



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 13 November 2015

on a register of bank accounts

(CON/2015/46)

Introduction and legal basis

On 7 October 2015 the European Central Bank (ECB) received a request from the Bulgarian Ministry of Finance for an opinion on a draft law amending and supplementing the law on Credit Institutions (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 establish an electronic information system (hereinafter the 'register') containing bank account numbers, the names of the account holders, the names of the persons authorised to manage these accounts and the names of persons with rental contracts for bank safe deposit boxes.

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

- The register will be developed and maintained by Българска народна банка (Bulgarian National Bank) (BNB).
- Banks must provide the required information on a monthly basis.
- Several national law enforcement authorities and other public authorities will be granted access to the register in connection to the performance of their duties.
- Right of access to the system will be given to individuals who manage and represent such authorities or to officials authorised by them, on condition that the confidentiality of any information obtained from the register is protected.
- The scope of reporting, the procedures, the time limits for banks to submit information and the procedures for authorised institutions and individuals to access the register, will be set out in a BNB ordinance.
- In order to access the system, the public authorities will pay a fee based on the costs incurred by BNB, the level of such fees will be set out in a BNB ordinance.

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).

- Natural and legal persons may obtain details of any information regarding them that is held in the register by submitting a request to BNB.
- The collected information will be maintained in the register for a period of five years from the date of its receipt by BNB.
- The register will be operational within twelve months of the entry into force of the draft law.

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 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 prohibition². This guidance is set out in this paragraph 2.1. The concrete assessment of whether BNB's task of establishing and operating the register of bank accounts 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 to be 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

² See in the first instance paragraph 2 of Opinion CON2015/22. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

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.

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 register on BNB*

The ECB notes that the draft law would assign to BNB the establishment and the operation of the register of bank accounts.

3.1.1 *New task*

The establishment and operation of a register of bank accounts is an entirely new task, which no public authority in Bulgaria has previously performed. 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 BNB 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 56a(7) of the draft law, which requires that the public authorities pay a fee based on the costs incurred by BNB as determined by a BNB ordinance. However, the draft law does not specify whether the State would reimburse BNB for the initial costs that BNB incurs in setting up the register.

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 tasks³. Similarly, the new task of operating a register of bank accounts does not relate to banking supervision, the collection of data for statistical purpose or other existing BNB tasks whether under the Treaty or under Bulgarian law. 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 Bulgaria 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 task⁴.

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

The ECB understands that BNB will be bound by the same secrecy and personal data obligations in respect of the data in the register as apply currently to data reported by credit institutions under the banking laws. However, such a general condition does not seem adequate to fully address any possible conflicts of interest that might arise between the operation of the register and other BNB tasks.

Furthermore, the ECB does not see a clear indication in the draft law of how the register would relate to the already existing credit register⁵. It is therefore unclear whether the new task can be regarded as complementing BNB's existing 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 register of bank accounts 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 appears to be legally entirely separate from the prudential reporting scheme for credit institutions. However, there is no indication in the draft law as to whether the data obtained is accessible to other BNB 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 lack of legal clarity regarding the possibility for the State to reimburse BNB for the initial costs that BNB incurs in setting up the register, suggests that BNB may bear significant financial risks in taking up this new task. Moreover, in the absence of provisions to the contrary, the ECB understands that, in accordance with the general liability regime under Bulgarian law, BNB will be solely responsible for any damage or loss stemming from an unlawful decision or the use of the wrong administrative procedure by BNB when operating the register. This raises significant monetary financing concerns.

³ See paragraph 2.1 of Opinion CON/2011/30.

⁴ See paragraph 2.3.1 (general considerations) of Opinion CON2015/22.

⁵ See Article 56 of the Law on credit institutions.

The fee-based system in the draft law does not address these concerns in an adequate manner. In order to assuage these concerns it needs to be ensured that BNB will be fully and adequately reimbursed for all costs incurred in performing activities related to the tasks entrusted to it in connection with the setting up and operation of the register. 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 arise⁶.

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

The ECB notes that the draft law provides that the public authorities that have access to the register must adopt and enforce internal rules for the effective monitoring of the individuals authorised to access the information. This should limit the risk of BNB being sued for allowing an applicant unauthorised access to the register. However, BNB will be obliged to perform the new task as any other public function that is assigned to it by law. BNB's Governing Council will therefore be responsible for the due and proper operation of the register. It cannot be excluded that BNB's Governing Council could be exposed to reputational risks should the data in the register – 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 otherwise be 'leaked'. The fact that the register will contain sensitive information, such as the basic data on accounts of politically exposed persons⁷, could place BNB's Governing Council members in a difficult position should this information enter into the public domain in breach of the draft law. This could also entail a negative impact on their personal independence.

3.2 *Conclusion*

BNB's new task raises significant concerns as regards BNB's financial and operational independence, especially in the absence of any clear commitment from the State to reimburse BNB for the costs for setting up the register or for any damages incurred by BNB as a result of operating the register. Additionally, there is insufficient evidence that the new tasks would in any way complement BNB's existing ESCB or other national tasks. In view of these other considerations, the ECB has a more general concern about the assignment to BNB of this sensitive new task.

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

Done at Frankfurt am Main, 13 November 2015.

[signed]

The President of the ECB

Mario DRAGHI

⁶ See paragraph 3.1.6 of Opinion CON/2015/36 and paragraph 2 of Opinion CON/2011/98.

⁷ 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'.