



EUROPEAN CENTRAL BANK

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OPINION OF THE EUROPEAN CENTRAL BANK

of 18 June 2020

on the appointment of the Central Bank of Ireland as registrar for registers of
beneficial ownership for certain financial entities

(CON/2020/18)

Introduction and legal basis

On 27 May 2020 the European Central Bank (ECB) received a request from the Irish Minister for Finance for an opinion on draft European Union (Modifications of Statutory Instrument No. 110 of 2019) (Registration of Beneficial Ownership of Certain Financial Vehicles) Regulations 2020 (hereinafter the 'draft regulations'). In addition, on 9 June 2020 the ECB received a further request for an opinion on a draft Investment Limited Partnerships (Amendment) Bill 2020 (hereinafter the 'draft law', and together with the draft regulations, 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 third indent of Article 2(1) of Council Decision 98/415/EC¹, as the draft laws relate to the Central Bank of Ireland (CBI). 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 regulations and laws

1.1 Draft regulations

The draft regulations provide, inter alia, for the establishment and maintenance of the Central Register of Beneficial Ownership of Irish Collective Asset-management Vehicles, Credit Unions and Unit Trusts (hereafter the 'Register') in Ireland. The draft regulations give further effect to Article 30 of Directive EU/2015/849² as amended by Article 1(15) of Directive EU/2018/843³, in order to facilitate the prevention, detection or investigation of money laundering or terrorist financing. The draft regulations require certain financial vehicles, including Irish collective asset management vehicles, unit trusts and credit unions, to register information on this central register in Ireland. The Register will co-exist alongside the existing Central Register of Beneficial Ownership

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 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

³ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (OJ L 156, 19.6.2018, p. 43).

of Companies and Industrial and Provident Societies, which is operated by the Irish Companies Registration Office, and in respect of which corporate and other legal entities incorporated in Ireland are required to obtain and hold adequate, accurate and current information in relation to their beneficial owners.⁴

- 1.2 The draft regulations facilitate the appointment by the Irish Minister for Finance as the registrar responsible for the establishment and maintenance of the Register.

1.3 *Draft law*

The draft law amends the Investment Limited Partnerships Act 1994, the Irish Collective Asset-management Vehicles Act 2015 and the Investment Funds, Companies and Miscellaneous Provisions Act 2005 and provides for related matters. The draft law proposes to establish central registers in Ireland which will be established and operated by the CBI and will be called the Central Register of Beneficial Ownership of Common Contractual Funds and Investment Limited Partnerships (together with the Register, the 'Registers').

1.4 *Key attributes of the Registers under the draft laws*

As registrar, the CBI will be required under the draft laws to enter the required information in the Registers and to keep the Registers in such form as the CBI considers appropriate. In the context of discrepancies, the CBI may make an entry into the Registers that specifies the particulars as regards the notice of discrepancies received from a relevant entity required to register.

- 1.5 As registrar, the CBI will be required under the draft laws to afford the maker of a request for inspection access, in a timely manner, to the Registers. While the Registers are available for public inspection, persons who have a right to inspect the Registers for specific information (i.e. unrestricted access) include specified entities, including members/officers of the *Garda Síochána* (Irish police), the Irish Finance Intelligence Unit, the Revenue Commissioners, the Criminal Assets Bureau, or a competent authority engaged in the prevention, detection or investigation of possible money laundering or terrorist financing, and do not include members of staff of the CBI, unless they are authorised and of a specified grade. The CBI will not alert any relevant entity to the fact that unrestricted access to the Registers has been afforded to any other entities. The CBI will also arrange for the connection of the Registers to registers in other Member States.

- 1.6 The draft laws provide that the Commission of the CBI will make regulations prescribing dedicated levies to be paid by entities that are required to register information on the Registers. The moneys received by the CBI by way of such levies will be used to defray the CBI's expenses associated with its functions under the draft laws. The CBI shall not provide any funds from its own resources other than the dedicated levies to defray the CBI's expenses incurred in the performance of its functions under the draft laws. Where in any year the CBI reasonably apprehends that it will be unable to defray all of its expenses arising in that year from moneys received by way of the dedicated levies, or where for any reason there is an insufficiency in any year of moneys available to the CBI to defray all of its expenses, the Irish Minister for Finance will, on written request of the CBI, advance to the CBI such sums as he or she thinks proper to enable the CBI to defray all of its

⁴ See European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 (S.I. No. 110 of 2019) (hereinafter the '2019 Regulations').

expenses. The advancement of these sums will be made on such terms as regard to repayment, interest and other matters as may be determined by the Minister after consulting the CBI. As soon as may be after the commencement of the draft regulations, the CBI will consult, with the Minister in relation to what the CBI estimates, as best it may, to be the likely amount of expenses incurred by the performance of the functions under the draft regulations, and will have regard to recommendations the Minister may decide to make to the CBI insofar as the Minister considers them likely to limit the amount of those expenses.

2. Conferral of a new task on the Central Bank of Ireland

2.1 New task of the Central Bank of Ireland

- 2.1.1 It is foreseen that the establishment and maintenance of the Registers will be conferred on the CBI. The establishment and maintenance by the CBI of the Registers is distinct and separate to the CBI's existing role as supervisor of compliance by credit and financial institutions with anti-money laundering (AML) requirements and combating the financing of terrorism (CFT) requirements. Rather, the maintenance of the Registers will facilitate the investigative role of the law enforcement authorities in Ireland, which have access to the Registers, and will enable obliged entities to meet their obligations under AML law to identify beneficial owners.
- 2.1.2 The ECB underlines that a proposed conferral of new tasks on a national central bank (NCB) in the European System of Central Banks (ESCB) must be assessed 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 3603/93⁵ defines 'other type of credit facility', inter alia, as 'any financing of the public sector's obligations vis-à-vis third parties'.
- 2.1.3 Ensuring that Member States implement a sound budgetary policy is one of the key objectives of the monetary financing prohibition, which may not be circumvented⁶. Therefore, the task of financing measures, which are normally the responsibility of the Member States, and which are financed from their budgetary sources rather than by the NCBs, must not be entrusted to NCBs. To decide what constitutes 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 central bank tasks, it is necessary to carry out, on a case-by-case basis, 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. In other words, adequate 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.
- 2.1.4 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 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 obligation within the

⁵ 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 L 332, 31.12.1993, p. 1).

⁶ Article 123 of the Treaty also serves the objective of maintaining price stability and reinforces central bank independence.

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 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 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 properly perform 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 that 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.

2.1.5 Based on the criteria set out above, the following paragraphs assess whether the CBI's new task is in line with the prohibition of monetary financing.

2.2 *Tasks related to the tasks conferred upon the European Central Bank and the National Central Banks by the Treaty and the Statute of the European System of Central Banks*

The task of operating the Registers for the purposes of the prevention, detection or investigation of possible money laundering or terrorist financing is not in any respect related to the tasks conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB.

2.3 *Tasks which are atypical of central bank tasks*

The task of operating the Registers is an atypical task for a NCB. The ECB understands that this task has not been allocated to any NCB in the ESCB. However, NCBs have been given – in certain Member States – the task of operating registers of bank accounts for criminal law enforcement purposes, including the investigation of money laundering and terrorist financing⁷. It should be recalled in this respect that the ECB has previously opined that tasks entrusted to an NCB relating to the establishment of a central register of bank accounts are not central bank tasks nor do they facilitate the enforcement of such tasks⁸.

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

This task is not part of the CBI's AML/CFT supervisory role. The new task conferred on the CBI is essentially a government task as its purpose is to further the State's interest in being able to efficiently access information for the prevention, detection or investigation of money laundering or terrorist financing by specified State authorities, such as the *Garda Síochána*, the Criminal Assets Bureau and the Revenue Commissioners, and thereby protect the financial interests and security of the State and to require obliged entities to meet their AML obligations. This new task is therefore discharged primarily in the interest of the government, and cannot be regarded in any respect as a central bank task⁹. The Registers could be operated by any competent State authority. In this regard, it is noted that corporate and other legal entities incorporated in Ireland, other than the financial vehicles subject to the draft laws, are required to register beneficial ownership information with a register operated by the Companies Registration Office, which is a central government body.

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

It is difficult to perceive any conflicts of interest arising with other aspects of the CBI's mandate.

2.6 *Extent to which performance of the new task is disproportionate to the financial or organisational capacity of the Central Bank of Ireland*

2.6.1 As previously noted by the ECB¹⁰, the principle of financial independence requires that Member States not put their NCBs in a position where they have insufficient resources to carry out both their ESCB-related tasks and their national tasks, from an operational and financial perspective. Furthermore, when allocating specific new tasks to NCBs, each NCB concerned should have

⁷ See, for example, Opinions CON/2011/30, CON/2011/98, CON/2016/35 and CON/2018/4 (Belgium), CON/2015/36 (Czech Republic) and CON/2015/46 (Bulgaria). All ECB opinions are available on the ECB's website at www.ecb.europa.eu.

⁸ See paragraph 2.1 of Opinion CON/2011/30, paragraph 3.1.3 of Opinion CON/2015/36, paragraph 3.1.3 of Opinion CON/2015/46 and para. 2.2.5.1 of Convergence Report, May 2018.

⁹ See paragraph 2.1 of Opinion CON/2011/30, paragraph 3.1.3 of Opinion CON/2015/36, and paragraph 3.1.3 of Opinion CON/2015/46.

¹⁰ See, for example, paragraph 4.6.1 of Opinion CON/2018/21.

sufficient financial and human resources at its disposal to ensure that the tasks can be carried out without impacting on the NCB's financial or operational capacity to perform its ESCB-related tasks. In order to ensure that the CBI's capacity to perform its ESCB-related tasks is not impaired, the CBI must, therefore, be able to avail itself of the necessary resources to carry out its duties under the draft laws. At this stage it is not possible for the ECB to comment on what additional resources the CBI will require in order to perform its new task.

2.6.2 It seems clear that the CBI's performance of the new task is not disproportionate to the financial capacity of the CBI, since the draft laws expressly provide that the CBI may not use funds from its own resources to defray expenses incurred by discharging its functions¹¹. Rather, these expenses are to be met by the industry levies to be paid by those entities required to register information on the registers¹². In addition, if the CBI reasonably anticipates that the industry levies will not suffice to defray all of its expenses, or if there is an insufficiency in any given year, the CBI may request the shortfall from the Irish Minister for Finance¹³. Insofar as the Minister in turn may advance such sums as he or she thinks proper to enable the CBI to defray all of its expenses, the draft laws retain an element of discretion for the Minister in regard to the advancement of sums requested by the CBI to defray its costs. In addition, the draft laws provide that sums advanced by the Minister can be subject to repayment, interest and other terms set by the Minister after consulting with the CBI¹⁴. These repayments, interest and other terms are, however, not specified further or limited in the draft laws. It would not seem appropriate to charge interest on any moneys advanced by the Minister to the CBI insofar as the task performed by the CBI is a government task discharged in the interest of the government. Finally, it is noted that the current wording of the draft law in relation to the defrayal of the CBI's expenses incurred in discharging its functions with respect to the Central Register of Beneficial Ownership of Common Contractual Funds does not cover all of the specified functions allocated to the CBI in respect of this particular register¹⁵.

2.7 *Extent to which performance of the new task fits into the institutional set-up of the Central Bank of Ireland, in the light of central bank independence and accountability considerations*

2.8 The performance of the new task does not fit smoothly into the institutional set-up of the CBI. The new task does not complement the CBI's other tasks. The operation of the Registers will be functionally separated from the AML/CFT and prudential supervisory roles of the CBI.

¹¹ See Regulation 31A(2) of the draft regulations, Section 36 of the draft law (adding Section 45(2) of the Investment Limited Partnerships Act 1994 (hereinafter, the '1994 Act') and Section 61 of the draft law (adding Section 5(2) of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (hereinafter, the '2005 Act')).

¹² See Regulation 31A(3) of the draft regulations, Section 36 of the draft law (adding Section 45(3) of the 1994 Act), Section 61 of the draft law (adding Section 5(3) of the 2005 Act) and Section 32D of the Central Bank Act, 1942, as amended.

¹³ See Regulation 31A(4) of the draft regulations, Section 36 of the draft law (adding Section 45(4) of the 1994 Act) and Section 61 of the draft law (adding Section 5(4) of the 2005 Act).

¹⁴ See Regulation 31A(5) of the draft regulations, Section 36 of the draft law (adding Section 45(5) of the 1994 Act) and Section 61 of the draft law (adding Section 5(5) of the 2005 Act).

¹⁵ See Section 61 of the draft law (adding Section 5(2)-(4) of the 2005 Act), which only makes reference to the defrayal of the CBI's expenses associated with its functions under Sections 18O to 18T of the 2005 Act. No reference is made to the defrayal of the CBI's expenses associated with its functions under Sections 18L to 18N of the 2005 Act.

2.9 *Extent to which the performance of tasks harbours substantial financial risks*

The performance of the new task does not harbour substantial financial risks for the CBI. As noted above, the draft laws expressly provide that the CBI may not use funds from its own resources to defray expenses it incurs in discharging its functions. In addition, if the CBI reasonably anticipates that the industry levies will not suffice to defray all of its expenses, or if there is an insufficiency in any given year, the CBI may request the shortfall from the Irish Minister for Finance. Moreover, the CBI is not liable for damages for anything done or omitted in the performance or purported performance or exercise of any of its functions or powers, unless it is proved that the act or omission was in bad faith¹⁶.

2.10 *Extent to which the performance of the new task exposes members of the decision-making bodies of the Central Bank of Ireland to disproportionate political risks and impacts on their personal independence*

The performance of the new functions conferred under the draft laws do not appear to expose the CBI's decision-making bodies to any disproportionate political risk or have an impact on their personal independence. However, the possibility cannot be entirely excluded that the CBI would be exposed to reputational risks should the information in the Registers be accessed by non-authorised persons.

2.11 *Conclusions*

2.11.1 The new task conferred on the CBI is essentially a government task as its purpose is to further the State's interest in being able to efficiently access information for the prevention, detection or investigation of money laundering or terrorist financing by specified State authorities, such as the *Garda Síochána*, the Criminal Assets Bureau and the Revenue Commissioners, and thereby protect the financial interests and security of the State. This new task is therefore discharged primarily in the interest of the government, and cannot be regarded in any respect as a central bank task. Consequently, as a safeguard against the circumvention of the monetary financing prohibition, the CBI needs to be fully and adequately remunerated when carrying out its tasks in relation to the registers¹⁷.

2.11.2 In this respect, the ECB strongly welcomes the provisions of the draft laws providing that the CBI may not use funds from its own resources to defray expenses it incurs in discharging its functions, and that if the CBI reasonably anticipates that industry levies will not suffice to defray all of its expenses, or if there is an insufficiency in any given year, the CBI may request the shortfall from the Irish Minister for Finance. These provisions should greatly help to ensure compliance by the CBI with the prohibition of monetary financing.

2.11.3 For the avoidance of doubt, and for the sake of legal certainty, the consulting authority is invited to clarify through appropriate amendments to the draft laws that any anticipated or actual shortfall of funds to defray the CBI's expenses will be granted by the Irish Minister for Finance on a regular

¹⁶ See Section 33AJ(2) of the Central Bank Act 1942.

¹⁷ See paragraph 2 of Opinion CON/2011/30, paragraph 2 of Opinion CON/2011/98, paragraph 3.2 of Opinion CON/2015/36, paragraphs 2.2, 3.2 and 3.8 of Opinion CON/2016/35, paragraph 4.4 of Opinion CON/2017/20, paragraph 2.3 of Opinion CON/2018/4, paragraph 2.1 of Opinion CON/2018/57, and the ECB's Convergence Report, May 2018, p. 30.

and prompt basis as the costs arise in order to ensure that the CBI does not have to fund the cost of its task under the draft laws from its own funds under any circumstances. In addition, it would be helpful to clarify that repayment terms for amounts advanced by the Minister are, in all cases, subject to the overarching principle that the CBI may not use funds from its own resources to defray its expenses arising under the draft laws. Finally, it should be clarified that the CBI's expenses incurred in discharging all of its functions with respect to the Central Register of Beneficial Ownership of Common Contractual Funds will be defrayed.

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

Done at Frankfurt am Main, 18 June 2020.

[signed]

The President of the ECB

Christine LAGARDE