# OPINION OF THE EUROPEAN CENTRAL BANK

**of 13 October 2016**

**on a draft law to facilitate the reimbursement of certain spreads charged on foreign exchange-linked loans**

**(CON/2016/50)**

## Introduction and legal basis

On 15 September 2016 the European Central Bank (ECB) received a request from the Polish Parliament for an opinion on a draft law to facilitate the reimbursement of certain amounts due under loan and cash advancement agreements (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[1], as the draft law contains rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets, which relates to the ESCB's contribution to the smooth conduct of policies pursued by the competent authorities relating to the stability of the financial system under Article 127(5) of the Treaty. 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 facilitate the reimbursement to borrowers of foreign exchange spread amounts considered to be unfairly charged by banks in connection with certain secured loans denominated in, or indexed to, a foreign currency (hereinafter 'foreign currency loans'). Borrowers who may benefit from the draft law include consumers as well as natural persons who are sole traders, provided that they did not invoke any depreciation charges with respect to the property acquired using the foreign currency loan and did not claim as tax-deductible expenses the interest and other charges arising from such loan.

1.2 The draft law applies to loan agreements entered into between 1 July 2000 and 26 August 2011, even if such loan agreements have terminated, provided that the loan agreement contained at least one of the following three features:

(i) in the case of an indexed loan (i.e. a loan granted in Polish zloty (PLN), which in accordance with the loan agreement is equivalent to a specific foreign currency amount or is indexed to, or revalued in line with, a foreign currency), where, at the time the loan was granted, the

1 Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

exchange rate used was lower than 99.5 % of the selling rate of Narodowy Bank Polski (NBP) for the foreign currency to which the loan is indexed, as published by NBP on the date on which the foreign currency amount was determined;

(ii) in the case of a foreign currency denominated loan (i.e. a loan granted in a foreign currency that was disbursed in PLN), where, at the time the loan was granted, for the purpose of determining the loan amount or its tranches to be disbursed in PLN, the exchange rate used was lower than 99.5 % of NBP's buying rate for the foreign currency in which the loan is denominated, as published by NBP on the date on which the conversion to PLN of the loan amount or its tranches occurred; or

(iii) in the case of an indexed loan or foreign currency denominated loan, where for the purposes of converting PLN to the foreign currency in which the loan instalments, fees or charges are expressed, the exchange rate used was higher than 100.5 % of NBP's selling rate for the foreign currency, as published by NBP on the due date for such loan instalments, fees or charges or, where payment was made after the due date, on the payment date.

1.3 A borrower has six months after the entry into force of the draft law to request the lender to notify the borrower in writing whether his or her loan agreement contains any of the abovementioned features. The lender is required to provide the notification within 30 days of receipt of the borrower's request. If the loan agreement contains any of the abovementioned features, the lender's notification must also specify: (i) an amount expressed in the relevant foreign currency which represents the difference between the value of the relevant loan principal, instalment, fee or charge as calculated based on the exchange rate actually used at the relevant time and the value of the same loan principal, instalment, fee or charge as calculated using the relevant NBP exchange rate decreased or increased by 0.5 %, as applicable, and (ii) interest on the amount referred to in point (i) calculated at 50 % of the statutory interest rate. The draft law provides formulae for the calculation of the amounts referred to in points (i) and (ii).

1.4 Within 14 days of a written request by the borrower (to be made within 12 months of the lender's notification specified in paragraph 1.3), the lender must (i) reduce the principal of the foreign currency loan by the sum of the amounts referred to in paragraph 1.3, or (ii) where such sum exceeds the outstanding principal of the foreign currency loan or the loan principal has been repaid, pay such sum to the borrower. A borrower who disagrees with the content of the notification referred to in paragraph 1.3 may, within two months of receiving the notification, lodge a complaint with the lender. However, the lodging of a complaint does not affect the borrower's right to the reduction of principal or payment of the surplus amount.

1.5 Irrespective of the amount of the foreign currency loan, the borrower is entitled to exercise the right to reduction or payment of the surplus amount only to a maximum loan principal amount of PLN 350 000.

1.6 If the lender fails to fulfil its obligations under the draft law, the borrower is entitled to compensation amounting to 0.01 % of the outstanding loan principal. In addition, the Polish Financial Supervision Authority may, as the body entrusted with the supervision of lenders' compliance, impose on a

lender a penalty of up to 0.002 % of the value of the lender's outstanding foreign currency loans for each day that the lender fails to comply with its obligations under the draft law.

1.7 The draft law is intended to enter into force within 30 days of its promulgation. The exercise by the borrower of rights under the draft law does not affect the borrower's right to initiate or continue court proceedings with respect to claims related to the loan agreement.

## 2. General observations

2.1 Prior to the global financial crisis, borrowing in foreign currencies by households and non-financial corporations was popular in several Member States[2]. As previously noted by the ECB[3], the lower interest rates applicable to foreign currency loans compared to loans in the domestic currency, as well as the expectation of domestic currency appreciation, increased the demand for such loans. The ECB understands that most of the foreign currency loans in Poland are housing loans denominated in Swiss francs and that foreign currency housing loans constituted approximately 43 % of all outstanding housing loans and 26 % of all outstanding loans to households in July 2016[4].

2.2 The ECB has previously been consulted by the Polish Parliament and issued opinions on two draft legislative proposals, which were subsequently not adopted, dealing with the restructuring of foreign currency loans[5]. The ECB notes that, unlike the previous two proposals, the draft law does not propose solutions involving the conversion of foreign currency loans into PLN loans.

## 3. Specific observations

*Retroactivity*

3.1 Although Directive 2014/17/EU of the European Parliament and of the Council[6] does not apply to credit agreements existing before 21 March 2016, as previously noted by the ECB[7], the retroactive effect of the draft law does not seem to be in line with the general aim and principle of Article 23(5) of Directive 2014/17/EU. This provision allows Member States to further regulate foreign currency loans on condition that such regulation is not applied with retroactive effect.

3.2 In addition, as previously noted by the ECB[8], introducing measures with retroactive effect undermines legal certainty and is not in line with the principle of legitimate expectations. It is

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2 For further information on lending in foreign currencies in the Union see the Annex to Recommendation ESRB/2011/1 of the European Systemic Risk Board of 21 September 2011 on lending in foreign currencies (OJ C 342, 22.11.2011, p. 1).

3 See paragraph 2.2 of Opinion CON/2014/59, paragraph 2.1 of Opinion CON/2015/26, paragraph 2.1 of Opinion CON/2015/32 and paragraph 2.2 of Opinion CON/2016/39. All ECB opinions are available on the ECB's website at www.ecb.europa.eu .

4 See the NBP's Monetary and financial statistics report at http://www.nbp.pl.

5 See Opinions CON/2015/26 and CON/2016/39.

6 Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34).

7 See paragraph 3.2 of Opinion CON/2014/59, paragraph 2.2 of Opinion CON/2015/26, paragraph 3.2.1 of Opinion CON/2015/32 and paragraph 3.1.1 of Opinion CON/2016/39.

8 See paragraph 3.2.2 of Opinion CON/2015/32 and paragraph 3.1.2 of Opinion CON/2016/39.

however for the Polish authorities to assess whether the retroactive character of the draft law complies with Polish legal and constitutional principles.

*Effects on the banking sector, financial stability and the Polish economy*

3.3 The ECB reiterates its comments regarding risks associated with foreign currency loans made in previous opinions[9]. Nevertheless, in the case of Poland, such risks do not, at present, appear to be of a systemic nature for the financial system and are not seen as representing a particular risk from a financial stability perspective. The ECB also notes that the draft law is mainly justified by considerations related to consumer protection.

3.4 The ECB notes that implementation of the draft law may entail significant financial costs for the banking sector. The explanatory memorandum estimates the implementation cost of the draft law for banks at between PLN 3.6 billion and 4.0 billion (i.e. approximately EUR 830-920 million). Nevertheless, considering the significant uncertainties relating to the estimation methodology, as well as additional operational costs, it is possible that the actual cost of implementing the draft law for banks will be higher than the legislators' estimate. In this respect, the ECB notes that, in its opinion on the draft law[10], NBP estimates the cost of the draft law to be twice the cost indicated in the explanatory memorandum, suggesting it could amount to two thirds of the annual profits of the domestic banking sector in 2015.

3.5 As the ECB has noted previously[11], introducing measures with retroactive effect may also have some negative impact on the Polish economy if it leads to a deterioration in foreign investor sentiment due to a perceived increase in legal uncertainty and country risk.

3.6 Consequently, the ECB encourages the Polish authorities to carry out a thorough analysis to better quantify the financial stability implications of the draft law, in particular whether the envisaged retroactive measures could have negative effects on credit institutions taken individually, the banking sector as a whole and the overall economy in Poland. In particular, due consideration should be given to the capital adequacy of the affected institutions and cross-border effects on the consolidated profits of international banking groups.

3.7 With regard to any potential negative effects of the proposed measures, the ECB remains of the opinion that due consideration should also be given to fair burden sharing among all stakeholders, thus also avoiding moral hazard in the future[12]. The ECB also expects that the solution proposed by the draft law should be balanced with regard to the impact on local and foreign owned banks.

3.8 Finally, the ECB notes that the scheme introduced by the draft law does not comprehensively eliminate risks relating to foreign currency loans.

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9 See paragraphs 3.3.1 and 3.3.2 of Opinion CON/2015/26 and paragraph 3.3.1 of Opinion CON/2016/39.

10 Available on the Polish Parliament's website at http://orka.sejm.gov.pl.

11 See paragraph 3.4.1 of Opinion CON/2015/26 and paragraph 3.3.3 of Opinion CON/2016/39.

12 See paragraph 3.4 of CON/2014/59, paragraph 3.3 of CON/2014/87, paragraph 3.3.4 of Opinion CON/2015/26 and paragraph 3.3.6 of Opinion CON/2016/39.

*Miscellaneous*

3.9 In line with the opinion expressed by NBP, the ECB also has some technical comments regarding the method indicated in the draft law for calculation of the amount of a spread refund. First, the value of the spread refund is denominated in a foreign currency and not in PLN, which may result in an increased benefit to borrowers. Second, the formula used for the computation of the spread refund in respect of indexed loans refers to the NBP selling rate while the NBP buying rate is used in the formula for foreign currency denominated loans. Use of these different NBP rates could result in borrowers with indexed loans receiving a much greater refund in PLN terms than borrowers with foreign currency denominated loans granted for the same amount.

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

Done at Frankfurt am Main, 13 October 2016.

*[signed]*

*The President of the ECB*

Mario DRAGHI