



EUROPEAN CENTRAL BANK

EUROSYSTEM

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OPINION OF THE EUROPEAN CENTRAL BANK

of 22 September 2015

on the designation of Lietuvos bankas as a resolution authority

(CON/2015/33)

Introduction and legal basis

On 13 August 2015, the European Central Bank (ECB) received a request from the Lithuanian Ministry of Finance (hereinafter the 'consulting authority') for an opinion on a draft law amending the Law on Lietuvos bankas (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/EC¹, as the draft law relates to Lietuvos bankas and rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. For elements of the draft law the exclusive purpose of which is the implementation of Union law, the ECB's competence to deliver an opinion is based on Article 25.1 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'). 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 purpose of the draft law is to implement in Lithuanian law Article 3(1) of Directive 2014/59/EU of the European Parliament and of the Council² that requires each Member State to designate one or, exceptionally, more resolution authorities empowered to apply the resolution tools and exercise the resolution powers under that Directive. In particular, the draft law amends the Law on Lietuvos bankas³ to provide that Lietuvos bankas will carry out the functions assigned to the resolution authority for financial sector entities subject to Lithuanian law (including credit institutions, the Central Credit Union, certain financial brokerage firms, financial holding companies, mixed financial holding companies and mixed activity holding companies, branches established in Lithuania by credit institutions and financial brokerage firms established in third countries and certain specific financial institutions). This does not apply where the Single

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 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).

³ Nr. IX-205, 2001 03 13, Žin., 2001, Nr. 28-890 (2001 03 30).

Resolution Board carries out these functions pursuant to Regulation (EU) No 806/2014 of the European Parliament and of the Council⁴. The draft law also specifies that Lietuvos bankas will carry out the functions assigned to the national resolution authority under Regulation (EU) No 806/2014. The draft law further provides that, according to the Law on financial sustainability⁵, Lietuvos bankas will make decisions with regard to the resolution of financial sector entities. In this respect, the draft law is a part of a package of draft legislation that has been prepared in order to transpose Directive 2014/59/EU and Directive 2014/49/EU of the European Parliament and of the Council⁶ into Lithuanian law, as well as to ensure the effective application of Regulation (EU) No 806/2014 and to ratify the intergovernmental Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund. However, the draft Law on financial sustainability which amends the existing law, transposes in detail the provisions of Directive 2014/59/EU and further defines resolution tools, powers and processes, has not been submitted for consultation to the ECB.

- 1.2. The draft law also states that financial market supervision and the activities of the resolution authority will be financed from financial market participants' contributions and other Lietuvos bankas funds. The basis for calculating contributions and the maximum contribution rates are set out in annexes to the draft law, while the contribution level for each year will be established by Lietuvos bankas after consultation with the relevant financial market participants. The draft law clarifies that if the sum of contributions paid by financial market participants under supervision during a particular year is insufficient to cover the expenses related to financial market supervision and the functions of the resolution authority in relation to financial sector entities, Lietuvos bankas will increase the contributions to be paid the following year by the necessary amount and use part of the contributions to cover the shortfall from the previous year.

2. General observations

- 2.1. The ECB welcomes the draft law, as it strengthens the tools and procedures available to Lietuvos bankas for carrying out effective preventive measures, early intervention and effective resolution in line with the common framework of intervention powers, rules and procedures laid down in Directive 2014/59/EU. The ECB stresses that its opinion concerns the provisions of the draft law that may impact on the role and tasks of Lietuvos bankas as a central bank and member of the European System of Central Banks (ESCB). With this in mind, the ECB must also examine the provisions related to the new tasks of Lietuvos bankas under the draft Law on financial sustainability, cross-referenced in the text of the draft law, and approved by the Lithuanian Government on 2 September 2015 for submission to the Lithuanian Parliament. The ECB

⁴ Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

⁵ Valstybės žinios, 2009, No 93-3985.

⁶ 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).

stresses, however, that its opinion does not constitute an assessment whether Lithuania has effectively discharged its obligations to implement Directive 2014/59/EU in Lithuanian law.

- 2.2. The ECB underlines that, in the context of a proposed conferral of tasks on an ESCB member, it is necessary to assess such conferral against the monetary financing prohibition laid down in Article 123 of the Treaty. The ECB has developed guidance, in the form of general and specific considerations, on the basis of which it may decide whether a new task conferred on an ESCB national central bank (NCB) is to be considered a central banking task or a government task for the purposes of assessing such conferral against the monetary financing prohibition.

2.2.1. *General considerations*

First, the systematic categorisation of tasks assigned to NCBs as central banking or government tasks applies to genuinely new tasks that did not exist in the past or did not form an integral part of the central banking tasks already assigned to the NCB. In recognition of the different Member States' legal frameworks, central banking traditions and national set-ups, the tasks currently discharged by an NCB as central banking tasks are not reviewed and re-categorised, but may be reassessed if they are subject to legislative amendments of substance.

Second, the principle of financial independence requires that the Member States may not put their NCBs in a position where they have insufficient financial resources to carry out their ESCB or Eurosystem-related tasks.

Third, central banking tasks comprise in particular those tasks that are related to the tasks listed in Article 127(2), (5) and (6) of the Treaty.

Fourth, new tasks conferred on an NCB which are atypical of NCBs' tasks, or which are clearly discharged on behalf of and in the exclusive interest of the government or of other public entities, should be considered as government tasks. In that context, a distinction should be drawn between liquidity and solvency-related tasks of NCBs. While, for purposes of the monetary financing prohibition, solvency support is a government task, liquidity-related tasks, the ultimate objective of which are to finance the economy, are central banking tasks.

2.2.2. *Specific considerations*

Resolution tasks discharged by central banks are considered central banking tasks provided that they do not undermine an NCB's independence in accordance with Article 130 of the Treaty and Article 7 of the Statute of the ESCB⁷. However, the discharge of these tasks by central banks may not extend to the financing of resolution funds or other resolution financial arrangements as these are government tasks. This is without prejudice to the following: (i) the possibility that central banks may provide short-term financing to deposit guarantee schemes under certain conditions⁸ and (ii) the possibility that NCBs may provide emergency liquidity assistance to solvent credit institutions.

An important criterion for qualifying a new task as a government task is therefore the impact of the task on the institutional, financial and personal independence of the NCB. In particular, the following should be taken into account.

⁷ See Opinion CON/2015/22. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

⁸ See the ECB's 2014 Convergence Report, p. 30.

First, it should be assessed whether the performance of the new task creates inadequately addressed conflicts of interests with existing central banking tasks, and does not necessarily complement those existing central banking tasks. If a conflict of interest arises between existing and new tasks, there should be sufficient mitigation in place to adequately address that conflict. Complementarity between the new task and existing central banking tasks should not, however, be interpreted extensively, so as to lead to the creation of an indefinite chain of ancillary tasks. Complementarity should also be examined from the point of view of the financing of those tasks.

Second, it should be assessed whether without new financial resources the performance of the new task is disproportionate to the financial or organisational capacity of the NCB and may negatively impact on its capacity to properly perform existing central banking tasks.

Third, it should be assessed whether the performance of the new task does not fit into the institutional set-up of the NCB in the light of central bank independence and accountability considerations.

Fourth, it should be assessed whether the performance of the new task harbours substantial financial risks.

Fifth, it should be assessed whether the performance of the new task exposes the members of the NCB's decision-making bodies to political risks which are disproportionate and may also impact on their personal independence and, in particular, the guarantee of the term of office under Article 14.2 of the Statute of the ESCB.

- 2.3. Any final assessment on the qualification of a task given to an NCB as either falling within the scope of a central banking task or a government task will be guided by the objective of ensuring the consistent application of the monetary financing prohibition within the Eurosystem and the ESCB.

3. Specific observations

3.1. *Conferral of resolution tasks on Lietuvos bankas*

The draft law designates Lietuvos bankas as the resolution authority, broadening its current functions and activities to include placing obliged entities under resolution and taking resolution measures in respect of such entities. By virtue of this designation, Lietuvos bankas carries out resolution tasks and exercises resolution powers.

In the light of the guidance set out in paragraph 2.2, it must be assessed carefully whether Lietuvos bankas' new tasks and responsibilities in this field could constitute a breach of the monetary financing prohibition.

3.1.1. *New tasks*

Whilst Lietuvos bankas already has a role with regard to handling distressed financial institutions, the draft Law on financial sustainability assigns a new role to Lietuvos bankas and makes specific resolution tools available, such as the bail-in mechanism, which in their proposed form do not currently exist in Lithuanian law, and gives Lietuvos bankas new resolution-related powers. The

draft laws introduce substantial legislative amendments to Lietuvos bankas' existing tasks, and should therefore be assessed as new tasks in the light of the monetary financing prohibition.

3.1.2. *Principle of financial independence*

The principle of financial independence requires NCBs to have sufficient means to carry out not only their ESCB-related tasks from an operational and financial point of view, but also their national tasks⁹. In this regard, the draft law provides for the financing of costs related to Lietuvos bankas' functions as a resolution authority from financial market participants' contributions and other Lietuvos bankas funds¹⁰. While the ECB understands from the consultation request that this provision is only intended to refer to the administrative costs related to the functions of Lietuvos bankas as a resolution authority, the wording of the draft law is not limited in this way. Therefore, it could be interpreted more widely to cover the costs related to financing resolution actions. For example, in accordance with Article 43(5) of the draft Law on financial sustainability, Lietuvos bankas could be required to pay the salary and other costs of a special manager in the event that an institution under resolution fails to pay the special manager on time.

In order to avoid a wide interpretation of what is meant by the costs to be financed by the financial market participants' contributions and other Lietuvos bankas funds, the ECB recommends expressly limiting these contributions to financing Lietuvos bankas' administrative costs as a resolution authority. Any other expenses beyond the scope of administrative costs that are related to financing resolution actions cannot be financed under any circumstances by Lietuvos bankas. The ECB would welcome a clarifying provision to this effect.

Furthermore, the ECB understands that, as a general principle, all expenses related to the fulfilment of the functions of the resolution authority by Lietuvos bankas will be fully covered by the contributions of financial market participants. The other funds of Lietuvos bankas will only be used to cover for a limited period any shortfalls related to expenses arising during a particular year, and Lietuvos bankas will increase the contributions to be paid the following year to cover this indebtedness.

Finally, the draft Law on financial sustainability requires Lietuvos bankas, acting as a resolution authority, to recover any reasonable expenses actually incurred as a result of resolution action¹¹.

Against this background, the new tasks assigned to Lietuvos bankas would not affect the resources it currently allocates to the performance of its monetary policy tasks provided that the clarifying provision referred to above is introduced.

3.1.3. *Links to tasks listed in Article 127(2), (5) and (6) of the Treaty*

Administrative resolution tasks are considered tasks related to the tasks referred to in Article 127(5) of the Treaty, based on the understanding that administrative resolution tasks and supervisory tasks complement each other, particularly where, as in this case, an NCB has a mandate for the stability of the financial system and the designated resolution authority already

⁹ See the ECB's 2014 Convergence Report, p. 25.

¹⁰ See Article 4 of the draft law.

¹¹ Article 42(12) of the draft Law on financial sustainability provides that the resolution authority and the resolution fund must seek to recover all reasonable expenses incurred when performing resolution actions in any of the established means

carries out certain tasks relating to the supervision of financial markets, including the supervision of credit institutions, payment institutions, securities and insurance markets.

3.1.4. *Atypical tasks*

A number of Member States have conferred on their NCBs a significant role in the resolution of financial institutions, whether as the resolution authority or as a competent authority in the decision-making process for resolution. The ECB has generally welcomed the allocation of such tasks to NCBs provided they do not interfere financially and operationally with the performance of the NCB's ESCB-related tasks¹². The resolution tasks of an NCB can therefore be regarded as being tasks not atypical of a central bank, particularly if, as in the case of Lietuvos bankas, it has a statutory responsibility for maintenance of financial stability and the reliability of the financial system¹³.

3.1.5. *Discharge of tasks on behalf of and in the exclusive interest of the government or of other public entities*

Lietuvos bankas is designated as the sole resolution authority and takes resolution measures acting as an administrative authority in the exercise of public functions in its own name, and not on behalf of any other authority. In line with Directive 2014/59/EU, Lietuvos bankas is under the legal obligation to obtain prior approval from the Ministry of Finance before implementing decisions that have a direct fiscal impact or systemic implications. There is no indication that in discharging its resolution function Lietuvos bankas acts exclusively in the interests of the Ministry of Finance or another public entity.

3.1.6. *Extent to which conflicts of interests with existing Lietuvos bankas tasks are addressed*

3.1.6.1. The ECB has repeatedly noted¹⁴ that, in line with Directive 2014/59/EU¹⁵, staff involved in carrying out the functions of a resolution authority in accordance with the Directive must be structurally separate and subject to separate reporting lines from the staff involved in carrying out prudential banking supervision tasks pursuant to the relevant Union legislation¹⁶ or with regard to the other functions of the relevant authority. The ECB observes that Directive 2014/59/EU 'exceptionally' allows one authority to carry out both resolution and supervisory functions on the condition that adequate structural arrangements are put in place in order to ensure operational independence and to avoid conflicts of interest between that authority's resolution function and its other functions.

¹² See, e.g., paragraph 2.3 of Opinion CON/2015/25, paragraphs 2.1 and 3.2.4 of Opinion CON/2015/22, paragraph 4.1 of Opinion CON/2014/60, paragraph 2.1 of Opinion CON/2013/73, paragraph 2.3 of Opinion CON/2011/72, paragraph 2.2 of Opinion CON/2011/83, paragraph 2.2 of Opinion CON/2011/39, paragraph 2.2. See also in the UK the role of the Bank of England in the Special Resolution Regime under the Banking Act 2009.

¹³ Article 8(4) of the Law on Lietuvos bankas.

¹⁴ For example, see paragraph 4.3 of Opinion CON/2015/2, paragraphs 5.1 and 5.2 of Opinion CON/2015/3, and paragraph 3.3 of Opinion CON/2014/67.

¹⁵ See the second subparagraph of Article 3(3) of Directive 2014/59/EU.

¹⁶ See 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) and 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).

3.1.6.2. Pursuant to the draft Law on financial sustainability, Lietuvos bankas is required to ensure the operational and organisational independence, including separate reporting lines, of the unit carrying out resolution functions to ensure there is no conflict of interest between the resolution tasks and other tasks assigned by law to Lietuvos bankas¹⁷. Furthermore, the draft Law on financial sustainability requires Lietuvos bankas to adopt and make public internal rules specifying the separation of these functions, including rules regarding the protection of professional secrecy and exchange of information between the different functional areas. The ECB welcomes these provisions, as they appear to adequately address potential conflicts of interests between resolution and Lietuvos bankas' other tasks and functions. The ECB would appreciate being provided in advance, for information purposes, with the internal rules implementing these provisions.

3.1.7. *Extent to which the performance of tasks is proportionate to Lietuvos bankas financial and operational capacity and its ability to perform its ESCB-related tasks*

As noted above, in order to remain financially independent, NCBs must have sufficient means to carry out not only their ESCB-related tasks from an operational and financial point of view, but also their national tasks. In this regard, provided that the necessary amendments clarifying the draft law's intention are introduced, the ECB welcomes the fact that Lietuvos bankas may recover administrative expenses incurred in carrying out its resolution tasks from the institutions concerned.

3.1.8. *Extent to which the performance of tasks fits into Lietuvos bankas institutional set-up in the light of central bank independence and accountability considerations*

As noted above, before implementing decisions that have a direct fiscal impact or systemic implications, Lietuvos bankas is required to obtain prior approval from the Ministry of Finance. Furthermore, Lietuvos bankas has a duty to notify, inter alia, the Ministry of Finance when it determines that the conditions for resolution are met and after taking a resolution action. The ECB considers that the resolution tasks that Lietuvos bankas is to assume under the draft law will involve much closer cooperation with the Ministry of Finance when fiscal funds or systemic implications are at stake than for the exercise of its supervisory or other functions.

3.1.9. *Extent to which the performance of tasks harbours substantial financial risks*

3.1.9.1. With regard to the provisions on the liability of Lietuvos bankas, the draft Law on financial sustainability does not contain provisions excluding or limiting the liability of Lietuvos bankas as resolution authority for any negligent act when applying the resolution tools or exercising resolution powers. Instead, the general liability regime governing Lietuvos bankas applies for any damage incurred as a result of Lietuvos bankas or its staff acting unlawfully in its capacity as resolution authority. Lietuvos bankas will be held liable if the person who has suffered damage proves fault on the part of Lietuvos bankas or its staff. This is in marked contrast to the express

¹⁷ See Article 44(2) of the draft Law on financial sustainability. See also page 4 of the explanatory memorandum to the draft law.

exclusion of liability for publicly-owned resolution vehicles – for example, the bridge institution – whose liability is limited to wilful misconduct and gross negligence¹⁸.

3.1.9.2. The ECB notes that, under the Lithuanian Civil Code, the State is primarily liable for any damage caused by an unlawful decision or improper administrative action by a legal entity or person in the course of exercising public authority on the State's behalf¹⁹. The carrying out of resolution functions clearly constitutes the exercise of public authority on the State's behalf. For this purpose the entity or person exercising public authority in this situation is Lietuvos bankas. Notwithstanding this provision, the Law on Lietuvos bankas expressly provides that the State shall not be liable for the obligations of Lietuvos bankas, and that Lietuvos bankas shall not be liable for the State's obligations²⁰. This would seem to indicate, contrary to the rule established by the Civil Code, that Lietuvos bankas would be fully liable in its own right for carrying out its resolution functions. It is not obvious why Lietuvos bankas should assume the sole burden of those potential liabilities when the draft law requires it to obtain prior approval from the Ministry of Finance before implementing resolution decisions that have a direct fiscal impact or systemic implications. In this context, the ECB observes that by reason of the monetary financing prohibition laid down in the Treaty, national legislation may not require an NCB to finance the public sector's obligations in relation to third parties²¹. Given that potential liability issues represent substantial financial risks for Lietuvos bankas²², this should be taken into account in determining the body that is liable to pay damages to third parties and in assessing Lietuvos bankas' ability to recover its resolution-related expenses. The ECB considers that it would be useful to expressly clarify this point.

3.1.10. *Conclusion*

The ECB considers that there are grounds for regarding Lietuvos bankas' resolution tasks as central banking tasks, in the sense that they complement Lietuvos bankas' existing supervisory functions. The fact that Lietuvos bankas' administrative resolution functions will be financed by financial market participants should also impact positively on its financial capacity to assume those tasks. However, the ECB considers that the draft laws potentially create significant financial risks for Lietuvos bankas because they do not limit its liability for negligent acts in its role as resolution authority. Moreover, it is not clear who should pay damages to third parties in the event of Lietuvos bankas or its staff acting unlawfully. Finally, insofar as Lietuvos bankas would appear to be exclusively liable for carrying out its resolution functions under the Law on Lietuvos bankas, there is no obvious reason why Lietuvos bankas should assume the sole burden of those potential liabilities when Lietuvos bankas is under the legal obligation to obtain the prior approval of the Ministry of Finance before implementing decisions that have a direct fiscal impact or systemic implications.

18 See Article 70 of the draft Law on financial sustainability.

19 See Article 6.271 of the Civil Code.

20 See Article 2(4) of the Law on Lietuvos bankas.

21 See the ECB's 2014 Convergence Report, p. 29.

22 See paragraph 3.2.9.3 of Opinion CON/2015/22.

3.2. *Establishment of bridge institution and asset management vehicles*

With regard to the bridge institution tool and the asset separation tool, the draft Law on financial sustainability provides that the bridge institution or asset management vehicle will be established by the resolution authority or the Government of Lithuania²³. Although the State is the owner of such an entity, the resolution authority will in all cases control the entity. In situations where a central bank acts as resolution authority, it should be made clear, for the avoidance of doubt, that the central bank will in no circumstances assume or finance any of these entities' obligations²⁴. A central bank's role as the founder of such an entity must remain consistent in all cases with the monetary financing prohibition laid down in Article 123 of the Treaty and supplemented by Council Regulation (EC) No 3603/93²⁵. This prohibits any financing by a central bank of the public sector's obligations in relation to third parties. Moreover, this role as founder of such an entity must be performed without prejudice to central bank independence, in particular financial and institutional independence. The principle of financial independence requires NCBs to have sufficient means to carry out not only their ESCB-related tasks from an operational and financial point of view, but also their national tasks²⁶. For that reason, it should be ensured that if Lietuvos bankas, as resolution authority, decides to become the founder of such an entity, it will be provided with sufficient financial and human resources to address the associated operational burden.

3.3. *No role for Lietuvos bankas to provide liquidity to the Resolution Fund*

The ECB understands, based on the package of draft legislation including the draft law, that Lietuvos bankas is not authorised to provide any loan or financing under any circumstances to the Resolution Fund established under the draft Law on financial sustainability. The provision of such financing to the Resolution Fund would constitute a government task, and any such loan or financing by Lietuvos bankas would therefore breach the monetary financing prohibition laid down in the Treaty²⁷.

3.4. *Resolution planning*

The draft Law on financial sustainability provides that recovery plans and resolution plans drawn up shall not assume any public financial support beyond that granted by the Resolution Fund²⁸. However, they shall include, where applicable, a forward-looking analysis of how and when an institution may apply for the use of central bank liquidity in stressed conditions and the collateral to be used in those circumstances²⁹. While these provisions appear to be in line with the requirements of Directive 2014/59/EU, the ECB emphasises that they do not in any way affect the competence of the Eurosystem to decide independently and at its full discretion on the provision

23 See Articles 66(1) and 72 of the draft Law on financial sustainability.

24 See paragraph 3.4.3 of Opinion CON/2015/25.

25 Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty (OJ L 332 , 31.12.1993, p. 1).

26 See the ECB's 2014 Convergence Report, p. 25.

27 Ibid.

28 See Articles 5(3) and 13(3) of the draft Law on financial sustainability.

29 See Articles 5(2)(2) and 13(2)(17) of the draft Law on financial sustainability.

of central bank liquidity, based on the existing legal framework and within the limitations imposed by the monetary financing prohibition laid down in the Treaty³⁰.

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

Done at Frankfurt am Main, 22 September 2015.

[signed]

The President of the ECB

Mario DRAGHI

³⁰ See paragraph 3.2 of Opinion CON/2012/99, paragraph 3.3 of Opinion CON/2014/67 and paragraph 3.4 of Opinion CON/2015/22.