OPINION OF THE EUROPEAN CENTRAL BANK
of 5 February 2020
on the Supervisory Board of Eesti Pank
(CON/2020/7)

Introduction and legal basis

On 31 December 2019 the European Central Bank (ECB) received a request from the Finance Committee of the Estonian Parliament for an opinion on a draft law amending the Law on Eesti Pank[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 Eesti Pank. 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 revises the composition of the Supervisory Board of Eesti Pank and the conditions and requirements applicable to its members.

Role and composition of Supervisory Board of Eesti Pank under current law.

1.2 Under the current Law on Eesti Pank, the Supervisory Board of Eesti Pank exercises oversight over all the activities of Eesti Pank[3]. The Law on Eesti Pank entrusts the following tasks to the Supervisory Board[4]:

1) making proposals to the President of the Republic of Estonia concerning the appointment of the Governor of Eesti Pank;

2) appointing to or releasing from office Eesti Pank's: (i) Deputy Governors; (ii) heads of autonomous divisions or branch offices; and (iii) head of the internal audit department, proposals for these decisions are to be made by the Governor of Eesti Pank;

3) appointing to office and removing from office members of the Supervisory Board of the Estonian Financial Supervision Authority (*Finantsinspektsioon*) and members of the Fiscal Council *(eelarvenõukogu*), on a proposal from the Governor of Eesti Pank;

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1 Eesti Panga seaduse muutmise eelnõu SE 97 II. The draft law discussed in this opinion is based on the draft law as presented to the Estonian Parliament for a second reading.

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).

3 See Section 9(1) of the Law on Eesti Pank (Eesti Panga seadus RT I 1993, 28, 498, RT I, 19.03.2015, 39).

4 See Sections 9(2), 11(1) 6), 31(1) and 31(3) of the Law on Eesti Pank.

4) approving Eesti Pank's Statute, the Charter of the Fiscal Council, the charters of Eesti Pank's independent divisions and branch offices and the constitutive regulations of Eesti Pank's internal audit department;

5) overseeing the implementation of Eesti Pank's budget;

6) appointing Eesti Pank's internal auditors and approving the work schedule of the internal audit;

7) appointing independent auditors of Eesti Pank, as recommended by the ECB's Governing Council and approved by the Council of the European Union, to monitor Eesti Pank's activities during the fiscal year and to attest to the truth and accuracy of the annual report prepared by Eesti Pank;

8) approving Eesti Pank's annual report on a proposal from the Governor of Eesti Pank;

9) making decisions, following the procedure laid down in Union legislation, on the design of the national side of new euro coins and on the nominal value and design of commemorative coins;

10) deciding, on a proposal from the Governor of Eesti Pank, on the establishment, reorganisation and liquidation of autonomous divisions of Eesti Pank; and

11) reviewing and approving written proposals and other documents to be submitted to the Estonian Parliament in Eesti Pank's name.

1.3 In addition, under the current Law on Eesti Pank, regarding the distribution of Eesti Pank's profits and losses, at least 25 % of annual profits are to be used to increase the base capital up to the amount determined by the Parliament. At least 25 % of annual profits are to be used to increase the reserve capital when the Supervisory Board so decides. After these allocations, part of the profits may be used, on a decision from the Supervisory Board, to create or increase dedicated capital funds and funds for specific purposes as provided in Eesti Pank's Statute[5].

1.4 Moreover, the Supervisory Board receives, on a regular basis, information from the Governor of Eesti Pank concerning Estonia's economy and monetary policy, the situation of the financial sector and the implementation of Eesti Pank's budget[6]. Meetings of the Supervisory Board are held in camera, unless decided otherwise by the Chairman of the Supervisory Board. Eesti Pank's Governor and Deputy Governors participate in meetings of the Supervisory Board and have the right to speak. The Minister of the Republic of Estonia responsible for the area may participate in the meetings, subject to Article 130 of the Treaty[7]. The Governor of Eesti Pank is responsible for making arrangements to implement the resolutions of the Supervisory Board[8]. If the Governor does not agree with a Supervisory Board resolution, he or she reports this to the President of the Parliament within three working days and proposes to address an interpellation on the matter to the

5 See Section 30(2), (3) and (4) of the Law on Eesti Pank.
6 See Section 9(2^1) of the Law on Eesti Pank.
7 See Section 9(5) of the Law on Eesti Pank.
8 See Section 11(1) 2) of the Law on Eesti Pank.

Chairman of the Supervisory Board[9]. The Governor of Eesti Pank reports to the Supervisory Board about his or her work on a regular basis[10].

1.5 Under the current Law on Eesti Pank, the Supervisory Board comprises the Chairman, who is appointed for a five-year term by the Estonian Parliament (*Riigikogu*) on a proposal from the President of the Republic of Estonia, and seven members appointed for a five-year term by the Estonian Parliament on a proposal from the Chairman of the Supervisory Board[11].

Changes to the Supervisory Board under the draft law.

1.6 The draft law changes the composition of the Supervisory Board by providing that the Supervisory Board comprises the Chairman, representatives of each faction in the Estonian Parliament and four experts in the field[12]. The draft law also revises the procedure for appointing Supervisory Board members by providing that the members of the Supervisory Board are appointed by the Estonian Parliament on a proposal from the Parliament's Finance Committee. Under the draft law each faction in the Parliament is to nominate its representative, who must be a member of the Parliament, to the Finance Committee within four months of the respective faction being formed. The Chairman of the Supervisory Board is responsible for nominating the candidate experts in the field to the Parliament's Finance Committee within four months of being appointed[13]. The procedure for appointing the Chairman of the Supervisory Board remains unchanged.

1.7 The draft law also introduces a procedure for nominating candidate experts in the field should the Chairman of the Supervisory Board fail to nominate candidates: (i) to the Estonian Parliament by the specified deadline and in a manner prescribed by the draft law; or (ii) that are supported by a majority in the Parliament. In such cases, the Parliament's Finance Committee may propose candidate experts in the field to the new Supervisory Board.[14]

1.8 The draft law establishes restrictions whereby the Chairman of the Supervisory Board may be nominated for a maximum of two consecutive terms and the members may be appointed for a maximum of two consecutive memberships of the Supervisory Board[15]. The draft law adds a requirement that the Chairman of the Supervisory Board must, among other things, have the knowledge and experience necessary for participating in and managing the work of the Supervisory Board[16]. In addition, the draft law specifies that the members of the Supervisory Board must, among other things, have the knowledge and experience necessary for participating in the work of the Supervisory Board[17].

1.9 The draft law also specifies the term of office of the members of the Supervisory Board. In particular, the term of the members of the Supervisory Board who are experts in the field begins when the decision appointing the experts in the field enters into force and ends when the term of

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9 See Section 11(3) of the Law on Eesti Pank.
10 See Section 11(4) of the Law on Eesti Pank.
11 See Sections 6, 8(1) and 8(5) of the Law on Eesti Pank.
12 See Section 1 of the draft law.
13 See Sections 4 and 5 of the draft law.
14 See Section 5 of the draft law.
15 See Sections 2 and 8 of the draft law.
16 See Section 3 of the draft law.
17 See Section 6 of the draft law.

the Chairman of the Supervisory Board expires. The term of a Supervisory Board member who represents a parliamentary faction begins when the decision appointing him or her enters into force and ends when his or her membership of the Parliament terminates or is suspended[18]. To ensure continuity of the work of the Supervisory Board, the draft law establishes that the terms of the members of the Supervisory Board remain in force until new members are appointed[19]. In the period from the termination of the mandate of outgoing members of the Supervisory Board to the start of the mandate of the new members of the Supervisory Board, the Supervisory Board must refrain, unless strictly necessary, from taking decisions on certain matters, such as proposing the appointment of a new Governor of Eesti Pank to the President of Estonia[20].

1.10 The draft law also provides for the removal from office of members of the Supervisory Board. In particular, the Estonian Parliament must remove the Chairperson or a member of the Supervisory Board from office immediately if: (i) he or she is convicted in a criminal matter; (ii) a bankruptcy ruling has entered into force or a prohibition on carrying out a business or engaging in an economic activity applies with respect to him or her; (3) he or she does not meet the requirements provided for in the Law on Eesti Pank, or if he or she has submitted false information regarding his or her compliance with such requirements; or (4) he or she has failed to perform the duties of a member of the Supervisory Board to a material extent, has damaged Eesti Pank's interests, or there is any other good reason why the member of the Supervisory Board is unsuitable to perform his or her duties. The Parliament may also, on a proposal from a faction, remove the representative of the faction from the Supervisory Board if the representative leaves the faction[21].

1.11 The draft law contains transitional provisions with respect to the current Chairman and members of the Supervisory Board[22].

2. Observations

Institutional independence

2.1 Pursuant to Article 130 of the Treaty, when exercising the powers and carrying out the tasks and duties conferred on it 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'), neither a national central bank (NCB), nor any member of its decision-making bodies, may seek or take instructions from, inter alia, any government of a Member State 'or from any other body', which includes a statutory body such as the Supervisory Board. The ECB understands that the Governor of Eesti Pank is exclusively responsible for the performance of ESCB-related tasks[23], and therefore qualifies as a decision-making body of Eesti Pank within the meaning of Article 130 of the Treaty. The ECB notes that the Law on Eesti Pank emphasises that the Governor of Eesti Pank is independent in the

18 See Section 7 of the draft law.
19 See Section 10 of the draft law.
20 See Section 8 of the draft law.
21 See Section 11 of the draft law.
22 See Section 12 of the draft law.
23 See Section 11(1)(1) of the Law on Eesti Pank.

performance of his or her functions[24]. Furthermore, the ECB understands that the Supervisory Board does not intervene in the performance of ESCB-related tasks, nor in the decisions concerning those tasks, and that it therefore cannot be considered to be a decision-making body within the meaning of Article 130 of the Treaty. Therefore, having regard both to the structure of the Supervisory Board, as a constituent part of Eesti Pank, and to its tasks, the Supervisory Board may not seek to influence the Governor of Eesti Pank, in his or her capacity as Eesti Pank's decision-making body responsible for the performance of Eesti Pank's ESCB-related tasks[25].

2.2 Regarding the exchange of information with, and reporting to, the Supervisory Board by the Governor of Eesti Pank, the ECB notes that dialogue between an NCB and third parties, even when based on statutory obligations to provide information and exchange views, is compatible with central bank independence provided that: (i) this does not result in interference with the independence of the members of the NCB's decision-making bodies; (ii) the special status of Governors in their capacity as members of the ECB's decision-making bodies is fully respected; and (iii) confidentiality requirements resulting from the Statute of the ESCB are observed[26].

Financial independence

2.3 Even if an NCB is fully independent from a functional, institutional and personal point of view, as guaranteed by the NCB's statutes, its overall independence would be jeopardised if it could not autonomously avail itself of sufficient financial resources to fulfil its mandate and perform the ESCB-related tasks required of it under the Treaty and the Statute of the ESCB[27].

2.4 Regarding the Supervisory Board's competence to oversee the implementation of and to comment on Eesti Pank's budget[28], the ECB has noted that a third party having the power to influence an NCB's budget is incompatible with financial independence unless the law provides a safeguard clause so that such a power is without prejudice to the financial means necessary for carrying out the NCB's ESCB-related tasks[29]. This requirement is satisfied as the budget of Eesti Pank is approved by the Governor of Eesti Pank, who, as already noted, is exclusively responsible for the performance of Eesti Pank's ESCB-related tasks[30]. The Supervisory Board's role is advisory in nature and it has no capacity to approve or veto Eesti Pank's budget.

2.5 Regarding the Supervisory Board's competence to approve Eesti Pank's annual report, which includes the annual accounts[31], the ECB has noted that the annual accounts should be adopted by the NCB's decision-making bodies, assisted by independent accountants, and may be subject to ex post approval by third parties (e.g., the government or the parliament)[32]. This requirement is materially satisfied by an arrangement whereby the annual accounts are drafted by Eesti Pank's

24 See Section 10(3) of the Law on Eesti Pank.

25 See paragraph 6 of Opinion CON/2002/16 and paragraph 2.3 of Opinion CON/2019/12. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

26 See the ECB Convergence Report (May 2018), p. 22.

27 See the ECB Convergence Report (May 2018), p. 25.

28 See Section 9(1)(6) of the Law on Eesti Pank and Section 19(4) of the Charter of Eesti Pank.

29 See the ECB Convergence Report (May 2018), p. 26.

30 See Section 11(1)(7) of the Law on Eesti Pank.

31 See Section 9(2)(8) of the Law on Eesti Pank.

32 See the ECB Convergence Report (May 2018), p. 27.

Executive Board[33], comprising the Governor and two Deputy Governors[34], and then submitted to the Supervisory Board for approval. In this respect, it is noted that the Deputy Governors are independent in the performance of their functions, are appointed by the Supervisory Board on a proposal from the Governor of Eesti Pank for a term of five years, and may only be removed from office on the grounds specified in Article 14.2 of the Statute of the ESCB[35]. In addition, as noted in paragraph 2.4, the Governor of Eesti Pank is exclusively responsible for the performance of Eesti Pank's ESCB-related tasks.

2.6 Regarding the Supervisory Board's competence with respect to the allocation of profits, an NCB's statutes may prescribe how its profits are to be allocated. In the absence of such provisions, decisions on the allocation of profits should be taken by the NCB's decision-making bodies on professional grounds, and should not be subject to the discretion of third parties unless there is an express safeguard clause stating that this is without prejudice to the financial means necessary for carrying out the NCB's ESCB-related tasks as well as national tasks. As regards financial provisions or buffers, NCBs must be free to independently create financial provisions to safeguard the real value of their capital and assets. Member States may also not hamper NCBs from building up their reserve capital to a level which is necessary for a member of the ESCB to fulfil its tasks[36]. As noted above, the Governor of Eesti Pank is exclusively responsible for the performance of Eesti Pank's ESCB-related tasks. It would be useful to clarify the Governor's responsibility in this respect by explicitly specifying that the Supervisory Board's competences regarding the distribution of Eesti Pank's profits and losses are without prejudice to the financial means necessary for carrying out Eesti Pank's ESCB-related and national tasks.

2.7 Regarding the Supervisory Board's competence in staffing matters, in particular so far as concerns the appointment and removal of the heads of Eesti Pank's autonomous divisions, branch offices, the head of the internal audit department and internal auditors, the ECB has noted that the Member States may not impair an NCB's ability to employ and retain the qualified staff necessary for the NCB to perform independently the tasks conferred on it by the Treaty and the Statute of the ESCB[37]. In this respect the ECB notes that there are several statutory safeguards. As previously noted, the Governor of Eesti Pank is exclusively responsible for the performance of Eesti Pank's ESCB-related tasks. The ECB understands that this also encompasses staffing matters and would allow the Governor to fulfil Eesti Pank's ESCB-related tasks independently also in cases where the Supervisory Board declines to appoint relevant personnel under the Law on Eesti Pank.

2.8 In relation to the internal audit function, regardless of the right of the Supervisory Board to nominate the internal auditors and the head of the audit department[38], candidates are proposed either by the Governor of Eesti Pank, who proposes the candidates for the head of the internal audit function, or by the Head of the internal audit function him or herself with regard to internal

33 See Section 7(1)(4) of the Charter of Eesti Pank.
34 See Section 13(1) of the Law on Eesti Pank.
35 See Sections 10(2¹), 10(3) and 12(2) of the Law on Eesti Pank.
36 See the ECB Convergence Report (May 2018), pp. 27-28.
37 See the ECB Convergence Report (May 2018), p. 28.
38 See Sections 9(1)(4) and 9(1)(7) of the Law on Eesti Pank.

auditors[39]. Similarly, the Governor would propose the candidates for the heads of the autonomous divisions[40]. The ECB understands this to mean that the Supervisory Board may not select the relevant person(s) itself and may only approve or reject a candidate. Together with the exclusive responsibility of the Governor of Eesti Pank for the performance of Eesti Pank's ESCB related tasks, these safeguards sufficiently ensure Eesti Pank's ability to employ and retain the qualified staff necessary for Eesti Pank to perform independently the tasks conferred on it by the Treaty and the Statute of the ESCB.

Legal certainty

2.9 In the interest of legal certainty, the national legislator may wish to review the text of the draft law to ensure that the terminology used and processes provided for are sufficiently clear and could not be misinterpreted or lead to any ambiguity.

2.10 First, the draft law provides that the Finance Committee of the Parliament may propose for the parliamentary approval the candidates to the Supervisory Board who are experts in the field , if the Chairman of the Supervisory Board does not propose such candidates or the Chairman's candidates fail to obtain the Estonian Parliament's approval[41]. However, the draft law does not provide for a similar process if the parliamentary factions either fail to nominate their representatives or if these candidates are rejected. The ECB understands this to mean that in such cases a faction would not have a representative on the Supervisory Board. It might, nevertheless, be helpful to clarify this point, for the sake of legal certainty.

2.11 Second, the draft law provides that in the event that the mandate of a member of the Supervisory Board terminates, the mandate of such member is nevertheless automatically extended until the entry into force of a decision appointing a new member to replace the incumbent[42]. The draft law includes grounds for removing a member of the Supervisory Board from office when he or she is not suitable, e.g. in cases where a member is convicted in a criminal matter or a prohibition on business has been applied[43]. The draft law should make it clear, for the avoidance of any doubt, that in such cases the term of office of the outgoing member does not extend until the appointment of a new member.

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

Done at Frankfurt am Main, 5 February 2020.

[signed]

The President of the ECB

Christine LAGARDE

39 See Section 11(1)(6) of the Law on Eesti Pank and Section 5.3 of the Charter of the Internal Audit Department of Eesti Pank.

40 See Section 11(1)(6) of the Law on Eesti Pank.

41 See Section 5 of the draft law.

42 See Section 10 of the draft law.

43 See Section 11 of the draft law.