision.

1.2 The draft law on trading proposes the following arrangements.

- (a) Financial instruments will be categorised into five groups, each with a different overall risk level, which takes into account price risk, liquidity risk, interest rate risk and credit risk. Entities seeking admission of financial instruments to trading will be obliged to assign a risk category to the instrument. KNF will maintain a public register of financial instruments and their risk categories and will have the power to change the risk category of a given instrument.
- (b) A list of 'prohibited market practices' that are to be combated by KNF will be introduced.

2. General observations

The ECB notes that the draft laws were submitted for consultation at an early stage of the legislative process. Since it is likely that the draft laws will undergo further amendments in the course of the legislative process, which makes it difficult to fully assess their impact on the Polish financial market regulation and supervision at this time, this Opinion only addresses issues related to the general approach adopted in the draft laws. If significant changes are introduced in the draft laws as they proceed further through the legislative process, the ECB expects to be consulted on the amended versions.

3. Objectives of financial supervision and role of the Public Interest Council

3.1 The draft law introduces a new primary objective of financial supervision in Poland, i.e. 'the protection of the public interest'. This objective will be supported by actions implementing the present objectives of financial supervision, including the 'proper functioning of the financial market, its stability, security and transparency, confidence in financial markets, and protection of the interests of market participants'². Moreover, the newly established Public Interest Council is to provide opinion on the actions of KNF from the perspective of protecting the public interest³. The Public Interest Council will pursue this objective essentially through continuous auditing of KNF activities and through recommending measures to be taken by the Prime Minister in relation to the KNF.

² See Article 2 of the Law of 21 July 2006 on supervision of financial market (Dz. U. of 4 September 2006 No 157, item 1119), as amended by Article 1(2) of the draft law on supervision.

³ See Article 6b(2) of Law on supervision of financial markets, as inserted by Article 1(4) of the draft law on supervision.

3.2 The ECB notes that the introduction of the broad and ambiguous concept of ‘public interest’ as an objective of the financial supervision, as well as the corresponding wide definition of the role of the Public Interest Council, including its powers to review KNF actions, would affect KNF’s operational independence and result in a dilution of the supervisory objectives pursued by KNF in accordance with its statutory mandate. The ECB points to international standards in the area of financial market supervision, such as the Core Principles for Effective Banking Supervision, which emphasise the need for supervisors to be operationally independent and for supervisory responsibilities and objectives to be clearly defined⁴.

4. Financing supervisory activities

4.1 Currently, the operating costs of the KNF and the KNF Office are covered by fees paid for the benefit of the KNF by the supervised entities, in the amount specified annually by the budgetary law, and in accordance with individual fee calculations based on separate sectoral laws. The draft law on supervision requires supervised entities to contribute to the State budget, hence discontinuing the direct allocation of those payments to finance KNF’s supervisory activities.

4.2 The ECB notes that the proposed model significantly differs from that applied by most Member States, where the supervisory authorities are not financed from the general State budget or this financing is limited. If the proposed model were to be introduced in Poland, the ECB recommends, in line with the Core Principles⁵, that appropriate measures are taken to secure adequate resources for the conduct by KNF of effective supervision, ensuring its autonomy and operational independence.

5. Categorisation of financial products and services and the list of prohibited market practices

The declared objective behind the requirement that financial institutions categorise financial products and services they offer by economic risk and the introduction of a list of prohibited market practices is to strengthen consumer protection. In both cases, generally worded clauses are used to define the new measures⁶. While the ECB supports the general objective of strengthening the protection of consumers of financial services, it recommends that the proposals contained in the draft laws are carefully assessed from the perspective of their compatibility with the existing instruments of Union law in the area of financial services and with the current legislative initiatives at Union level which define instances for

⁴ See Basel Committee for Banking Supervision, ‘Core Principles for Effective Banking Supervision’, September 2012, Principle 1 (hereinafter the ‘Core Principles’), available at the Bank for International Settlements’ website at www.bis.org.

⁵ See Core Principles, principle 2, essential criterion 6.

⁶ For example, a financial instrument in the ‘heightened risk’ category is defined as ‘a financial instrument with a medium price volatility, medium liquidity risk, medium to high interest rate risk and medium credit risk’ and a category of prohibited practice defined as ‘dishonest or imprudent behaviour not respecting the justified interests of the clients and of the general good of the financial markets’; see Article 13a(3) and Article 118a(1)(1) introduced in the Law of 29 July 2005 on trading in financial instruments (Dz. U. of 23 September 2005 No 183 item 1538) by the draft law on trading.

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supervisory intervention aimed at protection of consumers of financial services in a specific manner. In particular, the ECB draws the consulting authority's attention to the ongoing review of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC⁷, Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC⁸, and Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)⁹, as well as to the proposal for a Regulation of the European Parliament and of the Council on key information documents for investment products¹⁰. Such Union legislative instruments and initiatives, together with the relevant delegated and implementing measures, contribute to the harmonised protection of consumers of financial services within the Union, while respecting a need for legal certainty on the part of the providers of such services.

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

Done at Frankfurt am Main, 4 January 2013.

[signed]

The President of the ECB

Mario DRAGHI

⁷ OJ L 145, 30.4.2004, p. 1.

⁸ OJ L 345, 31.12.2003, p. 64.

⁹ OJ L 96, 12.4.2003, p. 16.

¹⁰ COM(2012) 352 final.