EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 11 April 2014

on the independence of Banka Slovenije

(CON/2014/25)

Introduction and legal basis

On 19 February 2014, the European Central Bank (ECB) received a request from the President of the Slovenian Parliament for an opinion on a draft law amending the Law on Banka Slovenije[1] (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[2], 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 Pursuant to the explanatory memorandum to the draft law submitted to the National Assembly for the legislative procedure by a group of its deputies, the purpose of the draft law is to strengthen the democratic accountability of Banka Slovenije and to enhance the transparency of its operations, in particular in the context of its banking supervisory role.

1.2 The draft law amends the provisions of the Law on Banka Slovenije (hereinafter the 'Law') relating to Banka Slovenije's reporting to the National Assembly. It contains exemptions from the duty to safeguard confidential information in respect of credit institutions which are recipients of state aid where such information is requested by the National Assembly or its committees. The draft law also proposes that additional representatives of the National Assembly's committees may participate in meetings of Banka Slovenije's Governing Board.

1.3. The draft law stipulates a larger voting majority for the appointment of the Governor and other members of Banka Slovenije's Governing Board by the National Assembly and also contains amendments to the rules on their reappointment, limiting the number of their terms of office to two.

1.4 Furthermore, the draft law introduces a new ground for the dismissal of members of Banka Slovenije's decision-making bodies and gives the Governor of Banka Slovenije the right to dismiss directors or deputy directors of its departments without needing to provide any grounds.

---

1 *Zakon o Banki Slovenije (ZBS-1)* (*Ur. l. RS* No 72/2006 – official consolidated text, 59/11).

2 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).

1.5 Finally, the draft law provides for the auditing of Banka Slovenije's operations by an external auditing company appointed by the National Assembly, on a proposal from the Committee for the control of public finance. This external auditor would also be empowered to establish the incompatibility of functions of the members of Banka Slovenije's Governing Board, rather than Banka Slovenije itself.

2. Dismissal of members of Banka Slovenije's decision-making bodies

2.1 Article 130 of the Treaty lays down the principle of personal independence, which is a key aspect of the principle of central bank independence for the members of the European System of Central Banks (ESCB). This principle is reflected in Article 7 and Article 14.2 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'). In particular, Article 14.2 provides, *inter alia*, that governors may only be relieved from office if they no longer fulfil the conditions required for the performance of their duties or if they have been guilty of serious misconduct, with the possibility of recourse to the Court of Justice of the European Union.

The purpose of Article 14.2 of the Statute of the ESCB is to prevent the authorities involved in the appointment of governors, particularly the government or parliament, from exercising their discretion to dismiss a governor. Since Article 14.2 is directly applicable, national central bank (NCB) statutes should either contain grounds for dismissal in line with Article 14.2, or should omit any mention of such grounds. Once elected or appointed, governors may not be dismissed under conditions other than those mentioned in Article 14.2 of the Statute of the ESCB even where they have not yet taken up their duties.

Personal independence would be jeopardised if the same rules did not also apply to other members of the decision-making bodies of NCBs involved in the performance of ESCB-related tasks. Various provisions of the Treaty and the Statute of the ESCB require comparable security of tenure. Article 14.2 of the Statute of the ESCB does not restrict the security of tenure of office to governors, while Article 130 of the Treaty and Article 7 of the ESCB Statute refer to 'members of the decision-making bodies' of NCBs rather than to governors specifically. This applies in particular where a governor is 'first among equals' with colleagues with equivalent voting rights or where such other members are involved in the performance of ESCB-related tasks[3].

2.2 Article 39(1)[4] of the Law provides that the members of Banka Slovenije's Governing Board may only be removed from office before expiry of the term if they ask to be relieved (indent 1), if grounds for the incompatibility of functions arise during their term of office (indent 2), or if it has

3 See, for example, the ECB's Convergence Report 2013, pp. 23 to 24. All ECB Convergence Reports are available on the ECB's website at www.ecb.europa.eu.

4 In connection with Article 39.a of the Law which stipulates the application of certain provisions of law governing the prevention of corruption.

been found in a prescribed procedure[5] that they no longer fulfil the conditions required for the performance of their duties or that they have been guilty of serious misconduct (indent 3).

2.3 The proposed amendment to Article 39 of the Law also provides for the dismissal of a member of Banka Slovenije's Governing Board on a proposal from the Slovenian President, by a majority of two thirds of all deputies of the National Assembly. This adds a new ground for dismissal to the two existing ones provided by Article 14.2 of the Statute of the ESCB and is thus incompatible with the Statute. The proposed amendment should therefore be deleted.

2.4 The incompatibility of functions referred to in indent 2 of Article 39(1) of the Law only addresses the situations defined in Article 38 of the Law. In this respect, the ECB would reiterate the view expressed in its Convergence Report of May 2006 that inserting a cross-reference to Article 38 in point 2 of Article 39(1) would be welcome for legal certainty reasons. In addition, it should be clarified that point 2 of Article 39(1) of the Law is a condition required for the performance of duties and not a ground for dismissal in addition to the two grounds provided by Article 14.2 of the Statute of the ESCB.

3. Participation by representatives of third parties in Banka Slovenije's Governing Board meetings

The principle of central bank institutional independence, enshrined in Article 130 of the Treaty and Article 7 of the Statute of the ESCB, renders the participation by representatives of third parties in an NCB's decision-making body with a right to vote on matters concerning the performance by the NCB of ESCB-related tasks incompatible with the Treaty and the Statute of the ESCB, even if such a vote is not decisive[6]. Furthermore, the principle of central bank institutional independence also renders the participation of third party representatives, without a right to vote in the meetings of an NCB's decision-making body entrusted with the performance of ESCB-related tasks, incompatible with the Treaty and the Statute of the ESCB, if such participation interferes with the performance of ESCB-related tasks[7] by that decision-making body or endangers compliance with the ESCB's confidentiality regime.

5 This procedure is governed by a Decision on the Procedure of Establishing Responsibility of Members of the Governing Board of Banka Slovenije, adopted by Banka Slovenije in agreement with the Finance Minister (Sklep o postopku ugotavljanja odgovornosti članov Sveta Banke Slovenije) (Ur. l. RS No 24/2003).

6 See, for example, the ECB's Convergence Report 2013, p. 22.

7 Pursuant to Article 2 of the Law, 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.

4. External audit of Banka Slovenije's operations

4.1 The draft law proposes the introduction of a new Article 41.a[8] into the Law, pursuant to which the operations of Banka Slovenije would be audited by an auditing company, selected by the National Assembly on a proposal from the Committee for public finance control.

4.2 Article 27.1 of the Statute of the ESCB requires the accounts of the ECB and NCBs to be audited by independent external auditors recommended by the Governing Council and approved by the Council and this is duly reflected in Articles 52 and 65 of the Law. The proposed amendment is thus incompatible with Article 27.1 of the Statute of the ESCB and contradicts the existing provisions of Articles 52 and 65 of the Law.

4.3 Where an NCB's operations are subject to the control of a state audit office or similar body charged with controlling the use of public finances, a number of safeguards of central bank independence should apply: (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[9]; (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[10]. The proposed amendments of the Law do not meet all these requirements.

5. Reporting by Banka Slovenije to the National Assembly and confidentiality of information

5.1 As pointed out by the ECB in its Convergence Reports[11], the obligation of professional secrecy for ECB and NCB staff under Article 37 of the Statute of the ESCB may give rise to similar provisions in NCBs' statutes or in Member States' legislation. The primacy of Union law and rules adopted thereunder also means that national laws on third party access to documents may not result in infringements of the ESCB's confidentiality regime. Access to an NCB's information and documents must be without prejudice to the ESCB's confidentiality regime, to which the members of NCBs' decision-making bodies and staff are subject. NCBs should ensure that such bodies protect the confidentiality of information and documents disclosed at a level corresponding to that applied by the NCBs. Therefore, any provision of information permitted by the proposed amendments to Article 26 of the Law on the reporting of Banka Slovenije to the National Assembly and the proposed amendment to Article 47 of the Law on protection of confidential data should comply with the relevant Union laws, including those governing the exchange of supervisory and statistical information, as well as the obligation of safeguarding professional secrecy. Therefore, Article 26 of the Law should refer not only to national laws in this respect but also to Union law

8 In connection with the proposed deletion of point 1 of Article 32(1) of the Law.

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

10 See, for example, p. 26 of the ECB's Convergence Report 2013, Opinions CON/2011/9 and CON/2011/53. All ECB Opinions are available on the ECB's website at www.ecb.europa.eu

11 See, for example, p. 27 of the ECB's Convergence Report 2013.

including Article 37 of the Statute of the ESCB. The ECB emphasises that confidential information may be exchanged only if necessary for the performance of the tasks of the body that receives the information. In this context, the ECB notes that a representative of the National Assembly's Committee for finance and monetary policy may participate in meetings of the Governing Board of Banka Slovenije[12] where they can get acquainted with any confidential information, including the details relating to granting state aid to credit institutions.

5.2 The proposed new Article 26(3) of the Law provides that the report addressed to the National Assembly should contain a report on the work and on the performance of tasks of the members of the Governing Board of Banka Slovenije. However, the Governing Board is a collegial body accountable to the National Assembly as a whole. Depending on the level of detail of this report, this provision raises concerns regarding the institutional independence of Banka Slovenije and the personal independence of the members of the Governing Board of Banka Slovenije. The Law should contain adequate safeguards in order to ensure that: (a) the reporting obligations do not result in interference with the independence of the members of Banka Slovenije's Governing Board as provided by Article 130 of the Treaty and Article 7 of the Statute of the ESCB; (b) the special status of governors in their capacity as members of the ECB's decision-making bodies is fully respected; and (c) confidentiality requirements resulting from the Statute of the ESCB are observed[13].

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

Done at Frankfurt am Main, 11 April 2014.

[signed]

The President of the ECB

Mario DRAGHI

12 See Article 33(1) of the Law.

13 See, for example, p. 22 of the ECB's Convergence Report 2013.