



OPINION OF THE EUROPEAN CENTRAL BANK
of 18 March 2011
on prevention of late payments
(CON/2011/25)

Introduction and legal basis

On 21 February 2011, the European Central Bank (ECB) received a request from the Slovenian Ministry of Finance (hereinafter: the ‘Ministry’) for an opinion on a draft law on prevention of late payments (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 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 provisions¹, 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 According to the consultation request, the draft law broadly follows the provisions contained in the proposed Directive of the European Parliament and of the Council on combating late payment in commercial transactions (recast) (hereinafter the ‘proposed Directive’), which was aimed at replacing Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions². The ECB notes that the proposed Directive was recently adopted as Directive 2011/7/EC of 16 February 2011 on combating late payment in commercial transactions (recast)³ and was published on 23 February 2011. Given the above, the ECB does not provide its opinion on the transposition of Directive 2011/7/EC⁴; instead, following the request of the Ministry, the ECB limits its views to the impact of the draft law on Banka Slovenije.
- 1.2 The draft law regulates measures to prevent late payments as part of the Government’s efforts to improve economic and business conditions for small and medium size enterprises. It defines the moment of late payment and the consequences of late payment for contracts concluded between

¹ OJ L 189, 3.7.1998, p. 42.

² OJ L 200, 8.8.2000, p. 35.

³ OJ L 48, 23.2.2011, p. 1.

⁴ See Article 1(2) of Decision 98/415/EC.

economic operators or between economic operators and public authorities where one party provides goods or services and the other party provides payment. The draft law does not apply where insolvency proceedings have been initiated against a debtor pursuant to the law governing insolvency proceedings⁵.

2. Duty to consult the ECB

- 2.1 The ECB notes that the Parliament adopted the draft law on 4 March 2011, eleven days after the ECB received the Ministry's consultation request, without any prior notification to the ECB. The Ministry asked for the opinion to be delivered as soon as possible, but did not indicate a specific deadline nor grounds for extreme urgency that would justify setting a short deadline.
- 2.2 The ECB reiterates the position which it has consistently communicated to the Ministry⁶ that even cases of particular urgency do not abrogate the duty of the national authorities under Articles 127(4) and 282(5) of the Treaty to consult the ECB on national draft legislative provisions falling within its fields of competence and to allow sufficient time to take into account its views, in accordance with Decision 98/415/EC.
- 2.3 Pursuant to Article 3(1) and (2) of Decision 98/415/EC, the consulting authorities may, if they consider it necessary, set the ECB a time limit for the submission of its opinion which may not be less than one month from the date on which the President of the ECB receives notification to this effect. In case of extreme urgency, the time limit may be reduced. In this case, the consulting authority must state the reasons for the urgency. Had the present consultation been a case of particular urgency which would not allow for a normal consultation period, the Ministry should have indicated urgency in the consultation request and asked for a shorter deadline than provided for in Decision 98/415/EC for the ECB's opinion to be adopted. In the absence of an explicit deadline for the submission of its opinion, but taking into account the Ministry's request for it to deliver an opinion as soon as possible, the ECB decided to apply the minimum one-month deadline provided in Article 3(1) of Decision 98/415/EC.
- 2.4 The second sentence of Article 4 of Decision 98/415/EC provides that the ECB must be consulted at an appropriate stage enabling the authority initiating the draft legislative provision to take into consideration the ECB's opinion before taking its decision on the substance. The consultation should therefore take place at a point in the legislative process which affords the ECB sufficient time to examine the draft legislative provisions and which also enables the relevant national authorities to take the ECB's opinion into consideration before the provisions are adopted. It also follows from Article 3(4) of Decision 98/415/EC that once a consultation request has been submitted to the ECB, Member States are obliged to suspend the process of adoption of draft

⁵ See Article 1 of the draft law.

⁶ See paragraph 2.2 of Opinion CON/2010/55, paragraph 2.4 of Opinion CON/2008/76 and paragraph 2.1 of Opinion CON/2008/92.

legislative provisions, pending receipt of the ECB's opinion or the expiry of a time limit set for the submission of the ECB opinion in accordance with Decision 98/415/EC⁷.

- 2.5 With respect to the present consultation, the duty to consult the ECB has not been respected by the Ministry. The ECB's comments on the provisions on which it was consulted do not eliminate the breach of the obligation to consult it. The ECB would appreciate it if the Ministry would honour their duty under the Treaty to consult the ECB in the future.

3. Independence of Banka Slovenije

Application of the draft law to Banka Slovenije's contractual relations

- 3.1 The ECB understands that the draft law applies to Banka Slovenije (which falls under the definition of 'public authorities') as regards its contractual relations in the area of administration, in particular. However, Article 2(4) of the draft law clarifies that the draft law does not apply to Banka Slovenije where it exercises its exclusive competences pursuant to the law governing Banka Slovenije or any other laws or Union regulations laying down exclusive competences of Banka Slovenije. The ECB welcomes this provision as it ensures that the draft law does not interfere with the tasks of the European System of Central Banks (ESCB) and the Eurosystem carried out by Banka Slovenije in accordance with the Treaty and the Statute of the European System of Central Banks and of the European Central Bank, in particular the implementation of the monetary policy of the Union. For sake of clarity, the draft law could be further improved by referring precisely to Banka Slovenije's competences as part of the ESCB and the Eurosystem.

Supervision of the implementation of the draft law

- 3.2 Pursuant to Article 23 of the draft law, inspectorates and other authorities, in accordance with their competences, supervise the implementation of the draft law and identify related breaches. Pursuant to Article 24(3) of the draft law, each of these supervisory authorities has the power to decide on offences for identified breaches of the draft law in the areas under their supervision.
- 3.3 Under the draft law Banka Slovenije is also subject to supervision under the provisions referred to paragraph 3.2. In order to fully respect central bank independence, it should be made clear that any supervision of Banka Slovenije's compliance with the draft law should observe its status as an independent central bank as granted by the Treaty.
- 3.4 The provisions referred to paragraph 3.2 are not sufficiently clear as regards Banka Slovenije's role. If it is intended that, in the context of exercising its function of banking supervisor, the tasks of Banka Slovenije are extended to supervision of the implementation of the draft law and to deciding on breaches in this context by banks, savings banks and other entities under its supervision in accordance with law, it should be expressly stated.

⁷ See Title IV, Section 1 of the Guide to consultation of the European Central Bank by national authorities regarding draft legislative provisions, available on the ECB's website at www.ecb.europa.eu.

3.5 If the draft law indeed allocates a new task as referred to in paragraph 3.4 to Banka Slovenije, it will have to commit additional human and financial resources to carry out this task. In this context, the ECB has emphasised that ‘Member States may not put their [national central banks] in a position where they have insufficient 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 national central banks, it must be ensured that they have sufficient human and financial resources, both in terms of quantity and quality, for all of their tasks, and in particular that their capacity to fulfil their ESCB- or Eurosystem-related tasks is not affected⁹. Accordingly, the ECB expects that Banka Slovenije will have sufficient human and financial resources for any new tasks so that its capacity to perform its Eurosystem tasks will remain unaffected.

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

Done at Frankfurt am Main, 18 March 2011.

[signed]

The President of the ECB

Jean-Claude TRICHET

⁸ See e.g. the ECB’s Convergence Report May 2010, p. 21, available on the ECB’s website at www.ecb.europa.eu.

⁹ In the context of consultations by Slovenian authorities, see e.g. paragraph 2.3 of Opinion CON/2007/38.