



OPINION OF THE EUROPEAN CENTRAL BANK

of 11 November 2014

on banking regulation

(CON/2014/79)

Introduction and legal basis

On 1 October 2014, the European Central Bank (ECB) received a request from the Slovenian Ministry of Finance for an opinion on a draft law on banking¹ (hereinafter the ‘draft law’). On 20 October 2014, the ECB received certain revised provisions of the draft law².

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/EC³, 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 draft law regulates, inter alia, the conditions for the establishment, operation and winding up of credit institutions, the powers and procedures for supervising the activities of credit institutions, and the powers and procedures for managing macro-prudential and systemic risks relating to credit institutions⁴.
- 1.2 The draft law is a recast of the current Law on banking⁵. The main purpose of the amendments made by the draft law is to transpose or adapt national law to Union legislation prepared in the context of and as a response to the recent financial crisis. In particular, the draft law implements Directive 2013/36/EU of the European Parliament and of the Council⁶ (hereinafter ‘CRD IV’) and adapts national law to Regulation (EU) No 575/2013 of the European Parliament and of the

¹ *Predlog zakona o bančništvu (ZBan-2)*.

² The revised provisions are Articles 400 to 406 of the draft law.

³ 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).

⁴ See Article 1(1) of the draft law.

⁵ *Zakon o bančništvu (ZBan-1)* (Official Journal of the Republic of Slovenia, no. 99/10 – official consolidated text, 52/11 - corr., 9/11 - ZPlaSS-B, 35/11, 59/11, 85/11, 48/12, 105/12, 56/13, 63/13 - ZS-K and 96/13).

⁶ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

Council⁷ (hereinafter the 'CRR'). Certain elements of Directive 2014/59/EU⁸ (hereinafter the 'BRRD') are transposed by the draft law, including provisions relating to early intervention measures, recovery plans and intra-group financial support. In the light of the establishment of the single supervisory mechanism (hereinafter the 'SSM'), the draft law also adapts national law to Council Regulation (EU) No 1024/2013⁹ (hereinafter the 'SSM Regulation') and Regulation (EU) No 468/2014 of the European Central Bank¹⁰ (hereinafter the 'SSM Framework Regulation'). This adaptation includes, inter alia, the reflection of changes to the distribution of powers between the authorities involved in banking supervision.

- 1.3 Similarly to current requirements under the Law on banking with respect to the members of banks' boards of management, the draft law introduces a requirement to obtain the authorisation of Banka Slovenije in order to perform the functions of a member of the supervisory board of a bank¹¹. The draft law also transfers from the Slovenian banking association to Banka Slovenije the responsibility to maintain the system for the exchange of bank information on client creditworthiness¹².
- 1.4 The draft law envisages the adoption of further legislation to regulate the winding up and resolution of banks, and to regulate the deposit guarantee scheme. According to the explanatory memorandum to the draft law, such future legislation is intended to fully transpose the BRRD and Directive 2014/49/EU¹³ (hereinafter the 'new DGS Directive') into national law. Until the adoption of this legislation, the winding up and resolution of banks, and the deposit guarantee scheme will be regulated by the current Law on banking, as amended and extended in the recast effected by the draft law. The new amendments in this respect are as follows.

The deposit guarantee scheme

- 1.5 The draft law introduces changes to the current deposit guarantee scheme¹⁴. It provides for the transition from a scheme financed ex post to a scheme financed ex ante by establishing a deposit guarantee fund within Banka Slovenije. Pursuant to the draft law, the assets of the deposit guarantee fund will have a target level of 0.8% of the total guaranteed deposits in all banks. The

⁷ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

⁸ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

⁹ 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.63).

¹⁰ Regulation (EU) No 468/2014 (ECB/2014/17) of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (OJ L 141, 14.5.2014, p. 1).

¹¹ Article 55 of the draft law.

¹² Articles 407 to 409 of the draft law in conjunction with Article 390.a of the Law on banking, as well as Article 397(3) of the draft law.

¹³ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 12.6.2014, p. 149).

¹⁴ The current deposit guarantee scheme is governed by Chapter 8 of the Law on banking.

banks' contributions to the deposit guarantee fund will be collected over time and will include regular and, if necessary, extraordinary contributions. The contributions paid into the fund will reduce the amount of liquid assets that the banks are required to hold for the purposes of the deposit guarantee scheme. Although it will have no legal personality, the deposit guarantee fund will be separate from Banka Slovenije and the latter will not be liable for the obligations of the fund. If the contributions from the banks and their liquid investments are insufficient or not available in time to cover the obligations of the deposit guarantee fund, the draft law envisages that alternative financing, including loans, or temporary financial assistance from the State, may be obtained by the fund to cover the financial shortfall.

In addition to providing for the availability of the deposit guarantee fund to repay guaranteed deposits where a bank becomes bankrupt, the draft law also provides for the fund's availability in the context of bank resolution. According to the draft law, where resolution measures grant depositors access to their guaranteed deposits and it is in the interest of financial stability, the deposit guarantee fund may be available in the resolution process up to the amount of the estimated loss that the fund would suffer in the event of bankruptcy proceedings.

The deposit guarantee fund will be established within and managed by Banka Slovenije. Banka Slovenije will bear no liability for the obligations of the fund and the costs of Banka Slovenije relating to the management of the fund are to be recovered from the fund itself¹⁵.

The resolution fund

- 1.6 The draft law also provides for the establishment of a resolution fund. The banks will be required to make a capital investment in the resolution fund, in the form of cash, within a maximum period of three months from the entry into force of the draft law. This capital investment is to amount to 2.3% of the total guaranteed deposits in all banks. The banks' investment in the resolution fund will not be transferable and will only be repaid to a bank if the bank is voluntarily or compulsorily liquidated, or if it commences bankruptcy proceedings.

Pursuant to the draft law, Banka Slovenije may decide to activate the resolution fund where banks are in resolution if this is necessary for financial stability reasons. Activation of the resolution fund where a bank is in resolution may take the form of: (a) purchase of capital instruments of a bridge bank or of another bank in resolution; (b) a contribution to a transferee to cover a financial shortfall specifically arising from the transfer to it of the assets and liabilities of the bank in resolution; (c) a contribution to the compensation of shareholders and other creditors of the bank following bail-in, where the losses of the shareholders and other creditors of the bank are greater than they would be in the event of bankruptcy proceedings; and (d) loans, guarantees and the provision of other types of security interest to the bridge bank or another bank involved in the resolution process.

In a similar manner to the deposit guarantee fund, the resolution fund will be established within Banka Slovenije. The resolution fund will have no legal personality but, according to the draft law, it will be liable for the obligations it assumes in the sense that assets in the fund will be available to

¹⁵ Articles 400 to 402 and 405 (as revised), in conjunction with Article 397(3) of the draft law.

meet such obligations. Accordingly, the draft law states that Banka Slovenije will have no liability for the obligations of the resolution fund and that the costs incurred by Banka Slovenije in managing the fund will be covered by the fund itself¹⁶.

Other amendments

- 1.7 Other measures introduced by the draft law include: (a) a new resolution tool – the bridge bank¹⁷; (b) the possibility of early repayment of a bank's liabilities where the bank is in the process of winding down gradually¹⁸; and (c) certain proposed amendments to the rules on the ranking of creditors' claims in the event of a bank becoming bankrupt¹⁹.

2. General observations

- 2.1 The draft law aims to integrate the Slovenian national banking supervisory structure into the SSM and to ensure that no legal obstacles arise under national law in relation to the performance by the ECB, with the assistance of the national competent authority, of its banking supervisory tasks under the SSM Regulation. The ECB understands that the rules are not intended to narrow or amend the scope of the SSM Regulation and the SSM Framework Regulation, which are directly applicable. In this regard, the ECB welcomes Articles 9 and 235 of the draft law, which make general reference to the division of powers under the SSM Regulation between Banka Slovenije and the ECB.
- 2.2 The draft law transposes certain elements of the BRRD, including provisions relating to early intervention measures, recovery plans and intra-group financial support. The ECB understands that the Slovenian authorities will transpose the remaining elements of the BRRD, as well as the new DGS Directive, in a separate law, which is intended to ensure full transposition of the abovementioned Union law into national law. In this context, the Slovenian authorities may also implement adequate structural arrangements to ensure the separation between the resolution function and Banka Slovenije's other functions considering that Banka Slovenije is the national central bank and acts as both supervisory authority and resolution authority²⁰.

3. Supervisory fees and fines

- 3.1 Pursuant to Article 239 of the draft law, the banks are required to pay supervisory fees to Banka Slovenije to fund its supervisory tasks. The annual amount of the fees to be paid to Banka Slovenije shall not exceed the actual cost of supervision for that year. Income received from the proceeds of fees charged in relation to the issuance of authorisations and the supervisory procedures of Banka Slovenije is to be deducted from the cost of supervision. Pursuant to Article 265(6) of the draft law,

¹⁶ Articles 403 and 404 (as revised) of the draft law.

¹⁷ Article 406 of the draft law. Banka Slovenije has other resolution tools at its disposal; see Chapter 7.7 of the Law on banking.

¹⁸ Article 398 of the draft law.

¹⁹ Article 399 of the draft law.

²⁰ See Article 3(3) of the BRRD.

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income received by Banka Slovenije from the proceeds of fines imposed on banks for breaches of prudential requirements shall become the revenue of Banka Slovenije and shall be taken into account in determining the cost of banking supervision for the purposes of Article 239 of the draft law.

- 3.2 Whereas relevant Union law, including the CRD IV, CRR, SSM Regulation and SSM Framework Regulation, does not specify who should own the proceeds of sanctions imposed by national competent authorities, Article 137 of the SSM Framework Regulation provides that the proceeds from administrative penalties imposed by the ECB under Article 18 of the SSM Regulation shall be the ECB's property. Those sums will not be deducted from the supervisory fees payable by banks to the ECB pursuant to Article 30 of the SSM Regulation.

4. Deposit guarantee fund – role of the State

- 4.1 Pursuant to Article 401(2) of the draft law, where the assets of the deposit guarantee fund, including the regular contributions made by banks, the liquid assets that the banks are required to hold for the purposes of the deposit guarantee scheme, the banks' extraordinary contributions, and any borrowings made by the deposit guarantee fund are insufficient to cover the obligations of the deposit guarantee fund, Banka Slovenije is to make a proposal to the State that the State temporarily covers any shortfall in the deposit guarantee fund's assets in accordance with the second paragraph of Article 313 of the Law on banking.
- 4.2 It is important to ensure, in the light of the prohibition on monetary financing under Article 123 of the Treaty, that the draft law, together with Article 313 of the Law on banking, clearly places an obligation on the State to cover any potential financial shortfall in the deposit guarantee fund.

5. Resolution fund – financial stability considerations

- 5.1 The ECB welcomes the establishment of a resolution fund in Slovenia that is financed ex ante. However, it is unclear how the proposed resolution fund will fit into the framework of the BRRD, which must be transposed into national legislation by 31 December 2014. The ECB understands that the Slovenian authorities will fully transpose the BRRD in a separate law and it is important to ensure consistency between any such transposition and the draft law.
- 5.2 The aggregate capital investment that banks will be required to make into the resolution fund within three months seems relatively large. It is therefore recommended that the national authorities prudently assess how the size of this aggregate capital investment and the timeframe within which it must be made could affect the banks concerned. In particular, given the cash nature of the investment and the fact that a bank's investment cannot be repaid to it unless it is liquidated, the authorities might wish to assess the effect of the draft law on the banks' liquidity and capital positions in order to avoid any unintended consequences for financial stability.

6. Deposit guarantee fund and resolution fund – liability of Banka Slovenije

Banka Slovenije will manage the deposit guarantee fund and the resolution fund in accordance with the draft law. Although the draft law states that Banka Slovenije will bear no liability for the obligations of these funds, Banka Slovenije's possible liability with regard to the management of the funds does not seem to be fully clear. Taking into account the structure of these funds, as described above, the authorities may consider whether the draft law would benefit from clarifying the legal consequences of a potential breach of fund management duties by Banka Slovenije.

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

Done at Frankfurt am Main, 11 November 2014.

[signed]

The President of the ECB

Mario DRAGHI