



**OPINION OF THE EUROPEAN CENTRAL BANK**  
**of 9 August 2019**  
**on restrictions on transfers of mortgage claims**  
**(CON/2019/29)**

**Introduction and legal basis**

On 10 July 2019 the European Central Bank (ECB) received a request from the Polish *Sejm* (Parliament) for an opinion on a draft law amending the Law on banking (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<sup>1</sup>, 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 Under the Law on banking<sup>2</sup>, in order to establish a mortgage for the benefit of a bank, the owner of an immovable property (hereinafter the ‘property owner’) must submit a written statement of consent, confirming the creation of a mortgage in favour of the bank. This statement is necessary in order to record a mortgage in the land and mortgage register.
- 1.2 The draft law provides that the requirement to submit such a written statement of consent applies, *mutatis mutandis*, in the case of the transfer of a mortgage in connection with the disposal of bank claims.

**2. General observations**

- 2.1 The ECB understands that the amendment introduced by the draft law should be interpreted as requiring the written consent of a property owner to transfer any bank claim secured by a mortgage established for the benefit of a bank, without distinguishing between the purpose and the means of the transfer. This would include, *inter alia*, transfers for the purpose of creating asset-backed securities or security over pools of credit claims or transfers to specialised institutions for the purpose of issuing covered bonds.

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<sup>1</sup> 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).

<sup>2</sup> Ustawa z dnia 29 sierpnia 1997 r. Prawo bankowe (Dz. U. z 2018 r., poz. 2187, z późn. zm.).

- 2.2 The effect of the draft law would be to render the type of asset transfers required to utilise these financial instruments and techniques significantly more difficult for Polish credit institutions. However, all of these instruments and techniques are important for the funding and, thus, the functioning of the Polish banking sector.
- 2.3 The ECB also understands that the provisions of the draft law are limited to the banking sector. This implies that only transfers of mortgage claims established for the benefit of a credit institution would require the written consent of the property owner. This places Polish credit institutions in a disadvantageous position compared to other market participants, who would be able to acquire or dispose of mortgage claims without the need to obtain the consent of the property owner for such a transaction.
- 2.4 The ECB also understands that the draft law applies not only to the transfer of ‘new’ mortgages, i.e. those created after the enactment of the draft law, but also to transfers of ‘existing’ mortgages, i.e. those created prior to the enactment of the draft law. Hence, the draft law may raise issues of legal certainty in respect of the validity of such transfers.

### 3. Specific observations

#### 3.1 *Impact on securitisation and covered bond markets*

- 3.1.1 The ECB has a strong interest in the sustainable revival of the European securitisation market. Securitisation is a form of asset-based financing with the capacity both to channel flows of credit to the real economy and to transfer risk<sup>3</sup>. A healthy European securitisation market is important to ensure well-functioning capital markets in the Union. Particularly where credit institutions’ capacity to lend to the real economy is constrained, securitisation can act as a fresh source of funding and free up capital for lending<sup>4</sup>.
- 3.1.2 At Union level, the ECB supports the proposal for a directive of the European Parliament and the Council on the issue of covered bonds and covered bond public supervision<sup>5</sup>, aimed at facilitating the creation of a developed, harmonised, high-quality and transparent covered bond market in the Union, which is important for promoting further integration of Union financial markets and deepening the Capital Markets Union (CMU)<sup>6</sup>. At national level, in the case of Poland, the ECB has welcomed the legal framework introduced in the past to promote the development of the Polish covered bond market<sup>7</sup>.
- 3.1.3 In this context, the draft law must carefully balance the benefits of well-functioning securitisation and covered bond markets against the impetus to protect debtors. In this respect, the ECB notes

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<sup>3</sup> See paragraph 1.1 of Opinion CON/2016/11. All ECB opinions are published on the ECB’s website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

<sup>4</sup> See paragraph 3.1.1 of Opinion CON/2018/16 and paragraph 2.3.1 of Opinion CON/2018/31.

<sup>5</sup> Proposal for a directive of the European Parliament and of the Council on the issue of covered bonds and covered bond public supervision and amending Directive 2009/65/EC and Directive 2014/59/EU (COM(2018) 94 final).

<sup>6</sup> See the first paragraph under ‘General observations’ in Opinion CON/2018/37.

<sup>7</sup> See paragraph 2.1 of Opinion CON/2015/11.

that the draft law is being introduced without the benefit of a thorough impact assessment. It is only by making such a prior assessment that it may be possible both to determine whether the draft law could achieve its aim, and to mitigate any negative implications. In the absence of an impact assessment, however, it is difficult to ascertain whether the objectives set by the draft law will be achieved<sup>8</sup>.

3.1.4 The ECB has concerns that the draft law would, by making it more difficult for credit institutions to resort to securitisations or issue covered bonds, have significant adverse effects on Polish credit institutions' funding situation and their capacity to properly manage their balance sheets. In particular, the draft law would impact the true sale securitisation structures of Polish credit institutions.

3.2 *Compliance with Polish constitutional and other legal principles*

It is for the Polish authorities to assess whether the draft law, including its potentially retroactive character, complies with Polish constitutional and other legal principles, in particular property rights. For its part, the ECB notes that introducing measures with retroactive effect would undermine legal certainty and not be in line with the principle of legitimate expectations<sup>9</sup>.

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

Done at Frankfurt am Main, 9 August 2019.

[signed]

*The President of the ECB*

Mario DRAGHI

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<sup>8</sup> See paragraph 2.4 of Opinion CON/2019/14, paragraph 2.4.4 of Opinion CON/2018/31, paragraph 2.2.2 of Opinion CON/2018/13, paragraph 2.3 of Opinion CON/2012/40, paragraph 2.3 of Opinion CON/2012/70, and paragraph 2.2 of Opinion CON/2010/34.

<sup>9</sup> See paragraph 3.8 of Opinion CON/2019/14, paragraph 4.3 of Opinion CON/2017/9, and paragraph 3.2 of Opinion CON/2016/50.