OPINION OF THE EUROPEAN CENTRAL BANK
of 10 March 2015
on the legal framework for Narodowy Bank Polski
(CON/2015/9)

Introduction and legal basis

On 30 December 2014 the European Central Bank (ECB) received a request from the Polish Ministry of Finance for an opinion on a draft law amending the Law on Narodowy Bank Polski and the Law on higher education (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 first, second and third indents of Article 2(1) of Council Decision 98/415/EC[1], as the draft law relates to currency matters, means of payment and national central banks. 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 Law of 29 August 1997 on Narodowy Bank Polski[2] (hereinafter the 'Law on NBP') with a view to revising and updating the legal framework for the central bank in Poland.

1.2 To this end, the draft law:

(a) subject to a transitional period, reduces the number of members of the Monetary Policy Council (MPC), NBP's independent rate-setting body, and introduces a rolling membership system with overlapping terms of office for MPC members appointed by the various appointing bodies, in order to enhance the stability of the MPC's composition and the continuity of its decision-making process;

(b) clarifies restrictions on the MPC members' professional and public activities and introduces sanctions for non-compliance;

(c) reorganises the portfolio of instruments available to NBP by categorising all existing and new NBP instruments as monetary policy instruments or financial stability instruments, as well as by expanding the category of financial stability instruments to include: (i) stability loans, which may be granted to banks as well as other entities subject to financial market supervision; (ii) intraday loans, which may be granted to entities that are subject to financial market supervision and participate in payment systems operated by NBP; and (iii) sales and

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 Consolidated text published in *Dziennik Ustaw* (Dz. U.) of 2013, item 908.

purchases of debt securities outside open market operations, as part of transactions with the deposit guarantee scheme and the central securities depository.

(d) amends the provisions regarding the issue of currency, in particular by: (i) limiting the NBP President's task of determining the maximum volume of issuance of banknotes and coins so that it applies only to collector banknotes and coins; (ii) consolidating in the Law on NBP and expanding the rules regarding authenticity and fitness checking, and the criteria for the replacement of banknotes and coins; and (iii) consolidating in the Law on NBP and expanding the rules regarding counterfeit banknotes and coins;

(e) enables NBP to cooperate with international organisations, international financial institutions and international banking institutions even if it is not a member thereof, and to participate in projects implemented in the context of such cooperation;

(f) clarifies that NBP may be a member of any international organisation, including organisations whose area of activity goes beyond banking and finance;

(g) clarifies that the expenses relating to Poland's membership in the International Monetary Fund (IMF) that are covered by NBP's own funds include in particular expenses relating to: (i) quotas assigned to Poland; and (ii) Poland's participation in IMF financial initiatives addressed to its members;

(h) streamlines the procedures for deputising for NBP's President.

2. General observations

2.1 Since 2004, in its Convergence Reports, the ECB has assessed the compatibility of Polish legislation with the requirements of primary Union law relating to NBP's participation in the European System of Central Banks (ESCB) and, prospectively, in the Eurosystem[3]. The legal provisions identified in the ECB's Convergence Reports as being incompatible with Union requirements are found both in the Polish Constitution[4] and in ordinary legislation, in particular in the Law on NBP.

2.2 The ECB welcomes the draft law to the extent that it addresses a number of these incompatibilities. However, there are still various outstanding issues that the draft law does not remedy. The ECB therefore invites the Polish authorities to ensure compatibility with Union requirements at all levels of national legislation.

3. Personal independence

3.1 The ECB's Convergence Report 2014 identified several provisions of the Law on NBP and other laws that are incompatible with the requirements under the Treaty on the Functioning of the European Union with respect to central bank personal independence. In particular, some of these provisions in the Law on NBP establish grounds for the dismissal of NBP's President and other

3 See in particular the ECB's Convergence Report 2014, Section 6.6, pp. 250 to 254, and paragraph 2 of Opinion CON/2011/9. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

4 See Opinion CON/2011/9.

members of NBP's decision-making bodies involved in the performance of ESCB-related tasks that go beyond the exclusive grounds for dismissal specified in Article 14.2 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB')[5].

3.2 In this respect, the draft law not only fails to remedy the above incompatibilities with the Union requirements but introduces an additional ground for dismissal of the MPC members, i.e. a breach of the restrictions imposed on their professional activities[6]. These restrictions include a prohibition on holding any other positions or engaging in commercial or public activities other than academic work, teaching or writing or engaging, without the MPC's consent, in any activities of international organisations[7]. Such restrictions are welcomed since they represent safeguards against a conflict of interests, and such safeguards are an element of the personal independence of the members of NBP's decision-making bodies. However, in order to ensure compliance with Article 14.2 of the Statute of the ESCB, in conjunction with Article 130 TFEU and Article 7 of the Statute of the ESCB, the draft law should make clear that a breach of such restrictions does not constitute a ground for dismissal of MPC members in addition to the two grounds laid down in Article 14.2 of the Statute of the ESCB. This could be achieved, for example, if compliance with the abovementioned restrictions was subsumed under the conditions required for the performance of the duties of the members of NBP's decision-making bodies.

3.3 The sanction for non-compliance with the abovementioned restrictions is introduced with respect to the MPC members only, and not to the members of NBP's Management Board[8]. However, the ECB has on many occasions noted that personal independence would be jeopardised if the rules for the security of tenure and grounds for dismissal of governors of national central banks (NCBs) were not also to apply to other members of the NCBs' decision-making bodies[9], which in this case covers the NBP Management Board and MPC members alike. In that respect, the ECB emphasises that the grounds for dismissal of both MPC members and NBP Management Board members should be fully in line with Article 14.2 of the Statute of the ESCB.

3.4 At the same time, the ECB reiterates the remarks made in the ECB's Convergence Report 2014 and Opinion CON/2011/9, which relate to the grounds for dismissal of members of NBP's decision-making bodies.

4. Monetary financing prohibition

4.1 The ECB's Convergence Report 2014 referred to the provisions of the Law on NBP that lay down NBP's powers to grant refinancing credit to banks. In particular, reference was made to Article 42(3) of the Law on NBP, which allows NBP to grant refinancing credit for the purpose of implementing bank rehabilitation proceedings that are initiated in the event of a bank suffering a net

5 See the ECB's Convergence Report 2014, Section 6.6.2.2, p. 251, recommending amendments to Articles 9(3), 9(5), 13(5) and the second sentence of Article 17(2b) of the Law on NBP.

6 See Article 1(5)(b) of the draft law.

7 See Article 1(6)(a) of the draft law.

8 See Article 1(8) of the draft law and p. 5 of the explanatory memorandum.

9 See the ECB's Convergence Report 2014, Section 6.6.2.2, p.251, and related ECB opinions referred to therein.

loss, of being threatened with such a loss, or of insolvency[10]. The Convergence Report stated that safeguards aimed at ensuring timely repayment of such credit did not fully exclude an interpretation that would allow an extension of refinancing credit to a bank undergoing rehabilitation proceedings that then becomes insolvent. In this respect, the ECB recommended the introduction of explicit safeguards to avoid incompatibility with the monetary financing prohibition under Article 123 of the Treaty and recommended amending the Law on NBP by introducing more explicit safeguards in relation to all financial institutions receiving liquidity support.

4.2 Therefore, the ECB welcomes the provisions proposed in Article 1(17)(b) of the draft law, repealing Article 42(3) of the Law on NBP and thus abolishing the possibility of granting refinancing credit to a bank for the purpose of implementing a rehabilitation programme. This amendment brings the provisions related to refinancing credit into line with the monetary financing prohibition rules.

4.3 Nevertheless, the ECB would welcome two further clarifications in the draft law. First, it is noted that the draft law repeals Article 42(7) of the Law on NBP, which extends to refinancing credit the application of general conditions for extending credit contained in the Law of 29 August 1997 on banking[11], including in particular the requirement to provide adequate collateral. Therefore, the requirement to provide adequate collateral is missing from the proposed wording of Articles 42(1) and 43(1) of the Law on NBP, i.e. the provisions related to refinancing credit and loans extended to the Bank Guarantee Fund. The ECB would recommend that the requirement that these loans may only be granted against adequate collateral be reintroduced in these provisions. Secondly, as regards the intraday loan facility introduced by the proposed Article 43a of the Law on NBP, which may be granted to entities subject to financial market supervision which participate in the payment systems operated by NBP, the provision could specify that this instrument supports the smooth functioning of payment systems and not only financial stability. The ECB understands that such intraday credit is not restricted to situations that threaten financial stability.

5. Issuance of money

5.1 The proposed Article 35b(2)(1)(a) of the Law on NBP excludes euro banknotes and coins from the scope of applicability of the rules on authenticity checking. With regard to the authenticity checking of euro banknotes and coins, Article 35b(5) then refers to Article 6 of Council Regulation (EC) No 1338/2001[12]. However, Article 6 of Regulation (EC) No 1338/2001 is only applicable in Member States which have not adopted the euro as their single currency, due to the extension of the scope of applicability contained in Article 1 of Council Regulation (EC) No 1339/2001[13]. Moreover, Article 1 of Regulation (EC) 1339/2001 refers to a broader set of rules, so the reference made in the proposed Article 35b(5) of the Law on NBP appears to be too narrow in this regard. At the

10 See the ECB's Convergence Report 2014, Section 6.6.4, pp. 252 and 253.

11 Consolidated text published in Dz. U. of 2015, item 128.

12 Council Regulation (EC) No 1338/2001 of 28 June 2001 laying down measures necessary for the protection of the euro against counterfeiting (OJ L 181, 4.7.2001, p. 6).

13 Council Regulation (EC) No 1339/2001 of 28 June 2001 extending the effects of Regulation (EC) No 1338/2001 laying down measures necessary for the protection of the euro against counterfeiting to those Member States which have not adopted the euro as their single currency (OJ L 181, 4.7.2001, p. 11).

same time, Article 6 of Regulation (EC) No 1338/2001 encompasses references to other applicable rules, in particular concerning the method for carrying out authenticity checks. In this regard too, a reference to Article 6 of Council Regulation (EC) 1338/2001 could be too narrow.

5.2 Therefore, the ECB advises amending the wording of the proposed Article 35b(5) of the Law on NBP to correctly reflect these references.

6. Other incompatibilities with Union legislation

6.1 The ECB's Convergence Report 2014 identified several provisions in the Law on NBP that are incompatible with Treaty requirements regarding central bank independence and confidentiality[14]. Although the draft law amends some of those provisions, it does not fully remedy all of the incompatibilities. This applies in particular to the following provisions.

6.2 Firstly, the ECB's Convergence Report 2014 referred to various issues of institutional independence that need to be addressed inter alia by amending Article 11 of the Law on NBP[15]. Although the draft law introduces some amendments to this Article, it does not remedy its incompatibility with Article 130 of the Treaty and Article 7 of the Statute of the ESCB. Furthermore, the draft law amends Article 23 of the Law on NBP but it does not remove the obligation to forward draft monetary policy guidelines to the Council of Ministers and the Minister for Finance. These provisions need to be brought into line with the relevant requirements of the Treaty and of the Statute of the ESCB.

6.3 With respect to the rules on the confidentiality of information, although the draft law introduces amendments to Article 23 of the Law on NBP, it does not address the issue of the disclosure of certain data that is made possible by Article 23(7) of the Law on NBP. The ECB's Convergence Report 2014 cites this as an issue that could potentially affect data protected under the ESCB's confidentiality regime. The Convergence Report recommended amending the provision to fully comply with Article 37 of the Statute of the ESCB[16], and that recommendation is now reiterated.

7. Legal integration of NBP into the Eurosystem

7.1 The legal integration of NCBs into the Eurosystem requires that national legislation be amended to allow for the performance of Eurosystem-related tasks and compliance with the ECB's decisions once the Member State concerned has adopted the euro. The ECB's Convergence Report 2014 pointed to the necessity of several such amendments. Although some of the relevant provisions are being amended, the draft law has not taken this opportunity to remedy these incompatibilities. In addition to the provisions referred to in paragraphs 3, 4 and 6 of this Opinion, this refers in particular to the following.

7.2 Firstly, as regards NBP's tasks[17], although the draft law amends provisions relating to the MPC and

14 See in particular the ECB's Convergence Report 2014, Section 6.6, pp. 250 to 254.
15 See the ECB's Convergence Report 2014, Section 6.6.2.1, pp. 251 and 252.
16 See the ECB's Convergence Report 2014, Section 6.6.3, p. 252.
17 See the ECB's Convergence Report 2014, Section 6.6.5.2, pp. 253 and 254.

monetary policy instruments, it does not address the fact that the provisions providing for NBP's powers with regard to monetary policy do not recognise the ECB's powers in this field. Similarly, the draft law amends Article 23 of the Law on NBP, which provides for NBP's powers relating to the collection of statistics, but does not remedy the fact that the Law on NBP does not recognise the ECB's powers in this field. Also, the provisions of the Law on NBP which provide for NBP's exclusive powers to issue and withdraw banknotes and coins having the status of legal tender do not recognise the powers of the Council and the ECB in this field.

7.3 Secondly, as regards financial provisions[18], the draft law amends the rules on the appointment of independent external auditors, but does not recognise the powers of the Council and the ECB under Article 27.1 of the Statute of the ESCB[19]. Also, the draft law does not address the need to ensure that the powers of the Supreme Audit Office (NIK) to control NBP's activities are clearly defined and are without prejudice to the activities of NBP's independent external auditors.

7.4 As regards exchange rate policy, although the draft law amends Article 17 of the Law on NBP, it does not recognise the powers of the Council and the ECB in this field[20].

7.5 Further, although the draft law amends the provisions of the Law on NBP related to the issuing of banknotes and coins having the status of legal tender, it does not recognise the powers of the Council and the ECB in this field.

7.6 Finally, although the draft law amends the provisions related to the NBP's participation in international financial and banking institutions, it does not recognise the ECB's powers in this field[21].

8. Appropriate time to amend the Law on NBP

8.1 The ECB draws the Polish authorities' attention to the fact that, in order to comply with Article 131 of the Treaty requiring the compatibility of national legislation with the Treaty and the Statute of the ESCB, the relevant Polish legislation had to be adjusted by the date of Polish accession to the Union, i.e. 1 May 2004. Hence, amendments addressing the outstanding issues identified in the ECB's Convergence Report 2014 concerning central bank independence, confidentiality and the monetary financing prohibition need to be adopted and enter into force as soon as possible, irrespective of when Poland adopts the euro.

8.2 Although the amendments that are necessary to ensure the full integration of NBP into the Eurosystem should also be adopted as soon as possible, at the latest they must enter into force on the date when Poland adopts the euro.

---

18 See the ECB's Convergence Report 2014, Section 6.6.5.3, p. 254.

19 In this respect, on 14 June 2012 the Governing Council approved a series of good practices for the selection and mandate of external auditors in accordance with Article 27.1 of the Statute of the ESCB. These were established in order to provide high level guidance for the selection and mandate of external auditors. Although not binding, it is intended that each Eurosystem central bank, when selecting its external auditors pursuant to Article 27.1 of the Statute of the ESCB, and when determining their mandate thereafter, applies these good practices and/or explains any divergence.

20 See the ECB's Convergence Report 2014, Section 6.6.5.4, p. 254.

21 See the ECB's Convergence Report 2014, Section 6.6.5.5, p. 254.

9. Expenses relating to Poland's membership of the IMF

Monetary financing prohibition

9.1 The tasks performed by an NCB must comply with the monetary financing prohibition under Article 123 of the Treaty and Council Regulation (EC) No 3603/93[22]. Pursuant to Article 7 of that Regulation, the financing by NCBs of obligations falling upon the public sector vis-à-vis the IMF is not regarded as a credit facility within the meaning of Article 123 of the Treaty. Recital 14 of Regulation 3603/93 sets out the rationale for the exemption and confirms that it is appropriate to authorise the financing by NCBs of obligations falling on the public sector vis-à-vis the IMF, as this financing results in claims which have all the characteristics of reserve assets. In the light of the draft amendment to Article 5(1a) of the Law on NBP, it must be understood that NBP would be responsible for the financing of IMF-related obligations only in respect of financing which results in claims of NBP which have the characteristics of reserve assets[23], or in respect of financing which does not result in such claims but which is financed from funds that are due to Poland from, and transferred to it by, the IMF and the spending of which reduces NBP's revenue and, consequently, the portion of its profit to be remitted to the State budget[24]. Provided that this is the case, the ECB considers that the proposed provisions would fall within the scope of Article 7 of Regulation (EC) No 3603/93 and should therefore not be regarded as a form of monetary financing prohibited under the Treaty.

Central bank independence

9.2 NBP is responsible for paying any increases in Poland's IMF quota. It also exercises all rights connected with the IMF system of special drawing rights (SDRs) and is in charge of fulfilling all Polish financial obligations resulting from Poland's membership of the IMF. In this context, and in line with the principle of central bank independence enshrined in Article 130 of the Treaty and Article 7 of the Statute of the ESCB, NBP should take decisions regarding the management of the SDRs in a fully independent manner[25]. The ECB recommends that this is clarified in the draft law.

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

Done at Frankfurt am Main, 10 March 2015.

[signed]

The President of the ECB

Mario DRAGHI

22 Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty (OJ L 332, 31.12.1993, p. 1).

23 See Article 5(1b) of the Law on NBP.

24 Similarly, see Opinion CON/2010/22.

25 Similarly, see Opinion CON/2012/65.