EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 20 June 2006

at the request of the Polish Minister of Finance on a draft law amending the Law on banking

(CON/2006/31)

Introduction and legal basis

On 15 May 2006, the European Central Bank (ECB) received a request from the Polish Minister of Finance for an opinion on a draft law (hereinafter the 'draft law') amending the Law on banking of 29 August 1997[1] (hereinafter the 'Banking Law').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and the sixth 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 provisions[2], as the draft law relates to the 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 is intended to facilitate restructuring in the banking sector[3] by abolishing the prohibition on the division of banks operating as joint stock companies, which was introduced into Polish law in May 2004[4]. To that end, the draft law proposes to allow the division of a bank operating as a joint stock company, under the relevant provisions of the Commercial Companies Code of 15 September 2000[5] (hereinafter the 'Companies Code').

1.2 As a result of the proposed reform, the shareholders of an existing bank operating as a joint stock company would be allowed, on basis of the publicly registered terms of a division[6] and upon

1 Law on banking of 29 August 1997 (consolidated text: Dz. U. of 2002, No 72, Item 665, as amended).

2 OJ L 189, 3.7.1998, p. 42.

3 Second paragraph of the explanatory memorandum to the draft law.

4 The change was effected by Article 1(72) of the Law of 1 April 2004, amending the Banking Law as of 1 May 2004 (Dz. U. 2004, No. 91, Item 870), which introduced the current Article 124c of the Banking Law.

5 Dz. U. of 2000, No 94, Item 1037, as amended.

6 Articles 534-535 of the Companies Code.

obtaining the consent of the Banking Supervision Commission[7], to do either of the following: (i) to transfer all the assets of the existing bank to other banks, in exchange for shares in the acquiring banks issued to the shareholders of the divided bank (division by acquisition)[8], or (ii) to transfer part of the assets of the existing bank to another bank, in exchange for shares in the acquiring bank issued to the shareholders of the divided bank (division by separation)[9]. The draft law expressly excludes the division of co-operative banks[10]. Banks acquiring the assets of a divided bank may either be Polish banks or other credit institutions authorised in the European Economic Area (EEA)[11]. The shares of joint stock companies which operate banks and which continue to exist after the division process would be tradable under the general rules.

1.3 The provisions of the draft law would apply in parallel with the existing rules allowing for intra-group and cross-group transfers of assets by means of the direct sale of all or part of banking enterprises between banks, upon obtaining the consent of the Banking Supervision Commission[12].

2. The ECB's comments

2.1 From the explanatory memorandum to the draft law, it appears that it has become necessary to repeal the prohibition on the division of banks operating as joint-stock companies, as this was hindering the necessary restructuring of the banking sector. Accordingly, the draft law seeks to ensure that associations, mergers and divisions of banks do not negatively affect the banks concerned by providing that the Banking Supervision Commission shall refuse to allow the division of a bank if this would be detrimental to the prudent and sound management of the bank. Thus, the draft law aims to reconcile both the need for flexibility in the restructuring of banking activities and the need to ensure depositor protection and financial stability.

2.2 Although there is no specific Community legislation on the supervisory aspects of such operations, the Banking Directive[13] provides for specific requirements and supervisory approval with regard to banking activities, which must be continuously applied. As regards restructuring operations affecting credit institutions, many Member States have provided for a role for a supervisory authority which, apart from any considerations about the commercial aspects of such operations, is

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7 Article 1(3) of the draft law, introducing the new Article 124c(2) of the Banking Law.

8 Article 1(3) of the draft law, introducing the new Article 124c(1)(a) of the Banking Law, referring to Article 529(1)(1) of the Companies Code.

9 Article 1(3) of the draft law, introducing the new Article 124c(1)(b) of the Banking Law, referring to Article 529(1)(4) of the Companies Code.

10 Article 1(2) of the draft law, amending Article 124b of the Banking Law.

11 Article 1(3) of the draft law, introducing the new Article 124c(1) of the Banking Law in connection to Article 4(1)(17) and Article 4(3) of the Banking Law.

12 Article 124a of the Banking Law, as introduced by the amending Law of 1 April 2004 (Dz. U. 2004, No. 91, Item 870), in force as of 1 May 2004.

13 Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, (OJ L 126, 26.5.2000, p. 1), as amended by Commission Directive 2006/29/EC (OJ L 70, 9.3.2006, p. 50).

required to ensure that restructuring does not raise any concerns about financial stability or supervisory concerns.

2.3 The ECB welcomes the provision in the draft law that the banks acquiring the assets of a divided bank may either be Polish banks or EEA credit institutions, since it is expected that this clarification will ensure a level playing field. More detailed rules (possibly in secondary legislation) on the procedure for obtaining the authorisation referred to in Article 1(3) of the draft law, and the information to be provided to the supervisory authority, would further enhance the transparency of the supervisory process.

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

Done at Frankfurt am Main, 20 June 2006.

[signed]

The President of the ECB

Jean-Claude TRICHET