OPINION OF THE EUROPEAN CENTRAL BANK

of 12 June 2017

on the auditing of Banka Slovenije's business operations

(CON/2017/24)

Introduction and legal basis

On 11 May 2017, the European Central Bank (ECB) received a request from the President of the National Assembly of the Republic of Slovenia for an opinion on a draft law amending the Bank of Slovenia Act and establishing rules for the auditing of Banka Slovenije's operations by the national Court of Audit (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the third indent of Article 2(1) of Council Decision 98/415/EC[1] as the draft law relates to Banka Slovenije. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft law

1.1 Banka Slovenije's financial accounts must be audited pursuant to Article 27.1 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'). The purpose of the draft law is to establish rules for the auditing of Banka Slovenije's operations by the national Court of Audit[2] in a manner compatible with Banka Slovenije's independence[3].

1.2 Under the draft law, the Court of Audit must audit the regularity and performance of Banka Slovenije's business operations. Pursuant to Article 20(3) of the Court of Audit Act[4], the following terms have the following meanings: (a) a 'regularity audit' means obtaining relevant and sufficient data to enable an opinion to be expressed on the compliance of an operation with regulations and guidelines that any user of public funds is required to observe when conducting an operation; and

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1 Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

2 Pursuant to Article 1 of the Court of Audit Act, the Court of Audit is the supreme audit institution for supervising State accounts, the State budget and all public spending in Slovenia. In relation to other State authorities, the Court of Audit is an autonomous and independent authority.

3 The draft law provides for the introduction of these rules by adding a new article to the Bank of Slovenia Act (*Ur. l. RS No 72/06 – official consolidated text and 59/11*).

4 Court of Auditors Act (*Ur. l. RS No 11/01 and 109/12*).

(b) a 'performance audit' means obtaining relevant and sufficient data to enable an opinion to be expressed on the economy, efficiency and effectiveness of a business operation.

1.3 The draft law expressly states that the Court of Audit must not audit: (a) any actions that constitute decisions on the implementation of monetary policy, in accordance with the rules established by the ECB's decision-making bodies; and (b) the application and interpretation of supervisory law and practices carried out by Banka Slovenije on the basis of the Bank of Slovenia Act or other provisions within the framework of the single supervisory mechanism (SSM)[5]. However, the draft law seems to limit this exclusion by stating that the Court of Audit may audit the regularity and performance of any Banka Slovenije decisions that have led to the use of public funds[6]. The ECB understands that under the draft law the audit must not interfere with or encompass Banka Slovenije's competences as part of the European System of Central Banks (ESCB), the Eurosystem, the European System of Financial Supervision, the European Banking Authority, the European Systemic Risk Board, and the Single Resolution Mechanism. Nor must it entail a direct or indirect audit of the ECB, other members of the ESCB, or the Eurosystem.

1.4 The draft law provides that, notwithstanding the provisions of the Court of Audit Act, Banka Slovenije is not obliged to submit to the Court of Audit reports concerning the elimination of any irregularities and inexpediencies identified. The draft law further specifies that Banka Slovenije must explain any deviation from the recommendations proposed by the Court of Audit in its audit report.

1.5 The draft law provides that confidential information, within the meaning of Article 37 of the Statute of the ESCB, may be obtained by the Court of Audit in accordance with the rules governing the operations of the ESCB. It provides further that other confidential information, including statistical and supervisory data, whose exchange is regulated by Union rules, may be obtained by the Court of Audit in accordance with these rules. The draft law also stipulates that the auditors and officers of the Court of Audit and other persons who are in any legal relationship whatsoever with the Court of Audit must maintain the confidentiality of all information that they become aware of when auditing Banka Slovenije and which is regarded as confidential pursuant to the Banking Act[7].

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5 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 5).

6 In particular, the draft law states that 'the audit does not cover the application and interpretation of supervisory law and practices carried out by Banka Slovenije on the basis of the Bank of Slovenia Act or other provisions and within the framework of the single supervisory mechanism (SSM) on the basis of Council Regulation (EU) No 1024/2013. Notwithstanding the previous sentence the Court of Audit may audit the regularity and performance of those decisions of Banka Slovenije, which have led to the use of public funds.'

7 Banking Act (*Ur. l. RS No 25/15, 44/16 – ZRPPB and 77/16 – ZCKR*). Article 14 of the Banking Act defines confidential information as any information obtained from banks or other persons in supervisory proceedings before Banka Slovenije or prepared by Banka Slovenije in the context of such proceedings.

1.6 If information is requested from the Court of Audit pursuant to the Public Information Access Act[8], the Court of Audit may only disclose such information under the conditions governing the disclosure of information applicable to Banka Slovenije.

1.7 The draft law also introduces a new provision that was not present in its original versions, on which the ECB was consulted in 2016[9], which establishes that an audit may include any actions of Banka Slovenije in the ten-year period prior to the entry into force of the draft law. The explanatory memorandum accompanying the draft law states that this provision will enable the Court of Audit to audit previous decisions of Banka Slovenije, including decisions taken in 2013 and 2014 regarding the recovery of banks[10].

2. Observations

2.1 The ECB notes that it has been consulted by the Slovenian authorities and issued opinions on previous versions of the draft law on two occasions. The ECB reiterates the views expressed in Opinions CON/2016/24 and CON/2016/59 and has the following additional comments to make in relation to the draft law.

2.2 The second indent of the proposed new paragraph 2 of Article 52.a of the Law on Banka Slovenije includes Banka Slovenije's tasks within the SSM within the scope of the audit carried out by the Court of Audit, extending to any supervisory decisions of Banka Slovenije that have led to the use of public funds and to actions that have taken place during the last ten years. In this respect, the draft law is not in line with the independence requirement laid down in Article 19 of Regulation (EU) 1024/2013, which states that when acting within the SSM the national competent authorities must act independently and that the governments of the Member States and any other bodies must respect that independence. In line with this independence requirement, audits of Banka Slovenije's supervisory activities should (a) not extend to the application and interpretation of supervisory law and practices in the context of the SSM, and (b) not interfere with and not include the tasks conferred on the ECB by Regulation (EU) No 1024/2013[11].

2.3 In addition, pursuant to Article 2 of the Law on Banka Slovenije, Banka Slovenije's independence should be respected not only when it performs ESCB-related tasks, but also when it performs national tasks.

2.4 The draft law establishes a legal basis for auditing Banka Slovenije's actions that have taken place during the last ten years, and as such may be seen as potentially having a retroactive character. As

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8 Public Information Access Act (*Ur. l. RS No 51/06 – official consolidated text, 117/06 – ZDavP-2, 23/14, 50/14, 19/15 – CC dec. and 102/15*).

9 See Opinions CON/2016/24 and CON/2016/59. All ECB opinions are published on the ECB's website at www.ecb.europa.eu .

10 See the Government's proposal for an Act amending the Bank of Slovenia Act from 20 April 2017 (*EVA 2016-1611-0054*).

11 See paragraphs 2.4 and 2.5 of Opinion CON/2016/59.

previously noted by the ECB[12], introducing measures with retroactive effect could in principle undermine legal certainty and might not be in line with the principle of legitimate expectations. The prohibition against the retroactive effect of legal acts derived from the principle of legal certainty is also protected by EU legal principles. The principle of legal certainty is not absolute and would allow for limited and well defined exemptions where the purpose to be achieved so demands and the legitimate expectations of those concerned are duly respected. In this respect, the ECB questions whether a provision allowing for auditing Banka Slovenije's actions that have taken place during the last ten years is compatible with the principle of legal certainty.

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

Done at Frankfurt am Main, 12 June 2017

[*signed*]

The President of the ECB

Mario DRAGHI

12 See paragraph 3.2.2 of Opinion CON/2015/32, paragraph 3.1.2 of Opinion CON/2016/39 and paragraph 3.2 of Opinion CON/2016/50.