EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 12 January 2016

on a tax for certain financial institutions

(CON/2016/1)

Introduction and legal basis

On 15 December 2015 the European Central Bank (ECB) received a request from the Polish Parliament for an opinion on a draft law establishing a tax on certain financial institutions (hereinafter the 'draft law')[1].

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[2], as the draft law relates to 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 imposes an obligation on certain financial and insurance institutions to pay a special monthly levy of 0.0366% on the value of an institution's assets, subject to certain exemptions, thresholds and deductions (hereinafter: the 'tax'). According to the explanatory memorandum, the tax is aimed at creating an additional source of funding for public expenditure and at increasing the contribution made by the financial sector for funding public expenditure, in particular social security, as set out in the Polish Government's spending programme.

1.2 Under the draft law, the tax applies to: (a) domestic banks; (b) branches of foreign banks; (c) branches of Union credit institutions; (d) cooperative savings and loan unions; (e) domestic insurers; (f) domestic reinsurers; (g) branches of foreign insurers and reinsurers; (h) consumer credit institutions.

1.3 Under the draft law, the tax will not apply to: (a) state-owned banks; (b) tax payers that are subject to a supervisory decision; and (c) tax payers implementing a restructuring programme. In addition, according to the explanatory memorandum, the tax will not apply to: (a) credit institutions located in the Union that carry out banking activities on a cross-border basis under the 'European single

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1 Following amendments, the draft law was adopted by the lower chamber of the Polish Parliament on 29 December 2015 and sent to the upper chamber. The upper chamber adopted further amendments on 31 December 2015. The ECB has adopted its opinion based on the draft law sent for consultation, also taking into account the amendments introduced by the lower and upper chambers of the Polish Parliament.

2 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).

passport[3]"; and (b) insurance companies located in the Union carrying out insurance activities other than through a branch.

1.4 Subject to exemptions, the tax base will comprise the value of the assets at the end of each month exceeding a threshold in the amount of: (a) PLN 4 billion for banks and cooperative savings and loan unions; (b) PLN 2 billion for insurers and reinsurers; and (c) PLN 200 million for consumer credit institutions.

1.5 The draft law provides that the tax base will be reduced:

(a) for domestic banks and branches, by the value of: (i) own funds referred to in Article 126 of the Law on Banking[4]; and (ii) the assets acquired by the taxpayer from Narodowy Bank Polski (NBP) and securing refinancing credit provided by the NBP to a credit institution;

(b) for cooperative savings and loan unions, by the value of own funds referred to in Article 24 of the Law on cooperative savings and loan unions;

(c) for domestic banks, branches and cooperative savings and loan unions, by the value of: (i) the increase in own funds following a supervisory decision; and (ii) assets held in the form of Treasury bonds;

(d) for domestic banks that are affiliating banks within the meaning of Article 2(2) of the Law on the functioning of cooperative banks, by the value of all funds accumulated on all accounts of the affiliated cooperative banks.

1.6 The draft law also provides that if the tax base is denominated in a foreign currency, the conversion into PLN will be performed on the basis of an average exchange rate published by the NBP on the last business day prior to the date on which the tax base is determined.

1.7 The tax will not be a deductible cost. Additionally, institutions may not use the tax as a basis for altering any terms on which their financial and insurance services are provided that are included in contracts existing prior to the entry into force of the draft law.

2. General observations

2.1 Unlike in most Member States that have introduced a bank levy, the proposed tax is not linked with specific risks stemming from the financial sector, nor does it relate to former public support to the financial sector. Rather, the proposed tax exclusively aims at increasing the amount of funds that are being contributed by the financial sector for financing public expenditure. In this context, the ECB has consistently advised that taxes on financial institutions should be considered in relation to the dual objective of: (a) ensuring a more equitable distribution of the costs arising from their potential failure between taxpayers and the financial sector; and (b) addressing the risks that they

3 The 'European single passport' is a system that allows financial services operators legally established in one Member State to establish/provide their services in the other Member States without further authorisation requirements.

4 These own funds are defined under Article 4(1)(118) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

pose[5]. Imposing any ad hoc taxes on banks for general budgetary purposes should be preceded by a thorough analysis of potential negative consequences for the banking sector to ensure that such taxes do not pose risks to financial stability and the provision of credit, which could eventually adversely affect growth in the real economy. Such an effect might result in banks offering less favourable terms to their customers when providing loans and other services, and may also induce certain banks to cut back on their activities, leading to a reduction in the availability of credit and creating uncertainty for these banks[6].

2.2 The introduction of the tax should be carefully considered with regard to its impact on the profitability of affected financial institutions, their capital adequacy and resilience to adverse shocks and, more generally, its impact on financial stability, credit growth and the economy generally. In this context, the differences in the situation of individual banks need to be taken into account, together with the impact of other regulations being introduced in Poland and the Union. In particular, the situation of weaker banks that may record losses as a result of the proposed tax should be fully analysed.

2.3 The proposed tax's structure may give financial institutions an incentive to change their risk profile by restructuring their portfolios in favour of riskier products, by making use of off-balance sheet activities and/or by transferring their assets abroad.

2.4 In the light of the foregoing, and in line with its previous opinions[7], the ECB invites the consulting authority to consider whether it would be advisable to undertake a comprehensive impact assessment of the proposed tax.

3. Specific observations

3.1 *Definition of 'tax base'*

The current definition of 'tax base' in Article 5 of the draft law is unclear and may therefore create an incentive for banks to reduce the size of their balance sheet in order to reduce their tax obligation. In the case of an increase in assets resulting from intra-group unsecured funding, the corresponding assets should not be taxed twice within the same financial group, since this could have an adverse effect on the intra-group funding needs of credit institutions.

3.2 *Harmonisation of fiscal policies*

The development of a harmonised, consistent and transparent approach to special taxation of the financial sector is necessary to achieve the overall objective of preserving a level playing field, while limiting distortions to competition, and ensuring that financial stability is equally safeguarded. This is particularly important in the Union, where the introduction of different bank levy schemes

5 See paragraph 3.1.1 of Opinion CON/2015/43, paragraph 2.1 of Opinion CON/2013/44, paragraph 2.1 of Opinion CON/2011/29 and paragraph 3.2.1 of Opinion CON/2010/62. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

6 See paragraph 3.1.1 of Opinion CON/2015/43, paragraph 2.1 of Opinion CON/2011/29 and paragraph 3.2.2 of Opinion CON/2010/62.

7 See paragraph 2.2 of Opinion CON/2013/44, paragraph 2.2 of Opinion CON/2011/29 and paragraph 3.2.2 of Opinion CON/2010/62.

could potentially undermine the process of financial integration by introducing elements of fiscal, regulatory and supervisory fragmentation.

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

Done at Frankfurt am Main, 12 January 2016.

[signed]

The President of the ECB

Mario DRAGHI