OPINION OF THE EUROPEAN CENTRAL BANK

of 3 May 2016

on the resolution and winding-up of banks

(CON/2016/28)

Introduction and legal basis

On 25 March 2016 the European Central Bank (ECB) received a request from the Slovenian Ministry of Finance for an opinion on a draft law on the resolution and winding-up of banks (hereinafter the 'draft law'). On 21 April 2016, the Ministry sent the ECB 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[1], as the draft law relates to Banka Slovenije and 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 amends the hierarchy of creditors in insolvency proceedings for a bank and provides that creditor's claims must be paid in the following order[2]:

(1) the costs of compulsory liquidation proceedings and bankruptcy proceedings;

(2) priority claims, including employee-related claims (e.g. salaries for the three months preceding the opening of bankruptcy proceedings), damages for occupational diseases and accidents at work, severance payments, certain taxes and social contributions linked to employee-related claims, etc.[3];

(3) claims comprising guaranteed deposits as well as other claims listed in Article 80(2) of the draft law, unless the claims listed in that Article fall within the category of priority claims (referred to in point (2)) or can be enforced on the basis of the right to separate satisfaction (i.e., secured claims) or the right to separation[4]. Article 80(2) of the draft law

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 See Article 207 of the revised version of the draft law.

3 See Article 21 of the Law on Financial Operations, Insolvency Proceedings and Compulsory Dissolution (ZFPPIPP) (Ur. l. RS No 13/14 – official consolidated text and 10/15 –corr.).

4 The right to separate satisfaction and the right to separation are defined in Articles 19, 20 and 22 of the ZFPPIPP. The ECB understands that creditors with a right to separation (*izločitvena pravica*) are, for example, creditors with retention of title (e.g. owners of property which is in the possession of the insolvent debtor). The assets of such creditors must be separated from the rest of the bankrupt estate and returned to these creditors. Creditors with the

lists liabilities that are excluded from the scope of the bail-in tool in accordance with Article 44 of Directive 2014/59/EU of the European Parliament and of the Council[5]. Some of these claims are secured claims, others are claims requiring separation (e.g. liabilities that arise as a result of a fiduciary relationship) and some represent priority claims (such as certain employee claims and related tax claims). The ECB thus understands that the claims that rank pari passu with the guaranteed deposits include creditors' claims that arise, primarily, from the following liabilities of a bank: (i) liabilities towards institutions, not belonging to the same group, with an original maturity of less than seven days (including, for example, very short-term inter-bank deposits), (ii) liabilities owed to systems or operators of payment and settlement systems designated according to Directive 98/26/EC of the European Parliament and of the Council[6], or liabilities owed to the participants in such systems, where the liabilities of a bank result from its participation in such systems and they have a remaining maturity of less than seven days, (iii) liabilities arising from the supply of goods or provision of commercial services that are critical to the daily functioning of the bank's operations, including IT services, utilities and the rental, servicing and upkeep of premises, and (iv) liabilities to deposit guarantee schemes;

(4) eligible deposits of investors, who are natural or legal persons and who satisfy the criteria for micro, small and medium-sized enterprises, in excess of the amounts of guaranteed deposits (i.e. EUR 100 000), including deposits that would be deemed eligible deposits if they had not been deposited at the bank's branch in a third country;

(5) other eligible deposits not included in points (3) or (4);

(6) deposits with the bank which are not considered to be eligible deposits with the bank, including: (i) deposits of banks and investment firms and other financial institutions deposited on their own behalf and for their own account; (ii) deposits of insurance companies, reinsurance companies and insurance holding companies; (iii) deposits of collective investment undertakings, including closed investment undertakings; (iv) deposits of pension funds and pension companies; (v) deposits of governments, central banks and entities which are direct or indirect users of the State budget; (vi) deposits of local communities and direct and indirect users of local communities' budgets[7];

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right to separate satisfaction (*ločitvena pravica*) are secured creditors and are thus repaid from the relevant asset. If the value of the asset securing the claim is lower than the secured claim, the difference in value will be treated as an unsecured claim pursuant to the ZFPPIPP.

5 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).

6 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).

7 It is noted that under existing Slovenian law there is already a general depositor preference similar to that described herein (see Article 365 of the Law on Banking (ZBan-2) (Ur. l. RS No 25/15) in connection with Article 329 of the old Law on Banking (ZBan-1) (Ur. l. RS No 99/10 – official consolidated text, 52/11 – corr., 9/11 – ZPlaSS-B, 35/11, 59/11, 85/11, 48/12, 105/12, 56/13, 63/13 – ZS-K, 96/13, and 25/15 – ZBan-2 and 27/26 –ZSJV).

(7) other unsecured ordinary claims (which may include, for example, certain claims arising under derivatives transactions), except claims arising from debt securities and similar instruments issued by the bank;

(8) unsecured and non-subordinated claims arising from debt securities and other similar financial instruments issued by the bank, with the exception of structured instruments which based on their characteristics satisfy the criteria set out in points (2)-(7);

(9) subordinated claims which on the basis of contractual arrangements between the parties in the event of a bank's insolvency proceedings are paid out as unsecured claims after full payment of the claims referred to in points (2)-(8), and which are not classified in the categories referred to in points (10)-(12);

(10) claims which satisfy the conditions for the bank's Tier II capital instruments, and other subordinated claims which, having regard to the contractual arrangements in the event of the bank's insolvency, are paid at the same time as claims arising from Tier II capital instruments;

(11) claims which satisfy the conditions for the bank's Tier I capital instruments, and other subordinated claims which, having regard to the contractual arrangements in the event of the bank's insolvency, are paid at the same time as claims arising from Tier I capital instruments; and

(12) claims which satisfy the conditions for the bank's common equity Tier I capital instruments, and other subordinated claims which, having regard to the contractual arrangements in the event of the bank's insolvency, are paid at the same time as claims arising from common equity Tier I capital instruments[8].

1.2 The draft law also transposes into Slovenian law certain provisions of Directive 2014/59/EU relating to the resolution of banks. In particular, the draft law regulates: (1) Banka Slovenije's responsibilities and procedures for the implementation of its tasks and powers as the banking resolution authority; (2) bank resolution planning; (3) the resolution procedures and powers related to the resolution tools. Directive 2014/59/EU has already been partially transposed into Slovenian law. The provisions relating to early intervention measures, recovery plans and intra-group financial support were transposed in the recast of the Law on Banking[9]. Banka Slovenije, which was already acting as a resolution authority at that time, was explicitly designated as a resolution authority for the purposes of Article 3 of Directive 2014/59/EU under the Law on Bank Resolution Authority and Fund[10]. The current legal framework for the resolution of banks, which is also based on Directive 2014/59/EU, enables Banka Slovenije to impose certain 'extraordinary measures'[11] on banks that are failing or likely to fail. These measures include: (a) putting the

8 See Article 207 of the draft law.

9 Law on Banking (ZBan-2), on which the ECB issued Opinion CON/2014/79. All ECB Opinions are published on the ECB's website at www.ecb.europa.eu.

10 Law on the Bank Resolution Authority and Fund (ZOSRB) (Ur. l. RS No 97/14 and 91/15). Parts of this Law were initially intended to be included in the recast of the Law on Banking, however, they were later excluded from the latter and adopted as a separate legal act. The Law on the Bank Resolution Authority and Fund was adopted in December 2014, shortly after the publication of Opinion CON/2014/79.

11 See Opinion CON/2013/73.

bank into special administration and appointing administrators; (b) selling all of the bank's shares; (c) increasing the share capital of the bank; (d) transferring the bank's assets; (e) establishing a bridge bank, and (f) reducing share capital, writing off and writing down of: (i) hybrid capital instruments, (ii) other financial instruments which must be taken into account in calculating the bank's additional capital, and (iii) subordinated liabilities of a bank, or converting such instruments and subordinated liabilities into common shares of a bank[12].

1.3 By further adapting existing national legislation to comply with the provisions of Directive 2014/59/EU, the draft law enables Banka Slovenije to take resolution measures regarding the following entities established in Slovenia: (1) banks, (2) financial institutions which are subsidiaries of a credit institution or of a financial holding company, mixed financial holding company or a mixed activity holding company, which have their head office in a Member State and are included in the supervision of the parent undertaking on a consolidated basis in accordance with Articles 6 to 17 of Regulation (EU) No 575/2013 of the European Parliament and of the Council[13], (3) financial holding companies, mixed financial holding companies or the mixed activity holding companies, which are subsidiaries of credit institutions established in a Member State; (4) financial holding companies, mixed financial holding companies and mixed activity holding companies, which are the parent undertakings of a credit institution established in a Member State; and (5) Slovenian branches of any third country credit institutions[14].

1.4 In order for Banka Slovenije to carry out resolution measures, the draft law requires adequate internal organisational measures to ensure Banka Slovenije's operational independence, as well as to avoid any potential conflict of interests in the performance of Banka Slovenije's resolution tasks on the one hand and its prudential supervisory tasks on the other[15].

1.5 The draft law takes into account the competences of the Single Resolution Board and provides that Banka Slovenije will perform resolution tasks and exercise resolution powers except in situations where the Single Resolution Board is competent in line with Regulation (EU) No 806/2014 of the European Parliament and of the Council[16]. In such cases Banka Slovenije exercises resolution tasks and powers only where this is necessary to implement the decisions of the Single Resolution Board[17]. The draft law also contains provisions that regulate a mechanism to collect and transfer, into the Single Resolution Fund, *ex ante* and extraordinary *ex post* contributions made by banks to their head offices in Slovenia. This mechanism was set up in accordance with Regulation (EU) No 806/2014 and the Agreement on the transfer and

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12 These measures can be found in the old Law on Banking (ZBan-1), which is in the relevant part still applicable as provided for in Article 405 of the recast of the Law on Banking (ZBan-2) (Ur. l. RS No 25/15), and in the Law on the Bank Resolution Authority and Fund.

13 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).

14 See Article 2 of the draft law.

15 See Article 7(2) of the draft law.

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

17 See Articles 7(1), 7(5) and 7(8) of the draft law.

mutualisation of contributions to the Single Resolution Fund. This mechanism was so far regulated under the Law on the Bank Resolution Authority and Fund.

1.6 The draft law reflects the powers and competences of the ECB within the Single Supervisory Mechanism (SSM). It stipulates that if, in accordance with Council Regulation (EU) No 1024/2013[18], the ECB is competent for the implementation of specific tasks and powers in the field of the prudential supervision of banks, Banka Slovenije as the resolution authority will take into account the views and findings of the ECB regarding the fulfilment of a bank's prudential requirements and prudential supervisory measures[19].

1.7 Under the draft law, the resolution measures include reaching the conclusion that the conditions for resolution have been met, deciding to use one or more resolution tools and using other resolution powers to implement the resolution tools. The resolution tools available to Banka Slovenije include: (i) the write-down and conversion of capital instruments tool; (ii) the sale of business tool; (iii) the bridge institution tool; (iv) the asset separation tool; and (v) the bail-in tool[20]. Moreover, Banka Slovenije also takes measures regarding asset management companies in relation to the asset separation tool and bridge banks in relation to the bail-in tool.

1.8 In addition to the provisions already cited, the draft law also regulates procedures for the compulsory winding-up of banks. Under the current legal framework, Banka Slovenije is the competent authority for the implementation of compulsory liquidation proceedings for banks and has the competence to initiate bankruptcy proceedings in relation to a bank with the relevant court[21]. The current legal framework only defines general powers in relation to liquidation and bankruptcy proceedings, and refers to a reasonable use of the instruments generally available for insolvency proceedings. Under the draft law similar powers are now conferred on Banka Slovenije for the winding-up of banks – the administration of compulsory liquidation and the initiation of judicial bankruptcy proceedings.

1.9 The draft law revises the legal framework governing compulsory liquidation and bankruptcy proceedings for banks.[22] In particular, it aims to regulate more comprehensively compulsory liquidation powers and instruments. Compulsory liquidation proceedings will always be initiated following the withdrawal or termination of a bank's authorisation, unless a bank had already fulfilled all of its obligations in relation to eligible deposits[23]. The aim of any compulsory liquidation proceedings initiated by Banka Slovenije as winding-up proceedings is to conclude the bank's operations and to repay the bank's obligations vis-à-vis depositors. Under the draft law, if the conditions for compulsory liquidation are met, Banka Slovenije will initiate the proceedings, designate one or more liquidation administrator and impose limits on the bank's business. The

18 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).

19 See Article 7(7) of the draft law. The ECB's competences within the SSM are reflected also in other provisions of the draft law.

20 See Article 25 of the draft law.

21 See Article 8 and Chapter 3 (Article 145 et seq.) of the draft law.

22 The rules are set out in the old Law on Banking (ZBan-1).

23 The deposit guarantee scheme is regulated in the Law on the deposit guarantee scheme (ZSJV) (Ur. l. RS No 27/16), on which the ECB recently issued Opinion CON/2016/6.

compulsory liquidation instruments available to Banka Slovenije include: (1) the sale of assets; (2) separation of assets; and (3) the sale of business.

1.10 With respect to the regular insolvency proceedings of other entities over which Banka Slovenije has resolution powers, as described in paragraph 1.3, the prior consent of Banka Slovenije is required under the draft law for the initiation of such proceedings[24]. Banka Slovenije is also competent to propose the initiation of insolvency proceedings regarding these entities should the conditions for their resolution not be met[25].

1.11 Lastly, the draft law also includes an amendment concerning the conditions for appointing members of a bank's supervisory board[26]. According to Article 53 of the Law on Banking which governs such conditions, a person may be appointed as a member of a bank's supervisory board if, inter alia, they enjoy the reputation and possess the qualities required to supervise the management of a bank's operations. The draft law would add a provision stating that a person is deemed not to enjoy the reputation and possess the qualities required to supervise the management of a bank's operations if that person was employed in a bank as a member of a bank's management board, a member of a bank's supervisory board, a senior executive or an employee with special authorisation for representing and entering into business relations on behalf of and in the name of an individual bank, in which the ratio of non-performing claims relative to all claims, in any individual period, was on average not less than the ratio in other banks in the country where the bank is operating, or was on average not less than the ratio in other banks in the European Economic and Monetary Union, as further specified in the draft law.

2. Scope of the opinion

The opinion focuses on (1) the insolvency hierarchy of bank creditors, (2) the new tasks conferred on Banka Slovenije as the resolution authority for banks and other financial institutions forming part of a banking group and (3) specific provisions on appointing members of a bank's supervisory board. The ECB stresses, however, that it does not opine on whether the draft law effectively implements Directive 2014/59/EU into Slovenian law. In this respect, so far as concerns the new tasks conferred on Banka Slovenije, the ECB focuses on those provisions that may impact on the roles and tasks of Banka Slovenije as a central bank and as a member of the European System of Central Banks (ESCB), as well as those provisions that may impact the specific tasks conferred on the ECB by Regulation (EU) No 1024/2013.

3. Observations

3.1 *Insolvency hierarchy of bank creditors*

3.1.1 The draft law provides for a preference not only for claims arising out of deposits guaranteed under the deposit guarantee scheme ('covered deposits', or, as used in this opinion, 'guaranteed

24 See Article 28 of the draft law.

25 See Article 72(5) of the draft law.

26 See Article 268(1) of the revised version of the draft law amending Article 53 of the Law on Banking (ZBan-2).

deposits') and eligible deposits of natural persons and micro, small and medium-sized enterprises (SMEs), but also for other deposits, thereby providing for a general depositor preference[27]. The draft law introduces some changes to the ranking of depositors, by ranking guaranteed deposits alongside a variety of claims which are mandatorily excluded from bail-in under Directive 2014/59/EU, including, for example, short-term interbank liabilities, liabilities arising out of payment systems, certain claims of trade creditors that are critical to a bank's operations and liabilities to deposit guarantee schemes. In addition, the draft law ranks eligible deposits from natural persons and microenterprises, SMEs below guaranteed deposits and the claims excluded from bail-in under Directive 2014/59/EU, but ahead of other deposits, which in turn rank ahead of unsecured ordinary claims. The ECB also notes that the draft law subordinates unsecured and non-subordinated claims arising from debt securities and other similar financial instruments issued by a bank (hereinafter referred to as 'unsecured bank debt instruments'), except as regards certain structured instruments, to unsecured ordinary claims, whilst ensuring that these claims are still ranked ahead of contractually subordinated claims.

3.1.2 The ECB welcomes the fact that the draft law provides for a general depositor preference and the statutory subordination of unsecured bank debt instruments, since both of these features are expected to enhance resolvability by providing clarity about the hierarchy of creditors and enabling the allocation of losses to unsecured bank debt instruments without triggering concerns with regard to the principle that no creditor should be worse off in resolution than in insolvency. This may also facilitate the application of the bail-in tool to unsecured bank debt instruments ahead of operational liabilities, including, for example, corporate deposits and derivatives. The bail-in of unsecured bank debt instruments is regarded as carrying a lower contagion risk than that of operational liabilities[28], which makes it likely to be more effective and credible to market participants. Facilitating the allocation of losses to the holders of such instruments therefore fosters effective resolution action and reduces the need to use the resolution fund, which is expected to promote an adequate pricing of risk on the side of investors. This is expected to improve the resolvability of credit institutions and to enhance market discipline.[29]

3.1.3 Regarding the ranking of deposit claims, the ECB notes that the draft law amends Slovenia's existing depositor preference rule by elevating certain other claims that are excluded from bail-in, so that they rank pari passu with guaranteed deposits, and above other deposit claims. The ECB understands that this is intended to allow for the mandatory exclusion of these claims from bail-in to take effect without triggering 'no creditor worse off than in insolvency' concerns, which will facilitate resolution action.

However, a distinction should be made insofar as this change relates to short-term interbank liabilities, which also represent a form of deposit. It is questionable whether granting interbank deposits an equally preferred status as guaranteed deposits is strictly in line with Article 108 of

27 It is noted that also the existing Slovenian law provides for a general depositor preference, however with a somewhat different scope of sub-ranking within the general depositor preference.

28 See paragraph 3.2.2 of Opinion CON/2015/31; paragraph 3.7.1 of Opinion CON/2015/35; paragraph 3.1 of Opinion CON/2016/7.

29 See paragraph 3.2.3 of Opinion CON/2015/31 and paragraph 3.1 of Opinion CON/2016/7.

Directive 2014/59/EU, which regulates the 'ranking of deposits in insolvency hierarchy' and provides for a 'super priority' for guaranteed deposits and a 'simple priority' for eligible deposits of natural persons, microenterprises and SMEs. This clear ranking of depositors would be altered by granting short-term interbank deposits an equally high preference as guaranteed deposits, and the protection of guaranteed deposits and of eligible deposits of natural persons, microenterprises and SMEs would be thereby diluted. This situation could be avoided if short-term interbank deposits were considered a separate creditor category and were allocated a ranking below guaranteed deposits and eligible deposits of natural persons, microenterprises and SMEs.

While Article 108 of Directive 2014/59/EU regulates the ranking of different categories of depositors and their ranking compared to ordinary unsecured, non-preferred creditors, it does not prevent Member States from granting a preference to other categories of claims under their insolvency law. As such, it is in accordance with Article 108 for Member States to provide for a preference to other liabilities that are excluded from bail-in, by making them rank pari passu with guaranteed deposits. Such a provision may prove beneficial from a resolution perspective when applying the bail-in tool for the abovementioned reasons. However, the ECB would underline the fact that when conferring additional preferences on other classes of claims, Member States should be mindful of not overly diluting the preferred status of depositors under Article 108, which is notably intended to provide a certain level of protection for the deposits of natural persons, microenterprises and SMEs holding eligible deposits in excess of the level of guaranteed deposits. In addition, Article 108 is intended to ensure that the claims of guaranteed deposits (and deposit guarantee schemes) should have an even higher ranking under national insolvency law[30]. From a financial stability perspective, this depositor preference reduces the risks of bank runs, potential losses of the guaranteed depositors in a liquidation phase, as well as the excessive depletion of the DGS[31]. Furthermore, it should be carefully assessed whether the preferred ranking of other liabilities alongside guaranteed deposits, could complicate the application of other resolution tools, such as the sale-of-business or bridge bank tool. This is especially relevant where the resolution strategy is to carve out and transfer the deposit book while leaving the other liabilities in the 'old bank' which will then enter into liquidation.

3.1.4 Regarding the statutory subordination of unsecured bank debt instruments and its positive impact on the eligibility of these instruments for the purpose of total loss-absorbing capacity (TLAC) under the Financial Stability Board's TLAC term sheet, the ECB also notes that, in principle, the same considerations apply here as raised in its earlier opinion on the German Law on bank resolution[32]. The ECB notes, however, that there is currently no global systemically important bank established in Slovenia, to which the TLAC requirement would apply.

3.1.5 The ECB welcomes the additional degree of precision introduced by the draft law with respect to the respective ranking of contractually subordinated claims arising out of, inter alia, Tier 1 and Tier 2 capital instruments.

30 See Recital 111 of Directive 2014/59/EU.

31 See paragraph 8.2 of Opinion CON/2012/99.

32 See paragraphs 3.2.4 and 3.2.5 of Opinion CON/2015/31.

3.1.6 As regards the legal drafting of the draft law, the ECB would recommend that, instead of using a cross-reference to Article 80(2) when referring to liabilities that are excluded from bail-in, legal certainty would be enhanced if such liabilities were explicitly listed in the insolvency ranking instead. This would also serve to further clarify whether some of the respective liabilities fall under the rank of priority claims or secured claims or whether they will be fully separated as the property of third persons, and whether, for example, in the event of an underlying obligation to a secured claim not being fully covered by the value of the security provided, the uncovered part of the claim would be categorised as an unsecured ordinary claim. Similarly, concerning the treatment of structured instruments, in particular instruments that may qualify as debt securities, the ECB would also recommend enhancing the clarity of the drafting of the draft law to further promote legal certainty in the ranking of creditors' claims.

3.1.7 A common framework at Union level on the hierarchy of creditors and notably the scope of the depositor preference and the degree of subordination of debt securities and other similar financial instruments in bank resolution and/or insolvency proceedings may help to advance the integration of the financial services markets within the Union and facilitate the tasks of the ECB both with regard to monetary policy and to supervision within the SSM[33].

3.2 *Conferral of new resolution tasks on Banka Slovenije*

3.2.1 The ECB welcomes the draft law's resolution-related provisions, as they strengthen the tools and procedures available to Banka Slovenije to carry out effective resolution in line with the common framework of intervention powers, rules and procedures laid down in Directive 2014/59/EU.

3.2.2 The ECB has developed guidance, as set out in paragraphs 3.2.3 and 3.2.4, on the basis of which it may decide whether a new task conferred on an ESCB national central bank (NCB) is to be considered a central banking task or a governmental task for the purposes of assessing the conferral of such a task against the prohibition of monetary financing under Article 123 of the Treaty[34]. This guidance applies to genuinely new tasks that either did not exist in the past or did not form an integral part of the central banking tasks previously assigned to the NCB in question. The tasks currently discharged by an NCB as central banking tasks are not reviewed and re-categorised, but may be reassessed if they are subject to substantive legislative amendments. In this regard, the ECB notes that, already in the past, Banka Slovenije has had extensive powers to take specific resolution measures in relation to credit institutions. The draft law, however, extends the existing resolution powers and responsibilities of Banka Slovenije, as it is designated as the resolution authority not only for credit institutions, but also for other financial institutions as described in paragraph 1.3. The draft law should therefore be assessed in the light of the prohibition of monetary financing. The concrete assessment of whether Banka Slovenije's tasks as the resolution authority for financial institutions forming part of a banking group is to be considered a central banking task or a governmental task is undertaken in paragraph 3.2.5 of this opinion.

33 See paragraph 3.4 of Opinion CON/2015/31 and paragraph 3.7.3 of CON/2015/35.

34 See paragraph 2.3 of Opinion CON/2015/22.

3.2.3 *First*, the principle of financial independence requires that the Member States may not put their NCBs in a position where they have insufficient financial resources to carry out their ESCB- or Eurosystem-related tasks, as applicable[35].

Second, central banking tasks comprise in particular those tasks that are related to the tasks listed in Article 127(2), (5) and (6) of the Treaty.

Third, new tasks conferred on an NCB that are atypical of NCBs' tasks, or which are clearly discharged on behalf of and in the exclusive interest of the government or of other public entities, should be considered as governmental tasks. In that context, a distinction should be drawn between the liquidity- and solvency-related tasks of NCBs. While, for the purposes of assessing compliance with the monetary financing prohibition, solvency support is a governmental task, liquidity-related tasks, the ultimate objective of which is to finance the economy, are central banking tasks.

Resolution tasks may be considered to be central banking tasks, provided that they do not undermine an NCB's independence in accordance with Article 130 of the Treaty. However, the discharge of these tasks by central banks may not extend to the financing of resolution funds or other financial arrangements related to resolution proceedings as these are governmental tasks[36]. This is without prejudice to the possibility that: (a) central banks may provide short-term financing to deposit guarantee schemes under certain conditions; and (b) NCBs may provide emergency liquidity assistance to solvent credit institutions.

3.2.4 An important criterion for qualifying a new task as a governmental task is therefore the impact of the task on the institutional, financial and personal independence of the NCB. In particular, the following should be taken into account.

First, it should be assessed whether the performance of the new task creates inadequately addressed conflicts of interests with existing central banking tasks, and does not necessarily complement those existing central banking tasks. If a conflict of interest arises between existing and new tasks, there should be sufficient mitigation in place to adequately address that conflict. Complementarity between the new task and existing central banking tasks should not, however, be interpreted extensively, so as to lead to the creation of an indefinite chain of ancillary tasks. Complementarity should also be examined from the point of view of the financing of those tasks.

Second, it should be assessed whether without new financial resources the performance of the new task is disproportionate to the financial or organisational capacity of the NCB and may negatively impact on its capacity to properly perform existing central banking tasks.

Third, it should be assessed whether the performance of the new task fits into the institutional set-up of the NCB in the light of central bank independence and accountability considerations.

Fourth, it should be assessed whether the performance of the new task would entail substantial financial risks.

35 See paragraph 2.2.1 of Opinion CON/2015/37.

36 See paragraph 2.3.2 of Opinion CON/2015/22.

Fifth, it should be assessed whether the performance of the new task exposes the members of the NCB's decision-making bodies to political risks which are disproportionate and may also impact on their personal independence and, in particular, the guarantee of the term of office under Article 14.2 of the Statute of the European System of Central Banks and of the European Central Bank.

Any final assessment on the qualification of a task given to an NCB as either falling within the scope of a central banking task or a governmental task will be guided by the objective of ensuring the consistent application of the prohibition of monetary financing within the Eurosystem and the ESCB to the extent that it applies to its members.

3.2.5 As noted in paragraph 3.2.2, the draft law also designates Banka Slovenije as the resolution authority for financial institutions which are part of a banking group. In the light of the guidance in paragraphs 3.2.3 and 3.2.4, an assessment must therefore be made as to whether Banka Slovenije's new tasks and responsibilities in this field could constitute a breach of the prohibition of monetary financing.

3.2.5.1 *Principle of financial independence*

The principle of financial independence requires NCBs to have sufficient means to carry out not only their ESCB-related tasks from an operational and financial point of view, but also their national tasks[37]. In this respect the ECB notes that, under the draft law, banks and branches of Union banks established in Slovenia are required to pay an annual fee in relation to Banka Slovenije's resolution tasks[38]. Moreover, in order to safeguard Banka Slovenije's financial independence, the provisions of the draft law authorise Banka Slovenije, in its capacity as resolution authority, to require institutions to reimburse all operational expenditure and costs incurred during the performance of its responsibilities and powers in relation to resolution[39].

3.2.5.2 *Links to tasks listed in Article 127(2), (5) and (6) of the Treaty*

Administrative resolution tasks are considered to be tasks related to those referred to in Article 127(5) of the Treaty, based on the understanding that administrative resolution tasks and supervisory tasks complement each other. In the case of the extension of Banka Slovenije's resolution-related responsibilities to other financial institutions forming part of a banking group, such new tasks may also be considered to be related to tasks under Article 127(5) of the Treaty, by analogy with the complementarity of Banka Slovenije's resolution tasks in respect of credit institutions with its existing supervisory and financial stability tasks.

3.2.5.3 *Atypical tasks*

A number of Member States have conferred on their NCBs a significant role in the resolution of credit and financial institutions, whether as the resolution authority or as a competent supervisory authority. The ECB has generally accepted the allocation of such tasks to NCBs provided they do not interfere financially and operationally with the performance of the NCB's ESCB-related

37 See the ECB's 2014 Convergence Report, p. 25.

38 See Article 14 (1) of the draft law.

39 See Article 15 (1) of the draft law.

tasks[40]. The new resolution tasks of Banka Slovenije in respect of other financial institutions forming part of a banking group can therefore be regarded as being tasks not atypical of a central bank, particularly if, as in the case of Banka Slovenije, it already had responsibilities and tools for intervening in relation to distressed financial institutions that pose a risk to financial stability.

3.2.5.4 *Discharge of tasks on behalf of and in the exclusive interest of the Government or of other public entities*

Whilst Banka Slovenije is designated as the sole resolution authority and takes resolution measures acting as an administrative authority exercising a public functions in its own name, and not on behalf of any other authority, it is required, before placing a credit or financial institution into resolution or taking any other resolution action, to: (i) inform the Ministry of Finance and obtain the prior approval of the Government if the decision would entail additional public financing and (ii) to inform the Ministry of Finance where there are systemic implications[41]. This provision implements Article 3(6) of Directive 2014/59/EU and ensures that Banka Slovenije has control over any decision related to a resolution matter that could affect Banka Slovenije's financial independence. There is no indication that in discharging its resolution function Banka Slovenije acts exclusively in the interest of another public entity.

3.2.5.5 *Extent to which conflicts of interest with existing tasks are addressed*

Pursuant to the draft law, Banka Slovenije must adopt and publish all of its relevant internal rules in order to ensure that there is no conflict of interest, and to ensure the operational and organisational independence of the organisational unit carrying out resolution functions from Banka Slovenije's other tasks[42]. The ECB expects Banka Slovenije's internal rules to adequately address potential conflicts of interest between Banka Slovenije's resolution function and its other tasks, particularly its tasks related to the supervision of credit institutions and other financial institutions.

3.2.5.6 *Extent to which the performance of tasks is proportionate to Banka Slovenije's financial and operational capacity and its ability to perform its ESCB-related tasks*

The ECB welcomes the fact that Banka Slovenije may recover the expenses incurred in carrying out its resolution tasks from the institutions concerned.[43]

3.2.5.7 *Extent to which the performance of tasks entails substantial financial risks*

With regard to the Banka Slovenije's liability, the draft law stipulates that Banka Slovenije and its staff must act with the diligence of a 'good expert'. Banka Slovenije will be held liable for any damages that occur as a result of a breach of this obligation, and the draft law does not contain provisions excluding or limiting the liability of Banka Slovenije in this respect. By contrast, the draft law does provide that the liability of Banka Slovenije's staff is limited to acts of gross

40 See paragraphs 2.1 and 3.4.3 of Opinion CON/2016/5, paragraphs 2.1 and 2.3 and paragraph 3.2.4 of Opinion CON/2015/22, paragraph 4.1 of Opinion CON/2014/60, paragraph 2.1 of Opinion CON/2013/73, paragraph 2.3 of Opinion CON/2011/72, paragraph 2.2 of Opinion CON/2011/83, and paragraph 2.2 of Opinion CON/2011/39.

41 See Article 22 of the draft law.

42 See Article 7 of the draft law.

43 See Article 15 of draft law.

negligence or wilful misconduct in the performance of their functions. In such cases, Banka Slovenije will pay the injured party for any damages that result from its staff member's gross negligence or wilful misconduct and Banka Slovenije will then will require the staff member to reimburse it for any money paid out to the injured party[44]. In the light of this difference in approach, it might be worth considering whether Banka Slovenije's institutional liability should also be confined to acts of gross negligence or wilful misconduct, as is the case for Banka Slovenije's staff[45].

3.2.5.8 *Conclusion*

The ECB considers that there are grounds for regarding Banka Slovenije's extended resolution tasks as central banking tasks, in the sense that they complement Banka Slovenije's existing supervisory and resolution functions. The fact that Banka Slovenije may require financial institutions to pay for any operational expenditure and costs incurred during the performance of its responsibilities safeguards Banka Slovenije's financial independence and has a positive impact on Banka Slovenije's financial capacity to assume the extended tasks. However, given that potential liability issues represent a substantial financial risk for Banka Slovenije, the ECB suggests that Banka Slovenije's institutional liability should be usefully confined to acts of gross negligence or wilful misconduct, similar to the standard applicable to the liability of Banka Slovenije's staff.

3.2.6 *Resolution planning*

The draft law stipulates that when Banka Slovenije evaluates resolution plans for specific institutions, it must not assume that extraordinary public financial support will be granted, other than the use of resources from the resolution fund. The draft law further clarifies that there must be no assumption that any special liquidity loan or any other liquidity assistance from Banka Slovenije based on non-standard collateralisation, tenor and interest rate terms, will be granted[46]. While this appears to be in line with the requirements of Directive 2014/59/EU, the ECB emphasises that these provisions do not in any way affect Banka Slovenije's competence to decide, independently and at its full discretion, on the provision of central bank liquidity to solvent institutions, both through standard monetary policy operations and emergency liquidity assistance, within the limits imposed by the prohibition of monetary financing under the Treaty[47].

3.3 *Appointment of members of a bank's supervisory board*

The explanatory memorandum to the draft law states that the amendment pursuant to which a person who held a senior position in a bank, which has accumulated a higher than average level of non-performing claims, may not be considered to have the necessary reputation and qualities to be a member of the bank's supervisory board, is intended to ensure that the composition of banks' supervisory boards will be of a higher quality. According to the explanatory memorandum, this provision should result in the more stable and efficient functioning of banks and an

44 See Article 16 of draft law.
45 See paragraph 3.4.7 of Opinion CON/2016/5.
46 See Article 29(3) of the draft law.
47 See paragraph 3.2 of Opinion CON/2012/99 and paragraph 3.3 of Opinion CON/2014/67.

improvement to the entire Slovenian banking system. The ECB notes that the amendment does not appear to leave any discretion. Applying this provision in such a formulaic manner without leaving any discretion might raise concerns with regard to whether the new amendment is proportionate to what is necessary to achieve its objectives. Furthermore, the consulting authority is invited to consider whether the provision might be open to legal challenge.

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

Done at Frankfurt am Main, 3 May 2016.

[signed]

The President of the ECB

Mario DRAGHI