



OPINION OF THE EUROPEAN CENTRAL BANK

of 30 June 2011

on the harmonisation of legislation related to TARGET2-Securities and Banka Slovenije's
sanctioning powers relating to investment services

(CON/2011/55)

Introduction and legal basis

On 27 May 2011, the European Central Bank (ECB) received a request from the Slovenian Ministry of Finance for an opinion on the draft law amending the Law on the market in financial instruments and the draft law amending the Law on book-entry securities (hereinafter jointly referred to as the 'draft laws'). On 21 June 2011, the Ministry notified the ECB that a new Article 7 had been added to the draft law amending the Law on the market in financial instruments.

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 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 provisions¹, as the draft laws relate to Banka Slovenije 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 laws

1.1 The main objective of the draft laws is to harmonise legislation governing the operation of integrated securities settlement systems in order to facilitate the integration of the Slovenian central securities depository, *Centralna klirinško depotna družba d.d., Ljubljana*, with TARGET2-Securities (T2S). To this end, the draft laws introduce the following changes:

- (a) The draft law amending the Law on the market in financial instruments removes all references concerning the application of administrative procedures to the central securities depository (CSD). As stated in the explanatory memorandum to the draft law, the amendments are: (i) made in order to clarify that the CSD does not exercise public authority; and (ii) necessary to allow the CSD to transfer its task of effecting entries of book-entry securities in the central register to T2S;

¹ OJ L 189, 3.7.1998, p. 42.

- (b) According to Article 34 of the Law on book-entry securities, the CSD is strictly liable to issuers and holders of rights entered into the central register for any damage caused by the CSD's failure to execute an order, execute it correctly, or meet any of its other obligations under the Law. However, the CSD will not be strictly liable where it can prove that the cause was (i) an event beyond the scope of its business and its consequences could not be anticipated, avoided or averted; or (ii) an action on the part of an issuer, holder, CSD member or third party that could not be anticipated and its consequences could not be avoided or averted. Pursuant to the draft law, strict liability will be replaced by fault-based liability of the CSD vis-à-vis its service users in accordance with the law governing obligations²;
- (c) The draft law amending the Law on book-entry securities also introduces a matching phase in the securities transfer between different accounts whereby, prior to carrying out a transfer, the CSD must establish that transfer orders from the transferor and the recipient match³.
- 1.2 The draft law amending the Law on the market in financial instruments (hereinafter the 'Law') is also intended to transpose Directive 2010/78/EU⁴ into Slovenian law. In accordance with Article 1(2) of Decision 98/415/EC, the ECB does not provide its opinion on draft legislative provisions the exclusive purpose of which is the transposition of Union directives in the law of Member States.
- 1.3 The draft law amending the Law has been amended to add a new Article 7, which amends Article 33 of the Law. If this amendment were made, Banka Slovenije would no longer have powers to sanction a breach of the Law relating to the provision of investment services by banks in Slovenia. Instead, those powers would be transferred to the Slovenian Securities Market Agency (hereinafter the 'Agency'), which is competent, in cooperation with Banka Slovenije to supervise all of the following in respect of investment services: (a) Slovenian banks; (b) Member State banks and special financial institutions as defined by the Law; (c) third country banks.

2. General observations

- 2.1 The ECB welcomes the amendments proposed by the draft laws mentioned in paragraph 1.1, which should facilitate the smooth integration of the Slovenian CSD with T2S.
- 2.2 As regards the proposed transfer of Banka Slovenije's sanctioning powers to the Agency, pursuant to Article 7 of the draft law amending the Law, the ECB notes that breaches of the Law relating to the provision of investment services might affect the prudent and safe operations of supervised entities in general which are subject to prudential supervision by Banka Slovenije. Also, taking into

² Article 239(2) of the Code of obligations: '(2) If a debtor fails to perform its obligation or is late in performing it, the creditor shall also be entitled to demand reimbursement of damage incurred thereby.'

³ Article 22(3) of the Law as amended by Article 8 of the draft law.

⁴ Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) (OJ L 331, 15.12.2010, p. 120).

account that, according to the Law, supervision in the area concerned is carried out by the Agency in cooperation with Banka Slovenije, this warrants Banka Slovenije remaining involved in the sanctioning process. Against this background, the ECB expects that any decision on the transfer of sanctioning powers should be taken in consultation with Banka Slovenije.

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

Done at Frankfurt am Main, 30 June 2011.

[signed]

The President of the ECB
Jean-Claude TRICHET