EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 9 March 2006

at the request of the Polish Minister of Finance

on a draft law on the supervision of financial institutions

(CON/2006/15)

On 7 February 2006 the European Central Bank (ECB) received a request from the Polish Minister of Finance for an opinion on a draft law on the supervision of financial institutions (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on the third, fifth 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[1], as the draft law relates to a national central bank (NCB), namely Narodowy Bank Polski (NBP), the oversight of payment and settlement systems and 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 proposes to establish a new institutional framework for the supervision of banking, capital markets, insurance and pension funds in Poland[2]. Under the current model financial supervision is conducted by three separate collegiate bodies: (i) for banking supervision: the Banking Supervision Commission (Komisja Nadzoru Bankowego) (hereinafter the 'Banking Commission')[3], which is chaired by the NBP's President and which operates with the assistance of its executive arm, the General Inspectorate of Banking Supervision, a separate organisational unit within the structure of NBP[4]; (ii) for capital markets supervision: the Securities and Exchange Commission (Komisja Papierów Wartościowych i Giełd) (hereinafter the 'Securities

1 OJ L 189, 3.7.1998, p. 42.

2 Article 1 of the draft law.

3 Article 25(1) of the Law on NBP of 29 August 1997 on Narodowy Bank Polski (consolidated text: Dz. U. 2005 No 1, Item 2, as amended) (hereinafter the 'Law on NBP'). Entities operating on the basis of the Law on cooperative savings and loan associations of 14 December 1995 (Dz. U. 1996 No 1, Item 2, as amended) are not included within the scope of the Banking Commission's supervision.

4 Articles 25(1) and 29(1) of the Law on NBP.

Commission')[5]; and (iii) for insurance and pension funds supervision: the Insurance and Pension Funds Supervisory Commission (Komisja Nadzoru Ubezpieczeń i Funduszy Emerytalnych) (hereinafter the 'Insurance Commission')[6].

1.2 Under the draft law, it is proposed to ultimately dissolve all three of the abovementioned supervisory bodies[7] and transfer their competences to a newly established integrated supervisor, namely the President of the Financial Supervisory Authority (hereinafter the 'FSA President' and the 'FSA', respectively)[8]. The FSA President will be the central government administrative body responsible for the supervision of financial institutions[9], i.e. a single-person decision-making organ, with the FSA functioning as its executive arm. The FSA is to be financed by contributions from supervised entities[10]. In the case of banking supervision, this is a change from the current regime under which banking supervision is financed by NBP.

1.3 The draft law will transfer supervisory responsibilities from the current supervisors to the FSA President in two stages, beginning with the integration of the supervision of capital markets, insurance and pension funds from 1 April 2006[11] and concluding with the transfer of responsibility for banking supervision from the Banking Commission to the FSA President from 1 January 2008[12]. The delay in the transfer of responsibility for banking supervision is related to the implementation of the Capital Requirements Directive in the Polish banking sector[13].

1.4 The draft law's provisions for the organisational merger of the supervisory authorities are not accompanied by any provisions for integrated supervisory methods or procedures; it is stated that such measures are not necessary in view of the existing level of financial market consolidation in Poland[14]. However, the declared aim of the supervisory reform is to pursue the following advantages: (i) improved efficiency of the supervisory authority's operations, (ii) facilitation of Poland's participation in EU-level supervisory structures, (iii) lower operational costs for the integrated supervisor, (iv) decreased administrative burdens for the supervised entities, and (v) facilitated supervision over financial conglomerates[15].

---

5 Article 3(1) of the Law of 29 July 2005 on supervision of the capital market (Dz. U. 2005 No 183, Item 1537).

6 Article 2(3) of the Law of 22 May 2003 on insurance and pension funds supervision and the Insurance Ombudsman (Dz. U. 2003 No 124, Item 1153, as amended). The interests of the insurance and pension fund beneficiaries are represented by the Insurance Ombudsman (Article 5(1) of this law), a function which is also covered by the current reform (Article 44(1) of the draft law).

7 Article 44 of the draft law.

8 Article 2(2) of the draft law.

9 Article 2(1) of the draft law.

10 Articles 16 and 18 of the draft law.

11 Article 56 of the draft law.

12 Article 56(2) in conjunction with Article 53(1)(2) of the draft law.

13 As stated in the fifth paragraph of the consultation request from the Minister for Finance of 7 February 2006.

14 As stated in the fourth paragraph of the consultation request from the Minister for Finance of 7 February 2006.

15 As stated in the first, third and fourth paragraphs of the Explanatory Memorandum to the draft law.

2. Financial stability and prudential role of a central bank

2.1 *General observations*

2.1.1 The ECB notes that Article 105(5) of the Treaty establishing the European Community assigns to the European System of Central Banks the task of contributing to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.

2.1.2 In line with the above, the ECB has consistently favoured the involvement of central banks in prudential supervision, expressing the view that an institutional framework in which the Eurosystem's responsibilities for monetary policy in the euro area are coupled with extensive (i.e. both micro and macro-prudential) supervisory responsibilities of NCBs in domestic markets, and with enhanced cooperation at a euro area-wide level, is most appropriate for tackling the changes triggered by the introduction of the euro[16]. Past ECB opinions on draft national legislation reforming the institutional framework for prudential supervision in Member States have noted: (i) central banks have traditionally been closely involved in the prudential supervision of credit institutions due to their pivotal role in the financial system, in particular regarding implementing monetary policy and ensuring the proper functioning of payment systems[17]; and (ii) maintaining a close involvement of NCBs in prudential supervision is an important condition for allowing the Eurosystem to contribute adequately to monitoring the risks to financial stability in the euro area[18], in accordance with Article 105(5) of the Treaty, and to safeguard a smooth coordination between the central banking functions exercised at the Eurosystem's level and the supervisory functions carried out at national level[19].

2.1.3 The ECB recognises that the nature and scope of risk in the financial sector is widening, due to closer links between credit institutions, insurance companies, investment firms and pension funds. The traditional borders between the banking, securities and insurance sectors of the financial market are becoming increasingly blurred, as demonstrated by the emergence of hybrid financial products, the increased use of risk transfer instruments and distribution agreements between the three sectors, and the growing role of financial conglomerates. In this context, the ECB has welcomed institutional frameworks established in Member States that recognise the essential role of central banks in promoting the safety and soundness of financial institutions and the stability of the financial system as a whole[20].

---

16 Cf. European Central Bank, 'The role of central banks in prudential supervision', 30 March 2001, available on the ECB website (www.ecb.int).

17 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.

18 See, e.g. paragraph 4 of ECB Opinion CON/2001/10 of 25 May 2001 at the request of the Austrian Ministry of Finance on a draft Federal law establishing and organising the financial market supervisory authority [title shortened].

19 See, e.g. paragraph 5 of ECB Opinion CON/2001/35 of 8 November 2001 at the request of the German Ministry of Finance on a draft law establishing an integrated financial services supervision.

20 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.

2.1.4 Maintaining NBP's close involvement in prudential supervision will be all the more desirable as it is necessary for Poland's adoption of the euro, to enable NBP to contribute adequately to monitoring the risks to financial stability in the euro area. This is of particular importance in a context in which the nature and scope of these risks are affected by the introduction of the single currency and the consequent enhanced integration of financial markets. 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 NCBs can contribute to the monitoring of financial stability should be recognised as an important institutional asset[21]. Also, given that banking activity accounts for a large proportion of the Polish financial market, and that banks remain key agents of financial intermediation in Poland, providing most of the credit to the economy and channelling most of the population's savings, while the role of the capital markets remains secondary[22], the ECB believes that the systemic arguments in favour of maintaining a strong involvement by NBP in banking supervision are relevant. In this context, the draft law is seen as a proposal to create a body functioning as chiefly a banking supervisor, from whose operations NBP would be insulated.

2.1.5 In line with its previous opinions, the ECB considers that more effective coordination between supervision of all financial sectors could be pursued also with means that do not imply a reduced role of the central bank in this field[23].

2.2 *Legislative recognition of the central bank's financial stability role*

2.2.1 With the establishment of an independent FSA, it becomes important to delineate the financial stability role of NBP more explicitly. Under the existing provisions of Polish law, the financial stability role of NBP is implicitly reflected in its objective to 'establish the necessary conditions for the development of the banking system'[24]. In practical terms, NBP's financial stability role is also implicitly reflected in the existing institutional arrangements linking NBP with the Banking Commission.

2.2.2 In keeping with the position taken by the ECB in previous opinions on draft national legislation proposing supervisory reforms, the ECB considers that central banks are in general in the best position to take on responsibility for financial stability, given their insight into money and financial market developments and involvement in payment systems and monetary policy operations. This applies both to the normal conduct of business and in crisis situations[25]. Central banks' remit on systemic stability means that they concentrate on the potential impact of macro-economic shocks or

---

21 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 supervision of the financial market and on amendments to certain laws.

22 Cf. European Central Bank, 'Financial Sectors in the EU Accession Countries', 19 August 2002, p. 171; and 'Banking structures in the new EU Member States', 31 January 2005, p. 38. Both publications are available on the ECB website (www.ecb.int).

23 See paragraph 4 of the ECB Opinion CON/2001/10.

24 Article 3(2)(6) of the Law on NBP.

25 See, e.g. paragraph 7 of Opinion CON/2001/10.

disturbances and of other common factors influencing the stability of financial system as a whole[26]. Explicit legislative recognition of NBP's financial stability role would be consistent with the approach taken in many Member States which have adopted a supervisory model based on an independent financial supervisory authority[27]. Hence, the ECB recommends amending the draft law to clarify that NBP has formal responsibility for contributing to financial stability by monitoring and assessing the financial system as a whole, as a separate function from hands-on supervision and financial regulation.

2.3 *Duty of cooperation between central bank and FSA*

As a general point, the ECB notes the emphasis placed by the Basel Core Principles for Effective Banking Supervision[28] on the maintenance of a system of cooperation and sharing of relevant information among the various official agencies, both domestic and foreign, responsible for the safety and soundness of the financial system[29]. As noted in its previous opinions[30], the ECB considers that it would be helpful to state in the draft law the basic principle that, in order to carry out their respective responsibilities effectively, there should be close cooperation between the FSA and NBP in all fields of common interest. This principle should be further reflected in a general provision stipulating a duty of cooperation, whose ultimate purpose would be to put in place effective and practical arrangements for cooperation and information-sharing between NBP and the FSA. Such legislative provisions have been introduced in a number of Member States which have adopted supervisory models based on an independent financial supervisory authority, including, for example, Belgium[31], Germany[32], Estonia[33], Hungary[34] and Austria[35]. For this reason, the ECB

26 See, e.g. paragraph 10 of Opinion CON/2004/31.

27 Belgium: Article 23 of the Statutes of the Nationale Bank van België/Banque Nationale de Belgique; Estonia: Article 2(5) of the Law on Eesti Pank; Ireland: Section 6A(2)(a) of the Central Bank Act 1942; Hungary: Article 4(7) of Law No LVIII of 2001 on Magyar Nemzeti Bank; Malta: Section 4(2)(c) of the Central Bank of Malta Act; Finland: Point 3 of the Section 3(2) of the Law on Suomen Pankki (214/1998).

28 Basel Committee on Banking Supervision, 'Core Principles for Effective Banking Supervision', September 1997, available on the Bank for International Settlements website (www.bis.org).

29 See Section II, Principle 1 fifth indent of the Basel Core Principles (see footnote 28).

30 See, e.g. paragraph 8 of ECB Opinion CON/2001/10.

31 The Commissie voor het Bank, Financie- en Assurantiewezen/Commission bancaire, financière et des assurances (the Banking, Finance and Insurance Commission) and the Nationale Bank van België/Banque Nationale de Belgique collaborate closely on all issues of common interest and in particular with regard to international cooperation in respect of prudential matters, inter-sectoral aspects of prudential policy relating to the providers of financial services, macro-prudential analyses and legal studies. See Article 117 § 1 of the Law of 2 August 2002 on the supervision of the financial sector and on financial services.

32 The Bundesanstalt für Finanzdienstleistungsaufsicht (Federal Financial Supervisory Authority or BaFin) and the Deutsche Bundesbank are required to work together, and this cooperation includes ongoing monitoring of credit institutions by the Deutsche Bundesbank, including analysing and assessing documents, audit reports and annual accounts submitted by credit institutions, conducting and analysing banking audits to determine the capital adequacy and risk management procedures of credit institutions and evaluating audit findings. See Article 7(1) of the German Law on banking (Kreditwesengesetz – KWG).

recommends subjecting in the draft law the FSA President to an express duty of co-operation with NBP on all issues of common interest.

2.4 *Information-sharing between central bank and FSA*

2.4.1 Central bank access to prudential information is essential for the conduct of macro-prudential monitoring, the oversight of payment systems and the safeguarding of other market infrastructures, which are essential for the smooth conduct of monetary policy. In particular from a financial stability perspective, should there be a crisis in financial markets, the central bank would inevitably be involved. In that context, the ready availability of relevant information and the ability to interpret it are important. The Consolidated Banking Directive provides that information subject to confidentiality and professional secrecy requirements may be shared between supervisory authorities and central banks, and vice versa, for the purposes of the exercise of their respective tasks[36]. As emphasised in previous ECB opinions[37], central banks provide valuable input to the supervisory process, while access by central banks to supervisory information benefits the conduct of monetary policy operations, the oversight of payment systems and the pursuit of financial stability. Provisions authorising the exchange of information between central banks and supervisory authorities have therefore been included in the legislation of virtually all Member States which have adopted supervisory models based on an independent financial supervisory authority[38].

---

33 Eesti Pank is required to cooperate with the Financial Supervision Authority in order to ensure financial stability and it has the right to obtain information necessary for the performance of its functions. See Section 2(5) of the Eesti Pank Act. The Supervision Authority may enter into bilateral or multilateral agreements for cooperation with Eesti Pank, the Ministry of Finance or any other state agency, if such cooperation is necessary for the attainment of the objectives of financial supervision. The Financial Supervision Authority, the Ministry of Finance and Eesti Pank are required to cooperate, on the basis of a written agreement, in the collection and analysis of reports, the drafting of legislation and the exchange of information on events which have a substantial impact on the financial sector. See Section 50 of the Law on the Financial Supervision Authority.

34 In course of performing its tasks, the Hungarian Financial Supervisory Authority is required to cooperate with Magyar Nemzeti Bank. See Article 6/C(1) of Law No CXXIV of 1999 on the Financial Supervisory Authority. This cooperation is curried out on the basis of a signed Memorandum of Understanding, updated every year.

35 Within the scope of its federal statutory duties and its duties within the ESCB, the Oesterreichische Nationalbank (OeNB) is required to cooperate with the Finanzmarktaufsicht (Financial Market Authority or FMA) by providing mutual assistance. Both the OeNB and the FMA are required to report to each other observations and findings of a fundamental nature or of particular importance in the area of banking. See Sections 5, 7 and 8 of the Federal Law on the institution and organisation of the Financial Market Authority; and Sections 79(1) and 80(1) of the Federal Law on banking.

36 Article 30(8) of 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).

37 See, e.g. paragraph 9 of ECB Opinion CON/2001/10.

38 See, e.g. Belgium: Article 56 of the Statutes of the Nationale Bank van België/Banque Nationale de Belgique; Denmark: Article 354(5) of the Law on financial services; Article 22 of the Law on deposit guarantees and investors; Article 20 of the Law on Danmarks Nationalbank; Estonia: Section 2(5) of the Law on Eesti Pank; Sections 48(2), 54(2) of the Law on the Financial Supervision Authority; Ireland: Sections 33C(1)(c) and 33C(8) of the Central Bank Act 1942; Latvia: Article 6 of the Law on Latvijas Banka; Article 10 of the Law on the Financial and Capital Market Commission; Luxembourg: Article 33(2) of the Law of 23 December 1998 concerning monetary status and the Banque centrale du Luxembourg; Article 16, third paragraph of the Law of 23 December 1998 on the establishment of a commission for the supervision of the financial sector; Hungary: Article 44 of Law No LVIII of 2001 on Magyar Nemzeti Bank; Malta: Section 38A of the Central Bank of Malta Act; Section 18 of the Malta Financial Services Act; Austria: Articles 79 to 80 of the Law on banking; Finland: Section 26 of the Law on Suomen Pankki, No 214/1998.

2.4.2 It is understood that there is currently no specific legal framework for the exchange of information between NBP and the Banking Commission since, as a practical matter, NBP's President chairs both institutions. While the draft law provides, for example, that the FSA President is responsible for performing periodic assessments of the financial condition of banks and presenting these to the body responsible for monetary policy[39], it does not provide for an ongoing exchange of information between NBP and the FSA. Since the draft law plans a new supervisory authority separate from NBP, the ECB recommends expressly providing in the draft law for the exchange of information between NBP and the FSA. Furthermore, the ECB recommends expressly removing possible legal obstacles to information sharing between the independent financial supervisor and NBP, stipulating that information subject to confidentiality and professional secrecy requirements may be shared between the supervisory authority and the central bank, and vice versa, for the purposes of the exercise of their respective tasks. In drafting the provisions relating to the exchange of information between NBP and the FSA, it may be helpful to use, as a minimum standard, the example of the existing Polish provisions (which are retained under the draft law) regarding information-sharing between NBP and the Securities Commission or the Insurance Commission, respectively[40], in the context of the supplementary supervision of financial conglomerates (implementing the relevant Community legislation[41]).

2.4.3 Following Poland's adoption of the euro, information-sharing may involve a cross-border dimension, since information concerning Eurosystem-related tasks may need to be conveyed to other NCBs of the Eurosystem and to the ECB. A provision reflecting this particular aspect would be welcome. This suggestion is in line with the recommendations made by the Economic and Financial Committee in its 'Report on financial crisis management'[42], to remove any legal impediments to the cross-border exchange of information between supervisors and central banks. The continuity of current arrangements with foreign supervisors should also be secured.

3. Institutional relationship between NBP and the FSA

3.1 *The existing institutional model for prudential supervision in Poland*

3.1.1 The ECB would like to express its very positive assessment of the existing institutional model for the prudential supervision of credit institutions in Poland. In particular, the following institutional elements ensure that there is the necessary degree of involvement in banking supervision on the

39 Article 3(1)(a)(c) of the draft law.

40 Articles 22 to 23 of the Law on supervision of the capital market (see footnote 5 above) and Article 17(6) of the law on insurance supervision (see footnote 6 above), respectively.

41 Articles 12 of the Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).

42 Economic Paper No 156, the Economic and Financial Committee, 'Report on financial crisis management', 17 April 2001, available on the European Commission website (www.europa.eu.int).

part of the central bank: (i) NBP's President chairs the seven-person Banking Commission[43]; (ii) the Banking Commission's decisions are implemented and coordinated by the General Inspectorate of Banking Supervision, which is structured as the executive arm of the Banking Commission and is a separate organisational unit of NBP, institutionally autonomous and subordinate to the Banking Commission[44]; (iii) the General Inspector of Banking Supervision is appointed and dismissed by NBP's President in agreement with the Minister of Finance[45]; and (iv) there are staff cooperation arrangements in place between NBP departments and the General Inspector of Banking Supervision. This structure greatly facilitates the flow of information between NBP and the Banking Commission, allowing NBP to fulfil its role of promoting the safety and soundness of financial institutions and the stability of the financial system as a whole. From a more specific Eurosystem perspective, this structure, which shares a number of institutional features with the French banking supervisory model[46], is particularly well designed to facilitate an NCB's contribution to the prudential supervision of credit institutions and the stability of the financial system, as required, also in the future euro accession context, under Article 105(5) of the Treaty.

3.1.2 Assuming, nevertheless, that an independent financial supervision authority will be established in Poland without the benefit of the existing institutional relationship between NBP and the Banking Commission, the ECB wishes to point out that Member States which have adopted supervisory models based on an independent financial supervisory authority have used a variety of institutional arrangements to ensure that the NCB can make its necessary contribution to the conduct of prudential supervision and financial stability. The ECB considers that these institutional arrangements make an important contribution towards ensuring the smooth interaction between central banks and supervisory authorities.

3.2 *Central bank appointment of members to the FSA's decision-making body*

3.2.1 The ECB understands that under the draft law, the FSA President, in his capacity as the central government administrative body responsible for the integrated supervision of the banking, capital markets and insurance/pension funds sectors, will be a single-person decision-making body for virtually all financial supervisory matters in Poland[47]. The FSA President is to be appointed, from among qualified persons, by the Council of Ministers' President for a six-year term in office[48], with narrowly defined grounds for possible dismissal[49]. The appointment of the FSA President is not

43 Article 26(1)(1) of the Law on NBP.

44 Articles 25(1) and 29(1) of the NBP Law on NBP.

45 Article 29(3) of the Law on NBP. The General Inspector of Banking Supervision is a member of the Banking Commission, see Article 26(1)(7) of the Law on NBP.

46 In France, the prudential supervision of credit institutions is carried out by the Commission Bancaire. The Banque de France's Governor chairs the Commission Bancaire, and the Banque de France provides the General Secretariat of the Commission Bancaire with staff and resources necessary for carrying out on-site inspections of credit institutions. See Articles L. 613-3 and L. 613-7 of the French Financial and Monetary Code.

47 Article 2 of the draft law.

48 Article 4(1) of the draft law.

49 Article 5 of the draft law. Such grounds include cases where the FSA President: (1) has received a final sentence for an intentionally committed offence; (2) has received a final sentence of imprisonment for an unintentionally committed

subject to the provisions regulating open competitions for management positions in the Polish government[50]. From the draft law provisions, it is not entirely clear to whom and how the FSA President will be accountable – a single reference to annual reports to be issued by the FSA President[51] is not linked to any procedure for submitting or reviewing such reports. The legal framework proposed by the above quoted provisions does not provide for conformity with the applicable institutional standards that a market supervisor such as the FSA President needs to be embedded in; further consideration in this regard is recommended. A particular concern that needs to be expressed in this context relates to the prosecutorial powers that the FSA President is to have in civil proceedings related to the banking, capital market, insurance and pension funds markets[52].

3.2.2 The ECB further understands that the tasks of the FSA President will be carried out with the assistance of the FSA staff and the FSA Vice-Presidents[53]. The FSA Vice-Presidents will be appointed by the Council of Ministers' President upon the nomination of the FSA President[54] and may apparently be dismissed at the sole discretion of the Council of Ministers' President[55]. The FSA Vice-Presidents will not form a board or any other collegiate body and will not have the powers of an organ of the government administration. As regards banking supervision responsibilities during the transitional period in which the FSA will exist alongside the Banking Commission, i.e. until 31 December 2007, the FSA President will be a member of the Banking Commission in the capacity of Deputy Chairman and will also appoint one additional person as a Banking Commission member[56].

3.2.3 In line with the position taken by the ECB in previous opinions[57], and in light of the widespread practice in the European Union on decision-making in supervisory matters, it would be desirable to allow for the establishment of a formal board acting on the basis of collegiality in the draft law. In this respect, the ECB notes that in many Member States which have adopted supervisory models based on an independent financial supervisory authority, the central bank either provides members of the decision-making body of the supervisory authority or plays an institutional role in the appointment and dismissal of its members. In some cases there is cross-membership between the decision-making bodies of the central bank and the supervisory authority. Such provisions have

---

offence; (3) has resigned from office; (4) has lost Polish citizenship; or (5) has become unable to fulfill duties in office because of prolonged illness lasting more than nine months.

50 Article 11(2)(1) of the draft law.

51 Article 4(2) of the draft law.

52 Article 3(2) of the draft law.

53 Article 6(1) of the draft law.

54 Article 6(2) of the draft law.

55 Article 6(3) of the draft law.

56 Article 53(4) of the draft law.

57 See, e.g. paragraph 14 of ECB Opinion CON/2005/34 of 6 October 2005 at the request of the Italian Ministry of Economy and Finance on an amendment to the draft law on the protection of savings concerning the Banca d'Italia.

been introduced, for example, in Belgium[58], Estonia[59], Latvia[60], Austria[61], and Finland[62]. Such an approach would retain some of the advantages of the existing institutional framework for the supervision of credit institutions in Poland, and provide a practical means of exchanging information between NBP and the FSA[63].

3.2.4 Having regard to the above, the ECB proposes considering the inclusion in the draft law of provisions establishing a collegiate decision-making body as the FSA's sole organ and a body of central government administration. The ECB also proposes including an appropriate number of NBP representatives in such a collegiate body, with the full right to participate in its meetings and deliberations, to vote and to share in all information available to the FSA. Such inclusion of the NBP representatives in the FSA's collegial body would need to be effected with appropriate consideration given to the independence safeguards relating to the members of the NBP staff or governing bodies.

3.3 *Central bank involvement in major supervisory decisions*

In a number of Member States which have adopted supervisory models based on an independent financial supervisory authority, the central bank has been given an explicit role in major supervisory decisions, including decisions relating to issuing or revoking authorisations and licences. Such legislative provisions have been introduced, for example, in Denmark[64], Ireland[65], and Hungary[66]. Such provisions would assist NBP in the performance of its financial stability tasks.

---

58 Three of the seven members of the Management Committee of the Commissie voor het Bank, Financie- en Assurantiewezen/Commission bancaire, financière et des assurances (the Banking, Finance and Insurance Commission) are required to be appointed from among the members of the Board of Directors of the Nationale Bank van België/Banque Nationale de Belgique. See the third indent of Article 49 § 6 of the Law of 2 August 2002 on the supervision of the financial sector and on financial services.

59 Of the six members of the Estonian Financial Supervision Authority's Supervisory Board, the Governor of Eesti Pank is an *ex officio* member and two of the remaining five members are appointed and removed by the Executive Board of Eesti Pank on the Governor's proposal. See Section 8 of the Law on the Financial Supervision Authority.

60 The Chair and the Deputy Chair of the Council of the Latvian Financial and Capital Market Commission (FCMC) are appointed by the Parliament for a period of six years upon a joint proposal of the Governor of Latvijas Banka and the Minister for Finance. One of the grounds for dismissal of the Chair and their Deputy by the Parliament is if an application for dismissal is submitted jointly by the Governor of Latvijas Banka and the Minister for Finance. The FCMC's Chair appoints and removes the other members of the FCMC Council, and is required to co-ordinate their decision with the Latvijas Banka's Governor and the Minister for Finance. The Governor or Deputy Governor of Latvijas Banka may participate in FCMC Council meetings. See Articles 13(3), 13(4), 14(4) and 16(2) of the Law on the Financial and Capital Market Commission.

61 The Oesterreichische Nationalbank (OeNB) nominates the Deputy Chair of the Supervisory Board, as well as two additional members of the eight-member Supervisory Board and one member of the two-member Executive Board of the Austrian Finanzmarktaufsicht (Financial Market Authority or FMA), who are appointed by the Federal Minister for Finance (in the case of the Supervisory Board members) and the Federal Government (in the case of the Executive Board members). The Federal Minister for Finance is required to consult the OeNB prior to the dismissal of a member of the FMA Supervisory or Executive Boards nominated by the OeNB, except in case of imminent danger. See Sections 5, 7 and 8 of the Federal Law on the establishment and organisation of the Financial Market Authority.

62 Suomen Pankki proposes to nominate one of the six members and one of the three deputy members of the Board of Directors of the Finnish Financial Supervisory Authority. See Section 9 of the Law on the Financial Supervisory Authority.

63 See paragraph 5 of Opinion CON/2001/10.

64 A representative of Danmarks Nationalbank is a member of the Financial Business Council which, *inter alia*, takes decisions in supervisory cases of importance as well as in cases which are significant for financial entities and holding companies in general. See Article 345 of the Law on financial services (LBKG 2005-06-21, No 613).

3.4 *Financial Stability Committee*

Another institutional mechanism for encouraging cooperation between central banks and independent financial supervisory authorities which the ECB has welcomed in past opinions is the establishment of a financial stability/ market committee as a body to foster cooperation and information-sharing between the authorities, including the finance ministry, which are jointly responsible for financial system stability and regulation[67].

3.5 *Operational involvement of central banks in financial supervision*

Yet another mechanism which has been used in some Member States to encourage cooperation between central banks and independent financial supervisory authorities involves the allocation of certain operational tasks to the central bank, including on-site inspections and reviews of the capital adequacy and risk management systems of supervised institutions[68].

4. Oversight of payment and securities settlement systems

4.1 The ECB notes that NBP enjoys exclusive licensing and supervisory rights over payment systems in Poland[69]. Additionally, the legislation currently in force grants to a representative of NBP's President the right to participate, without the right to vote, in meetings of the Securities Commission whenever issues concerning the supervision of securities settlement systems (SSSs) are discussed[70]. NBP's President also has a right to give an opinion at any time when the approval of the establishment of a new SSS (with certain exclusions) is issued by the Securities Commission[71]. The impact of the draft law on these NBP competences is not entirely clear. While winding up the Securities Commission (and hence eliminating NBP's right to participate in its meetings), the draft law appears to retain the advisory role of NBP's President, even though the relevant reference to the Securities Commission in the current legislation is not explicitly replaced

---

65 The Irish Financial Services Regulatory Authority is required to consult the Governor of the Central Bank and Financial Services Authority of Ireland, and may act only with the agreement of the Governor on any matter relating to the financial stability of the state's financial system, including (but not limited to) the issue, revocation and suspension of a licence or other authority. See Sections 33C(9), (9A) and (9B) of the Central Bank Act 1942, as amended.

66 Where prescribed by law, the Hungarian Financial Supervisory Authority must consult with or obtain the consent of Magyar Nemzeti Bank prior to issuing or revoking authorisations and licences. See Article 6/C(2) Law No CXXIV of 1999 on the Financial Supervisory Authority.

67 See paragraph 7 of Opinion CON/2001/10 (Austria). Similarly, Hungary created a Financial Stability Committee comprising its newly established Financial Services Authority, Magyar Nemzeti Bank and the Ministry of Finance, to cooperate actively and discuss financial stability issues.

68 Germany: Law on banking (numerous provisions); Austria: Law on banking (numerous provisions). Also, in Ireland the Governor of the central bank has been given independent powers to investigate businesses and carry out on-site inspections of licensed credit and financial institutions. See, e.g. in the case of banks, Section 17A of the Central Bank Act 1971.

69 Article 16(1) of the Law on settlement finality in payment and securities settlement systems and on the supervision of such systems (Dz. U. 2001 No 123, Item 1351, as amended).

70 Article 8(6) of the Law on supervision of capital markets. At the same time, the General Inspector of Banking Supervision is a member of Securities Commission, see Article 8(5)(5) of the Law on supervision of capital market (see footnote 5).

71 Article 16.2 of the Law on settlement finality (see footnote 69 above).

by a reference to the FSA President. The ECB recommends clarifying the NBP's role in SSS oversight, in accordance with the principles set out below.

4.2 As noted in previous ECB opinions[72], payment systems and SSSs are interlinked, particularly in view of the use of the 'delivery versus payment' mechanism, under which settlements of securities and transfers of funds take place simultaneously. There is therefore a strong argument in favour of the model used in some Member States of integrating the oversight of payment and securities settlement systems, and for the NCB to perform this function. Settlement of both legs of such transactions should be subject to similar safeguards in order to avoid asymmetries with systemic implications. In order to safeguard the effectiveness of monetary policy and the overall stability of the financial system, the NCBs' oversight responsibilities mean that they must ensure that SSSs are sufficiently protected against systemic disruptions. The framework for the NCBs' conduct of this function, although informal, has been effective and successful. A growing number of NCBs see a benefit in formalising their oversight role. The majority of NCBs carry out this function on the basis of their general statutory laws, without any explicit detailed legal provisions. At the Community level, the general legal basis for this activity is provided by the Treaty and the Statute of the European System of Central Banks and of the European Central Bank[73], with more detailed policies introduced by the Eurosystem's common oversight policy, as defined by the Governing Council.

4.3 In view of the widespread practice of Member States referred to above, the ECB recommends giving NBP responsibility for the oversight function over SSSs, including access to all information and data relevant for the performance of such oversight tasks.

5. Monetary financing and monetary policy independence

5.1 *Monetary financing*

5.1.1 According to the relevant Polish provisions, as amended by the draft law, the FSA President will have the competence to request a supervised bank to commission an audit from an indicated external auditor in cases where irregularities are established in the audit conducted on the bank's own behalf. The costs of such an audit ordered by the FSA President will be borne by NBP, unless the audit reveals relevant irregularities (in which case the costs of the audit will be borne by the supervised bank)[74]. Similarly, audit costs will be borne by NBP where an audit is demanded by the FSA President to clarify doubts as to the credibility of financial statements of dependent entities or

72 See, e.g. paragraphs 10 to 14 of ECB Opinion CON/2003/14 of 7 August 2003 at the request of the Banca d'Italia on a draft regulation on payment systems, payment infrastructures and payment instruments; paragraphs 13 to 16 of ECB Opinion CON/2005/24 of 15 July 2005 at the request of the Ministry of Finance of the Czech Republic on a draft law on the integration of financial market supervisors.

73 Article 105(2) of the Treaty and Articles 3.1 and 22 of the Statute.

74 Article 135(2)(3) of the Law on banking of 29 August 1997 (consolidated text: Dz. U. of 2002, No 72, Item 665, as amended), as amended by Article 23 of the draft law.

of entities having close links with a domestic bank operating in a holding structure and where the results of the audit do not support such doubts[75].

5.1.2 By virtue of the prohibition of monetary financing established under Article 101 of the Treaty, overdraft facilities or any other type of credit facility with NCBs in favour of public sector bodies is prohibited[76]. In this regard, the ECB wishes to recall its position[77] that in assessing the compatibility of any financing arrangement with the prohibition of monetary financing, not only is a strict literal interpretation relevant, but it is also relevant to consider the purpose of the provision. The overall aim of the prohibition of monetary financing is to prevent NCBs from financing the public sector. Further, in line with relevant secondary Community law[78], any financing of the public sector's obligations vis-à-vis third parties constitutes an 'other type of credit facility' for the purposes of the prohibition of monetary financing. Consequently, the monetary financing prohibition applies to national legislation conferring on central banks the task of financing third parties where such financing does not relate to any of the tasks and functions of the central bank, but is a responsibility of the State. The prohibition of such financing arrangements must be interpreted strictly, subject only to certain express and limited exemptions contained in Community law[79]. For an NCB to bear the costs of audits independently ordered by a financial supervisor, in circumstances where the NCB has no meaningful involvement in the supervisory decision-making process, must be considered an instance of the NCB's financing of the public sector's obligations vis-à-vis third parties, which is not covered by any of the statutory exemptions[80]. In this context, the ECB recommends that appropriate amendments be made to the draft law so that this activity of the FSA President will not be financed by NBP.

5.2 *Monetary policy competence of NBP*

Under the draft law, the FSA President will be responsible for evaluating the impact of monetary, tax and supervisory policies on the development of banks[81]. In order to avoid any ambiguity with respect to NBP's exclusive competences in the area of monetary policy, it is suggested that the reference to monetary policy in this provision should be deleted.

---

75 Article 141h(2)(3) of the Law on banking, as amended by Article 23 of the draft law.

76 Article 101(1) of the Treaty and Article 21.1 of the Statute.

77 See paragraph 9(i) of ECB Opinion CON/2003/27 of 2 December 2003 at the request of the Austrian Federal Ministry of Finance on a draft Federal law on the National Foundation for Research, Technology and Development.

78 Article 1(1)(b)(ii) of Council Regulation (EC) No 3603/93 of 13 December 1993 specifying the 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).

79 See paragraph 6 of ECB Opinion CON/2005/1 of 3 February 2005 at the request of the Italian Ministry of Economic Affairs and Finance on a draft law amending Law Decree No 7 of 25 January 1999, as converted by Law No 74 of 25 March 1999, concerning urgent provisions on Italian participation in the International Monetary Fund's interventions to confront severe financial crises of its member countries.

80 Article 101(2) of the Treaty and Articles 2 and 5 to 7 of Regulation (EC) No 3603/93.

81 Article 3(1)(1)(c) of the draft law.

6. Specific issues

6.1 *Implementation of the Capital Requirements Directive*

The ECB notes that a smooth transposition of the Capital Requirements Directive (CRD) is taken into account by the draft law proposal as a factor affecting the implementation of the proposed supervisory reform; it is for this reason that the transfer of banking supervision responsibilities to the FSA President is only foreseen as of 1 January 2008[82]. In this context, the ECB wishes to recall the long-term and far-reaching nature of the CRD reform, the residual uncertainty about its influence on the level of capital in the banking system and the need to develop appropriate supervisory guidance over time in line with evolving industry practices and experiences of national supervisors. The resulting institutional challenges in implementing the CRD are not expected to end with the CRD's transposition into national law, since continuing challenges for national supervisors may be expected to arise beyond that date. Against this background, the ECB assumes that all precautionary measures are arranged by the Polish authorities so that the implementation of the supervisory reform does not affect negatively the implementation of the new capital adequacy regime.

6.2 *Advisory committee membership*

The ECB notes that the draft law plans to include within the FSA an advisory committee, a 15-member body appointed by the Council of Ministers' President, with at least six members recommended by the Tripartite Commission for Social and Economic Issues[83], which is a body consisting of representatives of employers, employees and government administration with a basic task of conducting social dialogue regarding labour remuneration and social benefits[84]. Assuming that the draft law's proposed reform is implemented, the ECB recommends including in the Advisory Committee, in order to provide the Advisory Committee with a broad range of banking and financial expertise, the representatives of banking, financial, insurance and consumer protection bodies. Under the same assumption, the ECB recommends that the Advisory Committee members should be covered by the same confidentiality requirements as would apply to the FSA management and staff under the draft law[85].

6.3 *Continuity of staff experience*

The ECB notes that the draft law provides for the transfer of the staff of the current supervisory bodies to the FSA, whereby these employees are to become employees of the FSA (in accordance with the proposed timing for the transfer of the supervisory responsibilities)[86]. However, the

82 As stated in the fifth paragraph of the consultation request from the Minister of Finance of 7 February 2006.

83 Article 12(1) of the draft law.

84 Articles 1(3) and 4(1) of the Law of 6 July 2001 on the Tripartite Commission for Social and Economic Issues (Dz. U. 2001 No 100, Item 1080, as amended).

85 Article 10 of the draft law.

86 Article 43(1)(2) of the draft law.

employment relationship of such employees is to expire after six months from the last day of the month in which the FSA is established (or in the case of the employees of the General Inspectorate of Banking Supervision, on 30 June 2008), unless they receive an offer of new employment and remuneration conditions within such period and accept it[87]. While not commenting in any way on the legal safeguards for the stability of employment in national supervisory administration, the ECB would like to recall the Polish legislator's declared aim of finding, under the newly proposed structure, the appropriate application for the accumulated competences and experiences of the existing supervisory bodies[88].

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

Done at Frankfurt am Main, 9 March 2006.

[signed]

The President of the ECB

Jean-Claude TRICHET

87 Article 50 of the draft law.

88 As stated in the third paragraph of the consultation request from the Minister for Finance of 7 February 2006.