EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 1 July 2015

on consumer protection in the financial markets

(CON/2015/21)

Introduction and legal basis

On 29 October 2014, the European Central Bank (ECB) received a request from the Slovak Ministry of Finance for an opinion on a draft law amending Law No 747/2004 on supervision of the financial markets and amending certain laws (hereinafter the 'draft law'). In addition to Law No 747/2004, the draft law also amends Law No 566/1992 on Národná banka Slovenska and certain other laws, such as Law No 129/2010 on consumer credit and other credits and loans to consumers. It is noted that the draft law was adopted by the Slovak Parliament on 26 November 2014 and signed by the President on 10 December 2014. In the course of the legislative process, further amendments were made to 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 second, third and sixth indents of Article 2(1) of Council Decision 98/415/EC[1], as the draft law relates to means of payment, Národná banka Slovenska (NBS) and rules applicable to financial institutions which 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

Previously to the draft law, no authority in Slovakia was competent to conduct supervision in the field of consumer protection in the financial markets[2], with the exception of the provision of consumer credit, for which the Slovak Trade Inspection is the supervisory authority. In order to address this situation, the draft law extends the scope of NBS supervision of the financial markets to include responsibility for consumer protection[3]. In order to facilitate the exercise of this additional responsibility, the draft law introduces a number of sanctions and enforcement measures which NBS will be entitled to impose for breach of an obligation in the field of financial consumer protection[4]. Under the draft law, minor and obvious breaches will be dealt with via simplified proceedings[5]. Members of staff of NBS authorised to carry out on-site supervision will have the authority to order, on the spot, a supervised entity to take immediate action to

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 See point 4.2 (impact assessment) of the explanatory memorandum to the draft law.

3 Point 2 of Article I of the draft law.

4 Point 26 of Article I of the draft law.

5 ibid., in particular new sections 35b and 35c.

eliminate any breach which has been identified. They may also order a supervised entity to suspend the provision or intermediation of the financial service affected by such breach until it has been eliminated[6]. The draft law provides that, under certain circumstances, NBS will have the power to withdraw a supervised entity's permit or other authorisation allowing it to engage in an activity related to the financial markets, or to strike it off the relevant register of entities authorised to engage in activity related to the financial markets[7]. A proportion of the costs incurred by NBS in the protection of financial consumers will be covered by a surcharge on annual contributions paid by entities supervised by NBS. This will be paid *ex post* and only by those supervised entities which have breached their obligations in relation to the protection of financial consumers or violated the rights of financial consumers[8].

The draft law also amends certain rules on how supervision is carried out. It provides for 'mystery shopping' exercises[9] and the conclusion, for supervisory purposes, of a financial services contract with a supervised entity[10]. In addition, a party which has initiated proceedings before NBS may be allowed to submit technical documentation, or other annexes to the application, in a foreign language[11].

As regards the amendments to Law No 566/1992, the draft law proposes to increase the number of board members of NBS from five to six and to extend their term of office from five to six years[12]. Current board members will not be affected by these new provisions[13].

The draft law prohibits the use of the terms 'coin', 'banknote' and 'currency' in the specification or description of a token, medal, means of payment or analogous technical means, or other tangible or intangible items related to the production, offer, sale, or dissemination of such a token, medal, means of payment or analogous technical means. This prohibition extends to words that contain such terms, as well as to related translations[14].

Finally, the draft law amends Law No 747/2004 to include references to the role of NBS within the Single Supervisory Mechanism[15].

2. General observations

2.1 As indicated, no authority in Slovakia was competent to conduct supervision in the field of consumer protection in the financial market[16]. The new task allocated to NBS's in respect of consumer protection in the financial markets is not listed among the functions of national central banks set out in the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB').

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6 Point 26 of Article I of the draft law (new section 35d).

7 Point 26 of Article I of the draft law (new section 35g). However, please see the observation of the ECB below.

8 Points 29 and 35 of Article I of the draft law and the corresponding parts of the special part of the explanatory memorandum.

9 Points 11, 12, 13 and 15 of Article I.

10 Point 12 of Article I.

11 Point 17 of Article I.

12 Points 4 and 6 of Article II.

13 Point 17 of Article II.

14 Point 9 of Article II.

15 Points 5, 6 and 7 of Article I.

16 With exception of consumer credit, see paragraph 1 of this opinion.

2.2 The ECB underlines that, in the context of a proposed conferral of tasks on an ESCB member, it is necessary to assess such conferral against the prohibition of monetary financing under Article 123 of the Treaty. The ECB has developed the following guidance, in the form of general and specific considerations, on the basis of which the ECB may decide whether a new task conferred on an ESCB national central bank (NCB) is to be considered a central banking task or a government task for the purposes of the monetary financing prohibition.

2.2.1 *General considerations*

First, the systematic categorisation of tasks assigned to NCBs as central banking or government tasks applies to genuinely new tasks that did not exist in the past or did not form an integral part of the central banking tasks already assigned to the NCB. In recognition of the different EU Member States' legal frameworks, central banking traditions and national set-ups, the tasks currently discharged by an NCB as central banking tasks are not reviewed and re-categorised, but may be reassessed if they are subject to legislative amendments of substance.

Second, the principle of financial independence requires that the Member States may not put their NCBs in a position where they have insufficient financial resources to carry out their ESCB or Eurosystem-related tasks, as applicable.

Third, central banking tasks comprise in particular those tasks that are related to the tasks listed in Article 127(2), (5) and (6) of the Treaty.

Fourth, new tasks conferred on an NCB which are atypical of NCBs' tasks, or which are clearly discharged on behalf of and in the exclusive interest of the government or of other public entities, should be considered as government tasks. In that context, a distinction should be drawn between liquidity and solvency-related tasks of NCBs. While, for purposes of the monetary financing prohibition, solvency support is a government task, liquidity-related tasks, the ultimate objective of which are to finance the economy, are central banking tasks.

2.2.2 *Specific considerations*

An important criterion for classifying a new task as a government task is, therefore, the impact of the task on the institutional, financial and personal independence of the NCB. In particular, the following should be taken into account.

First, it should be assessed whether the performance of the new task creates inadequately addressed conflicts of interests with existing central banking tasks, and does not necessarily complement those existing central banking tasks. If a conflict of interest arises between existing and new tasks, there should be sufficient mitigation in place to adequately address that conflict. Complementarity between the new task and existing central banking tasks should not, however, be interpreted extensively, so as to lead to the creation of an indefinite chain of ancillary tasks. Complementarity should also be examined from the point of view of the financing of those tasks.

Second, it should be assessed whether without new financial resources the performance of the new task is disproportionate to the financial or organisational capacity of the NCB concerned, and may negatively impact its capacity to properly perform existing central banking tasks.

Third, it should be assessed whether the performance of the new task does not fit into the institutional set-up of the NCB in the light of central bank independence and accountability considerations.

Fourth, it should be assessed whether the performance of the new task harbours substantial financial risks.

Fifth, it should be assessed whether the performance of the new task exposes the members of the NCB's decision-making bodies to political risks which are disproportionate and may also impact on their personal independence and, in particular, the guarantee of the term of office under Article 14.2 of the ESCB Statute.

2.2.3 Any final assessment on the qualification of a task given to an NCB as either falling within the scope of a central banking task or a government task will be guided by the objective of ensuring the consistent application of the prohibition of monetary financing within the Eurosystem and the ESCB to the extent that it applies to its members.

3. Specific observations

3.1 *Consumer protection not atypical central banking task*

The ECB has consistently expressed the view that consumer protection tasks discharged by an NCB will be central banking tasks, and therefore that no monetary financing issue arises, provided 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"[17]. Sufficient mitigation measures must be put in place to ensure that in case of a conflict of interests supervisory considerations prevail.

3.2 *Links to basic tasks listed in Article 127(2), (5) and (6) of the Treaty*

Financial consumer protection as a task complementary to existing supervisory powers may be considered a task related to the tasks referred to in Article 127(5) of the Treaty, particularly where an NCB already has a mandate for supervision in financial markets, which is the case with NBS.

3.3 *Consumer protection as a task complementary to existing supervisory powers*

In accordance with the above, the new task entrusted to NBS can be considered a central banking task, as it complements its existing supervisory powers over entities active in the financial markets already supervised by NBS, is financed as part of a system of (partial) financing of NBS's supervisory tasks via contributions and fees related to supervision, and contributes to the soundness of the financial markets and the preservation of confidence in the markets. In this regard, the ECB welcomes the consulting authority's aim of ensuring that NBS has effective means to enforce compliance with the rules on financial consumer protection.

17 See, for example, ECB Opinions CON/2007/29, CON/2007/8, CON/2006/47, and CON/2006/38. All ECB Opinions are on the ECB's website at www.ecb.europa.eu.

3.4 *Conflict of interests between consumer protection and supervisory tasks; fitting of the new task within NBS's institutional set-up*

3.4.1 Under the draft law, in the protection of financial consumers, NBS will carry out activities and exercise authorisation pursuant to Law No 747/2004[18]. The draft law empowers NBS to impose specific administrative measures for breaches of obligations in the field of consumer protection in the financial markets. Such specific administrative measures include monetary penalties, banning unfair commercial practices or unacceptable conditions disadvantaging financial consumers, banning the provision of a financial service not complying with consumer protection rules, and withdrawal of an authorisation or permit.

3.4.2 The ECB notes that, pursuant to Article 1(1) of Law No 747/2004, when exercising such powers, NBS should take into account the general objective of financial market supervision in order to contribute to the stability of the financial market as a whole, as well as to the safe and smooth operation of the financial markets in the interests of maintaining the credibility of the financial markets, the protection of customers, and compliance with competition law. In this respect, the ECB understands that NBS, as the sole authority responsible for supervision under Law No 747/2004, will be required to mitigate any potential conflict of interests between its consumer protection tasks and its financial stability mandate by always taking financial stability considerations into account when imposing a sanction or enforcement measure for a breach of an obligation in the field of financial consumer protection. In this regard, given the complementarity of the consumer protection task, that new task fits into NBS's institutional set-up.

3.4.3 In view of the primacy of Union legislation, the ECB also notes that when NBS considers that it is necessary to withdraw a credit institution's authorisation under section 35g of the draft law, it must give full regard to Article 4(1)(a) and Article 14(5) of Council Regulation (EU) No 1024/2013[19], which assign to the ECB the exclusive competence to withdraw a credit institution's authorisation, and submit a proposal to the ECB to that end. In that case, the ECB will take a decision on the proposed withdrawal of authorisation, taking into account the justification for withdrawal put forward by NBS.

3.5 *Financial independence; proportionality to the organisational capacity of NBS to perform its tasks*

The principle of financial independence requires NCBs to have sufficient means to carry out not only their ESCB-related tasks from an operational and financial point of view, but also their national tasks. In this regard, the ECB notes that additional expenses for NBS resulting from the assumption of its new tasks and powers in the field of consumer protection in the financial markets are to be financed by a surcharge on annual contributions of entities supervised by NBS being a part of a system of (partial) financing of NBS's supervisory tasks via contributions and fees related to supervision[20]. The ECB further notes that the surcharge will not be payable regularly and by all supervised entities, but only by those which, pursuant to a final decision of NBS, are found to have

18 See point 26 of Article I of the draft law (new Section 35a of Law No 747/2004).

19 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

20 See Section 39 *et seq.* of the Law No 747/2004.

breached their obligations in the field of financial consumer protection or violated the rights of financial consumers. However, entities which have been subject to sanctions or other enforcement measures imposed in simplified proceedings, and addressees of interim measures, will not be subject to this fee. It will not be possible to estimate the amount of proceeds from the surcharge. However, considering that the task is complementary to existing supervisory tasks and that a proportion of the costs incurred by NBS in financial consumer protection will be covered by the surcharge, the performance of the new task cannot be considered disproportionate to NBS's financial or organisational capacity and should not negatively impact on its capacity to properly perform its existing central banking tasks.

3.6 *Extent to which the performance of tasks harbours substantial or disproportionate risks*

Given that the new consumer protection task may be considered complementary to existing supervisory tasks which are partially financed via contributions and fees related to supervision, these tasks bear similar financial and political risks as supervision. In this regard, such risks should not be considered substantial or disproportionate to the supervisory tasks already assumed by NBS.

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

Done at Frankfurt am Main, 1 July 2015.

[signed]

The President of the ECB

Mario DRAGHI