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THE CONSTITUTIONAL STATUS OF THE NATIONAL BANK OF POLAND ON THE THRESHOLD OF THE EUROSISTEM

1. The current constitutional status of the National Bank of Poland (NBP) as the central bank will inevitably change in the perspective of joining the European Monetary Union. In such a case, the range of regulations that should be included directly in the Constitution, is an essential issue. Leaving aside the question of other countries' practice concerning the matters expressed directly in a constitution, the issue of the guarantees provided by the direct regulation in the Constitution for a particular public-legal body, in this case the NBP as the central bank, is worth emphasizing in the specific conditions of the Polish democracy.

It is also worth bearing in mind the historical aspect of the issue. Some questions are naturally treated differently in countries where the tradition of functioning thoroughly democratic solutions is long and well-established. Yet, the matter is different in countries coming back to democratic procedures after a long period of real socialism and activity forms characteristic of it. After the dependency of the NBP from the executives organs, lasting from the end of the Second World War until 1981, the separation of the NBP from these organs, was perceived as a success and it was also a premise for the implementation of a modified model of its activity. Therefore, a relatively extensive regulation of the bank's status, and especially the guarantee of its independence directly in the Constitution¹, was of a prominent importance. The Constitution and the NBP Act have placed the NBP among the most independent central banks in the world.²

¹ Article 227 of The Constitution of Republic of Poland of 2nd April 1997 (Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.) – (Dz. U. No. 78, item 483 of 1997 with changes).

² W. Baka, *Niezależność i odpowiedzialność banku centralnego*, Prawo Bankowe, no 5 of 2002, p. 21.

Including in the Constitution the regulation of some basic issues, such as the independence of the NBP (personal, institutional, functional, and financial), its aims and role, guarantees the actual functioning of these aspects in practice, obviously providing that those regulations meet the requirement of precision and complete substantive correctness, as well as the conformity with the Treaty Establishing the European Community (TEC), the Treaty on the Functioning of the European Union (TFEU), the Statute of the European System of Central Bank (ESCB), the Statute of the European Central Bank (ECB) and other Community regulations. Such practice will make the infringement of the independence and competence of the NBP impossible by means of regulating ordinary statutes. The creators of acts will need to keep in minds whether the Constitutional Tribunal will relatively easily be able to decide on particular laws' unconstitutionality. Constitutional regulations and their range will essentially determine the quality of making new legal regulations and, consequently, their application.

Nonetheless, even the best formulated but limited in their range constitutional regulations may, in reality, increase the tendency to limit the role of the NBP with acts without the possibility of finding the adequate protection in the Constitution. Therefore, in the current situation, a wider constitutional regulation is justified not only by factual but also non-factual merits. This line of reasoning is supported by the incidents occurring in the regulations from the recent period. It seems that a peculiar threat is posed particularly not by a direct and distinct limitation of the NBP's role, but by an indirect limitation, introduced when other issues from the widely-understood banking law are regulated with acts.

One of the first examples for such practices might be the 2001³ deprivation of the NBP's President of the right to participate in the meetings of the Council of Ministers, the right which he originally had, together with the right to participate in the sessions of the Sejm.⁴ Although the Constitutional Tribunal recognized the amendment to the NBP Act as constitutional⁵, it does not change the fact that the powers of the President of the NBP are

³ Article 29 of the Act of 21st December 2001 on the amendment to the act on the organisation and mode of the Council of Ministers and the extent of the Minister's activities, the act on department of government administration authorities and the amendments to some acts (ustawa z dnia 21 grudnia 2001 r. o zmianie ustawy o organizacji i trybie pracy Rady Ministrów oraz o zakresie działania ministrów, ustawy o działach administracji rządowej oraz o zmianie niektórych ustaw) – (Dz. U. No 154, item 1800 of 2001).

⁴ Article 22 of the National Bank of Poland Act of 22nd August 1997 (ustawa z dnia 29 sierpnia 1997 r. o Narodowym Banku Polskim) in the original wording (the original wording Dz. U. No 140, item 938 of 1997, consolidated Dz. U. No 1, item 2 of 2005 with changes); later referred to as the NBP Act.).

⁵ Ref. no K. 9/02.

limited. Interestingly enough, at the same time the right for a representative of the Council of Ministers to participate in the session of the Monetary Policy Council was maintained, indeed without the right to speak but with the possibility to present proposals for the Council's consideration.⁶

Yet another typical example is the limitation of the NBP's role, and in particular the role of its President, in connection with the new concept of bank supervision, reflected in the replacing of the sector supervision with integrated financial supervision.

Personal independence was also reflected in the fact that the President of the NBP presided *ex officio* over the former Commission for Banking Supervision until the enactment of the Financial Market Supervision Act from 21st July 2006.⁷ In this respect, the role of the NBP was weakened, and since 2008, after the Polish Financial Supervision Authority (PFSA) received the supervision over the whole financial market, it has only been able to influence commercial banks using some instruments of monetary policy.

The present Commission for Banking Supervision is an administrative body, subordinated to the President of the Council of Ministers. Contrary to the recommendations of the European Central Bank, expressed in the opinion from 09.03.2006 to the Supervision Bill, the influence of the NBP on the CBS is too little.⁸ The ECB recommended granting the President of the NBP with decisive rights in the issues concerning essential supervision decisions for the banking sector, e.g. to make it impossible to take a decision to grant or withdraw licenses for banks with the opposition from or absence of the President of the NBP. According to Article 5 of the Supervision Act, the President of the NBP is only a member of the Commission, however not obligatorily, as he may delegate the Vice-President of the NBP. The ECB's opinion also pointed out the need for cooperation between the CBS and the President of the NBP. Nevertheless, Article 17 of the Supervision Act includes only a requirement of mutual exchange of information between the Chairman of the Committee and the President of the NBP in the scope indispensable for carrying out their tasks and activities specified in the Act; and a resolution about a possibility of making an agreement concerning their cooperation and exchange of information.

⁶ Article 15 in the original wording.

⁷ (Ustawa z dnia 21 lipca 2006 r. o nadzorze nad rynkiem finansowym), Dz. U. No 157, item 1119 of 2006; later referred to as The Supervision Act.

⁸ See the critical opinion of L. Góral of 04.07.2006 to the Supervision Act Bill (Bureau of Research Chancellery of the Sejm).

Financial supervision should be more independent, and the NBP should undoubtedly – taking into consideration the importance of the banking sector for the economy and other sectors of the financial market – play in it a more important role. The limited in the very nature of things role of the NBP after the access to the Eurosystem should not mean that the influence of the NBP on the activities of commercial banks is limited and that the security and safety of this activity is not guaranteed. It seems that the authority of the NBP (in the person of the President) should be connected with the Polish Financial Supervision Authority's granting permissions to found banks and commence their activities, as well as branches of foreign banks. It is, however, worth remembering that, on the other hand, the limited role of the European Central Bank in supervision has been provided for in the TEC. It can be seen in two aspects. The European System of Central Banks is to contribute to the proper authorities' efficient policy of banks' prudential supervision and the stability of the financial system. Moreover, with the Treaty's authority conditions, the European Central Bank can carry out clearly defined tasks connected with prudential supervision over banks and some other financial institutions. The European Central Bank is also entitled to issue opinions about the Community Law on prudential supervision over banks and the stability of the financial system.

Yet another example of the considerable limitation of the NBP's authority is the latest amendment to the regulation on Bank Guarantee Fund.⁹ It has been expressed, above all, in the composition of the Fund Council and the way it is appointed. The composition of the Council has been reduced from eleven to eight persons. Previously, the Chairperson of the Council was appointed and dismissed by the President of the Council of Ministers on the proposal agreed with the proper minister of financial institutions affairs and the President of the NBP, and after the proper Sejm committee had given its opinion. Currently, this authority has been granted to the proper minister of financial institutions affairs, after only consulting the President of the NBP and the Chairperson of the Commission for Banking Supervision. Formerly, the President of the NBP appointed four members of the Fund Council, presently – only two. Generally, also in cases where previously the consent of the President of the NBP was indispensable, this requirement has been changed to only expressing an opinion of the President of the NBP. Si-

⁹ The Act of 23rd October 2008 about the amendment of the Bank Guarantee Fund Act and the amendment of other acts (ustawa z dnia 23 października 2008 r. o zmianie ustawy o Bankowym Funduszu Gwarancyjnym oraz o zmianie innych ustaw) – (Dz. U. No 209, item 1315 of 2008); later referred to as the BGF Amendment Act.

milarly, the statute of the Fund was granted by the Council of Ministers on the proposal agreed with the proper minister of financial institutions affairs and the President of the NBP, and currently – by the minister after consulting the President of the NBP and the Chairperson of the Polish Financial Supervision Authority. After all, the statute defines, among others, the way of creating own funds and the principles of the Fund's financial economy. What is more, the financial report of the Fund is subject to the analysis by an authorised body chosen by a way of tender by the Fund's Council itself, and formerly by the President of the NBP, after only consulting the Fund's Council. The defining of the rules for liability turnover or additional activities in the area of helping subjects included in the guarantee system is only subject to opinion.

It is worth emphasising, however, that the Bank Guarantee Fund Act has introduced the European Union's requirement for a prohibition on financing certain obligations by the central bank and a privileged use of its resources. The NBP's obligation to pay to the Fund the equivalent of the reduction sums of fees paid by subjects included in the guarantee system¹⁰ has been revoked. The regulation providing for the resources from the loan given by the NBP on the conditions agreed with the Fund as one of the sources of financing the Fund¹¹ has been maintained; however, the BGF Amendment Act introduced limitations of short-term loans. It concerns a situation, provided for in the BGF Act, when after the resources for the payment of the depositor's claims provided for in the Act have run out, the President of the NBP is allowed to grant the Fund with a loan of the maximum statutory amount.¹² The amendment has introduced the conditions for granting a short-term loan in the form of a threat to the stability of the banking system as a premise for granting a loan and the necessity to establish the proper security. Granting of the short-term loan in a situation when the stability of the banking system is under threat cannot be perceived as contradictory to Article 101 of the TEC¹³ as the European Central Bank takes the view that there is no prohibition on the financing of the home system

¹⁰ Article 13 (3a and 3b) of the Bank Guarantee Fund Act of 14th December 1994 (ustawa z dnia 14 grudnia 1994 r. o Bankowym Funduszu Gwarancyjnym) – (consolidated Dz. U. No 70, item 474 of 2007 with changes) before the amendment of 23.10.2008; later referred to as the BGF Act.

¹¹ Article 15 Point 6 of the BGF Act.

¹² Article 34 (3).

¹³ Article 101 of the TEC prohibits national central banks from granting loans for covering deficit or loans to governments, local authorities or other public bodies and Corporation, as well as from acquiring debt securities directly from those subjects.

of insuring deposits by the central bank as long as it is short-term financing when the stability of the system is threatened.¹⁴

Maintaining the role of the central bank as a creditor in order to secure the stability of the country's financial system in a broad sense requires the constitutional financial independence of the NBP. It is, above all, guaranteed under Article 220 (2), providing for a ban on covering the budget deficit by taking out loans in the central bank of a country. Financial independence also consists of such elements as the principles of founding and dividing own funds, making it impossible for the government or parliament to wield financial influence on the bank's decisions¹⁵, on the division of profit and its allotting to the country's budget, and on connections with commercial banks, regulated in the NBP Act.

The recent regulation of 2008, setting up the Committee of Financial Stability¹⁶ is to ensure effective cooperation in the area of supporting and maintaining the stability of the country's financial system through an exchange of information, opinions, and assessments of situations in the financial system in the country and abroad, as well as coordinating activities within this scope.¹⁷ The Committee consisting of three persons includes the Minister of Finance, the President of the NBP, and the Chairperson of the Commission for Banking Supervision; and the Chairperson of the Committee is the Minister of Finance by the force of law. Taking into consideration various rights and responsibilities of the Committee and its individual members, and especially the President of the NBP, it is dubious whether the position and role of the NBP in respect to the whole banking system have been sufficiently considered in the Act.

Another issue, resulting from the current regulation of the 2009 Public Finance Act¹⁸, should not be omitted: it is the possibility of restricting one of the basic roles of the NBP – the role of the central bank of the state. Once Poland adopts Euro as its currency, the handling of the basic accounts run for the bank handling of the state's budget (the central current account of the state's budget, the current accounts of the state budgetary unit, and the current accounts of the offices attending to tax authorities)

¹⁴ See *The ECB Convergence Report of 2006*.

¹⁵ W. Baka, *Niezależność...*, *op. cit.*, p. 23.

¹⁶ Later referred to as the Committee.

¹⁷ The Committee of Financial Stability Act of 7th November 2008 (ustawa z dnia 7 listopada o Komitecie Stabilności Finansowej) – (Dz. U. No 209, item 1317 of 2008); later referred to as the Committee of Stability Act.

¹⁸ The Public Finance Act of 27th August 2009 (ustawa z dnia 27 sierpnia 2009 r. o finansach publicznych) – (Dz. U. No 157, item 2104 with changes).

will alternatively be put in the hands of Bank Gospodarstwa Krajowego.¹⁹ This could in effect lead to a full take-over of this handling by BGK and depriving the NBP of this role, provided that the presently possible rights in the area of handling other types of accounts connected with the bank handling of the state budget are maintained.

2. The necessity for changes in the Constitution is indisputable in connection with the intention to join the Eurosystem. Consequently, the only thing that could be disputed is the general scope of changes, the scope of issues regulated directly in the Constitution, the scope delegated for regulation in ordinary statutes, and the dates for these regulations. It seems that a part of the discussion concerning this topic is pointless as the requirement for the particular range of changes is determined by Poland's membership in the EU and by detailed regulations of the Community law concerning the position, role, and scope of each central bank in the countries of the Eurosystem. On joining the EU, Poland automatically committed itself to accepting the regulations for the Economic and Monetary Union, fulfilling the conditions of convergence, adopting the Euro and joining the European System of Central Banks by the NBP. Taking into consideration the above-mentioned premises, the inclusion of the basic regulations directly in the Constitution could be called for also in the matter of the monetary system. A relatively early amendment to the Constitution might be beneficial when the Council of Europe makes a decision on the revoking of derogation. Yet, it is important to bear in mind that one of the aspects that are taken into consideration is the regulation concerning the conformity of the national central banks' aims with those of the ESCB, and the independence of these banks in all its aspects.²⁰ It is therefore advisable to call for the regulation of the status of the NBP as a member of the ESCB carrying out its tasks; the regulation of the NBP's independence and the functioning of the Euro in the monetary system to be included directly in the Constitution. It is also important to take into consideration the fact that although the NBP will make over the competence for emission and for carrying out monetary policy to the European Central Bank, the President of the NBP will enter the decisive body of the ECB, that is the Board of Presidents. In this way, the NBP will participate in carrying out the monetary policy of the Eurosystem. Making decisions in the scope of monetary policy is centralised, however, carrying out of these decisions is done in compliance with

¹⁹ Article 196 of the Act.

²⁰ C. Kosikowski, *Prawne aspekty wejścia Polski do strefy euro*, Państwo i Prawo, no 12 of 2008, p. 25.

the Community subsidiary principle and is decentralised. Therefore, it is not only the ECB that carries out the monetary policy, but also all the National Central Banks of the Eurosystem. The NBP will be emitting the Euro in the scope defined by the ECB and it will be responsible for carrying out the operations of the open market and the deposit-loan operations, although it is the ESCB which defines the very principles of these operations. All of the mentioned activities require constitutional independence of the NBP. Due to the presently complex legislative process, a prompt undertaking of the necessary action should be called for.

Taking into consideration the premises for establishing the Monetary Policy Council, the course of its activity, and the relation to other bodies and institutions, it seems reasonable that the Council should be completely eliminated, or at least it should not be active in the NBP structures, and, at the same time, its competences should be changed.

The need for a far-fetched amendment to the act regulating the status and activity of the NBP is similarly indisputable. Some issues, such as the basic aim of its activity stemming from the fact of being a member of the ESCB and the requirement to carry out the tasks appointed by the ESCB (including the emitting of the Euro under the ECB's directive), need to be accommodated to the requirements of TEC, TFEU and the Statutes of the ESCB and the ECB. It is especially important to pay attention to formulating a precise amendment to Chapter 6 of the NBP Act concerning the instruments of monetary policy, used by the NBP with regard to commercial banks. The instruments connected directly with monetary policy will be automatically eliminated and they will fall within the scope of the ECB's responsibility and, due to this fact, the act should ensure a possibility for effective use of the remaining instruments of influencing commercial banks by the NBP in the role of the bank of banks. These instruments need to, even more than presently, be accommodated to the instruments currently used by the central banks of the Euro zone and by the ECB.²¹

The new regulations should precisely define the competences of individual bodies of the NBP, their mutual relations, the relationship of the NBP with the state authorities, and especially the scope of the responsibilities of the NBP's President. It is necessary to point here to the doubts present in the published literature and connected with the responsibility to the State Tribunal.²²

²¹ It is worth mentioning the differences arising from the fact that the EU banks lack in financial liquidity, while Polish banks often have over-liquidity.

²² C. Kosikowski, *Pozycja Narodowego Banku Polskiego i jego organów w prawie polskim (stan obecny i postulaty na przyszłość)*, Państwo i Prawo, no 11 of 2002, p. 27.

It seems that while amending the Constitution it is important to look at the issue of the character and the legal force of normative acts issued by the bodies of the NBP, and particularly by its President, who should be entitled to issue directives.²³ It might be worth noticing that the issue will not be of such an importance as it is at present, when the competences in the area of currency and monetary policy will be transferred to the ECB. However, a large scope of the subject needing legal regulations to be introduced by the NBP's bodies and the Financial Supervision Authority will be maintained. It should be mentioned that the State Tribunal has dismissed the possibility of treating the NBP Act as binding norms entitling the NBP to issue executive acts that would be universally and legally binding. The Tribunal has recognised the right to issue by the NBP's bodies (the Monetary Policy Council and the Board) acts of internal law within the framework of the banking system, assuming that the functional subordination of commercial banks to the central bank in the area of monetary policy arises from the character of the constitutional entitlements of the NBP.²⁴ The doctrine presents the opinion about the lack of organisational subordination of banks towards the NBP²⁵ and supervision authorities. Currently, the acts issued by the President of the NBP are inter-bank acts which do not bind banks like typical acts of internal law.²⁶ Therefore, this issue should be clearly regulated. The easiest solution would be to constitutionally equip the NBP with the right to issue executive directives and to formulate appropriately the statutory entitlements.²⁷

3. Summing up, the Article 227 concerning the NBP should be maintained in the Constitution. The Section should include the expression of the bank's status concerning the personal independence of the bank's bodies, and in particular that of the President, as well as the institutional independence. The principle of carrying out the aims and tasks of the ESCB and the participation in it of the NBP should be taken into consideration. Moreover, the principle of the Euro as the single currency should be expressed and the

²³ E. Fojcik-Mastalska, *Ocena aktualnego stanu prawa bankowego i rysujące się kierunki jego zmian*, Prawo Bankowe, no 3 of 2006, pp. 35–36.

²⁴ Decision of 28.06.2000 (K25/99), OTK ZU, no 5 of 2000, item 141.

²⁵ See E. Fojcik-Mastalska, *Ocena...*, *op. cit.*, pp. 35–36.

²⁶ E. Fojcik-Mastalska, *Podstawowe źródła prawa bankowego po nowelizacji*, Prawo Bankowe, no 4 of 2002, p. 51.

²⁷ A. Bałaban, *Glosa do wyroku TK z dnia 28 czerwca 2000 r.* (sygn. akt K 25/99), *Przegląd Sejmowy*, no 1 of 2001, p. 83.

regulation providing for the supervising the activities of the NBP by means of an act should be maintained.

The guarantee for the NBP of the appropriate position in financial (banking) supervision and the bodies of particular Commissions, Committees, or Funds should also be considered.

The liquidation of the Monetary Policy Council, or at least its isolation from the NBP's structures with an obvious amendment to the scope of its competences seems legitimate.

The Constitution should maintain the regulations concerning the guarantee of the NBP's financial independence, especially in the form of a ban on covering the budgetary deficit.

A clear regulation of the responsibility of the NBP, and in particular of its President, seems appropriate.

The regulation concerning the legal order in the form of including in it the directives of the President of the NBP and defining the object of the regulation by means of directives should be broadened.

S U M M A R Y

The constitutional status of the National Bank of Poland (NBP) will change in the perspective of joining the European Monetary Union. In such a case, the range of regulations that should be included directly in the Constitution, is an essential issue.

Including in the Constitution the regulation of some basic issues, such as the independence of the NBP (personal, institutional, functional, and financial), its aims and role, guarantees the actual functioning of these aspects in practice.

It seems that a peculiar threat is posed particularly not by a direct and distinct limitation of the NBP's role, but by an indirect limitation, introduced when other issues from the widely-understood banking law are regulated with acts.

The principle of carrying out the aims and tasks of the ESCB and the participation in it of the NBP should be taken into consideration.

The liquidation of the Monetary Policy Council, or at least its isolation from the NBP's structures with an obvious amendment to the scope of its competences seems legitimate.

The Constitution should maintain the regulations concerning the guarantee of the NBP's financial independence, especially in the form of a ban on covering the budgetary deficit.