EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 3 August 2005

at the request of the Ministry of Justice of the Slovak Republic

on a draft law on lobbying and on amendments to certain laws

(CON/2005/25)

1. On 24 June 2005 the European Central Bank (ECB) received a request from the Ministry of Justice of the Slovak Republic for an opinion on a draft law on lobbying and on amendments to certain laws (hereinafter the 'draft law').

2. The ECB's competence to deliver an opinion is based on 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 contains provisions concerning a national central bank (NCB). 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.

3. The main purpose of the draft law is to establish a legal framework to regulate lobbying as a business activity in the Slovak Republic, thereby ensuring the transparency and accountability of public officials and establishing the areas in which lobbying is and is not permissible. It lays down both the obligations of lobbyists and the obligations and prohibitions to which public officials who are exposed to lobbying are subject. In particular, Article 9(3) of the draft law establishes that certain public officials have to publish their work programme for the previous month before the tenth day of each month. According to Article 9(4) of the draft law, a work programme means a timetable of working meetings at which lobbying contact took place, giving details of the place and date of meetings and of the regulation, document or matter to which the meeting related. Failure to comply with the obligations and prohibitions laid down by the draft law may lead to sanctions including dismissal of the public official concerned.

4. The list of public officials who may be exposed to lobbying contained in Article 2(4) of the draft law includes the Governor of Národná banka Slovenska (NBS) and other members of NBS's highest governing body, the Bank Board (hereinafter the 'Bank Board'). The draft law provides that the Governor of NBS, like some other public officials, will be obliged to publish details of their work programme for the previous month on the internet by the tenth day of each month.

5. The ECB therefore considers that the draft law raises concerns as far as the independence of both NBS and its Governor is concerned. Article 108 of the Treaty establishing the European

1 OJ L 189, 3.7.1998, p. 42.

Community and Article 7 of the Statute of the European System of Central Banks and of the European Central Bank establish the principle of institutional independence which prohibits the government of a Member State from seeking to influence the members of the decision-making bodies of the NCBs whose decisions may have an impact on the fulfilment by the NCBs of their tasks relating to the European System of Central Banks (ESCB). Under Slovak law, the principle of institutional independence is enshrined in relation to NBS in Article 56 of the the Constitution of the Slovak Republic No 460/1992 Coll., as last amended and Article 1(1) of the Act No 566/1992 Coll. on Národná banka Slovenska, as last amended (hereinafter the 'NBS Act').

6. While the draft law provides for some exclusions to the reporting obligation laid down in Article 9(3), it cannot be excluded that this obligation covers activities of the Governor of NBS with regard to ESCB-related tasks. The ECB considers that this obligation conflicts with the principle of institutional independence established by the Treaty and the Statute and under Slovak law. Central banking tasks may also require informal dialogue between an NCB and third parties. The reporting obligation laid down in Article 9(3) of the draft law therefore comes close to an ex ante consultation requirement, which could provide the Slovak Government with a mechanism to influence NBS's decision-making.

7. The ECB also considers that Article 9(3) of the draft law impinges on the personal independence of the Governor of NBS. Article 14.2 of the Statute provides for safeguards against arbitrary dismissal of the Governors of NCBs stating that they may only be dismissed if they no longer fulfil the conditions required for performance of their duties or if they have been guilty of serious misconduct. Under the draft law the Governor of NBS may be dismissed if they fail to comply with the reporting obligation imposed by Article 9(3) of the draft law, even if the requirements of Article 14.2 of the Statute are not fulfilled.

8. The ECB understands that the intention behind the draft law is to make NBS subject to principles of transparency and accountability while preventing conflicts of interest of members of the Bank Board. However, the ECB considers that current Slovak legislation already provides for sufficient safeguards against such conflicts of interest. In particular, Article 7(7) of the NBS Act excludes members of the Bank Board from performing lobbying contact (as defined in Article 2(2) of the draft law) as it amounts to an explicit prohibition on them doing so. Moreover, other provisions of Article 7 of the NBS Act support this view. Article 7(5) of the NBS Act provides that a member of the Bank Board must not prefer his personal interest to the public interest and must abstain from anything which might conflict with the performance of the office of a member of the Bank Board. Furthermore, Article 7(6) of the NBS Act states that membership of the Bank Board is incompatible with occupying any post or performing any activity (be it in the public or private domain, remunerated or unremunerated) which may give rise to a conflict of interest with the duties of a member of the Bank Board. Moreover, issues relating to conflicts of interest of members of the Bank Board are regulated separately under the Constitutional Act No 357/2004 Coll. on protection of public interest in the performance of the office of public functionaries (hereinafter the

'Constitutional Act') which contains a definition of public functionaries which covers members of the Bank Board.

9. The ECB takes note that Article 2(3) of the draft law provides for exclusions from the definition of a lobbying contact. These include communication between public officials, public authorities and their employees (Article 2(3)(a)), the raising of comments on a draft regulation or document during comments proceedings and communication in respect of such comments in accordance with provisions governing comments proceedings (Article 2(3)(e)). Moreover, disclosure of information is also excluded if it is contrary to 'binding legal acts of the European Communities and European Union or an international treaty having binding effect on the Slovak Republic', referring directly to Article 38 of the Statute[2].

10. The ECB considers that the wording of Article 2(3)(a) and (e) of the draft law is unclear. First, it is arguable whether under the draft law, communication between public officials and public authorities and their employees also includes communication with Community institutions and their officials, and in particular the ECB and its employees. In this respect, the ECB observes that since NBS became a member of the ESCB on 1 May 2004, the ECB and its employees have communicated regularly with NBS in relation to the performance of the objectives and tasks of the ESCB by the NCBs. Second, the ECB notes that Article 2(3)(e) of the draft law, which excludes comments proceedings from the scope of lobbying contacts, does not clearly refer to the advisory functions of the ECB as provided for in the Treaty[3] and in the Statute[4]. According to the latter provisions, which are reiterated in Article 2 of Council Decision 98/415/EC, national authorities must consult the ECB regarding any draft legislative provision in its fields of competence and the ECB may submit an opinion to the relevant national authorities on matters in its fields of competence. The ECB notes that unless its advisory role is explicitly referred to in the draft law in the context of excluding communication in the course of comments proceedings from the scope of lobbying contact, this opinion itself could be regarded as lobbying contact within the meaning of the draft law. The ECB therefore considers that the two exclusions provided for under Article 2(3) of the draft law should be amended to explicitly refer to communication with Community institutions and their officials and to consultations with Community institutions, e.g. to advisory functions performed by the ECB in its fields of competence.

11. As a separate issue, the ECB welcomes the provisions of the draft law prohibiting lobbying in relation to certain matters[5]. In particular, the prohibition on lobbying in relation to decision-making by public authorities when issuing licences, permits, authorisations and other individual legal acts will safeguard the independence of decision-making by NBS, which will perform supervision of the whole financial market in the Slovak Republic from 1 January 2006.

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2 The draft law cross refers to Article 11(1)(f) of Act No 211/2000 Coll. on free access to information and on amendments to certain laws, as amended (Freedom of Information Act).

3 Article 105(4) of the Treaty.

4 Article 4 of the Statute.

5 Article 8 of the draft law.

12. In conclusion, the ECB considers that the draft law should be amended to exclude from its scope any member of NBS's decision-making bodies, at least to the extent that they are performing ESCB-related tasks.

13. The ECB would appreciate it if the Slovak authorities kept it informed of any proposed amendments to the draft law affecting the issues addressed in this opinion.

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

Done at Frankfurt am Main, 3 August 2005.

[signed]

The President of the ECB

Jean-Claude TRICHET