



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

## OPINION OF THE EUROPEAN CENTRAL BANK

of 16 October 2015

on the central register of bank accounts

(CON/2015/36)

### Introduction and legal basis

On 4 September 2015 the European Central Bank (ECB) received a request from the Czech Ministry of Finance (MoF) for an opinion on a draft law on the Central Register of Bank Accounts (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/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 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 main purpose to the draft law is to set up a centralised database of basic information on bank accounts in the Czech Republic. A centralised database could significantly simplify and streamline the delivery of account information from the banking sector to the competent authorities. It will enable the competent authorities to more efficiently identify who owns which account and to use that information to make further enquiries at the credit institution concerned with a view to prosecuting eventual offenders and thereby protecting the financial resources and security of the State.

1.2 The main provisions of the draft law are as follows:

- The draft law sets up a central database of basic information on accounts maintained for their clients by credit institutions, i.e., banks, credit unions and branches of foreign banks established in the Czech Republic (hereinafter, the 'central register of bank accounts' or 'CRBA').
- The Czech National Bank (ČNB) will administer the CRBA and be responsible for supervising the obligations of the above institutions under the draft law.
- The CRBA will hold certain basic data on accounts held by individuals and legal entities with the above institutions, namely data identifying the account holder and the credit institution,

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

the date of the account's opening and closing, any change to the identification data and any authorisation to dispose of resources held on the account. No information on the resources on the account will be collected in the CRBA.

- The State commits to pay ČNB for the costs that ČNB incurs in setting up and administering the CRBA. Detailed rules on the CRBA information system and on the reimbursement of ČNB's costs will be covered in an agreement to be concluded between the MoF and ČNB.
  - Credit institutions will be required to submit the prescribed data for the CRBA to ČNB in a form, structure and frequency to be set out in a ČNB Decree.
  - The CRBA will be accessible only to listed competent public authorities (e.g. the State authorities responsible for financial or customs administration, the authorities involved in criminal proceedings and the State intelligence agency, hereinafter referred to as 'applicant(s)') that are entitled to request data subject to banking secrecy requirements from credit institutions, under the conditions laid down by a further law<sup>2</sup> and only upon a request made via an encrypted electronic data box specifically intended for this purpose.
  - ČNB will enable access to the CRBA only if the applicant meets the access conditions and follows the stipulated procedures.
  - The applicants will be exclusively responsible for ensuring that they are properly authorised and meet the other conditions for accessing data subject to banking secrecy requirements under the applicable banking laws<sup>3</sup>.
  - ČNB will be obliged to store the aforementioned data on closed accounts for 10 years.
  - ČNB will also be obliged to publish an annual report on its website on the operation and use of the CRBA, including aggregated data.
- 1.3 It is understood that the MoF intends to bring the draft law into force on 1 January 2016. To allow time to set up the database, the draft law stipulates that the CRBA will only be accessible to applicants after fifteen months from the date of the draft law's entry into force. The ECB notes however that this provision was not contained in the draft law on which the MoF consulted it, but in a later version of the draft law attached to the MoF explanatory memorandum. A number of related laws will also consequently need to be amended.

## 2. General observations

- 2.1 The ECB would like to recall that when new tasks are conferred on an ESCB member, it is necessary to assess these tasks against the prohibition of monetary financing under Article 123 of the Treaty. For this purpose and in the light of that basic need, the ECB has developed guidance in the form of general and specific considerations on the basis of which the ECB may decide whether

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<sup>2</sup> Pursuant to Article 38(3) of the Act on Banks No. 21/1992 Coll., as amended, reports on matters concerning a client which are subject to banking secrecy may be submitted by a bank without the client's consent only upon the written request of certain listed authorities. The respective laws governing the activities of each of the listed authorities stipulate which individuals(s) may submit the request for such report on the authority's behalf in the performance of its public tasks. Under the draft law however a much narrower list of authorities would be permitted to request data from the CRBA.

<sup>3</sup> See footnote 2 above.

the 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<sup>4</sup>. This guidance is set out in this paragraph 2.1. The concrete assessment of whether the ČNB's task to administer and operate the CRBA is to be considered a central banking task or a government task is then undertaken in paragraphs 3.1 and 3.2.

#### 2.1.1 *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 an NCB. 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, 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.

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

#### 2.1.2 *Specific considerations*

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 issues 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 a new task should also take into account the financing of that task.

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.

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<sup>4</sup> See in the first instance paragraph 2 of Opinion CON2015/22.

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 ESCB.

- 2.2 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 monetary financing prohibition within the Eurosystem and the ESCB.

### **3. Specific observations**

#### **3.1 *Conferral of the task of administering the CRBA on ČNB***

The ECB notes that the draft law would assign to ČNB the administration and operation of the CRBA.

##### **3.1.1 *New task***

The administration of the CRBA is an entirely new task, which no public authority has yet been assigned to perform. In the light of the guidance set out in paragraph 2.1 it must therefore be assessed carefully whether this new task and the associated responsibilities for ČNB could constitute a breach of the monetary financing prohibition.

##### **3.1.2 *The principle of financial independence***

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 not only their ESCB related tasks, but also their national tasks, both from an operational and financial perspective. In this regard the ECB welcomes Article 14(1) of the draft law, which requires the State to reimburse ČNB for any costs that ČNB incurs in setting up and operating the CRBA. This statutory commitment by the State will alleviate the burden that the performance of this new task might otherwise put on ČNB's financial and operational independence and which might also negatively impact on its capacity to properly perform existing central banking tasks.

The ECB notes that Article 14(2) of the draft law requires an agreement to be concluded between the MoF and ČNB detailing, among other matters, how ČNB's costs for the establishment and operation of the CRBA will be paid. The ECB would appreciate being provided with a copy of this agreement for information purposes, as well as the final draft of the ČNB Decree referred to in Article 17 (enabling provisions) of the draft law.

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

The ECB has previously opined that tasks entrusted to an ESCB member relating to the establishment of a central register of bank account numbers are not central bank tasks nor do they facilitate the enforcement of such tasks<sup>5</sup>. Similarly, the new task of administering the CRBA does not relate to banking supervision, the collection of data for statistical purpose or other existing ČNB tasks whether under the Treaty or under Czech law<sup>6</sup>. The ECB considers this new task to be clearly a government task since its purpose is exclusively to further the State's interest in being able to more efficiently locate bank accounts held in the Czech Republic which may hold proceeds of crime and thereby protect the financial interests and security of the State. It thus cannot be regarded in any respect as a central bank task<sup>7</sup>.

### 3.1.4 *Complementarity of the new task with existing ČNB tasks and extent to which conflicts of interest with existing ČNB tasks are addressed*

The ECB appreciates that one of the main reasons for assigning the administration of the CRBA to ČNB is that it is regarded as having the necessary technical experience and integrity for performing such a task. It is the only authority which currently possesses an information system for data transmission which enables it to obtain from credit institutions information on their clients' accounts in the manner required for operating such a database<sup>8</sup>. The ECB also notes that the ČNB will be bound by the same secrecy and personal data obligations in respect of CRBA data as apply currently to data reported by credit institutions under the banking laws. Furthermore, only designated employees will be authorised to operate the CRBA and no exchange of data will be permitted between the CRBA and any other legally prescribed register. Taken together, these elements should limit the possibility of conflicts of interest arising between the operation of the CRBA and other ČNB tasks.

The ECB further understands that the reporting scheme that institutions will use to submit account data to ČNB for the CRBA will be entirely separate from that used by credit institutions to meet their prudential reporting requirements and that only the technical format for the transmitted data will be the same<sup>9</sup>. In the light of the above - particularly the prohibition on sharing CRBA data with other registers - the new task cannot be regarded as complementing the ČNB's existing tasks.

Nonetheless, the ECB considers that - if such legal restrictions were appropriately amended - administering the CRBA could serve additional purposes linked to ČNB's existing or foreseen ESCB tasks, or other national tasks such as banking supervision or the collection of granular

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<sup>5</sup> See paragraph 2.1 of Opinion CON/2011/30.

<sup>6</sup> ČNB is obliged to carry out checks on transactions with credit institutions and other obliged entities under the domestic legal acts implementing the EU anti money laundering and terrorist financing directives – principally Act No. 253/2008 Coll. June 5, 2008 on selected measures against legitimisation of proceeds of crime and financing of terrorism; also ČNB Decree No. 281/2008 Coll. of 1 August 2008 on certain requirements for the system of internal principles, procedures and control measures against money laundering and terrorist financing. However those tasks do not involve the collection of individual account data.

<sup>7</sup> See paragraph 2.3.1 (general considerations) of Opinion CON2015/22.

<sup>8</sup> See the General part of the MoF explanatory memorandum to the draft law (page 7).

<sup>9</sup> Under the Act on Banks 21/1992 Coll. and the Act on the ČNB 6/1993 Coll.

statistical information from credit institutions<sup>10</sup>. Such new task could then potentially complement ČNB's other statutory tasks.

### 3.1.5 *Extent to which the performance of the new task is aligned with the institutional set-up of the NCB*

In view of the fact that operating a bank account register cannot be regarded as a central bank task, it might raise concerns as to how such a task would fit into the institutional set-up of a central bank. In this case, the ECB notes that the reporting scheme is legally entirely separate from the prudential reporting scheme for credit institutions, and that the data obtained is not accessible to other ČNB departments carrying out ESCB or other national tasks

### 3.1.6 *Extent to which the performance of the new task entails substantial financial risks*

The State's commitment under the draft law to pay all costs of operating the CRBA should ensure that ČNB bears no significant financial risk in taking up this new task. The ECB understands that the State will be primarily responsible for any damage or loss, including costs of proceedings, incurred by ČNB taking an unlawful decision or using the wrong administrative procedure in administering the CBRA<sup>11</sup>. It is however also noted that the State may request reimbursement from ČNB should ČNB be ordered by a court of law to pay damages as a result of its negligence or wilful intent when carrying out this task<sup>12</sup>.

It will also be necessary to consider the exact financial terms of the agreement to be concluded between the MoF and ČNB under Article 14(2) of the draft law. In order to assuage any monetary financing concerns, it needs to be ensured that ČNB will be fully and adequately reimbursed for all the costs incurred in performing activities related to the tasks entrusted to it in connection with the CRBA<sup>13</sup>. The reimbursement should be made on the basis of 'at arm's length' commercial terms - either in advance of costs being incurred or on a regular and prompt basis as the costs arise<sup>14</sup>.

### 3.1.7 *Extent to which the performance of the new task exposes the members of ČNB's Board to disproportionate political risks or could impact on their personal independence*

The ECB notes that the draft law makes applicants exclusively responsible for being properly authorised and meeting the other conditions for accessing data subject to banking secrecy under the banking laws when requesting data from the CRBA. This should limit the risk of ČNB being sued for allowing an applicant unauthorised access to the CRBA data.

However, ČNB will be obliged to perform the new task as any other public function that is assigned to it by law. ČNB's Board will therefore be responsible for the due and proper operation of the CRBA. It cannot be excluded that ČNB's Board could be exposed to reputational risks should the CRBA data – albeit of a less sensitive nature than some of the other data received from credit institutions when performing its supervisory tasks - be accessed by a non-authorised applicant or

<sup>10</sup> This would be for example applicable to the preparatory work launched by the ESCB under Decision ECB/2014/6 of the European Central Bank of 24 February 2014 on the organisation of preparatory measures for the collection of granular credit data by the European System of Central Banks (OJ L 104, 8.4.2014, p. 72), subject to national provisions as regards the re-use of the information for statistical purposes.

<sup>11</sup> Article 3 of the Act on State Liability No.82/1998 Coll., as amended.

<sup>12</sup> Articles 16-18 of the Act on State Liability No.82/1998 Coll., as amended.

<sup>13</sup> See paragraph 2 of Opinion CON/2011/98 and paragraph 2 of Opinion CON/2011/30.

<sup>14</sup> See paragraph 2 of Opinion CON/2011/98.

otherwise be 'leaked'. The fact that the CRBA will contain sensitive information, such as the basic data on accounts of politically exposed persons<sup>15</sup>, could place ČNB's Board members in a difficult position should this information enter into the public domain in breach of the law. This could also entail a negative impact on their personal independence.

### 3.2 *Conclusion*

Whilst welcoming the State's financial commitment to cover ČNB's costs for setting up and operating the CRBA, which will deal with certain concerns over ČNB's financial and operational independence, as regards the terms of such financing ČNB should either be reimbursed for the full budgeted costs of setting up and operating the CRBA in advance of these costs being incurred or on a regular and prompt basis as the costs arise. Additionally, as the reporting scheme for the CRBA will be entirely separate from the prudential reporting scheme for credit institutions, and the data obtained will not be accessible to other ČNB departments carrying out ESCB or other national tasks, the new task of administering the CRBA cannot be regarded as complementary to ČNB's current ESCB related and other national tasks. In view of these other considerations, the ECB has a more general concern about the assignment to ČNB of this sensitive new task.

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

Done at Frankfurt am Main, 16 October 2015.

[signed]

*The President of the ECB*

Mario DRAGHI

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<sup>15</sup> Under Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L141, 5.6.2015, p. 73), NCB Board members are also deemed to be 'politically exposed persons'.