



EUROPEAN CENTRAL BANK

EUROSYSTEM

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OPINION OF THE EUROPEAN CENTRAL BANK

of 21 August 2017

on the designation of the Central Bank of Cyprus as the information authority and inclusion of relevant exception to bank secrecy requirement

(CON/2017/32)

Introduction and legal basis

On 31 July 2017 the European Central Bank (ECB) received a request from the Ministry of Justice and Public Order of the Republic of Cyprus for an opinion on: (a) a draft law amending the Law on the Central Bank of Cyprus (hereinafter the 'first draft law'); and (b) a draft law amending the Law on the business of credit institutions (hereinafter the 'second draft law') (hereinafter, collectively, the 'draft laws').

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 second and third indents of Article 2(1) of Council Decision 98/415/EC¹, as the draft laws relate to means of payment and the Central Bank of Cyprus (CBC). 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 Article 14(5) of Regulation (EU) No 655/2014 of the European Parliament and of the Council (hereinafter the 'Regulation')² into Cypriot law. Article 14(4) of the Regulation provides that in order to obtain the account information referred to in paragraph 1 of that Article, the information authority in the Member State of enforcement shall use one of the methods available in that Member State pursuant to paragraph 5 of Article 14. Article 14(5) lists these methods of obtaining information and the Member States are required to make at least one of these methods available in their national law. The first method requires all banks in the territory of a Member State to disclose, upon request by the information authority, whether the debtor holds an account with them.
- 1.2. The first draft law designates the CBC as the information authority for the purposes of the Regulation. The Regulation requires the Member States to designate the authority competent for the purposes of obtaining the necessary information on the debtor's account or accounts pursuant

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 Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (OJ L 189 27.6.2014, p. 59).

to Article 14³. The second draft law provides for an additional exception to bank secrecy provisions laid down in Article 29(2) of the Law on the business of credit institutions in order to allow credit institutions in Cyprus to provide the CBC with information when acting in its capacity as information authority. The draft laws therefore, when read together, transpose the first method of obtaining information found in paragraph (a) of Article 14(5) of the Regulation. As noted in the consultation request of the Ministry of Justice and Public Order of the Republic of Cyprus, the first draft law and second draft law are interconnected.

2. Observations

2.1. General observations

2.1.1. This opinion does not address whether the draft laws effectively implement into Cypriot law the provisions of the Regulation that require transposition into national law. The ECB only assesses those provisions of the draft laws that may have an impact on the role and tasks of the CBC as a central bank, national supervisory authority and member of the Eurosystem and the European System of Central Banks (ESCB).

2.1.2. As noted in paragraph 1.2, the draft laws confer new tasks on the CBC. The ECB underlines that, in the context of a proposed conferral of tasks on a national central bank (NCB) in the ESCB, it is necessary to assess such a conferral against the prohibition on monetary financing under Article 123 of the Treaty. For the purposes of that prohibition, Article 1(1)(b)(ii) of Council Regulation (EC) No 3603/93⁴ defines 'other type of credit facility', inter alia, as 'any financing of the public sector's obligations vis-à-vis third parties'.

As one of the objectives of the monetary financing prohibition, which may not be circumvented, is ensuring a sound budgetary policy of Member States⁵, the task of financing measures which are normally the responsibility of the Member States, and financed from their budgetary sources rather than by the NCBs, must not be entrusted to NCBs by law. In order to decide what constitutes a form of financing of the public sector's obligations vis-à-vis third parties, which can be translated as the provision of central bank financing outside the scope of the central bank tasks, an assessment of whether the task to be undertaken by an NCB is a central bank task or a government task, i.e. a task within the responsibility of the Member States, needs to be carried out on a case-by-case basis. In other words, sufficient safeguards must be in place to ensure that circumventions of the objective of the monetary financing prohibition of maintaining a sound budgetary policy of Member States do not take place.

2.1.3. As part of its discretion in the exercise of its duty, on the basis of Article 271(d) of the Treaty and Article 35.6 of the Statute of the European System of Central Banks and of the European Central

³ Article 50(1)(b) of the Regulation.

⁴ Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty (OJ L332, 31.12.1993, p. 1).

⁵ Article 123 of the Treaty also serves the objective of maintaining price stability and reinforces central bank independence.

Bank (hereinafter the 'Statute of the ESCB'), to ensure that NCBs honour the obligations laid down by the Treaty, the Governing Council has endorsed safeguards of that kind in the form of criteria for determining what may be seen as falling within the scope of a public sector's obligation within the meaning of Article 1(1)(b)(ii) of Regulation (EC) No 3603/93 or, in other words, what constitutes a government task as follows:

First, central bank tasks are in particular those tasks that are related to the tasks that have been conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB. These tasks are mainly defined in Article 127(2), (5) and (6) and Article 128(1) of the Treaty, as well as Article 22 and Article 25.1 of the Statute of the ESCB.

Second, as Article 14.4 of the Statute of the ESCB allows NCBs to perform 'other functions', new tasks, i.e. tasks that are not related to tasks that have been conferred upon the ECB and the NCBs, are not precluded per se. However, new tasks that are undertaken by an NCB and which are atypical of NCB tasks or which are clearly discharged on behalf of and in the exclusive interest of the government or of other public sector entities should be considered government tasks.

Third, an important criterion for qualifying a new task as atypical of an NCB task or as being clearly discharged on behalf of and in the exclusive interest of the government or other public sector entities is the impact of the task on the institutional, financial and personal independence of that NCB.

In particular, the following aspects should be taken into account:

- (a) whether the performance of the new task creates conflicts of interest with existing central bank tasks which are not adequately addressed and does not necessarily complement those existing central bank tasks. If a conflict of interest arises between existing and new tasks, sufficient safeguards to mitigate that conflict should be in place. The complementarity between a new task and the existing central bank tasks should not be interpreted broadly, so as to lead to the creation of an indefinite chain of ancillary tasks. Such complementarity should be examined also in relation to the financing of those tasks;
- (b) whether without new financial resources the performance of the new task is disproportionate to the NCB's financial or organisational capacity and may have a negative impact on the capacity to perform properly the existing central bank tasks;
- (c) whether the performance of the new task fits into the institutional set-up of the NCB in the light of central bank independence and accountability considerations;
- (d) whether the performance of the new task harbours substantial financial risks;
- (e) whether the performance of the new task exposes the members of the NCB decision-making bodies to political risks which are disproportionate and may also have an impact on their personal independence and, in particular, on the guarantee of term of office set out in Article 14.2 of the Statute of the ESCB.

2.2. *Specific observations*

On the basis of the criteria set out above, the following paragraphs assess whether the new tasks of the CBC are in line with the monetary financing prohibition.

2.2.1. *Tasks related to the tasks conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB*

The tasks of the CBC as the information authority designated to obtain account information upon a request made by a court with which an application for a preservation order has been made, and the subsequent transmission of such information to the relevant court for the purpose of facilitating the enforcement of debt recovery in civil and commercial cases, are neither among the tasks conferred upon the ESCB by Article 127(2), (5) and (6) and Article 128(1) of the Treaty, or Article 22 and Article 25.1 of the Statute of the ESCB⁶, nor are they related to such tasks⁷. The draft laws designate the CBC as the information authority for the purpose of facilitating the cross-border enforcement of claims. The preamble of the Regulation specifically states that its objective is to establish a Union procedure for a protective measure which enables a creditor to obtain a Preservation Order preventing the subsequent enforcement of the creditor's claim from being jeopardised through the transfer or withdrawal of funds held by the debtor in a bank account within the Union⁸. Furthermore, these new tasks do not have a prudential supervisory dimension, as they do not rely on information that the CBC collects in its capacity as supervisory authority. Against this backdrop, the conferral of these tasks on the CBC must be closely scrutinised to assess whether these tasks constitute government tasks and whether the related funding gives rise to monetary financing concerns.

2.2.2. *Tasks which are atypical of NCB tasks*

The designation of a competent authority as the information authority for the purposes of the Regulation is a new task for national authorities in the Union. No other Member State has so far designated its NCB as the information authority for the purposes of the Regulation. Most of the Member States have designated judicial officials, such as bailiffs⁹, the district courts or their president¹⁰, or other officials involved in the administration of justice, such as the Federal Office of Justice¹¹ or the Ministry of Justice¹². In this respect, the new tasks conferred upon the CBC by the draft laws can be regarded as atypical of a central bank.

2.2.3. *Tasks clearly discharged on behalf of and in the exclusive interest of the government*

As the role of the information authority is needed to overcome existing practical difficulties in obtaining information about the location of a debtor's bank account in a cross-border context¹³, the ECB understands that this role is, with regard to the draft laws, intended to alleviate the work

6 See paragraph 2.4.1 of Opinion CON/2017/19.

7 Similarly, the ECB considers that tasks 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. See, e.g., Opinions CON/2015/36 and CON/2015/46.

8 See Recital (47) of the Regulation.

9 e.g. in France and Belgium.

10 e.g. in Italy, Latvia and Czech Republic.

11 e.g. in Germany.

12 e.g. in Ireland, Bulgaria and Spain. More information is available on the European Commission's website at www.e-justice.europa.eu.

13 See recital 20 of the Regulation.

involved in the administration of justice, which is a government task¹⁴. The rules of the Regulation apply to pecuniary claims in civil and commercial matters in cross-border cases¹⁵, meaning cases in which the bank accounts to be preserved by the Preservation Order are maintained in a Member State other than the Member State of the court seised of the application for the Preservation Order pursuant to Article 6 thereof or the Member State in which the creditor is domiciled¹⁶. The fact that the CBC is the competent authority responsible for the authorisation and prudential supervision of credit institutions does not appear to be relevant to the new role conferred upon it by the first draft law as the supervisor is not expected to already possess, in the context of banking supervision tasks, the account information that is necessary under the Regulation and will thus need to contact the credit institutions established in Cyprus to obtain this information. The new task of the CBC of being the competent authority for the collection and transmission of account information does not seem to complement its existing tasks. Therefore, the new tasks conferred on the CBC can be considered as performed exclusively in the interest of the government.

2.2.4. Extent to which performance of the new task creates conflicts of interest with existing central bank tasks

Carrying out the new task conferred upon the CBC by the draft laws does not appear to create conflicts of interest with other central bank tasks performed by the CBC.

2.2.5. Extent to which performance of the new task is disproportionate to the financial or organisational capacity of the CBC

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. Furthermore, when allocating specific non-ESCB-related tasks to the NCBs, additional personnel and financial resources must also be allocated so that these tasks may be carried out in a manner that will not affect the NCBs' operational or financial capacity to perform their ESCB-related tasks¹⁷. It is noted that the Regulation provides that the fees charged by any authority or other body in the Member State of enforcement which is involved in providing account information pursuant to Article 14 thereof shall be determined on the basis of a scale of fees or other set of rules established in advance by each Member State and transparently setting out the applicable fees¹⁸. The first draft law, however, does not specify how the costs related to the collection and transmission of account information by the CBC are to be financed. The Cypriot authorities should in any case ensure that the CBC can avail itself of sufficient resources for the performance of the new duties relating to its role as the information authority under the first draft law, so that the capacity of the CBC to perform its ESCB-related tasks is not affected¹⁹.

¹⁴ See paragraph 2.4.3 of Opinion CON/2017/19.

¹⁵ See Article 2.1 of the Regulation.

¹⁶ See Article 3.1 of the Regulation.

¹⁷ See paragraphs 2.1 and 2.2 of Opinion CON/2011/30.

¹⁸ See Article 44 of the Regulation.

¹⁹ See paragraphs 2.1 and 2.2 of Opinion CON/2011/30.

2.2.6. Extent to which performance of the new task fits into the institutional set-up of the CBC, in the light of central bank independence and accountability considerations

The performance of the new tasks does not appear to be problematic from the perspective of the institutional set-up of the CBC, nor to raise accountability or personal and institutional independence concerns. Although the information requested by the CBC from credit institutions in its capacity as information authority under the draft laws is not relevant to the information-gathering conducted by the CBC as competent supervisory authority, the institutional set-up of the CBC appears to facilitate the performance of information exchange functions.

2.2.7. Extent to which the performance of tasks harbours substantial financial risks

Neither the first draft law, nor the Regulation, contain any specific provisions on the liability of the information authority for the performance of its tasks. This is in contrast with existing legal frameworks assigning specific tasks to the CBC, such as the Law on the business of credit institutions, which excludes the liability of the CBC, and the liability of any director or officer of the CBC, unless it is proven that any act or omission in the discharge of their relevant functions and responsibilities was done in bad faith or was the result of gross negligence²⁰. Along the same lines, Article 47A of the Law on the Central Bank of Cyprus regulates liability with regard to the task of macroprudential oversight. Given that liability issues could give rise to financial risks for the CBC, the ECB invites the consulting authority to consider introducing a provision on the liability of the CBC in relation to the tasks undertaken by the CBC in carrying out its role as the information authority for the purposes of the Regulation.

2.2.8. Extent to which performance of the new task exposes members of the decision-making bodies of the CBC to disproportionate political risks and impacts on their personal independence

The performance of the tasks conferred under the draft laws does not appear to be exposing the decision-making bodies of the CBC to any disproportionate political risk or to impact their personal independence.

2.2.9. Conclusion

The ECB considers that the new tasks conferred on the CBC under the draft laws constitute government tasks for the purposes of the monetary financing prohibition. These new tasks are not related to those conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB, are atypical for a central bank as the role of information authority in other Member States has been assigned to representatives from the judicial system or ministries of justice, and are performed in the exclusive interest of the government as they are intended to alleviate the work involved in the administration of justice. The ECB strongly recommends that further consideration should be given to the designation of the CBC as the information authority for the purposes of the Regulation. In

²⁰ See Article 32 of the Business of Credit Institutions Law of 1997 (66(I)/1997) as amended.

any case, CBC's liability should be properly regulated and the CBC should be fully and adequately reimbursed for any costs incurred in relation to the performance of its new tasks in order to ensure compliance with the prohibition of monetary financing.

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

Done at Frankfurt am Main, 21 August 2017.

[signed]

The President of the ECB

Mario DRAGHI