



## OPINION OF THE EUROPEAN CENTRAL BANK

of 7 December 2012

on the Law on banking

(CON/2012/101)

### **Introduction and legal basis**

On 14 November 2012, the European Central Bank (ECB) received a request from the Slovenian Ministry of Finance for an opinion on the draft law amending the Law on banking (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 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<sup>1</sup>, 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 measures proposed in the draft law are aimed at addressing the impact of the deepening financial crisis on the banking system. In particular, the crisis has had an adverse effect on the ability of banks to obtain appropriate financing and, therefore, to comply with the capital adequacy requirements of Banka Slovenije and the European Banking Authority. Accordingly, the draft law provides for the establishment of a legal regime to address these issues.
- 1.2 Pursuant to the draft law, Banka Slovenije, as the banking supervisory authority, may take actions against a bank that breaches risk management rules and capital requirements. It may also act against a bank where it considers it likely that a breach will occur on the basis of defined negative trends in a bank. In addition, Banka Slovenije may act when it considers that the financial system's stability is endangered. The draft law accordingly provides for a clearer definition of the supervisory measures and, in addition to amending some of the existing measures that Banka Slovenije may utilise in its supervisory capacity, introduces new supervisory measures, including the following: (a) Banka Slovenije may appoint an authorised person to a bank to act pursuant to Banka Slovenije's instructions in order to improve a bank's risk management strategy or to effectively implement measures to eliminate breaches. Under certain conditions, the authorised

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<sup>1</sup> OJ L 189, 3.7.1998, p. 42.

person may also be given the powers of a bank's management board member; and (b) Banka Slovenije may transfer a bank's assets and liabilities to an acquiring company in cases of increased risk in a bank.

- 1.3 The scope of Banka Slovenije's supervisory powers is also extended, *inter alia*, with regard to the members of a banks' supervisory board. Under the draft law, Banka Slovenije may prohibit supervisory board members from performing their functions where the member breaches supervisory board member's duties or does not meet the conditions necessary for appointment or there is an obstacle to the appointment.
- 1.4 In addition, the draft law amends the Law on banking in relation to, *inter alia*, (a) the deposit guarantee scheme, (b) the regulation of non-cash contributions for banks' share capital increase, (c) the supervisory order by Banka Slovenije to a bank to increase its capital, (d) exemptions to the obligation to submit a mandatory takeover bid. Moreover, the draft law introduces certain provisions regarding the Law on Slovenia's measures to strengthen bank stability.

## 2. General observations

The ECB welcomes the Slovenian authorities' initiative to improve and introduce measures on capital requirements for banks, their risk management and their resolution. As the Ministry of Finance has explained in its accompanying memorandum to the draft law, the proposed amendments regarding bank resolution were prepared on the basis of the Commission's proposal for a directive on recovery and resolution of banks<sup>2</sup>. In addition to this proposal, further related Union legislation is expected soon<sup>3</sup>. The ECB points out that national laws and regulations will have to be brought into line with such Union legislation once it is adopted. Finally, national legislation will have to be brought into line also with anticipated Union legislation, including the Proposal for a Council Regulation conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions<sup>4</sup>, and the upcoming establishment of a single resolution mechanism, focused on a European resolution authority, which the ECB fully supports, as highlighted in Opinion CON/2012/96.

## 3. Specific observations

- 3.1 *Performance of new tasks by Banka Slovenije under the draft law*

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<sup>2</sup> See Commission's Proposal for a Directive 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).

<sup>3</sup> See (a) Proposal for a Directive of the European Parliament and of the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (COM(2011) 453 final); (b) Proposal for a Regulation of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms (COM(2011) 452 final); (c) Proposal for a Directive of the European Parliament and of the Council on Deposit Guarantee Schemes (recast) (COM(2010) 368 final).

<sup>4</sup> See COM(2012) 511 final.

The draft law assigns new supervisory tasks to Banka Slovenije, including, *inter alia*, the supervision of members of banks' supervisory boards and the power to order the transfer of a bank's assets and liabilities to an acquiring company. The ECB welcomes the fact that Banka Slovenije will be given additional powers to contribute to the efficient supervision of banks by taking timely action to identify and resolve relevant issues, thus ensuring financial stability. Nonetheless, widening the scope of Banka Slovenije's tasks should not affect its ability to carry out its ESCB-related tasks from an operational and financial perspective<sup>5</sup>.

In addition, in performing the new powers, Banka Slovenije should ensure appropriate functional separation of resolution activities from its supervisory or other activities in order to avoid possible conflicts of interest between these functions, in line with the Commission's proposal for a directive on recovery and resolution of banks<sup>6</sup>.

### 3.2 *The draft law and the Law on Slovenia's measures to strengthen bank stability*

In parallel to the draft law, the Slovenian authorities have prepared the Law on Slovenia's measures to strengthen bank stability<sup>7</sup>, which aims to strengthen the stability of the financial system as a whole by improving the stability of banks. The ECB was consulted on this Law and adopted Opinion CON/2012/71, in which it suggested further clarifying how the measures under the Law on Slovenia's measures to strengthen bank stability fit into the system of supervisory measures taken by Banka Slovenije pursuant to the Law on banking<sup>8</sup>. Given that the draft law further broadens the scope for supervisory action by Banka Slovenije and also entrusts it with resolution powers, including in cases of endangerment of the financial system's stability, the ECB notes that it would be beneficial to ensure that the Law on Slovenia's measures to strengthen bank stability and the Law on banking are aligned to avoid any potential conflict between both laws and thereby Banka Slovenije's ability to fulfil its regulatory and supervisory responsibilities, including under the Law on banking, as amended by the draft law.

### 3.3 *Endangered financial system stability*

The proposed Article 254 of the Law on banking provides that, if financial system stability in Slovenia is or might be jeopardised, Banka Slovenije is to immediately notify the Ministry of Finance as well as other national authorities. The ECB is of the view that if these risks have a systemic dimension, i.e. when there is a risk of disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy<sup>9</sup>, the European Systemic Risk Board (ESRB) should also be informed of these developments as well as of the

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<sup>5</sup> See, for example, Opinions CON/2011/46 and CON/2010/46. All Opinions are published on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

<sup>6</sup> See Article 3 of COM(2012) 280 final.

<sup>7</sup> *Zakon o ukrepih Republike Slovenije za krepitev stabilnosti bank.*

<sup>8</sup> See paragraph 4.2 of Opinion CON/2012/71.

<sup>9</sup> See Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing the European Systemic Risk Board (OJ L 331, 15.12.2010, p. 1).

substance and timeline of the actions taken to address such risks at national level<sup>10</sup>. Furthermore, it would be beneficial for financial stability to establish an effective macro-prudential policy framework at a national level, where Banka Slovenije plays a key role<sup>11, 12</sup>.

3.4 *Prompt and efficient action*

Under the draft law, Banka Slovenije may impose measures in relation to a bank's share capital increase, subject to a procedure involving shareholders and the Ministry of Finance before and after imposition of the measure. The ECB is of the view that the procedures for imposing such measures should be as short and simple as possible to allow for prompt and efficient supervisory action.

3.5 *Bank share capital increase against non-cash contributions*

The draft law clarifies when an increase of banks' share capital using non-cash contributions is allowed. In addition, Banka Slovenije's prior approval must be obtained for non-cash recapitalisation, with such approval being based on the eligibility criteria for non-cash contributions. These criteria are to be set out in an implementing regulation adopted by Banka Slovenije. In Opinion CON/2012/48, the ECB recommended specifying eligibility criteria for non-cash contributions as these will be used as the exemption to the general rule requiring banks' shares to be paid in cash. In this context, the ECB welcomes the proposed clarification, but notes that issuance of shares against cash contributions is preferred for financial stability reasons<sup>13</sup>.

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

Done at Frankfurt am Main, 7 December 2012.

[signed]

*The President of the ECB*

Mario DRAGHI

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10 See Opinion CON/2012/44.

11 See Recommendation ESRB/2011/3 of the European Systemic Risk Board of 22 December 2011 on the macro-prudential mandate of national authorities (OJ C 41, 14.2.2012, p. 1).

12 See Opinion CON/2012/80.

13 See paragraphs 4.1.1 and 4.1.2 of Opinion CON/2012/48.