



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 8 June 2016

on consumer credit

(CON/2016/31)

Introduction and legal basis

On 28 April 2016 the European Central Bank (ECB) received a request from the Slovenian Ministry of Economic Development and Technology for an opinion on a draft law on consumer credit (hereinafter the 'draft law')¹.

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/EC², 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 The Slovenian Law on consumer credit (hereinafter the 'Law on consumer credit')³ currently implements Directive 2008/48/EC of the European Parliament and of the Council⁴ and also contains a number of specific rules concerning consumer credit agreements relating to immovable property. The main purpose of the draft law is to implement Directive 2014/17/EU of the European Parliament and of the Council in Slovenian law⁵. The main effect of the draft law is to amend, by way of a recast, the existing framework for consumer credit agreements relating to immovable property.
- 1.2 Under the current Law on consumer credit, entities authorised to provide consumer credit by the Ministry of Economic Development and Technology, banks authorised to provide banking services in accordance with the Law on banking⁶ and a few other entities are permitted to engage in consumer lending, including as regards immovable property⁷. No authorisation is currently required for intermediaries arranging consumer credit. However, intermediaries must fulfil certain conditions in the pursuit of their activity. The supervision of consumer credit providers authorised by the

¹ *Predlog zakona o potrošniških kreditih (ZPotK-2).*

² 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).

³ *Zakon o potrošniških kreditih (ZPotK-1)* (Ur. l. RS No 59/10, 77/11, 30/13 and 81/15).

⁴ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p.66).

⁵ Directive 2014/17/EU of the European Parliament and the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34).

⁶ *Zakon o bančništvu (ZBan-2)* (Ur. l. RS No 25/15).

⁷ Articles 29 and 30 of the Law on consumer credit.

Ministry of Economic Development and Technology and of their intermediaries is entrusted to the Market Inspectorate⁸. The supervision of credit institutions and entities intermediating consumer credit for credit institutions is entrusted to Banka Slovenije⁹. The Information Commissioner supervises compliance with rules on the collection and processing of personal data¹⁰.

- 1.3 The draft law introduces new conditions for the provision and intermediation of consumer credit relating to immovable property. In particular, in order to increase consumer protection, only the following groups of entities will be permitted to provide consumer credit relating to immovable property: (a) authorised credit institutions; (b) authorised non-bank financial institutions whose exclusive or main activity is financial leasing and (i) in which a bank has at least a 20% share of the institution's voting rights or capital, or (ii) whose total balance sheet is at least EUR 50 000 000 (hereinafter 'financial leasing companies'); and (c) certain other entities which do not need to be authorised (e.g. employers granting credit to their employees free of interest or at an annual percentage rate of charge lower than those applied by credit institutions)¹¹. Intermediaries of permitted providers will also be required to obtain authorisation in order to arrange consumer credit relating to immovable property¹².
- 1.4 In this context, in addition to its existing supervisory tasks¹³, Banka Slovenije will become responsible for: (a) authorising financial leasing companies to provide consumer credit relating to immovable property¹⁴; (b) authorising intermediaries arranging consumer credit relating to immovable property¹⁵; and (c) supervising financial leasing companies and their intermediaries with respect to consumer credit relating to immovable property. In addition, Banka Slovenije will: (a) have powers to impose supervisory measures and sanctions on supervised entities¹⁶; (b) act as a competent authority in the context of cross-border intermediation of consumer credit relating to immovable property¹⁷; (c) serve as a single contact point for cooperation between competent authorities of different Member States for the purposes of Directive 2014/17/EU¹⁸; and (d) establish and maintain a public register of financial leasing companies granting consumer credit relating to immovable property and of intermediaries arranging consumer credit relating to immovable property¹⁹.
- 1.5 Under the Law on consumer credit, as a general rule, consumer loans may be transferred from consumer credit providers only to entities that are also permitted to act as consumer credit providers. However, this rule does not apply to credit institutions, which may thus transfer

8 Article 34 of the Law on consumer credit.

9 Article 33 of the Law on consumer credit.

10 Article 36 of the Law on consumer credit.

11 Article 58 of the draft law.

12 Article 62(1) of the draft law.

13 Article 29 and 33 of the Law on consumer credit in conjunction also with the Law on banking.

14 Article 58(1), third indent, in conjunction with Article 66 of the draft law.

15 Article 62 of the draft law.

16 Articles 77 and 83 and also Articles 71 and 65 of the draft law.

17 Article 72, 73, 77 and 84 to 87 of the draft law.

18 Article 74 of the draft law.

19 Articles 68 and 63 of the draft law.

consumer loans to any third party²⁰. With regard to entities that are not permitted to act as consumer credit providers, the draft law limits the scope of eligible third parties to: (a) securitisation special purpose vehicles, (b) the Slovenian Bank Asset Management Company (BAMC), and (c) other entities managing impaired assets of banks²¹. These entities must fulfil the same obligations towards the consumer as a consumer credit provider, and may further transfer the credit only to a permitted consumer credit provider²². Under the draft law, Banka Slovenije will be responsible for the supervision of the above entities with respect to consumer credit²³.

2. General observations

2.1 This opinion does not address whether the draft law effectively implements Directive 2014/17/EU in Slovenian law. The ECB will only assess those provisions of the draft law that may impact on the role and tasks of Banka Slovenije as a central bank, a financial supervisory authority and as a member of the Eurosystem and the European System of Central Banks (ESCB).

2.2 The draft law broadens and expands Banka Slovenije's current supervisory functions and activities in the consumer credit field beyond its existing responsibilities with respect to credit institutions and their intermediaries, by conferring on it the following tasks:

- (1) authorising financial leasing companies, as regards the provision of consumer credit relating to immovable property, and intermediaries that arrange consumer credit relating to immovable property;
- (2) supervising financial leasing companies and their intermediaries with respect to the consumer protection-related obligations in the field of consumer credit relating to immovable property;
- (3) supervising certain entities permitted to be transferees of consumer credit from entities authorised to perform banking activity or to provide financial services listed in paragraph 1.5.

The ECB underlines that, in the context of a proposed conferral of new tasks on an ESCB member, it is necessary to assess whether this contravenes the prohibition of monetary financing under Article 123 of the Treaty. The ECB has developed the guidance set out in paragraphs 2.2.1 to 2.2.3 on the basis of which it may decide whether a new task conferred on a national central bank (NCB) is to be considered a central banking task or a government task for the purposes of assessing such conferral of tasks against the prohibition of monetary financing²⁴.

2.2.1 General considerations

First, the systematic categorisation of tasks assigned to NCBs as central banking or government tasks applies to genuinely new tasks that did not exist in the past or did not form an integral part of the central banking tasks already assigned to the NCB in the past. In recognition of the different

²⁰ Article 20(4) of the Law on consumer credit.

²¹ Article 23(4) of the draft law.

²² Article 23(5) of the draft law.

²³ Article 77(2)(3) in conjunction with Article 23 and of the draft law.

²⁴ See Opinion CON/2015/22. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

Member States' legal frameworks, central banking traditions and national set-ups, the tasks currently discharged by an NCB as central banking tasks are not reviewed and re-categorised, but may be reassessed if their substance is amended.

Second, it needs to be emphasised that when Member States decide to confer new tasks on their NCBs, due regard must be given to the role of the NCB as part of the ESCB or Eurosystem, as applicable, and to the requirement of central bank independence. The principle of financial independence, which is a key aspect of the principle of central bank independence as laid down in Article 130 of the Treaty, requires that the Member States may not put their NCBs in a position where they have insufficient financial resources to carry out their ESCB- or Eurosystem-related tasks, as applicable. Accordingly, an NCB must have sufficient financial means not only to perform its ESCB- or Eurosystem-related tasks but also its national tasks (e.g. financing its administration and own operations)²⁵. Where an NCB considers that the allocation of a new task would impinge on its financial independence, because it would not have sufficient means to focus primarily on its ESCB- or Eurosystem-related tasks, or that the discharge of the new task would impose a disproportionate burden on it, the NCB should be able to object to the new task being allocated to it.

Third, central banking tasks comprise in particular those tasks that are related to the tasks listed in Article 127(2), (5) and (6) of the Treaty.

Fourth, new tasks conferred on an NCB which are atypical of NCBs' tasks, or which are clearly discharged on behalf of and in the exclusive interest of the government or of other public entities, should be considered as government tasks.

2.2.2 *Specific considerations*

Consumer protection tasks related to financial services are central banking tasks to the extent that these complement existing supervisory powers and thus contribute to the soundness of the financial markets and the preservation of confidence in the marketplace.

An important criterion for qualifying a new task as a government task is the impact of the task on the institutional, financial and personal independence of the NCB. In particular, the following should be taken into account.

First, it should be assessed whether the performance of the new task creates inadequately addressed conflicts of interests with existing central banking tasks, without necessarily complementing the NCB's existing central banking tasks. If a conflict of interest arises between existing and new tasks, there should be sufficient mitigation measures in place to adequately address that conflict. Complementarity between the new task and existing central banking tasks should not, however, be interpreted broadly, as this could lead to the creation of an indefinite chain of ancillary tasks. The assessment of the complementarity of the new task should also take into account the financing of that task. In the event of a conflict of interest between prudential supervision and consumer protection, prudential supervisory considerations must prevail²⁶.

²⁵ See the ECB's 2014 Convergence Report, p. 25.

²⁶ See paragraph 3.1 of Opinion CON/2015/21.

Second, it should be assessed whether without new financial resources the performance of the new task places a disproportionate burden on the financial or organisational capacity of the NCB and may negatively impact on its capacity to properly perform its existing central banking tasks.

Third, it should be assessed whether the performance of the new task is aligned with the institutional set-up of the NCB, in particular as regards central bank independence and accountability considerations.

Fourth, it should be assessed whether the performance of the new task entails substantial financial risks.

Fifth, it should be assessed whether the performance of the new task exposes the members of the NCB's decision-making bodies to political risks that are disproportionate and could also impact on their personal independence and, in particular, the guarantee of the Governor's term of office under Article 14.2 of the Statute of the European System of Central Banks and of the European Central Bank.

- 2.2.3 The final assessment of the qualification of a task given to an NCB as either falling within the scope of a central banking task or a government task will be guided by the objective of ensuring the consistent application of the prohibition of monetary financing within the Eurosystem and the ESCB.

3. Specific observations

3.1 *Conferral on Banka Slovenije of new tasks*

The draft law broadens Banka Slovenije's current supervisory responsibilities in the field of consumer credit to include the tasks of: authorising and supervising non-bank financial leasing companies providing consumer credit relating to immovable property, and intermediaries arranging consumer credit relating to such property; and supervising transferees of consumer credit. In the light of the guidance set out in paragraphs 2.2.1 to 2.2.3, it must be assessed whether Banka Slovenije's new tasks could constitute a breach of the monetary financing prohibition.

3.2 *Principle of financial independence*

The principle of financial independence requires NCBs to have sufficient means to carry out not only their ESCB-related tasks but also their national tasks, both from an operational and financial perspective²⁷. In this regard the ECB notes that, under the draft law, financial leasing companies that may provide consumer credit relating to immovable property and intermediaries arranging such consumer credit will be required to pay to Banka Slovenije a fee determined by Banka Slovenije for their authorisation²⁸. In addition, authorised financial leasing companies and authorised intermediaries arranging consumer credit relating to immovable property will also pay to Banka Slovenije an annual fee to cover the actual costs incurred by Banka Slovenije in the performance of its supervisory tasks²⁹. Whilst the ECB welcomes such provisions of the draft law, it notes that the draft law does not specify how costs related to the supervision of the entities that are permitted to

²⁷ See ECB's 2014 Convergence Report, p. 25.

²⁸ Article 76 of the draft law.

²⁹ Article 78 of the draft law.

acquire consumer loans from banks, such as the BAMC or securitisation special purpose vehicles, are to be financed. In this regard the ECB invites the consulting authority to consider extending the cost-recovery regime to cover transferees of consumer credit.

3.3 *Links to tasks listed in Article 127(5) of the Treaty*

The authorisation and supervision of non-bank financial leasing companies providing consumer credit relating to immovable property and of intermediaries arranging such consumer credit can be considered as tasks related to those referred to in Article 127(5) of the Treaty, based on the understanding that they are complementary to the supervisory tasks exercised by the NCB, particularly where, as in this case, Banka Slovenije already supervises credit institutions, including their consumer credit and financial leasing activities and their intermediaries, and has the task of ensuring the stability of the financial system³⁰. The new tasks are also complementary to its existing supervisory powers because they are financed through fees in a manner similar to the system used for financing the supervision of entities actively carrying out banking activity³¹.

3.4 *Atypical tasks*

A number of Member States have conferred on their NCBs supervisory tasks related to the provision of consumer credit³². The ECB has generally accepted the allocation of such tasks to NCBs provided they do not interfere with the performance of the NCB's ESCB-related tasks³³. The tasks of an NCB with regard to the supervision of non-bank consumer credit providers and intermediaries can therefore, if this condition is met, be regarded as tasks not atypical of a central bank, particularly if, as in the case of Banka Slovenije, it has a statutory responsibility for banking supervision, including supervising the provision of consumer credit and financial leasing, and financial stability³⁴.

3.5 *Discharge of tasks on behalf of and in the exclusive interest of the Government or of other public entities*

Banka Slovenije is designated by the draft law as the sole supervisory authority for financial leasing companies and intermediaries arranging consumer credit relating to immovable property, and of certain non-bank transferees of consumer credit, in its own name and not on behalf of any other authority³⁵. There is no indication that, in carrying out its supervisory functions, Banka Slovenije would act exclusively in the interest of another public entity.

³⁰ In this regard, see paragraph 3.3 of Opinion CON/2015/54; paragraph 3.1.2 of Opinion CON/2015/37; paragraph 3.1.2 of Opinion CON/2015/45; paragraphs 3.2 and 3.3 of Opinion CON/2015/21.

³¹ Article 238 of the Law on banking.

³² See paragraph 3.4 of Opinion CON/2015/54.

³³ See, for example, paragraphs 2.1 to 2.3 of Opinion CON/2006/38, paragraphs 2.1 and 2.2 of Opinion CON/2006/47, paragraphs 2.1 to 2.5 of Opinion CON/2007/29, and paragraph 2 of Opinion CON/2009/71.

³⁴ Article 33 of the Law on consumer credits, the Law on banking and the Law on Banka Slovenije (*Zakon o Banki Slovenije*) (ZBS-1) (Ur. l. RS No 72/06 – official consolidated text, and 59/11).

³⁵ With Information Commissioner supervising compliance with the rules on the collection and processing of personal data (Article 77(5) of the draft law).

3.6 *Extent to which the performance of tasks is aligned with Banka Slovenije's institutional set-up, in particular as regards accountability considerations*

Given the complementarity of the new tasks with Banka Slovenije's existing supervisory tasks, in particular in the field of supervision of credit institutions, including their consumer credit and financial leasing activities, and their intermediaries, the new tasks appear to broadly fit into Banka Slovenije's institutional set-up. However, the draft law does not contain provisions clarifying the tools and powers necessary for Banka Slovenije to effectively perform its supervisory tasks in relation to transferees of consumer credit, such as the BAMC and securitisation special purpose vehicles, which may expose Banka Slovenije to reputational risks.

3.7 *Extent to which the performance of tasks is proportionate to Banka Slovenije's financial and operational capacity and its ability to perform its ESCB-related tasks*

As noted above, since not all of Banka Slovenije's costs related to its new tasks are covered under the draft law (which does not specify whether the costs of supervision of transferees of consumer credits, such as the BAMC or securitisation special purpose vehicles, would be reimbursed), the ECB invites the consulting authority to consider introducing the same mechanism for all supervised entities as regards the financing of costs incurred by Banka Slovenije in the performance of its new tasks.

3.8 *Extent to which the performance of tasks entails substantial financial risks*

The draft law does not contain any specific provisions on liability for the performance of supervisory tasks. Banka Slovenije's potential liability for the performance of the new tasks given to it under the draft law will be thus subject to the rules on liability for damage caused in the exercise of public authority³⁶.

3.9 *Conclusion*

The ECB considers that there are grounds for regarding Banka Slovenije's new tasks of authorising financial leasing companies providing financial leasing services relating to immovable property to consumers and intermediaries arranging consumer credit relating to immovable property, as well as supervising these financial leasing companies, their intermediaries, and certain transferees of consumer credit transferred by entities authorised to perform banking activity or to provide financial services, as central banking tasks, in the sense that they can be regarded as complementing Banka Slovenije's existing banking supervisory functions, including in the area of consumer credit. In addition, the fact that the supervised entities will contribute to the costs incurred by Banka Slovenije in performing its new supervisory tasks, by paying authorisation and annual supervisory fees, which will also have a positive impact on Banka Slovenije's financial capacity to assume these tasks, may be regarded as reflecting such complementarity. However, the draft law does not contain provisions clarifying the tools and powers necessary for Banka Slovenije to effectively oversee compliance by certain transferees of consumer credits, such as the BAMC and securitisation special purpose vehicles, with consumer protection rules at the operational level, which may expose Banka Slovenije to reputational risks. In addition, the draft law does not specify

³⁶ Article 26 of the Slovenian Constitution in conjunction with the Code of Obligations (*Obligacijski zakonik*) (OZ) (Ur. l. RS No 97/07 – official consolidated text).

how the supervisory costs incurred by Banka Slovenije in relation to these entities are to be reimbursed.

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

Done at Frankfurt am Main, 8 June 2016.

[signed]

The President of the ECB

Mario DRAGHI