EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 22 May 2006

at the request of the Slovenian Ministry of Justice
on a draft law amending the Law on financial collateral

(CON/2006/24)

Introduction and legal basis

On 13 April 2006 the European Central Bank (ECB) received a request from the Slovenian Ministry of Justice for an opinion on a draft law amending the Law on financial collateral (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 on the fifth and sixth indents of Article 2(1) and Article 2(2) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions[1], as the draft law relates to payment and settlement systems, the rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets, and instruments of monetary policy. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft law

The main objectives of the draft law are: (i) to introduce into the Law on financial collateral[2] (hereinafter the 'Law') the concept of a 'maximum pledge' with respect to the provision of financial collateral; and (ii) to implement Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (hereinafter the 'Collateral Directive')[3].

2. General observations

2.1 In general terms, the ECB welcomes the proposed amendments as the draft law addresses matters that are directly relevant to the Eurosystem's core fields of competence and will have an impact

1 OJ L 189, 3.7.1998, p. 42.

2 *Zakon o finančnem zavarovanju*, adopted on 22 April 2004, published in the Official Gazette of the Republic of Slovenia No 47/04.

3 OJ L 168, 27.6.2002, p. 43.

both on the efficient and safe use of financial collateral arrangements in EU financial markets and the Eurosystem's credit operations. As the Law applies, inter alia, to financial collateral arrangements concluded by national central banks of Member States and the ECB with their counterparties, the new provisions should give additional support to the conduct of credit operations with Banka Slovenije's domestic counterparties, as well as operations in the context of the correspondent central banking model. In this respect, the introduction of the concept of a 'maximum pledge' (as defined in Article 1 of the draft law) will allow collateral providers to provide collateral up to a defined amount or, in case the maximum amount is not stipulated, up to the full value of the pledged financial instrument in relation to one or several claims in a legal relationship without the need to do so separately for each individual claim.

2.2 Articles 2, 3 and 4 of the draft law would further clarify the implementation of the Collateral Directive in Slovenia. In this respect, the ECB notes the following proposed changes: (a) the draft law specifies for the avoidance of doubt that, among other rights arising under a financial collateral contract, the right to enforce collateral also remains valid even after an insolvency procedure has been opened against a collateral provider or collateral taker: such a procedure should therefore not represent an obstacle to the swift and unimpeded realisation of collateral (in line with Article 8 of the Collateral Directive); (b) the validity of a close-out netting agreement is expressly extended to cases of judicial and other attachment to fully meet the requirement laid down in Article 7 of the Collateral Directive; and (c) the law applicable to financial collateral provided by way of entry of a transfer as collateral or pledge in the register of financial instruments is stated to be the law of the country of the register (see Article 9 of the Collateral Directive).

3. Maximum pledge

3.1. The new concept of 'maximum pledge' should facilitate the provision of collateral, as it enables collateral providers to provide collateral up to a defined amount for several claims in a legal relationship without having to do so separately for each individual claim. It is noted that a 'maximum pledge' may only be established in relation to financial instruments entered in the official register, thereby ensuring transparency of established collateral rights. In this context, the ECB refers to Article 3 of the Collateral Directive and would like to reiterate its position that 'simple and reliable methods of collateralisation, which include efficient enforcement methods, are of fundamental interest to the Eurosystem, as they help, inter alia, to ensure the smooth functioning of the Eurosystem's single monetary policy'[4].

3.2. As regards the presumption contained in the last sentence of Article 7.a(1) of the draft law, the ECB suggests that the wording 'it shall be deemed that the financial instrument fully guarantees the

4 See paragraph 12 of ECB Opinion CON/2005/12 of 25 May 2005 at the request of the Ministry of Finance of Luxembourg on a draft law on financial collateral arrangements; available on the ECB's website at www.ecb.int.

secured claims' should be made clearer by providing that, in such case, it is deemed that the financial instrument is fully available to guarantee the secured claims.

4. Implementation of the Collateral Directive

4.1. The ECB notes that the definition of 'financial instruments' in Article 3 of the Law reflects the wording used in the Collateral Directive. The ECB has consistently maintained[5] that the scope of national implementation of the Collateral Directive should cover all types of assets eligible for Eurosystem credit operations. This is particularly relevant with regard to credit claims in the form of bank credits. In 2005, the Governing Council of the ECB approved a unified regime for the use of bank credits from all euro area countries as collateral for Eurosystem credit operations from 2007. It is therefore of crucial importance to the Eurosystem that credit claims can be handled safely and smoothly both domestically and on a cross-border basis. In this context, pursuant to Article 22.d of the Law on Banka Slovenije[6], credit claims provided as collateral by means of an entry in the register of financial assets to be established and maintained by Banka Slovenije will fully benefit from the regime established by the Law. This regime would thus ensure, inter alia, the validity of an assignment for security purposes or simplified enforcement of bank credits.

4.2. The ECB welcomes the provision inserted into Article 11 of the Law, which makes it clear that, among other rights arising under a financial collateral contract, the right to enforce collateral also remains valid even after an insolvency procedure has been opened against the collateral provider or collateral taker. The ECB suggests that this provision could be made even clearer by stating that the relevant methods of enforcement are those listed in point 9 of Article 3 of the Law, and that such methods are without prejudice to close-out netting as provided for under Article 12 of the Law.

4.3. Pursuant to Article 12 of the Law, the validity of a close-out netting agreement is expressly extended to cover cases of judicial and other attachment to meet the requirement laid down in Article 7 of the Collateral Directive. If considered appropriate, the application of this provision could be extended further to cover certain insolvency-like proceedings, such as regulatory moratoria.

4.4. The draft law proposes a revised Article 15, which contains a conflict-of-law provision regarding the determination of the applicable law in relation to securities provided as collateral by means of an entry in a financial instruments register. It is acknowledged that this provision is consistent with Article 9 of the Collateral Directive. However, the ECB suggests introducing an additional general conflict-of-law provision, which would determine the applicable law in cases where financial

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5 See paragraph 10 of ECB Opinion CON/2001/13 of 13 June 2001 at the request of the Council of the European Union concerning a proposal for a Directive of the European Parliament and of the Council on financial collateral arrangements, paragraph 6 of ECB Opinion CON/2003/11 of 26 June 2003 at the request of Austrian Federal Ministry of Justice on a draft federal law implementing Directive 2002/47/EC on financial collateral arrangements, and paragraph 15 of ECB Opinion CON/2005/12. The opinions are available on the ECB's website at www.ecb.int.

6 *Zakon o Banki Slovenije*, adopted on 19 June 2002 and last amended on 30 March 2006; published in the Official Gazette of the Republic of Slovenia, Nos 58/02, 85/02 and 39/06.

instruments are held on securities accounts outside a register or a central securities depository. This additional provision would cover situations where financial instruments are provided as collateral by way of an entry on a securities account held with a financial intermediary (e.g. a credit institution), whereby the applicable law is determined by the jurisdiction of the place of the relevant securities account in accordance with Article 9 of the Collateral Directive.

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

Done at Frankfurt am Main, 22 May 2006.

[signed]

The President of the ECB

Jean-Claude TRICHET