



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 15 December 2016

on the powers of Česká národní banka to conduct financial market transactions

(CON/2016/60)

Introduction and legal basis

On 24 November 2016 the European Central Bank (ECB) received a request from the Minister of Finance of the Czech Republic for an opinion on a draft law amending the Law on Česká národní banka and the Law on the circulation of banknotes and coins (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 first, third and sixth indents of Article 2(1) of Council Decision 98/415/EC¹, as the draft law contains provisions relating to currency matters, Česká národní banka and rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. 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 of the draft law is to amend certain provisions of the Law on Česká národní banka², which are seen as not sufficiently reflecting or in step with developments in the conduct of monetary and macroprudential policy, particularly regarding the central bank's monetary and macroprudential policy instruments. The draft law aims therefore to give Česká národní banka (ČNB) the flexibility to use a wider range of monetary and macroprudential policy instruments to protect the financial system against threats to financial stability. In place of the current provisions on transactions conducted with banks³ and other transactions, which specify which types of transaction ČNB may enter into and with what types of institution, the draft law authorises ČNB to conduct transactions in the financial market generally and sets out a non-exhaustive list of such transactions and their counterparties⁴. The draft law also changes the formula for setting the penalty interest to be applied for a breach of minimum reserve requirements to make it a more effective sanction.
- 1.2. The draft law also amends the rules allowing ČNB to provide emergency liquidity assistance to permit ČNB, in the interests of maintaining the liquidity of a bank, foreign bank branch or credit

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 Law No 6/1993 Coll.

³ Articles 27 to 29a of the Law on ČNB.

⁴ Draft new Article 32 of the Law on ČNB.

union, to exceptionally provide an institution of that kind with short-term credit, if adequately collateralised, or to enter into a repo transaction for up to three months. Furthermore, if the Guarantee System for the Financial Market (GSFM) has insufficient funds to perform its tasks arising under the legislation governing deposit insurance⁵ and this situation might jeopardise stability in the financial market, the draft law authorises ČNB in urgent cases to provide the GSFM, upon request, with short-term credit or enter into a repo transaction with the GSFM for a maximum period of three months⁶.

- 1.3. The draft law also amends provisions of the Law on ČNB concerning ČNB's other statutory activities. The most significant amendment is the express authorisation of ČNB to establish or participate in the capital of another legal entity in order to support the carrying out of ČNB's tasks⁷. According to the explanatory memorandum to the draft law this is not a new power but simply a clarification for reasons of legal certainty. Until now this power has been derived from an interpretation of the general wording of Article 40 of the Law on ČNB, which provides that ČNB is entitled to engage in investment activity. According to the explanatory memorandum, the said authorisation is without prejudice to the responsibility of ČNB for the proper performance of its central bank objectives and tasks. It is also explained that it is without prejudice to the prohibition of monetary financing, set out in Article 34a (1) of the Law on ČNB, which means that any 'form of arrangement is excluded which might lead to the provision of credit by the central bank to the State, to another public law entity or to a person under the public law entity's control or which might entail any form of financing of State tasks by the central bank'⁸.
- 1.4. In addition, ČNB's other activities are extended to expressly include 'security activities insofar as is necessary to provide for its own operations'⁹. According to the explanatory memorandum this is not a new power but simply a clarification for reasons of legal certainty. Until now this power has been derived from an interpretation of the general wording of Article 47a of the Law on ČNB, which provides that ČNB shall manage its assets with due diligence. As regards consumer credit secured by residential property, the draft law introduces a macroprudential regulatory regime for credit indicators to be used by providers of consumer credit, allowing ČNB to set upper limits on selected credit indicators concerning consumer credit secured by residential property if it identifies systemic risks related to the provision of the credit.
- 1.5. In the area of banknotes and coins, the draft law amends the Law on ČNB and consequentially the Law on the circulation of banknotes and coins¹⁰, authorising ČNB to issue commemorative banknotes and trade coins¹¹. The term 'commemorative banknote' is defined as a domestic banknote intended for collection which is defined as a commemorative banknote by an

5 Law No 374/2015 Coll. on recovery and resolution in the financial market and Law No 21/1992 Coll. on banks.

6 Draft new Article 33a of the Law on ČNB.

7 Draft new Article 40(2) of the Law on ČNB.

8 See the explanatory memorandum, p. 22-23. The explanatory memorandum is available in Czech on the Czech Government's website at www.odok.cz.

9 Draft new Article 40(1) of the Law on ČNB. According to the explanatory memorandum, this is not meant to be a new statutory task.

10 Law No 136/2011 Coll.

11 Draft new Article 20 of the Law on ČNB as regards issue of trade coins and draft new Article 16(2) of the Law on ČNB law as regards commemorative banknotes.

implementing legal rule governing its issuance¹². Trade coins will not be legal tender and have no par value.

- 1.6. Finally, the draft law makes a number of technical amendments to the Law on ČNB, principally concerning ČNB's cooperation with foreign or other international organisations, its financial management, statistical reporting and annual reporting. As regards annual reporting, the disclosure of salaries in ČNB's annual financial report is extended to include the senior officers reporting directly to ČNB's Board and remote access to the annual report is introduced.

2. General observations

The ECB broadly welcomes the draft law, which is generally designed to bring the Law on ČNB in line with the statutory framework of the European System of Central Banks (ESCB) with respect to the conduct of monetary policy, particularly regarding ČNB's monetary and macroprudential policy instruments, and other activities of ESCB members.

3. Specific observations

- 3.1 The ECB welcomes the broadening of the provisions of the Law on ČNB concerning ČNB's transactions on the market to allow it to conduct a wider range of transactions with financial market participants. The ECB notes that the provisions of the draft law which deal with ČNB's open market and credit operations are inspired in this regard by the wording of Article 18 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB').
- 3.2 The ECB also welcomes the provisions of the draft law clarifying the conditions for ČNB's provision of urgent, short-term liquidity to the GSFM. The ECB understands that the reference to 'tasks arising under the legislation governing deposit insurance' is a consequential amendment necessitated by the legislation implementing Directive 2014/59/EU of the European Parliament and of the Council¹³, which specifies the tasks and financing of the deposit guarantee scheme (DGS), as distinct from the resolution fund, which although also administered by the GSFM, must not be financed by ČNB by reason of the prohibition of monetary financing under Article 123 of the Treaty. The ECB considers that in this respect the draft law is in line with the ECB's position according to which national legislation that provides for the financing by a national central bank (NCB) of a national DGS for credit institutions is compatible with the monetary financing prohibition only if it is short term, addresses urgent situations, systemic stability aspects are at stake, and decisions are at the NCB's discretion¹⁴. The ECB notes that the draft law aims to fully reflect these criteria by also specifying that the funding may be granted only in urgent cases. Furthermore, the draft law enables

¹² Draft new Article 2(3) of the Act No. 136/2011 Coll., on the circulation of banknotes and coins and on the amendment of Act No. 6/1993 Coll., on the Czech National Bank.

¹³ Directive 2014/59/EU of the European Parliament and 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).

¹⁴ ECB Convergence Report 2016, p. 33; see also paragraph 3.1.3 of Opinion CON/2015/22. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

ČNB to enter into a repurchase transaction (repo) with the GSFM as an alternative to a short term credit facility. The ECB considers repo operations to fall within the concept of a 'credit facility' for the purposes of assessing the compliance of such transactions with the prohibition of monetary financing under Article 123 of the Treaty. This is because repo operations entail the creation of a claim in favour of ČNB against the GSFM, as ČNB would have the right to be repaid the cash amount, increased by the applicable repo rate, upon the transfer back to GSFM of the collateral securities.

- 3.3 The ECB notes that the draft law permits ČNB to establish a legal entity or acquire holdings therein in order to support the carrying out of its tasks. The ČNB's tasks include the task of contributing to the tasks and objectives of the ESCB pursuant to the Treaty and the Statute of the ESCB¹⁵. Tasks assigned to the ESCB by the Treaty and the Statute of the ESCB must be fulfilled by the ECB and the NCBs¹⁶. As a consequence, ČNB's ESCB-related tasks must not be transferred to another legal entity. Activities that are ancillary and preparatory to these tasks may be outsourced if ČNB retains full legal responsibility and maintains supervision and control over the relevant activities, in particular to ensure that the applicable legal regime, including confidentiality provisions, is maintained. The ECB invites ČNB to seek the ECB's views if ČNB intends to make arrangements using the power to establish a legal entity or acquire holdings therein in order to support the carrying out of its ESCB-related tasks.
- 3.4 In addition, the ECB understands that ČNB's establishment of, or acquisition of any holding in, another legal entity will be without prejudice and subject to the monetary financing prohibition under Article 123 of the Treaty, as referred to in Article 34a of the Law on ČNB, which is not amended¹⁷ and applies across the Law on ČNB. In this regard, The ECB wishes to emphasise in this respect that ČNB must not establish another legal entity which is involved in the performance of a government task without being adequately remunerated in advance for the costs involved, and that ČNB must in no event assume or finance, even in its capacity as shareholder, any obligation of such a legal entity, for example, a bridge bank for the purposes of bank resolution.
- 3.5 The ECB notes that ČNB will be authorised to issue commemorative banknotes. The competence to decide on the denominations and specifications of banknotes denominated in national currency remains at the national level as long as the Czech Republic is a Member State with a derogation in accordance with Article 140(1) of the Treaty. As and when the Czech Republic's derogation will be abrogated in accordance with Article 140(2) of the Treaty, this competence will be transferred to the ECB Governing Council. The existing Decision of the ECB of 19 April 2013 on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes (ECB/2013/10)¹⁸ does not refer to the issuance of commemorative euro banknotes, thus reflecting that no such notes may currently be issued by Eurosystem central banks. In addition, the potential issuance of commemorative banknotes of very high value could thwart efforts to combat money

15 Article 1a of the Law on ČNB.

16 Paragraph 4 of Opinion CON/1998/35 and paragraph 4 of Opinion CON/1999/20.

17 Other than the insertion of a footnote reference to Article 123(2) of the Treaty.

18 OJ L 118, 30.4.2013, p. 37.

laundering and terrorism financing, taking into account concerns that such banknotes could facilitate illicit activities.

- 3.6 Finally, the ECB welcomes the clarifying amendments in particular in the area of statistics and reporting, and the proposed inclusion of citations to relevant Union regulations on reporting and the sharing of confidential statistical information¹⁹. These amendments are mainly aimed at dispelling any doubt that the relevant provisions of the Law on ČNB are in line with Union regulations. As regards Article 43b of the Law on ČNB, consistent with their approach to cite relevant provisions of Union legal acts in footnotes, the legislative authorities are invited to add a footnote reference to the relevant provision of Council Regulation (EC) No 2533/98²⁰ from which the obligation of cooperation between the members of the ESCB and the European Statistical System derives.

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

Done at Frankfurt am Main, 15 December 2016.

[signed]

The President of the ECB

Mario DRAGHI

¹⁹ Citations are added to Articles 41, 42 and 43f of the Law on ČNB.

²⁰ Article 2a of Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank (OJ L 318, 27.11.1998, p. 8).