EUROPEAN CENTRAL BANK

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 28 May 2015

on the legal framework for the deposit guarantee scheme and resolution in the financial markets

(CON/2015/17)

Introduction and legal basis

On 10 April 2015 the European Central Bank (ECB) received a request from the Polish Ministry of Finance for an opinion on a draft law on the Bank Guarantee Fund, the deposit guarantee scheme and compulsory restructuring (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 sixth indents of Article 2(1) of Council Decision 98/415/EC[1], as the draft law relates to Narodowy Bank Polski ('NBP') and rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. For elements of the draft law, where the exclusive purpose is the implementation of Union law, the ECB's competence to deliver an opinion is based on Article 25.1 of the Statute of the European System of Central Banks and of the European Central Bank. 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 main purpose of the draft law is to modify the legal framework of the current deposit guarantee scheme in Poland, operated by the Bank Guarantee Fund (the 'Fund'), and develop a framework allowing for the resolution of entities subject to this scheme. To this end, the draft law implements Directive 2014/59/EU of the European Parliament and of the Council[2] and Directive 2014/49/EU of the European Parliament and of the Council[3] through a new, separate legal act repealing the current Law on the Bank Guarantee Fund[4] (hereinafter the 'Law on BFG'). The draft law also repeals existing restructuring and support measures under Polish law to bring the relevant provisions in line with the new resolution framework. In this respect the draft law amends several other related legal acts, including legislation on financial instruments, insolvency, financial market supervision and recapitalisation of financial institutions.

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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).

2 Directive 2014/59/EU of the European Parliament and the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

3 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 12.6.2014, p. 149).

4 Consolidated text Dz.U. of 2014, item 1866.

1.2 Under the draft law, the Fund, which is a legal person, is designated as the national resolution authority and administrator of the deposit guarantee scheme, and Komisja Nadzoru Finansowego (KNF, The Financial Supervisory Authority) retains its supervisory tasks as the national supervisory authority. The most important characteristics of the redesigned framework are the following:

(a) the newly established deposit guarantee scheme and resolution framework is obligatory and covers, inter alia, domestic banks, branches of non-EU credit institutions and Polish credit unions;

(b) the purpose of the Fund's activities is to take measures aimed at stabilising the domestic financial system, in particular by ensuring the functioning of the compulsory deposit guarantee scheme and conducting compulsory restructuring proceedings;

(c) as the resolution authority, the Fund is conferred with resolution powers and has access to resolution tools, in particular the sale of business tool, the bridge institution tool, the asset separation tool and the bail-in tool;

(d) when performing its tasks, the Fund cooperates with other bodies and institutions concerned with the stability of the domestic financial system, as well as other competent authorities;

(e) the governing bodies of the Fund are the Fund Council and the Fund Management Board. The Fund Council consists of the chairperson and seven members, including two representatives of NBP, nominated by its President. The Fund Management Board is composed of three to five members (including the President and the Vice-President) and is appointed by the Fund Council; and

(f) the main sources of the Fund's financing include mandatory ex-ante annual contributions, extraordinary ex-post contributions, income from financial assets of the Fund, funds from short-term loans granted by NBP, funds from loans granted from the State budget, and funds received as a result of borrowing and issuing bonds.

1.3 Under Article 251(7) of the draft law, the sources of the Fund's financing include funds from the short-term loans granted by NBP in accordance with Article 273. According to this Article, in the event of a threat to financial stability and in order to cover any urgent needs of the Fund related to the disbursement of guaranteed funds, NBP may, at the request of the Fund Council, and subject to the provision of adequate collateral, grant short-term credit to the Fund. The ECB understands that the circumstances and conditions under which such credit will be granted are similar to those governing short-term credit under the current Law on BFG. The ECB also understands that, if approved by NBP at its sole discretion, such temporary credit would be provided under a contract between NBP as creditor, and the Fund as debtor. The draft law does not stipulate further the material terms and conditions (e.g. pricing terms) of such credit.

1.4 The Fund is designated as a resolution authority and, as a result, the role of NBP in administrative resolution matters is mainly consultative and cooperative. This role includes:

(a) consultative powers, including the requirement imposed on the Minister for Finance to consult the NBP President on certain implementing measures as well as on a decision to provide a recapitalisation guarantee in respect of a distressed financial institution or to apply any of the government financial stabilisation tools;

(b) an obligation to conclude separate agreements for the cooperation and the exchange of information between NBP, the Fund, KNF and the Minister for Finance, which would establish an obligation to exchange information necessary for the performance of the statutory tasks of the respective entities; and

(c) involvement in resolution proceedings, where NBP: (i) is informed by KNF of any cases that have been identified of institutions that are likely to fail, and (ii) informs the Fund of any institutions it is aware of whose economic situation may have a negative impact on the continuation of critical functions, financial stability or the protection of depositors.

2. General observations

2.1 The ECB welcomes the draft law which strengthens the tools and procedures available to the national authorities, thereby allowing for early intervention and, if necessary, effective resolution of institutions, in line with the common framework of intervention powers and rules laid down in Directive 2014/59/EU . The resolution tools and procedures will, in particular, help to resolve failing banks while preserving financial stability, and help shield the public budget from the resolution costs.

2.2 The ECB stresses, however, that it does not opine on whether the draft law effectively discharges the obligations of Poland to implement Directive 2014/59/EU and Directive 2014/49/EU into Polish law. Rather, the ECB focuses on those provisions that may impact on the role and tasks of NBP as a central bank and as a member of the European System of Central Banks (ESCB).

3. The Fund as the resolution authority

3.1 Directive 2014/59/EU does not prescribe the type of authority or authorities that Member States should appoint as resolution authorities, leaving this to the discretion of Member States. In this respect, the ECB notes that the Fund is designated as the national resolution authority and administrator of the deposit guarantee scheme as well as administrator of the resolution financing arrangement.

3.2 The ECB understands that the Fund is therefore entrusted with different functions, in particular: (i) management of the deposit guarantee scheme; (ii) management of the resolution fund; and (iii) resolution functions. In this respect, the ECB observes that, under Directive 2014/59/EU, adequate structural arrangements must be in place to ensure operational independence and avoid conflicts of interest between the resolution function and the other functions of the relevant authority[5].

4. Liquidity provision from NBP to the Fund

4.1 The ECB emphasises the importance of alignment of national provisions with the monetary financing prohibition under Article 123 of the Treaty. The ECB underlines that national legislation which provides for the financing by a national central bank (NCB) within the ESCB of a national

5 See Article 3(3) of the Directive 2014/59/EU.

deposit guarantee scheme for credit institutions will only be compatible with the monetary financing prohibition if such financing is short-term, addresses urgent situations, systemic stability issues are at stake and decisions are made at the NCB's discretion[6]. To this end, inserting references to Article 123 of the Treaty in national legislation should be considered. When exercising its discretion to grant a loan, the NCB must ensure that it is not in effect taking over a government task. In particular, central bank support for deposit guarantee schemes should not amount to a systematic 'pre-funding' operation.

4.2 The ECB notes that short-term credit granted by NBP to the Fund under Article 273 of the draft law is not explicitly excluded from being used to replenish the resolution fund, even though Article 273 provides that NBP may only grant such short-term credit in order to cover urgent needs of the Fund related to the disbursement of guaranteed funds. The provision of such financing to the resolution fund would constitute a government task, and any such loan or financing by NBP would therefore breach the monetary financing prohibition under the Treaty. For the sake of legal certainty, the ECB therefore recommends that an explicit provision be inserted into the draft law specifying that the short-term credit granted under Article 273 may not be used to supplement the bank resolution fund, the credit unions' resolution fund or for any other resolution purposes. Directive 2014/59/EU provides that resolution costs should in principle be borne by shareholders and creditors and, where these funds are not sufficient, by financing arrangements. In line with the monetary financing prohibition, NCBs may not fund these financing arrangements[7] and replenish the resolution fund by providing credit to it.

5. Cooperation and exchange of information between the Fund and other relevant authorities, including NBP

5.1 The ECB notes that the draft law provides for cooperation between the Fund (as the resolution authority and the deposit guarantee scheme administrator) and other relevant authorities, including NBP, in performing their respective tasks, each keeping in mind the impact of their performance on the other. In particular, this is reflected in Section V of the draft law referring to the information requirements, data exchange and protection.

5.2 The ECB welcomes these provisions as they will enable the relevant entities to perform their statutory tasks in a coordinated fashion. In particular, they facilitate the performance by NBP of its financial stability mandate. Such arrangements are also in line with current ECB doctrine and requirements under Directive 2014/59/EU, pursuant to which Member States must ensure that, where the central bank is not itself the resolution authority, the competent authority (i.e. the authority responsible for the prudential supervision of institutions) and the resolution authority engage in an adequate exchange of information with the NCB[8].

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6 See the ECB's June 2014 Convergence Report, p. 30.

7 See paragraph 3.4 of ECB Opinion CON/2012/99, paragraph 4 of ECB Opinion CON/2011/103, paragraph 4.3 of ECB Opinion CON/2011/93, paragraph 3.6 of ECB Opinion CON/2011/39 and paragraph 3.2 of ECB Opinion CON/2008/59. All ECB Opinions are available on the ECB's website at www.ecb.europa.eu. See the ECB's June 2014 Convergence Report, p. 28.

8 See paragraph 3.1 of ECB Opinion CON/2012/99.

6. Extending the resolution regime to credit unions

6.1 Under the draft law, Polish credit unions will be subject to both the regular deposit guarantee scheme and the resolution scheme. To that end, the draft law creates separate sub-funds, i.e. the credit unions' guarantee fund and the credit unions' resolution fund, and includes specific provisions related to the resolution of credit unions and safeguarding their depositors.

6.2 The ECB was consulted on the existing Law on credit unions several times[9]. In its opinions, the ECB especially recommended the inclusion of credit unions in NBP's minimum reserves regime and within the scope of KNF's financial supervision[10]. The ECB notes that these elements are now part of the credit unions' regulatory framework, together with the inclusion of credit unions in the current deposit guarantee scheme.

6.3 The ECB understands that the draft law aims to complement the existing legal provisions in order to establish a comprehensive legal framework for credit unions in view of their increasing importance in the Polish banking sector. In view of the above, the ECB welcomes the extension of the resolution regime to credit unions, as a natural consequence of their being subject to KNF supervision and the deposit guarantee scheme.

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

Done at Frankfurt am Main, 28 May 2015.

[signed]

The President of the ECB

Mario DRAGHI

9 See ECB Opinions CON/2009/60 and CON/2013/5.

10 See paragraphs 2.5 and 2.7 of ECB Opinion CON/2009/60. See also paragraph 2.1 of ECB Opinion CON/2013/5.