EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 15 October 2013

on measures for bank reorganisation

(CON/2013/73)

Introduction and legal basis

On 19 September 2013, 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 banking[1] (hereinafter the 'draft law'). On 4 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 third and sixth indents 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 Banka Slovenije and 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 draft law mainly relates to 'extraordinary measures' that Banka Slovenije may impose on banks that fail or are likely to fail to meet minimum requirements for capital and liquidity in a way that would justify the withdrawal of the authorisation[3]. The extraordinary measures may be imposed on a bank with a view to either (i) restoring the bank to long-term viability pursuant to the Law on banking and other applicable laws or (ii) enabling an orderly wind-down of the bank[4].

1.2 There are four types of extraordinary measures already available to Banka Slovenije: (a) putting the bank into special administration, and appointing administrators; (b) selling all of the bank's shares; (c) increasing the share capital of the bank; and (d) transferring the bank's assets. The draft law broadens this framework of extraordinary measures to empower Banka Slovenije to reduce share capital, to write down hybrid capital instruments and subordinated liabilities of a bank, or to convert hybrid capital instruments and subordinated liabilities into common shares of a bank, to the

1 Zakon o bančništvu (ZBan-1) (Ur. l. RS No 99/2010 – official consolidated text, as amended).

2 OJ L 189, 3.7.1998, p. 42.

3 See conditions for the application of extraordinary measures in the amended Article 253a of the Law on banking.

4 See the proposed new Article 253b of the Law on banking.

extent necessary to cover losses and ensure the capital adequacy of a bank. Any exercise of this power shall adhere to the principle that no creditor shall be worse off than under normal insolvency proceedings[5].

1.3 Furthermore, the draft law revises the rules on other extraordinary measures. As regards special administration, it specifies in more detail, *inter alia*, the tasks of the administrators, which include assessing the viability of, and preparing a reorganisation plan for, the relevant bank[6]. The draft law also modifies provisions on other existing extraordinary measures, i.e. bank's share capital increase and transfer of assets[7].

1.4 Banka Slovenije will regularly assess the effectiveness of extraordinary measures in terms of their objectives. Should the bank's situation during the implementation of the extraordinary measures not improve to the extent of ensuring its long-term viability, Banka Slovenije will initiate winding up proceedings against the bank, i.e. compulsory liquidation or bankruptcy proceedings[8]. The rules on compulsory liquidation are amended to take account of the revision of the rules governing the extraordinary measures[9].

1.5 The draft law also amends the provisions on legal recourse against Banka Slovenije's decision on extraordinary measures. It further specifies limitations to Banka Slovenije's liability for damages with respect to such measures. Those affected by extraordinary measures may seek compensation if the damage suffered is greater than if no extraordinary measures had been implemented[10].

1.6 Certain amendments are also introduced in relation to the liability of members of banks' governing bodies.

2. General observations

2.1 The ECB broadly welcomes the draft law as it strengthens the tools and procedures available to Banka Slovenije for the effective reorganisation of distressed banks.

The ECB understands that Banka Slovenije's extraordinary measures serve both as tools for the restructuring[11], as well as the resolution of banks[12]. The tasks allocated to Banka Slovenije as a supervisory and resolution authority, should not affect its ability to carry out its tasks related to the European System of Central Banks as provided for by the Treaty and the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB') from an operational and financial perspective. Furthermore, Banka Slovenije, in exercising its powers, should take all measures necessary to ensure appropriate functional separation between its

5 See the amended Section 7.7.2. of the Law on banking.
6 See amendments to Articles 255a to 260b of the Law on banking.
7 See amendments to Articles 262a and 262b of the Law on banking.
8 See amendments to Article 263 of the Law on banking·
9 See amendments to Article 266 of the Law on banking.
10 See the amended Section 10.2.2. of the Law on banking.
11 See the proposed new Article 253b, point 1 of the Law on banking.
12 See the proposed new Article 253b, point 2 of the Law on banking.

supervisory and resolution tasks, on the one hand, and its monetary policy tasks, on the other hand, in line with the Treaty and the Statute of the ESCB[13].

2.2 The ECB notes that Banka Slovenije's new tools and powers in relation to bank reorganisation, in particular the power to reduce share capital and to write down or convert into common shares hybrid capital instruments and subordinated liabilities, draw from the resolution tools and powers provided for in the European Commission's proposal for a directive establishing a framework for the recovery and resolution of credit institutions and investment firms[14], which is currently going through the adoption process in the European Parliament and the Council. In this context, the ECB understands that the legislator will review the Law on banking once the above-mentioned draft directive is adopted, in order to ensure full consistency with developments at Union level. The same applies with respect to the development and implementation of the Single Supervisory Mechanism, which will confer specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions.

2.3 Union State aid rules[15] must be complied with whenever Banka Slovenije imposes reorganisation measures in the form of extraordinary measures as provided for under the Law on banking in respect of any bank and, in addition to extraordinary measures, such banks need public support to ensure their viability or orderly resolution in the event that they are not viable.

3. Specific observations

3.1 The proposed new Article 260a of the Law on banking prohibits the administrators from paying out holders of capital instruments and subordinated liabilities, where the bank's operations are to be gradually wound down, without the prior consent of Banka Slovenije. The draft law further states that Banka Slovenije will give its consent to the repayment of such instruments and liabilities where their non-payment could endanger the stability of the financial system. In line with State aid rules, such consent may be given at Banka Slovenije's discretion, but only in exceptional circumstances when Banka Slovenije considers that the stability of the financial system would be endangered. In this context, the ECB notes an inconsistency in the regime of exceptions to burden-sharing measures under the proposed new Article 260a of the Law on banking as described above and the regime under the proposed new Section 7.7.2 of the Law on banking, where no exceptions to burden-sharing are provided for.

3.2 As highlighted in previous ECB opinions on bank resolution, institutions that are failing or likely to fail should in principle, subject to a decision by the resolution authorities, be resolved using resolution tools when this is deemed necessary and in the public interest, including the prevention

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13 See paragraph 3.1 of Opinion CON/2012/101 and paragraph 3.2 of Opinion CON/2013/10.

14 Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010 (COM (2012) 280 final).

15 Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') (OJ C 216, 30.7.2013, p. 1).

of systemic risk. If the resolution authority concludes that there is no public interest concern, the institution should be liquidated under the insolvency proceedings normally applicable to such institutions under national law[16].

3.3 The draft law seeks to ensure that Banka Slovenije's decisions on extraordinary measures are recognised, and therefore enforced, in other Member States. In this respect, the ECB welcomes that the revised version of the draft law explicitly defines Banka Slovenije's extraordinary measures as reorganisation measures under Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions[17], where those measures are 'intended to preserve or restore the financial situation of a credit institution and which could affect third parties' pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims'.

3.4 Finally, the valuation of a bank's assets pursuant to the proposed new Article 261b should not be made on the assumption that the bank is a going concern, except for the purpose of determining the value of new shares in the case of an increase in share capital by means of the conversion of qualified liabilities into equity on the basis of the relevant extraordinary measure.

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

Done at Frankfurt am Main, 15 October 2013.

[signed]

The President of the ECB

Mario DRAGHI

16 See paragraph 1 of Opinion CON/2012/99.

17 OJ L 125, 5.5.2001, p. 15.