EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 23 November 2007

at the request of the Slovenian Ministry of Finance
on a draft law on foreign exchange

(CON/2007/38)

Introduction and legal basis

On 30 October 2007, the European Central Bank (ECB) received a request from the Slovenian Ministry of Finance for an opinion on a draft law on foreign exchange (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 third 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 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 draft law: (i) regulates foreign exchange cash operations; (ii) designates competent authorities for supervision of compliance with the draft law and for taking decisions in offence proceedings under the draft law; and (iii) specifies the competent authorities and the penalties for infringements as required by Regulation (EC) No 1889/2005 on controls of cash entering or leaving the Community[2].

1.2 Pursuant to Article 13 of the draft law, Banka Slovenije is to supervise the operations of authorised banks and savings banks in respect of foreign exchange cash operations, and other persons authorised to carry out foreign exchange cash transactions. This supervisory function already exists pursuant to Article 58[3] of the present Law on foreign exchange[4] which will be repealed by the draft

1 OJ L 189, 3.7.1998, p. 42.

2 OJ L 309, 25.11.2005, p. 9.

3 Article 58 of the Law on foreign exchange: 'Banka Slovenije shall supervise the operations of authorised banks and savings banks and, in respect of foreign exchange cash operations, also of other persons authorised to carry out foreign exchange cash transactions.'

law. However, Article 13 of the draft law, read in conjunction with Article 45(1) and (2)[5] of the Law on general offences[6], expands Banka Slovenije's powers to include new tasks related to taking decisions concerning the offences set out in the draft law[7]. In exercising supervision within the scope of its competence, whenever Banka Slovenije finds that the conditions it prescribes for carrying out foreign exchange transactions have been breached, it should also take decisions with regard to such offences and impose appropriate penalties in offence proceedings. Under the current Law on foreign exchange, the offence proceedings described have hitherto been conducted by the Slovenian Tax Administration.

2. General observations

2.1 The new tasks described in paragraph 1.2 are not listed among the functions of national central banks (NCBs) specified in the Statute of the European System of Central Banks and of the European Central Bank. However, without prejudice to the Governing Council's powers under Article 14.4 of the Statute of the ESCB, the ECB considers that these tasks should not interfere with the objectives and tasks of the European System of Central Banks. These new tasks would be performed on the responsibility and liability of Banka Slovenije, and would not be regarded as being part of the ESCB's functions.

2.2 The ECB understands that the underlying reason for allocating the tasks referred to in paragraph 1.2 to Banka Slovenije is linked to Banka Slovenije's overall responsibility for the supervision of banks and savings banks. The ECB is of the opinion that the exercise of the new tasks under the draft law could further enhance this supervisory function in respect of foreign exchange cash transactions.

2.3 Banka Slovenije will have to commit additional resources, both human and financial, to carrying out the tasks referred to in paragraph 1.2. In this context, the ECB has emphasised that 'Member States may not put their NCBs in a position where they do not have sufficient financial resources to carry out their ESCB- or Eurosystem-related tasks, as applicable'[8]. The ECB has consistently expressed its concern that, when allocating additional tasks to NCBs, it must be ensured that they have sufficient human and financial resources, both in terms of quantity and quality, to carry out all

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4 *Zakon o deviznem poslovanju*, adopted on 23 March 1999, published in the Official Gazette of the Republic of Slovenia No 23/1999. The Law as last amended by the Law on the introduction of the euro (Official Gazette of the Republic of Slovenia No 114/2006).

5 Article 45 (1) and (2) of the Law on general offences:
'(1) Offence authorities and courts shall take decisions with regard to offences.
(2) Offence authorities are administrative and other State authorities and bodies with certain public powers which monitor the implementation of laws and regulations setting out offences, and the authorities of self-governing local communities which are authorised to take decisions with regard to offences by virtue of special regulations.'

6 *Zakon o prekrških*, adopted on 18 December 2002, published in the Official Gazette of the Republic of Slovenia No 7/2003. The Law as last amended by the Constitutional Court decision No U-I-69/06-16 of 14 December 2006 (Official Gazette of the Republic of Slovenia No 139/2006).

7 See Article 16(1), paragraph 2, of the draft law.

8 See e.g. the ECB's Convergence Report 2007, p. 19, available on the ECB's website at www.ecb.int.

their tasks, and in particular that their capacity to carry out their ESCB- or Eurosystem-related tasks is not affected[9]. Accordingly, the ECB expects that Banka Slovenije will have sufficient human and financial resources to carry out its new tasks so that its capacity to carry out its Eurosystem tasks will be unaffected.

3. Specific observations

3.1 For reasons of legal clarity, the ECB recommends reconsidering the content of Article 11 of the draft law where the Ministry of Finance is listed among the supervisory authorities under the draft law while subsequently only the supervisory powers of Banka Slovenije and the customs authority are specified (in Sections 4.2 and 4.3). According to additional clarification provided by the consulting authority, the Ministry is listed among the supervisory authorities as the appellate body, i.e. the body which decides on appeals against the decisions of the supervisory authorities in accordance with the draft law. If this is indeed the intended meaning, the ECB recommends that this should be explicitly set out in Article 11 of the draft law.

3.2 With respect to Article 11 of the draft law, the ECB would further like to draw the attention of the consulting authority to the special regime established in accordance with the Law on Banka Slovenije[10] in conjunction with the Law on banking[11]. Under this regime the decisions of Banka Slovenije on individual matters are *only* subject to the judicial review of the Supreme Court of the Republic of Slovenia. While taking into account the general principle that ministries act as appellate bodies with regard to the decisions of the bodies which are under their authority (hence the Ministry of Finance's competence to review the decisions of the Customs Administration), the wording of Chapter III of the draft law should clearly provide for the exemption of Banka Slovenije's decisions from the review by the Ministry.

3.3 With respect to Article 13 of the draft law, it is not clear why the competence of Banka Slovenije is restricted to supervising the operations of authorised banks and savings banks 'in respect of foreign exchange cash operations'. Banka Slovenije is in any event competent to comprehensively supervise the operations of banks and savings banks on the basis of Articles 217(1) and 380(1) of the Law on banking[12]. According to Article 11 of the draft law, the supervisory authorities are to

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9 See paragraph 3.3 of ECB Opinion CON/2007/29 of 5 October 2007 at the request of the Portuguese Ministry of Finance and Public Administration on a draft decree-law amending the legal framework of credit institutions and financial companies, paragraph 2.1 of ECB Opinion CON/2007/23 of 2 August 2007 at the request of Banca Națională a României on a draft law on non-banking financial institutions, and paragraph 3.2 of ECB Opinion CON/2007/17 of 18 June 2007 at the request of the Italian Ministry of Economic Affairs and Finance on a draft law on the regulation and supervision of markets and the functioning of the competent independent authorities.

10 *Zakon o Banki Slovenije* – official consolidated version, published in the Official Gazette of the Republic of Slovenia No 72/2006.

11 *Zakon o bančništvu*, adopted on 23 November 2006, published in the Official Gazette of the Republic of Slovenia No 131/2006.

12 Article 217(1) of the Law on banking:
'(1) Banka Slovenije is competent and responsible to supervise a bank with regard to all services and operations performed by the bank in the territory of the Republic of Slovenia, of a Member State and of a third country.'

supervise operations carried out pursuant to the draft law within their respective fields of competence. The general competence of Banka Slovenije to monitor implementation of laws and regulations issued and measures taken on the basis thereof within the scope of its competences in the supervision of banks and savings banks and other persons pursuant to the law already exists by virtue of Article 43(1) of the Law on Banka Slovenije. If the intention of Article 13 of the draft law is merely to distinguish Banka Slovenije's powers under the draft law from the powers of the customs authorities, the ECB suggests that the provision be worded accordingly.

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

Done at Frankfurt am Main, 23 November 2007.

[signed]

The President of the ECB

Jean-Claude TRICHET

Article 380(1) of the Law on banking:
'(1) Provisions of other chapters in this Law concerning banks shall apply to savings banks, unless otherwise stipulated in this chapter.'