



OPINION OF THE EUROPEAN CENTRAL BANK

of 30 January 2020

on the right of insolvency administrators and liquidators of credit institutions to hold funds in an account in Latvijas Banka

(CON/2020/4)

Introduction and legal basis

On 26 November 2019, the European Central Bank (ECB) received a request from the Ministry of Finance of the Republic of Latvia for an opinion on a draft law containing amendments to the Law on credit institutions¹ (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 indent of Article 2(1) of Council Decision 98/415/EC², as the draft law relates to Latvijas Banka. 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 Currently Latvian national law imposes an obligation on administrators of credit institutions that are insolvent to hold funds in an account opened at Latvijas Banka. The draft law seeks mainly to (i) change this obligation into a right, and (ii) to extend this right to liquidators of credit institutions that are being liquidated³.
- 1.2 According to the draft law, a liquidator or administrator of a credit institution may hold the funds of a credit institution that is being liquidated or a credit institution that is insolvent, including funds recovered during the liquidation or insolvency process, in a euro account in Latvijas Banka in accordance with the terms and conditions applicable to the managing of such accounts in Latvijas Banka. Only the liquidator or administrator is entitled to transfer funds to such an account in Latvijas Banka from an account of the credit institution that is to be liquidated or credit institution that is insolvent that is held at a credit institution in an EU/EEA Member State. Similarly, only the liquidator or administrator is entitled to transfer funds from such an account in Latvijas Banka to the account of the credit institution that is to be liquidated or credit institution that is insolvent. The liquidator or administrator is also entitled to keep cash in the cashier's office to the extent necessary for covering the current expenses of the liquidation or insolvency process.

¹ Kredītiestāžu likums, Latvijas Vēstnesis, 163, 24.10.1995.

² 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).

³ Pursuant to Article 6 of the Law on credit institutions, branches of third country credit institutions can exercise the existing right to keep funds in an account in Latvijas Banka during insolvency processes. Unless Article 6 of the Law on credit institutions is amended, branches of third country credit institutions that are being liquidated will also be able to exercise the right to keep funds in an account in Latvijas Banka.

- 1.3 According to the Ministry of Finance, the draft law adopts a common approach to the rights of insolvency administrators and liquidators of credit institutions in relation to the holding of funds of such credit institutions in an account opened in Latvijas Banka and the holding of cash at its cashier's office for covering current expenses of the liquidation or insolvency process.

2. General observations

2.1 *Tasks of Latvijas Banka*

- 2.1.1 Under the existing provisions of the Law on credit institutions, funds which have been obtained in the insolvency process of a credit institution by recovering or selling its assets, have to be transferred by the administrator to an account of the credit institution opened in Latvijas Banka. The draft law establishes a right (but not an obligation) of a liquidator or administrator to keep funds of a credit institution that is being liquidated or of a credit institution that is insolvent, including funds recovered during the liquidation or insolvency process, in an account in Latvijas Banka. Therefore the draft law's proposed extension of the existing arrangements for insolvency administrators to liquidators of credit institutions that are being liquidated does not confer a new task on Latvijas Banka, but is rather a technical extension of Latvijas Banka's existing task in this respect.

- 2.1.2 In addition, it should be noted that while the majority of national central banks (NCBs) in the European System of Central Banks (ESCB) do not appear to have been assigned tasks relating to the maintenance of accounts for insolvency administrators or liquidators, the ECB has identified one non-euro area Member State where an NCB has been given similar tasks. In Bulgaria, a trustee in bankruptcy can deposit funds of the credit institution that has declared bankruptcy into an account with Българска народна банка (the Bulgarian National Bank)⁴. Also, in another non-euro area Member State (Croatia), credit institutions under voluntary or compulsory liquidation are obliged to allocate and maintain required reserves in an account with Hrvatska narodna banka (the Croatian National Bank)⁵. In some other non-euro area Member States⁶, while the respective NCBs are not explicitly entrusted with a similar task of keeping funds of credit institutions that are being liquidated or that are insolvent, insolvency or liquidation as such does not automatically trigger a cancellation of the account in the respective NCB. In this regard, and also taking into account that it is generally not unusual for NCBs to provide banking services to various kinds of entities, the extended task of Latvijas Banka does not appear to be completely atypical of NCB tasks.

2.2 *Consequences of insolvency or liquidation of a credit institution in relation to Eurosystem operations*

- 2.2.1 Regarding the consequences of insolvency or liquidation of a credit institution in relation to Eurosystem monetary policy operations, each NCB in the Eurosystem is required to apply contractual or regulatory arrangements that, as a minimum, provide for events of default where, *inter alia*, a decision is made by a competent judicial or other authority to implement, in relation to

⁴ Article 72(2) of the Law on bank bankruptcy (Закон за банковата несъстоятелност).

⁵ Article 16 of the Law on Hrvatska narodna banka (Закон о Хрватској народној банци (Narodne novine br. 75/2008), Закон о измјенама и допунама Закона о Хрватској народној банци (Narodne novine br. 54/2013)).

⁶ For example in the Czech Republic and in Hungary.

the counterparty, a procedure for the winding-up of the counterparty or the appointment of a liquidator or if the counterparty is, or is deemed to be, insolvent. In the event of a procedure for the winding-up of the counterparty or for the appointment of a liquidator, the default shall be automatic, whereas in the event the counterparty is, or is deemed to be, insolvent, the default may be automatic⁷.

2.2.2 Regarding the consequences for opening an insolvency process in relation to a credit institution participating in a TARGET2 component system, the central bank or component operator shall immediately terminate without prior notice or suspend the participant's participation in its TARGET2 component system if, inter alia, an insolvency process (defined as any collective measure provided either to wind up the participant or to reorganise it, where such measure involves the suspending of, or imposing limitations on, transfers or payments⁸) is opened in relation to the participant⁹. Liquidation is not independently specified as the grounds for termination of participant's participation in TARGET2 component and it is up to the legal order of each Member State to ascertain under the national law whether liquidation is a part of the insolvency process for the purpose of application of Guideline ECB/2012/27 of the European Central Bank¹⁰. In Latvia, a credit institution can undergo a liquidation process in the event of, inter alia, insolvency pursuant to Article 126(1)3) of the Law on credit institutions. If, however, the liquidation process is initiated prior to and/or in the absence of the credit institution becoming insolvent (for example, due to revocation of a banking licence or in the event of self-liquidation) a participant's participation in TARGET2 could be terminated due to the participant's failure to meet access criteria specified in Article 17(1)(b) of Guideline ECB/2012/27.

2.2.3 Against this backdrop, the rights of administrators of credit institutions that are insolvent and liquidators of credit institutions that are being liquidated to hold funds in accounts opened at Latvijas Banka under the draft law have no implications for Eurosystem operations. The funds held in such accounts shall be treated in accordance with the relevant rules adopted by the Governing Council of the ECB, including the application of the negative deposit facility rate¹¹.

2.2.4 The monetary financing prohibition set out in Article 123(1) of the Treaty prohibits, inter alia, overdraft facilities or any other type of credit facility with NCBs in favour of the public sector. The precise scope of application of the monetary financing prohibition is further clarified by Council Regulation (EC) No 3603/93¹² which makes it clear that the prohibition includes any financing of

⁷ Articles 165(1) and 165(2) of Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60) (OJ L 91 2.4.2015, p.3).

⁸ Point (j) of Article 2 of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45).

⁹ Articles 2(43) and 17(1) of Guideline 2013/47/EU of the European Central Bank of 5 December 2012 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2) (ECB/2012/27) (OJ L 30, 30.1.2013, p.1).

¹⁰ Guideline ECB/2012/27 of the European Central Bank of 5 December 2012 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2) (OJ L 30, 30.1.2013, p.1).

¹¹ To the extent that such funds qualify as non-monetary policy deposits other than government deposits, reference is made to Article 4(2) of Guideline (EU) 2019/671 of the European Central Bank of 9 April 2019 on domestic asset and liability management operations by the national central banks (ECB/2019/7) (OJ L 113, 29.4.2019, p. 11).

¹² 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). The provisions of Articles 104 and 104b(1) of the Treaty establishing the European Community are now laid down in Articles 123 and 125(1) of the Treaty.

the public sector's obligations vis-à-vis third parties. National legislation that provides for the financing by an NCB of credit institutions other than in connection with central banking tasks (such as monetary policy, payment systems or temporary liquidity support operations) would be incompatible with the monetary financing prohibition. In particular, the support of credit institutions that are insolvent and/or other financial institutions that are insolvent would be incompatible with this prohibition. The rationale is that by financing a credit institution that is insolvent, an NCB would be assuming a government task¹³. Against this backdrop, no overdraft or other type of credit facility in favour of administrators of credit institutions that are insolvent or liquidators of credit institutions that are being liquidated holding accounts at Latvijas Banka would be possible.

2.3 *Effect of the task on financial or organisational capacity of Latvijas Banka*

Under the draft law, Latvijas Banka will be able to access the necessary resources to carry out this task. Thus, Latvijas Banka will only hold funds of credit institutions that are being liquidated in accordance with terms and conditions applicable to the managing of such accounts in Latvijas Banka of Latvijas Banka, which will allow Latvijas Banka to set and apply fees for the provision of the respective service to a credit institution that is being liquidated. The draft law permits transfers only between the Latvijas Banka account of a credit institution that is being liquidated and accounts of that credit institution in other credit institutions in an EU/EEA Member State. This means that fund transfers from the Latvijas Banka account of the credit institution under liquidation to creditors or other entities will not be possible, and that fund transfers from the credit institution that is being liquidated to such creditors would be executed out of the relevant account in a credit institution¹⁴. Considering the limited functionality of the account maintained at Latvijas Banka, it is expected that the account at Latvijas Banka would be used by a credit institution that is being liquidated for a very limited number of transactions. In this respect, it is not expected that Latvijas Banka will have to dedicate significant additional human, technical and financial resources to perform this extended task.

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

Done at Frankfurt am Main, 30 January 2020.

[signed]

The President of the ECB

Christine LAGARDE

¹³ See ECB Convergence Report 2018, available on the ECB website at www.ecb.europa.eu.

¹⁴ The obligation of a liquidator to settle creditors' claims as prescribed in Section IX of the Law on credit institutions remains unchanged by the draft law.