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Opinion of the European Central Bank of 25 November 2008 at the request of the Slovenian Ministry of Finance on a draft law amending the Law on public finance (CON/2008/76)

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OPINION OF THE EUROPEAN CENTRAL BANK

of 25 November 2008

at the request of the Slovenian Ministry of Finance
on a draft law amending the Law on public finance

(CON/2008/76)

Introduction and legal basis

On 3 November 2008 the European Central Bank (ECB) received a request from the Slovenian Ministry of Finance (hereinafter the 'Ministry') for an opinion on a draft law amending the Law on public finance¹ (hereinafter the 'draft law' and the 'Law', respectively), which was adopted on 11 November 2008 (hereinafter the 'adopted law').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and on the sixth indent of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions², as the draft law relates to rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft law

- 1.1 The draft law is aimed at limiting the effects of the global financial crisis in Slovenia and maintaining the stability of the domestic financial system. During the financial crisis, the draft law allows for additional State borrowing and issuing of State guarantees beyond the extent laid down in the existing budget legislation³, without a prior budget adjustment and adoption of a special law on guarantees or the amending of the existing amounts of State guarantees projected in the existing budget, respectively.
- 1.2 The draft law provides for four categories of measures: (i) loans to credit institutions, insurance companies, reinsurance companies and pension companies having their corporate seat in Slovenia; (ii) purchase of claims from credit institutions with their seat in Slovenia; (iii) capital investments

¹ Law on public finance, published in *Uradni list Republike Slovenije* No 79/1999.

² OJ L 189, 3.7.1998, p. 42.

³ See Articles 29 and 31 of the Law on the implementation of the Republic of Slovenia Budget for 2008 and 2009, published in *Uradni list Republike Slovenije* No 114/2007.

by the State in credit institutions as well as in insurance companies, reinsurance companies and pension companies having their corporate seat in Slovenia; and (iv) State guarantees to credit institutions up to the total principal amount of EUR 8 billion, which was increased to EUR 12 billion in the adopted law. The criteria, conditions and charges for implementation of the abovementioned measures will be set out in separate decrees to be adopted by the Government for each measure.

- 1.3 The draft law provides for a general legal framework allowing the State to address the emergency situation in the financial markets, should the need arise. Detailed rules for the implementation of specific measures in individual cases, such as their content, extent, duration, as well as the designated beneficiaries, will be defined in a decision to be adopted by the Government on the proposal of the Ministry. These decisions will be based on the assessment by the competent supervisory authorities on the need for and appropriateness of individual measures. The Government is obliged to inform the Parliament of any measures taken under the draft law.
- 1.4 The provisions on measures introduced by the draft law will enter into force on the day after their publication and are of a temporary nature: they will apply until 31 December 2010.

2. General observations

- 2.1 The ECB was consulted by the Ministry on the draft law on 3 November 2008 and was asked to issue its opinion within one month after receiving the consultation request to enable the swift adoption of the draft law by the Slovenian Parliament. The ECB was not notified of any acceleration in the legislative procedure. However, the draft law was then adopted on 11 November 2008, without any prior notification of the ECB. In fact, the ECB was unofficially informed that the consultation request would be supplemented with a revised draft law and a draft government decree governing State guarantees. The ECB would like to point out that, in cases of particular urgency, which do not allow for a normal consultation period, the consulting authority may indicate such urgency in the consultation request and ask for a shorter deadline for adoption of the ECB's opinion. This does not prejudice the national authorities' duty under Article 105(4) of the Treaty to appropriately consult the ECB on national draft legislative provisions falling within its fields of competence. It follows from Article 3(4) of Decision 98/415/EC that Member States are obliged to suspend the process of adoption of the draft legislative provision pending receipt of the ECB's opinion. The adopting national authority should have the opportunity meaningfully to deliberate the ECB's opinion prior to taking its decision on the substance. If a time limit has been set for submission of the ECB opinion and this time limit has expired, the national authority concerned may restart the adoption process⁴.

⁴ See Guide to consultation of the European Central Bank by national authorities regarding draft legislative provisions, Title IV, Section 1.

2.2 The ECB has issued several recent opinions on State measures taken to address the global financial crisis⁵, which all emphasise the importance of a common approach aimed at restoring confidence in financial markets. Similarly, the ECB notes that the conclusions adopted at the Ecofin meeting on 7 October 2008 highlighted common principles to guide the States' actions⁶. Moreover, the ECB notes that on 12 October 2008 the Heads of State of the euro area issued a 'Declaration on a concerted European action plan of the euro area countries'⁷ (hereinafter the 'Declaration'), in which they confirmed their commitment to act together in a decisive and comprehensive way in order to restore confidence and the proper functioning of the financial system and to restore appropriate and efficient financing conditions for the economy. They agreed on common principles to be followed by the EU and euro area governments, central banks and supervisors, to avoid national measures adversely affecting the functioning of the single market and the other Member States. This coordinated approach includes initiatives aimed at ensuring appropriate liquidity, facilitating the funding of banks by various means, providing additional capital resources to financial institutions and recapitalising distressed banks. These principles were also endorsed for all Member States by

⁵ See ECB Opinions: CON/2008/44 of 3 October 2008 at the request of the Irish Minister for Finance on a draft Credit Institutions (Financial Support) Bill 2008; CON/2008/46 of 8 October 2008 at the request of the Belgian Ministry of Finance on a preliminary draft law on measures promoting financial stability and in particular establishing a State guarantee for the provision of credit in the context of financial stability; CON/2008/48 of 15 October 2008 at the request of the Irish Minister for Finance on a draft Credit Institutions (Financial Support) Scheme 2008; CON/2008/50 of 17 October 2008 at the request of the Belgian Ministry of Finance on a draft royal decree adopted under Article 117*bis* of the Law of 2 August 2002 on the supervision of the financial sector and on financial services; CON/2008/51 of 17 October 2008 at the request of the Greek Ministry of Economy and Finance on a draft law on, *inter alia*, the establishment of the 'Depositors and Investors of Credit Institutions Compensation Fund'; CON/2008/52 of 17 October 2008 at the request of the Spanish State Secretary for Economic Affairs on a Royal Decree-Law creating a Fund for the acquisition of financial assets and on a Royal Decree-Law adopting urgent financial and economic measures in relation to the concerted European action plan of the euro area countries; CON/2008/54 of 17 October 2008 at the request of the Danish Ministry of Economic and Business Affairs on a proposed Law on financial stability; CON/2008/55 of 20 October 2008 at the request of the Austrian Ministry of Finance on draft legal measures to ensure the stability of the Austrian financial market; CON/2008/56 of 21 October 2008 at the request of the Banque de France on a draft amending finance law for the financing of the economy; CON/2008/57 of 21 October 2008 at the request of the German Ministry of Finance on a Law on the implementation of a package of measures to stabilise the financial market and an order on its implementation; CON/2008/58 of 23 October 2008 at the request of the Banca d'Italia on behalf of the Italian Ministry for Economic Affairs and Finance on two Decree-Laws containing urgent measures to guarantee the stability of the banking system and the continuity of the provision of credit; CON/2008/59 of 24 October 2008 at the request of the Swedish Ministry of Finance on a draft proposal on stabilising measures for the Swedish financial system; CON/2008/60 of 27 October 2008 at the request of the Spanish State Secretary for Economic Affairs on a draft Order implementing Royal Decree-Law 6/2008 creating the Fund for the acquisition of financial assets and on a draft Basic Agreement of the Fund's Executive Council; CON/2008/61 of 28 October 2008 at the request of the Belgian Minister for Finance on a draft royal decree implementing the Law of 15 October 2008 on measures promoting financial stability and in particular establishing a State guarantee for the provision of credit in the context of financial stability, in relation to the protection of deposits and life insurance and amending the Law of 2 August 2002 on the supervision of the financial sector and on financial services; CON/2008/62 of 29 October 2008 at the request of the Swedish Ministry of Finance on a draft ordinance on State guarantees for banks etc.; CON/2008/65 of 12 November 2008 at the request of the Banca d'Italia on behalf of the Italian Ministry for Economic Affairs and Finance on a draft ministerial decree containing provisions to implement Decree-Law No 157/2008 on further urgent measures to guarantee the stability of the credit system; CON/2008/67 of 13 November 2008 at the request of the Spanish Ministry for Economic Affairs and Finance on a draft order implementing Royal Decree-Law 7/2008 authorising State guarantees; and CON/2008/68 of 13 November 2008 at the request of the Finnish Ministry of Finance on a draft government proposal for laws amending the Law on the Government Guarantee Fund and the Law on credit institutions.

⁶ According to these principles, (i) interventions should be timely and the support should in principle be temporary; (ii) the interests of taxpayers should be protected; (iii) existing shareholders should bear the due consequences of the intervention; (iv) the Government should be in a position to bring about a change of management; (v) management should not retain undue benefits; (vi) governments may have, *inter alia*, the power to intervene in remuneration; (vii) legitimate interest of competitors must be protected, in particular through the State aid rules, and (viii) negative spill-over effects should be avoided.

⁷ Available on the website of the French Presidency at www.ue2008.fr.

the European Council on 16 October 2008. As pointed out in these recent ECB opinions⁸, it is of utmost importance that the operations conducted by national authorities do not interfere by any means with the single monetary policy and/or with the Eurosystem's refinancing operations.

- 2.3 The ECB also wishes to underline the importance of ensuring that the proposed arrangements comply with the relevant Community law provisions and with criteria set out in the recently adopted Commission's guidance on compliance by financial sector support schemes with EU State aid rules⁹ (hereinafter the 'Commission's guidance'), and that the State's role as shareholder as a consequence of recapitalisation under the draft law is limited in time.
- 2.4 The ECB understands that the Slovenian Government intends to adopt decrees on the basis of the new Article 88.a(1) of the Law¹⁰ if it assesses that taking measures under the draft law may be necessary to address the situation in the Slovenian financial market. The ECB expects to be consulted on any new draft legislative provisions should they materially influence the stability of financial markets.

3. Specific observations

Selection of beneficiary credit institutions

- 3.1 Pursuant to the new Article 81.a of the Law¹¹, all credit institutions as defined in the Law on banking¹² having their corporate seat in Slovenia are entitled to benefit from the measures under the draft law. The ECB understands, therefore, that this comprises banks, savings banks and e-money institutions where the term 'bank' applies to any bank having its corporate seat in Slovenia that was licensed by Banka Slovenije to provide banking services; subsidiaries of foreign banks are also included, but branches of foreign banks are not. The ECB welcomes the above provisions, as they avoid the preferential treatment of specified credit institutions, and the distortion of the level playing field as regards the treatment of domestic financial institutions and subsidiaries of foreign institutions¹³. The ECB notes that, in the specific context of provision of State guarantees, the Commission's guidance includes detailed rules on the eligibility criteria for the beneficiary institutions¹⁴. In this context, the ECB appreciates that pursuant to the new Article 88.a(2) of the

⁸ See, in particular, ECB Opinions CON/2008/52 and CON/2008/60.

⁹ See 'Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis' (2008/C 270/02) of 13 October 2008, available on the Commission's website at www.ec.europa.eu.

¹⁰ Inserted by Article 4 of the draft law.

¹¹ Inserted by Article 2 of the draft law.

¹² Law on banking, published in *Uradni list Republike Slovenije* No 131/2006.

¹³ On these aspects see, in particular, ECB Opinions: CON/2008/44, CON/2008/48, CON/2008/52 and CON/2008/55.

¹⁴ See paragraph 18 of the Commission's guidance, specifying that 'The eligibility criteria of financial institutions ... must be objective, taking due account of their role in the relevant banking system and the overall economy, and non-discriminatory so as to avoid undue distortive effects on neighbouring markets and the internal market as a whole. In application of the principle of non discrimination on the grounds of nationality, all institutions incorporated in the Member State concerned, including subsidiaries, and with significant activities in that Member State should be covered by the scheme'.

Law¹⁵, the Government's decisions on measures under the draft law must be based on the assessment of the need for and appropriateness of the individual measures provided by the supervisory authority.

Relationship of the draft law to the single monetary policy of the euro area

- 3.2 In line with the Declaration, Member States have to act in a coordinated manner to avoid significant differences in national implementation having a counter-productive effect and creating distortions in global banking markets. The euro area Heads of State also acknowledged the need to cooperate with the ECB to ensure consistency in liquidity management by the Eurosystem and compatibility with the operational framework of the Eurosystem. Against this background, the ECB notes that uncoordinated decisions among Member States should be avoided as they may involve a fragmentation of the euro area money market.
- 3.3 Pursuant to the new Article 86.a(4) of the Law¹⁶, State guarantees may be issued to cover all liabilities of credit institutions vis-à-vis credit institutions and other financial companies with the exception of liabilities arising from: (i) structured financial instruments, (ii) subordinated liabilities of a credit institution and (iii) liabilities to the parent company and its associated entities. On this basis, the ECB understands that State guarantees may be issued to cover interbank deposits. This should be avoided as it could entail a substantial distortion in the various national segments of the euro area money market by potentially increasing short-term debt issuance activity across Member States, thus impairing the implementation of the single monetary policy, which is an exclusive Eurosystem competence under Article 105(2) of the Treaty.
- 3.4 Pursuant to the new Article 88.a(1) of the Law¹⁷, the criteria, conditions and charges for implementation of the measures under the new Articles 81.a and 86.a of the Law¹⁸ will be set out in separate decrees to be adopted by the Government for each measure. The ECB would like to recall the need for its involvement in such concertation and the importance it attaches to the harmonisation of the pricing of guarantees and other measures under the draft law within the euro area and the EU aimed at creating the essential conditions for a level playing field. In particular, it is important to ensure that the price of the State guarantee is risk-based and market-oriented in that it is determined on the basis of the costs of a corresponding guarantee in the market.
- 3.5 Article 6 of the adopted law provides that the provisions of Articles 2, 3 and 4 of the draft law apply until 31 December 2010. The ECB notes that this provision is in line with the principles stated in the Declaration which point to the temporary features of such schemes. Moreover, the harmonisation regarding the end date of such schemes across the euro area and EU Member States is also crucial and the ECB should be involved in such concertation.

15 Inserted by Article 4 of the draft law.

16 Inserted by Article 3 of the adopted law.

17 Inserted by Article 4 of the adopted law.

18 Inserted by Articles 2 and 3 of the adopted law respectively.

Role of the central bank

- 3.6 The ECB understands that Banka Slovenije in its supervisory role will provide its assessment under the new Article 88.a (2) of the Law¹⁹ with respect to banks, savings banks and e-money institutions.
- 3.7 The ECB expects that the involvement of Banka Slovenije will not go beyond the supervisory function and, in particular, that it will fully comply with the prohibition on monetary financing laid down in Article 101 of the Treaty. According to the specific deposit guarantee scheme in Slovenia²⁰, Banka Slovenije pays in its name and on behalf of Slovenian banks and of the State the guaranteed deposits to depositors²¹. To address the current financial crisis this scheme was recently changed to introduce an unlimited State guarantee for bank deposits²². The ECB notes with concern that no legislative provision was envisaged in the draft law with regard to additional State borrowing which would ensure that sufficient funds are available to cover such potential amounts to be paid. Should the State not be able to transfer sufficient funds to Banka Slovenije, the latter may be put in a position where it has to provide, even if only temporarily, its own funds for financing the national deposit guarantee scheme²³ which would be a clear breach of the monetary financing prohibition under the Treaty.

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

Done at Frankfurt am Main, 25 November 2008.

[signed]

The Vice-President of the ECB

Lucas D. PAPADEMOS

¹⁹ Inserted by Article 4 of the draft law.

²⁰ Articles 310 to 329 of the Law on banking.

²¹ Pursuant to provisions of the Law on banking governing the deposit guarantee scheme in Slovenia, the banks having their corporate seat in Slovenia guarantee payment of guaranteed deposits held at a bank against which bankruptcy proceedings have been initiated. Upon the initiation of bankruptcy proceedings, Banka Slovenije assumes the obligation to pay the guaranteed deposits in its own name and on behalf of the banks. To cover this obligation it orders the banks to pay in their respective shares and forwards these funds to the successor bank authorised to execute the payments of guaranteed deposits to the depositors. In the bankruptcy proceedings, Banka Slovenije lodges claims arising from the guaranteed deposits and returns any funds retrieved from the bankruptcy estate to the banks according to their paid-in shares.

²² In the latest amendment to the Law on banking adopted on 11 November 2008, it was stipulated that the banks with their seat in Slovenia guarantee payment of guaranteed deposits of the bank in bankruptcy up to the amount of EUR 22 000 and the State guarantees the exceeding amount without limitation (Articles 310 and 313 of the amended Law on banking).

²³ Upon the initiation of bankruptcy proceedings, Banka Slovenije assumes the obligation to pay the guaranteed deposits of the bank in bankruptcy in its own name and on behalf of the banks with their seat in Slovenia and of the State (Article 315 of the amended Law on banking).