EUROPEAN CENTRAL BANK

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OPINION OF THE EUROPEAN CENTRAL BANK

of 6 November 2015

on resolving crisis situations in the financial market and on a special levy for selected financial institutions

(CON/2015/43)

Introduction and legal basis

On 28 September 2015, the European Central Bank (ECB) received a request from the Slovak Ministry of Finance for an opinion on a draft law that amends Law No 371/2014 on resolution in the financial market and on amendments to certain laws (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[1], as the draft law relates to a national central bank (NCB) and to 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

The draft law is intended to introduce several technical and substantive changes to a number of laws, including Law No 371/2014 on resolving crisis situations in financial markets, Law No 483/2001 on banks, Law No 276/2009 on measures to mitigate the effects of the global financial crisis on the banking sector and Law No 384/2011 on a special levy on selected financial institutions[2].

Amendments to Law No 371/2014

Most of the amendments made by the draft law consist of legislative and technical changes to the provisions implementing Directive 2014/59/EU of the European Parliament and of the Council[3]. The draft law introduces substantial changes to the way that the government financial stabilisation tool is implemented in cases of systemic crisis. The draft law reinforces the government's and the Ministry of Finance's role in the use of the government stabilisation tool, due to the budgetary implications

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 These other laws include Law No 233/1995 on judicial executors and execution activities, Law No 566/2001 on Securities and Investment Services, Law No 186/2009 on financial intermediation and financial counselling and Law No 39/2015 on insurance.

3 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

associated with that use. The government financial stabilisation tool may only be used in the context of resolution proceedings and provided that the conditions of Law No 371/2014 for the government stabilisation tool, which in turn implements the conditions set out in Directive 2014/59/EU, are fulfilled. The draft law is not clear on whether the conditions for providing the government stabilisation tool must always include a requirement that resolution measures are insufficient to protect the public interest and emergency liquidity assistance has already been provided.

Law No 371/2014 established a resolution authority called the Resolution Council. A new organisational unit was established within Národná banka Slovenska (NBS) to provide expertise to and support the Resolution Council. This new unit must ensure that the Resolution Council's tasks are carried out independently from the other tasks of NBS. NBS staff members that perform these tasks may not be involved in any supervision over institutions in matters that do not fall under the Resolution Council's jurisdiction. The draft law introduces amendments to further clarify that NBS employees performing these tasks must be authorised to carry out supervision under Law No 371/2014 or to perform tasks in matters entrusted to the Resolution Council where they have been designated to do this under Law No 371/2014 by the Resolution Council or by a competent Resolution Council member. The draft law also clarifies that the NBS board member who is responsible for supervision in the financial markets does not have a voting right on the Resolution Board.

The draft law provides that any reasonable expenses incurred by the Resolution Council in connection with the use of resolution tools or powers, which may be recovered from institutions undergoing resolution, are to be reimbursed from state financial assets that are held in an extra-budgetary account containing the proceeds of the bank levy collected pursuant to Law No 384/2011. These reasonable expenses include those incurred in connection with the institution's special management, the valuation of its assets, rights and liabilities or the application of government financial stabilisation tools.

The draft law amends the provisions on the national resolution fund. Client assets are no longer subtracted in order to calculate the yearly contribution to the national resolution fund. The Deposit Protection Fund, which administers the national resolution fund, may delegate parts of this administration to third parties. The draft law no longer includes the possibility of NBS granting credit to the national resolution fund.

Amendments to Law No 483/2001

The draft law introduces several changes implementing or related to the implementation of Directive 2013/36/EU[4] including provisions that further clarify already existing provisions on fit and proper assessments, remuneration and recovery plans.

Various technical changes have been introduced to Law No 483/2001, on provisions implementing Directive 2014/59/EU with respect to intra-group financial support and the appointment of a temporary administrator. The sanctioning powers of NBS have been amended to reflect Article 111 of Directive 2014/59/EU.

4 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

The draft law also extends the deadlines by one month for NBS to give prior approval to individuals being appointed or reappointed as members of a credit institution's statutory body or supervisory body, as an authorised agent (*prokurista*), managerial staff, or head of internal control and audit. With regard to significant institutions, the ECB has the supervisory role in the pre-approval procedure for these individuals.

Amendments to Law No 276/2009

The amendments to the Law No 276/2009 have two fundamental goals: (a) to align Law No 276/2009 with the provisions of Law No 371/2014, in particular with regard to the provisions on the government stabilisation tool; and (b) to reflect the Commission Banking Communication's[5] requirements in the process of granting state aid.

Amendments to Law No 384/2011

The draft law substantively invalidates, from 1 July 2016, the provisions introduced by Law No 87/2015[6] into Law No 384/2011, which allowed state financial assets from the bank levy proceeds to be used to strengthen the own funds of legal persons fully owned by the state. In addition, the draft law introduces an obligation on these legal persons to transfer any income from the use of the received proceeds back to the special extra-budgetary account in which the proceeds of the state levy are held.

2. Government stabilisation tool and emergency liquidity assistance

2.1 Article 56(4)(a) to (c) of Directive 2014/59/EU requires that when applying the government financial stabilisation tools, Member States must ensure that their competent ministries or governments and the resolution authority apply these tools only if: (a) all the conditions for resolution are present; and (b) one of three specific additional conditions are met. One of these three specific additional conditions is that the competent ministry or government and the resolution authority determine that the application of the resolution tools would not suffice to protect the public interest, where extraordinary liquidity assistance from the central bank has previously been given to the institution[7].

2.2 The draft law is unclear on whether only one of these three conditions, or all three, must be met. This lack of clarity could lead to a possible interpretation that NBS would have to provide emergency liquidity assistance in order to enable the use of the government stabilisation tool.

2.3 Since the use of emergency liquidity assistance cannot be a pre-condition to the use of the government stabilisation tool, the text of the draft law should be clarified to ensure that only one of these three conditions must be met, and that any temporary liquidity support that NBS provides cannot be viewed as a pre-condition to the use of the government stabilisation tool.[8]

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5 Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') (OJ C 216, 30.7.2013, p. 1).

6 Law No 87/2015 which amends Law No513/1991 Commercial Code and on amendments of certain laws.

7 See Article 56(4)(b) of Directive 2014/59/EU.

8 The ECB understands that this matter is being clarified in amendments to the draft law under discussion in the National Council of the Slovak Republic. See http://www.nrsr.sk/web/Dynamic/Download.aspx?DocID=421528..

3. The use of bank levy proceeds

3.1 *Limited purpose of use of proceeds of bank levies or taxes*

3.1.1 The ECB has consistently advised that taxes on financial institutions should be considered in relation to the dual objective of: (a) ensuring a more equitable distribution of the costs arising from their potential failure between taxpayers and the financial sector; and (b) addressing the risks that they pose[9]. Using the proceeds of any ad hoc taxes imposed on banks for general budgetary purposes would be undesirable, to the extent that such taxes would place undue burdens on banks, hampering the provision of credit, with a knock-on effect on growth in the real economy. This might result in extra charges for their customers, and may also induce certain banks to cut back on their activities, leading to a reduction in the availability of credit and creating uncertainty for banks[10].

3.1.2 Consistently with the above, the ECB has in the past opined on draft legislation introducing a bank levy in Slovakia, the proceeds of which are held in an extra-budgetary account and intended to cover costs related to the resolution of financial crises in the banking sector and to protect the financial stability of the Slovakian banking sector[11]. In particular, the ECB has reiterated in its previous opinions the necessity of introducing: (a) a clear separation between the extra-budgetary account created out of the levy proceeds and the general budgetary resources; and (b) detailed rules on the application of the resolution fund to finance bank resolution measures[12]. The ECB has further opined that the extra-budgetary account used for the collection of the regular bank levy should not be used for other purposes[13].

3.1.3 The ECB recalls that Law No 384/2011 was amended by Law No 87/2015, which substantially extended the possible use of the bank levy proceeds by allowing the extra-budgetary account to be used to strengthen the own funds of legal persons that are fully owned by the state. Under these amended provisions, the Slovakian government was given the power to designate a legal person as a beneficiary of the bank levy proceeds, the amount by which such a legal person should be recapitalised, as well as the aim and manner in which that legal person could use the recapitalised own funds. The Slovakian government established these specifications in Decision No 165/2015[14]. Notwithstanding the ECB's previous opinions on the subject matter, the ECB was not consulted on either of these legal acts.

3.1.4 In the light of the above, the ECB welcomes the provisions of the draft law which, from 1 July 2016, will prohibit the use of the bank levy to strengthen the own funds of legal persons that are fully owned by the state and that obliges such legal persons to transfer any income from the use of

9 See paragraph 2.1 of Opinion CON/2013/44 paragraph 2.1 of Opinion CON/2011/29, and paragraph 3.2.1 of Opinion CON/2010/62. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

10 See paragraph 2.1 of Opinion CON/2011/29 and paragraph 3.2.2 of Opinion CON/2010/62.

11 See paragraph 3.1 of Opinion CON/2011/66 and paragraph 2.1 of Opinion CON/2012/53.

12 See paragraph 2.1 of Opinion CON/2012/53and paragraphs 3.2.1 and 2 of Opinion CON/2011/66.

13 See paragraph 2.3 of Opinion CON/2012/53.

14 Decision of the Government of the Slovak Republic No 165/2015 of 8 July 2015 executing section 4(5) of Law No 384/2011 on a special levy on selected financial institutions.

already strengthened own funds to the extra-budgetary account. Nevertheless, the ECB reiterates that until 1 July 2016, a potential beneficiary legal person should only use own funds that have been strengthened in accordance with Law No 371/2014 to address concerns relating to the stability of the Slovakian financial sector.

3.2 *The use of bank levy proceeds to pre-fund the resolution costs*

3.2.1 Following the introduction of the resolution fund by Law No 371/2014, the ECB has recommended making clear in which part of the resolution financing process the income from the bank levy is to be employed and how the bank levy proceeds will interact with the resolution fund in order to avoid duplication of instruments[15]. The ECB currently understands that the use of the resolution fund is limited to the use under Article 92 of Law No 371/2014, whereas the bank levy proceeds would serve as a funding backstop that is not covered by the resolution fund and for refinancing the deposit guarantee fund.

3.2.2 In the light of the above, the ECB welcomes the specification for the use of the bank levy proceeds to pre-fund reasonable expenses incurred by the Resolution Council in connection with the use of resolution tools or powers that are recoverable from institutions undergoing resolution. The ECB understands that such expenses are to be put back into the extra-budgetary account once the Resolution Council recovers these expenses: by (a) deducting any amounts paid in the course of the resolution; (b) from any proceeds generated as a result of a bridge institution's operation being terminated; or (c) via an asset management vehicle, where the Resolution Council would be a preferred creditor.

4. Funding of the resolution fund

The ECB has advised in the past that, in line with the monetary financing prohibition, NCBs may not fund financing arrangements that fund resolution costs[16]. Therefore the ECB considered the provisions of Law No 371/2014, which allowed the Resolution Council to ask NBS to provide credit to the resolution fund, to interfere with the monetary financing prohibition, and advised that this provision should be deleted[17]. In view of the above, the ECB welcomes the amendment made by the draft law, which no longer includes the possibility of NBS granting credit to the national resolution fund.

5. Voting of an NBS Board member on the Resolution Council

The ECB has, in its previous opinion, recommended that Law No 371/2014 should make clear whether the NBS Board member appointed as a member of the Resolution Council is the NBS Board member responsible for supervision in the financial market, since this would have an impact on the voting rights of the member in question in the Resolution Council[18]. In this regard, the ECB welcomes the clarification in

15 See paragraph 4.1 of Opinion CON/2015/3.
16 See paragraph 3.4 of Opinion CON/2012/99.
17 See paragraph 3 of Opinion CON/2015/3.
18 See paragraph 6 of Opinion CON/2015/3.

the draft law that the NBS Board member responsible for supervision in the financial market will not vote at a plenary session of the Resolution Council.

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

Done at Frankfurt am Main, 6 November 2015.

[signed]

The President of the ECB

Mario DRAGHI