EN

EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 29 September 2009

on payment services

(CON/2009/75)

Introduction and legal basis

On 5 August 2009 the European Central Bank (ECB) received a request from the Slovak Ministry of Finance for an opinion on a draft law on payment services and on amendments to certain laws (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 second to fifth indents 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 means of payment, the national central bank, statistics, and payment and settlement systems. 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 main purpose of the draft law is to transpose into Slovak law Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (hereinafter the 'Payment Services Directive')[2]. The draft law also implements Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (hereinafter the 'Settlement Finality Directive')[3] and Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions (hereinafter the 'Electronic Money Institutions Directive')[4]. As stated in its explanatory memorandum, the draft law goes beyond the implementation of the abovementioned Community directives and focuses in particular on consumer protection in the field of payment systems.

---

1 OJ L 189, 3.7.1998, p. 42.

2 OJ L 319, 5.12.2007, p. 1.

3 OJ L 166, 11.6.1998, p. 45. Directive 98/26/EC has already been transposed into Slovak law by Law No 510/2002 Coll. on payment systems (*zákon o platobnom styku*), which the draft law will repeal.

4 OJ L 275, 27.10.2000, p. 39. Directive 2000/46/EC has already been transposed by the abovementioned Law on payment systems.

1.2 The focus of this opinion is on the provisions of the draft law that relate to means of payment, Národná banka Slovenska, statistics and payment and settlement systems that go beyond the strict implementation of the abovementioned Community directives. In this opinion the ECB provides no assessment of the overall implementation in Slovakia of those directives.

2. General observations

The aim of the draft law is to comprehensively govern payment services, electronic money, and payment and settlement systems in Slovakia and, by implementing the Payment Services Directive, to fulfil the regulatory pre-conditions for the introduction of the Single European Payment Area.

Despite the wording of Article 1(3)(h) of the draft law and the differences in the scopes of the Payment Services Directive, on the one hand, and the Settlement Finality Directive, on the other hand, the ECB understands that it should be interpreted in the light of Article 1(1)(b) of the draft law. However, for reasons of legal certainty, it would be welcomed if Article 1(3)(h) could be explicitly clarified on this point to avoid any doubt as to whether the comprehensive approach of the draft law could lead to the exclusion of the application of the implementing provisions for the Settlement Finality Directive.

3. Specific observations

3.1 *New tasks and sufficient human and other resources*

The draft law acknowledges Národná banka Slovenska's oversight and supervision tasks in respect of payment systems and payment institutions. However, in order for Národná banka Slovenska to perform these tasks in parallel with its existing Eurosystem-related tasks and other tasks assigned to it by national law, it is essential that it has sufficient human and other resources[5].

3.2 *Operation and oversight of payment systems*

Article 45(3)(a) of the draft law defines 'payment systems' as such systems as are operated by Národná banka Slovenska. Article 47(1) lists possible participants in payment systems. The ECB points out that, in respect of Národná banka Slovenska's component in TARGET2, the list of participants is more narrowly defined in Národná banka Slovenska's Decision 9/2008 of 25 November 2008 on conditions for participation in TARGET2-SK, in accordance with Article 4 of the Harmonised Conditions for participation in TARGET2[6]. Therefore, the ECB recommends amending Article 47(1) to clarify that the list of participants in payment systems may be defined in more detail in payment system rules.

Article 45(8) of the draft law lays down the oversight requirements for payment system operators, central securities depositories and payment service providers in accordance with international oversight standards and evaluation criteria and oversight standards and procedures established by

5 See paragraph 3.1 of ECB Opinion CON/2009/27 and paragraph 3 of ECB Opinion CON/2009/36. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

6 See Annex II to Guideline ECB/2007/2 of 26 April 2007 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2) (OJ L 237, 8.9.2007, p. 1).

the ECB, the European System of Central Banks (ESCB) and/or other European Economic Area (EEA) Member State authorities designated under the laws of the relevant EEA Member State. The references to the applicable oversight standards are too broad, so the ECB suggests that the current wording of the first sentence of Article 45(8) should be restricted to the applicable Eurosystem oversight standards and any supplementary standards adopted by Národná banka Slovenska.

Under Article 61(3) of the current Law on payment systems, an entity applying for a licence to operate a payment system governed by Slovak law must fulfil certain criteria, including a requirement to be a joint-stock company with a registered office in Slovakia[7]. Article 57(2)(a) of the draft law amends the criteria by requiring the entity to be a joint-stock company with a registered office in an EEA Member State.

Concerning EEA operators of payment systems governed by the law of Slovakia and supervised by Národná banka Slovenska under Article 60 of the draft law, the ECB understands that Article 45(8) of the draft law takes into account the application by Národná banka Slovenska of the Eurosystem's location policy so that the Eurosystem has sufficient means to ensure the safety of non-Eurosystem operators and to avoid the risk of undermining the Eurosystem's control over the euro, and for the proper performance of its core tasks. For greater clarity, in its Article 45(8), the draft law should explicitly state the Eurosystem principles on the location and operation of systems that settle in euro.

3.3 *Liability issues*

In implementing the Payment Services Directive, the term 'gross negligence' and the distinction between ordinary negligence and gross negligence are introduced in the draft law[8]. The ECB points out that the liability regime which applies to cases of "gross negligence" is also applicable to cases of "fraud and wilful misconduct" pursuant to Article 31(2) of the Harmonised Conditions for participation in TARGET2. Therefore the ECB recommends amending Article 45(9)(a) of the draft law accordingly. Moreover, the ECB suggests that, in order to fully transpose the liability regime, amendments reflecting the distinction between ordinary negligence and gross negligence should be made to the measures which have been adopted by Národná banka Slovenska to implement Article 31 of the Harmonised Conditions for participation in TARGET2.

3.4 *Statistics*

The draft law also amends Law No 566/1992 Coll. on Národná banka Slovenska, and explicitly empowers Národná banka Slovenska to collect statistics and other data under Law No 566/1992 Coll. and under special legislation. The ECB suggests that the duties in the field of statistics should be clarified and should encompass the collection of statistical information in order to assist the ECB in the performance of the ESCB's tasks. In this respect, Articles 5.1 and 5.2 of the Statute of the European System of Central Banks and of the European Central Bank state that, for the performance of the tasks of the ESCB, the ECB, assisted by the national central banks shall collect

7 The ECB commented on this issue in its Opinion CON/2008/18.

8 See Articles 10(2), 12(2) and 45(9)(a) of the draft law.

the necessary statistical information, and the national central banks shall carry out these tasks, to the extent possible.

3.5 *Date of entry into force*

Although Article 94(1) of the Payment Services Directive provides that the Member States have to bring into force the laws, regulations and administrative provisions necessary to comply with it before 1 November 2009, Section XVIII of the draft law lays down the date 1 December 2009. While the ECB understands that the date of entry into force of the draft law has been determined to guarantee an adequate period for its addressees to become acquainted with the new regime it introduces, the transposition obligations flowing from the Payment Services Directive should be observed.

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

Done at Frankfurt am Main, 29 September 2009.

[signed]

The President of the ECB

Jean-Claude TRICHET