EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 19 September 2006

at the request of the Slovenian Ministry of Finance
on certain provisions of a draft law on banking

(CON/2006/48)

Introduction and legal basis

On 23 August 2006 the European Central Bank (ECB) received a request from the Slovenian Ministry of Finance for an opinion on certain provisions of a draft law on banking (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 sixth indent 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 provisions in question relate to 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 main objective of the draft law is to comprehensively regulate the banking sector and transpose relevant Community directives into Slovenian law, in particular Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (hereinafter the 'Recast Banking Directive')[2] and Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast)[3].

1.2 The ECB has only considered those provisions of the draft law that are covered by the scope of the consultation request received from the Slovenian Ministry of Finance and has in general not assessed the other provisions. The consultation request only applies to those provisions of the draft law that: (i) do not implement Community directives; (ii) are new in substance compared to the

1 OJ L 189, 3.7.1998, p. 42.
2 OJ L 177, 30.6.2006, p. 1.
3 OJ L 177, 30.6.2006, p. 201.

current Law on banking[4]; and (iii) potentially influence the stability of financial institutions and markets. These provisions are contained in various parts of the draft law and cover the following: definitions of relevant terms, the corporate structure of banks, the provision of banking and financial services, risk management and internal audit, business books and annual reports, the supervision of banks, guaranteed deposits and e-money institutions.

2. General observations

The ECB welcomes this general revision of the existing Slovenian Law on banking, which is the main law regulating the banking sector in Slovenia. The draft law is expected to achieve its main objective of ensuring consistent implementation of financial Community directives in national law.

3. Definition of credit institutions

3.1 In Article 13(3) of the draft law, the term 'credit institution' is used as a generic term for banks and companies issuing e-money. The ECB notes that savings banks are not included in the category of credit institutions. A savings bank is defined in Article 13(5) of the draft law as a legal person with its seat in the Republic of Slovenia performing banking services[5] on the basis of Banka Slovenije's authorisation and which is subject to the same rules that apply to banks, unless stated otherwise in Chapter 11 of the draft law[6].

3.2 Under Article 4 of the Recast Banking Directive, the term 'credit institution' comprises, in addition to e-money institutions, undertakings whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account. In order to bring the draft law into line with the Recast Banking Directive, the ECB would recommend that the consulting authority includes savings banks under the definition of credit institutions.

4. Bank management system

4.1 Pursuant to Article 60 of the draft law, a bank may choose either a two-tier bank management system with a management board and a supervisory board, or a one-tier bank management system with a board of directors. In the latter case, certain provisions referring to the management board will also apply *mutatis mutandis* to the executive directors, including Article 62 of the draft law

4 Official Gazette of the Republic of Slovenia, No 104/2004 – official consolidated version.

5 Under Article 7 of the draft law, the banking services are receiving deposits from the public and granting credits for own account.

6 Pursuant to the specific rules in Chapter 11 of the draft law, savings banks:
- may have a lower initial capital than banks (EUR 1 million instead of EUR 5 million);
- are prohibited from providing pension fund management services in accordance with the law governing pension and disability insurance as defined in point 3 of Article 11(1) of the draft law;
- may only perform foreign exchange transactions with prior Banka Slovenije authorisation for such transactions;
- may contractually transfer internal audit tasks to a person not employed by the savings bank but fulfilling the conditions for carrying out such tasks.

laying down the membership requirements of banks' management boards. Article 62(3) of the draft law states that at least one member of the management board must have a perfect command of the Slovenian language and that at least one member of the management board must have 'their centre of vital interests in the Republic of Slovenia'.

4.2 These two requirements may constitute a breach of the principle of free movement of workers, as they limit the access of citizens of other Member States to membership of Slovenian banks' management boards. According to Community law, such requirements could be justified as (i) exceptions permissible under Article 39 of the Treaty[7]; or (ii) exceptions concerning 'general interest objectives'[8]. Unless the two requirements in Article 62(3) of the draft law can be so justified, the ECB would recommend abolishing them.

4.3 As regards the language requirement in Article 62(3) of the draft law, the ECB recognises the right to impose such a requirement in certain circumstances[9]; however, the level of linguistic knowledge must be proportionate to the objective to be achieved and should not result in discrimination against citizens of other Member States[10]. Therefore, if the language requirement is to be retained, the phrase 'perfect command of the Slovenian language' should at least be replaced by different wording, which can perhaps refer to a 'satisfactory command of the Slovenian language commensurate with performing the duties of a member of the bank's management board', since this would be more in line with Community law. Moreover, it is recommended that the language requirement is waived if it is not necessary for prudential supervision reasons.

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7 Such exceptions must be justified on grounds of public policy, public security or public health; in addition, employment in the public service is exempt from the free movement of workers provisions.

8 This concept has its origins in the Court of Justice's judgment in Case 120/78 *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 ('*Cassis de Dijon*'), in particular paragraph 8. National measures which are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it (see, for example, paragraph 37 of the Court of Justice's judgment in Case C-55/94 *Reinhard Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165).

9 Article 3 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community allows conditions relating to 'linguistic knowledge required by reason of the nature of the post to be filled'.

10 In Case C-379/87 *Anita Groener* v *Minister for Education and the City of Dublin Vocational Educational Committee* [1989] ECR 3967, the Court of Justice held at paragraph 19 that although there was no Treaty ban on a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language, such a policy must not in any circumstances be disproportionate to the aim pursued and the manner in which it is applied must not bring about discrimination against nationals of other Member States.

5. References to the European Commission

The ECB would like to make the following editorial comment. Article 22(2) of the draft law states that the term 'EU Commission' means the Commission of the European Communities. The ECB would recommend simply referring to the 'Commission', which is more accurate (as it is an institution of the European Communities and not the EU) and is also an established term in Community legislation.

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

Done at Frankfurt am Main, 19 September 2006.

[signed]

The President of the ECB

Jean-Claude TRICHET