



**OPINION OF THE EUROPEAN CENTRAL BANK**  
**of 17 January 2008**  
**at the request of the Polish Minister for Finance**  
**on a draft law amending the Law on the Bank Guarantee Fund**  
**(CON/2008/5)**

**Introduction and legal basis**

On 22 October 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’)<sup>1</sup>.

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 provisions<sup>2</sup>, 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 constitutes an updated version of amendments to the national deposit-guarantee scheme in Poland, as managed by the Bank Guarantee Fund (hereinafter the ‘Fund’)<sup>3</sup>. The ECB has already been consulted on an earlier version of such amendments, relating to the method of financing, governance and supervision of the Fund, as described in detail in an earlier ECB opinion<sup>4</sup>.

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

<sup>2</sup> OJ L 189, 3.7.1998, p. 42.

<sup>3</sup> 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 the ‘Law on the Bank Guarantee Fund’)). For ease of reference, the entities covered by the mandatory deposit-guarantee scheme operated by the Fund are referred to in this opinion as ‘commercial banks’.

<sup>4</sup> See paragraphs 1.1 to 1.2 of ECB Opinion CON/2007/26 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.

1.2 Compared with the original version of the draft law, the current version introduces the following new elements:

- (i) NBP's right to extend credit facilities to the Fund is restricted to short-term credit facilities extended at NBP's discretion to enable the Fund to repay guaranteed deposits, only in so far as the Fund's own resources are not sufficient and only where the stability of the banking system is threatened<sup>5</sup>.
- (ii) New rules are introduced on the Fund's management of its financial resources. In particular, any balance sheet surplus of the Fund should, as a rule, be allocated to its 'assistance fund' supporting the Fund's operations to the benefit of distressed but still solvent commercial banks, rather than to the Fund's core resources securing the repayment of guaranteed deposits in the event of a bank insolvency<sup>6</sup>. Wider powers are also given to the Fund as regards the offering of financial support for the consolidation and modernisation of cooperative banks<sup>7</sup>.
- (iii) The draft law, similarly to the previously consulted provisions, contains proposals to amend the Fund's governance, regulation and supervision. However, amendments in this area now ensure that NBP's existing powers as regards the governance and regulation of the Fund are largely maintained<sup>8</sup>.

## 2. The ECB's comments

### 2.1 *General comments*

The ECB welcomes the draft law in so far as it continues to propose abolishment of the annual subsidies contributed by NBP to the financing of the Fund and incorporates earlier ECB recommendations related to the need to maintain effective coordination of the deposit-guarantee scheme with the overall role of the central bank in safeguarding financial stability<sup>9</sup>. In particular, the ECB welcomes the general aim of the draft law to preserve or strengthen the specific regulatory functions exercised in relation to the Fund by the President of NBP<sup>10</sup>.

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<sup>5</sup> See Article 1(9) and (12) of the draft law. At the same time, the draft amendments related to abolishing NBP's non-repayable annual subsidies for the Fund, as well as the changed method for calculating the commercial banks' financial contributions, are maintained (see Article 1(1) and (8) of the draft law).

<sup>6</sup> See Article 1(10) of the draft law. The statutory application of the Fund's various resources is regulated in paragraphs 28 to 31 of the Statute of the Bank Guarantee Fund (see 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')).

<sup>7</sup> See Article 2 of the draft law.

<sup>8</sup> See Articles 1(2) to (7), (11), (12) and (15) of the draft law. Among other things these amendments increase the regulatory and supervisory powers exercised in relation to the Fund by the Minister for Finance. Auditing powers exercised by the Supreme Chamber of Control, a state audit body, are also strengthened (Article 3 of the draft law).

<sup>9</sup> See paragraphs 2.2 and 3.3 of ECB Opinion CON/2007/26.

<sup>10</sup> Under the provisions of the Law on the Bank Guarantee Fund, as amended by the current version of the draft law, the President of NBP will: (1) agree with the Minister for Finance on the regulatory proposals submitted to the Council of Ministers for: (i) changes to the Fund Statute, (ii) additional tasks of the Fund concerning the provision of assistance to commercial banks, and (iii) emergency rates for commercial banks' financial contributions to the Fund; (2) submit a non-

## 2.2 *Compatibility of NBP's extension of credit facilities to the Fund with the monetary financing prohibition*

The ECB recalls its stance on the prohibition on monetary financing, as expressed in its Convergence Report of December 2006. In the Report, the ECB stated that national legislation which provides for the 'financing by NCBs [national central banks] 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 discretion'<sup>11</sup>. In the Report, the ECB further noted that the current Article 43 of the Law on Narodowy Bank Polski<sup>12</sup> and Article 15(6) of the Law on the Bank Guarantee Fund, which give NBP the power to grant credit to the Fund, are incompatible with the Treaty provision on monetary financing<sup>13</sup>.

2.3 The draft law will amend the conditions under which NBP may grant credit facilities to the Fund. Under the amended Article 34(3) of the Law on the Bank Guarantee Fund, such credit facilities may only be given for a short term, and only when: (i) the stability of the banking system is threatened; and (ii) the total amount of claims submitted for the repayment of guaranteed deposits exceeds the Fund's accumulated resources<sup>14</sup>. Further, Article 15(6) of the Law on the Bank Guarantee Fund, establishing the sources of finance of the Fund, is amended to reflect the amendments to Article 34(3) of the same Law<sup>15</sup>. Other related provisions of the Law on the Bank Guarantee Fund, specifying the mode of application and repayment of NBP's credits, are not affected; in particular, the Law continues to stipulate that NBP's credit facilities may only be used to fulfill the Fund's task of protecting guaranteed deposits, hence excluding the use of NBP's credits to finance any of the Fund's other operations (such as giving support to distressed but still

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binding opinion on draft regulations by the Minister for Finance relating to the conditions for the Fund's trading in loans acquired from commercial banks threatened with insolvency; (3) set the remuneration of the Fund Council's members in agreement with the Minister for Finance; and (4) establish the commercial banks' reporting obligations to the Fund (Article 3(4), Articles 4(2a) and 34(4) (as amended by Article 1(5) and (12) of the draft law) and Articles 4(3), 6(4) and 38(7) of the Law on the Bank Guarantee Fund). At the same time, President of NBP will retain his current powers related to the appointment of the Fund Council's members and the selection of the Fund's auditors (Articles 6(3) and 17(2) of the Law on the Bank Guarantee Fund). The President of NBP will also have a new right to receive, together with the Minister for Finance, quarterly reports on the activities and finances of the Fund (Article 7(2)(3a) of the Law on the Bank Guarantee Fund, as added by Article 1(6) of the draft law).

<sup>11</sup> 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.

<sup>12</sup> Law on Narodowy Bank Polski of 29 August 1997 (consolidated text: Dz.U. of 1 April 2005 No 1, Item 2, as amended (hereinafter the 'Law on NBP')).

<sup>13</sup> See the 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.

<sup>14</sup> The proposed wording of Article 34(3) of the Law on the Bank Guarantee Fund, as amended by Article 1(12) of the draft law.

<sup>15</sup> The proposed wording of Article 15(6) of the Law on the Bank Guarantee Fund, as amended by Article 1(9) of the draft law, specifies 'short-term credit facility extended by NBP pursuant to Article 34(3) [of the Law]' as one of the sources of finance of the Fund.

solvent commercial banks)<sup>16</sup>. At the same time, the draft law amends Article 43 of the Law on NBP so that it will now only provide that ‘Narodowy Bank Polski may extend credit facilities to the Bank Guarantee Fund’, without referring to any conditions that must be agreed with the Fund’s management before such lending may take place<sup>17</sup>. According to the consulting authority, the new regulation of conditions under which NBP’s credit facilities may be extended to the Fund is intended to ensure full compliance of the Law on the Bank Guarantee Fund with the monetary financing prohibition under Article 101(1) of the Treaty<sup>18</sup>.

2.4 The ECB reiterates its position that the granting of a credit facility by NBP to the Fund falls under the prohibition contained in Article 101(1) of the Treaty. The Fund qualifies as a ‘body governed by public law’ covered by Article 101(1) of the Treaty, since it has been established as a legal person by the Law on the Bank Guarantee Fund, while its organisation and the exercise of its public functions and powers in relation to commercial banks is based on the provisions of this Law and of relevant secondary legislation<sup>19</sup>. The Fund is also subject to public supervisory and auditing powers exercised by the Minister for Finance and NBP, as well as, in line with amendments introduced by the draft law, by the Supreme Chamber of Control<sup>20</sup>. The characterisation of the Fund as a body covered by the Treaty prohibition on monetary financing is unaffected by the provisions of the draft law which, from the point of view of the Polish administrative and budgetary regime, classify the Fund as a non-state body outside the scope of the public finance sector<sup>21</sup>.

2.5 While, subject to the conditions specified above, the provision of credit to funds vested with a deposit guarantee function may be justified<sup>22</sup>, it needs to be ensured that the proposed amendments to the Law on the Bank Guarantee Fund incorporate all such specified conditions. In this regard, the following needs to be noted.

- (i) The conditions that: (1) the NCB crediting of the deposit guarantee scheme has a short-term character; and (2) the crediting decision remains at the discretion of the NCB, are both already incorporated in the amended provisions of the Law on the Bank Guarantee Fund<sup>23</sup>.

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16 Articles 16(1)(2) together with Article 15(6) and Article 4(1) and (2) of the Law on the Bank Guarantee Fund. Any amounts 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 facility and to the restoration of the Fund’s original statutory assets (Article 35(2) of the Law on the Bank Guarantee Fund).

17 Article 43 of the Law on NBP as amended by Article 4 of the draft law.

18 See the second paragraph of the letter of Minister for Finance of 15 October 2007 requesting the ECB’s opinion.

19 See Article 3(1) to (4) of the Law on the Bank Guarantee Fund and paragraph 1 of the Fund Statute. See also the relevant secondary legislation adopted on basis of the provisions referred to in footnote 10 above.

20 See footnotes 8 and 10 above.

21 The proposed wording of Article 44 of the Law on the Bank Guarantee Fund, as amended by Article 1(13) of the draft law.

22 See paragraph 2.2 of this Opinion and paragraphs 10 to 14 of ECB Opinion CON/2001/32 of 11 October 2001 at the request of the Portuguese Ministry of Finance on a draft decree law amending the legal framework of credit institutions and financial companies.

23 See amendments introduced by Article 1(9) and (12) and Article 4 of the draft law.

- (ii) The condition that the NCB credit addresses urgent situations is not incorporated. To this effect, the wording of the amended Article 34(3) of the Law on the Bank Guarantee Fund needs to specify that credit facilities should only be granted for urgent needs of the Fund.
- 2.6. As regards the condition that credit may only be extended if systemic stability aspects are at stake, the ECB notes that NBP's credit facilities may only be extended to perform the Fund's task of protecting guaranteed deposits. In this context, the ECB understands that the above-mentioned task in principle should be financed by way of increased financial contributions from commercial banks<sup>24</sup> rather than by way of credit facilities extended by NBP. To this effect, the list of funding sources in Article 15 of the Law on the Bank Guarantee Fund could expressly provide that NBP credit facilities may only be extended in the absence of any other available sources<sup>25</sup>.
- 2.7 Moreover, to rule out any breach of the monetary financing prohibition, it may be useful to specify explicitly in Article 34 of the Law of the Bank Guarantee Fund that the credit facilities extended by NBP to the Fund are based on adequate collateral and are granted without prejudice to Article 101 of the Treaty<sup>26</sup>.
- 2.8 Finally, the proposed amendments to Article 43 of the Law on the NBP are not fully compatible with the monetary financing prohibition as long as they do not include an explicit cross-reference to the provisions of the Law on the Bank Guarantee Fund specifying the conditions that may justify the extension of credit to the Fund. The ECB considers that such an explicit cross-reference is necessary to avoid doubt and to ensure legal interpretation that complies with the monetary financing prohibition<sup>27</sup>.

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

Done at Frankfurt am Main, 17 January 2008.

[signed]

*The President of the ECB*

Jean-Claude TRICHET

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<sup>24</sup> In a way specified in Article 34(4) of the Law on the Bank Guarantee Fund.

<sup>25</sup> Article 15(6) of the Law on the Bank Guarantee Fund lists credit facilities extended by NBP among financial resources of the Fund. Special status of such credit facilities as the 'last resort' source of funding currently stems from systemic interpretation of the Article 34(3) in conjunction with Article 34(1)-(2) of the Law.

<sup>26</sup> See paragraph 13 of the ECB Opinion CON/2001/32. Under current Polish law, any credit facility agreement must, in particular, specify 'the mode of securing the repayment of the credit' (Article 69(2)(6) of the Law on banking of 29 August 1997 (consolidated text: Dz.U. of 12 June 2002 No 72, Item 665, as amended, hereinafter, the 'Law on banking')). The provisions of the Law on banking cover all types of credit facility agreements, including agreements related to credit facilities extended by NBP to the Fund.

<sup>27</sup> The draft law will amend with the same effective date the respective provisions of both the Law on the Bank Guarantee Fund and the Law on NBP, which may facilitate their consistent interpretation (Article 1(9) and (12) and Article 4 in conjunction with Article 7 of the draft law). Nevertheless, introduction of an express cross-reference will ensure that any divergent application is excluded.