OPINION OF THE EUROPEAN CENTRAL BANK

of 28 June 2016

on extending access to the central register of bank accounts

(CON/2016/35)

Introduction and legal basis

On 1 June 2016 the European Central Bank (ECB) received a request from the Belgian Ministry of Finance for an opinion on a draft law extending access to the central register of bank accounts (hereinafter the 'draft law') to certain tax authorities, various departments of the Ministry of Justice and public notaries.

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[1], as the draft law relates to the Nationale Bank van België/Banque Nationale de Belgique (NBB). 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 extend the list of persons authorised to access the central register of bank accounts, with a view to combating not only tax fraud and money laundering but also the financing of terrorism and financial crime in general. This central register, which has been operated by the NBB since 2011[2], consolidates data on bank accounts held by clients of financial institutions established in Belgium and on other financial operations (such as investment, leasing, mortgage and credit agreements). The NBB exercises formal control over the structure of the data but it has no control over the correctness and completeness of such data, which are provided by the financial institutions directly.

1.2 Under the current legal framework, only a limited number of specifically nominated high-ranking tax authority civil servants appointed by the Ministry of Finance have access to the central register, for the purpose of identifying possible cases of tax fraud. Such access is provided by the NBB in the form of an extranet portal, which has been specifically designed for use by the Ministry of Finance. The information queries posted by the authorised officials of the Ministry of Finance are manually processed by NBB staff, who thereafter have to upload the relevant data to the portal. The costs

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 In accordance with the Law of 14 April 2011 and the Royal Decree of 17 July 2013.

incurred by the NBB for the set-up, development, operation and maintenance of the central register are invoiced quarterly, in accordance with the agreement concluded between the NBB and the Ministry of Finance on the basis of Article 20 of the Royal Decree of 17 July 2013.

1.3 The draft law extends access to the central register to (a) high-ranking officials in charge of, in the event of fraud, value added tax and customs and excise duties; (b) high ranking officials in charge of collecting value added tax, customs and excise duties, non-tax debts, registration, mortgage and court registry rights, inheritance tax, criminal fines, confiscated sums of money and court costs; (c) public prosecutors in charge of investigations relating to tax fraud, money laundering and the financing of terrorism; (d) examining magistrates and the criminal courts; (e) the unit for the prevention of the use of the financial system for the purpose of money laundering and the financing of terrorism; and (f) notaries for the purpose of issuing inheritance declarations.

1.4 The draft law does not specify in which form access to the central register is to be provided to the persons granted access under the draft law.

1.5 The draft law is expected to enter into force shortly in order to enable immediate availability of the data contained in the central register to the persons mentioned in paragraph 1.3.

2. General observations

2.1 The ECB takes note of the fact that the draft law aims to combat tax fraud and prevent the use of the financial system for the purpose of money laundering and terrorist financing.

2.2 The ECB understands that the draft law amends the national legal framework governing the establishment and operation of the central register of bank accounts, which consists of the Law of 14 April 2011 and the Royal Decree of 17 July 2013. The ECB was consulted on these legal acts prior to their adoption and issued opinions on them[3]. In its opinions, the ECB noted, in particular, that the new task entrusted to the NBB is not a central banking task, nor does it facilitate the performance of such a task. Rather, the ECB understood that the new task entrusted to the NBB is linked to a State task, i.e. the collection of taxes by the State and the reinforcement of the fight against tax fraud, and is performed in the interest of the State. The ECB concluded, therefore, that if the NBB is to be entrusted with such a task, it needs to be adequately remunerated in advance, to ensure compliance with with the monetary financing prohibition. In addition, the financing of this new task entrusted to the NBB must comply with the principle of financial independence, under which a national central bank must have sufficient means not only to perform its ESCB-related tasks, but also its national tasks, e.g. financing its administration and own operations[4].

2.3 The ECB would like to recall that when new tasks are conferred on a member of the European System of Central Banks (ESCB), it is necessary to assess these tasks against the prohibition of monetary financing under Article 123 of the Treaty. For this purpose, the ECB has developed guidance in the form of general and specific considerations on the basis of which the ECB may

3 See Opinions CON/2011/98 and CON/2011/30. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

4 See paragraphs 2.1 and 2.2 of Opinion CON/2011/30 and paragraph 2 of Opinion CON/2011/98.

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 prohibition[5]. This guidance is set out in paragraph 2.4. The concrete assessment of whether the NBB's tasks in connection with the central register and the extension of access proposed under the draft law are to be considered central banking tasks or government tasks is then undertaken in paragraph 3 of this opinion.

2.4 *Guidance on the assessment of the monetary financing prohibition*

2.4.1 First, the systemic 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, the 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.

2.4.2 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 bank 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. Any final assessment on the qualification of a task given to an NCB as either falling within the scope of a central banking ask or a government task will be guided by the

5 See Opinion CON/2015/22.

objective of ensuring the consistent application of the monetary financing prohibition within the Eurosystem and the ESCB.

3. Specific observations

3.1 *Extended access to the central register*

The ECB notes that the draft law makes the NBB responsible for granting access to the central register of bank accounts to the persons mentioned in paragraph 1.3. The ECB understands that by extending access to the central register the users' group will be considerably broadened and will thus become more heterogeneous. The NBB may need to revisit its communication channels with the users, since these were only developed to accommodate a small number of requests entered by a few high-ranking Ministry of Finance officials. The substance of the task initially conferred on the NBB would be significantly expanded by the provisions of the draft law and should therefore be reassessed in the light of the proposed extension of access against the prohibition of monetary financing.

3.2 *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 a financial perspective. In the two previous ECB opinions submitted to the Belgian authorities on the legal framework governing the central register of bank accounts[6], the ECB insisted that the NBB be adequately remunerated for all costs incurred when performing activities related to its tasks in connection with the central register, be it through remuneration provided in advance or through full and prompt reimbursement of costs on market terms. The Royal Decree of 17 July 2013 implementing Article 322, section 3 of the Revenue Code had met these concerns by requiring that all costs incurred by the NBB for the establishment, development, operation and maintenance of the central register be allocated quarterly to the Ministry of Finance, in accordance with the agreement entered into with the NBB. Currently the costs incurred in connection with the central register can be easily tracked and invoiced to the Ministry of Finance. However, full coverage of the costs associated with the task of extending access to the central register to the persons mentioned in paragraph 1.3, most of whom operate within the remit of the Ministry of Justice, cannot be ensured. The existing financial arrangements only cover the costs of the requests filed by persons falling within the remit of the Ministry of Finance and thus the reimbursement of all costs incurred by the NBB when performing the significantly expanded task cannot be ensured.

The draft law contains no provisions on procedures for monitoring, allocating and invoicing the supplementary costs incurred by NBB in granting the extended access to the central register. The ECB understands that the Belgian legislator intends, at a later stage, to adopt a standalone law that would govern all relevant aspects of the central register, including its technical infrastructure and the financing mechanisms. However, the ECB notes that the expected significant increase in the

6 See paragraph 2 of Opinions CON/2011/30 and CON/2011/98.

number of requests for access may, if the new access requests are not received in an automated manner or via electronic means, necessitate the mobilisation of substantial NBB staff resources and place a disproportionate burden on the NBB's organisational capacity. This may negatively impact the NBB's capacity to properly perform its existing central banking tasks. The ECB therefore urges the Belgian legislator to ensure that the entry into force of the draft law be accompanied by the implementation of a corresponding cost recovery mechanism, in order to safeguard the financial independence of the NBB and dispel the monetary financing concerns associated with carrying out a government task.

3.3 *Discharge of tasks on behalf and in exclusive interest of Government*

The ECB has previously opined that tasks entrusted to an ESCB member relating to the establishment of a central register of bank accounts are not central bank tasks nor do they facilitate the enforcement of such tasks[7]. The ECB considers this task to be clearly a government task since its purpose is to combat tax evasion, money laundering and the financing of terrorism. It thus cannot be regarded in any respect as a central bank task.

3.4 *Complementarity of tasks with existing NBB tasks and extent to which conflicts of interest with existing NBB tasks are addressed*

Under the Royal Decree of 17 July 2013, the reasons for entrusting the NBB with the task of operating the central register are that the NBB is capable of handling sensitive bank account data, the NBB is neutral and independent of the other institutions involved in tax collection and the NBB has experience in centralising sensitive financial data. Notwithstanding these reasons, the ECB has analysed if the operation of a central register with such broad access is complementary to the NBB's existing tasks. The ECB notes that the draft law is only extending the scope of persons having access to the existing register and that the central register has been placed into a separate department, with access to the database being exclusively granted by the NBB Board to certain staff. This institutional set-up should help to alleviate concerns regarding potential conflicts of interest.

3.5 *Extent to which the performance of tasks is aligned with institutional set-up of NCB*

In view of the fact that operating a central register of bank accounts cannot be regarded as a central bank task, this might raise concerns as to how such a task would fit into the institutional set-up of the NBB. However, it is acknowledged that locating the central register in a separate department adequately ensures that the data obtained in this context are not accessible to other NBB departments carrying out ESCB or other national tasks.

3.6 *Extent to which the performance of tasks entails substantial financial risks*

As emphasised in its previous opinion[8], the liability of the NBB in relation to the operation of the central register is explicitly limited to cases of misconduct or wilful negligence, on account of the extremely limited control that the NBB has over the correctness and completeness of the data contained in the central register. This limitation of the NBB's liability should help to reduce the financial risks associated with the performance of the extension of access to the exisiting register to a broader range of persons.

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7 See paragraph 3.1.3 of Opinion CON/2015/46.

8 Paragraph 1.2 of Opinion CON/2011/98.

3.7 *Extent to which the performance of tasks exposes members of NBB's Board to disproportionate political risks or could impact their personal independence*

The limitation of the NBB's liability in relation to the operation of the central register is without prejudice to the Law of 8 December 1992 on the protection of privacy in relation to the processing of personal data, which applies to NBB as the central register is deemed to be a 'filing system' within the meaning of the said law. This law requires, in particular, that the NBB takes any appropriate technical and organisational measures necessary to protect personal data from unauthorised access and processing. In view of the increased number of persons authorised to access the central register, the NBB's compliance with this obligation will inevitably become more complex. It cannot be excluded that the NBB's Board could be exposed to reputational risks, should the data be accessed by a non-authorised applicant or otherwise be publicly disclosed. The fact that the central register will contain sensitive information could place NBB's Board members in a difficult position should this information enter into the public domain, potentially entailing a negative impact on their personal independence.

3.8 *Conclusion*

The ECB is concerned by the absence in the draft law of clear financial arrangements regarding the full recovery of the costs to be incurred by the NBB in performing its tasks concerning the central register of bank accounts. With a view to safeguarding the financial independence of the NBB and dispelling the monetary financing concerns associated with carrying out a government task, the ECB urges the Belgian legislator to ensure that the entry into force of the draft law be accompanied by procedures for monitoring, allocating and invoicing all costs associated with granting extended access to the central register.

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

Done at Frankfurt am Main, 28 June 2016.

[signed]

The President of the ECB

Mario DRAGHI