



OPINION OF THE EUROPEAN CENTRAL BANK

of 23 July 2012

on a stabilisation fund for banks

(CON/2012/58)

Introduction and legal basis

On 19 June 2012, the European Central Bank (ECB) received a request from the Polish Minister for Finance for an opinion on a draft law amending the Law on the Bank Guarantee Fund and certain other laws (hereinafter the ‘draft law’).

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 provisions¹, as the draft law relates to the 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 aims at enhancing the Polish framework for crisis management in the financial sector by establishing an industry-funded stabilisation fund for credit institutions, formed as a sub-fund under the management of the Bank Guarantee Fund (‘BFG’), the operator of the Polish deposit guarantee scheme². An existing BFG sub-fund, which is dedicated to providing assistance to the banks covered by the deposit guarantee scheme, will continue to exist in parallel to the newly-created fund³.

¹ OJ L 189, 3.7.1998, p. 42.

² To this end the draft law amends (a) the Law of 14 December 1994 on the Bank Guarantee Fund, consolidated text published in *Dziennik Ustaw* (Dz. U.) of 2009 No 84, item 711 (hereinafter the ‘Law on BFG’); and (b) the Law of 12 February 2010 on the recapitalisation of certain financial institutions, Dz. U. of 2010 No 40, item 226 (hereinafter ‘the Law on recapitalisation’).

³ According to Article 4(2)(1) and (1a) in connection with Articles 19 and 20 of the Law on BFG, the existing assistance fund is used by the BFG to provide the entities covered by the obligatory deposit guarantee scheme with returnable financial assistance (in the case of an insolvency threat or for the acquisition of banks’ shares), and for acquiring claims of banks threatened with insolvency. See also paragraphs 32(2) and 34 of the BFG’s Statute as introduced by the Regulation of the Minister for Finance of 14 September 2009 on establishing the Statute of the Bank Guarantee Fund (Dz. U. of 2009 No 164, item 1308).

- 1.2 The proposed sources of financing of the stabilisation fund include: (a) a pre-defined proportion of the mandatory annual contributions of institutions covered by the obligatory deposit guarantee scheme; and (b) a one-off payment to be made by those institutions in the year of the draft law's entry into force. The funds in the stabilisation fund will primarily be used to finance or co-finance recapitalisation guarantees granted in accordance with the Law on recapitalisation and will be subject *mutatis mutandis* to the application of the relevant procedures and modalities laid down in that Law⁴. Moreover, the draft law expands the list of eligible securities in which available BFG funds (not limited to those in the stabilisation fund) may be invested to include securities issued or guaranteed by governments or central banks of, *inter alia*, Union Member States⁵.
- 1.3 In addition, the draft law amends information-sharing arrangements by: (a) enabling the NBP to effectively obtain from the BFG any information necessary for it to fulfil its financial stability mandate and introducing reciprocity⁶; and (b) enabling the sharing of relevant information between the Polish Financial Supervision Authority and the BFG⁷. Finally, the draft law expands the membership of the Financial Stability Committee⁸ to include the President of the BFG⁹.

2. General observations

Assistance measures that may be offered by the BFG through the stabilisation fund are presently defined in the Law on recapitalisation as measures aiming to address solvency problems at a failing bank. The ECB understands that the Polish authorities contemplate further expansion of the role of the BFG¹⁰ which may in the future perform functions of a resolution authority designated under a harmonised Union framework¹¹. The ECB supports this intention to implement a fully-fledged bank resolution regime, in which the designated authority uses resolution tools harmonised under Union law, offering legally sound means of resolving non-viable institutions. The implementation

⁴ Under the Law on recapitalisation, a recapitalisation guarantee may be granted to a distressed financial institution by the Minister for Finance, resulting in the State Treasury acquiring shares, bonds or other debt instruments issued by the recapitalised financial institution in cases where such instruments are not acquired by market entities. See in this respect Opinion CON/2009/19 (all ECB opinions are published on the ECB's website at www.ecb.europa.eu). According to new Article 6(2a) of the Law on recapitalisation, inserted by Article 4 of the draft law, the Minister for Finance, having taken a decision to grant a recapitalisation guarantee, may request the BFG to provide financing or co-financing of the guarantee from the stabilisation fund.

⁵ See Article 16(3) of the Law on BFG, as amended by Article 1(5)(c) of the draft law.

⁶ See Article 38(4a) of the Law on BFG, inserted by Article 1(9) of the draft law.

⁷ See Article 17a of the Law of 21 July 2006 on financial market supervision, Dz. U. of 2008 No 209, item 1317, inserted by Article 2 of the draft law

⁸ Established by the Law of 7 November 2008 on the Financial Stability Committee, Dz. U. of 2006 No 157, item 1119. The Financial Stability Committee is a body currently comprising: the Minister for Finance (as Chairman), the President of NBP and the Chairman of the Financial Supervision Authority. It is responsible for the fostering and protection of the stability of the national financial system through the exchange of information and coordination of activities in this area. See also Opinion CON/2008/39.

⁹ See Article 4(1) of the Law on the Financial Stability Committee, as amended by Article 3(2) of the draft law.

¹⁰ See p. 11 of the draft law and its explanatory memorandum.

¹¹ See the proposal for a directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010 (COM(2012) 280 final) (hereinafter the 'proposed bank resolution directive').

of such a harmonised framework would achieve the objective of ensuring financial stability while preserving a level playing field, limiting distortions to competition, and addressing stakeholder rights. At the present stage, the ECB invites the Polish authorities to adopt a flexible approach in this respect, capable to adapting to the evolving Union framework.

3. Specific observations

3.1 *Financing of the BFG's function related to deposit guarantees*

Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes¹² requires that deposit guarantee schemes should be in a position to pay duly verified claims by depositors in the periods specified by this Directive¹³. This implies that the deposit guarantee schemes should have adequate financial means at their disposal to realise this objective¹⁴. A deposit guarantee scheme's deposit guarantee role and its assistance role should be well separated. Therefore, the financial resources available for paying guaranteed deposits should be ring-fenced and, if necessary, only used to cover the part of the assistance cost that indirectly ensures the depositors' protection¹⁵. This is crucial to ensure that the objective of the deposit guarantee scheme is fully respected. In this context, the ECB welcomes the fact that the recapitalisation guarantees will be granted by the BFG at its discretion¹⁶, solely on the basis of the funds explicitly allocated to the stabilisation fund in accordance with its financing regime¹⁷.

3.2 *Financing of the BFG's function related to bank resolution*

In accordance with its previous opinions¹⁸, the ECB invites the Polish authorities to consider introducing rules for replenishing the funds in the stabilisation fund where part or all of such funds are used to finance recapitalisation measures.

3.3 *Compliance with the monetary financing prohibition*

At the same time, the ECB reiterates its position concerning the limited conditions under which central bank credit may be provided to deposit guarantee schemes without breaching the monetary financing prohibition contained in Article 123 of the Treaty in connection with Council Regulation (EC) No 3603/93¹⁹. As pointed out in the ECB's convergence reports²⁰ and several opinions

¹² OJ L 135, 31.5.1994, p. 5.

¹³ See Article 10(1) of Directive 94/19/EC.

¹⁴ See recital 23 of Directive 94/19/EC specifying that the financing capacity of deposit guarantee schemes must be in proportion to their liabilities; see also paragraph 2.5 of Opinion CON/2007/26.

¹⁵ See the European System of Central Banks contribution to the Commission's public consultation on the technical details of a possible EU framework for bank recovery and resolution, May 2011, p. 18; see also Article 99(1) of the proposed bank resolution directive.

¹⁶ See new Article 20e(1) of the Law on BFG, inserted by Article 1(8) of the draft law.

¹⁷ See Articles 7(2)(5a)(b) and 20c(1) of the Law on BFG, as amended by Articles 1(3)(a) and 1(8) of the draft law, and Article 5(4) of the draft law.

¹⁸ See paragraph 3.6 of Opinion CON/2011/29 and paragraph 2.4 of Opinion CON/2011/66.

¹⁹ 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).

directed to the Polish authorities, the NBP may only extend credit to the BFG where such credit is provided for a short term, addresses urgent situations, with systemic stability aspects being at stake, and with decisions remaining at NBP's discretion²¹. Presently the Polish law complies with those conditions as it provides for a possible extension by the NBP, under its discretion, of short-term credit to the BFG related to the financing of its deposit guarantee function, if a threat to financial stability arises and in view of its urgent needs²². In line with its previously stated position²³, the ECB considers that provision of central bank credit to the national deposit guarantee fund for purposes not related to pay-outs of guaranteed deposits, but related to its recapitalisation functions, would constitute central bank financing of a public sector function in breach of the monetary financing prohibition²⁴. The ECB understands that the draft law complies with the monetary financing prohibition, as the financing of assistance measures conducted through the stabilisation fund (i.e. the recapitalisation functions) is not linked to the mechanism for the activation of guaranteed deposits described in Article 16a of the Law on BFG. Therefore, the ECB understands that such assistance measures will not be financed by way of central bank credit extended to the BFG.

3.4 *Information sharing arrangements*

In view of its previous recommendations²⁵, the ECB welcomes the proposed amendment of Article 38(4a) of the Law on BFG as this will give the NBP access to prudential information possessed, *inter alia*, by the BFG, which will allow the NBP to properly perform its financial stability role.

- 3.5 The ECB understands that the inclusion of the BFG President in the composition of the Financial Stability Committee aims to reflect the new financial stability tasks, which are explicitly assigned to the BFG under the draft law²⁶ and which the BFG will perform vis-à-vis the banks covered by the obligatory deposit guarantee scheme. The ECB welcomes this development as it reflects the rising role of the BFG in the financial safety net of the Polish financial system and ensures the involvement in the Financial Stability Committee's work of all relevant bodies, thereby facilitating effective exchange of information and coordination of financial stability activities.

20 See, for example, the ECB's Convergence Report of May 2012, p. 30.

21 See paragraph 2.1 of Opinion CON/2007/26, paragraph 2.2 of Opinion CON/2008/5 and paragraph 2.2 of Opinion CON/2008/32.

22 See Article 43 of the Law on Narodowy Bank Polski of 29 August 1997 (consolidated text: Dz.U. of 1 April 2005 No 1, item 2) together with Article 16a(5) of the Law on BFG. See also paragraph 2 of Opinion CON/2010/64.

23 Cf. paragraph 2.6 of Opinion CON/2008/32.

24 Cf. Article 1(1)(ii)(b) of Regulation (EC) No 3603/93.

25 See paragraph 3.2 of Opinion CON/2010/64.

26 See new Article 4(4) of the Law on BFG, added by Article 1(2)(b) of the draft law.

ECB-PUBLIC

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

Done at Frankfurt am Main, 23 July 2012.

[signed]

The Vice-President of the ECB

Vítor CONSTÂNCIO