Od: "Secretariat" <Secretariat@ecb.int>
Za: "gp@dz-rs.si" <gp@dz-rs.si>,
Datum: 18.07.2019 12:09
Zadeva: SI ECB Opinion on the conversion of Swiss franc loans (CON/2019/27)

Dear all,

Please find attached as requested and for the attention of Mag. Dejan Židan the final Opinion of the European Central Bank on the conversion of Swiss franc loans.

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

With kind regards,
ECB Secretariat
EUROPEAN CENTRAL BANK
email: ecb.secretariat@ecb.europa.eu

-----Original Message-----
From: Secretariat
Sent: 24 May 2019 09:46
To: gp@dz-rs.si
Subject: Acknowledgement of receipt - Request for an ECB Opinion on the conversion of Swiss franc loans - ECB-RESTRICTED

Dear all,

The ECB hereby acknowledges the receipt on 16 May 2019 of the letter also dated 16 May 2019 from Mag. Dejan Židan to Mr. Mario Draghi, President of the European Central Bank, requesting the ECB's opinion on the conversion of Swiss franc loans (the 'draft legislative provisions). Subject to further formal consideration of the matter by the ECB Governing Council, the ECB confirms the preliminary assessment of its staff that the draft legislative provisions fall within the ECB's fields of competence pursuant to the EU Treaties, and that at this point it is intended to prepare a formal ECB Opinion on the draft legislative provisions.

Please note that the timeline for the preparation of the ECB opinion starts on the date of receipt by the President of the ECB of the consultation request including the draft legislative provisions, pursuant to Council Decision

98/415/EC.
We should be grateful if you would communicate to us any further changes made to the draft legislative provisions during the consultation period.

With kind regards,
ECB Secretariat
EUROPEAN CENTRAL BANK
email: ecb.secretariat@ecb.europa.eu

-----Original Message-----
From: gp@dz-rs.si [mailto:gp@dz-rs.si]
Sent: 16 May 2019 16:11
To: Office President
Subject: Dopis Evropski centralni banki za mnenje o Predlogu zakona o razmerjih med dajalci kreditov in kreditojemalci glede kreditov v švicarskih frankih, 450-05/19-0003/0005, 0594-VIII

Spoštovani! V prilogi Vam pošiljamo dokument.

(See attached file: dopis.PDF)(See attached file: 7ds-18_Sklep_zak__inic__Svicarski_f_.PDF)

 - CON_2019_27 SI EN Opinion on the conversion of Swiss franc loans_.pdf  - CON_2019_27 SI SL Opinion on the conversion of Swiss franc loans_.pdf

EUROPEAN CENTRAL BANK

EUROSYSTEM

EN

ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 18 July 2019

on the conversion of Swiss franc loans

(CON/2019/27)

Introduction and legal basis

On 15 May 2019 the European Central Bank (ECB) received a request from the National Assembly of the Republic of Slovenia (hereinafter the 'National Assembly') 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 and 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 restructure consumer loans denominated in, or linked to, Swiss francs (hereinafter 'Swiss franc loans'), by requiring credit institutions established in Slovenia to convert Swiss franc loans concluded between 28 June 2004 and 31 December 2010 into loans denominated in euro.

1.2 The draft law aims to place borrowers of Swiss franc loans in the same position that they would have been in had their loans been denominated in euro from inception. To this end, the draft law sets out the following conversion mechanisms:

(i) the principal amount of the Swiss franc loans will be converted into euro at the exchange rate set out in the credit agreement applicable on the date the Swiss franc loans were drawn by the borrowers. In case the principal amount was paid out in euro at the time of drawdown then, for the purposes of the conversion, the actual amount as paid out in euro is to be taken into account;

(ii) the agreed interest rate will be converted into another interest rate, comprising the interbank interest rate in the euro area at the date on which the loan was drawn and the same margin agreed in the loan agreement. The agreed period for recalculations of the interest rate remains unaltered. According to the explanatory memorandum on the draft law, using the interbank interest rate in the euro area in the conversion mechanism

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).

protects the legitimate business interests of credit institutions by enabling the usual interest rates for euro denominated loans to be taken into account;

(iii) the lender is required to prepare a new loan repayment schedule calculated in accordance with the measures set out above and using the same methodology as for the original repayment schedule;

(iv) the instalments that have already been paid by the borrower in line with the original repayment schedule will be converted into euro at the exchange rate applicable on the date of payment of each instalment. In case the instalments were repaid in euro then, for the purposes of the conversion, the actual amount of the instalments as repaid in euro is to be considered. Paid instalments will serve as the basis for settling the amounts due under the new loan repayment schedule, whereby the same order for settling obligations as under the original loan agreement is to be used;

(v) the creditor shall prepare a new amortisation plan for existing credits which have been repaid ahead of schedule, taking any overpayments into account;

(vi) if the total amount of instalments already paid by the borrower and converted in euro (as described in point (iv) above) is higher than the total amount of converted instalments calculated according to the new loan repayment schedule (referred to in point (iii) above), this amount will be considered an 'overpayment'. Depending on the amount of this overpayment, it will be treated as follows:

a. if the amount of the overpayment does not exceed the sum of converted instalments that are still to be paid in line with the new repayment schedule, the overpayment will be proportionally distributed for the settlement of future outstanding instalments, and the loan agreement will remain in force;

b. if the amount of the overpayment exceeds the total sum of a converted Swiss franc loan that the borrower has to repay in line with the new repayment schedule, then the lender must return this overpayment to the borrower within 30 days from the date the borrower confirms the conversion proposal and the loan agreement will be terminated.

1.3 The conversion of Swiss franc loans applies to loans concluded between 28 June 2004 and 31 December 2010, irrespective of the current credit balance. The draft law requires lenders to prepare new repayment schedules and sets out supplementary conversion rules. With respect to loans that were acquired by new creditors, the draft law provides that the original lenders are required to pay the new creditors the difference calculated by comparing the original amount to the amount a borrower would owe the new creditor had the amount transferred been calculated according to the new amortisation plan.

1.4 The lender must prepare a new repayment schedule and recalculate the existing Swiss franc loans and submit these to the borrower along with the conversion proposal within 30 days of the entry into force of the draft law. The borrower must confirm or reject the conversion proposal within 30 days of its receipt.

1.5 The conversion procedures under the draft law are to be supervised by Banka Slovenije, which is also to act as the competent minor offence authority in case of breaches of the provisions of the draft law.

1.6 The draft law provides that the lender, although required to propose and perform the conversion of Swiss franc loans for the borrower, also has the right to challenge the conversion before a court within six months following the conversion. The creditor may challenge the conversion if the credit agreement or the documentation shows that certain criteria had been complied with at the time the relevant credit agreements were concluded. A creditor may challenge the conversion if, prior to concluding the credit agreement, the borrower signed all of the following documents: (i) a document stating a contractual condition governing the repayment of the obligation in a foreign currency, drawn up in clear and understandable language; (ii) a document stating he or she was informed of all elements that could affect the scope of his or her obligation; (iii) a document stating that he or she was given a warning on the possibility of exchange rate changes and of risks arising from a Swiss franc denominated transaction; (iv) a document stating that he or she was shown calculations on the economic effects of possible exchange rate fluctuations on his or her total obligation to repay under the agreement; (v) a document containing an example of an actual foreign currency credit in the past period showing risks associated with foreign currency credit; and (vi) a document showing that the creditor offered the borrower insurance for currency risks or used an upper limit risk, thereby preventing significant imbalance in the rights and obligations of the parties. Even if a creditor complies with the above criteria, the court shall also assess (i) the existence of a significant imbalance between the parties when a conversion is contested, and (ii) if the creditor should have known the agreement creates a significant imbalance between the parties as a result of which the condition is unfair and thus unlawful. The explanatory memorandum to the draft law sets out criteria for informed consent in relation to point (ii), which are based on, inter alia, the reasoning in a judgement of the Court of Justice of the European Union[2] concerning the interpretation of Council Directive 93/13/EEC[3].

1.7 Additionally, the draft law addresses the issue of conversion of transferred credits. Creditors who have transferred their loans to third parties are required to pay the transferee the difference calculated by comparing the amount of the transferred credit to the amount a borrower would owe the transferee of the receivable had the amount transferred been calculated according to the new amortisation plan on the day the receivable was transferred. If the borrower's debt to the transferee of the receivable is lower than that calculated difference, the creditor shall pay the borrower the difference.

1.8 According to the explanatory memorandum, the objective pursued by 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 for consumers who have taken out Swiss franc loans. The explanatory memorandum questions the legality of linking credit agreements to Swiss franc, in particular in a euro area country with a stable currency, where loans were granted mainly in euro. The explanatory memorandum argues that the use of

2 Judgement of the Court of Justice of 20 September 2017, *Andriciuc and Others*, C-186/16, ECLI:EU:C:2017:703.

3 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

currency clauses, the risk of which is predominantly borne by borrowers, is an unfair practice used by credit institutions, in particular combined with the lack of informed consent by the borrowers of Swiss franc loans.

2. General observations

2.1 The ECB issued an opinion on a similar Slovenian draft law [which was never enacted into law] in 2018[4].

2.2 Prior to the global financial crisis, borrowing in foreign currencies by households and non-financial corporations was popular in several Member States[5]. As previously noted by the ECB[6], 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 documentation included in the explanatory memorandum and the draft law, the majority of Swiss franc loans were and still are mortgage loans and were granted by foreign-owned credit institutions.

2.2.1 The ECB notes that the draft law anticipates that the conversion of the outstanding and already terminated Swiss franc loans to loans denominated in euro will be voluntary only for the borrowers. The ECB also notes that the draft law provides for the possibility for credit institutions to challenge the conversion after it has been implemented, restoring the parties to the position they were in under the terms of the original Swiss franc loan, if they can prove in court that the borrower entered into the Swiss franc loan on the basis of informed consent, as defined in the draft law.

2.3 *Legal aspects on retroactivity*

2.3.1 As previously noted by the ECB, introducing measures with retroactive effect undermines legal certainty and is not in line with the principle of legitimate expectations[7], and may also interfere with acquired rights.

2.3.2 Article 23(1) of Directive 2014/17/EU of the European Parliament and of the Council[8], which applies to credit agreements in existence from 21 March 2016[9], stipulates that Member States shall 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 not in line with the general aim of Article 23(5) of Directive

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4 See Opinion CON/2018/21. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

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

6 See, for example, paragraph 2.1 of Opinion CON/2018/21.

7 See, for example, paragraph 2.2 of Opinion CON/2018/21.

8 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).

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

2014/17/EU[10], which reflects one of the general principles of Union law, namely the principle of legal certainty[11] that supports the limitation of retroactive laws[12].

2.3.3 It is for the Slovenian authorities to assess whether the retroactive character of the draft law also complies with Slovenian legal and constitutional principles[13].

3. Specific observations

3.1 *Eligibility criteria*

3.1.1 The draft law does not prescribe any specific criteria for borrowers to be eligible to participate in the conversion. For example, the draft law does not impose an upper limit to the amount of the credit extended which would limit the risk of moral hazard[14].

3.2 *Effects on the banking sector*

3.2.1 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 to the extent that they have 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[15]. It is worth mentioning that determining the extent of such impact is difficult since the draft law has not benefited from an impact assessment conducted by the competent national authorities.

3.2.2 It should also be noted that the conversion will lead to a one-off increase in operational costs for the 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 the Swiss franc loans in order to notify each borrower individually thereof[16].

3.2.3 An additional concern is that the draft law puts the entire burden of conversion of Swiss franc denominated loans into euro denominated loans on the originator credit institutions even if, in the interim, originators had already transferred the loans (as non-performing loans, 'NPLs') to third parties, as is the case of numerous Slovenian credit institutions. Such provisions in the draft law represent an important impediment to the effective and resolution of NPLs as the originator credit institutions would not have been able to effectively transfer NPLs off their balance sheet. The reasoning behind NPL transfers is *inter alia* to remove uncertainty with regard to potential future losses associated with the transferred assets.

3.2.4 The ECB has been a strong proponent of the development of secondary markets for credit institution assets, particularly NPLs, as reflected in the EU Council's action plan to tackle NPLs in

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10 See the paragraphs of the Opinions referred to in footnote 7.

11 See, for example, judgement of the Court of Justice of the European Union of 10 March 2009, *Heinrich*, C-345/06, ECLI:EU:C:2009:140.

12 See, for example, judgement of the Court of Justice of the European Union of 16 May 1979, *Tomadini*, C-84/78, ECLI:EU:C:1979:129.

13 See paragraph 2.2.3 of Opinion CON/2018/21.

14 See paragraph 3.1.1 of Opinion CON/2018/21.

15 See paragraph 3.2.1 of Opinion CON/2018/21.

16 See paragraph 3.2.2 of Opinion CON/2018/21.

Europe[17], as the ECB has previously noted[18]. 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[19].

3.2.5 As a consequence of the draft law, Slovenian credit institutions will incur new losses with regard to NPLs already removed from their balance sheets. As the ECB has pointed out on previous occasions[20], 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 from 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.

3.2.6 Additionally, the Slovenian credit institutions that transferred their NPL portfolio to third parties, have also handed over all relevant documentation regarding the transferred loans 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.

3.2.7 To conclude, the draft law must carefully balance the benefits of creating well-functioning secondary markets for NPLs against the impetus to protect debtors[21]. In addition, the draft law would benefit from a thorough impact assessment.

3.3 *Effects on the financial stability*

3.3.1 The ECB has pointed out on several occasions the risks associated with foreign currency loans[22]. In particular, foreign currency loans have constituted a major risk to financial stability in several

17 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.

18 See paragraph 1.1. of Opinion CON/2018/54.

19 See paragraph 2.2.1 and 2.2.2 of Opinion CON/2018/31.

20 See, for example, paragraph 2.2.4 of the Opinion CON/2019/8.

21 See paragraph 2.2.3 of the Opinion CON/2018/31.

22 See in particular the ECB Financial Stability Review of June 2010 and, in respect of the foreign currency loans in Hungary, Opinions CON/2011/87, CON/2012/27, CON/2014/59, CON/2014/72 and CON/2014/76, and in respect of the foreign currency loans in Poland, Opinion CON/2015/26.

Member States, 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 ESRB in Recommendation ESRB/2011/1[23].

3.3.2 As regards the long-term effects on financial stability, when introducing measures in relation to settling and converting 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[24]. The explanatory memorandum argues that the interests of credit institutions are taken into account in the draft law, for example, in the conversion process higher interest rates are to be used for the preparation of the new repayment schedules, reflecting common practices in euro denominated loans. However, the draft law provides for the replacement of the previously agreed interest rate with the interbank interest rate in the euro area for recalculation purposes, whereas the original loan-based margin remains the same, which appears to potentially deviate from the common practices of credit institutions which typically apply a higher loan-based margin for euro denominated loans than for Swiss franc denominated loans.

3.3.3 As the ECB has noted previously[25], given that Slovenia only joined the euro area in 2007, the conversion of any loans from Swiss franc into euro between 2004 and 2007 could result in an unequal treatment of other customers, depending on exchange rate developments between the Slovenian tolar and Swiss franc during this period. A reconciliation method may therefore be needed to reflect exchange rate developments between the tolar, Swiss franc and euro during this period.

3.4 *Effects on the Slovenian economy*

3.4.1 As the ECB has noted previously[26], the conversion 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 of 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 conversion procedures in relation to credit institutions on Banka Slovenije and designates Banka Slovenije as the competent minor offence authority in case of a breach of the provisions of the draft law. The draft law does not specify in detail the scope of this new task. The ECB understands that the Banka Slovenije's supervisory task in this respect would essentially require Banka Slovenije 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 in the context of the conversion of Swiss franc denominated loans into euro denominated loans. Banka Slovenije has been designated as the competent minor offence authority in relation to breaches of the draft law, within the scope of the

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

24 See, for example, paragraph 3.3.2 of Opinion CON/2018/21.

25 See, for example, paragraph 3.3.3 of Opinion CON/2018/21.

26 See, for example, paragraph 3.4.1 of Opinion CON/2018/21.

performance of its prudential supervisory tasks over credit institutions[27], and also has, to a certain extent, an existing customer protection role[28]. However, Banka Slovenije has no comparable responsibilities in respect of the supervision of the compliance of credit institutions with the legal requirements relating to the restructuring of privately negotiated loan contracts by credit institutions with their customers. The draft law therefore confers a new task upon Banka Slovenije.

4.1.2 The ECB underlines that 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[29] 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[30]. 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 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

27 Article 380 of the Law of 2015 on banking.

28 See Law of 2016 on consumer credit.

29 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).

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

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 of 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[31], 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 customers 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. The new task conferred on Banka Slovenije does not form part of the prudential supervisory tasks of Banka Slovenije. Thus, the new task conferred on Banka Slovenije under the draft law is not directly related to the tasks conferred on the ECB and the NCBs by the Treaty and the Statute of the ESCB. Consequently, a careful assessment of the conferral of this task on Banka Slovenije is required in order to determine whether it constitutes a government task, and whether the related funding gives rise to monetary financing concerns.

31 See, for example, paragraph 4.2.1 of Opinion CON/2018/21.

4.3 *Tasks which are atypical of NCB tasks*

4.3.1 As previously noted by the ECB[32], the new task conferred on Banka Slovenije by the draft law relates to the supervision of the compliance by credit institutions with the requirements under the draft law relating to the restructuring of privately negotiated loan agreements between credit institutions and 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[33], 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[34] and Hungary[35], 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 to be conferred on Banka Slovenije under the draft law. In addition, the NCBs in Croatia[36], the Czech Republic[37], Ireland[38], Italy[39] and Slovakia[40] 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[41], 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 would extend to the resolution of disputes between contractual parties, which is a matter that is usually handled by the courts[42].

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

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32 See paragraph 4.3.1 of Opinion CON/2018/21.

33 See paragraph 4.3.2 of Opinion CON/2018/21.

34 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.

35 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.

36 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.

37 Česka Narodni 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.

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

39 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.

40 Narodna 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.

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

42 See paragraph 4.3.2 of Opinion CON/2018/21.

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. The draft law is therefore intended to provide protection to consumers of financial services. As previously noted by the ECB[43], the NCB 'is best placed to assess the terms and conditions of loan contracts entered into by consumers and the impact of the new legal measures on financial institutions. Within the scope of its tasks, the [NCB] can contribute to the prevention and mitigation of systemic risks to financial stability'. 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, there is a potential 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[44], 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[45], the principle of financial independence requires that Member States may 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. 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. While supervised entities are required to pay fees to Banka Slovenije in respect of the performance of its supervisory tasks under the Law on consumer credit[46], 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.

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43 See, for example, paragraph 4.4.1 of Opinion CON/2018/21.

44 See, for example, paragraph 4.5.1 of Opinion CON/2018/21.

45 See, for example, paragraph 4.6.1 of Opinion CON/2018/21.

46 See Article 79 of the Law on consumer credit (Zakon o potrošniških kreditih).

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 also 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 damages 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[47], the general liability regime would also apply with respect to any potential damages in connection with 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[48], 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. 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*

4.10.1 As previously noted by the ECB[49], the following should be noted as regards the compatibility of the draft law with the prohibition on monetary financing. 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 consideration should be made of 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.

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

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47 See paragraph 4.8.1 of Opinion CON/2018/21.

48 See paragraph 4.9.1 of Opinion CON/2018/21.

49 See paragraph 4.10.1 of Opinion CON/2018/21.

Done at Frankfurt am Main, 18 July 2019.

The President of the ECB

Mario DRAGHI

EVROPSKA CENTRALNA BANKA

EUROSISTEM

SL

ECB-PUBLIC

MNENJE EVROPSKE CENTRALNE BANKE

z dne 18. julij 2019

o konverziji kreditov v švicarskih frankih

(CON/2019/27)

Uvod in pravna podlaga

Evropska centralna banka (ECB) je 15. maja 2019 prejela zahtevo Državnega zbora Republike Slovenije za mnenje o predlogu zakona o razmerjih med dajalci kreditov in kreditojemalci glede 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 in na pravila v zvezi s finančnimi institucijami, kolikor pomembno vplivajo na stabilnost finančnih institucij in trgov. 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 ali vsebujejo valutno klavzulo v švicarskih frankih (v nadaljnjem besedilu: krediti v švicarskih frankih), in sicer z zahtevo za kreditne institucije s sedežem v Sloveniji, da opravijo konverzijo kreditov v švicarskih frankih, pri katerih so bile kreditne pogodbe sklenjene med 28. junijem 2004 in 31. decembrom 2010, v kredite v eurih.

1.2 Cilj predloga zakona je kreditojemalce, ki so najeli kredite v švicarskih frankih, postaviti v položaj, v kakršnem bi bili, če bi bili njihovi krediti že od nastanka nominirani v eurih. Za ta namen predlog zakona določa naslednji mehanizem konverzije:

(i) glavnica kredita v švicarskih frankih se preračuna v eure po deviznem tečaju, določenem v kreditni pogodbi, ki je veljal na dan, ko je kreditojemalec črpal kredit v švicarskih frankih. Če je bilo ob črpanju izplačilo glavnice opravljeno v eurih, je treba opraviti preračun dejanskega zneska izplačila v eurih;

(ii) dogovorjena obrestna mera se spremeni v drugo obrestno mero, sestavljeno iz medbančne obrestne mere v euroobmočju na datum črpanja kredita in v kreditni pogodbi dogovorjenega pribitka. Dogovorjeno obdobje za preračunavanje obrestne mere ostane nespremenjeno. Glede na obrazložitev predloga zakona se z uporabo medbančne obrestne mere v euroobmočju v mehanizmu konverzije varuje upravičen poslovni interes kreditnih institucij, ker se s tem omogoča, da se upoštevajo običajne obrestne mere za kredite v eurih;

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).

(iii) dajalec kredita je dolžan pripraviti nov amortizacijski načrt v skladu z zgoraj navedenimi določbami, po enaki metodologiji, kot je bil narejen prvotni amortizacijski načrt;

(iv) obroki, ki jih je kreditojemalec že plačal v skladu s prvotnim amortizacijskim načrtom, se preračunajo v eure po deviznem tečaju, ki je veljal na dan plačila posameznega obroka. Če je bilo plačilo obroka opravljeno v eurih, je treba za potrebe preračuna upoštevati dejanski znesek plačanega obroka v eurih. Že plačani obroki so osnova za poravnavo obveznosti iz novega amortizacijskega načrta, pri čemer se upošteva vrstni red poravnave obveznosti skladno s prvotno kreditno pogodbo;

(v) če je bil kredit predčasno odplačan z najetjem kredita v eurih, je dajalec kredita dolžan pripraviti nov amortizacijski načrt za obstoječi kredit in pri tem upoštevati preplačila;

(vi) če skupni znesek obrokov, ki jih je kreditojemalec že plačal, preračunanih v eure, kakor je navedeno v točki (iv), presega skupni znesek preračunanih obrokov po novem amortizacijskem načrtu iz točke (iii), se to šteje kot „preplačilo". Obravnava tega preplačila je odvisna od zneska:

a. če znesek preplačila ne presega skupnega zneska preračunanih obrokov, ki jih je treba še plačati po novem amortizacijskem načrtu, se preplačilo razdeli proporcionalno za poravnavo preostalih neplačanih obrokov, kreditna pogodba pa ostane v veljavi;

b. če znesek preplačila presega celotni znesek konvertiranega kredita v švicarskih frankih, ki ga je kreditojemalec dolžan vrniti skladno z novim amortizacijskim načrtom, mora dajalec kredita v 30 dneh od datuma, ko kreditojemalec potrdi predlog konverzije, temu vrniti ta znesek preplačila, kreditna pogodba pa se prekine.

1.3 Konverzija kreditov v švicarskih frankih se opravi za kredite, pri katerih so bile kreditne pogodbe sklenjene med 28. junijem 2004 in 31. decembrom 2010, ne glede na trenutno stanje kredita. Predlog zakona določa, da morajo dajalci kreditov pripraviti nove amortizacijske načrte, in določa dodatna pravila konverzije. V zvezi s krediti, pri katerih so terjatve prevzeli novi upniki, predlog zakona določa, da mora prvotni dajalec kredita novemu upniku poravnati razliko med prvotnim zneskom in zneskom, ki bi ga kreditojemalec dolgoval novemu upniku, če bi bil znesek za prenos izračunan po novem amortizacijskem načrtu.

1.4 Dajalec kreditov mora nove amortizacijske načrte, preračun obstoječih kreditov v švicarskih frankih in predloge konverzije pripraviti v 30 dneh od začetka veljavnosti predloga zakona ter jih predložiti kreditojemalcem. Kreditojemalec mora predlog konverzije potrditi ali zavrniti v 30 dneh po prejemu.

1.5 Nadzor nad postopki konverzije po predlogu zakona izvaja Banka Slovenije, ki je hkrati tudi pristojni prekrškovni organ za kršitve določb predloga zakona.

1.6 Predlog zakona določa, da ima dajalec kredita, čeprav mora kreditojemalcu predlagati in opraviti konverzijo kredita v švicarskih frankih, tudi pravico, da konverzijo izpodbija s tožbo v šestih mesecih od izvedene konverzije. Dajalec kredita lahko konverzijo izpodbija, če je iz kreditne pogodbe ali druge dokumentacije razvidno, da so bila ob sklenitvi te kreditne pogodbe izpolnjena nekatera merila. Dajalec kredita lahko konverzijo izpodbija, če je kreditojemalec pred sklenitvijo kreditne pogodbe podpisal vse naslednje dokumente: (i) dokument, v katerem je zapisano, da je pogodbeni pogoj, ki ureja odplačevanje obveznosti v tuji valuti, sestavljen v jasnem in razumljivem

jeziku; (ii) dokument, iz katerega je razvidno, da je bil kreditojemalec obveščen o vseh elementih, ki bi lahko vplivali na obseg njegove obveznosti; (iii) dokument, v katerem ga je dajalec kredita opozoril na mogoče spremembe deviznih tečajev in tveganja v zvezi z najemom kredita v tuji valuti; (iv) dokument, v katerem so kreditojemalcu predstavljeni izračuni v zvezi z ekonomskim učinkom mogočih nihanj deviznega tečaja na njegove skupne obveznosti za odplačevanje na podlagi pogodbe; (v) dokument, v katerem je predstavljen primer dejanskega kredita v tuji valuti za preteklo obdobje, ki daje vpogled v tveganja, povezana s kreditom v tuji valuti, ter (vi) dokument, iz katerega je razvidno, da je dajalec kredita kreditojemalcu ponudil zavarovanje za tečajno tveganje oziroma uporabil mero zgornje meje tveganja in s tem preprečil znatno neravnotežje pravic in obveznosti strank. Tudi če je dajalec kredita izpolnil vsa zgoraj navedena merila, mora sodišče presoditi tudi (i) obstoj znatnega neravnotežja med strankama in (ii) to, ali je dajalec kredita moral vedeti, da vnaša v pogodbo znatno neravnotežje med strankama, zaradi česar je pogoj nepošten in s tem nedovoljen. V obrazložitvi predloga zakona so navedena merila za poučeno in preudarno odločitev v zvezi s točko (ii), ki temeljijo med drugim na razlogovanju Sodišča Evropske unije v sodbi[2] v zvezi z razlago Direktive 93/13/EGS[3].

1.7 Predlog zakona dodatno ureja vprašanje konverzije pri odprodanih oziroma prenesenih kreditih. Dajalec kredita, ki je terjatev prenesel na tretjo osebo, mora prevzemniku terjatve poravnati razliko med zneskom prenesene terjatve in zneskom, ki bi ga kreditojemalec dolgoval prevzemniku terjatve, če bi bil znesek za prenos izračunan po novem amortizacijskem načrtu na dan prenosa terjatve. Če je dolg kreditojemalca do prevzemnika terjatve nižji od izračunane razlike, je dajalec kredita dolžan razliko izplačati kreditojemalcu.

1.8 Glede na obrazložitev predloga zakona je njegov namen uresničevanje ustavnega načela socialne države, sankcioniranje kršitev obveznosti v obligacijskih razmerjih ter zagotovitev pravnega varstva za potrošnike, ki so najeli kredite v švicarskih frankih. Obrazložitev izpostavlja vprašanje zakonitosti vezave kreditnih pogodb na švicarski frank, zlasti v državi euroobmočja s stabilno valuto, kjer so se krediti odobravali predvsem v eurih. V obrazložitvi je navedeno, da je uporaba valutne klavzule, pri kateri nosijo tveganje predvsem kreditojemalci, nepoštena poslovna praksa kreditnih institucij, zlasti v povezavi z odsotnostjo poučene in preudarne odločitve kreditojemalcev, ki so najeli kredite v švicarskih frankih.

2. Splošne pripombe

2.1 ECB je leta 2018 izdala mnenje o podobnem predlogu slovenskega zakona, [ki nato ni bil sprejet][4].

2.2 Pred svetovno finančno krizo je bilo izposojanje gospodinjstev in nefinančnih družb v tujih valutah priljubljeno v številnih državah članicah[5]. Kakor je ECB že ugotavljala[6], se je povpraševanje po

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2 Sodba Sodišča z dne 20. septembra 2017, Andriciuc in drugi, C-186/16, ECLI:EU:C:2017:703.

3 Direktiva Sveta 93/13/EGS z dne 5. aprila 1993 o nedovoljenih pogojih v potrošniških pogodbah (UL L 95, 21.4.1993, str. 29).

4 Glej Mnenje CON/2018/21. Vsa mnenja ECB so objavljena na spletni strani ECB na naslovu www.ecb.europa.eu.

5 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).

6 Glej na primer odstavek 2.1 Mnenja CON/2018/21.

kreditih v tujih valutah povečalo zaradi nižjih obrestnih mer pri takih kreditih v primerjavi s krediti v domači valuti. Glede na dokumentacijo v obrazložitvi predloga zakona je pri večini kreditov v švicarskih frankih šlo in še vedno gre za hipotekarne kredite, večino teh kreditov pa so odobrile kreditne institucije v tuji lasti.

2.2.1 ECB ugotavlja, da predlog zakona predvideva, da bo konverzija neodplačanih in drugih zajetih kreditov v švicarskih frankih v kredite v eurih prostovoljna samo za kreditojemalce. ECB tudi ugotavlja, da predlog zakona kreditni instituciji omogoča, da konverzijo po izvedbi izpodbija in s tem doseže, da se med strankama ponovno vzpostavi razmerje po pogojih iz prvotnega kredita v švicarskih frankih, če lahko na sodišču dokaže, da je kreditojemalec kredit v švicarskih frankih najel na podlagi poučene in preudarne odločitve, kakor je to opredeljeno v predlogu zakona.

2.3 *Pravni vidiki učinka za nazaj*

2.3.1 Kakor je ECB že ugotavljala, uvajanje ukrepov z učinkom za nazaj ogroža pravno varnost in ni skladno z načelom upravičenih pričakovanj[7] ter lahko tudi posega v pridobljene pravice.

2.3.2 Člen 23(1) Direktive 2014/17/EU Evropskega parlamenta in Sveta[8], ki se uporablja za kreditne pogodbe, sklenjene od 21. marca 2016 naprej[9], 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 ni skladen s splošnim ciljem člena 23(5) Direktive 2014/17/EU[10], ki upošteva eno od splošnih načel prava Unije, in sicer načelo pravne varnosti[11], ki podpira omejevanje zakonov z učinkom za nazaj[12].

2.3.3 Slovenski organi so pristojni za oceno, ali je učinek predloga zakona za nazaj skladen s slovenskimi pravnimi in ustavnimi načeli[13].

3. Posebne pripombe

3.1 *Merila za upravičenost*

3.1.1 Predlog zakona ne določa nobenih posebnih meril, po katerih bi bili kreditojemalci upravičeni do udeležbe pri konverziji. Na primer, predlog zakona ne določa zgornje meje zneska danega kredita, s katero bi se omejila nevarnost moralnega tveganja[14].

3.2 *Učinki na bančni sektor*

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7 Glej na primer odstavek 2.2 Mnenja CON/2018/21.

8 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).

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

10 Glej odstavke mnenj iz opombe 7.

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

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

13 Glej odstavek 2.2.3 Mnenja CON/2018/21.

14 Glej odstavek 3.1.1 Mnenja CON/2018/21.

3.2.1 Pričakuje se, 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[15]. Omeniti je treba, da je velikost tega vpliva težko ugotoviti, saj se predlog zakona ne naslanja na oceno učinka, ki bi jo pripravili pristojni nacionalni organi.

3.2.2 Izpostaviti je treba tudi to, da bo konverzija povzročila enkratno povečanje operativnih stroškov za prizadete kreditne institucije v Sloveniji, zlasti zaradi prestrukturiranja obstoječega varovanja pred tveganjem, ukrepov refinanciranja in stroškov, povezanih s preračunavanjem kreditov v švicarskih frankih za potrebe obveščanja vsakega posameznega kreditojemalca[16].

3.2.3 Dodaten pomislek je, da predlog zakona celotno breme konverzije kreditov v švicarskih frankih v kredite v eurih nalaga kreditnim institucijam, ki so sklenile prvotne kreditne pogodbe, tudi če so sklenitelјice v vmesnem času te kredite (kot nedonosna posojila) prenesle na tretje osebe, kar se je zgodilo v številnih slovenskih kreditnih institucijah. 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.

3.2.4 Kakor je ECB že izpostavila[17], ECB odločno zagovarja razvoj sekundarnih trgov za sredstva kreditnih institucij, zlasti nedonosna posojila, kakor se izraža v akcijskem načrtu Sveta EU za reševanje problema slabih posojil v Evropi[18]. 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[19].

3.2.5 Zaradi predloga zakona bodo slovenske kreditne institucije utrpele nove izgube v zvezi z nedonosnimi posojili, ki so jih že odstranile iz bilance stanja. Kakor je ECB izpostavila ob prejšnjih priložnostih[20], je sposobnost finančnih institucij za uspešno upravljanje kreditnega tveganja odvisna od zanesljivega, predvidljivega in stabilnega pravnega okvira, v katerem so ustrezno uravnoteženi

15 Glej odstavek 3.2.1 Mnenja CON/2018/21.

16 Glej odstavek 3.2.2 Mnenja CON/2018/21.

17 Glej odstavek 1.1 Mnenja CON/2018/54.

18 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.

19 Glej odstavka 2.2.1 in 2.2.2 Mnenja CON/2018/31.

20 Glej na primer odstavek 2.2.4 Mnenja CON/2019/8.

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.

3.2.6 Poleg tega so slovenske kreditne institucije, ki so svoj portfelj nedonosnih posojil prenesle na tretje osebe, tudi vso zadevno dokumentacijo v zvezi s prenesenimi posojili predale novim upnikom, ki so bili pred tem poslom v celoti seznanjeni z naravo prenesenih posojil. Predlog zakona bi torej lahko posegel v poslovne sporazume med kreditnimi institucijami in kupci posojil ter kreditnim institucijam povzročil nesorazmerne operativne stroške.

3.2.7 V predlogu zakona je torej treba skrbno uravnotežiti koristi vzpostavitve dobro delujočih sekundarnih trgov za nedonosna posojila in potrebo po zaščiti dolžnikov[21]. Poleg tega bi predlogu zakona koristila temeljita ocena učinka.

3.3 *Učinki na finančno stabilnost*

3.3.1 ECB je že večkrat izpostavila tveganja, povezana s krediti v tujih valutah[22]. Zlasti so krediti v tujih valutah pomenili veliko tveganje za finančno stabilnost v več državah članicah, v katerih je delež kreditov v tujih valutah relativno visok. V tej zvezi ECB izpostavlja analizo ESRB o teh tveganjih v Priporočilu ESRB/2011/1[23].

3.3.2 Kar zadeva dolgoročne učinke na finančno stabilnost, je treba pri uvajanju ukrepov v zvezi s poravnavo in konverzijo kreditov v tujih valutah vedno upoštevati pošteno porazdelitev bremena med vse deležnike, da se prepreči moralno tveganje v prihodnosti[24]. V obrazložitvi je navedeno, da predlog zakona upošteva interese kreditnih institucij, na primer s tem, da se pri konverziji za pripravo novih amortizacijskih načrtov uporabijo višje obrestne mere, take, kot so bile običajne pri kreditih v eurih. Toda predlog zakona določa, da se pri preračunavanju predhodno dogovorjena obrestna mera nadomesti z medbančno obrestno mero v euroobmočju, v prvotni kreditni pogodbi dogovorjeni pribitek pa se ne spremeni; zdi se, da to potencialno odstopa od običajne prakse kreditnih institucij, ki za kredite v eurih običajno uporabljajo višji pribitek kot za kredite v švicarskih frankih.

3.3.3 Kakor je ECB že ugotavljala[25], bi glede na to, da je Slovenija vstopila v euroobmočje šele leta 2007, konverzija kreditov iz švicarskih frankov v eure med letoma 2004 in 2007 lahko povzročila neenako obravnavo drugih strank, odvisno od gibanja deviznega tečaja med slovenskim tolarjem in švicarskim frankom v tem obdobju. Zato bi morali morda določiti metodo usklajevanja, s katero bi upoštevali gibanje deviznih tečajev med tolarjem, švicarskim frankom in eurom v tem obdobju.

3.4 *Učinki na slovensko gospodarstvo*

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21 Glej odstavek 2.2.3 Mnenja CON/2018/31.

22 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 in Mnenje CON/2015/26 v zvezi s krediti v tujih valutah na Poljskem.

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

24 Glej na primer odstavek 3.3.2 Mnenja CON/2018/21.

25 Glej na primer odstavek 3.3.3 Mnenja CON/2018/21.

3.4.1 Kakor je ECB že ugotavljala[26], bi konverzija kreditov v švicarskih frankih z učinkom za nazaj, kakor jo predvideva predlog zakona, lahko imela negativne učinke, če bi povzročila 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 novo nalogo, da nadzira postopke konverzije v zvezi s kreditnimi institucijami, in jo imenuje za pristojni prekrškovni organ za kršitve določb predloga zakona. Predlog zakona ne določa podrobneje, kaj ta naloga obsega. ECB razume, da bi nadzorna naloga Banke Slovenije v tej zvezi dejansko pomenila, da bi morala Banka Slovenije nadzirati skladnost kreditnih institucij z zahtevami predloga zakona, ki se nanašajo na prestrukturiranje njihovih zasebnih pogodbenih razmerij s posameznimi strankami v okviru konverzije kreditov v švicarskih frankih v kredite v eurih. Banka Slovenije je bila imenovana za pristojni prekrškovni organ v zvezi s kršitvami predloga zakona v okviru opravljanja njenih nalog bonitetnega nadzora kreditnih institucij[27], delno pa ima tudi obstoječo vlogo na področju varstva potrošnikov[28]. Vendar pa Banka Slovenije nima nobene primerljive odgovornosti v zvezi z nadzorom skladnosti kreditnih institucij z zakonskimi zahtevami glede prestrukturiranja zasebno izpogajanih kreditnih pogodb med kreditnimi institucijami in njihovimi strankami. Predlog zakona torej na Banko Slovenije prenaša novo nalogo.

4.1.2 ECB poudarja, da 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[29] 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[30]. 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 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.

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26 Glej na primer odstavek 3.4.1 Mnenja CON/2018/21.

27 380. člen Zakona o bančništvu (Uradni list RS, št. 25/15, 44/16 – ZRPPB, 77/16 – ZCKR, 41/17, 77/18 – ZTFI-1, 22/19 – ZIUDSOL in 44/19 – odl. US).

28 Glej Zakon o potrošniških kreditih (Uradni list RS, št. 77/16).

29 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).

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

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 ter 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[31], nadziranje skladnosti kreditnih institucij z zahtevami predloga zakona glede prestrukturiranja zasebno izpogajanih kreditnih pogodb s strankami ni med temeljnimi nalogami centralne banke, ki so navedene v členu 127(2) ali (5) Pogodbe ali drugače prenesene na NCB s Statutom ESCB. Nova naloga, ki se prenaša na Banko Slovenije, ni del njenih nalog bonitetnega nadzora. Nova naloga, ki se s predlogom zakona prenaša na Banko Slovenije, tako ni neposredno povezana z nalogami, ki so prenesene na ECB in NCB s Pogodbo in Statutom ESCB. 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[32], 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 med kreditnimi institucijami in njihovimi strankami. Lahko se razume, da je nova naloga Banke Slovenije delno povezana z varstvom potrošnikov.

4.3.2 Kakor je ECB že ugotavljala[33], 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[34] in Madžarskem[35] 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 bi se po predlogu zakona prenesle na Banko Slovenije. Poleg tega so NCB na Hrvaškem[36], v Češki republiki[37], na Irskem[38], v Italiji[39] in na Slovaškem[40] dobile podobne nadzorne naloge, ki se nanašajo splošneje na varstvo potrošnikov in preglednost

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31 Glej na primer odstavek 4.2.1 Mnenja CON/2018/21.

32 Glej odstavek 4.3.1 Mnenja CON/2018/21.

33 Glej odstavek 4.3.2 Mnenja CON/2018/21.

34 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.

35 Magyar Nemzeti Bank ima nadzorno vlogo v povezavi s skladnostjo kreditnih institucij z zakonskimi zahtevami glede konverzije 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.

36 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.

37 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.

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

39 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.

40 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.

kreditnih pogodb. Glede na to in ob upoštevanju sedanjih vlog številnih NCB v ESCB v zvezi z varstvom potrošnikov na področju finančnih storitev[41] 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[42].

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. Predlog zakona je torej namenjen za zagotavljanje varstva potrošnikov pri finančnih storitvah. Kakor je ECB že ugotavljala[43], NCB „najlažje oceni pogoje kreditnih pogodb, ki jih sklenejo potrošniki, in vpliv novih zakonskih ukrepov na finančne institucije. [NCB] lahko v okviru svojih nalog prispeva k preprečevanju in zmanjševanju sistemskih tveganj za finančno stabilnost". Zaradi uporabe predloga zakona za nazaj ni jasno, ali bi predlog zakona dejansko zagotovil, da se izpolni cilj varstva potrošnikov pri finančnih storitvah. Tako obstaja tveganje, 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[44], 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.

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

42 Glej odstavek 4.3.2 Mnenja CON/2018/21.

43 Glej na primer odstavek 4.4.1 Mnenja CON/2018/21.

44 Glej na primer odstavek 4.5.1 Mnenja CON/2018/21.

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

4.6.1 Kakor je ECB že ugotavljala[45], načelo finančne neodvisnosti zahteva, da države članice ne smejo spraviti svojih NCB 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. 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. Medtem ko morajo nadzorovani subjekti Banki Slovenije plačevati nadomestilo za opravljanje nadzornih nalog po Zakonu o potrošniških kreditih[46], 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.

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 tudi 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[47], 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[48], 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. V tej zvezi bi lahko proučili možnost, da bi

45 Glej na primer odstavek 4.6.1 Mnenja CON/2018/21.
46 Glej 79. člen Zakona o potrošniških kreditih.
47 Glej odstavek 4.8.1 Mnenja CON/2018/21.
48 Glej odstavek 4.9.1 Mnenja CON/2018/21.

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*

4.10.1 Kakor je ECB že ugotavljala[49], je treba v zvezi z združljivostjo predloga zakona s prepovedjo denarnega financiranja izpostaviti naslednje. 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 bi zaradi opravljanja nove naloge lahko prišlo do nesorazmernega političnega tveganja ali vpliva na osebno neodvisnost članov organov odločanja Banke Slovenije.

To mnenje bo objavljeno na spletni strani ECB.

V Frankfurtu na Majni, 18. julij 2019

Predsednik ECB

Mario DRAGHI

49 Glej odstavek 4.10.1 Mnenja CON/2018/21.