EUROPEAN CENTRAL BANK

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OPINION OF THE EUROPEAN CENTRAL BANK

of 15 June 2016

on amendments to the Law on Hrvatska Narodna Banka

(CON/2016/33)

Introduction and legal basis

On 24 May 2016 the European Central Bank (ECB) received a request from the Ministry of Finance of the Republic of Croatia for an opinion on draft amendments to the Law on Hrvatska Narodna Banka (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/EC[1], as the draft law relates to Hrvatska Narodna Banka (HNB). 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

The draft law proposes to amend the Law on Hrvatska Narodna Banka (1) to enable the State Audit Office to perform an annual audit of HNB's prepared financial statements and overall operations of HNB; (2) to require HNB to submit its Annual Report on its work and operations to the Croatian Parliament as well as the semi-annual information on financial standing, the accomplished level of price stability and the implementation of monetary policy, where they will be discussed and voted on at the Parliament's plenary session; and (3) to reduce the permissible number of 6-year terms of office of the Governor and other members of HNB's Council to a maximum of two terms.

2. Specific observations

2.1 State Audit Office's audit of HNB

2.1.1 The principle of institutional independence referred to in Article 130 of the Treaty and Article 7 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB' or the 'Statute') refers to the fact that the exercise of central bank powers and the performance of the tasks and duties conferred on central banks must not be subject to external instructions or government influence. In particular, where a national central bank (NCB)'s operations are subject to the control of a state audit office or similar body charged with controlling the use of public finances, the scope of the control (i) should be clearly defined by the

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).

legal framework, (ii) should be without prejudice to the activities of the NCB's independent external auditors to examine all books and accounts of the NCB[2], and further, in line with the principle of institutional independence, (iii) should comply with the prohibition on giving instructions to an NCB and its decision-making bodies and (iv) should not interfere with the NCB's ESCB-related tasks[3]. The state audit should be done on a non-political, independent and purely professional basis[4].

2.1.2 The ECB understands that the audit performed by the State Audit Office is generally governed by the provisions of the current Law on the State Audit Office. Its provisions stipulate that an audit includes a procedure for examining the auditee's financial transactions in terms of the legal use of funds and for assessing the effectiveness and efficiency of the auditee's operations and how effectively the auditee's general objectives were met or how effectively the objectives of the auditee's individual financial transactions, programmes and projects were met. Furthermore, the auditee must comply with audit findings and notify the State Audit Office of the actions taken in response to the audit findings. It follows that the State Audit Office would be empowered to assess whether HNB meets its general objectives, including its primary objective of maintaining price stability. These provisions of the current Law on the State Audit Office in conjunction with the relevant provisions of the draft law are not in line with the principle of central bank independence referred to in Article 130 of the Treaty and Article 7 of the Statute of the ESCB. There are no provisions to establish a framework for the public audit of HNB that respects HNB's independence under the Treaty and the Statute of the ESCB, and prohibits external instructions and interference with HNB's ESCB-related tasks or with the activities of HNB's independent external auditors. Therefore the draft law would need to be adapted to comply with the requirements referred to in paragraph 2.1.1.

2.1.3 According to the current Law on the State Audit Office, the legal representative of the audited entity is obliged, for the purposes of the audit, to provide the certified state auditor with all documentation classified as a business secret or any other type of secret. Under Article 37 of the Statute of the ESCB members of the governing bodies and the staff of NCBs are required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy. The primacy of Union law and the rules adopted thereunder means that national laws on access by third parties (such as the State Audit Office) to documents may not lead to infringements of the ESCB's confidentiality regime. The access of a state audit office or similar body to an NCB's information and documents must be limited and must be without prejudice to the ESCB's confidentiality regime to which the members of NCBs' decision-making bodies and staff are subject[5]. Hence, access by the State Audit Office to HNB's confidential information must be limited to that which is strictly necessary for the performance of the state auditor's statutory tasks. Such access must also be without prejudice both to HNB's independence and to the ESCB confidentiality regime, to which the members of HNB's decision-making bodies and staff are subject. In addition, the relevant legal provisions in the draft law should be amended to stipulate that the State Audit

2 For the activities of the independent external auditors of the NCBs see Article 27.1 of the Statute of the ESCB.

3 See the ECB's Convergence Report, June 2014, p. 26 and Opinions CON/2011/9 and CON/2011/53. All ECB Opinions and Convergence Reports are published on the ECB website at www.ecb.europa.eu.

4 See the ECB's Convergence Report, June 2014, p. 26.

5 See the ECB's Convergence Report, June 2014, p. 27.

Office must safeguard the confidentiality of information and documents disclosed by HNB to the same extent as the professional secrecy provisions applied by HNB[6].

2.2 Croatian Parliament's vote on HNB's Annual Report

2.2.1 On the basis of the explanatory memorandum to the draft law, the ECB understands that the reference in the draft law to HNB's obligation to 'submit the Annual Report', implies that the Croatian Parliament would discuss and vote upon the Annual Report. Although the explanatory memorandum states that the draft law clearly defines that HNB's Annual Reports are discussed and voted upon at a plenary session of the Croatian Parliament, it is not clear from the draft law what type of decision the Croatian Parliament would adopt on the Annual Report and what the consequences or implications of the Croatian Parliament's vote on the Annual Report might be. Furthermore, in addition to the HNB's obligation to 'submit the Annual Report' to the Croatian Parliament and its implied authority to discuss and vote upon the Annual Report, the proposed wording[7] provides that semi-annual information on financial standing, on the level of price stability achieved and on the implementation of monetary policy should be submitted to the Croatian Parliament. Although the explanatory memorandum to the draft law does not expressly mention this, the proposed wording in the draft law implies that the semi-annual information shall be subject to discussion and voting by the Parliament in the same manner as the HNB's Annual Report.

2.2.2 In line with the principle of institutional independence under Article 130 of the Treaty and Article 7 of the Statute of the ESCB the NCBs and the members of their decision-making bodies are prohibited from seeking or taking instructions from Union institutions, bodies or agencies, from any government of a Member State or from any other body. In addition, the governments of the Member States are prohibited from seeking to influence the members of the NCBs' decision-making bodies whose decisions may affect the fulfilment of the NCBs' ESCB-related tasks. If national legislation mirrors Article 130 of the Treaty and Article 7 of the Statute, it should reflect both prohibitions and not narrow the scope of their application.

2.2.3 Furthermore, the rights of third parties to approve, suspend, annul or defer an NCB's decisions are incompatible with the Treaty and the Statute as far as ESCB-related tasks are concerned[8]. Therefore, the Croatian Parliament's competence to vote on and adopt a decision on HNB's Annual Report on its activities, semi-annual information, annual financial statements and auditor's report could affect the institutional independence of HNB, as it goes beyond the transparency and accountability obligation of a central bank towards the national Parliament. The ECB notes that, in general, dialogue between NCBs and third parties is welcome and compatible with central bank independence, provided that (1) this does not result in interference with the independence of the members of the NCB's decision-making bodies; (2) the special status of Governors in their capacity as members of the ECB's General Council is fully respected; and (3) confidentiality requirements resulting from the Statute of the ESCB are observed. A decision of the Croatian Parliament as regards HNB's Annual Report, semi-annual information, annual financial statements or auditor's report must not result in any direct or indirect instructions being given to HNB, its decision-making

6 'See the ECB's Convergence Report, June 2016, Chapter 7.5.3'.

7 See Article 2 of the draft law (which amends Article 62, paragraph 1 of Law on HNB).

8 See the ECB's Convergence Report, June 2014, p. 22.

bodies or its members, for example as regards amending HNB's Annual Report. Moreover, any right of the Parliament to approve, suspend, annul or defer HNB's decisions would be contrary to HNB's institutional independence under the Treaty and the Statute of the ESCB[9].

2.3 Reduction of the number of terms of office of HNB's Governor and the other members of HNB's Council

2.3.1 In view of the principle of central bank independence laid down in Article 130 of the Treaty and Article 7 of the Statute of the ESCB, Governors and other members of NCBs' decision-making bodies involved in the performance of ESCB-related tasks may not be dismissed for reasons other than those mentioned in Article 14.2 of the Statute. Therefore, the current members of HNB's Council should be allowed to complete their current terms of office, irrespective of how many terms of office have already been served in the past, and the draft law should be adapted to explicitly guarantee the completion of their current terms.

2.3.2 Moreover, the ECB understands, in accordance with the principles of the rule of law, legal safety, legal predictability and legal certainty under the Croatian Constitution, that the requirement that the members of the HNB Council may be appointed for a maximum of two terms of office does not apply in respect of terms which were served before the date the draft law comes into effect[10]. This implies that the current and past members of the HNB Council would be able to serve two terms in the future, and that terms served in the past are not included and do not count towards the calculation of the limitation of two terms. The ECB welcomes this from the perspective of legal certainty.

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

Done at Frankfurt am Main, 15 June 2016.

[signed]

The President of the ECB

Mario DRAGHI

9 See Paragraphs 3.5, 3.6 and 3.7 of the Opinion CON/2008/31.

10 See Decision of the Constitutional Court of the Republic of Croatia U-III-930/2015, 31 March 2015.