EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 9 October 2007

at the request of the Polish Minister for Finance
on a draft law amending the Law on the supervision of financial markets
(CON/2007/31)

Introduction and legal basis

On 16 August 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 21 July 2006 on the supervision of financial markets[1]. On 23 August 2007, the ECB received a revised version of a draft law amending the Law on the supervision of financial markets (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 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[2], 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 modifies certain elements of the supervisory reform, which was initiated in September 2006 and originally scheduled to be implemented by 1 January 2008. Prior to the introduction of the reform, financial supervision was carried out by sectoral supervisors, including, for the banking sector, the Banking Supervision Commission[3] chaired by NBP's President and assisted by the General Inspectorate for Banking Supervision (a specialised supervisory unit within

1 Dz.U. of 4 September 2006 No 157, Item 1119, as amended (hereinafter the 'Law on the supervision of financial markets').

2 OJ L 189, 3.7.1998, p. 42.

3 The composition of the Banking Supervision Commission before 19 September 2006 was as follows: (i) NBP's President, as Chairman; (ii) the Minister for Finance or his representative, as Vice-Chairman; (iii) another representative appointed by the Minister for Finance; (iv) the representative of the President of the Republic; (v) the Chairman of the Bank Guarantee Fund; (vi) the Chairman of the Securities and Exchange Commission or deputy thereof; and (vii) the General Inspector for Banking Supervision (Article 26(1) of the 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 'NBP Statute')) .

NBP)[4]. The reform introduced a single consolidated supervisory authority, the Financial Supervision Commission (FSC)[5], which is gradually taking over supervisory responsibility for all segments of the financial markets[6]. One result of this process is that the Banking Supervision Commission is scheduled to be dissolved on 31 December 2007, following which its powers will be allocated to the FSC[7]. At the same time, the supervisory staff of the General Inspectorate for Banking Supervision will be transferred to the FSC's office[8]. During the transitory period from 19 September 2006 to 31 December 2007 the FSC Chairman replaces NBP's President as the Banking Supervision Commission Chairman[9].

1.2 The draft law modifies the supervisory framework as follows[10]:

(a) the transfer of banking supervision responsibility from the Banking Supervision Commission to the FSC will be delayed until 1 January 2013[11]. During the transitory period from the effective date of the draft law[12] until 31 December 2012: (i) NBP's President will take over as Chairman of the Banking Supervision Commission[13]; and (ii) the General Inspectorate for Banking Supervision will remain within NBP and will assist the Banking Supervision Commission in its work[14];

(b) as of the effective date of the draft law, the FSC will include three FSC Vice-Chairmen who will be appointed and dismissed by the President of the Council of Ministers on the motion of the Minister for Finance, NBP's President and the FSC Chairman, respectively (currently the two FSC Vice-Chairmen are appointed and dismissed on the motion of the FSC Chairman)[15]; and

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4 Article 25(1) and Article 29 of the NBP Statute.

5 The current composition of the FSC is as follows: (i) the FSC Chairman, appointed by the President of the Council of Ministers for a five year term in office; (ii) two FSC Vice-Chairmen, appointed and dismissed by the President of the Council of Ministers on the motion of the FSC Chairman; (iii) the minister responsible for financial institutions or his representative; (iv) the minister responsible for social security (participating, among other things, in the regulation of pension funds) or his representative; (v) NBP's President or the delegated Vice-President; and (vi) the representative of the President of the Republic (Article 5 and Articles 7 to 9 of the Law on the supervision of financial markets).

6 The FSC was established on 19 September 2006 and on this date took over non-banking supervision responsibilities (supervision of capital markets and insurance firms/pension funds: Article 67(1) together with Article 65(1) of the Law on the supervision of financial markets).

7 Articles 66 and Article 67(2) of the Law on the supervision of financial markets.

8 Article 74(4) together with Article 75(2) of the Law on the supervision of financial markets.

9 Article 77(2) of the Law on the supervision of financial markets. The Law provides that NBP's President (or delegated Vice-President) will continue to participate in the Banking Supervision Commission as an ordinary member.

10 The proposed amendments affect the Law on the supervision of financial markets as well as, among others, the NBP Statute and 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').

11 Article 1(6) of the draft law, amending Article 67(2) of the Law on the supervision of financial markets.

12 Entry into force is 14 days after the draft law is published (Article 17).

13 Article 14(1) together with Article 1(12) of the draft law, which repeals Article 77(2) of the Law on the supervision of financial markets.

14 Article 1(5) of the draft law, amending Article 66(2) of the Law on the supervision of financial markets.

15 Article 1(1) and (2) of the draft law, amending Articles 5(1) and 9(1) of the Law on the supervision of financial markets (the change does not have any foreseen end date). The candidates for the positions of FSC Vice-Chairmen have to comply with the same statutory criteria as the candidate for the position of the FSC Chairman. The FSC Chairman will be consulted on candidates for the FSC Vice-Chairmen presented by the Minister for Finance and NBP's President.

(c) NBP will become responsible for establishing a Financial Stability Committee, which will act on the basis of an agreement between NBP, the Banking Supervision Commission, the FSC, the Bank Guarantee Fund and the Minister for Finance, with the view to ensuring the exchange of information and coordination between the parties to the agreement as regards implementation of their respective statutory tasks[16].

2. Central bank contribution to prudential supervision

2.1 *Organisation of the supervisory framework*

The ECB commented on the original reform proposals in 2006[17]. In its opinions, the ECB stressed its positive assessment of the model of prudential supervision existing in Poland prior to September 2006, in which banking supervision was carried out by the Banking Supervision Commission, chaired by NBP's President and assisted by the General Inspectorate for Banking Supervision. The ECB considered this model particularly well-suited to facilitate NBP's contribution to the prudential supervision of credit institutions and to the stability of the financial system, as required under Article 105(5) of the Treaty in the context of the future introduction of the euro in Poland[18]. This is in particular relevant for financial markets such as the Polish one, where banking is a dominant sector and where banks remain key agents of financial intermediation[19]. The ECB emphasised the central banks' pivotal role in the financial system on many occasions, stressing that their close involvement in prudential supervision is necessary to allow central banks to adequately monitor financial stability risks[20]. Therefore, the ECB welcomes the draft law provisions that strengthen NBP's involvement in financial market supervision by reassigning the chairmanship of the Banking Supervision Commission to NBP's President. Moreover, by maintaining NBP's President as a member of the FSC and giving him the power to designate one of the FSC Vice-

16 Article 4(2)(b) of the draft law, adding Article 131(8) to (11) to the Law on banking. The Financial Stability Committee will include the following members: (i) NBP's President; (ii) the General Inspector for Banking Supervision; (iii) one further representative appointed by NBP's President; (iv) the minister responsible for financial institutions or his representative; (v) the FSC Chairman; (vi) the Chairman of the Management Board of the Bank Guarantee Fund; and (vii) the representative of the President of the Republic.

17 ECB Opinion CON/2006/15 of 9 March 2006 at the request of the Polish Minister of Finance on a draft Law on the supervision of financial institutions (an early version of the Law on the supervision of financial markets). The ECB specifically recommended: (i) that NBP appoint members to the supervisory authority's decision-making body; (ii) establishing express duties of cooperation and information-sharing between NBP and the supervisory authority; and (iii) that NBP participate in major supervisory decisions or in selected types of supervisory operations (see paragraphs 2.3, 2.4, 3.2, 3.3 and 3.5 of Opinion CON/2006/15). The ECB had the opportunity to repeat its comments on the reform in ECB Opinion CON/2006/39 of 2 August 2006 at the request of Poland's Sejm Marshall on a draft law amending the Law on Narodowy Bank Polski.

18 See paragraph 3.1.1 of Opinion CON/2006/15 and paragraph 4.1 of Opinion CON/2006/39.

19 See paragraph 2.1.4 of Opinion CON/2006/15; see also European Central Bank, 'Financial Sectors in the EU Accession Countries', 19 August 2002, p. 172 and 'Banking structures in the new EU Member States', 31 January 2005, p. 38. Both publications are available on the ECB's website at www.ecb.int.

20 See, e.g. paragraph 6 of ECB Opinion CON/2003/23 of 24 October 2003 at the request of the Ministry of Finance of the Netherlands on a draft law on provisions concerning the merger of De Nederlandsche Bank and the Pensions and Insurance Supervisory Authority Foundation; paragraph 4 of ECB Opinion CON/2001/10 of 25 May 2001 at the request of the Austrian Ministry of Finance on a draft article of the Federal law establishing and organising the financial market supervisory authority (title shortened); and paragraph 2.1.2 of Opinion CON/2006/15.

Chairmen, the draft law's provisions will enhance coordination between NBP and the FSC, facilitating consistent macro-prudential monitoring of the increasingly integrated financial markets[21].

2.2 *Ensuring a stable, long-term supervisory environment*

The explanatory memorandum states that the additional delay (until 1 January 2013) in transferring banking supervision responsibility from the Banking Supervision Commission to the FSC is necessary in order to, among other things: (i) ensure the smooth continuation of the follow-up supervisory work related to the transposition of the Capital Requirements Directives (CRD)[22]; and (ii) mitigate operational risks arising in connection with the supervisory reform process, in particular as regards maintaining the expertise of NBP's supervisory staff[23]. The consulting authority's remarks mirror the ECB's concerns which were expressed in its earlier opinions[24]. It is important to emphasise that the supervisory reform process should ensure the uninterrupted continuation of NBP's involvement in prudential supervision as well as sustainability of the supervisory expertise developed by NBP staff. As already noted by the ECB in the specific context of Member States preparing for the introduction of the euro, the independence, credibility and experience that national central banks can contribute to the conduct of prudential policies should be recognised as an important institutional asset[25].

2.3 In this context, the provisions of the draft law concerning the transfer of the Banking Supervision Commission's powers to the FSC on 1 January 2013 and the coincident assignment of NBP's supervisory staff to FSC's office[26] may not provide the necessary incentives for NBP and its supervisory staff to continue developing the supervisory function. Therefore, the temporary arrangements provided for by the draft law, while mitigating the above mentioned short- and medium-term risks, may not ensure the creation of a stable, long-term supervisory environment. An essential precondition for an efficient and effective supervisory framework is its capacity to build a

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21 See, e.g. paragraph 5 of ECB Opinion CON/2004/16 of 11 May 2004 at the request of the Italian Ministry of Economic Affairs and Finance on a draft law on the protection of savings and paragraph 2.1.3 of Opinion CON/2006/15.

22 Section 2 of the explanatory memorandum to the draft law. The 'Capital Requirements Directives' are Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (OJ L 177, 30.6.2006, p. 1). Directive as last amended by Directive 2007/44/EC (OJ L 247, 21.9.2007, p.1) and Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast) (OJ L 177, 30.6.2006, p. 201). The Capital Requirements Directives have been implemented in Poland by the Law of 26 January 2007 amending the Law on banking (Dz.U. of 9 March 2007 No 42, Item 272) and by resolutions of the Banking Supervision Commission (Nos 1 to 6/2007 of 13 March 2007).

23 Section 3 of the explanatory memorandum to the draft law.

24 The ECB pointed out risks related to interrupting long-term supervisory work stemming from the CRD reform and emphasised the importance of preserving continuity in supervisory expertise possessed by the staff of NBP's General Inspectorate for Banking Supervision (see paragraphs 6.1 and 6.3 of Opinion CON/2006/1 and paragraph 2.2 of Opinion CON/2006/39).

25 See paragraph 7 of ECB Opinion CON/2004/31 of 22 September 2004 at the request of Národná banka Slovenska on a draft law on the supervision of the financial market and on amendments to certain laws.

26 NBP's supervisory staff of the General Inspectorate for Banking Supervision will be transferred to the FSC's office as of 1 January 2013 and their employment contracts will expire after a six-month period, unless they receive and accept new employment conditions (Article 1(9) and (10) of the draft law, amending Articles 74(4) and 75(2) of the Law on the supervision of financial markets).

long-term relationship of mutual trust between supervisors and market participants providing the latter with confidence in the expertise and competence of the supervisory authority. Hence, any reform of the institutional supervisory setting should aim at comprehensive long-term arrangements that are conducive to a stable economic climate.

2.4 This opinion is based on the most recent version of the draft law, which the ECB understands may not be the final legislative proposal concerning the supervisory reform. In case new legislative drafts are proposed which constitute 'draft legislative provisions' within the meaning of Decision 98/415/EC, the ECB should be consulted and stands ready to provide its comments. This is particularly important where newly proposed drafts fundamentally change legislation in areas in which the ECB has a specific interest[27].

2.5 *Supervision and oversight over payment and settlement infrastructure*

The draft law corrects the provisions of the law transposing Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems[28] that refer to a defunct sectoral supervisor as the body supervising securities settlement systems. The draft law corrects these references by inserting the name of the FSC in the relevant provisions, while not further affecting any substantive rules[29]. The ECB welcomes the correction and notes that it would need to be further consulted on any substantive legislative proposals in this area falling within its scope of competence; this applies in particular to provisions on the supervision and oversight of market infrastructure[30].

3. Establishment of the Financial Stability Committee

3.1 The ECB welcomes the draft law provisions under which NBP will establish a Financial Stability Committee[31]. The explanatory memorandum to the draft law explains that this is necessary in the context of building the institutional framework for the prevention, forecasting and management of

27 See paragraph 3 of Opinion CON/2004/16.

28 OJ L 166, 11.6.1998, p. 45. The Directive was transposed by the Law of 24 August 2001 on settlement finality in the payment and settlement systems and on the supervision of such systems (Dz.U. of 25 October 2001 No 123, Item 1351, as amended, hereinafter, the 'Law on settlement finality').

29 Article 1(15) of the draft law amends Article 82(2) of the Law on the supervision of financial markets by deleting the reference to the Law on settlement finality from the list of legislative provisions to be amended on the date the Banking Supervision Commission is dissolved. Consequently, the day on which the draft law enters into force will be the day the changes to the Law on settlement finality enter into force.

30 See the fifth indent of the Article 2 of Council Decision 98/415/EC on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42), requiring consultation with the ECB on draft legislative provisions concerning 'payment and settlement systems'. Article 1(2) of Decision 98/415/EC specifies that the term 'draft legislative provisions' does not include 'draft provisions the exclusive purpose of which is the transposition of Community directives into national law'. In May 2007, a legislative draft was submitted to the Polish Parliament which substantially amended provisions of the Law on settlement finality, including the definition of a 'system' and the scope of the President of NBP's powers in the area of the supervision of payment and settlement infrastructure (see Article 13 of the draft law on amendments to the law on trading in financial instruments and to certain other laws, as submitted by the Council of Ministers to Sejm (Parliament) on 23 May 2007 (Sejm print No 1789)). The legislative process related to this legislative draft is currently at a standstill.

31 Article 4(2)(b) of the draft law, adding Article 131(8) to (11) to the Law on banking. See also paragraph 3.4 of Opinion CON/2006/15.

financial crises. The ECB supports this statutory intent; however, the ECB recommends that the legal framework of the Financial Stability Committee be more precisely formulated to ensure that the effectiveness of the coordination process is not affected by possible uncertainties regarding the role of the Committee and its participating bodies[32]. In particular, it should be clarified that the tasks attributed to this Committee must not compromise NBP's independence with regard to its central bank tasks. In addition, the NBP Statute should expressly recognise NBP's responsibility for contributing to financial stability by monitoring and assessing the financial system as a whole, which is a separate function from financial supervision and regulation[33].

3.2 Moreover, the composition of the Committee should reflect the contribution of each of its members in respect of their specific supervisory powers; the existing discrepancy between the list of parties adopting the agreement establishing the Financial Stability Committee and the list of Committee members should be resolved[34]. At the same time, the Financial Stability Committee tasks should be more clearly specified[35]. Finally, the current provisions relating to information-sharing within the Committee[36] should be complemented with appropriate information disclosure standards consistent with Community law provisions regulating the exchange of supervisory and statistical information[37] and the NBP Statute[38]. Such provisions should also be capable of facilitating the operation of relevant EU Memoranda of Understanding that the Polish authorities are signatories to.

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32 See paragraph 11 of ECB Opinion CON/2002/13 of 24 April 2002 at the request of the Belgian Ministry of Finance on a draft proposal for a law on prudential supervision of the financial sector and financial services.

33 See paragraph 2.2 of Opinion CON/2006/15 and paragraph 4.2 of Opinion CON/2006/39.

34 In particular, the Banking Supervision Commission is a party to the agreement establishing the Committee although its representation in the Committee is not clearly set out (the participation of NBP's President in the Committee is not expressly linked to his chairmanship of the Banking Supervision Commission) (paragraphs (8) and (9) added to Article 131 of the Law on banking by Article 4(2)(b) of the draft law).

35 Article 131(8) of the Law on banking, as added by Article 4(2)(b) of the draft law limits the Financial Stability Committee tasks to co-ordination and information-sharing. However, Article 131(10)(1) of the Law on banking, as added by the Article 4(2)(b) of the draft law makes it possible for the Financial Stability Committee to 'adopt arrangements' in relation to the statutory tasks of the parties establishing the Committee. Furthermore, the explanatory memorandum to the draft law seems to give the Committee an active role in 'managing' financial crises.

36 See Article 1(3) of the draft law adding Article 17(5) to the Law on the supervision of financial markets (data disclosure by the FSC); Article 3 of the draft law, amending Article 38(10) of the Law of 14 December 1994 on the Bank Guarantee Fund (consolidated text: Dz.U. of 19 April 2007 No 70, Item 474) (data disclosure by the Bank Guarantee Fund); and Article 5(2) of the draft law, adding Article 23(8) and (9) to the NBP Statute (data disclosure by NBP).

37 See, in particular, Articles 44 to 52 of Directive 2006/48/EC; Article 13 of Council Regulation (EC) No 322/97 of 17 February 1997 on Community Statistics (OJ L 52, 22.2.1997, p. 1). Regulation as last amended by Regulation (EC) No 1882/2003 of the European Parliament and the Council (OJ L 284, 31.10.2003, p. 1); Article 8(1) to (3) of Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank (OJ L 318, 27.11.1998, p. 8); and Article 3 of Council Regulation (Euratom, EEC) No 1588/90 of 11 June 1990 on the transmission of data subject to statistical confidentiality to the Statistical Office of the European Communities (OJ L 151, 15.6.1990, p. 1). Regulation as last amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council (OJ L 284, 31.10.2003, p. 1).

38 See Article 23(6) and (7) of the NBP Statute.

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

Done at Frankfurt am Main, 9 October 2007.

[signed]

The Vice-President of the ECB
Lucas D. PAPADEMOS