OPINION OF THE EUROPEAN CENTRAL BANK

of 11 January 2018

on markets in financial instruments

(CON/2018/3)

Introduction and legal basis

On 1 December 2017 the European Central Bank (ECB) received a request from the Slovenian Ministry of Finance for an opinion on a draft Law on the financial instruments market[1] (hereinafter 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 and sixth indents of Article 2(1) of Council Decision 98/415/EC[2], as the draft law relates to Banka Slovenije and 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 One of the purposes of the draft law, which recasts the currently applicable Law on the Financial Instruments Market[3], is to transpose Directive 2014/65/EU[4] and Delegated Directive (EU) 2017/593 supplementing Directive 2014/65/EU[5] into Slovenian law, and to implement and apply Regulation (EU) No 600/2014[6] and Regulation (EU) 2016/1011[7], together with the related delegated acts of the Commission.

1.2 The Securities Market Agency (Agencija za trg vrednostnih papirjev) is the designated competent authority responsible for supervising compliance with Regulation (EU) No 600/2014 and the acts

1 Predlog zakona o trgu finančnih instrumentov (ZTFI-1).

2 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).

3 Zakon o trgu finančnih instrumentov (Official Gazette of the Republic of Slovenia, No 108/10 – official consolidated version, 78/11, 55/12, 105/12 – ZBan-1J, 63/13 – ZS-K, 30/16 and 9/17).

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 Commission Delegated Directive (EU) 2017/593 of 7 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits (OJ L 87, 31.3.2017, p. 500).

6 Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

7 Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (OJ L 171, 29.6.2016, p. 1).

transposing Directive 2014/65/EU into Slovenian law[8], and the designated contact point pursuant to Article 79(1) of Directive 2014/65/EU.

1.3 Banka Slovenije also has a certain supervisory role in respect of the market in financial instruments, so far as concerns credit institutions. In particular, Banka Slovenije is responsible for granting and withdrawing licences to credit institutions established in Slovenia to provide investment services and activities[9]. Furthermore, the draft law specifies its individual provisions, transposing Directive 2014/65/EU and with regard to Regulation (EU) No 600/2014, that are to be applicable mutatis mutandis to credit institutions and special financial institutions providing investment services and activities. In applying those provisions, the references to investment firms shall, subject to certain exceptions, be read as references to credit institutions and special financial institutions and the references to the Securities Market Agency are to be read as references to Banka Slovenije[10]. Accordingly, Banka Slovenije will be responsible inter alia for: (i) carrying out the duties of a competent authority of the home Member State regarding the intended use by Slovenian banks of tied agents established in Slovenia or another Member State[11]; (ii) carrying out the duties of the competent authority of the home Member State where Slovenian banks operating a multilateral trading facility (MTF) or an organised trading facility (OTF) intend to provide for remote access and the use thereof by persons established in another Member State[12]; (iii) checking compliance by credit institutions with their obligations where they act as participants in an organised market[13]; and (iv) issuing decisions to credit institutions with regard to misdemeanours in the event of breach of the provisions of the draft law, including breaches identified by the Securities Market Agency in supervisory proceedings[14].

1.4 However, the Securities Market Agency will be responsible for the supervision of credit institutions and special financial institutions and for issuing supervisory measures[15]. The Securities Market Agency carries out this supervision in close cooperation with Banka Slovenije[16]. The Securities Market Agency has the authority to conduct supervisory activities under the draft law, while the withdrawal of a licence and sanctioning for breaches of the draft law pursuant to a misdemeanour procedure remains under the authority of Banka Slovenije[17].

1.5 The Securities Market Agency is designated also as the competent authority under Regulation (EU) 2016/1011.

1.6 In addition to the transposition and implementation of the abovementioned Union legislation in Slovenian law, the draft law also revises the provisions of the Law on the Financial Instruments Market concerning the investor compensation scheme. Banka Slovenije currently has an

8 Article 49(2) of the draft law.
9 Article 61(6) of the draft law.
10 Article 61(4) and 62 of the draft law.
11 Fourth indent of Article 61(1) of the draft law.
12 Fifth indent of Article 61(1) of the draft law.
13 Eighth indent of Article 61(1) of the draft law.
14 Tenth indent of Article 61(1) of the draft law.
15 Article 61(7) of the draft law.
16 Article 61(6) and (7) of the draft law.
17 Article 61(6) of the draft law.

administrative role in respect of the scheme and its tasks under the draft law have a similar scope[18].

1.7 The draft law provides that in the event of the insolvency of a member investment firm, including those which are credit institutions, the other member investment firms participating in the scheme guarantee, proportionately to their size in terms of number of clients, the repayment of the eligible claims of the insolvent firm's investor clients up to EUR 22 000 per investor. On the basis of the list of eligible claims, as prepared by the insolvency administrator, reviewed by the Securities Market Agency and approved by the competent court, the Agency requests the member investment firms to pay the necessary amounts to a specified account to be opened at Banka Slovenije. Banka Slovenije transfers the funds that it receives from the member firms to the account of a bank appointed by Banka Slovenije to make individual payouts to investors of the insolvent firm. For the first six months after the paying-out begins, the funds at the appointed bank shall be deemed, in the relationship between the appointed bank and the investors of the insolvent firm, as an interest free deposit of the investors and the bank is entitled to charge a maintenance fee not higher than the amount determined by Banka Slovenije. Thereafter, the bank can apply its market interest rate and fees for the maintenance of the deposit.

1.8 Where Banka Slovenije finds that member firms have not timely or fully ensured payment of the necessary amounts into the account it holds, the draft law provides that Banka Slovenije shall notify the Securities Market Agency and the Ministry of Finance. The draft law further provides that the ensuing shortfall in the scheme is to be temporarily covered by the Republic of Slovenia. The State is to provide a short-term loan to Banka Slovenije, acting as an agent for member investment firms who have failed to pay the relevant amounts into the scheme. The loan agreement with the Republic of Slovenia is to be concluded by Banka Slovenije on behalf of the member investment firms. Members who have failed to pay the required amount into the scheme would have to pay their proportionate amount of the loan back to the State. Banka Slovenije is further empowered to recover the outstanding amounts from the members who have not timely or fully ensured the necessary funds and thereby caused the shortfall in the scheme, together with any interest and fees. Any reimbursements from the enforcement procedure are to be used for repaying the loan provided by the State, together with interest and fees.

1.9 Following the activation of the scheme, the investors' guaranteed claims towards the insolvency estate are deemed to be transferred to the member investment firms. Any reimbursements from the insolvency estate are paid to Banka Slovenije for the benefit of the scheme members. Banka Slovenije transfers the reimbursements received to the members in proportion to their share in the scheme.

2. General observations

2.1 This opinion does not consider whether the draft law indeed transposes Directive 2014/65/EU and Commission Delegated Directive (EU) 2017/593 into Slovenian law, or implements and applies

18 Chapter 14 of the draft law.

Regulation (EU) No 600/2014, Regulation (EU) 2016/1011 and further related delegated acts of the Commission. The ECB will only assess those provisions of the draft law that may impact on the role and tasks of Banka Slovenije as a central bank and member of the Eurosystem and the European System of Central Banks (ESCB).

2.2 It is noted that Banka Slovenije is already responsible for granting and withdrawing licences to credit institutions established in Slovenia to provide investment services and activities and for carrying out the abovementioned tasks and cooperating with the Securities Market Agency with regard to the supervision of compliance by investment firms, including credit institutions and special financial institutions, with the provisions governing markets in financial instruments[19]. Therefore, the draft law does not alter Banka Slovenije's existing role or confer genuinely new tasks on Banka Slovenije in respect of the market in financial instruments.

2.3 Furthermore, the draft law does not confer on Banka Slovenije any genuinely new tasks in the context of the operation of the investor compensation scheme as described in paragraphs 1.7 to 1.9.

3. Specific observations

3.1 As regards the tasks of Banka Slovenije, the ECB notes that from a legal certainty perspective it might be advisable to simplify the legislative drafting. The draft law contains numerous cross-references, and provides for the mutatis mutandis application of certain articles of the draft law and other laws depending on the type of undertaking in question, including with regard to the description of the respective responsibilities of the Securities Market Agency and Banka Slovenije. In addition, it would be beneficial if the division of responsibilities between Banka Slovenije and the Securities Market Agency under the draft law was more clearly specified.

3.2 Concerning the investor compensation scheme, the ECB notes that the draft law aims to better and more precisely define the operation of the scheme, including how potential shortfalls in the scheme are to be covered. The ECB understands that the intention in this respect is to provide an explicit legal basis allowing and indeed requiring shortfalls to be financed by the Republic of Slovenia. The draft law establishes that it is the government of the Republic of Slovenia which has to finance potential shortfalls, thereby clarifying that Banka Slovenije does not finance them. While welcoming such clarification in the draft law, the ECB understands that any mismatch between the maturity of the short-term loan provided by the State to Banka Slovenije on behalf of the member investment firms who failed to ensure the provision of sufficient funds into the scheme and the timing of the recovery by Banka Slovenije of the outstanding funds from those members will be mitigated in such a way to ensure that Banka Slovenije does not bear any financial risks under the scheme. Any loss resulting from unsuccessful enforcement of amounts due from the individual members should be borne by the State.

19 See Article 33(6) and (7) of the Law on the Financial Instruments Market.

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

Done at Frankfurt am Main, 11 January 2018

[signed]

The President of the ECB

Mario DRAGHI