EUROPEAN CENTRAL BANK

EUROSYSTEM

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OPINION OF THE EUROPEAN CENTRAL BANK

of 18 July 2019

on the conversion of Swiss franc loans

(CON/2019/27)

Introduction and legal basis

On 15 May 2019 the European Central Bank (ECB) received a request from the National Assembly of the Republic of Slovenia (hereinafter the 'National Assembly') for an opinion on a draft law on relations between lenders and borrowers concerning credit agreements in Swiss francs (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 and the third and sixth indents of Article 2(1) of Council Decision 98/415/EC[1], as the draft law relates to Banka Slovenije and rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. 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 restructure consumer loans denominated in, or linked to, Swiss francs (hereinafter 'Swiss franc loans'), by requiring credit institutions established in Slovenia to convert Swiss franc loans concluded between 28 June 2004 and 31 December 2010 into loans denominated in euro.

1.2 The draft law aims to place borrowers of Swiss franc loans in the same position that they would have been in had their loans been denominated in euro from inception. To this end, the draft law sets out the following conversion mechanisms:

(i) the principal amount of the Swiss franc loans will be converted into euro at the exchange rate set out in the credit agreement applicable on the date the Swiss franc loans were drawn by the borrowers. In case the principal amount was paid out in euro at the time of drawdown then, for the purposes of the conversion, the actual amount as paid out in euro is to be taken into account;

(ii) the agreed interest rate will be converted into another interest rate, comprising the interbank interest rate in the euro area at the date on which the loan was drawn and the same margin agreed in the loan agreement. The agreed period for recalculations of the interest rate remains unaltered. According to the explanatory memorandum on the draft law, using the interbank interest rate in the euro area in the conversion mechanism

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).

protects the legitimate business interests of credit institutions by enabling the usual interest rates for euro denominated loans to be taken into account;

(iii) the lender is required to prepare a new loan repayment schedule calculated in accordance with the measures set out above and using the same methodology as for the original repayment schedule;

(iv) the instalments that have already been paid by the borrower in line with the original repayment schedule will be converted into euro at the exchange rate applicable on the date of payment of each instalment. In case the instalments were repaid in euro then, for the purposes of the conversion, the actual amount of the instalments as repaid in euro is to be considered. Paid instalments will serve as the basis for settling the amounts due under the new loan repayment schedule, whereby the same order for settling obligations as under the original loan agreement is to be used;

(v) the creditor shall prepare a new amortisation plan for existing credits which have been repaid ahead of schedule, taking any overpayments into account;

(vi) if the total amount of instalments already paid by the borrower and converted in euro (as described in point (iv) above) is higher than the total amount of converted instalments calculated according to the new loan repayment schedule (referred to in point (iii) above), this amount will be considered an 'overpayment'. Depending on the amount of this overpayment, it will be treated as follows:

a. if the amount of the overpayment does not exceed the sum of converted instalments that are still to be paid in line with the new repayment schedule, the overpayment will be proportionally distributed for the settlement of future outstanding instalments, and the loan agreement will remain in force;

b. if the amount of the overpayment exceeds the total sum of a converted Swiss franc loan that the borrower has to repay in line with the new repayment schedule, then the lender must return this overpayment to the borrower within 30 days from the date the borrower confirms the conversion proposal and the loan agreement will be terminated.

1.3 The conversion of Swiss franc loans applies to loans concluded between 28 June 2004 and 31 December 2010, irrespective of the current credit balance. The draft law requires lenders to prepare new repayment schedules and sets out supplementary conversion rules. With respect to loans that were acquired by new creditors, the draft law provides that the original lenders are required to pay the new creditors the difference calculated by comparing the original amount to the amount a borrower would owe the new creditor had the amount transferred been calculated according to the new amortisation plan.

1.4 The lender must prepare a new repayment schedule and recalculate the existing Swiss franc loans and submit these to the borrower along with the conversion proposal within 30 days of the entry into force of the draft law. The borrower must confirm or reject the conversion proposal within 30 days of its receipt.

1.5 The conversion procedures under the draft law are to be supervised by Banka Slovenije, which is also to act as the competent minor offence authority in case of breaches of the provisions of the draft law.

1.6 The draft law provides that the lender, although required to propose and perform the conversion of Swiss franc loans for the borrower, also has the right to challenge the conversion before a court within six months following the conversion. The creditor may challenge the conversion if the credit agreement or the documentation shows that certain criteria had been complied with at the time the relevant credit agreements were concluded. A creditor may challenge the conversion if, prior to concluding the credit agreement, the borrower signed all of the following documents: (i) a document stating a contractual condition governing the repayment of the obligation in a foreign currency, drawn up in clear and understandable language; (ii) a document stating he or she was informed of all elements that could affect the scope of his or her obligation; (iii) a document stating that he or she was given a warning on the possibility of exchange rate changes and of risks arising from a Swiss franc denominated transaction; (iv) a document stating that he or she was shown calculations on the economic effects of possible exchange rate fluctuations on his or her total obligation to repay under the agreement; (v) a document containing an example of an actual foreign currency credit in the past period showing risks associated with foreign currency credit; and (vi) a document showing that the creditor offered the borrower insurance for currency risks or used an upper limit risk, thereby preventing significant imbalance in the rights and obligations of the parties. Even if a creditor complies with the above criteria, the court shall also assess (i) the existence of a significant imbalance between the parties when a conversion is contested, and (ii) if the creditor should have known the agreement creates a significant imbalance between the parties as a result of which the condition is unfair and thus unlawful. The explanatory memorandum to the draft law sets out criteria for informed consent in relation to point (ii), which are based on, inter alia, the reasoning in a judgement of the Court of Justice of the European Union[2] concerning the interpretation of Council Directive 93/13/EEC[3].

1.7 Additionally, the draft law addresses the issue of conversion of transferred credits. Creditors who have transferred their loans to third parties are required to pay the transferee the difference calculated by comparing the amount of the transferred credit to the amount a borrower would owe the transferee of the receivable had the amount transferred been calculated according to the new amortisation plan on the day the receivable was transferred. If the borrower's debt to the transferee of the receivable is lower than that calculated difference, the creditor shall pay the borrower the difference.

1.8 According to the explanatory memorandum, the objective pursued by the draft law is to implement the constitutional principle of the 'welfare state' and to introduce sanctions for breaches of obligations arising under contractual relationships, thereby providing legal protection for consumers who have taken out Swiss franc loans. The explanatory memorandum questions the legality of linking credit agreements to Swiss franc, in particular in a euro area country with a stable currency, where loans were granted mainly in euro. The explanatory memorandum argues that the use of

2 Judgement of the Court of Justice of 20 September 2017, *Andriciuc and Others,* C-186/16, ECLI:EU:C:2017:703.

3 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

currency clauses, the risk of which is predominantly borne by borrowers, is an unfair practice used by credit institutions, in particular combined with the lack of informed consent by the borrowers of Swiss franc loans.

2. General observations

2.1 The ECB issued an opinion on a similar Slovenian draft law [which was never enacted into law] in 2018[4].

2.2 Prior to the global financial crisis, borrowing in foreign currencies by households and non-financial corporations was popular in several Member States[5]. As previously noted by the ECB[6], the lower interest rates applicable to foreign currency loans compared to loans in the domestic currency increased the demand for such loans. According to the documentation included in the explanatory memorandum and the draft law, the majority of Swiss franc loans were and still are mortgage loans and were granted by foreign-owned credit institutions.

2.2.1 The ECB notes that the draft law anticipates that the conversion of the outstanding and already terminated Swiss franc loans to loans denominated in euro will be voluntary only for the borrowers. The ECB also notes that the draft law provides for the possibility for credit institutions to challenge the conversion after it has been implemented, restoring the parties to the position they were in under the terms of the original Swiss franc loan, if they can prove in court that the borrower entered into the Swiss franc loan on the basis of informed consent, as defined in the draft law.

2.3 *Legal aspects on retroactivity*

2.3.1 As previously noted by the ECB, introducing measures with retroactive effect undermines legal certainty and is not in line with the principle of legitimate expectations[7], and may also interfere with acquired rights.

2.3.2 Article 23(1) of Directive 2014/17/EU of the European Parliament and of the Council[8], which applies to credit agreements in existence from 21 March 2016[9], stipulates that Member States shall ensure that an appropriate regulatory framework is in place for credit agreements in respect of foreign currency loans to ensure, at a minimum, that (a) the consumer has a right to convert the credit agreement into an alternative currency under specified conditions or (b) there are other arrangements in place to limit the exchange rate risk to which the consumer is exposed under the credit agreement. Article 23(5) of Directive 2014/17/EU allows Member States to further regulate foreign currency loans provided that such regulation is not applied with retroactive effect. The retroactive effect of the draft law is not in line with the general aim of Article 23(5) of Directive

4 See Opinion CON/2018/21. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

5 For further information on lending in foreign currencies in the Union see the Annex to Recommendation of the European System Risk Board (ESRB/2011/1) of 21 September 2011 on lending in foreign currencies (OJ C 342, 22.11.2011, p.1).

6 See, for example, paragraph 2.1 of Opinion CON/2018/21.

7 See, for example, paragraph 2.2 of Opinion CON/2018/21.

8 Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34).

9 See Article 43(1) of the Directive 2014/17/EU.

2014/17/EU[10], which reflects one of the general principles of Union law, namely the principle of legal certainty[11] that supports the limitation of retroactive laws[12].

2.3.3 It is for the Slovenian authorities to assess whether the retroactive character of the draft law also complies with Slovenian legal and constitutional principles[13].

3. Specific observations

3.1 *Eligibility criteria*

3.1.1 The draft law does not prescribe any specific criteria for borrowers to be eligible to participate in the conversion. For example, the draft law does not impose an upper limit to the amount of the credit extended which would limit the risk of moral hazard[14].

3.2 *Effects on the banking sector*

3.2.1 The implementation of the draft law is expected to entail financial costs for the Slovenian banking sector. Credit institutions may be affected to different degrees to the extent that they have concluded Swiss franc loans between 28 June 2004 and 31 December 2010. This, in turn, is expected to have a negative impact on the profitability, capitalisation and future lending capacity of the banking sector as a whole[15]. It is worth mentioning that determining the extent of such impact is difficult since the draft law has not benefited from an impact assessment conducted by the competent national authorities.

3.2.2 It should also be noted that the conversion will lead to a one-off increase in operational costs for the affected credit institutions in Slovenia, in particular due to the restructuring of existing hedges, refinancing measures, and the costs associated with the obligation to recalculate the Swiss franc loans in order to notify each borrower individually thereof[16].

3.2.3 An additional concern is that the draft law puts the entire burden of conversion of Swiss franc denominated loans into euro denominated loans on the originator credit institutions even if, in the interim, originators had already transferred the loans (as non-performing loans, 'NPLs') to third parties, as is the case of numerous Slovenian credit institutions. Such provisions in the draft law represent an important impediment to the effective and resolution of NPLs as the originator credit institutions would not have been able to effectively transfer NPLs off their balance sheet. The reasoning behind NPL transfers is *inter alia* to remove uncertainty with regard to potential future losses associated with the transferred assets.

3.2.4 The ECB has been a strong proponent of the development of secondary markets for credit institution assets, particularly NPLs, as reflected in the EU Council's action plan to tackle NPLs in

10 See the paragraphs of the Opinions referred to in footnote 7.

11 See, for example, judgement of the Court of Justice of the European Union of 10 March 2009, *Heinrich*, C-345/06, ECLI:EU:C:2009:140.

12 See, for example, judgement of the Court of Justice of the European Union of 16 May 1979, *Tomadini*, C-84/78, ECLI:EU:C:1979:129.

13 See paragraph 2.2.3 of Opinion CON/2018/21.

14 See paragraph 3.1.1 of Opinion CON/2018/21.

15 See paragraph 3.2.1 of Opinion CON/2018/21.

16 See paragraph 3.2.2 of Opinion CON/2018/21.

Europe[17], as the ECB has previously noted[18]. As part of a comprehensive solution to NPL resolution, the development of secondary markets may contribute to reducing NPLs. Looking ahead, well-functioning secondary markets may also prevent stocks of NPLs building up in the future. Moreover, a well-functioning secondary market may have a positive effect on financial stability to the extent that it could facilitate the transfer of the risks of NPLs off credit institutions' balance sheets. The presence of significant volumes of NPLs on credit institutions' balance sheets reduces their ability to fulfil their function as providers of credit to the real economy and hampers the operational flexibility and overall profitability that are essential to a well-functioning banking sector. It is essential that the legal framework applicable to secondary markets enables the efficient transfer of NPLs off the balance sheet of credit institutions, an aspect with regard to which the draft law may introduce uncertainty[19].

3.2.5 As a consequence of the draft law, Slovenian credit institutions will incur new losses with regard to NPLs already removed from their balance sheets. As the ECB has pointed out on previous occasions[20], the ability of financial institutions to effectively manage credit risk depends on a reliable, predictable and stable legal framework that adequately balances the interests of both the creditor and the debtor. In this respect, it is important to carefully consider the impact of the draft law in order to ensure legal certainty, and to prevent moral hazard from arising in the relationship between creditor and debtor. If credit institutions are deprived of efficient tools to work out NPLs in an effective and timely manner, this could result in unnecessarily high levels of NPLs and private sector debt, which in turn have an adverse impact on financial stability and could undermine future credit supply.

3.2.6 Additionally, the Slovenian credit institutions that transferred their NPL portfolio to third parties, have also handed over all relevant documentation regarding the transferred loans to the new creditors who were fully aware of the nature of the loans prior to that transaction. The draft law could therefore interfere with the commercial agreements between the credit institutions and the purchasers of loans and cause disproportionate operational costs for credit institutions.

3.2.7 To conclude, the draft law must carefully balance the benefits of creating well-functioning secondary markets for NPLs against the impetus to protect debtors[21]. In addition, the draft law would benefit from a thorough impact assessment.

3.3 *Effects on the financial stability*

3.3.1 The ECB has pointed out on several occasions the risks associated with foreign currency loans[22]. In particular, foreign currency loans have constituted a major risk to financial stability in several

17 See the Council's press release of 11 July 2017 on the 'Council conclusions on Action plan to tackle non-performing loans in Europe', available on the Council's website at: http://www.consilium.europa.eu.

18 See paragraph 1.1. of Opinion CON/2018/54.

19 See paragraph 2.2.1 and 2.2.2 of Opinion CON/2018/31.

20 See, for example, paragraph 2.2.4 of the Opinion CON/2019/8.

21 See paragraph 2.2.3 of the Opinion CON/2018/31.

22 See in particular the ECB Financial Stability Review of June 2010 and, in respect of the foreign currency loans in Hungary, Opinions CON/2011/87, CON/2012/27, CON/2014/59, CON/2014/72 and CON/2014/76, and in respect of the foreign currency loans in Poland, Opinion CON/2015/26.

Member States, where the share of foreign currency loans is relatively high. The ECB points, in this respect, to the analysis of such risks made by the ESRB in Recommendation ESRB/2011/1[23].

3.3.2 As regards the long-term effects on financial stability, when introducing measures in relation to settling and converting foreign currency loans, due consideration should always be given to fair burden sharing among all stakeholders in order to avoid moral hazard in the future[24]. The explanatory memorandum argues that the interests of credit institutions are taken into account in the draft law, for example, in the conversion process higher interest rates are to be used for the preparation of the new repayment schedules, reflecting common practices in euro denominated loans. However, the draft law provides for the replacement of the previously agreed interest rate with the interbank interest rate in the euro area for recalculation purposes, whereas the original loan-based margin remains the same, which appears to potentially deviate from the common practices of credit institutions which typically apply a higher loan-based margin for euro denominated loans than for Swiss franc denominated loans.

3.3.3 As the ECB has noted previously[25], given that Slovenia only joined the euro area in 2007, the conversion of any loans from Swiss franc into euro between 2004 and 2007 could result in an unequal treatment of other customers, depending on exchange rate developments between the Slovenian tolar and Swiss franc during this period. A reconciliation method may therefore be needed to reflect exchange rate developments between the tolar, Swiss franc and euro during this period.

3.4 *Effects on the Slovenian economy*

3.4.1 As the ECB has noted previously[26], the conversion of Swiss franc loans with retroactive effect, as envisaged by the draft law, could have negative effects if it were to lead to a deterioration of both foreign and domestic investor sentiment, and trust in the system, due to a perceived increase in legal uncertainty and country risk.

4. Conferral of new tasks on Banka Slovenije

4.1 *New task of Banka Slovenije*

4.1.1 The draft law confers the task of supervising the conversion procedures in relation to credit institutions on Banka Slovenije and designates Banka Slovenije as the competent minor offence authority in case of a breach of the provisions of the draft law. The draft law does not specify in detail the scope of this new task. The ECB understands that the Banka Slovenije's supervisory task in this respect would essentially require Banka Slovenije to supervise the compliance of credit institutions with the requirements of the draft law in relation to the restructuring of their private contractual relationships with individual customers in the context of the conversion of Swiss franc denominated loans into euro denominated loans. Banka Slovenije has been designated as the competent minor offence authority in relation to breaches of the draft law, within the scope of the

23 However this does not seem to be the case in Slovenia.

24 See, for example, paragraph 3.3.2 of Opinion CON/2018/21.

25 See, for example, paragraph 3.3.3 of Opinion CON/2018/21.

26 See, for example, paragraph 3.4.1 of Opinion CON/2018/21.

performance of its prudential supervisory tasks over credit institutions[27], and also has, to a certain extent, an existing customer protection role[28]. However, Banka Slovenije has no comparable responsibilities in respect of the supervision of the compliance of credit institutions with the legal requirements relating to the restructuring of privately negotiated loan contracts by credit institutions with their customers. The draft law therefore confers a new task upon Banka Slovenije.

4.1.2 The ECB underlines that a proposed conferral of new tasks on a national central bank (NCB) in the European System of Central Banks 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 3603/93[29] defines 'other type of credit facility', inter alia, as 'any financing of the public sector's obligations vis-à-vis third parties'.

4.1.3 Ensuring that Member States implement a sound budgetary policy is one of the key objectives of the monetary financing prohibition, which may not be circumvented[30]. 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.

4.1.4 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 European System of Central Banks and of the European Central 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

27 Article 380 of the Law of 2015 on banking.

28 See Law of 2016 on consumer credit.

29 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).

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

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 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.

4.1.5 On the basis of the criteria set out above, the following paragraphs assess whether the new task of Banka Slovenije is in line with the prohibition of monetary financing.

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

4.2.1 As previously noted by the ECB[31], supervising the compliance of credit institutions with the requirements of the draft law in relation to the restructuring of privately negotiated loan contracts with their customers is not among the basic central banking tasks listed in Article 127(2) or (5) of the Treaty or otherwise conferred upon the NCBs by the Statute of the ESCB. The new task conferred on Banka Slovenije does not form part of the prudential supervisory tasks of Banka Slovenije. Thus, the new task conferred on Banka Slovenije under the draft law is not directly related to the tasks conferred on the ECB and the NCBs by the Treaty and the Statute of the ESCB. Consequently, a careful assessment of the conferral of this task on Banka Slovenije is required in order to determine whether it constitutes a government task, and whether the related funding gives rise to monetary financing concerns.

31 See, for example, paragraph 4.2.1 of Opinion CON/2018/21.

4.3 *Tasks which are atypical of NCB tasks*

4.3.1 As previously noted by the ECB[32], the new task conferred on Banka Slovenije by the draft law relates to the supervision of the compliance by credit institutions with the requirements under the draft law relating to the restructuring of privately negotiated loan agreements between credit institutions and their customers. Banka Slovenije's new task can be seen, to a certain extent, as being related to the protection of consumers.

4.3.2 As previously noted by the ECB[33], it is necessary to analyse whether this new task is atypical of NCB tasks. While the majority of NCBs do not appear to have been assigned tasks of this nature, the ECB has identified two Member States where NCBs have been given similar tasks. In Cyprus[34] and Hungary[35], the NCBs have been given tasks relating to the supervision of the compliance by credit institutions with the legal requirements in relation to the restructuring of private, contractual loan agreements between credit institutions and their customers. In the case of Hungary, these tasks are substantially similar to the tasks to be conferred on Banka Slovenije under the draft law. In addition, the NCBs in Croatia[36], the Czech Republic[37], Ireland[38], Italy[39] and Slovakia[40] have been given similar supervisory tasks relating more generally to consumer protection and the transparency of loan arrangements. In this regard, also taking into account the consumer protection roles which are currently fulfilled by numerous ESCB NCBs in the field of financial services[41], the new task does not appear to be completely atypical of NCB tasks. However, the new task would be considered as atypical if Banka Slovenije's supervisory role would extend to the resolution of disputes between contractual parties, which is a matter that is usually handled by the courts[42].

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

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32 See paragraph 4.3.1 of Opinion CON/2018/21.

33 See paragraph 4.3.2 of Opinion CON/2018/21.

34 The Central Bank of Cyprus was entrusted with sanctioning powers in relation to the compliance of credit institutions with restrictions regarding the variation of the interest rates on credit facilities imposed by Cypriot Law 160(I)/1999 and supervisory tasks relating also to civil law aspects in the area of payment services and mortgage credit. In connection with the performance of these tasks the Central Bank of Cyprus may also request and review privately negotiated contracts between credit institutions and their customers.

35 Magyar Nemzeti Bank has a supervisory role in connection with the compliance by credit institutions with legal requirements relating to the conversion of foreign currency denominated consumer loans, including loans denominated in Swiss francs, as defined in applicable laws (e.g. Law XXXVIII of 2014 and Law XL of 2014, both as amended by Law LXXVIII of 2014, Law XXVII of 2014, Law LII of 2015 (amending Law XL of 2014) and Law CXLV of 2015). The performance of these supervisory tasks involves the verification of compliance by credit institutions, which includes also the review of privately negotiated contracts between credit institutions and their customers. See Opinion CON/2014/72.

36 Hrvatska narodna banka carries out oversight over credit institutions' compliance with the Law on credit institutions, which includes compliance with internal bylaws of credit institutions governing the relationship with their clients, contracts concluded and consumer protection provisions.

37 Česka Narodni Banka has been assigned tasks related to consumer protection, including supervision of compliance by supervised entities of the observance of the prohibition of unfair business practices and supervision of rules regarding consumer discrimination or the obligation to inform about prices.

38 See, for example, paragraph 3.4.2 of Opinion CON/2017/12.

39 Banca d'Italia has been assigned with tasks in relation to the supervision, from a transparency perspective, of the terms of banking and financial agreements between credit institutions and non-credit institution lenders.

40 Narodna Banka Slovenska has powers in the area of the protection of financial consumers, which include a preliminary assessment of unfair commercial practices of supervised entities and unacceptable conditions in contracts for the provision of financial services. The scope of this supervision does not include the adjudication of disputes between the supervised entities and their customers.

41 See for example, paragraph 3.4.2 of Opinion CON/2017/12.

42 See paragraph 4.3.2 of Opinion CON/2018/21.

4.4.1 According to the explanatory memorandum, the objective of the draft law is to implement the constitutional principle of the 'welfare state' and to introduce sanctions for breaches of obligations arising under contractual relationships, thereby providing legal protection to a number of consumers who have taken out Swiss franc loans. The draft law is therefore intended to provide protection to consumers of financial services. As previously noted by the ECB[43], the NCB 'is best placed to assess the terms and conditions of loan contracts entered into by consumers and the impact of the new legal measures on financial institutions. Within the scope of its tasks, the [NCB] can contribute to the prevention and mitigation of systemic risks to financial stability'. Due to the retroactive application of the draft law, it is not clear whether the draft law would effectively guarantee the fulfilment of the objective of protecting consumers of financial services. Thus, there is a potential risk that, in carrying out its supervisory functions, Banka Slovenije would act exclusively in the interest of another public entity.

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

4.5.1 As previously noted by the ECB[44], it may be considered that the new task at least partially complements other similar existing supervisory and consumer protection tasks of Banka Slovenije. As with other consumer protection tasks, sufficient mitigation measures must be put in place to ensure that in the event of a conflict of interest supervisory considerations prevail.

4.6 *Extent to which performance of the new task is disproportionate to the financial or organisational capacity of Banka Slovenije*

4.6.1 As previously noted by the ECB[45], the principle of financial independence requires that Member States may 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 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 tasks. In order to ensure that Banka Slovenije's capacity to perform its ESCB-related tasks is not impaired, Banka Slovenije must, therefore, be in a position to avail itself of the necessary resources to carry out its duties under the draft law. At this early stage, it is difficult to predict what additional resources Banka Slovenije will require in order to perform its new supervisory task under the draft law. However, it is likely that Banka Slovenije will have to dedicate additional human, technical and financial resources to implement this new supervisory task. This may impose an additional burden on existing central banking and supervisory tasks performed by Banka Slovenije. While supervised entities are required to pay fees to Banka Slovenije in respect of the performance of its supervisory tasks under the Law on consumer credit[46], the draft law does not provide for Banka Slovenije to be reimbursed for the costs of carrying out this new task. The ECB invites the consulting authority to consider the impact of the draft law on the resources of Banka Slovenije.

43 See, for example, paragraph 4.4.1 of Opinion CON/2018/21.

44 See, for example, paragraph 4.5.1 of Opinion CON/2018/21.

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

46 See Article 79 of the Law on consumer credit (Zakon o potrošniških kreditih).

4.7 *Extent to which performance of the new task fits into the institutional set-up of Banka Slovenije, in the light of central bank independence and accountability considerations*

4.7.1 The potential impact of the new task on the institutional, financial and personal independence of Banka Slovenije must also be taken into consideration.

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

4.8.1 The draft law does not contain any specific provisions on liability in relation to the exercise of Banka Slovenije's powers under the draft law or the failure to exercise such powers. Banka Slovenije's potential liability in respect of the performance of the new task will thus be subject to the rules on liability for damages caused in the exercise of public authority pursuant to the Law on banking and the general liability regime under Slovenian law. As previously noted by the ECB[47], the general liability regime would also apply with respect to any potential damages in connection with decisions of Banka Slovenije delivered in supervisory proceedings pursuant to the draft law which are later declared to be invalid in the courts.

4.9 *Extent to which the performance of the new task exposes members of the decision-making bodies of Banka Slovenije to disproportionate political risks and impacts on their personal independence*

4.9.1 As previously noted by the ECB[48], due to the sensitivity of the subject matter and the high degree of public attention being given to the restructuring of Swiss franc loans in Slovenia, due consideration should be given to any disproportionate political risk or impact on the personal independence of the members of the decision-making bodies of Banka Slovenije that may arise in the performance of the new task. In this respect, consideration might be given to the possibility of conferring this task on a separate government agency to which Banka Slovenije could provide technical support in view of its expertise and experience in dealing with the Slovenian banking sector.

4.10 *Conclusion*

4.10.1 As previously noted by the ECB[49], the following should be noted as regards the compatibility of the draft law with the prohibition on monetary financing. The new task of Banka Slovenije of supervising the compliance of credit institutions with the requirements under the draft law in relation to the restructuring of privately negotiated loan agreements between credit institutions and their customers can be regarded as a central bank task. However, as the new task conferred upon Banka Slovenije by the draft law must not adversely affect its capacity to carry out its NCB or ESCB-related tasks, careful consideration should be given to its impact on Banka Slovenije's operational capacity. In addition, careful consideration should be made of any disproportionate political risk or impact on the personal independence of the members of the decision-making bodies of Banka Slovenije that may arise in the performance of the new task.

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

47 See paragraph 4.8.1 of Opinion CON/2018/21.

48 See paragraph 4.9.1 of Opinion CON/2018/21.

49 See paragraph 4.10.1 of Opinion CON/2018/21.

Done at Frankfurt am Main, 18 July 2019.

[signed]

The President of the ECB

Mario DRAGHI