



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 28 May 2019

on judicial relief granted to former holders of qualified bank credit

(CON/2019/20)

Introduction and legal basis

On 12 April 2019 the European Central Bank (ECB) received a request from the Vice-President of the Slovenian National Assembly for an opinion on a draft law on judicial relief granted to former holders of qualified bank credit (hereinafter the 'draft law') prepared by the National Council of the Republic of Slovenia.

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/EC¹ as the draft law relates to Banka Slovenije, rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets and the tasks conferred upon the ECB pursuant to Article 127(6) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft law

1.1 The main objective of the draft law is to remedy the unconstitutionality, as declared by the Constitutional Court of the Republic of Slovenia (hereinafter the 'Constitutional Court') in Decision No U-I-295/13-260 of 19 October 2016 (hereinafter the 'Constitutional Court's Decision')², of certain provisions of the Law on banking (hereinafter the 'ZBan-1')³ governing Banka Slovenije's liability for damages with respect to extraordinary measures imposed by Banka Slovenije. The provisions assessed by the Constitutional Court⁴ authorised Banka Slovenije to adopt extraordinary measures to write-down or convert qualified liabilities during the reorganisation of a bank that failed or was likely to fail, to meet minimum requirements for capital and liquidity, to an extent that could result in the withdrawal of their banking authorisation.

¹ Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

² Odločba o ugotovitvi, da je bil 350.a člen Zakona o bančništvu v neskladju z Ustavo, Odločba o ugotovitvi, da je bil 265. člen Zakona o reševanju in prisilnem prenehanju bank v neskladju z Ustavo, Odločba o ugotovitvi, da členi 253, 253a, 253b, 261a, 261b, 261c, 261d, 261e, drugi odstavek 262.b člena, ter členi 346, 347 in 350 Zakona o bančništvu niso bili v neskladju z Ustavo, Odločba o ugotovitvi, da 41. člen Zakona o spremembah in dopolnitvah Zakona o bančništvu ni bil v neskladju z Ustavo, *Uradni list Republike Slovenije št. 71/16*.

³ *Zakon o bančništvu, Uradni list Republike Slovenije št. 131/06*.

⁴ Articles 253, 253.a, 253.b, 260.a, 260.b, 261.b, 261.c, 261.d, 261.e, 262.a, 262.b(2), 346, 347, 350 and 350.a of ZBan-1.

- 1.2 While the Constitutional Court confirmed that the legal basis for the extraordinary measures imposed in 2013 and 2014 by Banka Slovenije in respect of the write-down of subordinated instruments was in line with the Constitution of the Republic of Slovenia⁵, it held that the provisions of Article 350.a of the ZBan-1 providing for judicial relief to be unconstitutional. This conclusion was based on the Constitutional Court's finding that exercising judicial relief under Article 350.a of the ZBan-1 did not afford effective judicial protection to former holders of qualified bank credit affected by Banka Slovenije's extraordinary measures. The Constitutional Court decided that the legislator must remedy the unconstitutionality within six months of the publication of the Constitutional Court's decision and provided the legislator with further guidance on how best to ensure more effective judicial protection.
- 1.3 The main purpose of the draft law is to remedy the unconstitutionality of the judicial relief afforded to former holders of qualified bank credit affected by Banka Slovenije's extraordinary measures, as declared by the Constitutional Court.
- 1.4 The draft law codifies special procedural rules of judicial redress for the former holders of qualified bank credit, which deviate from the general rules and, inter alia, enable legal proceedings against a particular decision on extraordinary measures to be reviewed in a "sample procedure", meaning that the court reviews one claim, while other procedures are put on hold and a decision is then applied to other claims. Any action for compensation may be filed at the latest within twelve months from the entry into force of the draft law.
- 1.5 The draft law regulates those proceedings in which the former holders of qualified bank credit are seeking judicial protection under civil law on the basis of Article 350.a of the ZBan-1.
- 1.6 Article 350.a of the ZBan-1 stipulates that shareholders, creditors, and other persons whose rights are affected due to the effects of an order by Banka Slovenije on an extraordinary measure may claim damages from Banka Slovenije in accordance with Article 223.a of the ZBan-1, if they prove that the loss that has arisen due to the effects of the extraordinary measure is higher than it would have been had the extraordinary measure not been adopted. Article 223.a of the ZBan-1 stated that Banka Slovenije and all of the persons acting on its behalf should be acting with the diligence of a good expert when exercising their supervisory functions. As confirmed by the Constitutional Court, the liability of Banka Slovenije under Article 350.a of the ZBan-1 is a *sui generis* liability (specially determined liability)⁶.
- 1.7 The draft law refers to the provisions of the ZBan-1 for the criteria by which the court establishes whether a claimant has a right to compensation. It provides guidelines for the court on how to establish a right to compensation. When determining whether a claimant has a right to compensation, the court should primarily establish whether extraordinary measures relating to qualified liabilities were adopted by the Banka Slovenije in accordance with, and subject to the fulfillment of, the conditions laid down in the ZBan-1⁷. The court should, verify whether (a) the

⁵ *Ustava Republike Slovenije, Uradni list Republike Slovenije št. 33/91-I.*

⁶ See paragraph 120 of the Constitutional Court's Decision.

⁷ Article 253.a(1) and Articles 261.a to 261.d ZBan-1.

assessment of the fulfillment of the conditions for adoption of extraordinary measures was incorrect, (b) the obligations were not treated in line with the provisions of the ZBan-1, and (c) the assessment was not in line with the International Financial Reporting Standards (hereinafter the 'IFRS')⁸ and the relevant legislation applicable at that time.

- 1.8 To determine whether the conditions laid down in the ZBan-1⁹ were accurately assessed, the main aspects that the court should verify, are whether: (a) the method and the premise underlying the method used in the assessment were in breach of the relevant provisions of the ZBan-1 applicable at that time, Law on companies¹⁰ or Law on measures to strengthen the stability of banks¹¹; (b) the methods and premise underlying the methods used in the assessment were in breach of the IFRS or other legislation applicable at that time; (c) the method of obtaining the data used in the preparation of the assessment gives rise to a reasonable doubt as to whether correct source data were used and whether this affected the assessment; (d) the data used in the assessment was used incorrectly and whether this affected the assessment, and (e) there is reasonable doubt concerning the professionalism of the person who performed the valuation of the assets of the bank that was used for the assessment to such an extent that it would be an unsuitable basis for a decision¹².
- 1.9 To determine whether the valuation of liabilities was performed in line with the provisions of the ZBan-1 applicable at that time¹³, the main aspects that the court should verify are whether: (a) the method and the premise underlying the method used in the assessment, to an extent that impacted the assessment, were in breach of the provisions of the ZBan-1 applicable at that time, Law on Companies, Law on measures to strengthen the stability of banks, the IFRS and other relevant legislation applicable at that time; (b) the methods and premise underlying the methods used in the assessment were used wrongly or in breach of the relevant legislation applicable at that time; (c) the method of obtaining the data used in the preparation of the assessment gives rise to a reasonable doubt as to whether original source data were used and whether this affected the assessment; (d) the data used in the assessment was used incorrectly and whether this affected the assessment, and (e) the assessment of the premise and capital requirements, which were the basis for the preparation of the assessment, were in breach of the IFRS or the relevant legislation, as applicable at that time¹⁴.

⁸ Available on the IFRS Foundation's website at www.ifrs.org.

⁹ The conditions laid down in Article 253.a of ZBan-1 are as follows: (a) an increase in risk is prevailing in relation to the bank; (b) there are no circumstances indicated showing that the reasons for this increased risk are likely to be eliminated within an appropriate time, (c) it is not likely that Banka Slovenije could take other measures on the basis of this act for the bank to achieve short-term and long-term capital adequacy or to achieve an appropriate liquidity position within an appropriate time; and (d) extraordinary measures are in the public interest to prevent a threat to the stability of the financial system.

¹⁰ *Zakon o gospodarskih družbah, Uradni list Republike Slovenije št. 65/09.*

¹¹ *Zakon o ukrepih Republike Slovenije za krepitev stabilnosti bank, Uradni list Republike Slovenije št. 105/12.*

¹² See Article 9(2) of the draft law.

¹³ Pursuant to Article 261.b of ZBan-1 the assessment of a bank's assets is based on the following: i) the amount of the repayment of qualified liabilities from the bank's assets is based on the presumption of a non-going concern bank ii) the issue value of shares to be issued for the increase of the bank's initial capital through the conversion of the qualified liabilities is based on the presumption of a going concern bank.

¹⁴ See Article 9(3) of the draft law.

- 1.10 If the court establishes that the conditions for the imposition of extraordinary measures were not fulfilled or that qualified liabilities were not treated correctly, the court would have to establish what would have been the most likely treatment of qualified liabilities had they been treated correctly or had no extraordinary measures been imposed, and the difference in value of qualified liabilities in such a case in comparison with their actual treatment.
- 1.11 Thereby, the damages are set as the difference between the actual and most likely treatment of the qualified liabilities¹⁵. The basis for damages to be calculated by the court will include the amount of unpaid principal in qualified liabilities that had a due date, or the book value of qualified liabilities without a due date, and the prescribed interest rate¹⁶.
- 1.12 The draft law regulates claims for damages filed against Banka Slovenije pursuant to the relevant provisions of the ZBan-1 by the former holders of qualified liabilities, who were worse off due to the adoption of the extraordinary measures. According to the explanatory memorandum¹⁷, any compensation will be paid solely by Banka Slovenije. The draft law also provides for the Republic of Slovenia, in its role as a former holder of qualified liabilities, to make a claim against Banka Slovenije through the State Attorney's office.
- 1.13 The draft law also lays down rules for the disclosure of documents and information in relation to any decision on extraordinary measures adopted by Banka Slovenije. Banka Slovenije must establish a virtual data room for each bank in respect of which an extraordinary measure was adopted and disclose to the former holders of qualified liabilities and their advisers in full, in the original language as well as in Slovene, documents which were considered by Banka Slovenije in the adoption of the extraordinary measures. In particular, the following documentation must be disclosed: (a) the decision on extraordinary measures with all appendices and documents referenced in the decision, (b) the assessment of the relevant bank's assets, (c) all asset quality review (AQR) and stress tests, (d) the contract between the evaluator and Banka Slovenije and/or the relevant bank, (e) all documentation dealing with the Slovene economy prepared by Roland Berger and Oliver Wyman for the period between September 2013 and June 2014 which are in the possession of Banka Slovenije, (f) all minutes of the steering committee and operating committee, (g) loan files with an explanation how they were used in the valuation, (h) samples of real estate valuations and (i) other documents used in the assessment¹⁸. Access to such documents will be subject to confidentiality requirements.
- 1.14 The draft law provides that the costs of legal proceedings will be paid by the State.

2. Observations

2.1 *Prohibition of monetary financing*

- 2.1.1 The ECB has already delivered opinions on three earlier versions of the draft law prepared by the

¹⁵ See Article 10 of the draft law.

¹⁶ See Article 11 of the draft law.

¹⁷ See point 3 of the introductory part of the explanatory memorandum.

¹⁸ See Article 4 of the draft law.

Government of the Republic of Slovenia¹⁹. Under the first version of the draft law, compensation for damages incurred as a result of the extraordinary measures was required to be paid either by Banka Slovenije or the State, and if no liability could be attributed to Banka Slovenije, compensation was required to be paid by the State²⁰. Under the second version of the draft law, even though Banka Slovenije would be liable for damages, provision was also made for Banka Slovenije to file an action against the State in order to prove in a separate court procedure that Banka Slovenije was not liable for the damages resulting from the imposition of the extraordinary measures²¹. The third version of the draft law did not make any reference to the liability of the State²². Similarly to the latter, the current version of the draft law does not make any reference to the liability of the State. It however stipulates that the costs of legal proceedings will be paid by the State.

2.1.2 Against this background, the ECB reiterates the observations made in its previous opinion on this matter²³. As noted therein²⁴, a requirement that Banka Slovenije must pay compensation for damages, to the extent that it results in Banka Slovenije assuming the liability of the Republic of Slovenia, would not be in line with the monetary financing prohibition laid down in Article 123 of the Treaty²⁵. As repeatedly noted by the ECB, while resolution tasks may be considered to be central banking tasks, provided that they do not undermine the independence of a national central bank (NCB) in accordance with Article 130 of the Treaty, the discharge of these tasks by NCBs may not extend to the financing of resolution funds or other financial arrangements related to resolution proceedings as these are governmental tasks²⁶. In this respect, it is noted that Directive 2014/59/EU of the European Parliament and of the Council²⁷ provides that the resolution financing arrangements may be used to pay compensation to shareholders and creditors if the valuation carried out for the purposes of assessing whether shareholders and creditors would have received better treatment if the institution under resolution had entered into normal insolvency proceedings determines that any shareholder or creditor has incurred greater losses than they would have incurred under normal insolvency proceedings²⁸. It is also noted that Regulation (EU) No 806/2014 of the European Parliament and of the Council²⁹ envisages that, on the one hand, the resolution

19 See Opinion CON/2017/16, Opinion CON/2017/41 and Opinion CON/2019/13.

20 See paragraph 1.4 of Opinion CON/2017/16.

21 See paragraph 1.4 of Opinion CON/2017/41.

22 See paragraphs 1.6 and 2.1.1 of Opinion CON/2019/13.

23 See paragraph 2.1.2 of Opinion CON/2019/13.

24 See also paragraph 2.1 of Opinion CON/2017/16 and paragraph 2.1 of Opinion CON/2017/41.

25 For the purposes of the monetary financing prohibition, Article 1(1)(b)(ii) of 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) defines 'other type of credit facility', inter alia, as 'any financing of the public sector's obligations vis-à-vis third parties'.

26 See, e.g. paragraph 3.2.3 of Opinion CON/2016/28 and paragraph 2.1.2 of Opinion CON/2019/13.

27 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

28 See Articles 75 and 101(1)(e) of Directive 2014/59/EU.

29 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform

fund may be used to pay compensation to shareholders or creditors if, following a valuation, they have incurred greater losses than they would have incurred under normal insolvency proceedings while on the other hand, in the case of non-contractual liability, the Single Resolution Board would compensate for any damage caused by it or by its staff in the performance of their duties³⁰. The draft law should establish liability arrangements which clarify that Banka Slovenije is not liable to pay compensation for damages in circumstances that mirror the compensation provided for under Directive 2014/59/EU and Regulation (EU) No 806/2014 to be paid from resolution financing arrangements to shareholders or creditors when a second independent valuation (carried out after resolution actions have been effected) determines that shareholders or creditors have incurred greater losses than they would have incurred under normal insolvency proceedings, as otherwise, Banka Slovenije would *de facto* finance extraordinary measures akin to resolution proceedings. Banka Slovenije may not finance a government task.

- 2.1.3 In addition, the ECB notes that Article 258 of the Treaty empowers the European Commission to bring a case before the Court of Justice of the European Union where a Member State has failed to fulfil an obligation under the Treaties, e.g. by way of enacting national legislation incompatible with the Treaties. Such action for infringement of Union law by a Member State covers also infringement proceedings in connection with the prohibition on monetary financing laid down in Article 123 of the Treaty. In addition, under Article 271(d) of the Treaty the Governing Council of the ECB has in respect of NCBs the same powers as those conferred upon the Commission in respect of Member States by Article 258 of the Treaty. Consequently, if the ECB considers that an NCB has infringed an obligation under the Treaties, including where the monetary financing prohibition is concerned³¹, the ECB may bring an action for failure to fulfil obligations against that NCB before the Court³².

2.2 *Financial independence of Banka Slovenije*

As the ECB has repeatedly stated³³, Member States may not put their central banks in a position where they have insufficient financial resources and inadequate net equity to carry out their ESCB or Eurosystem-related tasks, as well as their national tasks. Consequently, the impact of the draft law on the financial resources of Banka Slovenije and its financial independence should be carefully considered should there be a possibility that Banka Slovenije could lose a significant amount of its reserves due to compensation for damages to be paid under the draft law.

2.3 *Professional secrecy*

- 2.3.1 As noted by the ECB in its opinions on earlier versions of the draft law, national legislation should be compatible with obligations to maintain professional secrecy imposed by Union law, in particular

rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

³⁰ See Articles 76(1)(e) and 87(3) of Regulation (EU) No 806/2014.

³¹ See paragraph 2 of Opinion CON/2005/50 and paragraph 3.2.2 of Opinion CON/2010/30.

³² Article 35.6 of the Statute of the ESCB and of the ECB. See also Recital 9 of Council Regulation (EC) 3603/93 according to which, notwithstanding the role assigned to the Commission pursuant to Article 258 of the Treaty, it is for the ECB, pursuant to Article 271(d) of the Treaty, to ensure that NCBs honour the obligations laid down by the Treaty.

³³ See paragraph 3.3 of Opinion CON/2014/24, paragraph 2.2 of Opinion CON/2014/27, paragraph 3.1.1 of Opinion CON/2014/56, paragraph 2.3 of Opinion CON/2017/17 and paragraph 2.2 of Opinion CON/2019/13.

by Article 53 of Directive 2013/36/EU of the European Parliament and of the Council³⁴. In this respect, the ECB considers that except for the outcome of stress tests, the publication of which is explicitly permitted under Article 53(3) of Directive 2013/36/EU, the stress test reports, AQR and asset valuations relating to individual supervised banks are to be regarded as confidential information. Disclosure of such confidential information can generally only be permitted in cases specified in Article 53(1) of Directive 2013/36/EU, which does not include disclosure to all the claimants envisaged under the draft law as disclosure is only permitted in cases of civil proceedings in connection with cases where a credit institution has been declared bankrupt or is being compulsorily wound up³⁵.

2.3.2 In order to ensure the adequate protection of confidential supervisory information, the disclosure of stress test reports and minutes of the steering and operating committees to the shareholders or creditors who were directly affected by the extraordinary measures taken by Banka Slovenije and therefore have a legitimate legal interest as defined by the Constitutional Court³⁶ should be done without confidential information being disclosed.

2.4 *Miscellaneous*

2.4.1 Finally, as previously noted by the ECB³⁷, pursuant to Article 33 of Council Regulation (EU) No 1024/2013³⁸, from 3 November 2013 onwards, in view of the imminent assumption of its prudential supervisory tasks under Regulation (EU) No 1024/2013, the ECB was authorised to require the national competent authorities, including Banka Slovenije, together with credit institutions, financial holding companies, mixed financial holding companies and mixed-activity holding companies of euro area Member States, as well as persons belonging to these entities and third parties to whom these entities had outsourced functions or activities, to provide all relevant information for the ECB to carry out a comprehensive assessment, including a balance-sheet assessment, of credit institutions in euro area Member States. The comprehensive assessment conducted by the ECB in this context comprised two components, including an AQR, which was a point-in-time assessment of the accuracy of the carrying value of banks' assets as on 31 December 2013. The AQR was undertaken by the ECB and the national competent authorities, including Banka Slovenije, and was based on a uniform methodology and harmonised definitions. The comprehensive assessment was based on Regulation (EU) No 575/2013 of the European Parliament and of the Council³⁹ and

³⁴ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

³⁵ See the judgement of the Court of Justice of 19 June 2018, *Baumeister*, C-15/16, ECLI:EU:C:2018:464; the judgement of the Court of Justice of 13 September 2018, *UBS Europe and Others*, C-358/16, ECLI:EU:C:2018:715; and the judgement of the Court of Justice of 13 September 2018, *Buccioni*, C-594/16, ECLI:EU:C:2018:717.

³⁶ See paragraph 123 of the Constitutional Court's Decision.

³⁷ See paragraph 2.9 of Opinion CON/2017/41 and paragraph of 2.4.2 of Opinion CON/2019/13.

³⁸ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

³⁹ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

Directive 2013/36/EU⁴⁰. The ECB notes that the judicial review of the comprehensive assessment, including the underlying uniform methodology, conducted by the ECB in this respect falls outside the competence of the national courts, and falls exclusively within the competence of the Court of Justice of the European Union. It would be useful, to avoid any possible doubt on this issue, to introduce a provision into the draft law to clarify this particular point, so that any possible discrepancies between the draft law and Union law in this respect can be avoided.

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

Done at Frankfurt am Main, 28 May 2019.

[signed]

The President of the ECB

Mario DRAGHI

⁴⁰ See pages 2 to 4 of the European Central Bank, Aggregate Report on the Comprehensive Assessment: Summary (October 2014), available on the ECB's website at www.ecb.europa.eu.