



OPINION OF THE EUROPEAN CENTRAL BANK
of 14 February 2011
on amendments to the Polish Constitution concerning adoption of the euro
(CON/2011/9)

Introduction and legal basis

On 10 December 2010, the European Central Bank (ECB) received a request from the Marshal of the Polish Parliament for an opinion on a draft law amending the Constitution of the Republic of Poland (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 (TFEU) and the third 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 provisions², as the draft law relates to 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.

1. Purpose of the draft law

- 1.1 The draft law amends the Constitution³ in order to address obligations stemming from Poland’s membership in the European Union. In particular, the draft law: (a) introduces a new Chapter Xa that consolidates provisions relating specifically to Poland’s membership in the Union; and (b) amends several existing provisions of the Constitution relating to NBP, by introducing ‘changes necessary for the full performance of Poland’s obligations in respect of its participation in economic and monetary union, allowing for the future introduction of ... the euro in Poland’⁴ (hereinafter the ‘NBP amendments’).
- 1.2 The NBP amendments will: (a) redefine NBP’s institutional status and objectives by introducing references to NBP’s membership in the European System of Central Banks (ESCB), to price stability as NBP’s primary objective and to NBP’s independence from other State bodies⁵; (b) repeal the provisions granting NBP the exclusive authority to issue money and to formulate and implement monetary policy; (c) abolish the Monetary Policy Council (MPC) as one of NBP’s

¹ Published on the Parliament’s website at www.sejm.gov.pl, parliamentary print no 3598.

² OJ L 189, 3.7.1998, p. 42.

³ *Dziennik Ustaw* (Dz. U.) of 1997, No 78, item 483 (hereinafter the ‘Constitution’).

⁴ See the explanatory memorandum to the draft law, p. 4.

⁵ See the amendments introduced in Article 227(1) of the Constitution by Article 1(7) of the draft law.

decision-making bodies⁶; (d) modify the scope of the Supreme Audit Office's (SAO) audit of NBP⁷; and (e) remove the reference to the NBP President from the list of State officials that are accountable before the State Tribunal⁸.

- 1.3 The draft law provides that all NBP amendments enter into force upon Poland's adoption of the euro⁹.

2. General comments

- 2.1 Since 2004, in its Convergence Reports, the ECB has been assessing the compatibility of Polish legislation, including the Constitution, with the requirements of primary Union law related to NBP's participation in the ESCB and, prospectively, in the Eurosystem. In particular, this assessment focuses on: (a) whether national law is compatible with Union law on central bank independence and confidentiality; (b) whether national law is compatible with the Union law prohibition on monetary financing and privileged access; and (c) the NBP's legal integration into the Eurosystem. This Opinion follows the structure of the relevant assessments in the ECB's Convergence Reports.

- 2.2 The legal provisions identified in the ECB's Convergence Reports as being incompatible with Union requirements are found in the Constitution and in ordinary legislation, and in particular, in the Law on Narodowy Bank Polski of 29 August 1997¹⁰. This Opinion focuses on the constitutional provisions amended by the draft law and also makes necessary references to directly related provisions of ordinary legislation. The ECB invites the Polish authorities to ensure compatibility with Union requirements at all levels of national legislation within the timeframe provided for under Union law. Union law does not prescribe the manner in which national legislation should be adapted to achieve compatibility with the relevant requirements under the TFEU and the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'). This may be achieved by referring to the TFEU and the Statute of the ESCB, by incorporating provisions thereof and referring to their source, by deleting any incompatibility, or by using a combination of these methods¹¹. Depending on the national legislator's decision, and in line with the hierarchical structure of national legislation, such changes may be introduced in constitutional provisions, ordinary legislation, or both.

⁶ See the amendments introduced in Articles 103(1) and 144(3) and Article 227 (1), (5) and (6) of the Constitution by Article 1(2), (3) and (7) of the draft law, together with Article 2 of the draft law.

⁷ See the amendments introduced in Articles 203(1) and 204(1)(1) of the Constitution by Article 1(5) and (6) of the draft law.

⁸ See the amendments introduced in Article 198(1) of the Constitution by Article 1(4) of the draft law.

⁹ See Article 3 of the draft law.

¹⁰ Consolidated text published in Dz. U. of 2005, No 1, item 2 (hereinafter the 'Law on NBP').

¹¹ See the ECB's Convergence Report, May 2010, Section 2.2.2.2, p.17.

3. Central bank independence

Functional independence

- 3.1 The principle of functional independence of a national central bank (NCB) requires that an NCB's primary objective is stated clearly and that it is fully in line with the primary objective of price stability pursuant to Article 127(1) TFEU. Currently, the Constitution specifies that NBP 'shall have the exclusive right to issue money as well as to formulate and implement monetary policy' and 'shall be responsible for the value of the Polish currency'¹². Furthermore, the Law on NBP states that 'The primary objective of the activity of NBP shall be to maintain price stability, while supporting the economic policies of the Government, insofar as this does not constrain the pursuit of the primary objective of NBP'¹³.
- 3.2 The draft law introduces a constitutional provision specifying that NBP 'shall ensure the stability of prices and shall perform the tasks and exercise the competences specified in the Treaties that form the basis of the European Union and in ordinary legislation'¹⁴. The ECB welcomes the inclusion of an explicit reference to 'price stability' in the Constitution, as this strengthens NBP's independence and ensures consistency between the Constitution and the Law on NBP. From the perspective of an NCB's functional independence, which is not linked to the Member State's adoption of the euro, the ECB would welcome the entry into force of the provision explicitly referring to 'price stability' as soon as possible, and prior to Poland adopting the euro.

Institutional independence

- 3.3 The principle of institutional independence referred to in Article 130 TFEU and Article 7 of the Statute of the ESCB refers to the exercise of central bank powers and the performance of relevant tasks and duties which is free from external instructions or government influence. In particular, in relation to the powers of a State audit office exercised vis-à-vis an NCB, the following central bank independence safeguards should apply to State audits¹⁵: (a) the scope of the audit should be clearly defined in the legal framework; (b) the activities of an NCB's independent external auditors should not be prejudiced; (c) the audit should comply with the prohibition on giving instructions to the NCBs and their decision-making bodies; (d) the audit should not interfere with the NCB's ESCB-related tasks; and (e) the audit should be performed on a non-political, independent and purely professional basis. The ECB's Convergence Report 2010¹⁶ identifies a few incompatibilities in the Polish legislation in the area of institutional independence, which include: (a) Article 203(1) of the Constitution on the scope of the SAO's powers to audit NBP; and (b) the lack of an express prohibition for NBP and members of its decision-making bodies to seek or take outside instructions and the lack of an express prohibition on the Government to seek to influence members of NBP's

¹² Second and third sentence of Article 227(1) of the Constitution.

¹³ See Article 3(1) of the Law on NBP.

¹⁴ See the second sentence of Article 227(1) of the Constitution introduced by Article 1(7) of the draft law.

¹⁵ See the ECB's Convergence Report 2010 pp. 22 and 253, the ECB's Convergence Report, May 2006, pp. 66 and 74, and paragraph 2.3 of Opinion CON/2006/4. See also Opinions CON/2002/22 and CON/2006/50.

¹⁶ See the ECB's Convergence Report 2010, Section 6.7.2.1, pp. 252 and 253.

decision-making bodies in situations where this may have an impact on NBP's fulfilment of its ESCB-related tasks.

- 3.4 The draft law introduces two changes to the Constitution related to NBP's institutional independence. First, it introduces an express general principle according to which 'In performing its activities, Narodowy Bank Polski is independent of other State bodies'¹⁷. Second, it modifies the SAO's powers vis-à-vis NBP by limiting such powers to 'audit[ing] the activities of Narodowy Bank Polski regarding their legality, economic prudence, efficiency and diligence, to the extent such activities are not related to the performance of tasks and the exercise of competences specified in the Treaties that form the basis of the European Union'¹⁸.
- 3.5 The general principle of central bank independence has already been extensively defined in the Constitutional Tribunal's decisions¹⁹, which refer to both the TFEU and the Statute of the ESCB, as well as to the specific aspects of central bank independence. The ECB understands, therefore, that in line with those decisions the rule expressed in the proposed third sentence of Article 227(1) of the Constitution will be interpreted with reference to all established aspects of central bank independence, i.e. functional, institutional, personal and financial. Moreover, the ECB understands that this rule refers to all NBP activities, i.e. its ESCB-related tasks and its other tasks. At the same time, the ECB expects that this rule will be elaborated on in the Law on NBP and other relevant legislation²⁰. In this respect, the ECB reiterates its remarks relating to NBP's institutional independence in the ECB's Convergence Report 2010²¹.
- 3.6 As regards the SAO, the proposed wording of Article 227(2) of the Constitution excludes ESCB-related tasks and competences performed by NBP from the scope of an SAO audit. The ECB considers the joint effect of both this exclusion and the express introduction into the Constitution of the general principle of central bank independence an important enhancement of legal certainty in the area of NBP's institutional independence. This is subject to the following specific observations: (a) in order to achieve full compliance with the principle of institutional independence, the prohibition on giving and taking instructions referred to in Article 130 TFEU and Article 7 of the Statute of the ESCB needs to be expressly referred to in Polish legislation so that it specifically applies to, *inter alia*, the SAO²²; (b) the scope of the SAO's audit of NBP should, for reasons of legal certainty, be further defined to safeguard NBP's institutional independence. In particular, relevant legislation should ensure that when auditing NBP, the application by the SAO of the

17 See third sentence of Article 227(1) of the Constitution introduced by Article 1(7) of the draft law.

18 See Article 227(2) of the Constitution, as amended by Article 1(7) of the draft law, together with amendments to Articles 103(1) and 144(3) of the Constitution introduced by Article 1(2) and (3) of the draft law.

19 See in particular the following judgements of the Polish Constitutional Tribunal: judgment K 25/99 of 28 June 2000, (*Orzecznictwo Trybunału Konstytucyjnego* (OTK) ZU No 5/2000, item 141); judgment K 26/03 of 24 November 2003 (OTK ZU No 9/A/2003, item 95); judgment U 4/06 of 22 September 2006 (OTK ZU No 8/A/2006, item 109); and judgment Kp 4/08 of 16 July 2009 (OTK ZU No 7/A/2009, item 112).

20 Compare, for example, solutions adopted in this respect by the Republic of Slovakia: Article 56(1)(1) of the Constitution of Republic of Slovakia (general rule of central bank independence) and Article 7(7) of Law on Národná banka Slovenska (prohibition for members of the central bank governing bodies to receive external instructions).

21 See Section 6.7.2.1 of the ECB's Convergence Report 2010.

22 See the ECB's Convergence Report, May 2010, Section 6.7.2.1, p. 252.

'efficacy criterion'²³ does not extend to an evaluation of NBP's activities related to its primary objective of price stability²⁴.

Personal independence

- 3.7 The principle of personal independence covers security of tenure and safeguards against arbitrary dismissal of members of the NCB's decision-making bodies. The ECB's Convergence Report 2010 identified several provisions of the Law on NBP and of the Law on the State Tribunal²⁵ that are incompatible with TFEU requirements in this respect. In particular, these laws establish grounds for the dismissal of NBP's President and other members of NBP's decision-making bodies involved in the performance of ESCB-related tasks which are in addition to the exclusive grounds for dismissal specified in Article 14.2 of the Statute of the ESCB. One such additional ground for dismissal refers specifically to the NBP President who may be suspended as a result of an indictment by the Parliament before the State Tribunal²⁶, and may ultimately be removed from office by a decision of this Tribunal²⁷.
- 3.8 The draft law removes the reference to NBP's President from the constitutional provision listing State officials that are accountable before the State Tribunal²⁸. The ECB welcomes this constitutional amendment as it eliminates the respective incompatibility with Article 14.2 of the Statute of the ESCB, and understands that it will be followed by relevant legislative amendments. At the same time, the ECB reiterates the remarks made in the ECB's Convergence Report 2010 which relate to the grounds for dismissal of members of NBP's decision-making bodies²⁹.

4. Legal integration of NBP into the Eurosystem

- 4.1 Legal integration of NCBs into the Eurosystem requires that national legislation be adapted 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 2010 identifies several legislative provisions that are incompatible with TFEU requirements, in particular: (a) the provisions of the Constitution and of the Law on NBP which provide for NBP's powers with regard to monetary policy and certain other fields, which do not recognise the ECB's powers in those fields; and (b) the provision of the Law on NBP which defines NBP's secondary objective in a manner that does not reflect the secondary objective of supporting the general economic policies in the Union, in accordance with Article 127(1) TFEU.

²³ See the second sentence of Article 203 of the Constitution.

²⁴ See the ECB's Convergence Report 2010, p. 22, and paragraph 2.3 of Opinion CON/2009/77.

²⁵ The Law on the State Tribunal of 26 March 1982; consolidated text published in Dz. U. of 2002, No 101, item 925.

²⁶ See Article 9(5) of the Law on NBP, together with the second sentence of Article 11(1) and Article 1(1)(3) of the Law on the State Tribunal.

²⁷ See Article 25(3) together with Article 3 and Article 1(1)(3) of the Law on the State Tribunal.

²⁸ See the amendments introduced in Article 198(1) of the Constitution by Article 1(4) of the draft law.

²⁹ See the ECB's Convergence Report 2010, Section 6.7.2.2 recommending amendments to Articles 9(3), 9(5), 13(5) and second sentence of Article 17(2b) of the Law on NBP.

4.2 The draft law: (a) reformulates the description of NBP's institutional status by introducing a reference to NBP's membership in the ESCB³⁰; (b) defines NBP's objectives by providing that NBP 'shall ensure the stability of prices and shall perform the tasks and exercise the competences specified in the Treaties which form the basis of the European Union and in ordinary legislation'³¹; (c) removes NBP's exclusive powers to issue money and to formulate and implement monetary policy³²; and (d) abolishes the MPC, an NBP decision-making body responsible for the formulation and implementation of monetary policy³³. The ECB welcomes these amendments, with the reservation that, for reasons of legal certainty, the Constitution should also refer in a sufficiently precise manner to the secondary objective of the ESCB specified in Article 127(1) TFEU and Article 2 of the Statute of the ESCB. Those provisions provide that, without prejudice to the primary objective of price stability, an NCB must support the general economic policies of the Union with a view to contributing to the achievement of Union objectives as laid down in Article 3 of the Treaty on European Union. The ECB understands that the above-mentioned constitutional amendments will be followed by the necessary amendments in the Law on NBP, which are indicated in the ECB's Convergence Report 2010³⁴.

5. Entry into force of the NBP amendments

The draft law provides that all NBP amendments are to enter into force at a later time than the remaining amendments introduced in the Constitution by the draft law, i.e. only when Poland adopts the euro. The ECB draws the Polish authorities' attention to the fact that, to comply with Article 131 TFEU requiring compatibility of Polish legislation with the TFEU and the Statute of the ESCB, 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 2010 concerning central bank independence, confidentiality and compliance with the monetary financing prohibition need to be adopted and enter into force as soon as possible, irrespective of when Poland adopts the euro. In relation to the constitutional amendments introduced by the draft law, this applies to the amendments discussed in paragraphs 3.3 to 3.8 of this Opinion. Adjustments necessary to ensure full integration of NBP into the Eurosystem, while they should also be adopted as soon as possible, must enter into force on the date Poland adopts the euro. This relates to the constitutional amendments discussed in paragraph 4 of this Opinion. Specifically, as regards the introduction in the Constitution of an express reference to price stability discussed in paragraphs 3.1 to 3.2 of this Opinion, the ECB would welcome its entering into force before the date Poland adopts the euro, since it strengthens NBP's functional

30 See the amendments introduced in Article 227(1) of the Constitution by Article 1(7) of the draft law.

31 See the second sentence of Article 227(1) of the Constitution introduced by Article 1(7) of the draft law.

32 See the amendments introduced in Article 227(2), (5) and (6) of the Constitution by Article 1(7) of the draft law.

33 See the amendments introduced in Articles 103(1), 144(3) and 227(1) of the Constitution by Article 1(2), (3) and (7) of the draft law, together with Article 2 of the draft law.

34 See the ECB's Convergence Report 2010, Section 6.7.5, p. 255.

independence. The ECB recommends that Article 3 of the draft law be amended in accordance with the above comments.

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

Done at Frankfurt am Main, 14 February 2011.

[signed]

The President of the ECB

Jean-Claude TRICHET