



OPINION OF THE EUROPEAN CENTRAL BANK

of 20 August 2009

on an extension to Narodowy Bank Polski's entitlement to trade in securities

(CON/2009/67)

Introduction and legal basis

On 27 July 2009 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 motorways and the National Road Fund and the Law on Narodowy Bank Polski (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and the third 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 Narodowy Bank Polski (NBP). 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

The National Road Fund², operated by Bank Gospodarstwa Krajowego (BGK)³, supports the financing of road and motorway construction in Poland. The draft law: (a) adds loans extended by the State budget to the list of available financing sources; and (b) regulates the procedure under which Treasury-guaranteed bonds are issued by BGK for the benefit of the National Road Fund⁴. One of the distribution channels of such bonds may be auctions organised, *inter alia*, by NBP, under an agreement entered into with BGK⁵. To enable NBP to organise such auctions, Article 2 of the draft law amends Article 48(3) of the Law on Narodowy Bank Polski⁶ by extending the NBP's entitlement to organise trading in securities to cover, in addition to securities issued by the Treasury, securities bearing the Treasury's guarantees or sureties.

¹ OJ L 189, 3.7.1998, p. 42.

² As regulated under the Law of 27 October 1994 on motorways and the National Road Fund, consolidated text: *Dziennik Ustaw* (Dz. U.) of 2004 No 256, Item 2571.

³ BGK is the only Polish credit institution established by legislation as a State bank.

⁴ See explanatory memorandum to the draft law, p. 1.

⁵ New Article 39r added in the Law on motorways and the National Road Fund by Article 1(2) of the draft law.

⁶ Law of 29 August 1997 on Narodowy Bank Polski, consolidated text: Dz. U. of 2005 No 1, Item 2.

2. Timing of the consultation

The ECB received the consultation request after adoption of the draft law by the Sejm and only a few days before consideration by the Senat. Article 4 of Decision 98/415/EC requires Member States to ensure that the ECB is consulted at an appropriate stage enabling the authority initiating the draft legislative provision to take into consideration the ECB's opinion before deciding on the substance.

3. Role of NBP and the monetary financing prohibition

The ECB understands that the draft law foresees provision by NBP of the fiscal agent services related to the organisation of auctions of Treasury-guaranteed bonds issued by a public undertaking (BGK) on the basis of the agreement between NBP and BGK providing for NBP's remuneration at market rates. Provision of such services by an ESCB central bank needs to be assessed as regards its compliance with the monetary financing prohibition set out in Article 101 of the Treaty and forbidding public undertakings or other public sector entities of the Member States from obtaining overdraft facilities or any other type of credit facility with the national central bank. Furthermore, under 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 [101] and 104b(1) [103(1)] of the Treaty⁷, the monetary financing prohibition relates *inter alia* to central bank financing of the public sector's obligations vis-à-vis third parties. Taking into account the express recognition in Article 21.2 of the Statute of the European System of Central Banks and of the European Central Bank of the provision of fiscal agency services as a legitimate function traditionally performed by central banks, the ECB notes⁸ that provision by central banks of fiscal agency services should comply with the prohibition on monetary financing, provided that such services remain within the field of the fiscal agency function and do not constitute central bank crediting of the public sector outside the narrowly defined exceptions specified in Regulation (EC) No 3603/93⁹ or central bank financing of public sector obligations vis-à-vis third parties¹⁰. Moreover, following previous ECB opinions, even if Article 101(1) refers literally to 'credit facilities', i.e. facilities extended with the obligation to repay, this prohibition may also apply *a fortiori* to other forms of funding, i.e. without the obligation to repay, since Article 101 of the Treaty has the overall aim of public finance discipline and of prohibiting national central banks from financing the public sector. This implies that both the ultimate objective and the spirit of these provisions must be taken into account in their interpretation¹¹. The ECB

⁷ OJ L 332, 31.12.1993, p. 1.

⁸ See ECB Opinion CON/2009/23, paragraph 2.2; all ECB opinions are available on the ECB's website at www.ecb.europa.eu. See also the ECB's Convergence Report of May 2008, p. 24, stating that 'The purpose of Article 21.2 of the Statute was to enable NCBs, following transfer of the monetary policy competence to the Eurosystem, to continue to conduct the fiscal agent service traditionally provided by central banks to governments and other public entities without automatically breaching the monetary financing prohibition.'

⁹ See Article 4 (non-extendable intra-day credits), Article 5 (crediting, under specified conditions, the public sector's account with cheques issued by third parties) and Article 6 (holding, within specified limits, coins issued by and credited to the public sector).

¹⁰ See the ECB's Convergence Report of May 2008, p. 233, which states that provision by Česká národní banka of administrative support to the Financial Arbitrator, an administrative body entirely independent from the central bank, 'constitutes a form of central bank financing of the public sector's obligations'.

¹¹ See ECB Opinion CON/2003/27, paragraph 9 and ECB Opinion CON/2009/59, paragraph 2.2(b).

considers in this context that provision by NBP of the fiscal agent services foreseen by the draft law does not raise concerns as regards its compliance with the monetary financing prohibition.

Conclusion

The ECB has no objections to the draft law.

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

Done at Frankfurt am Main, 20 August 2009.

[signed]

The President of the ECB

Jean-Claude TRICHET