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EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 18 June 2009

on the circulation of banknotes and coins

(CON/2009/52)

Introduction and legal basis

On 27 March 2009 the European Central Bank (ECB) received a request from Česká národní banka (CNB) for an opinion on a draft law on the circulation of banknotes and coins and on the amendment of Law No 6/1993 Coll. on Česká národní banka (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and the first and second indents 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 provisions[1], as the draft law relates to currency matters and means of payment. 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 regulates legal relationships in the area of the circulation of banknotes and coins and their protection against counterfeiting and also implements certain directly applicable regulations of the European Communities. While the main focus of the draft law is to regulate the circulation of national banknotes and coins, some of its provisions apply irrespective of the currency involved[2]. It lays down rules relating, *inter alia*, to the acceptance, exchange, processing, recycling and reproduction of banknotes and coins. CNB's powers are explicitly stipulated[3], including in relation to the registration and supervision of entities involved in the processing of national tender. The draft law also provides for sanctions on credit institutions and other entities for breaches of obligations imposed by the draft law or by a directly applicable Council regulation. CNB is empowered to regulate certain issues by means of decrees, which will be of a technical nature. It is envisaged that once it has been adopted, and subject to certain amendments, the draft law will continue to apply after the Czech Republic adopts the euro.

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1 OJ L 189, 3.7.1998, p. 42.

2 See, for example, Articles 7, 16 and 19 of the draft law.

3 Under Article 3(6) of the draft law, CNB will perform functions of the national counterfeit centre, the national analysis centre (NAC) and the coin national analysis centre (CNAC). Functions identical to those of the NAC and CNAC have historically been carried out by CNB based on its responsibilities in the area of banknotes and coins despite the absence of specific legislative provisions to this end.

2. General observations

2.1 While the Czech Republic is a Member State with a derogation within the meaning of Article 122 of the Treaty and the ECB requirements regarding the organisation of cash cycles in Member States that have adopted the euro currently do not apply to CNB, these requirements will become applicable to CNB once the Czech Republic adopts the euro and CNB becomes a fully integrated member of the Eurosystem.

2.2 Under Article 106 of the Treaty, the Governing Council of the ECB has the exclusive right to authorise the issue of banknotes within the Community, whereas the coins are issued by the Member States subject to the ECB's approval of the volume. Consequently, the Eurosystem's regulatory competence only concerns banknotes. Hence, with a view to national central banks (NCBs) joining the Eurosystem, the ECB consistently supports a clear separation between national rules relating to banknotes and rules relating to coins[4]. The ECB considers that the draft law would benefit from introducing such consistent internal separation. Should this not be feasible at the level of the draft law, the consulting authority should consider providing for such internal separation in the decrees to be issued by CNB pursuant to Article 21 of the draft law. This would facilitate the legal convergence of the Czech legislative framework, which is necessary for the Czech Republic to participate fully in economic and monetary union.

2.3 As a general comment, some of the draft law's provisions contain terminology and/or provide for concepts, such as 'anonymous and non-anonymous equipment' in Articles 11 and 12, which differ from those established within the Eurosystem. For reasons of clarity and legal certainty, particularly in view of the Czech Republic's future adoption of the euro, the ECB would invite the consulting authority to consider aligning such terminology and concepts with the approaches applied in the Eurosystem[5]. Furthermore the concept of 'tender damaged in a non-standard way' in Article 6(2) is not used by the Eurosystem. It should be noted in this context that unfit banknotes (e.g. those with holes or those that have been written on) and banknotes that have been stained by anti-theft devices are addressed together, which may lead to confusion.

3. Specific observations

3.1 *Scope of application of the obligation to withdraw suspicious banknotes and coins*

Article 7(1) of the draft law specifies entities obliged to seize suspicious banknotes and coins. These include CNB, credit institutions performing cash operations, processors of national tender[6], other legal entities, money exchangers and natural persons engaged in operating non-anonymous equipment. The ECB understands that Article 7 of the draft law also applies to euro banknotes and

4 See, for example, Opinions CON/2008/90, CON/2008/47, CON/2008/36 and CON/2007/28. All Opinions are available on the ECB's website at www.ecb.europa.eu.

5 See also paragraph 3.1 below.

6 Pursuant to Article 2(1)(g) of the draft law, a processor of national tender means a legal entity that processes national tender for other parties, registered by CNB.

coins[7]. In this context, the ECB points out that Article 6(1) of Council Regulation (EC) No 1338/2001 laying down measures necessary for the protection of the euro against counterfeiting[8] imposes an obligation on a number of entities to withdraw euro banknotes and coins from circulation where there is a sufficient reason to believe that they are counterfeit. By virtue of Regulation (EC) No 1339/2001[9], these rules also apply in Member States that have not yet adopted the euro, but are modified by Article 6(1a) of Council Regulation (EC) No 1338/2001. These entities include credit institutions, other payment service providers, and any other institutions engaged in the processing and distribution to the public of banknotes and coins, including: (i) establishments whose activity consists in exchanging banknotes and coins of different currencies, such as bureaux de change; (ii) transporters of funds; and (iii) other economic agents such as traders and casinos engaged on a secondary basis in the processing and distribution to the public of banknotes via automated teller machines. The ECB notes that insofar as Article 7(1) of the draft law also applies to euro banknotes and coins, it would be advisable for legal certainty reasons to fully align its wording with that of Article 6(1) and (1a) of Regulation (EC) No 1338/2001.

3.2 *Hidden charge for the acceptance of cash*

The ECB notes that under Article 9(4) of the draft law, 'CNB and credit institutions performing cash operations are entitled to require that a payer, when paying in cash or when depositing national tender onto an account, presents national tender sorted by nominal value or, depending on the quantity, packaged in the way stipulated by decree' and that they are 'entitled to charge a fee stipulated in advance if the payer presents national tender unsorted or unpackaged in the way stipulated by decree'.

The ECB understands the notion of legal tender to include the elements of mandatory acceptance **at full value** for the discharge of monetary debts. This is also laid down in Article 4 of the draft law, which stipulates that 'Česká národní banka and credit institutions performing cash operation shall accept national tender without restriction'. To the extent, however, the payer referred to in the above provision is required to *pay* a fee for enjoying the right of discharging his obligations in cash (especially if such payer is a consumer without the means to sort or package banknotes or coins), there is a hidden charge for the use of legal tender, which prejudices the use of cash vis-à-vis other payment instruments. In the context of cash services not necessarily involving discharge of monetary debts, attention is additionally drawn to the common Eurosystem fee policy for the cash transactions of professional clients at NCB counters[10] implemented from 1 March 2002, which defines different levels of services:

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7 According to the explanatory memorandum to the draft law, the definition of 'suspicious tender' includes, in addition to Czech banknotes and coins, banknotes and coins in other currencies, including the euro.

8 OJ L 181, 4.7.2001, p. 6. Regulation (EC) No 1338/2001 was recently amended by Council Regulation (EC) No 44/2009 (OJ L 17, 22.1.2009, p. 1).

9 OJ L 181, 4.7.2001, p. 11. Regulation (EC) No 1339/2001 was recently amended by Regulation (EC) No 45/2009 (OJ L 17, 22.1.2009, p. 4).

10 ECB Annual Report 2002, p. 134. Available on the ECB's website at www.ecb.europa.eu.

- free-of-charge: these are the basic services provided by all NCBs, taking into account their unique role in providing the economy with cash; and
- fee-based: these are additional services that NCBs may provide. A fee must be paid for these optional services, taking into account the fact that they may also be provided by commercial third parties.

In view of the future adoption by the Czech Republic of the euro, it is advisable to ensure that Czech legislation is compatible with the main principle of basic, free-of-charge cash services.

3.3 *The NAC's obligation to transmit new types of suspected counterfeit banknotes under Article 4(2) of Regulation (EC) No 1338/2001*

The ECB understands that functions of the NAC will be carried out by CNB (Article 3(6) of the draft law). In this context, the ECB would like to point out that Article 4(3) of Council Regulation (EC) No 1338/2001 and Article 1 of Regulation (EC) No 1339/2001 authorise the NAC to transmit as necessary to the ECB for examination or testing at least part of a batch of suspected counterfeit banknotes or coins being used or retained as evidence in criminal proceedings[11].

3.4 *Specific references to relevant Eurosystem rules*

3.4.1 Article 16 of the draft law provides that reproductions of national and foreign banknotes and coins or items similar to them may only be made under the conditions stipulated by decree or a directly applicable regulation of the European Communities. In this regard, CNB is invited to consider including a reference in the draft law or, as the case may be, in the implementing decree to be issued pursuant to Article 21(f) of the draft law to Decision ECB/2003/4 of 20 March 2003 on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes[12]. The ECB notes that there is such a reference in the currently applicable CNB Decree No 553/2006 Coll. of 30 November 2006 on the terms and conditions under which it is possible to reproduce banknotes, coins, cheques, securities and payment cards and to produce objects imitating them[13].

3.4.2 Under Article 9(1) of the draft law, CNB, credit institutions performing cash operations and processors of national tender are required to process national tender accepted from circulation in accordance with the standards for the processing of national tender stipulated by decree[14] before they recycle it. According to the explanatory memorandum to the draft law, it is envisaged that the above processing standards will be stipulated in a way similar to the standards laid down by the ECB in the 'Framework for the detection of counterfeits and fitness sorting by credit institutions and other professional cash handlers' (hereinafter the 'Banknote Recycling Framework')[15]. The ECB invites the consulting authority to consider including a reference to the Banknote Recycling

11 *See also* Recommendation ECB/2006/13 of 6 October 2006 on the adoption of certain measures to protect euro banknotes more effectively against counterfeiting (OJ C 257, 25.10.2006, p. 16).

12 OJ L 78, 25.3.2003, p. 16. The ECB understands from the explanatory memorandum to the draft law that conditions for reproducing euro banknotes laid down in Decision ECB/2003/4 will be implemented through a CNB decree issued under Article 21(f) of the draft law.

13 Available on CNB's website at www.cnb.cz.

14 See Article 21(e) of the draft law.

15 Document available on the ECB's website.

Framework in the draft law or, as the case may be, in the implementing decree to be issued pursuant to Article 21(e) of the draft law.

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

Done at Frankfurt am Main, 18 June 2009.

[signed]

The President of the ECB

Jean-Claude TRICHET