EN

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 4 November 2005

at the request of the Polish Minister of Finance
on a draft law amending the Foreign Exchange Law

(CON/2005/44)

1. On 24 August 2005 the European Central Bank (ECB) received a request from the Polish Minister of Finance for an opinion on a draft law (hereinafter the 'draft law') amending the Foreign Exchange Law of 27 July 2002[1] (hereinafter the 'Foreign Exchange Law') and the Penal Treasury Code of 10 September 1999[2].

2. The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community, and in particular on the first, second and third indents 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[3], as the draft law concerns currency matters, means of payment and Narodowy Bank Polski (NBP). 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.

General comments

3. Because of its interest in the application in the ten Member States that acceded to the European Union on 1 May 2004 of the provisions of the Treaty concerning the free movement of capital and payments[4], the ECB has closely monitored developments in Polish foreign exchange regulation. In particular, the ECB took note of the comprehensive reform brought about by the introduction of the Foreign Exchange Law with effect from 1 October 2002.

4. The ECB welcomes the fact that the draft law further enhances the free movement of capital by eliminating certain procedural requirements imposed on credit institutions in connection with the existing regime for granting general or individual foreign exchange permits for foreign exchange transactions. The ECB also welcomes the fact that the draft law introduces a greater degree of transparency for the application of the rules for granting foreign exchange permits.

---

1 *Dziennik Ustaw* (Dz. U.) (Journal of Laws) 2002 No 141, Item 1178, as amended.

2 Dz. U. 1999 No 83, Item 930, as amended.

3 OJ L 189, 3.7.1998, p. 42.

4 In this opinion reference is only made to the applicable provisions of the Treaty regarding the free movement of capital and payments. No reference is made to corresponding provisions of the Agreement on the European Economic Area of 2 May 1992, as adjusted by the Protocol of 17 March 1993 (OJ L 1, 3.1.1994, p. 3).

Specific comments regarding the draft law

5. It is a general principle under the existing provisions of the Foreign Exchange Law that foreign exchange permits are automatically awarded if there is no threat to State security, public order, the balance of payments or other fundamental interests of the State[5]. The draft law would amend this provision to state that foreign exchange permits are awarded if there is no threat to State security, public order, the balance of payments and no infringement of restrictions concerning turnover in foreign exchange convertible instruments arising from other acts and decisions by international organisations of which Poland is a member[6]. The ECB has three specific remarks regarding this key provision of the draft law.

6. *First*, the ECB welcomes the proposed deletion of 'other fundamental interests of the State' as a ground for denying a foreign exchange permit[7]. This undefined and imprecise criterion falls outside the list of exceptions to the free movement of capital permitted under Article 58 of the Treaty.

7. *Second*, regarding the criterion of a 'threat to State security or public order', the ECB would emphasise that the retention of this criterion, while in line with the 'measures which are justified on grounds of public policy or public security' that Member States are allowed to take under Article 58(1)(b) of the Treaty, should not, in accordance with Article 58(3) of the Treaty, constitute 'a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments […]'. It is recalled that in accordance with case-law of the Court of Justice, while Member States are still, in principle, free to determine the requirements of public policy and public security in the light of their national needs, these concepts must, in the Community context and where they are, in particular, used as a justification for derogating from the fundamental principle of free movement of capital, be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community[8].

8. *Third*, as regards the wording 'threat to the balance of payments', which the draft law proposes to retain, it is noted that this criterion remains outside the scope of the exceptions in Article 58 of the Treaty, and as such should only be considered as relevant in the extraordinary circumstances envisaged by Articles 119 and 120 of the Treaty. In this regard, the ECB notes that under the Foreign Exchange Law the Polish Council of Ministers, after inviting NBP's Monetary Policy Council to express its opinion, may introduce special restrictions on cross-border foreign exchange operations where indispensable to ensure a stable balance of payments in situations of general instability, a sudden collapse or a threat arising out of any of the foregoing[9]. This description of the

5 Article 6(1) of the Foreign Exchange Law.

6 Article 1(5) of the draft law in conjunction with Article 10(1)(1) of the Foreign Exchange Law.

7 Article 1(5) of the draft law.

8 See Case C-54/99 *Église de scientologie de Paris and Scientology International Reser*ves *Trust* v *The Prime Minister* [2000] ECR I-1335, Paragraph 17-19 (citing Case 36/75 *Rutili* v *Minister for the Interior* [1975] ECR 1219, paragraphs 26-27).

9 Articles 10(1), 10(3) and 62 of the Foreign Exchange Law.

circumstances in which special restrictions may be introduced on grounds of balance of payments difficulties generally corresponds with the grounds specified in Articles 119 and 120 of the Treaty, which refer to situations where a Member State is in difficulties or is seriously threatened with difficulties as regards its balance of payments, or where a sudden crisis in the balance of payments occurs. The ECB notes, however, that Articles 119 and 120 of the Treaty will cease to apply from the beginning of the third stage of economic and monetary union, meaning that Poland will only be allowed to rely on these exemptions from the free movement of capital until such time as it adopts the euro. Given that the Foreign Exchange Law already provides that certain provisions authorising the introduction of special restrictions are rendered void from the day of Poland's accession to the EU[10], the ECB suggests that it might be helpful to introduce a parallel provision clarifying that the abovementioned provision authorising the introduction of special restrictions on grounds of balance of payments difficulties will be rendered void from the date on which Poland adopts the euro. Finally, as regards the period before Poland adopts the euro, the ECB would emphasise the Community's competence to give final judgment as regards the compatibility with Articles 119 and 120 of the Treaty of any special restrictions introduced on balance of payments grounds.

9. The draft law amends the Foreign Exchange Law to provide that certain restrictions applicable to the turnover in foreign exchange convertible instruments do not apply where one of the parties involved, 'acting for its own account', is a bank or financial institution 'operating in the country' under supervision by supervisory authorities authorised to supervise certain financial institutions on the basis of separate provisions of law[11]. The ECB has two specific remarks regarding this provision.

10. *First*, the ECB understands that the requirement for a bank or financial institution which avails itself of this less onerous treatment to 'operate in the country' means that the bank or financial institution in question should operate in the territory of the Republic of Poland[12]. Insofar as the concept of a bank or financial institution for the purposes of this provision is limited to Polish banks and financial institutions, to the exclusion of credit and financial institutions operating in other Member States, this amended provision would place banks and financial institutions from other Member States at a disadvantage. Under Article 12 of the Treaty, any discrimination on grounds of nationality within the scope of application of the Treaty, including the Treaty provisions on the free movement of capital, is prohibited. The ECB would therefore recommend an amendment to the draft law clarifying that all EU credit and financial institutions recognised in accordance with the single licence arrangements under Community law and operating under the supervision of the competent authorities of the Member States are included within the concept of banks and financial institutions for the purposes of this provision.

10 Article 62 of the Foreign Exchange Law.

11 Article 1(2)(a) of the draft law, amending Article 3(3) of the Foreign Exchange Law.

12 Article 2(1)(4) of the Foreign Exchange Law.

11. *Second*, because the term 'financial institution' is not defined in the Foreign Exchange Law, the scope of entities covered by this concept is not entirely clear. In particular, the requirement for supervision by the authorities entitled to supervise certain financial institutions is insufficiently precise to remove all doubt as to exactly which financial institutions are covered. Since there is no standard definition of a 'financial institution' under Polish law[13], it would be helpful to clarify this term in the Foreign Exchange Law so as to avoid any misinterpretation regarding the scope of financial services providers covered by the relevant exemptions from foreign exchange restrictions. This might be done by reference to a specific definition already contained in certain existing statutory provisions (e.g. in Polish banking law). While drafting an appropriate definition lies within the Polish authorities' discretion, the ECB notes that the principle of non-discrimination as it applies to financial institutions from other Member States is one of the fundamental Community principles inherent in Treaty[14].

12. The Foreign Exchange Law states that, as a general rule, the exportation and dispatch abroad of foreign exchange gold or foreign exchange platinum is subject to the requirement to obtain a foreign exchange permit. However, there are a number of exemptions to this general rule, including (i) permission for residents conducting a business activity in the area of processing and trading in precious metals to export foreign exchange gold or platinum relating to such activities, and (ii) permission for the export of gold coins issued by the NBP[15]. The ECB notes that the abovementioned exemptions do not cover all possible situations where a resident may wish to rely on the freedom guaranteed by Article 56 of the Treaty in order to export or dispatch abroad foreign exchange gold and platinum. Furthermore, it would be helpful for the sake of completeness to extend the exemption for gold coins issued by the NBP to gold coins issued by other national central banks in the European System of Central Banks.

13. Following the observations in paragraph 12, and as a more general remark, the ECB is of the view that, while the Foreign Exchange Law has already been significantly liberalised in order to ensure

---

13 The definition of a 'financial institution' contained in Article 4(1)(7) of the Banking Law of 29 August 1997 (Dz. U. 2002 No 72, Item 665, as amended) reproduces the definition laid down in Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ L 126, 26.5.2000, p. 1). Other statutory definitions of 'financial institution' include those contained in Article 4(1)(7) of the Commercial Companies Code of 15 September 2000 (Dz. U. 2000 No 94, Item 1037, as amended) and in Article 2(10) of the Act on Individual Pension Accounts of 20 April 2004 (Dz. U. 2004 No 116, Item 1205).

14 The importance of the application of the principle of non-discrimination with regard to credit institutions should be taken into account with regard to Article 15(2) of the Foreign Exchange Law, where the ECB sees no reason for excluding credit institutions from other Member States from the scope of the exemption in respect of agreements for the sale of foreign means of payment acquired within the framework of foreign exchange market operations, as concluded by a registered business entity with a Polish bank.

15 See Article 9(2) of the Foreign Exchange Law; Paragraphs 6(1) and 8 of the Regulation of 3 September 2002 of the Minister of Finance on general foreign exchange permits (Dz. U. 2002 No 174, Item 1273, as amended) (hereinafter, the 'General Foreign Exchange Permits Regulation'). Similarly, under the Foreign Exchange Law the exportation and dispatch abroad of domestic or foreign means of payment with an aggregate value in excess of EUR 10 000 is stated, as a general rule, to be subject to the requirement to obtain a foreign exchange permit (see Article 9(3) of the Foreign Exchange Law). However, there are a number of exceptions to this general rule which render it practically ineffective, since residents and non-residents are permitted to export or dispatch abroad domestic or foreign means of payment exceeding EUR 10 000 where the money either (i) is withdrawn from a bank account or purchased from a bank with means accumulated in a bank account or (ii) comes from other sources, provided that the means of payment are declared in a written form to the customs authorities or the border guard exercising customs control (see Paragraphs 4, 4a and 4b of the General Foreign Exchange Permits Regulation).

the free flow of capital, it might be helpful to consider further streamlining and simplifying the Foreign Exchange Law at some point in the future. For example, at a certain stage in the process of liberalisation it may be more practical to provide for general rules of a permissive nature instead of establishing detailed lists containing exemptions from general rules of a restrictive nature. The latter approach carries the risk of inadvertently retaining restrictions in relation to certain categories of entities that are not covered by the relevant exemptions. Moreover, individual foreign exchange permits cannot be considered as an effective legal tool for achieving full liberalisation as they are issued on a discretionary basis and cannot ensure legal certainty as far as compatibility with the Treaty is concerned.

14. The draft law requires residents and non-residents exporting domestic or foreign means of payment or foreign exchange gold or foreign exchange platinum with a total value exceeding EUR 10 000 to present to the customs or border authorities, without being requested to do so, documents confirming that they are authorised to export the items concerned (or a foreign exchange export permit)[16]. Similarly, the draft law requires residents and non-residents crossing the Polish border to declare to the customs or border authorities the importation into Poland of domestic or foreign means of payment as well as foreign exchange gold or platinum with a value in excess of EUR 10 000[17]. The imposition of such obligations may be justified insofar as a prior declaration, unlike a prior authorisation, does not have the effect of suspending transactions by making them conditional in each case on the consent of the administrative authorities, but rather allows national authorities to exercise effective supervision in order to prevent infringements of their laws and regulations[18]. As a general remark, however, and in line with case-law of the Court of Justice, the ECB notes that it will be important to ensure that such prior declaration requirements do not have the effect of suspending transactions in contravention of Article 56 of the Treaty.

15. Under the Foreign Exchange Law, the transfer of money abroad or a settlement in Poland with a non-resident is subject to certain procedural requirements (e.g. the requirement to document the legal basis for the transfer or settlement)[19]. Insofar as these requirements might be regarded as an obstacle to the free movement of capital and payments under the Treaty, the ECB would refer to the remarks already made in paragraph 14 of this opinion concerning the case-law of the Court of Justice. In this regard the ECB would welcome the further enhancement of the free movement of capital that would result from the removal of certain procedural requirements imposed by these provisions of the Foreign Exchange Law, as this possibility has been introduced by the draft law and has been indicated in the statement of reasons provided by the Minister of Finance.

---

16 Article 1(9) of the draft law. See also the regulation issued by the Minister for Finance under Article 21 of the Foreign Exchange Law.

17 Article 1(8) of the draft law.

18 Joined cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraphs 24-31; Joined cases C-163/94, C-165/94 and C-250/94 *Lucas Emilio Sanz de Lera, Raimundo Diaz Jiménez and Figen Kapanoglu* [1995] I-4821, paragraphs 23-30; Case C-302/97 *Konle* v *Austria* [1999] ECR I-3099, paragraphs 44-46.

19 See Articles 26-27 of the Foreign Exchange Law.

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

Done at Frankfurt am Main, 4 November 2005.

[signed]

The President of the ECB

Jean-Claude TRICHET