



OPINION OF THE EUROPEAN CENTRAL BANK

of 31 May 2012

on the Law on Česká národní banka

(CON/2012/44)

Introduction and legal basis

On 26 March 2012, the European Central Bank (ECB) received a request from the Czech Ministry of Finance for an opinion on a draft law amending Law No 6/1993 Coll. on Česká národní banka and other related laws (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 (TFEU) 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 provisions¹, as the draft law relates to Česká národní banka (CNB). 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

The draft law is primarily aimed at addressing certain issues identified by the ECB and the European Commission in their Convergence Reports² in relation to Law No 6/1993 Coll. on Česká národní banka (hereinafter the 'Law on CNB'). To this end, amendments are made in particular to the provisions concerning the grounds for dismissal of the Governor and other members of the Bank Board, the confidentiality obligation and monetary financing prohibition. The draft law is also aimed at strengthening CNB's mandate as an institution responsible for ensuring financial stability and the safe functioning of the Czech financial system. It also specifies that one of CNB's tasks in this context is to set macro-prudential policy. Other proposed changes include: (a) more detailed and extended legal regulation of reporting and statistics, based on Union legislation; (b) legal clarification concerning the management of CNB's assets, including foreign reserves; (c) further specification of CNB's powers as regards oversight of payment and settlement systems; (d) repeal of CNB's power to issue provisions, a special regulatory tool to be replaced by decrees or CNB's communications; (e) necessary adjustments to the provisions concerning administrative offences and administrative proceedings; and (f) abolition of the Financial Market Committee as an advisory body to the Bank Board. In addition, several changes are

¹ OJ L 189, 3.7.1998, p. 42.

² See, for example, the ECB's Convergence Report May 2010.

made to the internal organisation of the Law on CNB with a view to clarifying issues relating to its application and structure. The draft law does not include any changes necessary for the legal integration of CNB into the Eurosystem.

2. Central bank independence

2.1 General considerations

Pursuant to Article 131 TFEU, each Member State must ensure that its national legislation is compatible with the Treaties and the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the ‘Statute of the ESCB’). Adaptation of national legislation may be achieved by referring to the Treaties and the Statute of the ESCB, by incorporating provisions thereof and referring to their provenance, by deleting any incompatibility with the Treaties and the Statute of the ESCB or by a combination of these methods³. In this context, the ECB notes that the amended Article 6(12) of the Law on CNB, which aims to mirror Article 14.2 of the Statute of the ESCB, only refers to infringements of the TFEU, while under Article 14.2 of the Statute of the ESCB, a decision to relieve a Governor from office may be referred to the Court of Justice of the European Union on the grounds of infringement not only of the TFEU, but of both Treaties (including their annexes and protocols). Similarly, the amended Article 9 of the Law on CNB, which aims to mirror the provisions of Article 130 TFEU, refers only to tasks and duties conferred by the TFEU and the Statute of the ESCB, while pursuant to Article 130 TFEU the principle of central bank independence applies to tasks and duties conferred upon central banks by both the Treaties and the Statute of the ESCB, thus including the Treaty on European Union. Consequently, the ECB recommends adapting Article 6(12) and Article 9 of the Law on CNB for the sake of consistency.

2.2 Functional independence

In line with Article 127(1) TFEU, the secondary objective of CNB ‘to ensure financial stability and the safe and sound operation of the financial system in the Czech Republic’⁴ should be stated to be without prejudice to the CNB’s primary objective to maintain price stability.

2.3 Institutional independence

The ECB notes that the draft law does not remove the existing incompatibilities of the Law on CNB in the area of institutional independence⁵. In particular, Article 3 of the Law on CNB obliges CNB to submit a report on monetary developments to the Chamber of Deputies at least twice a year for review. Upon the Chamber of Deputies’ resolution, CNB must submit an extraordinary report to be prepared pursuant to such resolution. The Chamber of Deputies has the power to acknowledge the report or ask for a revised report; such revised report must comply with the Chamber of

³ See the ECB’s Convergence Report May 2012, p. 23.

⁴ Amended Article 2(1) of the Law on CNB.

⁵ See the ECB’s Convergence Report May 2012, pp. 302 to 303.

Deputies' requirements. These parliamentary powers could potentially breach the prohibition on giving instructions to national central banks (NCBs) pursuant to Article 130 TFEU and Article 7 of the Statute of the ESCB. In addition, Article 47(5) of the Law on CNB requires CNB to submit a revised report if the Chamber of Deputies rejects its annual financial report. This revised report must comply with the Chamber of Deputies' requirements. Such parliamentary powers breach the prohibition on approving, annulling or deferring decisions. Article 3 and Article 47(5) of the Law on CNB are therefore incompatible with central bank independence and should be adapted accordingly.

Under amended Article 9(1) of the Law on CNB, when carrying out CNB's primary objective and when exercising the powers and carrying out the tasks and duties conferred upon them by the TFEU and the Statute of the ESCB, CNB, the Bank Board and any member of the Bank Board are prohibited from seeking or taking instructions from the President of the Republic, from Parliament, from the Government, from administrative authorities of the Czech Republic, from the bodies, institutions or other entities of the Union, from Member State governments or from any other body. Amended Article 9(1) does not prohibit the Government from seeking to influence the members of CNB's decision-making bodies in situations where this may have an impact on CNB's fulfilment of its ESCB-related tasks. In this respect the Law on CNB needs to be adapted to be fully consistent with Article 130 TFEU and Article 7 of the Statute of the ESCB.

2.4 *Personal independence*

Article 14.2 of the Statute of the ESCB stipulates, *inter alia*, that NCB Governors who have been dismissed from office or the Governing Council may refer such a decision to the Court of Justice on grounds of infringement of the Treaties or of any rule of law relating to their application. As regards judicial review by the Court of Justice, national legislation should either refer to the Statute of the ESCB or remain silent on the right to refer such decision to the Court of Justice (as Article 14.2 of the Statute of the ESCB is directly applicable)⁶. Amended Article 6(12) of the Law on CNB does not apply either of the two approaches and is not in line with Article 14.2 of the Statute of the ESCB, i.e. the date from which the Governor may challenge the decision of dismissal. In addition, it is not necessary to transpose the right of the ECB to refer a decision of dismissal to the Court of Justice into the Law on CNB since this right stems directly from Article 14.2 of the Statute of the ESCB.

As regards the members of the Board other than the Governor, as noted in the ECB's Convergence Reports⁷, the draft law does not specifically provide for the right of national courts to review a decision to dismiss any member, other than the Governor, of the CNB's Bank Board who is involved in the performance of ESCB-related tasks. Although it is understood that this right is available under the general law, providing specifically for such a right of review could increase legal certainty.

⁶ See, for example, the ECB's Convergence Report May 2012, p. 29.

⁷ See, for example, the ECB's Convergence Report May 2012, p. 304.

2.5 *Financial independence*

The ECB refers to its 2012 Convergence Report⁸ and the negative capital situation of CNB for a prolonged period of time.

3. **Monetary financing prohibition**

- 3.1 The ECB understands that new Article 34a of the Law on CNB aims at addressing defects highlighted in the ECB's Convergence Report in relation to the prohibition on monetary financing. The ECB therefore welcomes the proposed changes. However, the ECB notes that instead of providing for an exception to the monetary financing prohibition in favour of publicly owned credit institutions in the context of the supply of reserves, new Article 34a(2) provides for such an exception with reference to 'banks, foreign banks and credit unions'. As noted in the ECB's Convergence Report⁹, in general, it is unnecessary to transpose Article 123 TFEU, supplemented by 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 Treaty¹⁰, into national legislation as they are both directly applicable. If, however, national legislative provisions mirror these provisions, they may not narrow the scope of application of the monetary financing prohibition or extend the exemptions available under Union law. In this regard, the ECB understands that sectoral laws, i.e. the Law on banks and the Law on credit unions¹¹ define that banks, foreign banks and credit unions are covered by the definition of credit institutions¹². However, the respective national legislative provisions should include an explicit reference to their provenance¹³. New Article 34a(2) of the Law on CNB should therefore include an explicit reference to Article 123(2) TFEU.
- 3.2 Article 28 of the Law on CNB provides that CNB may purchase from banks or sell to them government bonds or other securities underwritten by the Government. The ECB notes that while secondary market purchases of debt instruments from the public sector are, in principle, allowed, Council Regulation (EC) 3603/93 clarifies in recital 7 that purchases made on the secondary market must not be used to circumvent the objective of Article 123 TFEU. In order to ensure compliance with the monetary financing prohibition it should therefore be ensured that, when applying Article 28, such purchases remain fully consistent with the objectives of Article 123 TFEU, namely: (a) the primary objective of price stability, (b) central bank independence, and (c) fiscal discipline.

⁸ See the ECB's Convergence Report May 2012, p. 304.

⁹ See the ECB's Convergence Report May 2012, p. 36.

¹⁰ OJ L OJ L 332, 31.12.1993, p. 1.

¹¹ Law No 21/1992 Coll. on banks and Law No 87/1995 Coll. on credit unions.

¹² Article 4(1) of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institution (OJ L 177, 30.6.2006, p. 1) defines a credit institution as 'an undertaking the business of which is to receive deposits or other repayable funds from the public and to grant credits for its own account'.

¹³ See the ECB's Convergence Report May 2012, p. 23.

- 3.3 Amended Article 30 of the Law on CNB provides that CNB keeps accounts in accordance with the budgetary rules, without further details. As noted in the ECB's Convergence Report¹⁴, national legislation that enables an NCB to hold government deposits and to service government accounts does not raise concerns about the compliance with the monetary financing prohibition as long as such provisions do not enable the extension of credit, including overnight overdrafts, and that deposits or current account balances are not remunerated above market rates.
- 3.4 The ECB understands that Article 31 and new Article 31a of the Law on CNB refer to activities to be carried out by CNB as an agent of the State. Taking into account the express recognition in Article 21.2 of the Statute of the ESCB of the provision of fiscal agency services as a legitimate function traditionally performed by central banks, the ECB notes that the provision by central banks of fiscal agency services¹⁵ complies with the monetary financing prohibition, provided that such services remain within the scope of the fiscal agency function and do not constitute central bank financing of public sector obligations vis-à-vis third parties¹⁶ or central bank crediting of the public sector outside the narrowly defined exceptions specified in Regulation (EC) No 3603/93¹⁷. The ECB considers that the provision without remuneration by CNB of fiscal agent services provided for under new Article 31a of the Law on CNB does not raise monetary financing concerns, provided they are core fiscal agent services. As regards possible CNB activities pursuant to Article 31 of the Law on CNB, relating to the management, redemption and transfer of government bonds, the payment of interest on such bonds and other activities as required, the law provides for remuneration of CNB to be agreed with the Ministry of Finance. In order to ensure full compliance with the monetary financing prohibition under Article 123 TFEU, it needs to be ensured that such activities do not involve any financing by CNB, even by means of bridge financing. The ECB understands that under the arrangements currently in place, the government bond redemptions and coupon redemptions are financed from government account balances and that the CNB does not provide any form of financing with the exception of intraday financing, which is in line with the monetary financing prohibition.

¹⁴ See the ECB's Convergence Report May 2012, p. 39.

¹⁵ See the ECB's Convergence Report May 2012, p. 38, stating that 'The purpose of Article 21.2 of the Statute is, following transfer of the monetary policy competence to the Eurosystem, to enable NCBs to continue to provide the fiscal agent service traditionally provided by central banks to governments and other public entities without automatically breaching the monetary financing prohibition.' See also, e.g., Opinion CON/2009/23. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

¹⁶ This is one of the prohibited forms of monetary financing; see Article 1(1)(b)(ii) of Regulation (EC) No 3603/93 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty. See the ECB's Convergence Report May 2008, p. 233, which states with reference to the provision by CNB of administrative and financial support to the Financial Arbitrator, an administrative body entirely independent from the central bank, 'constitutes a form of central bank financing of the public sector's obligations'.

¹⁷ See Article 4 (non-extendable intra-day credits), Article 5 (crediting, under specified conditions, the public sector's account with cheques issued by third parties) and Article 6 (holding, within specified limits, coins issued by and credited to the public sector) of Regulation (EC) No 3603/93.

4. Legal integration of CNB into the Eurosystem

The legal integration of NCBs into the Eurosystem requires that national legislation be adapted to allow for the performance of Eurosystem-related tasks and compliance with the ECB's decisions once the Member State concerned has adopted the euro. The ECB draws the consulting authority's attention to the fact that, to comply with Article 131 TFEU, relevant Czech legislation had to be adjusted by the date of the Czech Republic's accession to the Union, i.e. 1 May 2004. Such adjustments necessary to ensure full integration of CNB into the Eurosystem need only enter into force on the date the Czech Republic adopts the euro. The ECB's Convergence Report 2010 identifies several provisions of the Law on CNB and Law No 2/1969 Coll.¹⁸ that need to be adapted to ensure compatibility with the TFEU and the Statute of the ESCB in respect of Eurosystem-related tasks.

An NCB's secondary objectives must be consistent and not interfere with its obligation to support the Union's general economic policies with a view to contributing to the achievement of the objectives laid down in Article 3 of the Treaty on the European Union, which is itself an objective expressed to be without prejudice to maintaining price stability¹⁹. Therefore, amended Article 2(1) of the Law on CNB should make it clear that the objective in the area of financial stability is subordinate to the secondary objective of the ESCB²⁰, which is provided in the last sentence of amended Article 2(1).

5. CNB's role in macro-prudential supervision

- 5.1 The ECB welcomes the proposed amendments to the Law on CNB which entrust CNB with specific tasks in the area of macro-prudential policy. The ECB considers that the ECB and NCBs should play a leading role in macro-prudential oversight given their expertise and existing responsibilities in the area of financial stability, as referred to in the draft law. Against this background, the ECB would like to draw attention to the Recommendation of the European Systemic Risk Board of 22 December 2011 on the macro-prudential mandate of national authorities²¹ and more specifically to the following aspects of performance by CNB of its macro-prudential oversight tasks.
- 5.2 First, in order for CNB to undertake its tasks, the draft law entitles CNB to require necessary information and documents in the form of statistical statements and statements for supervisory purposes and additional information or reports (hereinafter the 'statements') from listed reporting

¹⁸ Law No 2/1969 Coll, establishing ministries and other central administrative bodies of the Czech Republic.

¹⁹ See Opinions CON/2010/30 and CON/2010/48.

²⁰ See Articles 127(1) and 282(2) TFEU.

²¹ See Recommendation ESRB/2011/3 of the European Systemic Risk Board of 22 December 2011 on the macro-prudential mandate of national authorities (OJ C 41, 14.2.2012, p. 1). See also recital 24 of Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing the European Systemic Risk Board (OJ L 331, 15.12.2010, p. 1).

entities.²² Under the draft law, CNB may use these statements to carry out any of its tasks, unless provided otherwise in a separate legislative act.²³ The ECB understands that, for the benefit of its macro-prudential oversight tasks, CNB would thus be authorised to require and obtain in a timely fashion all data and information collected from reporting entities such as all financial corporations and other persons who have the information in their disposal, as referred to in new Article 41 of the Law on CNB, including information other than that currently collected for the purpose of supervising financial institutions²⁴.

- 5.3. Second, the Law on CNB, as amended by the draft law, provides that CNB ‘shall cooperate with the relevant state authorities in setting macro-prudential policy’²⁵ that it ‘shall be part of the European System of Financial Supervision and cooperate with the European Systemic Risk Board and with European Supervisory Authorities’²⁶ and further that it ‘shall cooperate and negotiate agreements within the scope of its field of competence with the central banks of other countries, with foreign authorities engaged in financial market supervision, and with international organisations engaged in financial market supervision’²⁷. The ECB is of the view that these provisions may in addition specifically provide that the macro-prudential authority is entitled to exchange information with other central banks, macro-prudential authorities and with the ESRB, in particular on actions taken to address systemic risks at national level.

6. Statistics and reporting

- 6.1 The ECB takes note of the detailed and extended legal regulation of reporting and statistics, which is based on Union legislation and introduces a confidentiality regime for statistical information.
- 6.2 Article 5 of the Statute of the ESCB and Regulation (EC) No 2533/98²⁸ provide the legal basis for the ECB, assisted by NCBs, to collect the statistical information necessary for the performance of ESCB tasks. Although the draft law refers to Regulation (EC) No 2533/98, certain provisions are not fully in line with Article 8(4) of Regulation (EC) No 2533/98. Under Article 8(4), the transmission of confidential statistical information collected pursuant to Article 5 of the Statute of the ESCB ‘shall take place (a) to the extent and at the level of detail necessary for the performance of the tasks of the ESCB referred to in the Treaty; or (b) provided that such transmission is necessary for the efficient development, production or dissemination of statistics under Article 5 of the [Statute of the ESCB] or for increasing their quality’. New Article 43e and Article 43f(1)(a) and (c) of the Law on CNB limit the transmission of confidential statistical information that may be

²² See new Article 41(1) of the Law on CNB.

²³ See new Article 41(2) of the Law on CNB.

²⁴ See also recommendation C(2) of Recommendation ESRB/2011/3.

²⁵ See new Article 2(2)(e) of the Law on CNB.

²⁶ See Article 2a of the Law on CNB.

²⁷ See new Article 2 (3) of the Law on CNB.

²⁸ 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).

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provided by CNB to the ESCB to statistical purposes. In this respect, the draft law should be amended to allow the transmission of confidential statistical information also in accordance with Article 8(4)(a) of Regulation (EC) No 2533/98.

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

Done at Frankfurt am Main, 31 May 2012.

[signed]

The Vice-President of the ECB

Vitor CONSTÂNCIO