



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 9 December 2015

on consumer credit

(CON/2015/54)

Introduction and legal basis

On 6 October 2015 the European Central Bank (ECB) received a request from the Minister of Finance of the Czech Republic for an opinion on a draft law on consumer credit (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 third indent of Article 2(1) of Council Decision 98/415/EC¹, as the draft law relates to a national central bank. 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 purpose of the draft law is to transpose into Czech law Directive 2014/17/EU of the European Parliament and of the Council² and parts of Directive 2008/48/EC of the European Parliament and of the Council³, whilst also building on certain relevant EU provisions in Commission Delegated Regulation (EU) No 1125/2014⁴. The draft law also seeks to regulate the activities of authorised providers and intermediaries of consumer credit, including their activities abroad, and the rights and obligations of parties in the provision and intermediation of consumer credit.

1.2 The principal provisions of the draft law:

- (1) set out which types of authorised entity may provide and intermediate consumer credits⁵ as part of its business activity in the Czech Republic, subject to the provisions of the draft law, with such entities including also non-banks⁶ (hereinafter 'consumer credit providers 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 Directive 2014/17/EU of the European Parliament and the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34).

³ Directive 2008/48/EC of the European Parliament and the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p. 66). The draft law will overhaul Law 145/2010 Coll. on consumer credit, which implements Directive 2008/48/EC,

⁴ Commission Delegated Regulation (EU) No 1125/2014 of 19 September 2014 supplementing Directive 2014/17/EU of the European Parliament and of the Council with regard to regulatory technical standards on the minimum monetary amount of the professional indemnity insurance or comparable guarantee to be held by credit intermediaries (OJ L 305, 24.10.2014, p. 1).

⁵ As defined in Article 2 and subject to the exemptions set out in Article 4 of the draft law.

⁶ See Article 7 of the draft law. The addition of non-banks to the list of entities which may be authorised by ČNB to provide or intermediate consumer credit will require a small amendment to the Act on Česká národní banka No. 6/1993 Coll., as amended.

intermediaries'), and the activities that come under the provision and intermediation of consumer credit⁷;

- (2) place consumer credit providers and intermediaries under the oversight and supervision of Česká národní banka ('ČNB')⁸; and
 - (3) overhaul the current legal framework regulating such entities and the provision of such services and ČNB's supervisory and regulatory powers with respect to such entities, including the conditions for their authorisation, the maintenance by ČNB of a public register of such entities, and ČNB's power to charge fees for their authorisation and for renewals of authorisation, so as to finance ČNB's costs related to their supervision⁹.
- 1.3 The ECB understands that to date non-banking credit providers and intermediaries have been licensed by trade offices ("*živnostenský úřad*"), that they have been only lightly regulated and that they have been supervised by the Czech Trade Inspection Authority, which falls under the jurisdiction of the Ministry of Industry and Trade¹⁰.
- 1.4 The ECB understands that there is a disagreement between the Ministry of Finance and ČNB insofar as ČNB is not willing to assume this new supervisory task. The ECB trusts that this disagreement will be resolved at national level with due regard to the principle of central bank independence.

2. General observations

- 2.1 The ECB understands that the draft law will bring consumer credit providers and intermediaries under the supervision of ČNB. The ECB takes note of the intention of the legislator to achieve a consistently high level of supervision also for non-bank consumer credit providers. However, the ECB also notes that to date non-banking consumer credits have had negative social impacts in the Czech Republic.
- 2.2 The draft law expands ČNB's powers to supervise also non-bank consumer credit providers and intermediaries, thus broadening and extending ČNB's current responsibilities for the supervision of the same activities when undertaken by licensed credit institutions. The ECB underlines that, in the context of a proposed conferral of new tasks on an ESCB member, it is necessary to assess such conferral against the prohibition of monetary financing under Article 123 of the Treaty. The ECB has developed the guidance set out in paragraphs 2.2.1 to 2.2.3 of this opinion, in the form of

⁷ See Article 3(1)(a) and (b) of the draft law.

⁸ See Part X (Oversight) of the draft law. Currently ČNB supervises consumer credit only if provided or intermediated by entities which it supervises (i.e. credit institutions, foreign bank branches, electronic money institutions, savings banks and credit cooperatives).

⁹ See amended item 65, point 9 of Annex II to the accompanying draft law amending Law No.634/2004 on administrative fees. As regards ČNB's statutory power to set administrative fees for authorising and renewing of authorisation of consumer credit providers and of intermediaries, see Article 12(2) and Articles 20 and 31 of the draft law respectively.

¹⁰ Under the current Law 145/2010 Coll. on consumer credit, the Czech Trade Inspection Authority is responsible for supervising the provision and intermediation of consumer credit by non-banks (with Trade Licensing Offices being responsible for issuing trade licences to the entities concerned), unless, as part of these activities, the entities offer payment services, e.g. issue of credit cards, in which case they are licensed as payment institutions and supervised by ČNB.

general and specific considerations, on the basis of which it may decide whether a new task conferred on an ESCB national central bank (NCB) is to be considered a central banking task or a government task for the purposes of assessing such conferral against the prohibition of monetary financing under Article 123 of the Treaty¹¹. The concrete assessment of whether ČNB's task of supervising consumer credit providers and intermediaries is to be considered a central banking task or a government task is then undertaken in paragraph 3.1 of this opinion.

2.2.1 *General considerations*

First, the systematic categorisation of tasks assigned to NCBs as central banking or government tasks applies to genuinely new tasks that did not exist in the past or did not form an integral part of the central banking tasks already assigned to the NCB in the past. In recognition of the different Member States' legal frameworks, central banking traditions and national set-ups, the tasks currently discharged by an NCB as central banking tasks are not reviewed and re-categorised, but may be reassessed if their substance is amended.

Second, it needs to be emphasised that when Member States decide to confer new tasks on their NCBs, due regard must be given to the role of the NCB as part of the ESCB or Eurosystem, as applicable, and to the requirement of central bank independence. The principle of financial independence, which is a key aspect of the principle of central bank independence as laid down in Article 130 of the Treaty, requires that the Member States may not put their NCBs in a position where they have insufficient financial resources to carry out their ESCB- or Eurosystem-related tasks, as applicable. Accordingly, an NCB must have sufficient financial means not only to perform its ESCB- or Eurosystem-related tasks but also its national tasks (e.g. financing its administration and own operations)¹². Where an NCB considers that the allocation of a new task would impinge on its financial independence, because it would not have sufficient means to focus primarily on its ESCB- or Eurosystem-related tasks, or that the discharge of the new task would impose a disproportionate burden on it, the NCB should be able to object to the new task being allocated to it.

Third, central banking tasks comprise in particular those tasks that are related to the tasks listed in Article 127(2), (5) and (6) of the Treaty.

Fourth, new tasks conferred on an NCB which are atypical of NCBs' tasks, or which are clearly discharged on behalf of and in the exclusive interest of the government or of other public entities, should be considered as government tasks. In that context, a distinction should be drawn between NCBs' liquidity- and solvency-related tasks. While, for the purposes of the monetary financing prohibition, solvency support is a government task, liquidity-related tasks, the ultimate objective of which are to finance the economy, are central banking tasks.

¹¹ See Opinion CON/2015/22. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

¹² See the ECB's 2014 Convergence Report, p. 25.

2.2.2 *Specific considerations*

Banking supervision and macro-prudential tasks are central banking tasks when discharged by an NCB, provided they do not undermine its independence in accordance with Article 130 of the Treaty.

An important criterion for qualifying a new task as a government task is the impact of the task on the institutional, financial and personal independence of the NCB. In particular, the following should be taken into account.

First, it should be assessed whether the performance of the new task creates inadequately addressed conflicts of interests with existing central banking tasks, without necessarily complementing the existing central banking tasks. If a conflict of interest arises between existing and new tasks, there should be sufficient mitigation measures in place to adequately address that conflict. Complementarity between the new task and existing central banking tasks should not, however, be interpreted broadly, as this could lead to the creation of an indefinite chain of ancillary tasks. The assessment of the complementarity of the new task should also take into account the financing of that task. In the event of a conflict of interest between prudential supervision and consumer protection prudential supervisory considerations must prevail¹³.

Second, it should be assessed whether without new financial resources the performance of the new task places a disproportionate burden on the financial or organisational capacity of the NCB and may negatively impact on its capacity to properly perform existing central banking tasks.

Third, it should be assessed whether the performance of the new task is aligned with the institutional set-up of the NCB, in particular as regards central bank independence and accountability considerations.

Fourth, it should be assessed whether the performance of the new task entails substantial financial risks.

Fifth, it should be assessed whether the performance of the new task exposes the members of the NCB's decision-making bodies to political risks that are disproportionate and could also impact on their personal independence and, in particular, the guarantee of the Governor's term of office under Article 14.2 of the Statute of the European System of Central Banks and of the European Central Bank.

2.2.3 Any final assessment on the qualification of a task given to an NCB as either falling within the scope of a central banking task or a government task will be guided by the objective of ensuring the consistent application of the prohibition of monetary financing within the Eurosystem and the ESCB.

¹³ See paragraph 3.1 of CON/2015/21.

3. Specific observations

3.1 *Conferral on ČNB of the task of supervising consumer credit providers and intermediaries*

The draft law designates ČNB as the supervisory authority for non-bank consumer credit providers and intermediaries, thus broadening its current functions and activities. The ECB understands that up to now this segment of the financial market has been regulated in an unsatisfactory manner. In the light of the guidance set out in paragraphs 2.2.1 to 2.2.3, it must be assessed whether ČNB's new tasks could constitute a breach of the monetary financing prohibition.

3.2 *Principle of financial independence*

The principle of financial independence requires NCBs to have sufficient means to carry out not only their ESCB-related tasks but also their national tasks, both from an operational and financial perspective¹⁴. In this regard the ECB notes that the draft law provides that ČNB has the power to require that consumer credit providers and intermediaries pay ČNB fees for authorisations and renewals of authorisations¹⁵. The staff of such entities will need to acquire the relevant professional qualifications in order to be able to perform these activities. However, this will be achieved under the responsibility and at the cost of the supervised entity, with ČNB acting only as the accrediting body for such qualifications. This should ensure that the cost of authorising market participants for such activities is met by the industry. However, the costs of carrying out supervision by ČNB might not be fully covered by the fees collected. The new task is expected to lead to increased staffing and operational costs for ČNB¹⁶.

3.3 *Links to tasks listed in Article 127(5) of the Treaty*

The supervision of consumer credit providers and intermediaries can be considered a task related to those referred to in Article 127(5) of the Treaty, based on the understanding that it is complementary to the supervisory tasks exercised by the NCB, particularly where, as in this case, ČNB already supervises credit institutions, including their consumer credit activities, and has the task of ensuring the stability of the financial system.

Moreover, point 2 of Annex 1 to Directive 2013/36/EU of the European Parliament and of the Council¹⁷ lists the provision and intermediation of consumer credit as activities that are subject to mutual recognition. Such activities may thus be carried out across borders by credit institutions and non-banks authorised and supervised by the competent authorities of another Member State, provided that such activities are covered by the relevant authorisation of the entity concerned¹⁸. From this perspective, it makes sense to designate ČNB as the only competent authority in this area in the Czech Republic.

14 See ECB 2014 Convergence Report, p. 25.

15 See footnote 9 for provisions on the administrative fees that ČNB will charge for providers' and intermediaries' authorisations and renewals of authorisations.

16 For example, ČNB's branch network may face an increased work load as a result of having to deal with public complaints about local non-bank consumer credit providers.

17 See Annex 1 to Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

18 See also Opinion CON/2015/37.

3.4 *Atypical tasks*

A number of Member States have conferred on their NCBs supervisory tasks related to the provision of consumer credit¹⁹. The ECB has generally accepted the allocation of such tasks to NCBs provided they do not interfere with the performance of the NCB's ESCB-related tasks²⁰. The tasks of an NCB with regard to the supervision of consumer credit providers and intermediaries can therefore, if this condition is met, be regarded as tasks not atypical of a central bank, particularly if, as in the case of ČNB, it has a statutory responsibility for banking supervision and financial stability²¹. It is important however that appropriate resources are available to ensure that ČNB can properly perform these functions²².

3.5 *Discharge of tasks on behalf of and in the exclusive interest of the Government or of other public entities*

ČNB is designated as the sole supervisory authority for consumer credit providers and intermediaries in its own name. However, background documentation regarding the draft law indicates that this designation is proposed by the Ministry of Finance as a reaction to a social-economic problem associated with the indebtedness of some parts of the population in the Czech Republic²³.

3.6 *Extent to which conflicts of interests with existing ČNB tasks are addressed and the performance of tasks is aligned with ČNB's institutional set-up, in particular as regards central bank independence and accountability considerations*

As the supervisor of consumer credit providers and intermediaries, ČNB will also be responsible under the draft law for applying consumer protection rules to such entities. As the authority responsible for supervising the financial markets, ČNB will be required to mitigate any potential conflict of interests between its consumer protection tasks and its banking supervision and financial stability mandates, by always taking the latter into account when imposing a sanction or enforcement measure in relation to a breach of an obligation in the field of financial consumer protection. Sufficient mitigation measures must be put in place to ensure that, in the event of a conflict of interest, prudential supervisory considerations will prevail²⁴. In this regard, given the complementarity of the new task of supervising consumer credit providers and intermediaries with ČNB's existing supervisory tasks, the new task may be said to fit into ČNB's institutional set-up.

There is however a reputational risk that, despite the proposed more stringent regulation and supervision of consumer credit providers and intermediaries, ČNB could be held accountable by the general public for problems related to the indebtedness of society and unlawful usury.

¹⁹ According to the Ministry of Finance's explanatory memorandum to the draft law, there are 7 NCBs which currently carry out such supervisory tasks in the European Union.

²⁰ See, for example, paragraphs 2.1-2.3 of Opinion CON/2006/38, paragraphs 2.1 and 2.2 of Opinion CON/2006/47, paragraphs 2.1-2.5 of Opinion CON/2007/29 and paragraph 2 of Opinion CON/2009/71.

²¹ Articles 2 and 44 of the Act on the Czech National Bank No 6/1993 Coll., as amended.

²² See further paragraph 3.7 below

²³ See Parliamentary Resolution no. 367/2014 as published in the Parliamentary Gazette, Issue no. 41 and the Regulatory impact assessment (RIA) for the draft law: <http://www.mfcr.cz/cs/soukromy-sektor/spotrebitelsky-uver/distribuce-uveru-pro-spotrebitele/zahajeni-mezirezortniho-pripominkoveho-r-21716>

²⁴ See paragraph 3.1 of CON/2015/21.

3.7 *Extent to which the performance of tasks is proportionate to ČNB's financial and operational capacity and its ability to perform its ESCB-related tasks*

As noted above, in order to remain financially independent, NCBs must have sufficient means to carry out not only their ESCB-related tasks but also their national tasks, both from an operational and financial perspective. The ECB understands that the draft law's regulatory impact assessment does not contain a precise estimate of the direct costs that ČNB is likely to incur by also supervising non-bank consumer credit providers and intermediaries²⁵. In this regard, however, the ECB welcomes the fact that the draft law provides that consumer credit providers and intermediaries will be charged administrative fees for the issuance of authorisations to carry out such activities and for the renewal of such authorisations. However, the ECB presumes that these fees would not cover all of ČNB's costs related to this supervision.

The ECB also understands that this new task will lead to ČNB having to address more punitive administrative cases. In accordance with Czech administrative law, the ECB understands that these cases are heard by two instances. Although ČNB may recruit sufficient staff to deal with the cases at first instance, it is only ČNB's seven-member Bank Board that may take a final decision at second instance. Therefore, from an operational perspective, the ECB is concerned as to whether ČNB's Bank Board will have sufficient capacity to properly handle its core central banking and ESCB-related tasks together with these new consumer protection cases. Furthermore, the workload of ČNB's Bank Board related to consumer cases might be disproportionate in comparison to its core central banking, ESCB-related, prudential supervisory and macro-prudential tasks.

3.8 *Extent to which the performance of tasks entails substantial financial risks*

As in the case of other State authorities performing public functions, ČNB's potential liability for damages and/or costs arising from any breaches of law or improper administrative procedures in the supervision of such entities under the draft law, will be subject to the usual rules on liability for damage caused during the exercise of State Authority²⁶.

The ECB notes that the explanatory memorandum to the draft law considers that taking on the supervisory responsibility for a sector, which has for many years been only lightly regulated, may entail - apart from the additional financial burden - reputational risks for ČNB²⁷. The ECB also notes that the draft law includes powers to supervise such entities, so that if those powers are effectively used and enforced any reputational risks can be minimised.

²⁵ See the Ministry of Finance explanatory memorandum to the draft law, and p. 65 of the Regulatory impact assessment (RIA), which includes only a broad range of estimated annual costs as provided by ČNB: <http://www.mfcr.cz/cs/soukromy-sektor/regulace/spotrebitelsky-uver/distribuce-uveru-pro-spotrebitel/zahajeni-mezirezortniho-pripominkoveho-r-21716>.

²⁶ Pursuant to the Act No. 82/1998 Coll. on State liability, as amended, the State is primarily liable for damage caused by an unlawful decision or improper administrative action by a legal entity or person in the course of exercising public authority on the State's behalf. In this case that entity would be ČNB as the competent supervisory authority. Should the State be held liable for any breach of ČNB's legal obligations, the State may request it to indemnify the State but only for damage caused by ČNB's culpable conduct, such as negligence and wilful misconduct.

²⁷ See the Ministry of Finance's explanatory memorandum to the draft law as referred to in footnote 25, where the possible reputational risk for ČNB is acknowledged.

4. Conclusion

The ECB considers that there are grounds for regarding ČNB's new task of supervising non-bank consumer credit providers and intermediaries as a central banking task in the sense that it can be regarded as complementing ČNB's existing banking supervisory functions in the area of consumer credit, provided it does not undermine ČNB's independence. As the authority responsible for supervising the financial markets, ČNB should put in place measures to mitigate any potential conflict of interests between its consumer protection tasks in respect of such entities and its existing banking supervision and financial stability mandates, to ensure that in the event of a conflict, the latter mandates prevail.

There are concerns that by proposing that ČNB perform the new task under the draft law the authorities are reacting to a social-economic problem connected to the indebtedness of some parts of the population in the Czech Republic, which is a problem not purely related to financial supervision. There are also concerns relating to the operational and reputational risks connected with vesting ČNB with supervisory tasks in the area of non-bank consumer credit. These aspects should be considered in more depth by the relevant Czech authorities before the draft law is adopted.

As regards the principle of financial independence, the fact that the supervised entities will contribute to the cost of ČNB performing the new supervisory tasks, by paying authorisation fees, has a positive impact on ČNB's financial capacity to assume these tasks. This notwithstanding, it should be ensured that ČNB has sufficient human and material resources to carry out the new tasks without affecting its capacity to carry out its core central bank, ESCB-related and prudential supervisory tasks. Hence, ČNB should be able to object to the conferral of the new tasks on financial independence grounds, for example if assuming the task would mean that either ČNB would not have sufficient means to focus primarily on its ESCB-related tasks or the discharge of the new tasks would impose a disproportionate burden on it.

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

Done at Frankfurt am Main, 9 December 2015.

[signed]

The President of the ECB

Mario DRAGHI