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PREDSEDNIK DRŽAVNEGA ZBORA



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K našemu dopisu št. 00720-16/2013/12 z dne 7. 11. 2013, vam pošiljam Mnenje Evropske centralne banke o Predlogu zakona o spremembah in dopolnitvah Zakona o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju – nujni postopek.

PRILOGI: 2

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EUROPEAN CENTRAL BANK

EUROSYSTEM

# OPINION OF THE EUROPEAN CENTRAL BANK

## of 5 November 2013

## on financial restructuring of companies

## (CON/2013/75)

**Introduction and legal basis**

On 21 October 2013, the European Central Bank (ECB) received a request from the Slovenian Ministry of Justice for an opinion on a draft law amending the Law on financial operations, insolvency proceedings and compulsory dissolution[1] (hereinafter the 'draft law'). On 25 October 2013, the ECB received a revised version of the draft law.

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the 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 provisions[2], 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 existing Slovenian Law on insolvency regulates two types of court proceedings applicable to insolvent companies: (a) compulsory settlement proceedings aimed at restructuring insolvent entities by, *inter alia*, restructuring their liabilities; and (b) bankruptcy proceedings aimed at their winding up. The main aim of the draft law is to amend the Law on insolvency with a view to improving financial restructuring of distressed companies as well as the efficiency of insolvency proceedings in general.

1.2 To this end, the draft law (a) proposes certain amendments to the general rules on compulsory settlements, including an explicit reference to the 'absolute priority rule' pursuant to which the compulsory settlement as a restructuring proceeding shall be carried out in a way that reflects the burden-sharing rules among shareholders and different classes of creditors as applicable in bankruptcy proceedings[3]; (b) broadens the scope of simplified compulsory settlement proceedings

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1 Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju (ZFPPIPP) (Ur.l. RS No 63/2013-official consolidated text) (the 'Law on insolvency').

2 OJ L 189, 3.7.1998, p. 42.

3 See, in particular, Article 9 of the draft law amending Article 136 of the Law on insolvency.

to make them available to both micro companies and small companies[4] and further simplifies the prerequisites in the application of those proceedings; (c) amends some other existing rules of the Law on insolvency to improve the bankruptcy proceedings and to streamline the role of the courts in insolvency proceedings; and (d) introduces regulations for a new form of restructuring proceeding for large or medium-sized companies[5], as briefly described below.

1.3 For large or medium-sized companies that are not yet insolvent but are likely to become insolvent within a year, the draft law enables such companies to apply new preventive restructuring proceedings proposed by the draft law[6]. The aim of such proceedings is to facilitate early restructuring and to eliminate the causes for the insolvency of distressed companies by, *inter alia*, extending the binding effects of a concluded restructuring agreement that has been confirmed by the court to creditors who have not entered into the restructuring agreement, subject to having a certain majority of creditors supporting the agreement. The preventive restructuring proceedings are focused on the restructuring of financial claims[7], so that binding effects of the restructuring agreement may be imposed only on dissenting creditors holding that type of claim. Where the restructuring agreement provides for the restructuring of unsecured financial claims, such restructuring may entail the reduction of the principal or the extension of the maturity of the claims. If the secured financial claims are to be restructured as well, only their maturity may be extended or the interest rate modified.

1.4 Where companies are already insolvent, they may be restructured within compulsory settlement proceedings, rather than liquidated in bankruptcy proceedings, if the former would likely result in better repayment conditions for creditors than the latter. To facilitate the restructuring of insolvent large and medium-sized companies within the compulsory settlement proceedings on the basis of, *inter alia*, the required majority vote in relevant creditor classes, the draft law introduces certain special rules[8]. Pursuant to those special rules, it will be possible, among other things, to provide for the restructuring of only unsecured ordinary financial claims rather than all ordinary claims, as well as the restructuring of secured claims, the pooling of collateral and spin-offs. If secured claims are to be restructured, such claims may be split and converted into two new claims, a secured and an unsecured claim, based on the market value of the assets, subject to security as determined within the compulsory settlement proceedings. The secured claims may be restructured by way of extension of the maturity or modification of the interest rate. Since the restructuring of insolvent large or medium-sized companies within the compulsory settlement proceedings may have significant effects to the stability of banks, Banka Slovenije shall be notified on the initiation of the proceedings.

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4 As defined in Article 55 of the Law on companies (Zakon o gospodarskih družbah – ZGD-1).

5 As defined in Article 55 of the Law on companies.

6 See Article 4 of the draft law introducing a new Section 2.3 to the Law on insolvency.

7 See the definition of 'financial claim' in Article 3 of the draft law introducing a new article 20.a to the Law on insolvency.

8 See Article 37 of the draft law introducing a new Section 4.8 to the Law on insolvency.

## 2. General observations

2.1 The ECB welcomes the draft law as it broadens and strengthens the procedures and tools available for the restructuring of Slovenian companies. The new amendments should provide more efficient options for preserving as a going concern companies that are in distress or already insolvent, but are deemed economically viable upon potential debt restructuring. Especially in connection to the latter case, the clearer stipulation of the absolute priority rule and the premise that creditors of failing companies would be better off with a restructuring rather than a winding up of insolvent companies, as required by the draft law, should contribute to the successful execution of corporate restructuring procedures.

2.2 The draft law contains provisions that attempt to reasonably and proportionately balance the interests of both the debtor and its creditors in a restructuring process. Nevertheless, the ECB considers that the proposed significant changes to the existing regime could be accompanied by an economic and legal impact assessment that would inform authorities about the potential implications of applying the restructuring procedures provided for in the draft law on the economy in general and, in particular, on the balance sheets and profitability of credit institutions in their capacity as creditors of companies availing of the new procedures.

2.3 Furthermore, the impact of the new procedures should be monitored on a continuous basis and in the event that risks to financial stability emerge, the framework should be revised to address potential adverse impacts. Such monitoring appears warranted, specifically as the draft law regulates several new restructuring solutions, including the preventive restructuring proceedings and special rules for compulsory settlement proceedings applicable to large and medium-sized companies that specifically relate to credit and other financial institutions as holders of financial claims as defined under the draft law.

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

Done at Frankfurt am Main, 5 November 2013.

*The President of the ECB*

Mario DRAGHI

EVROPSKA CENTRALNA BANKA

EUROSISTEM

# MNENJE EVROPSKE CENTRALNE BANKE

## z dne 5. novembra 2013

## o finančnem prestrukturiranju gospodarskih družb

## (CON/2013/75)

**Uvod in pravna podlaga**

Evropska centralna banka (ECB) je dne 21. oktobra 2013 prejela zahtevo slovenskega Ministrstva za pravosodje za mnenje o predlogu zakona o spremembah in dopolnitvah Zakona o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju[1] (v nadaljnjem besedilu: predlog zakona). ECB je dne 25. oktobra 2013 prejela revidirano različico predloga zakona.

Pristojnost ECB, da poda mnenje, izhaja iz členov 127(4) in 282(5) Pogodbe o delovanju Evropske unije ter šeste alinee člena 2(1) Odločbe Sveta 98/415/ES z dne 29. junija 1998 o posvetovanju nacionalnih organov z Evropsko centralno banko glede osnutkov pravnih predpisov[2], saj se predlog zakona nanaša na pravila, ki se uporabljajo za finančne institucije, 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 Veljavni ZFPPIPP ureja dve vrsti sodnih postopkov, ki se lahko vodijo nad insolventnimi gospodarskimi družbami: (a) postopek prisilne poravnave za prestrukturiranje insolventnih subjektov, med drugim s prestrukturiranjem njihovih dolgov; in (b) stečajni postopek za prenehanje takih subjektov. Osrednji cilj predloga zakona je spremeniti ZFPPIPP z namenom izboljšanja pogojev za finančno prestrukturiranje gospodarskih družb v težavah in učinkovitosti insolvenčnih postopkov nasploh.

1.2 V ta namen se s predlogom zakona (a) predlagajo določene spremembe splošnih pravil o prisilni poravnavi, vključno s tem, da se izrecno navaja »načelo absolutne prednosti«, skladno s katerim je treba postopek prisilne poravnave kot postopek prestrukturiranja izvesti tako, da se upoštevajo pravila porazdelitve bremena med delničarji in različnimi razredi upnikov, kakor veljajo v stečajnem postopku[3]; (b) razširja področje uporabe poenostavljene prisilne poravnave, da bi bila ta na voljo tako za mikro kot tudi majhne družbe[4], in se dodatno poenostavljajo pravila tega postopka;

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1 Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju (ZFPPIPP) (Ur.l. RS št. 63/2013--UPB7).

2 UL L 189, 3.7.1998, str. 42.

3 Glej zlasti 9. člen predloga zakona, s katerim se spreminja 136. člen ZFPPIPP.

4 Kakor so opredeljene v 55. členu Zakona o gospodarskih družbah (ZGD-1).

(c) spreminjajo nekatera druga obstoječa pravila ZFPPIPP, da bi se izboljšali stečajni postopki in racionalizirala vloga sodišč v insolvenčnih postopkih; ter (d) uvajajo nove oblike postopkov prestrukturiranja velikih in srednjih družb[5], kakor so kratko opisane v nadaljevanju.

1.3 Predlog zakona za velike in srednje družbe, ki še niso insolventne, a za katere je verjetno, da bodo postale insolventne v obdobju enega leta, omogoča, da uporabijo novi postopek preventivnega prestrukturiranja, kot ga uvaja predlog zakona[6]. Namen tega postopka je olajšati zgodnje prestrukturiranje in odpraviti vzroke, zaradi katerih bi družbe v težavah postale insolventne, med drugim s tem, da zavezujoče učinke sklenjenega sporazuma o prestrukturiranju, ki ga potrdi sodišče, razširja na upnike, ki k takemu sporazumu niso pristopili, pod pogojem, da je določena večina upnikov sporazum podprla. Postopek preventivnega prestrukturiranja se osredotoča na prestrukturiranje finančnih terjatev[7], tako da ima lahko sporazum o prestrukturiranju zavezujoče učinke zgolj za tiste upnike, ki niso privolili v sporazum, ki so imetniki finančnih terjatev. Kadar sporazum o prestrukturiranju določa prestrukturiranje nezavarovanih finančnih terjatev, se lahko s prestrukturiranjem predvidi zmanjšanje glavnice ali podaljšanje zapadlosti teh terjatev. Če je treba prestrukturirati tudi zavarovane finančne terjatve, se lahko samo podaljša njihova zapadlost ali spremeni obrestna mera.

1.4 Namesto da prenehajo v stečajnem postopku, je družbe, ki so že postale insolventne, mogoče prestrukturirati v okviru postopka prisilne poravnave, če je verjetno, da bodo s prisilno poravnavo za upnike doseženi boljši pogoji poplačila kot v primeru stečaja. Da bi se spodbudilo prestrukturiranje insolventnih velikih in srednjih družb v postopku prisilne poravnave na podlagi, med drugim, potrebne večine v upoštevnih razredih upnikov, se s predlogom zakona uvajajo določena posebna pravila[8]. Skladno s slednjimi bo med drugim omogočeno prestrukturiranje zgolj navadnih finančnih terjatev namesto vseh navadnih terjatev, prestrukturiranje zavarovanih terjatev, oblikovanje skupnih ločitvenih pravic in prestrukturiranje z izčlenitvijo. Če bi se prestrukturirale zavarovane terjatve, se lahko taka terjatev razdeli in preoblikuje v dve novi terjatvi, zavarovano in nezavarovano, glede na tržno vrednost premoženja, ki je predmet zavarovanja, kakor se določi v postopku prisilne poravnave. Zavarovane terjatve se lahko prestrukturirajo tako, da se podaljša zapadlost ali spremeni obrestna mera. Ker ima lahko prestrukturiranje insolventnih velikih in srednjih družb v postopku prisilne poravnave pomembne učinke na stabilnost bank, je treba o začetku postopka obvestiti Banko Slovenije.

## 2. Splošne pripombe

2.1 ECB pozdravlja predlog zakona, saj širi in krepi postopke in orodja, ki so na voljo za prestrukturiranje slovenskih gospodarskih družb. Nove spremembe bi morale zagotoviti učinkovitejše možnosti za to, da se kot delujoča podjetja ohranijo tiste družbe, ki so v težavah ali so

5 Kakor so opredeljene v 55. členu ZGD-1.

6 Glej 4. člen predloga zakona, s katerim se v ZFPPIPP uvaja novi oddelek 2.3.

7 Glej opredelitev »finančne terjatve« v 3. členu predloga zakona, s katerim se v ZFPPIPP uvaja novi 20.a člen.

8 Glej 37. člen predloga zakona, s katerim se v ZFPPIPP uvaja novi oddelek 4.8.

že postale insolventne, a so po morebitnem prestrukturiranju dolgov z ekonomskega vidika sposobne dolgoročno uspešno poslovati. Še posebej v zvezi z insolventnimi družbami bi morala k uspešni izvedbi postopkov prestrukturiranja prispevati jasnejša določitev načela absolutne prednosti in pogoj, da bi morali biti upniki propadajočih družb v boljšem položaju v primeru prestrukturiranja kot v primeru prenehanja družbe v stečaju, kakor to zahteva predlog zakona.

2.2 Predlog zakona vsebuje določbe, s katerimi si prizadeva razumno in sorazmerno uravnotežiti interese dolžnikov in njihovih upnikov v procesu prestrukturiranja. Vseeno pa ECB meni, da bi predlagane pomembne spremembe obstoječe ureditve lahko spremljala ekonomska in pravna ocena učinkov, ki bi organe informirala o morebitnih učinkih uporabe postopkov prestrukturiranja, kot so določeni v predlogu zakona, na gospodarstvo nasploh in zlasti na bilance stanja in dobičkonosnost kreditnih institucij v vlogi upnikov družb, nad katerimi bi se vodili novi postopki.

2.3 Poleg tega bi bilo treba redno spremljati učinke novih postopkov in v primeru pojava tveganj za finančno stabilnost okvir revidirati, da bi se naslovili morebitni škodljivi učinki. Takšno spremljanje se zdi upravičeno zlasti zato, ker predlog zakona ureja več novih rešitev za prestrukturiranje, vključno s postopkom preventivnega prestrukturiranja velikih in srednjih družb ter posebnimi pravili za postopek prisilne poravnave nad takimi družbami, ki se izrecno nanašajo na kreditne in druge finančne institucije kot imetnike finančnih terjatev, kakor so opredeljene v predlogu zakona.

To mnenje bo objavljeno na spletni strani ECB.

V Frankfurtu na Majni, 5. novembra 2013

*Predsednik ECB*

Mario DRAGHI