EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 15 March 2011

on payment services

(CON/2011/23)

Introduction and legal basis

On 15 February 2011, the European Central Bank (ECB) received a request from the Polish Minister for Finance for an opinion on a draft law on payment services (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 third and fifth 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[1], as the draft law relates to Narodowy Bank Polski (NBP) and to payment systems. 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 purpose of the draft law is to transpose into Polish law Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC[2].

1.2 The main provisions of the draft law that go beyond the strict implementation of Union directives include:

(a) Article 48 of the draft law transposing Article 63 of Directive 2007/64/EC. Under this Article, the payer is entitled, subject to certain conditions, to the refund from his payment service provider (PSP) of an executed payment transaction initiated by or through a payee. This provision provides for an exemption under which NBP, when acting as a payer's PSP, may withhold such refund until funds are returned by the payee's PSP[3];

1 OJ L 189, 3.7.1998, p. 42.

2 OJ L 319, 5.12.2007, p. 1.

3 See Article 48(3) of the draft law.

(b) Article 165(7) of the draft law amending Article 16 of the Law of 21 July 2006 on the supervision of financial market[4]. This provision relates to the members of the Polish Financial Supervision Authority (FSA) and enables them to: (i) exchange information, including information protected under other legal provisions, to the extent necessary for the appropriate performance of financial market supervision[5]; and (ii) make available to their staff information obtained by virtue of their participation in the FSA's work, including information protected under other legal provisions[6].

2. General observations

In accordance with Decision 98/415/EC, this opinion only addresses those provisions of the draft law relating to NBP and payment and settlement systems which go beyond the strict implementation of Union directives. While acknowledging the importance of Directive 2007/64/EC, its transposition into national law is not addressed in this opinion. Similarly, the provisions of the draft law[7] which amend the national measures 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[8] are not considered in this opinion.

3. Specific observations

3.1 *NBP's role as payment service provider*

The proposed Article 48(3) aims to prevent a situation whereby NBP, acting in the capacity of a payer's PSP, is obliged to refund to the payer an authorised payment transaction executed as part of a direct debit arrangement before the respective funds are returned by the payee's PSP. The ECB understands that the rationale for this provision is the concern of the Polish legislator that such bridge financing by NBP might otherwise be interpreted as providing credit, in breach of Article 123 of the Treaty.

3.2 *Exchange and sharing of information by FSA members*

In its previous opinions on Polish legislation, the ECB has specifically encouraged measures promoting the exchange of information, including information subject to confidentiality and professional secrecy requirements, between the key public authorities in the financial markets, such as NBP, the FSA and the Financial Stability Committee, as well as the sharing of such information with the members of their decision-making bodies and their staff[9]. In this regard, the

4 Dz. U. of 2006 No 157, item 1119.

5 See new paragraph 2 in Article 16 of the Law on the supervision of the financial market.

6 See new paragraph 3 in Article 16 of the Law on the supervision of the financial market.

7 See Article 160 of the draft law amending the Law of 24 August 2001 on settlement finality in payment and settlement systems and on the supervision of such systems (consolidated text: Dz. U. of 2010 No 112, item 743).

8 OJ L 166, 11.6.1998, p. 45.

9 See, for instance, the recommendation to introduce legal provisions authorising the exchange of information between NBP and the FSA and removing possible legal obstacles to such information sharing, in particular as regards the

ECB welcomes the aim of ensuring the effective exchange of information between FSA members, as well as the possibility for FSA members to share information with their staff.

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

Done at Frankfurt am Main, 15 March 2011.

[signed]

The President of the ECB

Jean-Claude TRICHET

exchange of information subject to confidentiality and professional secrecy requirements (see paragraphs 2.4.1 and 2.4.2 of Opinion CON/2006/15); see also the recommendation to enable access to information exchanged within the Financial Stability Committee to the members of NBP's governing bodies and its staff who perform financial stability tasks but do not directly participate in the work of the Financial Stability Committee (see paragraph 3.3 of opinion CON/2008/39).