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EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 22 December 2010

on the extension of State Treasury support and recapitalisation measures to financial institutions subject to a European Commission decision

(CON/2010/95)

Introduction and legal basis

On 8 December 2010, 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 the provision of State Treasury support to financial institutions, the Law amending the Law on the provision of State Treasury support to financial institutions and the Law on recapitalisation of some financial institutions (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 contains 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 the following legislation: (i) the Law of 12 February 2009 on the provision of State Treasury support to financial institutions[2] (hereinafter the 'Law on State support'), on which the ECB was consulted at the drafting stage in November 2008[3]; (ii) the Law of 19 November 2009 on the Law amending the Law on the provision of State Treasury support to financial institutions[4] (hereinafter the 'Law amending the Law on State support') on which the ECB was consulted at the drafting stage in October 2009[5]; and (iii) the Law on recapitalisation of

1 OJ L 189, 3.7.1998, p. 42.

2 *Dziennik Ustaw* of 2009 No 39, Item 308.

3 See Opinion CON/2008/80; all ECB opinions are published on the ECB's website at www.ecb.europa.eu.

4 *Dziennik Ustaw* of 2010 No 3, Item 12.

5 See Opinion CON/2009/82.

certain financial institutions of 12 February 2010[6] (hereinafter the 'Law on recapitalisation'), on which the ECB was consulted at the drafting stage in March 2009[7].

1.2 The Law on State support introduced a scheme whereby various support measures were offered to eligible financial institutions[8]. The deadline for applying for support measures under this Law was originally set at 31 December 2009 and was subsequently extended until 31 December 2010 by the Law amending the Law on State support. The Law on recapitalisation provides for public intervention instruments to address potential liquidity or solvency difficulties that may arise in the financial market by way of enabling public authorities to (i) provide a State guarantee for market-initiated recapitalisation operations, and (ii) initiate compulsory State takeovers of a distressed financial institution[9].

Under the provisions currently in force, the measures provided for in both the Law on State support and the Law on recapitalisation are available until 31 December 2010[10].

1.3 According to the explanatory memorandum, the Polish financial institutions do not currently need to use the support foreseen by the abovementioned Laws. At the same time, because of possible future financial market changes, it is useful to extend those measures to 2011 subject to the European Commission's consent[11]. Nevertheless, the draft law does not specify a date until which the relevant measures foreseen by the Law on State support and the Law on recapitalisation may be applied. Rather, the draft law repeals the current time limit established by the Law amending the Law on State support and provides that the relevant measures may be applied if the European Commission's declaration of the State aid scheme's compatibility with the common market is in force on the day of granting this support[12]. According to the explanatory memorandum, this would allow the temporary character of 'those provisions to become permanent', whereby the time limit for the application of measures would 'result from the fact that the European Commission's consent for the State aid scheme is only issued for a limited period of time'[13].

1.4 The draft law does not change the conditions of support or the criteria by which the eligibility of financial institutions is assessed under the Law on State support or Law on recapitalisation.

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6 *Dziennik Ustaw* of 2010 No 40, Item 226.

7 See Opinion CON/2009/19.

8 Six categories of financial institutions established in Poland were eligible for the support scheme: banks, credit unions, investment funds, brokerage houses, insurance companies and pension funds (see Article 2 of the Law on State support).

9 See Article 1 of the draft law. See explanatory memorandum to the draft law, p. 1.

10 See Article 1 of the Law amending the Law on State support.

11 See the explanatory memorandum to the draft law, p. 1, second paragraph.

12 See Article 2 of the draft law, repealing the Law amending the Law on State support and Articles 1 and 3 of the draft law amending Article 20 of the Law on State support and Article 24 of the Law on recapitalisation, respectively.

13 See the explanatory memorandum to the draft law, p. 1, third paragraph.

2. The appropriate time to consult the ECB

2.1 The consulting authority submitted the draft law to the ECB on 8 December 2010, requesting the ECB's opinion within seven days due to 'the urgent character of the matter and the brief and uncomplicated content'[14] of the draft law.

2.2 The ECB emphasises that according to Article 3 of the Council Decision 98/415/EC, the authorities of the Member States preparing legislative provisions may, if they consider it necessary, set the ECB a time limit for the submission of its opinion which may not be less than one month. This time limit may be reduced only in case of extreme urgency for which the consulting authority must state the reasons.

2.3 In view of the above, the ECB emphasises that the consultation should take place at a point in the legislative process which affords the ECB sufficient time to examine the draft legislative provisions and to adopt its opinion in all required language versions, and which also enables the relevant national authorities to take the ECB's opinion into consideration before the provisions are adopted.

3. Interaction with monetary policy decisions

3.1 Since the draft law will *inter alia* extend the application of the support scheme laid down in the Law on State support on which the ECB has already been consulted, the ECB reiterates certain points in Opinion CON/2008/80, also reiterated in Opinion CON/2009/82, to the extent they have not been incorporated in the Law on State support, and now in the draft law.

3.2 First, the ECB notes that the Law on State support does not explicitly exclude interbank deposits from among the obligations that may be secured with a State guarantee. Although the draft law amends the Law on State support, the ECB understands that it does not include amendments which explicitly exclude interbank deposits. In this respect, the ECB once again reiterates that State guarantees for interbank deposits should be avoided as they have the potential to interfere with the conduct of the central bank's liquidity-providing operations, and thus have an impact on the transmission of Narodowy Bank Polski's monetary policy decisions[15].

3.3 Second, the ECB understands that the Law on State support introduces an explicit legal basis for the provision of State guarantees securing the repayment of Narodowy Bank Polski's refinancing credit, including in cases where such credit is provided as emergency liquidity assistance (ELA). In this context, the ECB would like to reiterate[16] that, in order to ensure that the extension by national central banks of ELA secured by a State guarantee complies with the monetary financing prohibition, it is essential for the State guarantee to cover 100% of the amount of the credit where

14 See second paragraph of the consultation letter of 8 December 2010.

15 See, for example, paragraph 3.2 of Opinion CON/2008/50, paragraph 2.3 of Opinion CON/2008/54 and paragraph 3.2(i) of Opinion CON/2008/80.

16 See paragraph 4.3 of Opinion CON/2008/80.

such guarantee would constitute the sole form of collateral for the ELA operation, and not only up to 50% of the amount remaining for repayment, as provided by the Law on State support[17].

4. Open-ended measures by referring to a Commission decision

4.1 The ECB reiterates its view that coordination of the duration of national financial support schemes across the Union is of crucial importance in order to ensure a level playing field. In addition, the ECB notes the need for national support measures to be temporary in nature.

The ECB is therefore concerned about the Polish authorities' intention of removing the expiry date for the measures foreseen by the Law on State support and the Law on recapitalisation, thus converting the temporary provisions into permanent provisions[18]. As emphasised in the European Commission's Communication, such measures 'can only be justified as an emergency response to the unprecedented stress in financial markets and only as long as these circumstances prevail'[19].

4.2 The fact that the European Commission renews its consent to the measures in place from a State aid perspective does not render a complete legal review of the measures unnecessary. Avoiding the renewal of a temporary legal regime circumvents the duty to consult the ECB, and thereby deprives the prolongation of such a regime from the necessary review with respect to monetary policy and financial stability aspects. Furthermore, this approach avoids the necessary regular review of the continued adequacy of the measures adopted by national authorities and does not lead to the necessary coordination of crisis management measures at European level.

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

Done at Frankfurt am Main, 22 December 2010.

[signed]

The President of the ECB

Jean-Claude TRICHET

17 See Article 4(2).

18 See the explanatory memorandum to the draft law.

19 Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ C 329, 7.12.2010, p. 7), p. 2, point 2.