



OPINION OF THE EUROPEAN CENTRAL BANK
of 4 April 2018
on the creation of a securitisation framework
(CON/2018/16)

Introduction and legal basis

On 3 January 2018 the European Central Bank (ECB) received a request from the Ministry of Finance of Cyprus for an opinion on a draft securitisation law (hereinafter the 'draft law'). On 22 February 2018, the Ministry of Finance submitted a new request for an opinion on a revised version of 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/EC¹, as the draft law relates to the Central Bank of Cyprus (CBC) and to rules applicable to financial institutions insofar as they 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

- 1.1 The purpose of the draft law is to establish a framework for securitisations in Cyprus to facilitate the secondary market for loans which may in turn support the reduction of the high level of non-performing loans (NPLs) of Cypriot banks. The draft law vests in the CBC the power to regulate and supervise securitisations in order to safeguard the proper functioning of the securitisation market in Cyprus.
- 1.2 In particular, the draft law establishes the procedure that an originator would need to follow in order to notify the CBC that it intends to carry out a securitisation. The draft law provides that a securitisation special purpose entity (SSPE) set up by an originator may not commence its activities as a securitisation vehicle, unless the originator has notified the CBC in writing of its intention to carry out one or more securitisation transactions and has furnished the CBC with the necessary information required under the draft law.
- 1.3 In the case of a traditional securitisation, the notification must be accompanied by the information that the originator needs to supply to the CBC in order to enable the CBC to assess whether the servicer of the SSPE has sufficient resources to carry out its activities and whether a sound and prudent management of the SSPE is achieved. The information required includes the amount and type of credit facilities to be securitised, the structure of the securitisation and the terms on which

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).

- the SSPE will issue the financial instruments. In the case of a synthetic securitisation, the notification to the CBC must be accompanied by such information as required under the draft law or any directives issued by the CBC under the draft law.
- 1.4 The CBC will evaluate the information received on the basis of the smooth functioning of the securitisation market in Cyprus and compliance with the provisions of the draft law and any directives or guidelines issued under the draft law. It must inform the originator within 20 days of receipt of the notification of its decision to oppose or not oppose the securitisation. An SSPE that fails to commence its activities within 24 months of the date on which the CBC adopts its decision must begin the notification procedure again and resubmit all necessary information.
- 1.5 For the purposes of the draft law, only credit institutions, financial institutions and credit acquiring companies² can act as originators. According to the draft law, originators are required to notify the underlying debtors, collateral providers and guarantors at least 45 days in advance of the transfer of exposures to an SSPE.
- 1.6 Where the originator is a credit institution and a right of set-off in respect of the underlying exposures of the securitisation against credit balances held by the underlying borrower with that credit institution exists or is created during the securitisation, the draft law provides that the terms of the securitisation shall include provisions pertaining to such right. The draft law sets out a number of mitigating actions that should be taken in cases where such a right of set-off exists or is created during the securitisation. In addition, the draft law provides that an SSPE will be subrogated to all rights of the originator to collateral held by it for the purposes of securing the repayment of the exposures and this subrogation will take place simultaneously with the transfer of exposures to the SSPE. The SSPE will assume all the rights and obligations of the originator and its ranking in respect of both the exposures and the related collateral.
- 1.7 The draft law contains provisions on the true sale of the exposures to the SSPE. In particular, it provides that the method of transfer of exposures is to be agreed between the originator and the SSPE and that the transfer becomes final, irrevocable and binding once the terms of such an agreement have been satisfied. The draft law allows for the possibility for originators to transfer the exposures using a trust and clarifies that an insolvency procedure against the originator will have no impact on an SSPE, its rights or exposures.
- 1.8 The draft law grants SSPEs both the right to borrow under credit facilities and the right to issue financial instruments. The financial instruments may be offered to professional clients or admitted to trading on a regulated market or on a multilateral trading facility.
- 1.9 The draft law stipulates that an SSPE shall appoint a servicer for the day-to-day management of the securitised exposures under the terms of a management agreement. Prior to undertaking the servicing of the securitised exposures, the servicer may obtain from the originator such information as it deems necessary to properly evaluate the securitised exposures. The appointment of a servicer which is not the originator would need to be notified to the underlying borrowers and guarantors no more than five business days after the date of appointment. The role

² For the purposes of the draft law, a credit acquiring company is a company incorporated in Cyprus and granted authorisation by the CBC pursuant to Law 169(I)/2015 on the sale of credit facilities and related issues.

of servicer can be undertaken by credit institutions, financial institutions, credit acquiring companies or limited liability companies established in Cyprus. Limited liability companies need to apply to the CBC for authorisation in accordance with the draft law. The draft law sets out the application procedure for the licensing of limited liability companies as servicers, as well as the procedures for the suspension and termination of such a licence. Any material changes that affect the information or documents submitted to the CBC as part of that procedure, the appointment of any member of management of authorised servicers and any increase or decrease of any special participation rights in the ownership structure of authorised servicers would each need to be notified to and, where appropriate, approved by the CBC.

- 1.10 The draft law grants the CBC the power to supervise the activities of SSPEs and servicers. It sets out a number of requirements relating to the assessment of the management and key function holders of a servicer; the requirement for SSPEs and servicers to report audited financial statements to the CBC; the CBC's right to conduct on-site investigations and have access to SSPEs' and servicers' books and records; the CBC's confidentiality duties; and the supervisory measures and sanctions that may be imposed in relation to SSPEs and servicers.
- 1.11 The draft law provides for the involvement of the CBC in the liquidation of an SSPE by establishing a requirement for the CBC's prior consent in the case of a voluntary liquidation of an SSPE and by entitling the CBC to initiate liquidation procedures and appoint a liquidator for an SSPE in certain circumstances.
- 1.12 The draft law empowers the CBC to issue directives and guidelines and to regulate, *inter alia*: (a) the procedure for granting a licence to servicers; (b) the criteria for the aptitude and fitness of shareholders, directors and key function holders of servicers and SSPEs; (c) the internal organisation and governance of servicers; (d) the supervisory fee and other charges that the CBC may impose from time to time; and (e) the information required for the purpose of synthetic securitisations.
- 1.13 The scope of the draft law is limited to the securitisation of credit facilities or other forms of receivables and/or exposures originated or acquired by credit institutions, financial institutions or credit acquiring companies, provided that the institution or company is an entity subject to supervision by a competent authority. For this purpose, a competent authority includes the CBC and, in the case of branches of credit institutions or financial institutions established in another Member State, the competent authority of the home Member State.

2. Scope of the opinion

This opinion focuses on: (1) specific aspects of the newly established securitisation framework (paragraph 3.1); and (2) the new tasks conferred on the CBC in to the context of the prohibition of monetary financing under Article 123 of the Treaty (paragraph 3.2).

3. Observations

3.1 *Specific aspects of the newly established securitisation framework*

- 3.1.1 The ECB has a strong interest in the sustainable revival of the European securitisation market. As a form of asset-based financing with the capacity both to channel flows of credit to the real economy and to transfer risk, securitisation has particular significance for the transmission mechanism of monetary policy. A healthy European securitisation market is important for well-functioning capital markets in the Union. Particularly where credit institutions' capacity to lend to the real economy is constrained, securitisation can act as a fresh source of funding and free up capital for lending. The ECB has significant experience in the field of securitisation through the Eurosystem's monetary policy operations. Considering the ECB's monetary policy and macro-prudential tasks, the ECB has participated actively in the public debate on regulatory initiatives on securitisation during which it has highlighted the benefits of sound securitisation markets, recommended differentiated capital treatment of securitisations and supported a prudent Union framework for simple, transparent and standardised (STS) securitisations³.
- 3.1.2 The ECB welcomes the establishment of the framework for securitisation in Cyprus as it may enable the efficient transfer of non-performing loans (NPLs) off the balance sheet of credit institutions. From a financial stability point of view, the presence of significant volumes of NPLs on credit institutions' balance sheets reduces their ability to fulfil their function as providers of credit to the real economy and hampers operational flexibility and overall profitability essential to a well-functioning banking sector. As such, the draft law may have a positive effect on financial stability to the extent that it would result in the transfer of the risks of NPLs off credit institutions' balance sheets⁴. In addition, by granting the CBC regulatory and supervisory authority over the securitisation activity of originators, servicers and SSPEs, the draft law intends to ensure that this activity is properly carried out and, more generally, to safeguard the proper functioning of the securitisation market in Cyprus.
- 3.1.3 The ECB takes note of the provisions of the draft law requiring originators to notify securitisations to the CBC.⁵ It would be worth clarifying whether the notification obligation would be equally applicable in cases where the SSPE has been set up by a person other than the originator which intends to carry out securitisation.
- 3.1.4 The ECB wishes to express its concerns as regards the power granted to the CBC to oppose a securitisation in advance, noting that such a power would be unusual in European securitisation markets and the justification for having such a power is not clear. In particular, the provision of the draft law requiring the CBC to consider whether the securitisation will affect the smooth functioning of the securitisation market in Cyprus appears to be rather vague and it would be helpful to clarify exactly what is meant by it. The ECB also notes that the disclosure provisions of the draft law may be intended to facilitate the CBC's assessment of compliance as regards specific entities regulated under the draft law, such as SSPEs and servicers, with the relevant regulatory requirements. If this is the intention, then the ECB suggests that the draft law clarify

³ See paragraphs 2.1-2.3 of Opinion CON/2016/11.

⁴ See paragraph 3.2.1 of Opinion CON/2016/17 and paragraph 2.2 of Opinion CON/2015/45.

⁵ See Articles 5, 6 and 7 of the draft law.

that the submission of documentation relates to these regulatory requirements and that non-compliance with the disclosure provisions may result in the CBC's refusal to authorise these entities to act in a particular securitisation. This clarification would reduce the possibility of a vague evaluation of the merits of individual securitisations. In case this provision is retained, and since the draft law would also apply to securitisations established by credit institutions which are directly supervised by the ECB, it is necessary to avoid any overlap between the supervisory competences of the ECB and the CBC. The ECB understands that the intention of the consulting authority is indeed to confine the role of the CBC under the draft law to matters falling out of the scope of the ECB's competences. It should therefore be clarified that the criterion in respect of the smooth functioning of the securitisation market in Cyprus does not overlap with the provisions of Regulation (EU) No 575/2013 of the European Parliament and of the Council⁶ as regards, for example, the assessment of whether a reduction in a risk-weighted exposure, through the means of securitisation, is justified by the transfer of credit risk to third parties.

The consulting authority may wish to further consider the practical aspects of granting such a power to the CBC in order to ensure that the provision does not discourage securitisation activity. For instance, as currently drafted, the draft law implies that an originator would have already embarked on the process of setting up a securitisation and would have borne all relevant legal and advisory costs, before notifying the CBC of its intention to carry out a securitisation and furnishing the CBC with the required information. Furthermore, the requirement for the CBC to assess the ability of the servicer to carry out its activities under Article 5(2) of the draft law appears redundant given that other provisions of the draft law require the authorisation of the servicer by the CBC. It is therefore not clear what additional standard would be applied under Article 5 of the draft law to assess the servicer's capacity.

- 3.1.5 The requirement imposed on originators to provide underlying borrowers, collateral providers and guarantors with 45 days' prior notice of the proposed transfer of loans to an SSPE raises concerns⁷. It is noted that requiring the prior notification of borrowers is inconsistent with the usual practice for true sale securitisations of performing assets in Member States with which the ECB has experience. Performing assets securitised by way of true sale are, by definition, freely transferrable and their transfer is, in the ECB's experience, 'silent', in the sense that the transfer is not notified to borrowers. Primarily, this is due to the fact that much of a securitisation's efficiency lies in the possibility of transferring large portfolios of exposures, often relating to thousands of borrowers, without the administrative costs of preparing letters to notify each borrower in order for the transfer to take effect legally. Notification of a borrower usually only takes place when an originator becomes insolvent or suffers another serious credit event. The introduction of such a notice requirement would create an unjustifiably heavy burden for originators, as regards both their operations and their resources, and may run the risk of creating an obstacle to the smooth execution of securitisations.

⁶ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

⁷ See Article 16(1) of the draft law.

The ECB understands that the intention of including this requirement in the draft law is to reflect a similar provision which exists in Cypriot Law 169(I)/2015 on the sale of credit facilities and related issues⁸, whereby, in contrast to the draft law, borrowers and guarantors are explicitly entitled to submit a counterproposal for the acquisitions of the credit facilities. In any case, where the borrowers of loans being securitised wish to rearrange their financial transactions because of the securitisation, including to repay their loans early, this could, in principle, also take place, to the extent permitted under their loan contracts after the securitisation has been established. Therefore a shorter notice period or even a general ex-post notification done through a publication in the official gazette of Cyprus, as is the case, for example, under the Italian Law of 1999 on securitisation, in particular Article 4(2) of that law⁹, could be an alternative. This could be combined with a right for any borrower to receive the information listed in Article 16(2) of the draft law upon request.

- 3.1.6 In addition to the above, a shorter notice period or an ex post notification requirement would also better serve the securitisation of credit card receivables and trade receivables, which typically have a maturity of less than 30 days. The 45 days' notice period, currently foreseen under the draft law, risks excluding the possibility of securitising real economy linked assets with short-term maturities since the claims would already have been repaid before the notice period has expired.
- 3.1.7 Furthermore, it is suggested that the assurances to be provided by originators to borrowers under Article 16(2) of the draft law could simply be enshrined as guarantees with the force of law in the draft law itself without the need for originators to provide these legal assurances separately to each individual borrower. In addition, it is noted that Article 16 of the draft law seems to concern true sale securitisations. Therefore, Article 16 of the draft law should be revisited to take account of the fact that there is no transfer or delivery of exposures in the case of synthetic or trust-based securitisations and thus some of the legal assurances are not applicable to securitisations of this kind.
- 3.1.8 With regard to the provisions of the draft law on true sale in traditional securitisations¹⁰, the protection of the true sale is very comprehensive. While robust true sale protection is a welcome part of the draft law, even jurisdictions with strong true sale protections may allow a limited period to challenge asset transfers in the event of fraud, bad faith or an intention to defraud creditors.
- 3.1.9 It is noted that there is a provision in the draft law that the transfer of underlying loans and related collateral may be recorded with, and registered by, *inter alia*, το Τμήμα Κτηματολογίου και Χωρομετρίας (the Department of Lands and Surveys) and το Τμήμα Εφόρου Εταιρειών και Επίσημου Παραλήπτη (the Department of the Registrar of Companies and Official Receiver) free of charge¹¹. While there is merit in ensuring that such formalities will not incur any additional costs for the originator or the SSPE, it is not clear whether other entities would have to bear these

⁸ Ο περί Αγοραπωλησίας Πιστωτικών Διευκολύνσεων και για Συναφή Θέματα Νόμος του 2015 (169(I)/2015).

⁹ Legge 130/1999 sulla cartolarizzazione dei crediti. See Article 4(2) of Law 130/1999 on securitisation and covered bonds.

¹⁰ See Article 21 of the draft law.

¹¹ See Article 19 of the draft law.

costs, or whether costs would be waived for all entities. The consulting authority may wish to revisit the draft law to clarify this point.

- 3.1.10 The ECB understands that it is quite common for Cypriot credit institutions to use the same asset, which in most cases is immovable property, as collateral for more than one facility granted by a credit institution to the same borrower (so called cross-collateralisation). However, in cases where the originator intends to securitise only part of its exposure towards certain debtors, a situation may occur where the originator will share legal rights over the same collateral with the SSPE. It is suggested to avoid disputes, delays and standstill situations between the two parties in such situations if, for instance, the originator and the SSPE have a different recovery strategy. The smooth functioning of securitisations affected by cross-collateralisation can be ensured by either (a) the draft law providing for rules to address such conflicts in enforcement or (b) the securitising parties addressing these risks at the outset of the securitisation using contractual solutions.
- 3.1.11 According to the draft law limited liability companies which the CBC may authorise as servicers need to be incorporated in Cyprus.¹² The ECB understands that the reason for not expanding the scope of this provision to cover companies incorporated in other Member States is the lack of harmonisation of the rules on authorisation of servicers across the Union.¹³ Servicers established in other Member States would therefore need to incorporate a limited liability company in Cyprus in order to carry out servicing activities in Cyprus. The decision of servicing companies to do so may depend also on the requirement imposed by the draft law on such authorised companies to notify the CBC of any direct or indirect changes to their qualifying holdings and by the ability of the CBC to then permit or prohibit direct or indirect acquisitions of shareholdings¹⁴. It is therefore suggested that the criteria on the basis of which the CBC may decide to prohibit an acquisition be elaborated in the draft law and that it should be clarified what is meant by an evaluation of the suitability of the new shareholders.
- 3.1.12 Furthermore, it is noted that the draft law contains potential safeguards against the potential reduction in the assets of the SSPE which might arise due to a debtor's right of set-off¹⁵. The draft law provides that the negative impact that a debtor's right to set-off the credit balances it holds with the originator against the debtor's exposures included in a securitisation shall be mitigated by the originator by creating blocked assets of at least equal value to the amount of that set off right for the benefit of the SSPE. The ECB understands that while exercising the set-off constitutes a right, and not an obligation, of the debtor, if this right exists in respect of exposures transferred in a securitisation, it is the obligation of the servicer to take the necessary mitigating measures once a set-off right is created or maintained in a securitisation. The obligation to fully collateralise the liability arising out of such set-off risk, as prescribed in the draft law, would cause securitisations to be highly inefficient for originators, thereby reducing the incentives to use securitisation as a financing tool. The assets blocked to meet such set-off risk would serve only to make whole the

¹² See Article 8 of the draft law.

¹³ The consulting authority may wish to closely monitor the developments regarding the European Commission's proposal for a Directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral (COM(2018)135).

¹⁴ See Article 12 of the draft law.

¹⁵ See Article 17 of the draft law.

noteholders of the securitisation, and have no impact on the rights or position of underlying debtors. They therefore create additional protection for the investors of the securitisation. However, this could be so costly that the securitisation is not economical for either originators or investors. In other Member States, this type of protection is usually a commercial compromise provided for by way of a partial reserve, which is accounted for in the overall rating and risk premium, i.e. the interest rate of the notes issued by the SSPE. While mitigation measures may be necessary to protect noteholders, it is more efficient to leave originators and investors free to come to commercial agreements on the appropriate level of protection from set-off risk needed for each transaction, without prejudicing the economics of securitisation as a whole in the Cypriot market. It is therefore suggested to remove paragraph (2) of Article 17 on the obligation of the originator to collateralise the liability in respect of the set off right for the benefit of the SSPE from the draft law.

Nevertheless, the ECB recommends that if it is commercially agreed in a securitisation to include the provision of additional collateral by the originator, then the effectiveness of the collateral arrangement should be protected from the effects of the default, insolvency or restructuring of the originator. This would help facilitating that the securitised exposures are put beyond the reach of the originator institution and its creditors, including in bankruptcy and receivership¹⁶.

3.1.13 Finally, in relation to the structure of the SSPE and the ring-fencing of its assets, it could be considered to address the possibility of multiple securitisations by a single SSPE. The draft law, possibly in conjunction with amendments in other pieces of legislation, could provide statutory protection for distinct asset portfolios securitised and held by the same SSPE in order to reduce the legal, administrative and accounting costs of establishing a new SSPE for each individual securitisation. This type of protection is found, for example, in the compartment feature of the Luxembourgish Law of 2004 on securitisation, in particular Articles 5, 8, 33 and 62 of that law¹⁷.

3.2 *Conferral of new tasks on the CBC*

3.2.1 As noted in paragraph 1, the draft law confers new tasks on the CBC. The ECB underlines that a proposed conferral of tasks on a national central bank (NCB) in the European System of Central Banks (ESCB) must be assessed against the prohibition on monetary financing under Article 123 of the Treaty. For the purposes of that prohibition, Article 1(1)(b)(ii) of Council Regulation (EC) No 3603/93¹⁸ defines 'other type of credit facility', inter alia, as 'any financing of the public sector's obligations vis-à-vis third parties'.

Ensuring that Member States implement a sound budgetary policy is one of the key objectives of the monetary financing prohibition, which may not be circumvented.¹⁹ Therefore, the task of financing measures which are normally the responsibility of the Member States, and which are financed from their budgetary sources rather than by the NCBs, must not be entrusted to NCBs. In order to decide what constitutes a form of financing of the public sector's obligations vis-à-vis

¹⁶ See Article 243(5)(b) of Regulation (EU) No 575/2013.

¹⁷ Loi du 22 mars 2004 relative à la titrisation.

¹⁸ Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty (OJ L 332, 31.12.1993, p. 1).

¹⁹ Article 123 of the Treaty also serves the objective of maintaining price stability and reinforces central bank independence.

third parties, which can be translated as the provision of central bank financing outside the scope of the central bank tasks, it is necessary to carry out, on a case-by-case basis, an assessment of whether the task to be undertaken by an NCB is a central bank task or a government task, i.e. a task within the responsibility of the Member States. In other words, adequate safeguards must be in place to ensure that circumventions of the objective of the monetary financing prohibition of maintaining a sound budgetary policy of Member States do not take place.

- 3.2.2 As part of its discretion in the exercise of its duty, on the basis of Article 271(d) of the Treaty and Article 35.6 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'), to ensure that NCBs honour the obligations laid down by the Treaty, the Governing Council has endorsed safeguards of that kind in the form of criteria for determining what may be seen as falling within the scope of a public sector's obligation within the meaning of Article 1(1)(b)(ii) of Regulation (EC) No 3603/93 or, in other words, what constitutes a government task as follows:

First, central bank tasks are in particular those tasks that are related to the tasks that have been conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB. These tasks are mainly defined in Article 127(2), (5) and (6) and Article 128(1) of the Treaty, as well as Article 22 and Article 25.1 of the Statute of the ESCB.

Second, as Article 14.4 of the Statute of the ESCB allows NCBs to perform 'other functions', new tasks, i.e. tasks that are not related to tasks that have been conferred upon the ECB and the NCBs, are not precluded per se. However, new tasks that are undertaken by an NCB and which are atypical of NCB tasks or which are clearly discharged on behalf of and in the exclusive interest of the government or of other public sector entities should be considered government tasks.

Third, an important criterion for qualifying a new task as atypical of an NCB task or as being clearly discharged on behalf of and in the exclusive interest of the government or other public sector entities is the impact of the task on the institutional and financial independence of that NCB and the personal independence of the members of that NCB's decision-making bodies.

In particular, the following aspects should be taken into account:

- (a) whether the performance of the new task creates conflicts of interest with existing central bank tasks which are not adequately addressed and does not necessarily complement those existing central bank tasks. If a conflict of interest arises between existing and new tasks, sufficient safeguards to mitigate that conflict should be in place. The complementarity between a new task and the existing central bank tasks should not be interpreted broadly, so as to lead to the creation of an indefinite chain of ancillary tasks. Such complementarity should be examined also in relation to the financing of those tasks;
- (b) whether without new financial resources the performance of the new task is disproportionate to the NCB's financial or organisational capacity and may have a negative impact on the capacity to perform properly the existing central bank tasks;
- (c) whether the performance of the new task fits into the institutional set-up of the NCB in the light of central bank independence and accountability considerations;

- (d) whether the performance of the new task harbours substantial financial risks;
- (e) whether the performance of the new task exposes the members of the NCB decision-making bodies to political risks which are disproportionate and may also have an impact on their personal independence and, in particular, on the guarantee of term of office set out in Article 14.2 of the Statute of the ESCB.

3.2.3 On the basis of the criteria set out above, the following paragraphs assess whether the new tasks of the CBC are in line with the monetary financing prohibition.

3.2.3.1 *Tasks related to the tasks conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB*

The powers conferred on the CBC by the draft law cannot be considered as tasks conferred upon the ECB and the NCBs by virtue of the Treaty. The draft law provides that the powers conferred on the CBC to supervise the activities of SSPEs and servicers aim to safeguard financial stability in Cyprus²⁰. These tasks are generally related to the ESCB's contribution to the smooth conduct of policies pursued by the competent authorities relating to the stability of the financial system pursuant to Article 127(5) of the Treaty. Moreover, as previously noted by the ECB²¹, Article 127(6) of the Treaty only permits the conferral of tasks on the ECB in policy areas relating to the prudential supervision of credit institutions. Accordingly, Council Regulation (EU) No 1024/2013²² assigns to the ECB, for prudential supervisory purposes, the task of ensuring compliance by significant credit institutions with the relevant Union law that imposes prudential requirements in the area of securitisation. The conferral of supervisory tasks in the area of securitisation which are not primarily prudential in nature, but rather relate to product markets or investor protection, do not fall within the scope of Article 127(6) of the Treaty. The supervisory tasks conferred on the CBC under the draft law are not related, as such, to the prudential supervision of credit institutions, but rather to the securitisation market in Cyprus.

3.2.3.2 *Tasks which are atypical of NCB tasks*

The conferral of the power to oppose, regulate and supervise the activity of securitisations can be considered to be uncommon tasks for central banks in the Union. Only one other Member State has conferred such powers on its central bank²³. However, the ECB understands that the underlying reason for allocating the new tasks to the CBC is linked to the CBC's overall set of responsibilities for financial supervision in Cyprus. In this context, the ECB considers that the new tasks complement the CBC's existing supervisory powers over credit institutions, financial institutions and credit acquiring companies and thus contribute to the soundness of the financial

²⁰ See Article 31 of the draft law.

²¹ See paragraph 3 of Opinion CON/2016/11.

²² See Article 4(1)(d) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

²³ This is the case in Hungary. In Ireland, the central bank is responsible for the authorisation and supervision of credit servicing firms and in Portugal the central bank is responsible for the authorisation and supervision of credit securitisation fund management companies.

market and the preservation of confidence in the marketplace.²⁴ As such they are not atypical for an NCB of the ESCB.

3.2.3.3 *Tasks clearly discharged on behalf of and in the exclusive interest of the government*

The ECB notes that under the draft law the CBC will be responsible for supervising the conduct of SSPEs and servicers and their compliance with their obligations under the draft law. The CBC is already the competent authority responsible for the authorisation and supervision of credit and financial institutions and of credit acquiring companies. The CBC's new tasks as the competent authority for the implementation and enforcement of the draft law therefore seem to complement its existing tasks, and have not been conferred on the CBC in the exclusive interest of the government or of other public entities.

3.2.3.4 *Extent to which performance of the new task creates conflicts of interest with existing central bank tasks*

Carrying out the new tasks conferred upon the CBC by the draft law does not appear to create conflicts of interest with other central bank tasks performed by the CBC.

3.2.3.5 *Extent to which performance of the new task is disproportionate to the financial or organisational capacity of the CBC*

The principle of financial independence requires that the Member States may not put their NCBs in a position where they have insufficient financial resources to carry out not only their ESCB-related tasks, but also their national tasks, both from an operational and financial perspective. Furthermore, when allocating specific new tasks to the NCBs, additional personnel and financial resources must also be allocated so that these tasks may be carried out in a manner that will not affect the NCBs' operational or financial capacity to perform their ESCB-related tasks²⁵. It is noted that the draft law provides that the CBC may issue directives, inter alia, on the annual supervision fee or any other fee that the CBC may impose from time to time.²⁶ The CBC would also need to arrange for the necessary staff with the appropriate skills that are essential for the authorisation of securitisation activity, the supervision of the SSPEs and servicers and the enforcement of the draft law in order to ensure that its capacity to perform its ESCB-related tasks and existing supervisory functions would not be affected by the assumption of these new tasks²⁷.

3.2.3.6 *Extent to which performance of the new task fits into the institutional set-up of the CBC, in the light of central bank independence and accountability considerations*

Given the complementarity of the new tasks with the CBC's existing powers, in particular in the field of supervision of credit institutions, financial institutions and credit acquiring companies, the new tasks appear to be aligned with the CBC's institutional set-up. In addition, the performance of the new tasks does not appear to raise accountability or personal and institutional independence concerns.

²⁴ See paragraph 2.3.2 of Opinion CON/2017/3.

²⁵ See paragraphs 2.1 and 2.2 of Opinion CON/2011/30.

²⁶ See Article 37(2) of the draft law.

²⁷ See paragraphs 2.1 and 2.2 of Opinion CON/2011/30.

3.2.3.7 *Extent to which the performance of tasks harbours substantial financial risks*

The draft law provides that the CBC and its advisors or officers shall not be subject to any liability in case of any legal action or other legal proceeding for damages in relation to any act or omission in the performance of their duties related to the tasks conferred by the draft law or directives issued pursuant to the draft law, unless it is proven that such act or omission was done in bad faith or is a result of gross negligence. The performance of the new tasks would not, therefore, appear to harbour undue financial risks for the CBC.

3.2.3.8 *Extent to which performance of the new task exposes members of the decision-making bodies of the CBC to disproportionate political risks and impacts on their personal independence*

The performance of the tasks conferred under the draft laws does not appear to be exposing the decision-making bodies of the CBC to any disproportionate political risk or to impact the personal independence of the members of its decision-making bodies.

3.2.4 *Conclusion regarding the compatibility of the draft law with the prohibition on monetary financing*

The ECB considers that the tasks conferred on the CBC under the draft law are new tasks. Nonetheless, the ECB understands that these tasks have been conferred on the CBC due to its overall set of responsibilities for financial supervision in Cyprus and that they appear to complement its existing supervisory powers over credit institutions, financial institutions and credit acquiring companies. The CBC's financing of the new tasks is in principle in compliance with the prohibition of monetary financing under Article 123 of the Treaty. It is, however, important that the Cypriot authorities ensure that the CBC can avail itself of sufficient resources for the performance of these new tasks so that its capacity to perform its ESCB-related tasks is not affected.

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

Done at Frankfurt am Main, 4 April 2018.

[signed]

The President of the ECB

Mario DRAGHI