EUROPEAN CENTRAL BANK

EUROSYSTEM

EN **ECB-PUBLIC**

# OPINION OF THE EUROPEAN CENTRAL BANK

## of 13 December 2016

## on the auditing of Banka Slovenije's business operations

## (CON/2016/59)

**Introduction and legal basis**

On 11 November 2016 the European Central Bank (ECB) received a request from the Slovenian Ministry of Finance for an opinion on a draft law amending the Law on Banka Slovenije (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 Banka Slovenije. 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 Banka Slovenije is currently subject to an audit of its financial accounts pursuant to Article 27.1 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'). The purpose of the draft law is to establish rules for the auditing of Banka Slovenije's operations by the national Court of Audit[2] in a manner compatible with the principle of central bank independence[3].

1.2 Pursuant to the draft law, the Court of Audit must audit the regularity and 'efficiency' of Banka Slovenije's business operations. However, a footnote to the text of the draft law indicates that, as part of the preparatory legislative process, the Court of Audit has proposed that, under the draft law, the Court of Audit must audit the regularity and 'performance' and not the efficiency of Banka Slovenije's business operations. The Law on the Court of Audit defines the concepts of 'regularity', 'efficiency' and 'performance' audits[4]. Pursuant to Article 20(3) of the Law on the Court of Audit, (i) a 'regularity audit' means obtaining relevant and sufficient data to enable an opinion to be expressed on the compliance of an operation with regulations and guidelines that any user of public funds is required to observe in the conduct of an operation and (ii) a 'performance audit'

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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 Pursuant to Article 1 of the Law on the Court of Audit, the Court is the supreme audit institution for the supervision of state accounts, the state budget and all public spending in Slovenia. In relation to other state authorities, the Court of Audit is an autonomous and independent authority.

3 The draft law provides for the introduction of these rules by adding a new article to the Law on Banka Slovenije. Zakon o Banki Slovenije (ZBS-1) (Ur. l. RS No 72/06 – official consolidated text, and 59/11).

4 See paragraph 4.2 of Opinion CON/2015/57 and paragraph 2.2 of Opinion CON/2016/24. All ECB Opinions are published on the ECB's website at www.ecb.europa.eu.

means obtaining relevant and sufficient data to enable an opinion to be expressed on the economy, efficiency and effectiveness of a business operation[5]. Hence, an 'efficiency audit' is one of the three types of audit that are categorised as performance audits[6].

1.3 The draft law expressly excludes from the scope of audit any actions that constitute decisions on the implementation of monetary policy, in accordance with the rules established by the decision-making bodies of the ECB.

1.4 The draft law further provides that in the auditing of supervisory duties the audit does not cover the application and interpretation of supervisory law and practices carried out by Banka Slovenije on the basis of the Law on Banka Slovenije or other provisions and within the framework of the single supervisory mechanism (SSM) on the basis of Council Regulation (EU) No 1024/2013[7]. However, a footnote to the text of the draft law indicates that, as part of the preparatory legislative process, the Court of Audit has proposed that the reference to the Law on Banka Slovenije and other provisions should be deleted from this carve-out, with the result that the carve-out would only cover the application and interpretation of supervisory law and practices carried out by Banka Slovenije on the basis of Regulation (EU) No 1024/2013. In addition, the draft law provides that in the auditing of supervisory duties the audit does not interfere with or include the competences of Banka Slovenije, which Banka Slovenije exercises as part of the European System of Central Banks (ESCB), or the Eurosystem, or as a member of the European System of Financial Supervision, as part of the activities of the European Banking Authority, the European Systemic Risk Board, and the Single Resolution Mechanism. Moreover, the draft law provides that in the auditing of supervisory duties the audit is not so broad as to result in an indirect audit of the ECB, other members of the ESCB, or the Eurosystem.

1.5 The draft law provides that, notwithstanding the provisions of the Law on the Court of Audit, Banka Slovenije is not obliged to submit to the Court of Audit reports concerning the elimination of irregularities and inexpediencies identified. The draft law further specifies that Banka Slovenije must explain any deviation from the recommendations or requirements proposed by the Court of Audit in its audit report. However, the text of the draft law places the reference to 'requirements' in square brackets and a footnote indicates that the inclusion of this term is on the proposal of the Court of Audit.

1.6 The draft law provides that confidential information, within the meaning of Article 37 of the Statute of the ESCB, may be obtained by the Court of Audit in accordance with the rules governing the operations of the ESCB. It provides further that other confidential information, including statistical and supervisory data, whose exchange is regulated by Union rules, may be obtained by the Court of Audit in accordance with these rules. The draft law also lays down that the auditors and officers of the Court of Audit and other persons who are in any legal relationship whatsoever with the Court of Audit must keep confidential all information which they learn when auditing Banka Slovenije. If information is requested from the Court of Audit pursuant to public access legislation, the Court

5 See Article 20(3) of the Law on the Court of Audit.

6 See paragraph 2.2 of Opinion CON/2016/24.

7 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. 5).

may only disclose information of that kind under the conditions governing the disclosure of information applicable to Banka Slovenije.

1.7 The draft law clarifies that, notwithstanding the provisions of the Law on the Court of Audit, the Court of Audit has no powers to propose the dismissal of members of the Governing Board of Banka Slovenije. Furthermore, the draft law requires the Court of Audit, when exercising its auditing powers, not to interfere in the activities of independent external auditors appointed in accordance with Article 52 of the Law on Banka Slovenije.

## 2. Observations

2.1 The ECB notes that it has been consulted by the Slovenian authorities on draft legislation relating to the auditing of Banka Slovenije's operations by the Court of Audit on three occasions in recent years[8]. It is understood that the previous legislative initiatives were not adopted, and that the draft law is the product of further consultations and changes. The draft law takes into consideration, inter alia, the concerns raised by the ECB in particular as regards the protection of central bank independence. The ECB notes that some of the provisions of the draft law respond to the previous opinions of the ECB, in particular ECB Opinion CON/2016/24. The ECB reiterates the views expressed in Opinion CON/2016/24 and has the following additional comments to make in relation to the draft law.

2.2 The ECB observes that, in principle, a state audit office or similar body that controls the use of public finances, such as the Court of Audit, may undertake an audit in respect of an NCB's activities the activities and use of public finances. However, any state audit office or similar body entrusted with such competences must be subject to a number of safeguards designed to ensure compliance with the principle of central bank independence: (a) the scope of the control should be clearly defined by the legal framework; (b) the activities of the NCB's independent external auditors should not be prejudiced; (c) in line with the principle of institutional independence, as enshrined in Article 130 of the Treaty and Article 7 of the Statute of the ESCB, the audit should: (i) comply with the prohibition on giving instructions to an NCB and its decision-making bodies, (ii) not interfere with the NCB's ESCB-related tasks, and (iii) be carried out on a non-political, independent and purely professional basis[9].

2.3 The ECB notes that the draft law excludes from the scope of audit any actions representing the definition and implementation of monetary policy in accordance with rules set by the decision-making bodies of the ECB.

2.4 It is not clear whether it is the intention of the draft law also to specify that the Court of Audit's audit may not interfere with or include Banka Slovenije's competences as part of the ESCB or the Eurosystem. The relevant provision introducing this carve-out is linked to the auditing of supervisory duties only. However, the carve-out should cover Banka Slovenije's competences as part of the ESCB or the Eurosystem. Namely, if the legislative intention is not to establish a carve-out from the Court of Audit's audit in respect of Banka Slovenije's competences as part of the

8 See Opinions CON/2015/8, CON/2015/57 and CON/2016/24.

9 See paragraph 4.4 of Opinion CON/2015/8, paragraph 4.2 of Opinion CON/2015/57 and paragraph 2.1 of Opinion CON/2016/24; see also ECB Convergence Report June 2016, pp. 26-27.

ESCB or the Eurosystem, except with regard to the definition and implementation of monetary policy, this would breach the requirements of central bank independence under Article 130 of the Treaty and Article 7 of the Statute of the ESCB. As noted in paragraph 2.2 above, and in the ECB's previous opinions, central bank independence requires that the audit may not interfere with Banka Slovenije's ESCB-related tasks[10].

2.5 The ECB recognises the consideration given in the draft law to the principle of independence set out in Article 19 of Regulation (EU) No 1024/2013, according to which, the ECB and the national competent authorities when acting within the SSM must act independently and the governments of the Member States and any other bodies must respect that independence, and the respect shown for the limitations provided in Article 27.2 of the Statute of the ESCB and Article 20(7) of Regulation (EU) No 1024/2013 with regard to the supervisory tasks conferred on the ECB by that Regulation. The ECB notes that the audit carried out by the Court of Audit on Banka Slovenije's supervisory activities should (a) not extend to the application and interpretation of supervisory law and practices in the context of the SSM; (b) not interfere with and not include the tasks conferred on the ECB by Regulation (EU) No 1024/2013, and (c) not extend to result in an indirect audit of the ECB. As already noted by the ECB, the audit should also be carried out on a non-political, independent and purely professional basis[11]. The ECB understands that the audit should also not extend as to result in an indirect audit of the ECB, other members of the ESCB, or the Eurosystem. However, the current wording of the draft law could be drafted more clearly so as to expressly clarify that the audit shall not entail indirect auditing of the ECB, other members of the ESCB, or the Eurosystem.

2.6 The ECB acknowledges the express provision in the draft law indicating that Banka Slovenije is not required to submit reports to the Court of Audit concerning the elimination of irregularities and inexpediencies identified, but must explain any deviation from its recommendations. As stated in an earlier Opinion, the ECB understands that by referring only to recommendations of the Court of Audit and to the 'comply or explain' principle, the draft law would ensure that Banka Slovenije is not bound by the opinion of the Court of Audit and therefore the Court of Audit may not give instructions to Banka Slovenije[12]. However, any references in the draft law to 'requirements' in addition to recommendations of the Court of Audit would not comply with the prohibition on giving instructions to Banka Slovenije and its Governing Board.

2.7 The ECB notes that the draft law's provisions on the Court of Audit's access to confidential information make reference both to Article 37 of the Statute of the ESCB and to applicable Union laws, including those governing the exchange of statistical and supervisory information. These provisions are beneficial from the perspective of legal certainty[13]. However, insofar as it is intended to establish carve-outs under the draft law from the ambit of the Court's audit in respect of Banka Slovenije's competences as part of the ESCB, the Eurosystem and the SSM and to ensure the safeguards mentioned above, it is difficult to imagine types of confidential information within the

10 Pursuant to Article 2 of the Law on Banka Slovenije, the principle of central bank independence should be respected not only when Banka Slovenije performs ESCB-related tasks, but also when it performs national tasks. See footnote 6 of the Opinion CON/2016/24, footnote 19 of the Opinion CON/2015/8 and footnote 7 of the Opinion CON/2014/25.

11 See paragraph 2.2 of Opinion CON/2016/24 and paragraph 4.3 of Opinion CON/2015/57.

12 See paragraph 2.2 of Opinion CON/2016/24.

13 See paragraph 2.3 of Opinion CON/2016/24.

meaning of Article 37 of the Statute of the ESCB and other statistical and supervisory data whose exchange is regulated by Article 27 of Regulation (EU) No 1024/2013 and other Union law to which the Court could have access[14].

2.8 Finally, in case this draft law undergoes substantial amendments of a non-technical nature compared with the version received and opined on herein, the ECB should be consulted in relation to those amendments[15].

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

Done at Frankfurt am Main, 13 December 2016.

[signed]

*The President of the ECB*

Mario DRAGHI

14 See paragraph 3.1.6 of Opinion CON/2016/52.

15 See the Guide to consultation of the European Central Bank by national authorities regarding draft legislative provisions, dated October 2015. The Guide is available on the ECB's website at www.ecb.europa.eu.