



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK
of 1 July 2015
on recovery and resolution in the financial market
(CON/2015/22)

Introduction and legal basis

On 27 March 2015 the European Central Bank (ECB) received a request from the Czech Ministry of Finance (MoF) for an opinion on a draft law on recovery and resolution in the financial market (hereinafter the 'draft law') and on a draft law amending certain laws connected with the adoption of the draft law¹ (hereinafter the 'draft amending law'; together with the draft law, the 'draft laws'). The MoF asked for the adoption of the ECB's opinion on an urgent basis within one month in line with Article 3 of Council Decision 98/415/EC of 29 June 1998².

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 (the 'Treaty') and the third and sixth indents of Article 2(1) of Decision 98/415/EC, as the draft laws relate to Česká národní banka (ČNB) and rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. For elements of the draft laws the exclusive purpose of which is the implementation of Union law, the ECB's competence to deliver an opinion is based on Article 25.1 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'). 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 laws

- 1.1 The purpose of the draft laws is to implement into Czech law Directive 2014/59/EU of the European Parliament and of the Council (the Bank Recovery and Resolution Directive, or 'BRRD')³, thereby providing a legal framework for the recovery and resolution of certain types of entities participating in the financial markets, including credit institutions, investment firms, and

¹ Draft law on recovery measures and resolution of crisis in the financial markets (*Navrh zákona o ozdravných postupech a reseni krize na financnim trhu*) and draft law amending certain other laws in connection with the adoption of that law (*Navrh zákona kterym se meni nektere zakony v souvislosti s prijetim zákona o ozdravných postupech a reseni krize na financnim trhu*). The versions of the draft laws provided by the MoF were its draft proposals of 19 March 2015 after conclusion of an inter-ministerial consultation.

² 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).

³ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

financial holding companies that have their head office in the Czech Republic (hereinafter 'obliged entities')⁴.

1.2 The draft law regulates plans and procedures for the recovery and resolution of obliged entities at both individual and group level, the status and powers of the competent supervisory authority and resolution authority, and the procedures under which they may intervene in distressed entities or subject them to resolution measures in the event that they are failing or likely to fail⁵. The main provisions of the draft law dealing with resolution tasks are as follows.

- ČNB, which is the competent authority for supervising the Czech financial markets, is designated as the resolution authority and ČNB's tasks are broadened to include taking specified recovery and resolution measures in respect of obliged entities⁶.
- ČNB is further required to ensure the operational independence of its resolution unit, which has been set up within ČNB by an internal regulation.
- To resolve a financial crisis situation at an obliged entity, ČNB may apply a number of 'crisis resolution measures'⁷. These measures include, besides the resolution tools provided for by the BRRD⁸, direct administration, which entails ČNB taking control of an institution for an undefined period by suspending the functions of its statutory and supervisory organs and taking decisions in their stead, either by itself or through a ČNB-appointed employee⁹.
- In general, ČNB may exercise its resolution powers without limitation or approval. However, ČNB may only apply a crisis resolution measure or order a capital write-down or debt conversion upon the prior approval of the MoF if the proposed action either: (a) requires the use of resources from public funds, provides for the introduction of a State guarantee, or the use of a bridge institution or an asset management entity; or (b) requires the use of resources from the Fund for Crisis Resolution (hereinafter the 'Resolution Fund') or from the Deposit Guarantee Scheme (hereinafter the 'Scheme') amounting to more than 60% of their available assets¹⁰.
- ČNB is authorised to collect any expenses properly incurred due to the taking of resolution actions from obliged entities and other prescribed persons¹¹, and preferential ranking in insolvency is accorded to such claims and to claims arising from loans made by ČNB to obliged entities¹².

4 See Article 2 of the draft law, which defines the obliged entities in accordance with the definitions in Article 2 BRRD.

5 Articles 1 and 4 of the draft law.

6 Article 5 and Part Six of the draft law.

7 Part Six, Title II of the draft law.

8 Articles 35 and 37 of the BRRD.

9 Article 81 of the draft law.

10 Article 214(1) of the draft law.

11 Article 165(1) and (2) of the draft law.

12 For the purposes of Article 168 of Law No182/2006 Coll. on Insolvency. The draft amending law sets out the order of preference of creditor claims, including, for example, the claims of covered depositors and those of the Scheme, but without making reference to the preferential claims of ČNB. See the proposed new Article 374 of Law No168/2006 Coll. on insolvency.

- The State is expressly required to pay ČNB's properly incurred expenses in carrying out certain early intervention and resolution related tasks, if the obliged entity does not have sufficient assets from which to make payment¹³.
- 1.3 The draft law also lays down arrangements for financing the cost of resolution and minimising the need for State financing of resolution measures. In particular, the draft law:
- establishes the Resolution Fund for the financing of resolution measures, to which institutions established in the Czech Republic and Czech branches of institutions established in non-Member States are required to contribute¹⁴, and sets out the sources of its funding and how those funds may be used;
 - sets up the Guarantee System for the Financial Market (GSFM), a separate legal entity, to administer in its own name the Resolution Fund and the existing Scheme¹⁵. GSFM is a *sui generis* entity¹⁶ and is expressly stated not to be a State fund under Czech law¹⁷. The Resolution Fund and the Scheme are not legal entities but separate accounting units, with separate sources of financing. The financial resources of each fund are ring-fenced by law and are required to be used exclusively for the legally prescribed purposes of that fund. The funds do not belong to the GSFM¹⁸. Thus, the claims of creditors of either fund arising from performance of the fund's functions may only be met from the assets of that fund;
 - provides for the governance of the GSFM through a five-person Supervisory Council whose members are appointed and dismissed by the MoF. The Supervisory Council is composed of two members nominated by the MoF, two members nominated by ČNB and one member nominated by the Czech Banking Association¹⁹;
 - requires the GSFM, ČNB and the MoF to cooperate closely in carrying out their respective tasks and activities including any exchange of information²⁰.
- 1.4 The draft law makes a number of consequential amendments to related laws, including:
- to provide that in the event that the Scheme does not have sufficient available financial resources and this situation could affect the stability of the financial markets ČNB may, on application, provide it with a short-term loan for a maximum period of three months, guaranteed by government bonds or other State-guaranteed securities that are held by the Scheme²¹;

13 For example, under Article 41(6) of the draft law for the costs of putting an institution under temporary administration, under Article 47(3) for the costs of valuation of the institution prior to resolution, and under Article 81(5) for the costs of direct administration.

14 Article 195 et seq. of the draft law (Part 9, Title II).

15 Article 185 et seq. of the draft law (Part 9, Title I).

16 Article 185 et seq. of the draft law.

17 I.e. within the meaning of Czech National Council Law No 576/1990 Coll. on the rules for financial management of the budgetary funds of the Czech Republic and of municipalities in the Czech Republic.

18 Article 185(5) of the draft law.

19 Part Nine, Articles 185-188 of the draft law.

20 Article 194 of the draft law.

21 See new Article 33a which will be inserted into Law No 6/1993 Coll. On ČNB, and new Article 41a(4), which will be inserted into Law No 21/1992 Coll. on banks.

- to specify that such loans and repayable financial assistance from ČNB form an additional source of funding for the Scheme's contributory fund²².

2. General observations

- 2.1 The ECB welcomes the draft laws, as they strengthen the tools and procedures available to ČNB for carrying out effective preventive measures, early intervention and effective resolution in line with the common framework of intervention powers, rules and procedures laid down in the BRRD.
- 2.2 The ECB stresses, however, that it does not opine on whether the draft laws effectively discharge the obligations of the Czech Republic to implement the BRRD in Czech law, but rather on those provisions that may impact on the role and tasks of ČNB as a central bank and as a member of the European System of Central Banks (ESCB).
- 2.3 The ECB underlines that, in the context of a proposed conferral of 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 following guidance, in the form of general and specific considerations, on the basis of which the ECB 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 the monetary financing prohibition.

2.3.1 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 they are subject to legislative amendments of substance.

Second, the principle of financial independence 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.

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 liquidity- and solvency-related tasks of NCBs. While, for 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.

2.3.2 Specific considerations

Resolution tasks discharged by central banks are considered central banking tasks provided that they do not undermine an NCB's independence in accordance with Article 130 of the Treaty²³.

²² Pursuant to amendments to be made to Article 41a(4) of Law No 21/1992 Coll. on banks.

However, the discharge of these tasks by central banks may not extend to the financing of resolution funds or other resolution financial arrangements as these are government tasks. This is without prejudice to the following: (i) the possibility that central banks may provide short-term financing to deposit guarantee schemes under certain conditions²⁴ and (ii) the possibility that NCBs may provide emergency liquidity assistance to solvent credit institutions.

An important criterion for qualifying a new task as a government task is therefore 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, and does not necessarily complement those existing central banking tasks. If a conflict of interest arises between existing and new tasks, there should be sufficient mitigation in place to adequately address that conflict. Complementarity between the new task and existing central banking tasks should not, however, be interpreted extensively, so as to lead to the creation of an indefinite chain of ancillary tasks. Complementarity should also be examined from the point of view of the financing of those tasks.

Second, it should be assessed whether without new financial resources the performance of the new task is disproportionate to 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 does not fit into the institutional set-up of the NCB in the light of central bank independence and accountability considerations.

Fourth, it should be assessed whether the performance of the new task harbours 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 which are disproportionate and may also impact on their personal independence and, in particular, the guarantee of the term of office under Article 14.2 of the ESCB Statute.

- 2.3.3 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 to the extent that it applies to its members.

3. Specific observations

3.1 ČNB's role in providing temporary liquidity to the GSFM

- 3.1.1 ČNB will be authorised to provide under certain conditions a temporary (for up to three months) State-guaranteed loan to the Scheme's contributory fund²⁵. Although it is not stated expressly,

23 This position departs from the one set out in Opinions CON/2015/3 and CON/2015/2. All ECB opinions are available on the ECB website at www.ecb.europa.eu.

24 See the ECB's 2014 Convergence Report, p. 30.

25 In this regard, see paragraph 1.3 and footnote 21 for references to the proposed amendments to Law No 6/1993 Coll. on ČNB and to Law No 21/1992 Coll. on banks.

the ECB understands that an application for such a temporary or 'bridging' loan would come from the GSFM as administrator of the Scheme and that, if approved by ČNB in its sole discretion, the temporary loan would be provided under a contract between ČNB and the GSFM as debtor²⁶. The draft law does not stipulate further the material terms and conditions (e.g. pricing terms) of any such loan.

- 3.1.2 The ECB underlines that national legislation which provides for the financing by an NCB of a national deposit guarantee scheme for credit institutions will only be compatible with the monetary financing prohibition if such financing is short-term, addresses urgent situations, systemic stability issues are at stake and decisions are made in the NCB's discretion. To this end, inserting references to Article 123 of the Treaty in national legislation should be considered. When exercising its discretion to grant a loan, the NCB must ensure that it is not in effect taking over a government task. In particular, central bank support for deposit guarantee schemes should not amount to a systematic 'pre-funding' operation²⁷.
- 3.1.3 The ECB notes that the condition that the temporary loan or other repayable financial assistance provided by ČNB must address an urgent situation is not expressly contained in the draft laws. Even if such funding is discretionary, temporary and in the interests of financial stability, it should be stipulated that the funding may be granted only in demonstrably urgent cases in order to be compatible with the monetary financing prohibition.
- 3.1.4 It is clear that the draft laws do not authorise ČNB to provide any loan or financing under any circumstance to the Resolution Fund. The provision of such financing to the Resolution Fund would constitute a government task, and any such loan or financing by ČNB would therefore breach the prohibition of monetary financing under the Treaty²⁸.

3.2 *Conferral of resolution tasks on ČNB*

The draft law designates ČNB as the resolution authority, broadening its responsibilities to include placing obliged entities under resolution and taking resolution measures in respect of such entities²⁹. By virtue of this designation, ČNB carries out resolution tasks and exercises resolution powers. As emphasised above, carrying out these resolution tasks does not require ČNB to provide any financing to the Resolution Fund.

In the light of the guidance set out in paragraph 2.3, it must be assessed carefully whether ČNB's new tasks and responsibilities in this field could constitute a breach of the monetary financing prohibition.

3.2.1 *New tasks*

The ECB notes that whilst ČNB has had for many years powerful tools to intervene in, and if necessary take control of distressed financial institutions which pose a risk to financial stability, principally in the form of the enforced administration regime, the draft law introduces specific, new resolution tools, such as bail-in and the bridge institution and asset management vehicle, which in

²⁶ Article 187(2)(c) of the draft law.

²⁷ See the ECB's 2014 Convergence report, p. 30.

²⁸ Ibid.

²⁹ Article 5 and Chapter VI (*Crisis resolution at obliged entities*) of the draft law.

their proposed form do not currently exist in Czech law, as well as expanded ancillary powers which did not exist as separate resolution measures or powers in the past. The ECB notes that the draft laws introduce substantial legislative amendments to ČNB's existing resolution-related tasks that are currently categorised as central banking tasks and should therefore be assessed in the light of the monetary financing prohibition.

3.2.2 *Principle of financial independence*

The principle of financial independence requires NCBs to have sufficient means to carry out not only their ESCB-related tasks from an operational and financial point of view, but also their national tasks³⁰. In this regard the ECB notes that the draft law authorises ČNB to recover its expenses and costs demonstrably incurred in carrying out resolution measures from the institutions concerned by such measures³¹. The ECB welcomes the provisions of the draft law concerning the financing of ČNB's new resolution tasks.

Furthermore, the ECB notes that ČNB's Board is required, before deciding to take a resolution measure, to obtain the prior approval of the MoF in a broad range of circumstances, often when the realisation of the measure would require the use of public funds or if the use of such funds would become more likely due to substantial outflows from the Scheme or the Resolution Fund³². It is important that ČNB's Board, as the decision-making body responsible for performing ČNB's ESCB-related tasks, should have ultimate control over any decision related to a resolution matter that could affect ČNB's financial independence³³.

3.2.3 *Links to tasks listed in Article 127(2), (5) and (6) of the Treaty*

Administrative resolution tasks are considered tasks related to the tasks referred to in Article 127(5) of the Treaty, based on the understanding that administrative resolution tasks and supervisory tasks complement each other, particularly where an NCB has a mandate for the stability of the financial system or where, as in this case, the designated resolution authority already carries out integrated supervision of the financial markets.

3.2.4 *Atypical tasks*

A number of Member States have conferred on their NCBs a significant role in the resolution of financial institutions, whether as the resolution authority or as a competent authority in the decision-making process for resolution. The ECB has generally welcomed the allocation of such tasks to NCBs provided they do not interfere financially and operationally with the performance of the NCB's ESCB-related tasks³⁴. The resolution tasks of an NCB can therefore be regarded as being tasks not atypical of a central bank, particularly if, as in the case of ČNB, it has a long-established statutory responsibility for financial stability³⁵.

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

31 Article 165 of the draft law.

32 See footnote 10 above.

33 See paragraph 3.3 of Opinion CON/2015/2.

34 See, e.g., Opinion CON/2011/14/60, paragraph 4.1; Opinion CON/2013/73, paragraph 2.1; Opinion CON/2011/72, paragraph 2.3; Opinion CON/2011/83 paragraph 2.2; Opinion CON/2011/39, paragraph 2.2. See further in the U.K. the role of the Bank of England in the Special Resolution Regime under the Banking Act 2009.

35 Article 2 of Law No 6/1993 Coll. on ČNB. See also in regard to the competence of ČNB's Board, Article 214(2) of the draft law.

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

Whilst ČNB is designated as the sole resolution authority and takes resolution measures acting as an administrative authority in the exercise of public functions in its own name, and not on behalf of any other authority, as noted in paragraph 3.2.2 above, ČNB's Board is required in some cases, before deciding to take a resolution measure, to obtain the prior approval of the MoF. ČNB also has to closely cooperate with the MoF in its resolution role. There is no indication that in discharging its resolution function ČNB acts exclusively in the interests of the MoF or another public entity.

3.2.6 *Extent to which conflicts of interests with existing ČNB tasks are addressed*

3.2.6.1 The ECB has repeatedly noted³⁶ that, in line with the BRRD³⁷, staff involved in carrying out the functions of a resolution authority in accordance with the Directive must be structurally separate and subject to separate reporting lines from the staff involved in carrying out prudential banking supervision tasks pursuant to applicable EU legal acts³⁸ or with regard to the other functions of the relevant authority. The ECB observes that the BRRD 'exceptionally' allows one authority to carry out both resolution and supervisory functions on the condition that adequate structural arrangements are put in place in order to ensure operational independence and to avoid conflicts of interest between that authority's resolution function and its other functions. For example, the BRRD envisages structural separation being achieved by keeping the reporting lines for staff involved in carrying out resolution tasks separate from those used by staff involved in supervision activities³⁹.

3.2.6.2 Pursuant to the draft law, ČNB is required to ensure the operational and organisational independence of the department carrying out resolution functions and its staff to ensure there is no conflict of interest and to provide for the separation of tasks relating to the resolution function from ČNB's other tasks⁴⁰. The draft law states that ČNB, as resolution authority, will apply crisis resolution measures 'separately from its other tasks'. These provisions aim to ensure that: (a) under the future regime there is a separation of resolution and supervision functions within a single resolution and supervision authority, and (b) the resolution function will have equal access to any necessary information available to the supervisory function, and vice versa. Furthermore, within ČNB, the Board, rather than the head of the resolution unit, will take all significant resolution decisions where either public funds or systemic risk are involved, with the exception of the exercise of the government stabilisation tool. The ECB welcomes these provisions, as they appear to adequately address potential conflicts of interests between resolution and ČNB's other

³⁶ For example see Opinion CON/2015/2, paragraph 4.3, Opinion CON/2015/3, paragraphs 5.1 and 5.2, and Opinion CON/2014/67, paragraph 3.3.

³⁷ See the second subparagraph of Article 3(3) of Directive 2014/59/EU.

³⁸ See Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1), and Directive No. 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).

³⁹ See Opinion CON/2014/67, paragraph 3.1.

⁴⁰ Article 5(1) and (2) of the draft law. See also page 73 of the explanatory memorandum to the draft law.

tasks and functions. The ECB would be interested in being provided in advance, for information, the future internal rules implementing these provisions.

3.2.7 *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 from an operational and financial point of view, but also their national tasks. In this regard the ECB welcomes the fact that ČNB may recover the expenses incurred in carrying out resolution measures from the institutions concerned. The ECB notes, however, that the administrative start-up and operational costs of the resolution unit will be borne by ČNB's own budget.

3.2.8 *Extent to which the performance of tasks fits into ČNB's institutional set-up in the light of central bank independence and accountability considerations*

As noted above, in a broad range of circumstances, typically when public funds are required, ČNB may only apply a resolution measure or order a capital write-down or debt conversion upon the prior approval of the MoF. ČNB has a duty to closely cooperate with the MoF, particularly in the foregoing cases, and it is generally required to grant the MoF and its duly-authorised employees access to all documents and information relating to resolution measures or a write-down of capital instruments⁴¹. The ECB considers that the broadened resolution tasks that ČNB will assume under the draft law entail much closer cooperation with the MoF when fiscal funds are at stake than for the exercise of its supervisory or other functions.

3.2.9 *Extent to which the performance of tasks harbours substantial financial risks*

3.2.9.1 The draft laws do not contain provisions excluding or limiting the liability of ČNB as resolution authority for any negligent act or omission or other breach of any legal obligation when applying the resolution tools or exercising resolution powers. This is in marked contrast to the explicit exclusion of liability of publicly-owned resolution vehicles – for example, the bridge institution⁴² – for any damage to shareholders or creditors of the obliged entity resulting from the application of crisis resolution measures.

3.2.9.2 The ECB understands⁴³ that the State is primarily liable for any 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. The carrying out of resolution and supervision functions clearly constitutes the exercise of a public authority. For this purpose the entity or person exercising public authority in this situation could be the State (or any organisational unit of the State), ČNB, or any other person provided it has separate legal personality.

3.2.9.3 Furthermore, the ECB understands that ČNB shall indemnify the MoF where the State is held liable for any breach of ČNB's legal obligations when applying the resolution framework⁴⁴. The ECB understands that this right of indemnification would apply even if ČNB had obtained prior

41 Articles 214 and 215 of the draft law.

42 Article 96(2) of the draft law.

43 Pursuant to Law No 82/1998 Coll. on State liability.

44 See Articles 16-18 of Law No. 82/1998 Coll. on State liability.

approval from the MoF for the improper resolution measure, in which case the MoF will de facto (if not de jure) operate as a joint resolution authority alongside ČNB. Against this backdrop, the ECB notes that, under the prohibition of monetary financing laid down in the Treaty, national legislation may not require an NCB to finance the public sector's obligations vis-à-vis third parties⁴⁵. The ECB understands that as a matter of Czech law the liability of ČNB for breaches of obligations under the resolution framework and to indemnify the MoF would only extend to its own administrative acts. The ECB considers that it would be useful to explicitly clarify this point in the draft laws, given that potential liability issues represent substantial financial risks for ČNB.

3.2.10 *Conclusion*

The ECB considers that there are grounds for regarding ČNB's expanded resolution tasks as central banking tasks, in the sense that they complement ČNB's existing supervisory functions. The fact that ČNB will be authorised to recover its resolution-related expenses from the institutions concerned should also contain the impact on its financial capacity of assuming those tasks, whilst the start-up and running costs will be absorbed by ČNB's budget. However, the ECB considers that the draft laws potentially create significant financial risks for ČNB because they do not limit its liability as the resolution authority for negligent or improper acts. Also, it would be useful to explicitly clarify that ČNB's obligation (under current state liability law) to indemnify the MoF for any damages and costs the State has to pay to third parties extends only to its own administrative acts. Moreover, it is not obvious why ČNB should assume the sole burden of those potential liabilities when the draft law requires ČNB to obtain prior approval from the MoF before taking resolution actions in a broad range of circumstances.

3.3 *The MoF's role in resolutions*

In requiring ČNB as the resolution authority to obtain the MoF's prior approval before taking resolution actions in a broad range of circumstances, the question arises whether the MoF may be considered to be a second resolution authority alongside ČNB. The consulting authority is invited to consider if its prior approval is more appropriately limited to exceptional cases in which the resolution measures have a direct fiscal impact or systemic implications, in order to avoid it de facto operating as a joint resolution authority alongside ČNB, which would require the MoF to ensure operational independence of its resolution function.

3.4 *Resolution planning*

The draft law stipulates that resolution plans must neither assume the granting of emergency liquidity assistance by ČNB as the central bank nor the use of public resources except the use of the resources of the Resolution Fund and the Scheme⁴⁶. It also provides that recovery plans must not assume the granting of public support or rely on granting of loans or entry into other transactions by the obliged entity preparing the plan with ČNB⁴⁷. While these provisions appear to be in line with the requirements of the BRRD, the ECB emphasises that they do not in any way affect the competence of central banks to decide independently and in their full discretion on the provision of central bank liquidity to solvent institutions, both through standard monetary policy

⁴⁵ See the ECB's 2014 Convergence Report, p. 29.

operations and emergency liquidity assistance, within the limits imposed by the monetary financing prohibition under the Treaty⁴⁶.

3.5 *Comparative status of ČNB's preferential and secured claims in insolvency*

Finally, regarding the provisions of the draft law on preferential claims of ČNB in respect of loans provided to institutions and other obliged entities as well as claims arising from expenses properly incurred by ČNB in carrying out resolution tasks⁴⁷, the ECB would invite the consulting authority to consider further amending the draft law, as well as the Law on Insolvency, in order to comprehensively clarify the status and ranking of preferential unsecured claims of ČNB in the insolvency of an obliged entity, also in relation to the unsecured claims of other creditors.

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

Done at Frankfurt am Main, 1 July 2015.

[signed]

The President of the ECB

Mario DRAGHI

46 Article 16(4) of the draft law.

47 Article 8(3) of the draft law.

48 See paragraph 3.2 of Opinion CON/2012/99 and paragraph 3.3 of Opinion CON/2014/67.

49 Article 165(4) of the draft law and Article 168 of Law No 168/2006 Coll. on Insolvency.