EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 5 July 2011

on the conversion of foreign credit institutions' branches into subsidiaries

(CON/2011/57)

Introduction and legal basis

On 31 May 2011, 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 banking and certain other laws (hereinafter the 'draft law').

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 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[1], as the draft law relates 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 amends, *inter alia*, the Law on banking of 29 August 1997[2] and the Law on the bank guarantee fund of 14 December 1994[3].

1.2 The main purpose of the draft law is to enable the transformation of a Polish branch of a credit institution established in another Member State and conducting its business in Poland under the single passport into a subsidiary of the same credit institution. Such a subsidiary would be established in Poland and operate as a domestic bank[4] in the form of a joint-stock company and would therefore be subject to supervision by the Komisja Nadzoru Finansowego (KNF, Financial Supervision Commission). Furthermore, deposits received by the subsidiary from the public would

1 OJ L 189, 3.7.1998, p. 42.

2 As published in *Dziennik Ustaw* (Dz. U.) of 2002 No 72, Item 665.

3 As published in Dz. U of 2009 No 84, Item 711.

4 Credit institutions registered in Poland are legally referred to as 'domestic banks'. The term 'credit institution' under Polish law only relates to European Economic Area (EEA) credit institutions from outside Poland. Non-EEA credit institutions are referred to under Polish law as 'foreign banks' (Article 2, Article 4(3), Article 4(1)(1) and Article 4(1)(17) to (20) of the Law on banking).

be covered by the Bankowy Fundusz Gwarancyjny (BFG, Deposit Guarantee Scheme), which, according to the explanatory memorandum to the draft law, 'may be beneficial from the point of view of customers, and particularly of depositors who entrusted their money to the branch in question'[5].

1.3 The draft law sets out the procedure to be followed when conducting the transformation, which comprises the following steps[6]: (a) application by the foreign credit institution concerned for an authorisation to establish, on the basis of an existing branch, a domestic bank in the form of a joint-stock company; (b) audit by the KNF of the branch to be transformed, verifying its current financial condition; (c) grant by the KNF of authorisation to establish a domestic bank on the basis of the branch[7]; (d) contribution in kind by the foreign credit institution of the business of the branch to the newly established domestic bank, in exchange for the bank's shares; (e) registration of the new domestic bank in, and deletion of the transformed branch from, the register of entrepreneurs.

1.4 The following main consequences occur on registration of a new domestic bank in the register of entrepreneurs: (a) the new bank assumes all the foreign credit institution's rights and obligations stemming from the operation of the transformed branch (universal succession)[8]; (b) the KNF assumes responsibility for supervision of the operations of the new domestic bank; (c) deposits accumulated via operations of the transformed branch, and transferred to the new domestic bank, become covered by the Polish deposit-guarantee scheme.

2. General observations

The appropriate time to consult the ECB

The draft law was adopted by the lower chamber of the Polish Parliament on 10 June 2011. This was shortly after the ECB had been consulted, resulting in the draft law being adopted not only before the expiry of the time limit for the submission of an ECB opinion set by the legislator in its consultation request, but also before it could take the ECB's views into account.

The ECB reiterates that even in cases of extreme urgency national authorities are not relieved from the duty to consult the ECB and to allow sufficient time to take its views into account laid down in Articles 127(4) and 282(5) of the Treaty. The second sentence of Article 4 of Decision 98/415/EC provides that the ECB must be consulted 'at an appropriate stage' in the legislative process. This

5 See the explanatory memorandum to the draft law, p. 3.

6 See Articles 48p to 48u of the Law on banking as amended by the draft law; see also the explanatory memorandum to the draft law, p. 7 to 11.

7 In accordance with Article 48p(2) of the Law on banking as amended by the draft law, standard provisions governing the establishment of banks in the form of joint-stock companies apply to the establishment of banks on the basis of an existing branch, including in particular the following: Article 30a, which requires that authorisation for the establishment of a bank is granted by the KNF; Article 30, which specifies the criteria applied in the assessment of an application for the establishment of a bank; Article 37, which specifies the grounds for the rejection of such applications.

8 See Article 48u(2) of the Law on banking, as amended by the draft law. As a result of the universal succession, the newly-established bank assumes, by operation of law, all relevant rights and obligations, including all liabilities, claims and related rights, as well as all authorisations, licences and exemptions, unless this is opposed by the relevant issuing authorities.

implies that the consultation should take place at a point in the legislative process that affords the ECB sufficient time to examine the draft legislative provisions and to adopt its opinion in all required language versions, and also enables the relevant national authorities to take the ECB's opinion into account before the provisions are adopted. Article 3(4) of Decision 98/415/EC obliges Member States to suspend the process of adoption of draft legislative provisions pending receipt of the ECB's opinion. On this occasion, the duty to consult the ECB at an appropriate stage in the legislative process has not been respected by the Polish authorities.

3. Specific observations

3.1 The restructuring mechanism proposed by the draft law will allow banking groups that have a presence in Poland to transform their branches into subsidiary companies. The ECB understands that such a mechanism will be triggered only upon request from a credit institution and will not impede Union credit institutions from exercising their right of establishment in Poland through the setting up and operation of either branches or subsidiaries. Opinion CON/2006/31[9] addressed similar draft legislation enabling the division of banks[10]. In this opinion, the ECB emphasised that, while there is no specific Union legislation on the supervisory aspects of such restructuring operations, Directive 2006/48/EC[11] provides for specific requirements regarding supervisory approvals of banking activities, which must be continuously applied.

3.2 In assessing applications for the establishment of a new bank on the basis of an existing branch, the KNF will apply standard prudential assessment criteria[12]. The draft law adds an additional criterion for rejecting applications, according to which a transformation should not be 'significantly detrimental to the national economy or to important interests of the State'[13]. The explanatory memorandum to the draft law justifies adding this criterion in the draft law based on the fact that an identical criterion had been established as a ground for the rejection of a supervisory approval for the division of an existing bank[14]. The ECB notes that this broad additional criterion may be seen as a general public interest clause, in so far as it does not explicitly refer to any specific prudential consideration for the rejection of supervisory approval for the establishment of a bank. The ECB understands that the Polish authorities may have intended to introduce this criterion to address threats to financial stability or, more specifically, to the smooth functioning of the national deposit-guarantee scheme. The introduction of such additional criterion in the Law on banking has to respect the limits set out by Union law.

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9 All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

10 See Article 124c of the Law on banking added by the Law amending the Law on banking of 18 October 2006 (Dz. U. of 2006 No 190, Item 1401).

11 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).

12 See Articles 30 and 37 of the Law on banking.

13 See Article 48s(2) of the Law on banking as amended by the draft law.

14 See the explanatory memorandum to the draft law, p. 9. The relevant changes had been introduced in the amending law of 18 October 2006 after the adoption of Opinion CON/2006/31.

3.3 In particular, when considering the further specification of that additional criterion, the Polish authorities should carefully take Directive 2006/48/EC into account. Directive 2006/48/EC provides that requirements laid down by Member States in respect of obtaining authorisation to carry on business as a credit institution should respect the minimum harmonised rules set out in Articles 7 to 12[15] of that Directive, and in particular the rule prohibiting assessment of applications for the establishment of a credit institution in terms of the 'economic needs of the market. Furthermore, the Polish authorities should take into account the judgments of the Court of Justice of the European Union regarding the right of establishment specified in Article 49 of the Treaty[16]. The Court has stated, *inter alia*, that 'the right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State'[17] and that restrictions on the freedom of establishment, allowed under Article 52(1) of the Treaty, may only be introduced pursuant to a legitimate aim which is compatible with the Treaty, justified by the overriding principles of public interest and achieved through measures proportionate to this aim[18]. In this last respect, the Court has taken the view that restrictions referring generally to 'national interest' fail the proportionality test[19]. The Court has also rejected the possibility that Union secondary law provisions safeguarding freedom of establishment may be set aside by special rules related to the financial sector introduced in the national law in order to, *inter alia*, ensure the proper operation of the national economy[20].

3.4 In view of the above, the ECB invites the Polish authorities to further specify the supervisory assessment criteria introduced by the draft law in connection with the transformations of foreign branches into subsidiaries, with the view to ensuring compliance with Union law.

3.5 The ECB emphasises the need to ensure that a branch continues to meet its obligations relating to the calculation and holding of minimum reserves following its transformation into a subsidiary. It also reiterates the remarks made in the context of the proposal enabling the division of banks, particularly with regard to ensuring compliance of the Polish minimum reserve framework with Eurosystem requirements[21].

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15 See Article 6 of Directive 2006/48/EC.

16 See in particular Judgment of 13 December 2005 in Case C-411/03 *Sevic* (ECR 2005, p. I-10805), Judgment of 13 May 2003 in Case C-463/00 *Commission* v *Spain* (ECR 2003, p. I-4581), Judgment of 13 September 2007 in Case C-260/04 *Commission* v *Italy* (ECR 2007, p. I-7083), Judgment of 22 March 2007 in Case C-383/05 *Raffaele Talotta* v *Belgium* ECR 2007, p. I-2555), Judgment of 11 December 2007 in Case C-438/05 *International Transport Workers' Federation and another* v *Viking Line and another* (ECR 2007, p. I-10779).

17 See Judgment of 13 December 2005 in Case C-411/03 *Sevic* (ECR 2005, p. I-10805, paragraph 18).

18 See Judgment of 11 December 2007 in Case C-438/05 *International Transport Workers' Federation and another* v *Viking Line and another* (ECR 2007, p. I-10779, paragraph 75).

19 See Judgment of 11 November 2010 in Case C-543/08 *Commission* v *Portugal* (not yet reported), paragraphs 6 and 91 to 92 (the case considered restrictions to freedom to provide services and freedom of establishment, see paragraph 98 to 99).

20 See Judgment of 12 March 1996 in Case C-441/93 *Panagis Pafitis and others* v *Trapeza Kentrikis Ellados* (ECR 1996, I-01347, paragraphs 12 and 46 to 52).

21 See paragraph 2.1 of Opinion CON/2007/34.

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

Done at Frankfurt am Main, 5 July 2011.

[signed]

The President of the ECB

Jean-Claude TRICHET