



EUROPEAN CENTRAL BANK

## OPINION OF THE EUROPEAN CENTRAL BANK

of 3 December 2004

at the request of Česká národní banka

**on a draft law amending the Act on transfers of funds, electronic means of payment and payment systems and certain other laws including the Act on Česká národní banka and the Act on banks**

(CON/2004/37)

1. On 5 October 2004, the European Central Bank (ECB) received a request from Česká národní banka (ČNB) for an opinion on a draft law amending the Act No 124/2002 Coll., on transfers of funds, electronic means of payment and payment systems (the Payment Systems Act), as last amended by Act No 257/2004 Coll. (hereinafter the 'Payment Systems Act'), and, *inter alia*, the Act No 6/1993 Coll. on Česká národní banka, as amended (hereinafter the 'ČNB Act') and the Act No 21/1992 Coll., on banks, as amended (hereinafter the 'Banking Act') (hereinafter the 'draft law').
2. The ECB's competence to deliver an opinion is based on the second, third, fifth and sixth indents of Article 2(1) and on Article 2(2) 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<sup>1</sup>, as the draft law concerns means of payment, a national central bank, payment and settlement systems, rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets and an instrument of monetary policy of a non-participating Member State, i.e. minimum reserve requirements. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the ECB, the Governing Council has adopted this opinion.
3. To implement Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions<sup>2</sup> (hereinafter the 'E-money Directive'), the draft law provides for the creation of electronic money institutions (ELMIs), which will be regulated in the Czech Republic pursuant to the Payment Systems Act and, to the extent not provided otherwise in the Payment Systems Act, by the Banking Act. The draft law also amends the ČNB Act, providing for ČNB to supervise ELMIs and other issuers of electronic money and enabling ČNB to issue electronic money. Finally, the draft law also concerns several items which do not relate to ELMIs, including:

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<sup>1</sup> OJ L 189, 3.7.1998, p. 42.

<sup>2</sup> OJ L 275, 27.10.2000, p. 39.

- (i) the insertion of provisions into the ČNB Act enabling ČNB to adopt measures relating to minimum reserve requirements; and (ii) an increase in the penalty interest rate for breach of minimum reserve requirements.
4. Pursuant to Article 1(2) of Decision 98/415/EC, Member States do not have to consult the ECB on the transposition of Community directives into national law. The ČNB was not therefore legally obliged to consult the ECB regarding the draft law in as far as it implements the E-money Directive. While the ECB notes that the competent authority for verifying the transposition of Community directives into national law is the Commission, the ECB nevertheless welcomes the opportunity to deliver its opinion on the draft law insofar as its provisions fall under one or more of its fields of competence.
  5. The ECB notes that electronic money may have significant implications for monetary policy in the future. For reasons of monetary policy effectiveness and taking into account the need for a level playing field, it is important to ensure that price stability, the unit-of-account function of money, the efficient functioning of payment systems and confidence in payment instruments are given full consideration in the development of this important means of payment.
  6. The ECB welcomes the provisions of the draft law pursuant to which ČNB will supervise ELMIs and other issuers of electronic money. This is consistent with ČNB's overall responsibility for the supervision of credit institutions. As noted in paragraph 14 of ECB Opinion CON/2002/1 of 4 January 2002 at the request of the Finnish Ministry of Finance on a draft proposal concerning the revision of the Credit Institution Act, draft national legislation implementing the E-money Directive 'may have implications for the smooth functioning of payment systems and the stability of financial markets.... [C]entral banks' traditional focus on systemic risk, together with their knowledge of money and securities markets and market infrastructures and their function in the oversight of payment and settlement systems, places them in a unique position to identify threats to the stability of the financial system.'
  7. The draft law defines ELMIs. In particular, the Payment Systems Act provides that certain Articles of the Banking Act will apply to ELMIs, as appropriate, unless otherwise provided in the Payment Systems Act. This means that ELMIs will not require a banking licence to issue electronic money in the Czech Republic, but that they will be regulated, as appropriate, unless otherwise provided in the Payment Systems Act, by certain Articles of the Banking Act<sup>3</sup>. However, it is not unambiguously clear from the draft law that ELMIs will be considered 'credit institutions' in the Czech Republic, as defined in Article 1(1) of Directive 2000/12/EC (hereinafter the 'Consolidated Banking Directive'), which has been duly implemented into Czech law in the Banking Act.

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<sup>3</sup> The term 'bank' here refers to the legal term laid down in Article 1(1) of the Banking Act, which transposes the concept of 'credit institution' in implementation of Article 1(1) of 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), as last amended by Directive 2004/39/EC (OJ L 145, 30.4.2004, p. 1).

8. As noted in paragraph 11 of ECB Opinion CON/2002/1, ‘the ECB would like to stress that Article 1(4) of [the E-money Directive] provides that Member States shall prohibit persons or undertakings that are not credit institutions from carrying on the business of issuing electronic money. Furthermore, the Council of the European Union stated in its common position concerning the proposal for [the E-money Directive]<sup>4</sup> that even though the Member States have the option to waive the application of some or all of the provisions of [the E-money Directive] and the application of [the Consolidated Banking Directive], this does not affect the nature of the institutions concerned; they remain credit institutions, as defined in Article 1, point 1, first subparagraph of [the Consolidated Banking Directive]. In addition, according to the common position, the competence of monetary authorities to impose minimum reserve requirements is not affected. The question of which types of institution are regarded as credit institutions is important for the ECB notably in the context of the European System of Central Banks’ operations.’
9. While the ECB appreciates that it is possible for the Czech legislator to ensure that all relevant provisions of Community law applicable to banks are and will remain applicable to ELMIs, it is nonetheless of the opinion that Community law would be consistently applied if Czech law did not merely apply certain Articles of the Banking Act to ELMIs, as appropriate, but actually included them within the definition of ‘credit institutions’, as defined by the Consolidated Banking Directive and duly implemented into Czech law.
10. A related issue arises in respect of how the draft law implements the waiver provision laid down in Article 8 of the E-money Directive. Article 18a(g) of the Payment Systems Act authorises ‘other entities’ [to issue electronic money] ‘on the basis of a permit from Česká národní banka’. Under the draft law, the entities affected are clearly intended to be a separate category of entity from either ELMIs or banks (Article 18a(d) and Article 18a(a) of the Payment Systems Act respectively). As noted in paragraph 7 of ECB Opinion CON/2002/1, ‘according to Article 19.1 of the Statute of the European System of Central Banks and of the European Central Bank, the ECB may require credit institutions established in the Member States to hold minimum reserves on accounts with the ECB and the national central banks in pursuance of monetary policy objectives. [The Consolidated Banking Directive] defines electronic money institutions as credit institutions.’ The ECB notes that these ‘other entities’ authorised to issue electronic money are potentially subject to ECB minimum reserve requirements because Article 2(1) of Regulation ECB/2003/9 of 12 September 2003 on the application of minimum reserves<sup>5</sup> provides that credit institutions as defined in the Consolidated Banking Directive shall be subject to reserve requirements, without referring to the relevant definitions under national laws. The ECB is not generally in favour of provisions which risk creating a new type of entity in application of Article 8 of the E-money Directive. The ECB is of

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<sup>4</sup> Common Position (EC) No 8/2000 adopted by the Council on 29 November 1999 with a view to adopting a Directive of the European Parliament and of the Council on the taking-up, pursuit of and prudential supervision of the business of electronic money institutions (OJ C 26, 28.1.2000, p. 1).

<sup>5</sup> OJ L 250, 2.10.2003.

the opinion that these other entities should also fall within the definition of ‘credit institutions’ as provided in the Consolidated Banking Directive and duly implemented into Czech law.

11. The ECB notes that under the draft law, ČNB is one of the entities given the right to issue electronic money pursuant to Article 18a of the Payment Systems Act. At the same time Article 18b(4) of the Payment Systems Act provides that ČNB should be the supervisory authority for the activities of electronic money institutions. If ČNB performed the roles of both issuer of electronic money and supervisor of ELMIs, it would combine the functions of service provider, supervisory authority and overseer. This would be challenging from the point of view of policy, since ČNB would simultaneously regulate and perhaps compete with private issuers of electronic money. To address this situation, ČNB would need to formulate a clear policy as to how these activities will be conducted as well as set up a proper organisational framework to deal with it. The ECB would suggest that prior to fulfilling such manifold roles, ČNB should adopt and publish its policies.
12. The draft law specifically excludes ELMIs from being participants in payment systems designated under Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems<sup>6</sup> (hereinafter the ‘Settlement Finality Directive’ or ‘SFD’), although not excluding ELMIs from participating in payment systems as such, since a wider prohibition on ELMIs participating in any payment system would be disproportionate and could upset the level playing field between ELMIs and banks, for example. The ECB considers that the question of whether ELMIs can be excluded from participation in SFD-designated systems may be due to different opinions regarding whether the SFD defines ‘participants’ to include, together with several other categories, credit institutions, as defined in the Consolidated Banking Directive, and therefore including ELMIs. At least one Member State has already implemented the E-money Directive in such a manner that ELMIs are not credit institutions for these purposes. As a result it is unclear whether ELMIs may participate in a system designated under the SFD or not. The potential systemic risk which would be created in these circumstances is the reason given for the exclusion of ELMIs from participating in such systems. The ECB considers that this situation is regrettable, and that a reference to credit institutions in national legislation should be understood as a reference to credit institutions as defined in the Consolidated Banking Directive, and therefore as including ELMIs.
13. The ECB takes note of the proposed insertion of Article 26a into the ČNB Act, which enables ČNB to issue implementing measures laying down the rules for the amount of required minimum reserves, their remuneration and the amount of interest payable in case of failure to maintain required minimum reserves. The ECB welcomes these provisions as contributing to a more effective minimum reserve system for the purposes of implementing monetary policy in the Czech Republic.

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<sup>6</sup> OJ L 166, 11.6.1998, p. 45.

14. The ECB confirms that it has no objection to the competent national authorities making this opinion publicly available at their discretion. This opinion will be published on the ECB's website six months after the date of its adoption.

Done at Frankfurt am Main, 3 December 2004.

[signed]

*The President of the ECB*

Jean-Claude TRICHET