EVROPSKA CENTRALNA BANKA
EUROSISTEM

SL

ECB-PUBLIC

MNENJE EVROPSKE CENTRALNE BANKE

z dne 26. novembra 2021

o spremembi kreditnih pogodb v švicarskih frankih

(CON/2021/36)

Uvod in pravna podlaga

Evropska centralna banka (ECB) je 15. aprila 2021 prejela zahtevo Državnega zbora Republike Slovenije za mnenje o predlogu zakona o omejitvi in porazdelitvi valutnega tveganja med kreditodajalci in kreditojemalci kreditov v švicarskih frankih (v nadaljnjem besedilu: predlog zakona).

Pristojnost ECB, da poda mnenje, izhaja iz členov 127(4) in 282(5) Pogodbe o delovanju Evropske unije ter iz tretje in šeste alinee člena 2(1) Odločbe Sveta 98/415/ES[1], saj se predlog zakona nanaša na Banko Slovenije, na pravila v zvezi s finančnimi institucijami, kolikor pomembno vplivajo na stabilnost finančnih institucij in trgov, ter na naloge ECB, ki se nanašajo na bonitetni nadzor kreditnih institucij, v skladu s členom 127(6) Pogodbe. V skladu s prvim stavkom člena 17.5 Poslovnika Evropske centralne banke je to mnenje sprejel Svet ECB.

1. Namen predloga zakona

1.1 Namen predloga zakona je prestrukturiranje potrošniških kreditov, ki so nominirani v švicarskih frankih (CHF) ali vsebujejo valutno klavzulo v švicarskih frankih in pri katerih so bile kreditne pogodbe sklenjene v obdobju od 28. junija 2004 do 31. decembra 2010 (v nadaljnjem besedilu: krediti v švicarskih frankih oziroma kreditne pogodbe v švicarskih frankih).

1.2 Glede na obrazložitev predloga zakona se želi s predlogom zakona kreditojemalcem, ki so najeli kredite v švicarskih frankih, omogočiti omejitev valutnega tveganja ter jim omogočiti, da kredite odplačajo pod pogoji, ki so jih glede na obrazložitev predloga zakona ob sklenitvi kreditne pogodbe lahko upravičeno in v dobri veri pričakovali[2]. Cilji predloga zakona so tudi zaščita potrošnikov, preprečevanje nepoštenih poslovnih praks kreditnih institucij in preprečevanje dolžniške krize[3].

1.3 Za doseganje teh ciljev predlog zakona zahteva, da kreditodajalci za vse kreditne pogodbe v švicarskih frankih, ki so bile sklenjene v obdobju od 28. junija 2004 do 31. decembra 2010, uvedejo določbo o valutni kapici. Ta valutna kapica se aktivira, ko zaradi spremembe menjalnega tečaja: (1) dejanski znesek preostanka kredita za več kot 5 % odstopa od zneska preostanka kredita, izračunanega po tečaju na dan črpanja kredita, ali (2) dejanska višina anuitete za več kot 5 %

1 Odločba Sveta 98/415/ES z dne 29. junija 1998 o posvetovanju nacionalnih organov z Evropsko centralno banko glede osnutkov pravnih predpisov (UL L 189, 3.7.1998, str. 42).

2 Obrazložitev predloga zakona št. 413-01-1/2021/4 z dne 14. aprila 2021 (v nadaljnjem besedilu: obrazložitev predloga zakona), str. 8.

3 Obrazložitev predloga zakona, str. 8.

odstopa od vrednosti anuitete, izračunane po tečaju na dan črpanja kredita. V času aktivacije valutne kapice se vrednost posamezne anuitete in drugih plačil na podlagi kreditne pogodbe obračunava po vrednosti, pri kateri se aktivira valutna kapica.

1.4 Predlog zakona določa, da morajo kreditodajalci – ti so opredeljeni kot kreditne institucije, ki so v času med 28. junijem 2004 in 31. decembrom 2010 s kreditojemalci sklenile kreditne pogodbe v švicarskih frankih – v roku 60 dni od uveljavitve predloga zakona pripraviti naslednjo dokumentacijo: (1) predlog pogodbe o ureditvi medsebojnih razmerij v obliki aneksa k veljavni kreditni pogodbi ali v obliki nove pogodbe, če je kreditna pogodba že prenehala veljati; (2) nov amortizacijski načrt, pri katerem se upošteva valutna kapica, ter (3) preračun preostanka dolga z upoštevanjem valutne kapice. Pri pripravi novega amortizacijskega načrta in preračuna preostanka dolga se mora skupni znesek prejetih plačil anuitet, ki presegajo znesek anuitet, izračunanih z upoštevanjem valutne kapice, uporabiti za poplačilo preostalih neplačanih anuitet. Kreditojemalca ne smejo bremeniti nobeni stroški v zvezi s pripravo dokumentacije in vso dokumentacijo je treba vročiti kreditojemalcu v 75 dneh. Če iz izračunov z upoštevanjem valutne kapice izhaja, da so vse obveznosti iz kreditne pogodbe že v celoti poplačane, mora kreditodajalec v roku 30 dni kreditojemalcu vrniti morebitno preplačilo. Če je obveznosti iz kreditne pogodbe plačeval tudi porok, je kreditodajalec dolžan pri vračilu morebitnih preplačil prednostno poplačati poroka. Če pa obveznosti iz kreditne pogodbe še niso v celoti poplačane, se pogodbeno razmerje nadaljuje skladno s spremenjenimi pogoji in novim amortizacijskim načrtom.

1.5 Predlog zakona ureja tudi vrsto posebnih situacij, ki lahko nastanejo po sklenitvi kreditnih pogodb v švicarskih frankih. Natančneje, če je kreditno pogodbo v švicarskih frankih odpovedal kreditodajalec, velja naslednje: (1) kreditodajalec mora za obdobje veljavnosti kreditne pogodbe izdelati nov amortizacijski načrt in pripraviti predlog pogodbe o ureditvi medsebojnih razmerij; (2) če že plačani zneski ne zadoščajo za poplačilo vseh obveznosti iz kreditne pogodbe, se lahko stranki dogovorita, da se preostali dolg poplača pod pogoji iz kreditne pogodbe ob upoštevanju valutne kapice, in (3) če že plačani zneski presegajo skupni dolg, je treba presežek vrniti kreditojemalcu.

1.6 Če je bila terjatev iz kreditne pogodbe v švicarskih frankih prenesena na tretjo osebo, velja naslednje: (1) prvotni kreditodajalec mora za obdobje do prenosa terjatve izdelati nov amortizacijski načrt in pripraviti predlog pogodbe o ureditvi medsebojnih razmerij; (2) če ima kreditojemalec še odprt dolg do prevzemnika terjatve, se lahko prvotni kreditodajalec in prevzemnik dogovorita, da se znesek kreditojemalčevega odprtega dolga zmanjša za višino preplačil. O tem je prvotni kreditodajalec dolžan obvestiti kreditojemalca in mu predložiti dokazila o zmanjšanju dolga; (3) če plačila v času do prenosa terjatve presegajo znesek po izračunu z upoštevanjem valutne kapice, mora kreditodajalec presežek vrniti kreditojemalcu v roku 30 dni od prejema podpisane pogodbe o ureditvi medsebojnih razmerij. V istem roku mora kreditodajalec kreditojemalcu vrniti obojestransko podpisano pogodbo o ureditvi medsebojnih razmerij.

1.7 Predlog zakona določa, da njegove določbe ne odrekajo pravice do sodnega varstva nobeni pogodbeni stranki. Vendar pa predlog zakona kreditodajalcu ne omogoča, da bi se izognil spremembi kreditnih pogodb, če bi dokazal, da so bili kreditojemalci ustrezno seznanjeni s tveganji.

1.8 Predlog zakona določa, da je Banka Slovenije pristojna za (1) nadzor nad izvajanjem zakona in (2) vodenje prekrškovnih postopkov. Če Banka Slovenije ugotovi kršitve, lahko naloži plačilo globe

ali celo začne postopek za odvzem dovoljenja za opravljanje bančnih storitev. Predlog zakona določa, da če kreditodajalec v več kot desetih primerih pravočasno ne odpravi ugotovljenih nepravilnosti, Banka Slovenije zoper njega začne postopek za odvzem dovoljenja za opravljanje bančnih storitev.

2. Odvzem dovoljenja za opravljanje bančnih storitev

2.1 Zakon o bančništvu določa, da se lahko dovoljenje za opravljanje bančnih storitev med drugim odvzame, če kreditna institucija ne ravna v skladu z odredbo in ne odpravi kršitev ali ne izvrši ukrepov, ki jih zahteva Banka Slovenije, in ugotovljenih kršitev ni mogoče odpraviti z drugimi ukrepi nadzora.[4]. Po predlogu zakona pa je Banka Slovenije zoper kreditodajalca dolžna začeti postopek za odvzem dovoljenja za opravljanje bančnih storitev, če v več kot desetih primerih pravočasno ne odpravi ugotovljenih nepravilnosti. Poleg tega predlog zakona pri tem ne postavlja pogoja, da ugotovljenih nepravilnosti ni mogoče odpraviti z drugimi ukrepi nadzora. Obrazložitev predloga zakona ne navaja razlogov, ki bi upravičevali, da je pristop po predlogu zakona strožji kot po Zakonu o bančništvu. V teh okoliščinah ECB poziva organ, ki se posvetuje, naj zagotovi, da bodo ukrepi, predvideni v predlogu zakona, sorazmerni in da bodo ustrezali namenu.[5].

2.2 Glede na primarnost zakonodaje Unije ECB tudi izpostavlja, da mora Banka Slovenije, kadar meni, da je treba začeti postopek za odvzem dovoljenja za opravljanje bančnih storitev, v celoti upoštevati člen 4(1)(a) in člen 14(5) Uredbe Sveta (EU) št. 1024/2013.[6], ki dajeta ECB za namene bonitetnega nadzora izključno pristojnost za odvzem dovoljenj pomembnim in manj pomembnim kreditnim institucijam. V skladu z Uredbo (EU) št. 468/2014 Evropske centralne banke (ECB/2014/17).[7] mora Banka Slovenije kot pristojni nacionalni organ v enotnem mehanizmu nadzora, če meni, da je treba kreditni instituciji v skladu z upoštevnim pravom Unije ali nacionalnim pravom v celoti ali delno odvzeti dovoljenje, predložiti ECB osnutek odločitve, s katerim predlaga odvzem dovoljenja. V tem primeru ECB pri sprejemanju odločitve o predlaganem odvzemu dovoljenja upošteva utemeljitev odvzema, ki jo predloži Banka Slovenije, in varovala po pravu Unije, vključno z načelom sorazmernosti.[8]. Glede na to bi moralo biti Banki Slovenije omogočeno, da v osnutku odločitve, ki ga predloži Evropski centralni banki, ugotovi, ali je odvzem dovoljenja primeren za uresničevanje legitimnih ciljev zakonodaje in ne presega meja potrebnega za dosego teh ciljev, tudi ob upoštevanju razumnih možnosti, da se kršitve odpravijo z drugimi ukrepi.

---

4 293. člen Zakona o bančništvu (Uradni list RS, št. 92/21 in 123/21 – ZBNIP).

5 Glej odstavek 3.1 Mnenja CON/2016/40.

6 Uredba Sveta (EU) št. 1024/2013 z dne 15. oktobra 2013 o prenosu posebnih nalog, ki se nanašajo na politike bonitetnega nadzora kreditnih institucij, na Evropsko centralno banko (UL L 287, 29.10.2013, str. 63).

7 Uredba (EU) št. 468/2014 Evropske centralne banke z dne 16. aprila 2014 o vzpostavitvi okvira za sodelovanje znotraj enotnega mehanizma nadzora med Evropsko centralno banko in pristojnimi nacionalnimi organi ter z imenovanimi nacionalnimi organi (okvirna uredba o EMN) (ECB/2014/17) (UL L 141, 14.5.2014, str. 1).

8 Glej člen 52(1) Listine Evropske unije o temeljnih pravicah, člen 5 Pogodbe o Evropski uniji in sodbo Splošnega sodišča z dne 6. oktobra 2021, Ukrselhosprom, T-351/18 in T-584/18, ECLI:EU:T:2021:669, točke 307 do 345.

3. Prestrukturiranje kreditov v švicarskih frankih

3.1 ECB je v letih 2018 in 2019 izdala mnenji o prejšnjih predlogih slovenskih zakonov v zvezi s krediti v švicarskih frankih, ki pa nato nista bila sprejeta[9].

3.2 Pred svetovno finančno krizo je bilo izposojanje gospodinjstev in nefinančnih družb v tujih valutah priljubljeno v številnih državah članicah[10]. Kakor je ECB že ugotavljala[11], se je povpraševanje po kreditih v tujih valutah povečalo zaradi nižjih obrestnih mer pri takih kreditih v primerjavi s krediti v domači valuti. Glede na obrazložitev predloga zakona gre pri kreditih v švicarskih frankih v Sloveniji v večini primerov za dolgoročne hipotekarne stanovanjske kredite.

3.3 Glede na predlog zakona bo prestrukturiranje kreditov v švicarskih frankih za kreditne institucije obvezno, ne glede na to, ali so krediti še nepoplačani, ali je kreditna pogodba že prenehala veljati in ali so bile terjatve odprodane. Predlog zakona kreditnim institucijam ne omogoča, da bi se izognile prestrukturiranju ali ga izpodbijale, tudi če lahko dokažejo, da je kreditojemalec kredit v švicarskih frankih najel na podlagi informirane odločitve.

3.4 *Pravni vidiki učinka za nazaj*

3.4.1 Kakor je ECB že ugotavljala[12], uvajanje ukrepov z učinkom za nazaj ogroža pravno varnost in ni skladno z načelom upravičenih pričakovanj ter lahko tudi posega v pridobljene pravice.

3.4.2 Po sedanjih določbah Zakona o potrošniških kreditih[13], ki se uporablja od 2. marca 2017, imajo potrošniki s hipotekarnimi krediti, ki so nominirani v tuji valuti ali vsebujejo valutno klavzulo, pravico zahtevati pretvorbo v eure, če se menjalni tečaj spremeni za več kot 10 %. V tem primeru morajo banke tak kredit pretvoriti po menjalnem tečaju, ki velja na dan vloženega zahtevka potrošnika. Glede na obrazložitev predloga zakona ta določa podoben mehanizem[14], ki bi se uporabljal za nazaj. Vendar pa predlog zakona uvaja veliko nižji prag za prestrukturiranje, saj zahteva spremembo menjalnega tečaja za več kot 5 %.

3.4.3 Člen 23(1) Direktive 2014/17/EU Evropskega parlamenta in Sveta[15], ki se uporablja za kreditne pogodbe, sklenjene od 21. marca 2016 naprej[16], določa, da morajo države članice zagotoviti, da za kreditne pogodbe, ki se nanašajo na posojila v tuji valuti, obstaja primeren regulativni okvir, s katerim se zagotovi vsaj, da (a) ima potrošnik pod določenimi pogoji pravico do pretvorbe kreditne pogodbe v drugo valuto ali (b) obstajajo druge ureditve za omejitev tveganja menjalnega tečaja, ki mu je potrošnik izpostavljen v okviru kreditne pogodbe. Člen 23(5) Direktive 2014/17/EU državam članicam omogoča, da dodatno uredijo posojila v tuji valuti, pod pogojem, da se takšna ureditev ne uporablja retroaktivno. Učinek predloga zakona za nazaj je v nasprotju s splošnim ciljem

---

9 Glej Mnenje CON/2018/21 in Mnenje CON/2019/27. Vsa mnenja ECB so objavljena na spletni strani EUR-Lex.

10 Za dodatne informacije o dajanju posojil v tujih valutah v Uniji glej Prilogo k Priporočilu ESRB/2011/1 Evropskega odbora za sistemska tveganja z dne 21. septembra 2011 o dajanju posojil v tujih valutah (UL C 342, 22.11.2011, str. 1).

11 Glej na primer odstavek 2.1 Mnenja CON/2018/21 in odstavek 2.2 Mnenja CON/2019/27.

12 Glej na primer odstavek 2.2 Mnenja CON/2018/21 in odstavek 2.3 Mnenja CON/2019/27.

13 52. člen Zakona o potrošniških kreditih (Uradni list RS, št. 77/16 in 92/21 – ZBan-3).

14 Obrazložitev predloga zakona, str. 13.

15 Direktiva 2014/17/EU Evropskega parlamenta in Sveta z dne 4. februarja 2014 o potrošniških kreditnih pogodbah za stanovanjske nepremičnine in spremembi direktiv 2008/48/ES in 2013/36/EU ter Uredbe (EU) št. 1093/2010 (UL L 60, 28.2.2014, str. 34).

16 Glej člen 43(1) Direktive 2014/17/EU.

člena 23(5) Direktive 2014/17/EU.[17], ki upošteva eno od splošnih načel prava Unije, in sicer načelo pravne varnosti.[18], ki podpira omejevanje zakonov z učinkom za nazaj.[19].

3.4.4 Slovenski organi so pristojni za oceno, ali je učinek predloga zakona za nazaj skladen s slovenskimi pravnimi in ustavnimi načeli.[20].

3.5 *Merila za upravičenost*

Predlog zakona ne določa posebnih meril, po katerih bi bili kreditojemalci upravičeni do udeležbe pri prestrukturiranju, razen da določa, da so morali biti krediti v švicarskih frankih odobreni v obdobju od 28. junija 2004 do 31. decembra 2010. To zbuja določene pomisleke glede namena predloga zakona. Kakor je ECB že ugotavljala.[21], bi bilo morda primerno uporabiti določena ciljno usmerjena merila za upravičenost, na primer povezavo pravice do prestrukturiranja s kreditojemalčevim dejanskim dohodkovnim položajem ali razmerjem med vrednostjo kredita in vrednostjo zastavljenih nepremičnin.

3.6 *Učinki na bančni sektor*

3.6.1 Kakor je ECB že ugotavljala.[22], se pričakuje, da bi imelo izvajanje predloga zakona negativne finančne posledice za slovenski bančni sektor. Kreditne institucije bi bile prizadete v različni meri, odvisno od tega, kolikšen obseg kreditov v švicarskih frankih so odobrile med 28. junijem 2004 in 31. decembrom 2010. To bi po pričakovanjih negativno vplivalo na dobičkonosnost, kapital in prihodnjo sposobnost kreditiranja v celotnem bančnem sektorju.[23].

3.6.2 Natančen vpliv na bančni sektor ni znan, saj predlog zakona ne vsebuje ocene učinka. Tudi če bi taka ocena obstajala, pa bi bilo težko napovedati možen vpliv v prihodnosti, saj je to odvisno od menjalnega tečaja za švicarski frank. Poleg tega bi časovni okvir in obseg prestrukturiranja kreditov, ki ga predvideva predlog zakona, lahko vnesla dolgoročnejšo negotovost v poslovno načrtovanje kreditnih institucij.

3.6.3 Kakor je ECB že ugotavljala.[24], bo prestrukturiranje povzročilo enkratno povečanje operativnih stroškov za prizadete kreditne institucije v Sloveniji, zlasti zaradi prestrukturiranja obstoječega varovanja pred tveganjem, ukrepov refinanciranja in stroškov, povezanih z obveznostjo preračunavanja kreditov v švicarskih frankih in obveščanja vsakega posameznega kreditojemalca o tem.[25].

3.6.4 ECB je že poudarila.[26] dodaten pomislek v zvezi s predvideno rešitvijo v predlogu zakona, da se glavno breme prestrukturiranja kreditov v švicarskih frankih nalaga kreditnim institucijam, ki so sklenile prvotne kreditne pogodbe, tudi če so sklenitelјice te kredite že prenesle (npr. kot nedonosna posojila) na tretje osebe, kar se je zgodilo v številnih slovenskih kreditnih institucijah.

---

17 Glej odstavka, navedena v opombi 12.

18 Glej na primer sodbo Sodišča z dne 10. marca 2009, Heinrich, C-345/06, ECLI:EU:C:2009:140.

19 Glej na primer sodbo Sodišča z dne 16. maja 1979, Tomadini, 84/78, ECLI:EU:C:1979:129.

20 Glej odstavek 2.2.3 Mnenja CON/2018/21 in odstavek 2.3.3 Mnenja CON/2019/27.

21 Glej na primer odstavek 3.3 Mnenja CON/2015/32.

22 Glej odstavek 3.2.1 Mnenja CON/2019/27.

23 Glej odstavek 3.2.1 Mnenja CON/2018/21 in odstavek 3.2.1 Mnenja CON/2019/27.

24 Glej odstavek 3.2.2 Mnenja CON/2019/27.

25 Glej odstavek 3.2.2 Mnenja CON/2018/21 in odstavek 3.2.2 Mnenja CON/2019/27.

26 Glej odstavek 3.2.3 Mnenja CON/2019/27.

Take določbe v predlogu zakona pomenijo pomembno oviro pri uspešnem reševanju problema nedonosnih posojil, saj kreditne institucije, ki so sklenile prvotne kreditne pogodbe, ne bi mogle uspešno prenesti nedonosnih posojil iz bilance stanja. Eden od razlogov za prenos nedonosnih posojil je odpraviti negotovost glede potencialnih prihodnjih izgub, povezanih s prenesenimi sredstvi. Zlasti ni znano, kako bi tako prestrukturiranje že prenesenih kreditov vplivalo na pogodbena razmerja med kreditnimi institucijami, ki so sklenile prvotne kreditne pogodbe, in kupci kreditov (npr. ali bi zaradi te spremembe za nazaj pogodbe postale neveljavne in/ali bi morale skleniteljice izpostavljenosti odkupiti nazaj). Predlog zakona ne zagotavlja gotovosti glede tega, kako bi se izvajal v zvezi z že prenesenimi sredstvi.

3.6.5 Kakor je ECB že izpostavila[27], odločno zagovarja razvoj sekundarnih trgov za sredstva kreditnih institucij, zlasti nedonosna posojila, kakor se izraža v akcijskem načrtu za reševanje problema slabih posojil v Evropi, o katerem se je dogovoril Svet EU[28]. Kot del celovitega pristopa k reševanju problema nedonosnih posojil bi lahko razvoj sekundarnih trgov prispeval k zmanjševanju obsega nedonosnih posojil. Dobro delujoči sekundarni trgi bi lahko tudi preprečili kopičenje nedonosnih posojil v prihodnosti. Poleg tega bi lahko dobro delujoč sekundarni trg pozitivno vplival na finančno stabilnost, če bi lahko omogočil prenos tveganj zaradi nedonosnih posojil iz bilance stanja kreditnih institucij. Če imajo kreditne institucije v bilanci stanja veliko nedonosnih posojil, se zmanjšuje njihova sposobnost, da opravljajo funkcijo kreditiranja realnega gospodarstva, ter poslabšuje operativna prožnost in splošna dobičkonosnost, ki sta bistveni za dobro delujoč bančni sektor. Bistveno je, da pravni okvir za sekundarne trge omogoča učinkovit prenos nedonosnih posojil iz bilance stanja kreditnih institucij, to pa je vidik, v zvezi s katerim bi lahko predlog zakona vnesel negotovost[29].

3.6.6 Zaradi predloga zakona bi lahko slovenske kreditne institucije utrpele nove izgube v zvezi z nedonosnimi posojili, ki so jih že odstranile iz bilance stanja. ECB je že ob prejšnjih priložnostih[30] izpostavila, da je sposobnost finančnih institucij za uspešno upravljanje kreditnega tveganja odvisna od zanesljivega, predvidljivega in stabilnega pravnega okvira, v katerem so ustrezno uravnoteženi interesi upnika in dolžnika. V tej zvezi je pomembno skrbno proučiti vpliv predloga zakona, da se zagotovi pravna varnost in prepreči nastanek moralnega tveganja v razmerju med upnikom in dolžnikom. Če bi kreditnim institucijam odvzeli učinkovite instrumente za uspešno in pravočasno zmanjšanje obsega nedonosnih posojil, bi to lahko privedlo do visoke ravni nedonosnih posojil in zadolženosti zasebnega sektorja, kar bi posledično negativno vplivalo na finančno stabilnost in bi lahko ogrozilo ponudbo kreditov v prihodnosti.

3.6.7 Poleg tega, kakor je ECB že izpostavila[31], so slovenske kreditne institucije, ki so svoje portfelje nedonosnih posojil prenesle na tretje osebe, tudi vso zadevno dokumentacijo v zvezi s prenesenimi krediti predale novim upnikom, ki so bili pred tem poslom v celoti seznanjeni z naravo prenesenih kreditov. Predlog zakona bi torej lahko posegel v poslovne sporazume med kreditnimi institucijami

---

27 Glej odstavek 1.1 Mnenja CON/2018/54 in odstavek 3.2.4 Mnenja CON/2019/27.

28 Glej sporočilo za javnost Sveta z dne 11. julija 2017 z naslovom Sklepi Sveta o akcijskem načrtu za reševanje problema slabih posojil v Evropi, dostopno na spletni strani Sveta na naslovu http://www.consilium.europa.eu.

29 Glej na primer odstavek 2.2.4 Mnenja CON/2019/8 in odstavek 3.2.4 Mnenja CON/2019/27.

30 Glej na primer odstavek 2.2.4 Mnenja CON/2019/8 in odstavek 3.2.4 Mnenja CON/2019/27.

31 Glej odstavek 3.2.6 Mnenja CON/2019/27.

in kupci kreditov ter kreditnim institucijam povzročil nesorazmerne operativne stroške. Ker te kreditne institucije nimajo več dostopa do dokumentacije o prenesenih kreditih, bi bilo morda nemogoče opraviti preračune in pripraviti dokumentacijo, kakor zahteva predlog zakona.

3.6.8 ECB tudi ugotavlja, da predlog zakona v primeru prenosa terjatev iz naslova kreditov v švicarskih frankih od kreditnih institucij zahteva, da te kredite prestrukturirajo za obdobje od črpanja kredita do prenosa. Predlog zakona pa ne predvideva prestrukturiranja kreditov za obdobje po prenosu.

3.6.9 V predlogu zakona je torej treba skrbno uravnotežiti koristi vzpostavitve dobro delujočih sekundarnih trgov za nedonosna posojila in potrebo po zaščiti dolžnikov.[32]. Poleg tega bi predlogu zakona koristila temeljita ocena učinka, ki bi vključevala učinke na pomembne in manj pomembne kreditne institucije.

3.7 *Učinki na finančno stabilnost*

3.7.1 ECB je že večkrat izpostavila tveganja, povezana s krediti v tujih valutah.[33]. Zlasti so krediti v tujih valutah pomenili veliko tveganje za finančno stabilnost v več državah članicah.[34], v katerih je delež kreditov v tujih valutah relativno visok. V tej zvezi ECB izpostavlja analizo Evropskega odbora za sistemska tveganja o teh tveganjih v Priporočilu ESRB/2011/1.

3.7.2 Iz podatkov Banke Slovenije je razvidno, da je stanje kreditov gospodinjstvom v švicarskih frankih največji delež doseglo oktobra 2008, ko je predstavljalo 34,7 % stanovanjskih kreditov in 8,5 % potrošniških kreditov. Ne glede na to se zdi, da so bili skupni portfelji kreditov gospodinjstvom v primerjavi z ostalimi portfelji bank kakovostnejši, kar se kaže v sorazmerno majhnem deležu nedonosnih posojil. Od takrat se je delež vseh kreditov, nominiranih v švicarskih frankih, močno znižal.[35]. Trenutno krediti, nominirani v švicarskih frankih, ne povzročajo sistemskih tveganj in ne ogrožajo finančne stabilnosti. Kakor pa je bilo že omenjeno, se pričakuje, da bi imelo izvajanje predloga zakona negativne finančne posledice za slovenski bančni sektor, zato bi lahko negativno vplivalo na dobičkonosnost in kapital slovenskih kreditnih institucij. Zlasti lahko določba, da mora kreditodajalec v roku 30 dni kreditojemalcu vrniti morebitno preplačilo, če so bile že poplačane vse obveznosti iz kreditne pogodbe po spremembah v skladu z valutno kapico, pomeni znaten pritisk na prihodke kreditnih institucij.

3.7.3 Kakor je ECB že poudarila z vidika dolgoročnih učinkov na finančno stabilnost.[36], je treba pri uvajanju ukrepov v zvezi s prestrukturiranjem kreditov v tujih valutah vedno upoštevati pošteno porazdelitev bremena med vse deležnike, da se prepreči moralno tveganje v prihodnosti.[37]. Predlog zakona določa, da ne glede na velikost nihanja menjalnega tečaja kreditojemalec vedno krije prvih

---

32 Glej odstavek 2.2.3 Mnenja CON/2018/31 in odstavek 3.2.7 Mnenja CON/2019/27.

33 Glej zlasti pregled finančne stabilnosti (*Financial Stability Review*) ECB iz junija 2010 ter mnenja CON/2011/87, CON/2012/27, CON/2014/59, CON/2014/72 in CON/2014/76 v zvezi s krediti v tujih valutah na Madžarskem; mnenja CON/2015/26, CON/2017/48 in CON/2017/9 v zvezi s krediti v tujih valutah na Poljskem, mnenji CON/2019/27 in CON/2018/21 v zvezi s krediti v tujih valutah v Sloveniji in Mnenje CON/2015/32 v zvezi s krediti v tujih valutah na Hrvaškem.

34 Sicer ne kaže, da bi bila Slovenija tak primer.

35 Trenutno delež vseh kreditov, nominiranih v švicarskih frankih, znaša 1,2 % vseh kreditov gospodinjstvom in nefinančnim družbam.

36 Glej na primer odstavek 3.3.2 Mnenja CON/2019/27.

37 Glej na primer odstavek 3.3.2 Mnenja CON/2018/21 in odstavek 3.3.2 Mnenja CON/2019/27.

5 % nihanja. Tako predlog omejuje izpostavljenost tveganju za kreditojemalca, ne pa za kreditne institucije, ki morajo sicer kriti tveganje nihanja menjalnega tečaja brez omejitev.

3.8 *Učinki na slovensko gospodarstvo*

Kakor je ECB že ugotavljala.[38], bi prestrukturiranje kreditov v švicarskih frankih z učinkom za nazaj, kakor ga predvideva predlog zakona, lahko imelo negativne učinke, če bi povzročilo poslabšanje razpoloženja tujih in domačih vlagateljev ter zaupanja v sistem zaradi zaznanega zmanjšanja pravne varnosti in povečanja deželnega tveganja.

4. Prenos novih nalog na Banko Slovenije

4.1 *Nova naloga Banke Slovenije*

4.1.1 Predlog zakona na Banko Slovenije prenaša nalogo nadziranja postopkov prestrukturiranja, ki jih morajo izvesti kreditne institucije. Poleg tega imenuje Banko Slovenije za pristojni prekrškovni organ v primerih kršitev predloga zakona. Predlog zakona ne določa podrobneje, kaj ta naloga obsega. ECB razume, da bi morala Banka Slovenije v bistvu nadzirati skladnost kreditnih institucij z zahtevami predloga zakona, ki se nanašajo na prestrukturiranje njihovih zasebnih pogodbenih razmerij s posameznimi strankami v zvezi s krediti v švicarskih frankih. Banka Slovenije je bila imenovana za pristojni prekrškovni organ v zvezi s kršitvami predloga zakona v okviru opravljanja njenih nalog bonitetnega nadzora kreditnih institucij.[39], delno pa ima tudi obstoječo vlogo na področju varstva potrošnikov.[40]. Vendar pa Banka Slovenije nima nobene primerljive odgovornosti v zvezi z nadzorom skladnosti kreditnih institucij z zakonskimi zahtevami glede prestrukturiranja zasebno izpogajanih kreditnih pogodb z njihovimi strankami. Predlog zakona torej na Banko Slovenije prenaša novo nalogo.

4.1.2 Kot je ECB že poudarila v zvezi s prejšnjima predlogoma zakonov.[41], je treba predlagani prenos novih nalog na nacionalno centralno banko (NCB) v Evropskem sistemu centralnih bank (ESCB) oceniti z vidika prepovedi denarnega financiranja iz člena 123 Pogodbe. Za potrebe te prepovedi člen 1(1)(b)(ii) Uredbe Sveta (ES) št. 3603/93.[42] opredeljuje „druge vrste kreditov" med drugim kot „vsa financiranja obveznosti javnega sektorja nasproti tretjim osebam".

4.1.3 Zagotavljanje, da države članice izvajajo trdno proračunsko politiko, je eden od ključnih ciljev prepovedi denarnega financiranja, ki se ne sme zaobiti.[43]. Zato se NCB ne sme zadolžiti za financiranje ukrepov, za katere so običajno odgovorne države članice ter ki se financirajo iz njihovih proračunskih virov in ne iz NCB. Da bi lahko presodili, kdaj gre za financiranje obveznosti javnega sektorja nasproti tretjim osebam, ki se lahko prevede kot zagotavljanje centralnobančnega financiranja zunaj okvira nalog centralne banke, je treba v posameznem primeru oceniti, ali je naloga, ki naj bi jo opravljala NCB, naloga centralne banke ali naloga države, tj. naloga v okviru

38 Glej na primer odstavek 3.4.1 Mnenja CON/2018/21 in odstavek 3.4.1 Mnenja CON/2019/27.

39 403. člen Zakona o bančništvu (Uradni list RS, št. 92/21 in 123/21 – ZBNIP).

40 Glej Zakon o potrošniških kreditih.

41 Glej na primer odstavek 4.1.2 Mnenja CON/2018/21 in odstavek 4.1.2 Mnenja CON/2019/27.

42 Uredba Sveta (ES) št. 3603/93 z dne 13. decembra 1993 o opredelitvi pojmov za uporabo prepovedi iz členov 104 in 104b(1) Pogodbe (UL L 332, 31.12.1993, str. 1).

43 Člen 123 Pogodbe prav tako prispeva k cilju ohranjanja stabilnosti cen in utrjuje neodvisnost centralnih bank.

odgovornosti držav članic. Z drugimi besedami, vzpostavljena morajo biti ustrezna varovala, s katerimi se zagotovi, da se ne zaobide ohranjanje trdne proračunske politike držav članic kot cilj prepovedi denarnega financiranja.

4.1.4 Svet ECB je v okviru proste presoje pri izvajanju naloge na podlagi člena 271(d) Pogodbe in člena 35.6 Statuta Evropskega sistema centralnih bank in Evropske centralne banke (v nadaljnjem besedilu: Statut ESCB), da zagotavlja, da NCB spoštujejo obveznosti iz Pogodbe, odobril tovrstna varovala v obliki naslednjih meril za ugotavljanje, kaj se lahko šteje, da sodi v okvir obveznosti javnega sektorja v smislu člena 1(1)(b)(ii) Uredbe (ES) št. 3603/93, ali, z drugimi besedami, kaj predstavlja nalogo države.

Prvič, naloge centralne banke so zlasti tiste naloge, ki so povezane z nalogami, ki so bile prenesene na ECB in NCB s Pogodbo in Statutom ESCB. Te naloge so opredeljene predvsem v členu 127(2), (5) in (6) in členu 128(1) Pogodbe ter členu 22 in členu 25.1 Statuta ESCB.

Drugič, ker člen 14.4 Statuta ESCB omogoča, da NCB opravljajo „druge funkcije", nove naloge, tj. naloge, ki niso povezane z nalogami, ki so bile prenesene na ECB in NCB, niso same po sebi izključene. Vendar pa je treba nove naloge, ki jih opravlja NCB in niso običajne naloge NCB ali se očitno izvajajo v imenu in izključnem interesu države ali drugih subjektov javnega sektorja, šteti za naloge države.

Tretjič, pomembno merilo za določitev, da nova naloga ni običajna naloga NCB ali se očitno izvaja v imenu in izključnem interesu države ali drugih subjektov javnega sektorja, je vpliv te naloge na institucionalno, finančno in osebno neodvisnost te NCB.

Upoštevati je treba zlasti naslednje vidike:

(a) ali zaradi opravljanja nove naloge nastaja nasprotje interesov v razmerju do obstoječih nalog centralne banke, ki ni ustrezno obravnavano, in ali nova naloga teh obstoječih nalog centralne banke nujno ne dopolnjuje. V primeru nasprotja interesov med obstoječimi in novimi nalogami je treba vzpostaviti zadostna varovala za omejitev tega nasprotja. Medsebojnega dopolnjevanja nove naloge in obstoječih nalog centralne banke se ne sme razlagati široko, da to ne privede do nastanka neskončne verige pomožnih nalog. Tako dopolnjevanje je treba proučiti v povezavi s financiranjem teh nalog;

(b) ali je opravljanje nove naloge brez novih finančnih virov nesorazmerno s finančnimi ali organizacijskimi zmožnostmi NCB in lahko negativno vpliva na zmožnost pravilnega opravljanja obstoječih nalog centralne banke;

(c) ali opravljanje nove naloge sodi v institucionalno ureditev NCB ob upoštevanju vidikov neodvisnosti centralne banke in odgovornosti;

(d) ali zaradi opravljanja nove naloge nastajajo znatna finančna tveganja;

(e) ali opravljanje nove naloge člane organov odločanja NCB izpostavlja političnim tveganjem, ki so nesorazmerna ter lahko tudi vplivajo na njihovo osebno neodvisnost in zlasti na jamstvo mandata, določeno v členu 14.2 Statuta ESCB.

4.1.5 Na podlagi zgoraj navedenih meril je v naslednjih odstavkih ocenjeno, ali je nova naloga Banke Slovenije skladna s prepovedjo denarnega financiranja.

4.2 *Naloge, povezane z nalogami, ki so prenesene na ECB in NCB s Pogodbo in Statutom ESCB*

4.2.1 Kakor je ECB že ugotavljala.[44], nadziranje skladnosti kreditnih institucij z zahtevami predloga zakona glede prestrukturiranja zasebno izpogajanih kreditnih pogodb s potrošniki ni med temeljnimi nalogami centralne banke, ki so navedene v členu 127(2) ali (5) Pogodbe ali drugače prenesene na NCB s Statutom ESCB. Prav tako ta naloga ne sodi v okvir nadzornih nalog Banke Slovenije. Zato je treba prenos te naloge na Banko Slovenije skrbno oceniti, da se ugotovi, ali ta naloga predstavlja nalogo države in ali njeno financiranje sproža vprašanja v zvezi z denarnim financiranjem.

4.3 *Naloge, ki niso običajne naloge NCB*

4.3.1 Kakor je ECB že ugotavljala.[45], se nova naloga, ki se prenaša na Banko Slovenije, nanaša na nadziranje skladnosti kreditnih institucij z zahtevami predloga zakona glede prestrukturiranja zasebno izpogajanih kreditnih pogodb z njihovimi strankami. Lahko se razume, da je nova naloga Banke Slovenije delno povezana z varstvom potrošnikov.

4.3.2 Kakor je ECB že ugotavljala.[46], je treba analizirati, ali ta nova naloga ni običajna naloga NCB. Kaže, da večini NCB tovrstne naloge niso bile dodeljene, je pa ECB ugotovila, da je v dveh državah članicah NCB dobila podobne naloge. Na Cipru.[47] in Madžarskem.[48] je NCB dobila naloge v zvezi z nadzorom skladnosti kreditnih institucij z zakonskimi zahtevami glede prestrukturiranja zasebnih kreditnih pogodb med kreditnimi institucijami in njihovimi strankami. V primeru Madžarske so te naloge vsebinsko podobne nalogam, ki se po predlogu zakona prenašajo na Banko Slovenije. Poleg tega so NCB na Hrvaškem.[49], v Češki republiki.[50], na Irskem.[51], v Italiji.[52] in na Slovaškem.[53] dobile podobne nadzorne naloge, ki se nanašajo splošneje na varstvo potrošnikov in preglednost kreditnih pogodb. Glede na to in ob upoštevanju sedanjih vlog številnih NCB v ESCB v zvezi z

---

44 Glej na primer odstavek 4.2.1 Mnenja CON/2018/21 in odstavek 4.2.1 Mnenja CON/2019/27.

45 Glej odstavek 4.3.1 Mnenja CON/2018/21 in odstavek 4.3.1 Mnenja CON/2019/27.

46 Glej odstavek 4.3.2 Mnenja CON/2018/21 in odstavek 4.3.2 Mnenja CON/2019/27.

47 Central Bank of Cyprus ima pooblastila za sankcioniranje v zvezi s skladnostjo kreditnih institucij z omejitvami glede spreminjanja obrestnih mer pri kreditih, ki so določene v ciprskem zakonu 160(I)/1999, ter nadzorne naloge, ki se nanašajo tudi na civilnopravne vidike na področju plačilnih storitev in hipotekarnih kreditov. V povezavi z opravljanjem teh nalog lahko Central Bank of Cyprus tudi zahteva in pregleda zasebno izpogajane pogodbe med kreditnimi institucijami in njihovimi strankami.

48 Magyar Nemzeti Bank ima nadzorno vlogo v povezavi s skladnostjo kreditnih institucij z zakonskimi zahtevami glede pretvorbe potrošniških kreditov v tujih valutah, vključno s krediti v švicarskih frankih, kakor je opredeljeno v veljavnih zakonih (npr. v zakonu XXXVIII iz leta 2014 in zakonu XL iz leta 2014, kakor sta bila spremenjena z zakonom LXXVIII iz leta 2014, zakonu XXVII iz leta 2014, zakonu LII iz leta 2015 (o spremembi zakona XL iz leta 2014) ter zakonu CXLV iz leta 2015). Opravljanje teh nadzornih nalog obsega preverjanje skladnosti kreditnih institucij, kar vključuje tudi pregled zasebno izpogajanih pogodb med kreditnimi institucijami in njihovimi strankami. Glej Mnenje CON/2014/72.

49 Hrvatska narodna banka pregleduje skladnost kreditnih institucij z zakonom o kreditnih institucijah, kar vključuje skladnost z notranjimi akti kreditnih institucij, ki urejajo razmerje z njihovimi strankami, sklenjenimi pogodbami in določbami predpisov o varstvu potrošnikov.

50 Centralni banki Česká národní banka so bile dodeljene naloge v zvezi z varstvom potrošnikov, vključno z nadziranjem skladnosti nadzorovanih subjektov s prepovedjo nepoštenih poslovnih praks ter nadziranjem spoštovanja pravil glede diskriminacije potrošnikov in obveznosti obveščanja o cenah.

51 Glej na primer odstavek 3.4.2 Mnenja CON/2017/12.

52 Centralni banki Banca d'Italia so bile dodeljene naloge v zvezi z nadziranjem preglednosti pogodbenih pogojev bančnih in finančnih pogodb, ki jih sklenejo kreditne institucije in dajalci kreditov, ki niso kreditne institucije.

53 Národná banka Slovenska ima pooblastila na področju varstva potrošnikov pri finančnih storitvah, ki vključujejo predhodno oceno nepoštenih poslovnih praks nadzorovanih subjektov in nesprejemljivih pogojev v pogodbah o opravljanju finančnih storitev. Ta nadzor ne obsega reševanja sporov med nadzorovanimi subjekti in njihovimi strankami.

varstvom potrošnikov na področju finančnih storitev.[54] se ne zdi, da bi bila nova naloga popolnoma neobičajna naloga NCB. Bi se pa štelo, da nova naloga ni običajna, če bi nadzorna vloga Banke Slovenije obsegala tudi reševanje sporov med pogodbenimi strankami, kar je običajno naloga sodišča.[55]. ECB razume, da predlog zakona tega ne predvideva.

4.4 *Naloge, ki se očitno izvajajo v imenu in izključnem interesu države*

4.4.1 Glede na obrazložitev predloga zakona je njegov namen uresničevanje ustavnega načela socialne države, sankcioniranje kršitev obveznosti v obligacijskih razmerjih ter zagotovitev pravnega varstva za številne potrošnike, ki so najeli kredite v švicarskih frankih.[56]. Predlog zakona je torej namenjen za zagotavljanje varstva potrošnikov pri finančnih storitvah.

4.4.2 Zaradi uporabe predloga zakona za nazaj ni jasno, ali bi predlog zakona dejansko zagotovil, da se izpolni cilj varstva potrošnikov pri finančnih storitvah. Tako ECB ne more izključiti tveganja, da bi Banka Slovenije pri izvajanju nadzornih funkcij delovala izključno v interesu drugega subjekta javnega prava.

4.5 *Ali zaradi opravljanja nove naloge nastaja nasprotje interesov v razmerju do obstoječih nalog centralne banke*

4.5.1 Kakor je ECB že ugotavljala.[57], se lahko šteje, da nova naloga Banke Slovenije vsaj delno dopolnjuje njene druge obstoječe podobne nadzorne naloge in naloge v zvezi z varstvom potrošnikov. Tako kot pri drugih nalogah v zvezi z varstvom potrošnikov je treba vzpostaviti zadostne ukrepe za omejitev nasprotja interesov, s katerimi se zagotovi, da v tem primeru prevladajo vidiki nadzora.

4.6 *Ali je opravljanje nove naloge nesorazmerno s finančnimi ali organizacijskimi zmožnostmi Banke Slovenije*

4.6.1 Kakor je ECB že izpostavila.[58], načelo finančne neodvisnosti zahteva, da države članice svojih NCB ne spravijo v položaj, v katerem imajo nezadostna sredstva za opravljanje nalog, povezanih z ESCB, in nacionalnih nalog, in sicer z operativnega in finančnega vidika. Poleg tega mora v primeru dodelitve posameznih novih nalog NCB vsaka zadevna NCB imeti na voljo zadostne finančne in človeške vire, tako da se zagotovi, da se lahko te naloge opravljajo brez vpliva na finančne ali operativne zmožnosti NCB za opravljanje nalog ESCB. Da se zagotovi, da se ne poslabša zmožnost Banke Slovenije za opravljanje nalog, povezanih z ESCB, mora imeti Banka Slovenije na razpolago vire, ki jih potrebuje za opravljanje nalog po predlogu zakona.

4.6.2 V tej zgodnji fazi je težko predvideti, koliko dodatnih virov bo Banka Slovenije potrebovala za opravljanje nove nadzorne naloge po predlogu zakona. Je pa verjetno, da bo morala Banka Slovenije izvajanju te nove nadzorne naloge nameniti dodatne človeške, tehnične in finančne vire. To bi lahko pomenilo dodatno breme za obstoječe naloge centralne banke in nadzorne naloge, ki jih opravlja Banka Slovenije. Poleg tega bi bila lahko Banka Slovenije pri nadzorniškem

54 Glej na primer odstavek 3.4.2 Mnenja CON/2017/12.

55 Glej odstavek 4.3.2 Mnenja CON/2018/21 in odstavek 4.3.2 Mnenja CON/2019/27.

56 Glej obrazložitev predloga zakona, str. 8, 9 in 11.

57 Glej na primer odstavek 4.5.1 Mnenja CON/2018/21 in odstavek 4.5.1 Mnenja CON/2019/27.

58 Glej na primer odstavek 4.6.1 Mnenja CON/2018/21 in odstavek 4.6.1 Mnenja CON/2019/27.

ocenjevanju primernosti pravnih stroškov zadevnih kreditnih institucij izpostavljena tveganju izgube ugleda.

4.6.3 Medtem ko morajo nadzorovani subjekti Banki Slovenije plačevati nadomestilo za opravljanje nadzornih nalog po Zakonu o potrošniških kreditih[59], predlog zakona ne predvideva povračila stroškov Banke Slovenije zaradi opravljanja nove naloge. ECB poziva organ, ki se posvetuje, naj upošteva vpliv predloga zakona na vire Banke Slovenije ter sprejme ustrezne ukrepe za zagotovitev, da ne bo nikakor prizadeto opravljanje centralnobančnih in nadzornih nalog Banke Slovenije.

4.7 *Ali opravljanje nove naloge sodi v institucionalno ureditev Banke Slovenije ob upoštevanju vidikov neodvisnosti centralne banke in odgovornosti*

4.7.1 Upoštevati je treba možen vpliv nove naloge na institucionalno, finančno in osebno neodvisnost Banke Slovenije.

4.8 *Ali zaradi opravljanja nalog nastajajo znatna finančna tveganja*

4.8.1 Predlog zakona ne vsebuje posebnih določb o odgovornosti v zvezi z izvajanjem pooblastil Banke Slovenije po predlogu zakona ali neizvajanjem teh pooblastil. Za morebitno odgovornost Banke Slovenije v zvezi z opravljanjem nove naloge bodo tako veljala pravila o odgovornosti za škodo, povzročeno v zvezi z izvajanjem javnih pooblastil, v skladu z Zakonom o bančništvu in splošna ureditev odgovornosti po slovenskem pravu. Kakor je ECB že ugotavljala[60], bi se splošna ureditev odgovornosti uporabljala tudi v zvezi z morebitno škodo zaradi odločitev Banke Slovenije v postopkih nadzora na podlagi predloga zakona, ki bi jih nato sodišče razveljavilo.

4.9 *Ali opravljanje nove naloge člane organov odločanja Banke Slovenije izpostavlja nesorazmernim političnim tveganjem in vpliva na njihovo osebno neodvisnost*

4.9.1 Kakor je ECB že ugotavljala[61], bi bilo zaradi občutljivosti tematike in velike pozornosti javnosti, ki je je v Sloveniji deležno prestrukturiranje kreditov v švicarskih frankih, treba upoštevati, ali bi zaradi opravljanja nove naloge lahko prišlo do nesorazmernega političnega tveganja ali vpliva na osebno neodvisnost članov organov odločanja Banke Slovenije.

4.9.2 V tej zvezi bi lahko proučili možnost, da bi to nalogo prenesli na ločeno državno agencijo, ki bi ji Banka Slovenije glede na strokovno znanje in izkušnje s slovenskim bančnim sektorjem lahko zagotavljala tehnično podporo.

4.10 *Sklep*

Nova naloga Banke Slovenije, ki se nanaša na nadziranje skladnosti kreditnih institucij z zahtevami predloga zakona glede prestrukturiranja zasebno izpogajanih kreditnih pogodb med kreditnimi institucijami in njihovimi strankami, se lahko šteje za nalogo centralne banke. Ker pa nova naloga, ki se s predlogom zakona prenaša na Banko Slovenije, ne sme negativno vplivati na njeno zmožnost za opravljanje nalog NCB ali nalog, povezanih z ESCB, je treba skrbno upoštevati vpliv te naloge na operativne zmožnosti Banke Slovenije. Poleg tega bi bilo treba skrbno upoštevati, ali

---

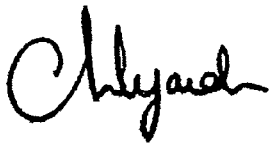
59 Glej 79. člen Zakona o potrošniških kreditih.

60 Glej odstavek 4.8.1 Mnenja CON/2018/21 in odstavek 4.8.1 Mnenja CON/2019/27.

61 Glej odstavek 4.9.1 Mnenja CON/2018/21 in odstavek 4.9.1 Mnenja CON/2019/27.

bi zaradi opravljanja nove naloge lahko prišlo do nesorazmernega političnega tveganja ali vpliva na osebno neodvisnost članov organov odločanja Banke Slovenije.[62].

V Frankfurtu na Majni, 26. novembra 2021



Predsednica ECB

Christine LAGARDE

62 Glej odstavek 4.10.1 Mnenja CON/2018/21 in odstavek 4.10.1 Mnenja CON/2019/27.

OPINION OF THE EUROPEAN CENTRAL BANK
of 26 November 2021
on the modification of Swiss franc loan agreements
(CON/2021/36)

Introduction and legal basis

On 15 April 2021 the European Central Bank (ECB) received a request from the National Assembly of the Republic of Slovenia for an opinion on a draft law on relations between lenders and borrowers concerning credit agreements in Swiss francs (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 and sixth indents of Article 2(1) of Council Decision 98/415/EC.[1], as the draft law relates to Banka Slovenije, rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets, and the ECB's tasks concerning the prudential supervision of credit institutions pursuant to Article 127(6) of the Treaty. 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 restructure consumer loans denominated in Swiss francs (hereinafter 'CHF') or containing a currency clause in CHF that were concluded between 28 June 2004 and 31 December 2010 (hereinafter 'Swiss franc loans').

1.2 According to the explanatory memorandum accompanying the draft law, the draft law aims to place borrowers of Swiss franc loans in a position to limit their exchange rate risk and to enable them to repay their loans under conditions that, according to the explanatory memorandum, they could reasonably expect when acting in good faith when concluding loan agreements.[2]. The draft law further aims to protect consumers, prevent unfair business practices by credit institutions and prevent a debt crisis.[3].

1.3 To achieve these aims, the draft law requires lenders to introduce an exchange-rate cap clause in relation to all agreements for Swiss franc loans concluded between 28 June 2004 and 31 December 2010. Such an exchange rate cap will be activated when the change in the exchange rate causes: (1) the actual credit balance to differ by more than 5% from the credit

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).

2 Explanatory memorandum no. 413-01-1/2021/4 of 14 April 2021 (hereinafter the 'explanatory memorandum'), p. 8.

3 Explanatory memorandum, p. 8.

balance calculated based on the exchange rate applicable at the date of drawdown; or (2) the actual instalment to differ by more than 5% from the instalment calculated based on the exchange rate applicable at the date of drawdown. When the exchange rate cap is activated, the instalments and other payments based on the loan agreement are calculated taking into account the currency exchange rate at which the exchange rate cap is activated.

1.4 The draft law requires lenders – defined as credit institutions that concluded Swiss franc loans with borrowers during the period 28 June 2004 to 31 December 2010 – to prepare the following documentation within 60 days after the draft law takes effect: (1) a draft agreement on the settlement of mutual claims in the form of an annex to a valid loan agreement or in the form of a separate agreement if the loan agreement has already been terminated or has expired; (2) a new repayment plan that reflects the exchange rate cap; and (3) a recalculation of the remaining debt taking account of the exchange rate cap. In the preparation of the new repayment plan and the recalculation of the remaining debt, the cumulative amount of instalments paid in excess of the amount of the instalments as calculated under the exchange rate cap must be used for the repayment of the remaining unpaid instalments. All the documentation must be prepared without any costs for the borrower and submitted to the borrower within 75 days. If the calculations based on the exchange rate cap show that all the obligations under a loan agreement have already been discharged in full, the lender must return any overpayment to the borrower within 30 days. In case of overpayment where any part of the obligations under a loan agreement were paid by a guarantor, the guarantor must be reimbursed before the borrower. If, however, the obligations under the loan agreement have not yet been discharged in full, the relationship continues under the amended conditions and pursuant to the new repayment plan.

1.5 The draft law also regulates a number of specific situations that may occur after the conclusion of agreements for Swiss franc loans. In particular, if the Swiss franc loan agreement has been terminated by the lender, the following applies: (1) the lender must prepare a new repayment plan and an agreement on the settlement of mutual claims for the period when the loan agreement was valid and effective; (2) if the amounts already paid are insufficient to discharge all the obligations under the loan agreement, the parties may agree that the outstanding debt is to be repaid under the terms of the credit agreement subject to the exchange rate cap; and (3) if the amounts already paid exceed the total amount payable, the excess amount must be repaid to the borrower.

1.6 If the receivables from Swiss franc loans have been assigned to a third party, the following applies: (1) the original lender must prepare a new repayment plan for the period until the assignment and an agreement on the settlement of mutual claims; (2) If the borrower still has any outstanding debt towards the transferee, the original creditor and the transferee may agree to reduce the amount of the borrower's outstanding debt for the amount of overpayments. The original lender is obliged to inform the borrower and provide him with evidence of debt reduction; (3) If the payments until the transfer exceed the total amount due under the loan agreement taking into account the currency cap, the lender must return overpayments to the borrower within 30 days of receipt of the signed agreement on settlement of mutual claims. In the same deadline,

the lender must also return to the borrower the countersigned agreement on settlement of mutual claims.

1.7 The draft law provides that the general legal protection available to any of the parties is not compromised by the provisions of the draft law. However, the draft law does not entitle the lender to avoid an amendment to loan agreements by proving that the borrowers were appropriately informed of the risks.

1.8 The draft law provides that Banka Slovenije is responsible for (1) overseeing the implementation of the law and (2) conducting misdemeanour procedures. If breaches are identified, Banka Slovenije can impose monetary penalties or even initiate the procedure for withdrawal of the banking licence. The draft law specifies that if a lender fails to eliminate in a timely manner the identified irregularities in more than 10 cases, Banka Slovenije must initiate the process for the withdrawal of the lender's banking licence.

2. Withdrawal of the banking licence

2.1 The Slovenian Law on banking specifies that the authorisation to provide banking services may be withdrawn, among other reasons, if a credit institution does not act in accordance with the order and does not eliminate the violations or does not implement the measures required by Banka Slovenije and if identified violations cannot be rectified by implementing other supervisory measures.[4]. Under the draft law, however, Banka Slovenije is obliged to initiate the process for the withdrawal of the lender's banking licence if a lender fails to eliminate in a timely manner the identified irregularities in more than 10 cases. Further, the draft law does not provide for a requirement that the identified irregularities cannot by rectified by implementing other supervisory measures. The explanatory memorandum does not identify reasons justifying the stricter approach taken under the draft law compared to the Law on banking. In those circumstances, the ECB invites the consulting authority to ensure that the measures provided for in the draft law are proportionate and suitable for their purpose[5].

2.2 Further, in view of the primacy of Union legislation, the ECB also notes that when Banka Slovenije considers that it is necessary to initiate the process for withdrawal of a banking licence, it must have full regard to Articles 4(1)(a) and 14(5) of Council Regulation (EU) No 1024/2013[6], which assign to the ECB the exclusive competence, for prudential supervisory purposes, to withdraw the authorisation of both significant and less significant credit institutions. Under Regulation (EU) No 468/2014 of the European Central Bank (ECB/2014/17)[7], if Banka Slovenije, as the relevant national competent authority in the Single Supervisory Mechanism, considers that a credit institution's authorisation should be withdrawn in whole or in part in accordance with relevant

4 Article 293 of the Law on banking (Official Gazette of the Republic of Slovenia no. 92/21 as amended).

5 See paragraph 3.1 of Opinion CON/2016/40.

6 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).

7 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

Union or national law, it must submit to the ECB a draft decision proposing the withdrawal of the authorisation. In that case, the ECB will take a decision on the proposed withdrawal of authorisation, taking into account the justification for withdrawal put forward by Banka Slovenije and the safeguards under Union law, including the principle of proportionality.[8]. Against this background, Banka Slovenije should be in a position to consider in its draft decision submitted to the ECB that the withdrawal of an authorisation is appropriate for attaining the legitimate objectives pursued by the legislation and does not exceed the limits of what is necessary in order to achieve those objectives, also considering any reasonable prospect for alternative measures to remediate the breaches committed.

3. Restructuring of Swiss franc loans

3.1 In 2018 and 2019 the ECB issued two opinions on earlier draft Slovenian laws concerning Swiss franc loans, which were, however, not enacted into law.[9].

3.2 Prior to the global financial crisis, borrowing in foreign currencies by households and non-financial corporations was popular in several Member States.[10]. As previously noted by the ECB.[11], the lower interest rates applicable to foreign currency loans compared to loans in the domestic currency increased the demand for such loans. According to the explanatory memorandum accompanying the draft law, most of the Swiss franc loans in Slovenia are long-term mortgage loans.

3.3 According to the draft law, the restructuring of Swiss franc loans whether still outstanding, already terminated or sold will be compulsory for credit institutions. The draft law does not provide for any possibility for credit institutions to avoid or challenge the restructuring, even if they can prove that the borrower took the Swiss franc loan on the basis of informed consent.

3.4 *Legal aspects concerning retroactivity*

3.4.1 As previously noted by the ECB.[12], introducing measures with retroactive effect undermines legal certainty and is not in line with the principle of legitimate expectations and may also interfere with acquired rights.

3.4.2 The existing provisions of the Slovenian Law on consumer credit.[13], which applies from 2 March 2017, enable consumers holding mortgage loans denominated in a foreign currency or containing a foreign currency clause to request conversion into EUR if the change in the exchange rate exceeds 10%. In such a case, the banks are obliged to convert such loans at the exchange rate applicable at the date the consumer makes the request. According to the explanatory

---

8 See Article 52(1) of the Charter of Fundamental Rights of the European Union, Article 5 of the Treaty on European Union, and judgment of the General Court of 6 October 2021, *Ukrselhosprom*, T-351/18 and T-584/18, ECLI:EU:T:2021:669, paragraphs 307 to 345.

9 See Opinion CON/2018/21 and Opinion CON/2019/27. All ECB opinions are published on EUR-Lex.

10 For further information on lending in foreign currencies in the Union see the Annex to Recommendation ESRB/2011/1 of the European Systemic Risk Board of 21 September 2011 on lending in foreign currencies (OJ C 342, 22.11.2011, p. 1).

11 See, for example, paragraph 2.1 of Opinion CON/2018/21 and paragraph 2.2. of Opinion CON/2019/27.

12 See, for example, paragraph 2.2 of Opinion CON/2018/21 and paragraph 2.3 of Opinion CON/2019/27.

13 Article 52 of the Law on consumer credit (Official Gazette of the Republic of Slovenia no. 77/16 as amended).

memorandum, the draft law provides for a similar mechanism.[14] which is to be applied retroactively. However, the draft law introduces a much lower threshold for restructuring, requiring a change in the exchange rate in excess of 5%.

3.4.3 Article 23(1) of Directive 2014/17/EU of the European Parliament and of the Council.[15], which applies to credit agreements that enter into existence from 21 March 2016.[16], specifies that Member States must ensure that an appropriate regulatory framework is in place for credit agreements in respect of foreign currency loans to ensure, at a minimum, that (a) the consumer has a right to convert the credit agreement into an alternative currency under specified conditions, or (b) there are other arrangements in place to limit the exchange rate risk to which the consumer is exposed under the credit agreement. Article 23(5) of Directive 2014/17/EU allows Member States to further regulate foreign currency loans provided that such regulation is not applied with retroactive effect. The retroactive effect of the draft law is contrary to the general aim of Article 23(5) of Directive 2014/17/EU.[17], reflecting one of the general principles of Union law, namely the principle of legal certainty.[18] which supports the limitation of retroactive laws.[19].

3.4.4 It is for the Slovenian authorities to assess whether the retroactive character of the draft law also complies with Slovenian legal and constitutional principles.[20].

3.5 *Eligibility criteria*

The draft law does not prescribe specific criteria for borrowers to be eligible to participate in the restructuring other than specifying that the Swiss franc loan should have been approved between 28 June 2004 and 31 December 2010. This raises some concerns with regard to the purpose of the draft law. In particular, as the ECB has previously noted.[21], the application of certain targeted eligibility criteria, such as, for example, linking the right to restructure to the borrower's actual income position or the loan-to-value (LTV) ratio, may be appropriate.

3.6 *Effects on the banking sector*

3.6.1 As previously noted by the ECB.[22], the implementation of the draft law is expected to entail financial costs for the Slovenian banking sector. Credit institutions may be affected to different degrees depending on the extent to which they concluded Swiss franc loans between 28 June 2004 and 31 December 2010. This, in turn, is expected to have a negative impact on the profitability, capitalisation and future lending capacity of the banking sector as a whole.[23].

---

14 Explanatory memorandum, p. 13.

15 Directive 2014/17/EU of the European Parliament and of 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).

16 See Article 43(1) of Directive 2014/17/EU.

17 See the paragraphs referred to in footnote 12.

18 See, for example, judgment of the Court of Justice of 10 March 2009, *Heinrich*, C-345/06, ECLI:EU:C:2009:140.

19 See, for example, judgment of the Court of Justice of 16 May 1979, *Tomadini*, 84/78, ECLI:EU:C:1979:129.

20 See paragraph 2.2.3 of Opinion CON/2018/21 and paragraph 2.3.3 of Opinion CON/2019/27

21 See, for example, paragraph 3.3 of Opinion CON/2015/32.

22 See paragraph 3.2.1 of Opinion CON/2019/27.

23 See paragraph 3.2.1 of Opinion CON/2018/21 and paragraph 3.2.1 of Opinion CON/2019/27.

3.6.2 The exact impact on the banking sector is unknown since the draft law does not include any impact assessment. Further, even if such assessment existed, it would be difficult to predict the possible future impact since this is dependent on the CHF exchange rate. In addition, the timing and scale of loan restructuring envisaged under the draft law could introduce longer-term uncertainty into credit institutions' business planning.

3.6.3 As previously noted by the ECB.[24], the restructuring will lead to a one-off increase in operational costs for affected credit institutions in Slovenia, in particular due to the restructuring of existing hedges, refinancing measures, and the costs associated with the obligation to recalculate Swiss franc loans and notify each borrower individually thereof.[25].

3.6.4 The ECB already emphasised.[26] its additional concern related to the placing of the main burden of the restructuring of Swiss franc loans on the originator credit institutions, envisaged under the draft law, even if the originators have already transferred the loans (e.g. as non-performing loans, 'NPLs') to third parties, as is the case with numerous Slovenian credit institutions. Such provisions in the draft law represent an important impediment to the effective resolution of NPLs as the originator credit institutions would not be able to effectively transfer NPLs off their balance sheet. The reasoning behind NPL transfers is, amongst other things, to remove uncertainty with regard to potential future losses associated with the transferred assets. In particular, it is unknown what the impact of such restructuring of loans already transferred would mean for the contractual agreements between the originator credit institutions and third-party purchasers (e.g. whether such retroactive adjustment would invalidate the contracts and/or the exposures would need to be repurchased by the originators). The draft law does not provide certainty with respect to its implementation in relation to assets already transferred.

3.6.5 As previously noted by the ECB.[27], the ECB has been a strong proponent of the development of secondary markets for credit institution assets, particularly NPLs, as reflected in the action plan agreed by the Council of the EU to tackle NPLs in Europe.[28]. As part of a comprehensive solution to NPL resolution, the development of secondary markets may contribute to reducing NPLs. Looking ahead, well-functioning secondary markets may also prevent stocks of NPLs building up in the future. Moreover, a well-functioning secondary market may have a positive effect on financial stability to the extent that it could facilitate the transfer of the risks of NPLs off credit institutions' balance sheets. 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 the operational flexibility and overall profitability that are essential to a well-functioning banking sector. It is essential that the legal framework applicable to secondary markets enables the efficient transfer of NPLs off the balance sheet of credit institutions, an aspect with regard to which the draft law may introduce uncertainty.[29].

---

24 See paragraph 3.2.2 of Opinion CON/2019/27.

25 See paragraph 3.2.2 of Opinion CON/2018/21 and paragraph 3 2.2 of Opinion CON/2019/27.

26 See paragraph 3.2.3 of Opinion CON/2019/27.

27 See paragraph 1.1. of Opinion CON/2018/54 and paragraph 3.2.4 of Opinion CON/2019/27.

28 See the Council's press release of 11 July 2017 on the 'Council conclusions on Action plan to tackle non-performing loans in Europe', available on the Council's website at: http://www.consilium.europa.eu.

29 See, for example, paragraph 2.2.4 of Opinion CON/2019/8 and paragraph 3.2.4 of Opinion CON/2019/27.

3.6.6 As a consequence of the draft law, Slovenian credit institutions might incur new losses with regard to NPLs already removed from their balance sheets. The ECB has already pointed out on previous occasions.[30] that the ability of financial institutions to effectively manage credit risk depends on a reliable, predictable and stable legal framework that adequately balances the interests of both the creditor and the debtor. In this respect, it is important to carefully consider the impact of the draft law in order to ensure legal certainty, and to prevent moral hazard arising in the relationship between creditor and debtor. If credit institutions are deprived of efficient tools to work out NPLs in an effective and timely manner, this could result in unnecessarily high levels of NPLs and private sector debt, which in turn have an adverse impact on financial stability and could undermine future credit supply.

3.6.7 Additionally, as the ECB has already noted.[31], the Slovenian credit institutions that transferred their NPL portfolios to third parties have also handed over all relevant documentation regarding the loans transferred to the new creditors, who were fully aware of the nature of the loans prior to that transaction. The draft law could therefore interfere with the commercial agreements between the credit institutions and the purchasers of loans and cause disproportionate operational costs for credit institutions. Further, the fact that such credit institutions no longer have access to the documentation on loans transferred could make it impossible to carry out the recalculations and prepare the documentation required by the draft law.

3.6.8 The ECB also notes that in the case of a transfer of receivables relating to Swiss franc loans, the draft law requires credit institutions to restructure Swiss franc loans for the period from the drawdown until the transfer. However, the draft law does not envisage a restructuring of the loans for the period following the transfer.

3.6.9 To conclude, the draft law must carefully balance the benefits of creating well-functioning secondary markets for NPLs against the impetus to protect debtors.[32]. In addition, the draft law would benefit from a thorough impact assessment, including on both significant and less significant credit institutions.

3.7 *Effects on financial stability*

3.7.1 The ECB has pointed out on several occasions the risks associated with foreign currency loans.[33]. In particular, foreign currency loans have constituted a major risk to financial stability in several Member States.[34], where the share of foreign currency loans is relatively high. The ECB points, in this respect, to the analysis of such risks made by the European Systemic Risk Board in Recommendation ESRB/2011/1.

---

30 See, for example, paragraph 2.2.4 of Opinion CON/2019/8 and paragraph 3.2.4 of Opinion CON/2019/27.

31 See paragraph 3.2.6 of the Opinion CON/2019/27.

32 See paragraph 2.2.3 of Opinion CON/2018/31 and paragraph 3.2.7 of Opinion CON/2019/27.

33 See, in particular, the ECB Financial Stability Review of June 2010 and, with respect to foreign currency loans in Hungary, Opinions CON/2011/87, CON/2012/27, CON/2014/59, CON/2014/72 and CON/2014/76; with respect to foreign currency loans in Poland, Opinions CON/2015/26, CON/2017/48, and CON/2017/9; with respect to foreign currency loans in Slovenia, Opinions CON/2019/27 and CON/2018/21; and with respect to foreign currency loans in Croatia, Opinion CON/2015/32.

34 However, this does not seem to be the case in Slovenia.

3.7.2 Data provided by Banka Slovenije show that the stock of Swiss franc loans to households reached a maximum share in October 2008, when they accounted for 34.7% of housing loans and 8.5% of consumer loans. Nevertheless, the overall household portfolios seems to have been of a better quality compared to the rest of the banks' portfolios, as reflected in a relatively low proportion of NPLs. Since then, the share of total loans denominated in Swiss francs has decreased significantly.[35]. At present, loans denominated in Swiss francs do not give rise to any systemic risks or pose threats to financial stability. As previously mentioned, however, the implementation of the draft law is expected to entail financial costs for the Slovenian banking sector and may, therefore, have a negative impact on the profitability and capitalisation of Slovenian credit institutions. In particular, the provision that the lender must return any overpayment to the borrower within 30 days if the total amount due under a loan agreement as amended in accordance with the exchange rate cap has been paid in full may imply substantial pressure on the income of credit institutions.

3.7.3 As the ECB has already highlighted in terms of the long-term effects on financial stability.[36], when introducing measures in relation to the restructuring of foreign currency loans, due consideration should always be given to fair burden sharing among all stakeholders in order to avoid moral hazard in the future.[37]. The draft law specifies that, regardless of the magnitude of the exchange rate fluctuation, the borrower always covers the first 5% of the fluctuation. Therefore, the draft law limits the risk exposure for the borrower, but not for the credit institutions, which are otherwise required to cover the risk of exchange rate fluctuations without any limitations.

3.8 *Effects on the Slovenian economy*

As the ECB has previously noted.[38], the restructuring of Swiss franc loans with retroactive effect, as envisaged by the draft law, could have negative effects if it were to lead to a deterioration in both foreign and domestic investor sentiment, and trust in the system, due to a perceived increase in legal uncertainty and country risk.

4. Conferral of new tasks on Banka Slovenije

4.1 *New task of Banka Slovenije*

4.1.1 The draft law confers the task of supervising the restructuring procedures performed by credit institutions on Banka Slovenije. Further, it designates Banka Slovenije as the competent misdemeanour authority in the event of breaches of the draft law. The draft law does not specify in detail the scope of this new task. The ECB understands that Banka Slovenije would be essentially required to supervise the compliance of credit institutions with the requirements of the draft law in relation to the restructuring of their private contractual relationships with individual customers regarding Swiss franc loans. Banka Slovenije has been designated as the competent

35 Currently, the share of total loans denominated in Swiss francs is 1.2% of total loans to households and non-financial corporations.

36 See, for example, paragraph 3.3.2 of Opinion CON/2019/27.

37 See, for example, paragraph 3.3.2 of Opinion CON/2018/21 and paragraph 3.3.2 of Opinion CON/2019/27.

38 See, for example, paragraph 3.4.1 of Opinion CON/2018/21 and paragraph 3.4.1 of Opinion CON/2019/27.

misdemeanour authority in relation to breaches of the draft law, within the scope of the performance of its prudential supervisory tasks over credit institutions.[39], and also has, to a certain extent, an existing consumer protection role.[40]. However, Banka Slovenije has no comparable responsibilities with respect to supervision of the compliance by credit institutions with the legal requirements relating to the restructuring of privately negotiated loan contracts with their customers. The draft law therefore confers a new task upon Banka Slovenije.

4.1.2 As the ECB already underlined in relation to the previous draft laws.[41], a proposed conferral of new tasks on a national central bank (NCB) in the European System of Central Banks 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 3603/93.[42] defines 'other type of credit facility', inter alia, as 'any financing of the public sector's obligations vis-à-vis third parties'.

4.1.3 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.[43]. 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. To decide what constitutes financing of the public sector's obligations vis-à-vis third parties, which can be translated as the provision of central bank financing outside the scope of 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.

4.1.4 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 an obligation of the public sector 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.

---

39 Article 403 of the Law on banking (Official Gazette of the Republic of Slovenia no. 92/21 in 123/21 – ZBNIP).

40 See the Law on consumer credit.

41 See, for example, paragraph 4.1.2 of Opinion CON/2018/21 and paragraph 4.1.2 of Opinion CON/2019/27.

42 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).

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

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, financial and personal independence of that NCB.

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 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.

4.1.5 On the basis of the criteria set out above, the following paragraphs assess whether the new task of Banka Slovenije is in line with the prohibition on monetary financing.

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

4.2.1 As previously noted by the ECB[44], supervising the compliance of credit institutions with the requirements of the draft law in relation to the restructuring of privately negotiated loan contracts with their consumers is not among the basic central banking tasks listed in Article 127(2) or (5) of the Treaty or otherwise conferred upon the NCBs by the Statute of the ESCB. Nor does the task falls within the scope of the supervisory tasks of Banka Slovenije. Thus, a careful assessment of the conferral of this task on Banka Slovenije is required in order to determine

44 See, for example, paragraph 4.2.1 of Opinion CON/2018/21 and paragraph 4.2.1 of Opinion CON/2019/27.

whether it constitutes a government task, and whether the related funding gives rise to monetary financing concerns.

4.3 *Tasks which are atypical of NCB tasks*

4.3.1 As previously noted by the ECB[45], the new task conferred on Banka Slovenije by the draft law relates to supervision of the compliance by credit institutions with the requirements under the draft law relating to the restructuring of privately negotiated loan agreements with their customers. Banka Slovenije's new task can be seen, to a certain extent, as being related to the protection of consumers.

4.3.2 As previously noted by the ECB[46], it is necessary to analyse whether this new task is atypical of NCB tasks. While the majority of NCBs do not appear to have been assigned tasks of this nature, the ECB has identified two Member States where NCBs have been given similar tasks. In Cyprus[47] and Hungary[48], the NCBs have been given tasks relating to the supervision of the compliance by credit institutions with the legal requirements in relation to the restructuring of private, contractual loan agreements between credit institutions and their customers. In the case of Hungary, these tasks are substantially similar to the tasks conferred on Banka Slovenije under the draft law. In addition, the NCBs in Croatia[49], the Czech Republic[50], Ireland[51], Italy[52] and Slovakia[53] have been given similar supervisory tasks relating more generally to consumer protection and the transparency of loan arrangements. In this regard, also taking into account the consumer protection roles which are currently fulfilled by numerous ESCB NCBs in the field of financial services[54], the new task does not appear to be completely atypical of NCB tasks. However, the new task would be considered as atypical if Banka Slovenije's supervisory role

---

45 See paragraph 4.3.1 of Opinion CON/2018/21 and paragraph 4.3.1 of Opinion CON/2019/27.

46 See paragraph 4.3.2 of Opinion CON/2018/21 and paragraph 4.3.2 of Opinion CON/2019/27.

47 The Central Bank of Cyprus was entrusted with sanctioning powers in relation to the compliance of credit institutions with restrictions regarding the variation of the interest rates on credit facilities imposed by Cypriot Law 160(I)/1999 and supervisory tasks relating also to civil law aspects in the area of payment services and mortgage credit. In connection with the performance of these tasks, the Central Bank of Cyprus may also request and review privately negotiated contracts between credit institutions and their customers.

48 Magyar Nemzeti Bank has a supervisory role in connection with the compliance by credit institutions with legal requirements relating to the conversion of foreign currency denominated consumer loans, including loans denominated in Swiss francs, as defined in applicable laws (e.g. Law XXXVIII of 2014 and Law XL of 2014, both as amended by Law LXXVIII of 2014, Law XXVII of 2014, Law LII of 2015 (amending Law XL of 2014) and Law CXLV of 2015). The performance of these supervisory tasks involves the verification of compliance by credit institutions, which includes also the review of privately negotiated contracts between credit institutions and their customers. See Opinion CON/2014/72.

49 Hrvatska narodna banka carries out oversight over credit institutions' compliance with the Law on credit institutions, which includes compliance with internal bylaws of credit institutions governing the relationship with their clients, contracts concluded and consumer protection provisions.

50 Česká národní banka has been assigned tasks related to consumer protection, including supervision of compliance by supervised entities of the observance of the prohibition of unfair business practices and supervision of rules regarding consumer discrimination or the obligation to inform about prices.

51 See, for example, paragraph 3.4.2 of Opinion CON/2017/12.

52 The Banca d'Italia has been assigned with tasks in relation to the supervision, from a transparency perspective, of the terms of banking and financial agreements between credit institutions and non-credit institution lenders.

53 Národná banka Slovenska has powers in the area of the protection of financial consumers, which include a preliminary assessment of unfair commercial practices of supervised entities and unacceptable conditions in contracts for the provision of financial services. The scope of this supervision does not include the adjudication of disputes between the supervised entities and their customers.

54 See, for example, paragraph 3.4.2 of Opinion CON/2017/12.

were to extend to the resolution of disputes between contractual parties, which is a matter that is usually handled by the courts.[55]. The ECB understands that this is not the case with the draft law.

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

4.4.1 According to the explanatory memorandum, the objective of the draft law is to implement the constitutional principle of the 'welfare state' and to introduce sanctions for breaches of obligations arising under contractual relationships, thereby providing legal protection to a number of consumers who have taken out Swiss franc loans.[56]. The draft law is therefore intended to provide protection to consumers of financial services.

4.4.2 Due to the retroactive application of the draft law, it is not clear whether the draft law would effectively guarantee the fulfilment of the objective of protecting consumers of financial services. Thus, the ECB cannot exclude the risk that, in carrying out its supervisory functions, Banka Slovenije would act exclusively in the interest of another public entity.

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

4.5.1 As previously noted by the ECB.[57], it may be considered that the new task at least partially complements other similar existing supervisory and consumer protection tasks of Banka Slovenije. As with other consumer protection tasks, sufficient mitigation measures must be put in place to ensure that in the event of a conflict of interest supervisory considerations prevail.

4.6 *Extent to which performance of the new task is disproportionate to the financial or organisational capacity of Banka Slovenije*

4.6.1 As previously noted by the ECB.[58], the principle of financial independence requires that Member States do not put their NCBs in a position where they have insufficient resources to carry out both their ESCB-related tasks and their national tasks, from an operational and financial perspective. Furthermore, when allocating specific new tasks to NCBs, each NCB concerned should have sufficient financial and human resources at its disposal to ensure that the tasks can be carried out without impacting on the NCB's financial or operational capacity to perform its ESCB tasks. In order to ensure that Banka Slovenije's capacity to perform its ESCB-related tasks is not impaired, Banka Slovenije must, therefore, be in a position to avail itself of the necessary resources to carry out its duties under the draft law.

4.6.2 At this early stage, it is difficult to predict what additional resources Banka Slovenije will require in order to perform its new supervisory task under the draft law. However, it is likely that Banka Slovenije will have to dedicate additional human, technical and financial resources to implement this new supervisory task. This may impose an additional burden on existing central banking and supervisory tasks performed by Banka Slovenije. Additionally, Banka Slovenije could be exposed to reputational risk in carrying out its supervisory assessment of the appropriateness of the legal costs of the credit institutions concerned.

---

55 See paragraph 4.3.2 of Opinion CON/2018/21 and paragraph 4.3.2 of Opinion CON/2019/27.

56 See the explanatory memorandum, pp. 8, 9 and 11.

57 See, for example, paragraph 4.5.1 of Opinion CON/2018/21 and paragraph 4.5.1 of Opinion CON/2019/27.

58 See, for example, paragraph 4.6.1 of Opinion CON/2018/21 and paragraph 4.6.1 of Opinion CON/2019/27.

4.6.3 While supervised entities are required to pay fees to Banka Slovenije in relation to the performance of its supervisory tasks under the Law on consumer credit[59], the draft law does not provide for Banka Slovenije to be reimbursed for the costs of carrying out this new task. The ECB invites the consulting authority to consider the impact of the draft law on the resources of Banka Slovenije and undertake appropriate measures to ensure that the central banking and supervisory tasks performed by Banka Slovenije will in no way be affected.

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

4.7.1 The potential impact of the new task on the institutional, financial and personal independence of Banka Slovenije must be taken into consideration.

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

4.8.1 The draft law does not contain any specific provisions on liability in relation to the exercise of Banka Slovenije's powers under the draft law or the failure to exercise such powers. Banka Slovenije's potential liability in respect of the performance of the new task will thus be subject to the rules on liability for damage caused in the exercise of public authority pursuant to the Law on banking and the general liability regime under Slovenian law. As previously noted by the ECB.[60], the general liability regime would also apply with respect to any potential damage resulting from decisions of Banka Slovenije delivered in supervisory proceedings pursuant to the draft law which are later declared to be invalid in the courts.

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

4.9.1 As previously noted by the ECB.[61], due to the sensitivity of the subject matter and the high degree of public attention being given to the restructuring of Swiss franc loans in Slovenia, due consideration should be given to any disproportionate political risk or impact on the personal independence of the members of the decision-making bodies of Banka Slovenije that may arise in the performance of the new task.

4.9.2 In this respect, consideration might be given to the possibility of conferring this task on a separate government agency to which Banka Slovenije could provide technical support in view of its expertise and experience in dealing with the Slovenian banking sector.

4.10 *Conclusion*

The new task of Banka Slovenije of supervising the compliance of credit institutions with the requirements under the draft law in relation to the restructuring of privately negotiated loan agreements between credit institutions and their customers can be regarded as a central bank task. However, as the new task conferred upon Banka Slovenije by the draft law must not adversely affect its capacity to carry out its NCB or ESCB-related tasks, careful consideration should be given to its impact on Banka Slovenije's operational capacity. In addition, careful

59 See Article 79 of the Law on consumer credit.

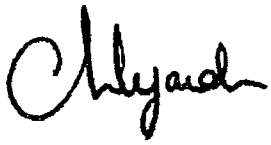
60 See paragraph 4.8.1 of Opinion CON/2018/21 and 4.8.1 of Opinion CON/2019/27.

61 See paragraph 4.9.1 of Opinion CON/2018/21 and 4.9.1 of Opinion CON/2019/27.

consideration should be given to any disproportionate political risk or impact on the personal independence of the members of the decision-making bodies of Banka Slovenije that may arise in the performance of the new task.[62].

This opinion will be published on EUR-Lex.

Done at Frankfurt am Main, 26 November 2021.



The President of the ECB

Christine LAGARDE

62 See paragraph 4.10.1 of Opinion CON/2018/21 and paragraph 4.10.1 of Opinion CON/2019/27.