



OPINION OF THE EUROPEAN CENTRAL BANK

of 7 May 2021

**on the provision of certain loans and the application of minimum reserve requirements
by Narodowy Bank Polski
(CON/2021/17)**

Introduction and legal basis

On 9 April 2021 the European Central Bank (ECB) received a request from the Polish Ministry of Finance for an opinion on certain amendments contained in a draft law amending the Law on Narodowy Bank Polski, the Law on the Bank Guarantee Fund, Deposit Guarantee Scheme and Resolution, the Law on banking and certain other laws (hereinafter the 'draft amendments').

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), and Article 2(2) of Council Decision 98/415/EC¹, as the draft amendments relate to Narodowy Bank Polski (NBP), rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets, and the instruments of monetary policy of a Member State which has not adopted the euro. 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 amendments

- 1.1 The purpose of the draft amendments is to facilitate certain lending operations of NBP, in particular in the context of NBP's role as lender-of-last-resort in the Polish financial system.
- 1.2 As noted in the consultation request, under the current provisions of the Law on the Bank Guarantee Fund, Deposit Guarantee Fund and Resolution² (hereinafter the 'Law on the Fund'), the Bank Guarantee Fund (hereinafter the 'Fund'), acting in its capacity as resolution authority, may amend the terms of agreements to which an entity under resolution is a party. The draft amendments explicitly exclude the possibility of the Fund amending (a) agreements related to granting the State Treasury guarantee for the repayment of an NBP refinancing loan and (b) agreements concluded with NBP, the central banks of other Member States or the ECB.
- 1.3 Under the current provisions of Polish law, the general rules applicable to the transfer of mortgage receivables or receivables secured with registered pledges require in any case that a relevant entry

¹ Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

² Ustawa z dnia 10 czerwca 2016 r. o Bankowym Funduszu Gwarancyjnym, systemie gwarantowania depozytów oraz przymusowej restrukturyzacji (*Dziennik Ustaw z 2016, poz. 996*).

in the Land and Mortgage Register is made by the registry court for such a transfer to be effective³. The draft amendments introduce an exception to this general rule in the case of (a) refinancing loans granted by NBP to banks in Polish zloty in order to replenish their money holdings or implement their recovery plans, (b) short-term loans granted by NBP, at its discretion, to the Fund for financing the Fund's deposit guarantee function, if a threat to financial stability arises and in view of the Fund's urgent needs and (c) short-term loans granted by NBP, at its discretion, to the National Association of Cooperative Savings and Credit Unions in the event of a threat to the liquidity of credit unions. In particular, the draft amendments clarify that in the case of securing these loans by the transfer of mortgage receivables or receivables secured with registered pledges, the mortgages or registered pledges shall devolve to NBP from the date of the granting of a refinancing loan or a short-term loan. A similar solution is introduced in respect of the collateral securing guarantees provided by the State Treasury in respect of NBP's refinancing loans. As noted in the consultation request, without these amendments the collateral may not be effectively established before the expiry of the term for which a loan is granted, which may hinder NBP's performance of its statutory tasks, including the capacity of banks to obtain a refinancing loan in a situation posing a threat to the stability of the financial system.

- 1.4 The draft amendments amend the banking secrecy and public procurement regimes in order to enable NBP to outsource to *Bank Gospodarstwa Krajowego* (BGK), a Polish State development bank⁴, some of the tasks related to granting refinancing loans or short-term loans, including securing and servicing of such loans. As noted in the consultation request, there are organisational reasons for entrusting BGK with these tasks, in particular when it is necessary to process a large number of receivables. Undertaking these additional activities could require NBP to increase its resources on an ad hoc basis which, due to the limited time when such activities would be performed, could prove inefficient for NBP. By contrast, BGK is operationally prepared for these kinds of activities.
- 1.5 Finally, the draft amendments introduce the possibility for the NBP Management Board to exempt an entity under resolution or a bridge institution from the obligation to maintain minimum reserve requirements during the period of resolution.

2. Provision of loans by NBP

- 2.1 The ECB welcomes that the draft amendments explicitly exclude the possibility for the Fund to amend agreements related to the granting of the State Treasury guarantee for the repayment of a refinancing loan and agreements concluded with NBP, the central banks of other Member States or the ECB. The exercise of such resolution powers in respect of central bank liquidity operations would be inappropriate.

³ See Article 79(1) of the Law of 6 July 1982 on the Land and Mortgage Registers and on Mortgage (Ustawa z dnia 6 lipca 1982 r. o księgach wieczystych i hipotece (*Dziennik Ustaw z 1982 r., nr 19, poz. 147*)). (and Article 17(1) of the Law of 6 December 1996 on the Registered Pledge and the Pledge Registry (.Ustawa z dnia 6 grudnia 1996 r. o zastawie rejestrowym i rejestrze zastawów (*Dziennik Ustaw z 1996 r., nr 149, poz. 703*)).

⁴ For the description of the BKG status and tasks see Opinion CON/2010/70. All ECB opinions are published on EUR-Lex.

- 2.2 The ECB welcomes that the draft amendments seek to facilitate the provision of adequate collateral for NBP's refinancing loans. In this respect, the existing administrative and procedural issues related to land registry court proceedings can hinder the process of NBP mobilising collateral in the form of mortgage receivables or receivables secured by registered pledges. The draft amendments will enhance the capacity of credit institutions to obtain liquidity support when needed, including in a situation posing a threat to the stability of the financial system.
- 2.3 Regarding NBP's proposed outsourcing of tasks related to the granting, servicing and securing of refinancing loans or short-term loans to the BGK, the ECB understands that these tasks will be limited to issues of an administrative and technical nature, such as the processing of a large number of mortgage loans in case of a foreclosure of collateral security provided to NBP.

3. NBP minimum reserve requirements

- 3.1 The ECB has noted in earlier opinions⁵ that Member States whose currency is not the euro retain their powers in the field of monetary policy according to national law⁶. As and when the euro is introduced, Poland's monetary policy will need to be consistent with the Eurosystem's operational framework and credit institutions should therefore be familiar with the requirements that would apply to them once the single monetary policy is implemented in Poland.
- 3.2 Regarding the envisaged discretionary exemption from minimum reserves requirements for an entity under resolution or a bridge institution during the resolution period, the ECB legal framework⁷ provides that the ECB may grant exemptions from minimum reserve requirements upon request by the relevant NCB, where an institution is subject to a reorganisation measure pursuant to Directive 2001/24/EC of the European Parliament and of the Council⁸. The definition of a reorganisation measure provided for in Article 2 of Directive 2001/24/EC clarifies that reorganisation measures include, inter alia, the application of the resolution tools and the exercise of resolution powers provided for in Directive 2014/59/EU of the European Parliament and of the Council⁹.
- 3.3 In view of the above, the ECB notes that the provisions of the draft law allowing NBP, at its discretion, to exempt entities under resolution and bridge institutions from minimum reserve requirements are, as such, in line with the Eurosystem framework for minimum reserve requirements. The relevant national provisions will be superseded by the Eurosystem's framework governing minimum reserves upon Poland's accession to the euro area. Currently, the consequence of exempting an entity (that is a Eurosystem monetary policy counterparty at the

⁵ See paragraph 2.2 of Opinion CON/2018/48 and paragraph 2 of Opinion CON/2016/40.

⁶ Article 282(4) of the Treaty and Article 42.2 of the Statute of the European System of Central Banks and of the European Central Bank.

⁷ See Article 4(2)(a) of Regulation (EU) 2021/378 of the European Central Bank of 22 January 2021 on the application of minimum reserve requirements (ECB/2021/1), which will apply from 26 June 2021 (OJ L 73, 3.3.2021, p. 1).

⁸ See Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ L 125, 5.5.2001, p. 15).

⁹ See Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

same time) from minimum reserve requirements is that it loses access to the Eurosystem's monetary policy operations¹⁰.

4. Prohibition of monetary financing

4.1 *Refinancing loans granted by NBP to credit institutions*

In line with the ECB's Convergence Report 2020, the ECB reiterates the recommendation for the introduction in the Law on NBP¹¹ of explicit safeguards with a view to ensuring compatibility with the monetary financing prohibition under Article 123(1) of the Treaty¹². This refers, in particular, to Article 42(3) of the Law on NBP, which allows NBP to grant refinancing loans for the purpose of implementing a bank rehabilitation plan, which is initiated in the event of a bank infringing, or being likely to infringe, certain requirements relating to, among other things, own funds, and the liquidity ratio. Currently, safeguards aimed at ensuring timely repayment of such loans do not fully exclude an interpretation that would allow an extension of refinancing credit to a bank undergoing rehabilitation proceedings that then becomes insolvent.

4.2 *Short-term loans granted by NBP to the Fund*

As a preliminary point, the ECB notes that an appraisal based on the guiding criteria contained in the ECB's Convergence Report regarding national legislation which provides for the financing by a national central bank (NCB) of a deposit guarantee scheme¹³, while necessary, is not sufficient for a comprehensive analysis of compatibility with the monetary financing prohibition. The reason is that those criteria are predicated on the implicit assumption of the possibility of short-term financial support to entities outside the public sector. The assumption ensures a coherent reading of the criteria against the wording of Article 123(1) of the Treaty which explicitly prohibits NCBs from granting overdraft facilities or any other type of credit facility to the public authorities and bodies of Member States. Consequently, this opinion analyses the provisions laid down in the Law on NBP and the Law on the Fund regarding short-term loans granted by NBP to the Fund from the perspective of the status of the Fund¹⁴. In particular, it considers whether the Fund is a 'body governed by public law' within the meaning of Article 123(1) of the Treaty¹⁵.

¹⁰ See for example Article 55(a) of Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (General Documentation Guideline) (ECB/2014/60) (OJ L 91, 2.4.2015, p. 3).

¹¹ Ustawa z dnia 29 sierpnia 1997 r. o Narodowym Banku Polskim (*Dziennik Ustaw z 2017 r., poz. 1373*).

¹² See the ECB's Convergence Report 2020, pp. 199-200.

¹³ See the ECB's Convergence Report 2020, p. 35. According to these guiding criteria, national legislation which provides for the financing by an NCB of a deposit guarantee scheme would be compatible with the monetary financing prohibition laid down in Article 123(1) of the Treaty only if it were short term, addressed urgent situations, systemic stability aspects were at stake, and decisions were at the NCB's discretion.

¹⁴ Previous recommendations made by the ECB in its opinions regarding the Fund addressed only issues raised by the consistency with the guiding criteria contained in the ECB's Convergence Report – see, for example, paragraph 3.3 of ECB Opinion CON/2012/58.

¹⁵ On the need to assess the status of the deposit guarantee fund, see paragraph 2.2 of Opinion CON/2020/24. For an earlier example, see paragraph 11 of Opinion CON/2005/50.

- 4.3 The ECB recalls that, notwithstanding the absence of a specific definition of the concept of ‘body governed by public law’ in Council Regulation (EC) No 3603/93¹⁶, other areas of Union law and the related case-law of the Court of Justice of the European Union provide guidance on its interpretation for the purposes of the monetary financing prohibition¹⁷. Accordingly, a body is ‘governed by public law’ within the meaning of Article 123(1) of the Treaty if it has all of the following characteristics: (a) it is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) it has legal personality; and (c) it is closely dependent on the public sector entities referred to in Article 123(1) of the Treaty. A close dependence on those public sector entities is presumed when a body is financed, for the most part, by them; or is subject to management supervision by them; or has an administrative, managerial or supervisory board, more than half of whose members are appointed by them.
- 4.4 The ECB notes that currently the Fund has the following main characteristics. It is a legal person and performs the function of the national resolution authority and administrator of the deposit guarantee scheme. The purpose of the Fund’s activities is to take measures aimed at stabilising the domestic financial system, in particular by ensuring the functioning of the compulsory deposit guarantee scheme and conducting compulsory restructuring proceedings¹⁸. The governing bodies of the Fund are the Fund Council and the Fund Management Board¹⁹. The Fund Council consists of six members, comprising three representatives of the Minister competent for financial institutions, including the Chairman of the Fund Council, two representatives of NBP and one representative of the Polish Financial Supervision Authority²⁰. The Fund Management Board is composed of three to five members, including the President and the Vice-President, and is appointed by the Fund Council²¹. The main sources of the Fund’s financing include mandatory ex-ante annual contributions, extraordinary ex-post contributions, income from financial assets of the Fund, funds from short-term loans granted by NBP, funds from loans granted from the State budget, and funds received as a result of borrowing and issuing bonds²².
- 4.5 It follows that the conditions mentioned above are all met since (a) the Fund has been established for the purpose of meeting needs in the general interest – especially tasks related to financial stability, administering the deposit guarantee scheme and resolution; (b) the Fund has legal personality; and (c) the majority of the members of the Fund Council are appointed by the Minister competent for financial institutions and the Financial Supervisory Authority.
- 4.6 In light of the foregoing, the ECB is of the view that the Fund qualifies as a ‘body governed by public law’ within the meaning of Article 123(1) of the Treaty. Consequently, given the current features of the Fund, the provisions laid down in the Law on NBP and the Law on the Fund regarding the

16 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).

17 See paragraph 2.3 of Opinion CON/2020/24 and the references made therein.

18 See Article 4 of the Law on the Fund.

19 See Article 6(1) of the Law on the Fund.

20 See Article 7(4) of the Law on the Fund.

21 See Article 10 of the Law on the Fund.

22 See Article 270 of the Law on the Fund.

possibility of NBP granting loans to the Fund are not compatible with the monetary financing prohibition and should be amended accordingly.

This opinion will be published on EUR-Lex.

Done at Frankfurt am Main, 7 May 2021.

[signed]

The President of the ECB

Christine LAGARDE