EUROPEAN CENTRAL BANK

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OPINION OF THE EUROPEAN CENTRAL BANK

of 31 January 2018

on key information documents for packaged retail and insurance-based investment products

(CON/2018/5)

Introduction and legal basis

On 27 December 2017 the European Central Bank (ECB) received a request from the Slovenian Ministry of Finance for an ECB opinion on a draft law implementing Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products (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 indent of Article 2(1) of Council Decision 98/415/EC[1] as the draft law relates to Banka Slovenije. 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 main purpose of the draft law is the implementation and application of Regulation (EU) No 1286/2014 of the European Parliament and of the Council[2] into Slovenian legislation.

1.2 The draft law designates the competent authorities in Slovenia for supervising the key documents for PRIIPs pursuant to Regulation (EU) No 1286/2014. In this respect, the draft law designates the following three competent authorities: Banka Slovenije, the Insurance Supervision Agency (*Agencija za zavarovalni nadzor*) and the Securities Market Agency (*Agencija za trg vrednostnih papirjev*). Banka Slovenije is designated as the competent authority for credit institutions, which are to be regarded as manufacturers of or persons selling PRIIPs pursuant to Regulation (EU) No 1286/2014.

1.3 Pursuant to the draft law Banka Slovenije is granted, in the context of its supervisory role, the power to impose administrative sanctions and measures listed in points (a) to (d) of Article 24(2) of Regulation (EU) No 1286/2014 and to impose administrative fines in misdemeanour proceedings in accordance with point (e) of the same Article..

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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 Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (OJ L 352, 9.12.2014, p. 1).

1.4 The draft law provides that each competent authority may introduce, as a part of its applicable tariffs, a new fee to be paid by supervised entities for performing supervisory duties pursuant to the draft law and Regulation (EU) No 1286/2014.

2. Observations

2.1 This opinion does not address the issue of whether the draft law effectively implements and applies Regulation (EU) No 1286/2014. The ECB only assesses those provisions of the draft law that may impact on the role and tasks of Banka Slovenije as an NCB and as a member of the Eurosystem and of the European System of Central Banks (ESCB).

2.2 The supervision of financial markets is shared in Slovenia between three institutions: Banka Slovenije, the Insurance Supervision Agency and the Securities Market Agency. Currently Banka Slovenije has a limited role in relation to the supervision of PRIIPs. The Securities Market Agency is primarily responsible for supervising financial instruments markets, and therefore also for supervising investment products[3]. In performing its prudential supervisory tasks Banka Slovenije also takes into account the risks that arise for credit institutions active in the investment products market, however it does not supervise the market conduct of credit institutions in relation to investment products, with the exception of structured deposits as defined in point 43 of Article 4(1) of Directive 2014/65/EU of the European Parliament and of the Council[4], for which Banka Slovenije is responsible for supervising the market conduct of credit institutions active on that market. As regards the insurance sector, Banka Slovenije's role is limited to issuing licences to banks for insurance brokerage services[5]. The draft law therefore confers a new task upon Banka Slovenije namely that of supervising the compliance of credit institutions with the provisions of Regulation (EU) No 1286/2014 and the draft law, which are deemed to be manufacturers of or persons selling PRIIPs, including the provisions of Regulation (EU) No 1286/2014 on imposing administrative sanctions and measures.

2.3 The ECB underlines that a proposed conferral of a new task on a national central bank (NCB) in the 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 3603/93[6] defines 'other type of credit facility', inter alia, as 'any financing of the public sector's obligations vis-à-vis third parties'.

2.4 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[7]. Therefore, the task of

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3 The Law on Financial Instruments Market (2007).

4 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

5 Article 558(5) of the Law on Insurance (2015) and Article 97(2) in connection with Article 6 of the Law on Banking(2015).

6 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).

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

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.

2.5 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 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 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.

3. Specific observations

3.1 *New tasks of Banka Slovenije*

On the basis of the criteria set out in paragraph 2.5, the following paragraphs assess whether the new task of Banka Slovenije is in line with the monetary financing prohibition.

3.1.1 *New tasks related to the tasks conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB*

Supervising compliance with the provisions of the draft law and Regulation (EU) No 1286/2014, including the provisions of Regulation (EU) No 1286/2014 on imposing administrative sanctions and measures, 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. Although the new task conferred on Banka Slovenije relates to supervising credit institutions' compliance with Union law requirements, it does not form part of the prudential supervisory tasks of Banka Slovenije. Banka Slovenije's new task relates mainly to the protection of consumers. Against this backdrop, 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 to determine whether it constitutes a government task, and whether the related funding gives rise to monetary financing concerns[8].

3.1.2 *Tasks which are atypical of NCB tasks*

The new task conferred on Banka Slovenije by the draft law does not appear to be atypical of NCB tasks. While the majority of Member States have designated national capital markets[9] and

8 See, for example, paragraph 3.4.1 of Opinion CON/2017/12, paragraph 2.2.1 of Opinion CON/2017/32, paragraph 3.1 of Opinion CON/2017/43 and paragraph 3.1 of Opinion CON/2017/52.

9 The following Member States have designated their national capital markets supervisors as either their sole or one of their competent authorities under Regulation (EU) No 1286/2014: Austria (Finanzmarktaufsicht – the Austrian Financial Market Authority), Belgium (Autorité des Services et Marches Financiers – Belgian Financial Services and Markets Authority), Bulgaria (Financial Supervision Commission), Cyprus (Securities and Exchange Commission – one of the competent authorities), Denmark (Finanstilsynet – Danish Financial Supervisory Authority), Estonia (Finantsinspektsioon – the Estonian Financial Supervisory Authority), France (l'Authorité des marchés financiers – the French Financial Markets Regulator; one of the competent authorities), Germany (Bundesanstalt für Finanzdienstleistungsaufsicht – the German Federal Financial Supervisory Authority), Finland (Finanssivalvonta - the Finnish Financial Supervisory Authority), Italy (Commissione Nazionale per le Società et la Borsa – Italian Companies and Exchange Commission – one of the competent authorities), Latvia (Finanšu un kapitāla tirgus komisijas – the Latvian Financial and Capital Market Commission), Malta (Malta Financial Services Authority), Netherlands (Autoriteit Financiële Markten – Dutch Authority for the Financial Markets), Poland

insurance supervisors[10] as their competent authorities under Regulation (EU) No 1286/2014, the ECB has identified a number of Member States, including Cyprus[11], the Czech Republic[12], Hungary[13], Ireland[14] and Slovakia[15], where at least part of the tasks under Regulation (EU) 1286/1014 have been conferred on NCBs[16].

3.1.3 In addition, Banka Slovenije's new task related to the supervision of PRIIPs does not appear to be atypical also in the light of the consumer protection roles which are currently also fulfilled by numerous ESCB NCBs in the field of financial services. The ECB has consistently expressed the view that consumer protection tasks discharged by an NCB may be regarded as central banking tasks provided that such tasks do not interfere with the performance of the NCB's ESCB-related tasks, and to the extent that those tasks complement existing supervisory powers and thus contribute to the soundness of the financial market and the preservation of confidence in the marketplace.

3.1.4 *Impact of the new task on the independence of Banka Slovenije*

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

(Komisja Nadzoru Finansowego – Polish Financial Supervision Authority) and Sweden (Finansinspektionen – Swedish Financial Supervisory Authority). In addition, the following Member States are in the process of designating their national capital markets supervisors as either their sole or one of their competent authorities: Croatia (Hrvatska Agencija za Nador Financijskih Usluga – Croatian Financial Services Supervisory Agency), Greece (Hellenic Capital Market Commission – one of the competent authorities), Luxembourg (Commission de surveillance du secteur financier – Luxembourg Commission for Supervision of the Financial Sector; one of the competent authorities), Portugal (Commisao do Mercato de Valores Mobiliaros – Portuguese Securities Market Commission; one of the competent authorities), Romania (Financial Supervisory Authority) and Spain (Comisión Nacional del Mercado de Valores – Spanish National Securities Market Commission one of the competent authorities).

10 The following Member states have designated their national insurance supervisors as either their sole or one of their competent authorities under Regulation (EU) 1286/2014: Cyprus (Superintendent of Insurance – one of the competent authorities), France (l'Authorité de contrôle prudential et de résolution – the French Prudential Supervision and Resolution Authority; one of the competent authorities) and Italy (Istituto per la Vigilanza sulle Assicurazioni – Italian Institute for Insurance Supervision; one of the competent authorities). In addition, the following Member States are in the process of designating their national insurance supervisors as their sole or one of their competent authorities: Luxembourg (Commissariat aux assurances – Luxembourg Insurance Commission; one of the competent authorities), Portugal (Autoridade de Supervisão de Seguros e Fundos de Pensões – Portuguese Insurance and Pension Funds Supervisory Authority; one of the competent authorities) and Spain (Spanish sectorial competent authorities on insurance matters - one of the competent authorities).

11 The Central Bank of Cyprus is one of the designated competent authorities pursuant to Regulatory Act Number 283/2015, of 4 September 2015.

12 Česka národní banka is the sole designated competent authority pursuant to Articles 136, 137 and 179 of Law No. 256/2004 Coll. on Capital Markets Undertakings.

13 The Magyar Nemzeti Bank is the sole designated competent authority pursuant to Article 186(5) m) of Law CXXXIX of 2013 on the Hungarian National Bank.

14 The Central Bank of Ireland is the sole designated competent authority pursuant to Regulation 3 of the European Union (Key Information Documents for Packaged Retail and Insurance-based Investment Products (PRIIPS)) Regulations 2017 (S.I. 629/2017).

15 Národná Banka Slovenska is the sole designated competent authority pursuant to Articles 38g and 38h of Law no 747/2004 Coll. on Supervision of the Financial Market as amended.

16 In addition, the following Member States are in the process of designating their NCBs as either their sole or one of their competent authorities: Greece (one of the competent authorities), Lithuania (sole competent authority) and Portugal (one of the competent authorities).

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

As noted above, although to date Banka Slovenije has not carried out any activities related to insurance products or PRIIPs, Banka Slovenije is currently involved in supervising other investment products such as structured deposits. Given that PRIIPs go beyond deposit-related products Banka Slovenije's new task seems to only partially complement its existing tasks. As with other consumer protection tasks, sufficient mitigation measures must be put in place to ensure that in the event of a conflict of interests supervisory considerations prevail[17].

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

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 an adverse impact on the NCB's financial or operational capacity to perform its ESCB tasks[18]. In order to ensure that the capacity of Banka Slovenije to perform its ESCB-related tasks is not impaired, Banka Slovenije must, therefore, be in a position to avail itself of the necessary resources, including personnel and the provision of IT services, to carry out its duties under the draft law. In this regard, it is noted that pursuant to the draft law Banka Slovenije can introduce a new fee applicable to supervised entities for the performance of its new supervisory duties, which has a positive impact on Banka Slovenije's capacity to perform its new task, without negatively affecting the performance of its ESCB-related tasks. However, the impact of the new task on Banka Slovenije's operational capacity is still unclear, due to the fact that the new task relates to a number of new products in respect of which Banka Slovenije has no previous supervisory experience.

3.1.7 *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*

The performance of the new task does not appear to be problematic from the perspective of the institutional set-up of Banka Slovenije, nor does it raise accountability or personal and institutional independence concerns. However, the complementarity between Banka Slovenije's new task and its existing tasks should not be interpreted too broadly, as this would lead to the creation of an indefinite chain of ancillary tasks which could eventually undermine Banka Slovenije's independence.

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17 See paragraph 3.1 of Opinion CON/2015/21 and paragraph 2.2.2 of Opinion CON/2016/31.

18 See, for example, paragraph 2.2.5. of Opinion CON/2017/32, paragraph 3.3.2. of Opinion CON/2017/43 and paragraph 3.3.2 of Opinion CON/2017/52.

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

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 for the performance of the new task given to it under the draft law 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.

3.1.9 *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*

The performance of the new task does not appear either to expose the members of the decision-making bodies of Banka Slovenije to any disproportionate political risk or to have an impact on their personal independence.

3.1.10 *Conclusion regarding the compatibility of the draft law with the prohibition on monetary financing*

The task of carrying out the duties in relation to supervising credit institutions' compliance with the provisions of Regulation (EU) No 1286/2014 and the draft law relating to PRIIPs 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 ESCB or Eurosystem related duties, careful consideration should be given to its impact on Banka Slovenije's operational capacity due to the fact that the new task relates to a number of new products in respect of which Banka Slovenije has no previous supervisory experience. In addition, the complementarity between new tasks to be conferred on Banka Slovenije and its existing tasks should not be interpreted too broadly, as this would lead to the creation of an indefinite chain of ancillary tasks which could eventually undermine Banka Slovenije's independence.

3.2 *Division of competences between the three Slovenian supervisory authorities*

The ECB notes that the proposed division of competences under the draft law between the three Slovenian supervisory authorities may also raise certain conflicts when applying the draft law, these possible conflicts should be further clarified. The draft law divides supervisory competences based on the identity of the supervised entities. However, since the obligations under the draft law and Regulation (EU) No 1286/2014 relate to both entities that manufacture PRIIPs and those that sell PRIIPs, situations could arise where two different competent authorities would exercise supervisory tasks over a single PRIIP. For example, in the case of insurance-based investment products these would be manufactured by an insurance undertaking, implying that the Insurance Supervision Agency would be regarded as the competent authority in relation to the manufacturer. At the same time insurance-based investment products may be sold by credit institutions acting as intermediaries selling PRIIPs. This means that Banka Slovenije would be regarded as a competent authority in relation to the seller of the PRIIPs. Such situations could give rise to two divergent opinions from two different competent authorities in relation to a single PRIIP. Against this backdrop the consulting authority may wish to further reflect on the division of competences under the draft law.

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

Done at Frankfurt am Main, 31 January 2018.

[signed]

The President of the ECB

Mario DRAGHI