



OPINION OF THE EUROPEAN CENTRAL BANK

of 21 June 2012

on bank recapitalisation

(CON/2012/48)

Introduction and legal basis

On 1 June 2012, the European Central Bank (ECB) received a request from the Slovenian Ministry of Finance (hereinafter the ‘Ministry’) 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 provisions¹, 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 main aims of the draft law are: (a) to allow for systemically important banks to achieve at least 9% capital adequacy measured with the core capital of the highest quality, in accordance with the recommendations of the European Banking Authority (EBA); (b) to allow banks to increase their capital by way of issuing contingent convertible bonds, given the substantial decrease in the bank shareholders’ financial power which makes a recapitalisation significantly more difficult; and (c) to ensure appropriate capital adequacy of the banking system which is key to maintaining an appropriate state rating.
- 1.2 In order to achieve the aims set out in paragraph 1.1 above, the draft law provides for the following key solutions.
 - 1.2.1 A share capital increase with non-cash contributions is now also permitted, provided that the share capital increase is based on an additional measure of Banka Slovenije².

¹ OJ L 189, 3.7.1998, p. 42.

² See Article 2 of the draft law amending Article 43(8) and (9) of the Law on banking.

- 1.2.2 General restrictions on the amount of a bank's share capital increase do not apply (a) in the case of a conditional share capital increase, and (b) with respect to the management board's authority to increase the share capital on the basis of the authorised capital³.
- 1.2.3 Special rules on the acquisition of bank shares and the submission of an obligatory takeover bid are put in place⁴.
- 1.2.4 Additional exemptions from the obligation to submit a takeover bid are provided for bank shareholders who have obtained their shares in the process of a bank's share capital increase⁵.
- 1.2.5 A special sanctioning regime now applies when shares are acquired and (a) the takeover threshold is exceeded, and (b) a takeover bid is not submitted⁶.

2. Duty to consult the ECB

- 2.1 The ECB notes that the Slovenian government endorsed the draft law with additional changes on 7 June 2012 and forwarded it to the Parliament for adoption in an urgent procedure. In this case, the ECB appreciated the need for a swift adoption of the draft law and thus also accepted the short deadline of 10 working days set by the Ministry for the submission of this opinion. The draft law was adopted by the Slovenian parliament on 15 June 2012. The ECB would like to draw the Ministry's attention to the proper procedure for its consultations as set out below⁷.
- 2.2 The second sentence of Article 4 of Decision 98/415/EC states that the ECB must be consulted 'at an appropriate stage' in the legislative process. This implies that the consultation should take place at a point in the legislative process which affords the ECB sufficient time to examine the draft legislative provisions (and where necessary translate them) and to adopt its opinion in all required language versions, and which also enables the relevant national authorities to take the ECB's opinion into consideration before the provisions are adopted. Where draft legislative provisions are prepared by an authority other than the adopting authority, it can be derived from Article 4 of Decision 98/415/EC that consultation on such provisions must take place at a time which enables the authority initiating the draft legislative provisions to consider whether they should be amended in order to accommodate the ECB's opinion, i.e. before transmission of the provisions to the adopting authority. The timetable should also factor in a reasonable period for the ECB to examine the consultation dossier and deliver its opinion. Article 4 does not preclude national authorities from taking steps in accordance with their legislative procedures that do not affect the substance of the draft legislative provisions.
- 2.3 It follows from the wording of Article 3(4) of Decision 98/415/EC that Member States are obliged to suspend the process for adoption of the draft legislative provision pending submission of the

³ See Article 43a in the Law on banking as inserted by Article 3 of the draft law.

⁴ See Article 45c in the Law on banking as inserted by Article 4 of the draft law.

⁵ See Article 45d in the Law on banking as inserted by Article 4 of the draft law.

⁶ See Article 45e in the Law on banking as inserted by Article 4 of the draft law.

⁷ See Title IV, Section I of the Guide to consultation of the European Central Bank by national authorities regarding draft legislative provisions, available on the ECB's website at www.ecb.europa.eu.

ECB's opinion. This does not mean that the whole national legislative process (for example, preparatory work of parliamentary standing committees, discussion of other opinions submitted by national authorities, etc.) should be suspended pending delivery of the ECB's opinion. Rather it means that the adopting authority has to have the opportunity meaningfully to deliberate the ECB's opinion prior to taking its decision on the substance. If a time limit has been set for submission of the ECB opinion and this time limit has expired, the national authority concerned may restart the adoption process. But even in such a case, and as long as the legislation has not yet been adopted, the national authorities continue to be obliged to take the ECB's opinion into consideration.

3. General observations

The ECB generally welcomes the draft law proposed in the context of the EBA capital adequacy requirements for the Slovenian banking sector⁸. The EBA's measures were part of the broader European package, agreed by the European Council on 26 October 2011 and confirmed during the ECOFIN Council on 30 November 2011. This package aims to address the current situation in the Union by restoring stability and confidence in the markets. The ECB has consistently stressed the importance of bank recapitalisation as an essential condition for financial and systemic stability, as well as a condition precedent to the preservation, by Eurosystem counterparties, of their eligible counterparty status, within the meaning of Section 2.1 of Annex I to the Guideline ECB/2011/14 of the European Central Bank of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem⁹.

4. Specific observations

While the ECB welcomes the initiative of the Slovenian authorities to introduce measures facilitating bank recapitalisation, it has the following specific observations on the draft law.

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

4.1.1 Article 43(8), point 2 of the Law on banking as amended by Article 2 of the draft law provides for an exemption from the general requirement for bank shares to be paid in money. This exemption provides that the bank share capital may be increased by non-cash contributions if such increase is based on an additional measure of Banka Slovenije. Instead of vaguely referring to 'non-cash contributions', the ECB would recommend specifying eligibility criteria for non-cash contributions that may be used for such an exemption.

4.1.2 As consistently expressed in its opinions¹⁰, the ECB generally prefers issuances of shares against a cash contribution for financial stability reasons. Other forms of capital injections, for example, against government bonds which tend to be rather volatile in value, might not provide the

⁸ See EBA Recommendation and figures relating to the recapitalisation needs of European banks published on 8 November 2011, available on the EBA website at www.eba.europa.eu.

⁹ OJ L 331, 14.12.2011, p. 1.

¹⁰ See paragraph 2.2 of Opinion CON/2012/23.

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envisaged additional buffer against unexpected losses, when this protection is needed most, i.e. during times of market stress. Therefore, the issuance of shares or contingent convertible bonds, i.e. debt instruments that convert into shares upon specific trigger events, against non-cash contribution should be limited to exceptional circumstances.

4.1.3 Pursuant to the draft law, banks would be allowed to issue contingent convertible bonds against both cash and non-cash contribution, including government bonds. The ECB understands that the features of these contingent convertible bonds would, in any case, be aligned with the requirements for ‘Buffer Convertible Capital Securities’, as laid down in the EBA Common Term Sheet, in order for these instruments to be eligible for the Core Tier 1 buffer in the context of the EBA recapitalisation exercise. As explained in more detail above, issuances of contingent convertible bonds against non-cash contribution should be accepted by Banka Slovenije in exceptional circumstances only.

4.2 *Recapitalisation versus resolution*

In view of the fact that the measures under the draft law aim to address solvency problems at a credit institution, the ECB considers that the objectives pursued by the measures may also be achieved through bank resolution tools. A fully-fledged bank resolution regime, comprising tools such as bridge banks, asset separation and transfers of business would offer legally sound means of resolving institutions on the brink of insolvency, safeguarding financial stability, whilst addressing stakeholder rights¹¹.

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

Done at Frankfurt am Main, 21 June 2012.

[signed]

The Vice-President of the ECB

Vítor CONSTÂNCIO

¹¹ In this context see the Commission’s Proposal for a Directive of the European Parliament and of the Council 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) 280/3).