



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

## OPINION OF THE EUROPEAN CENTRAL BANK

of 2 March 2015

on the independence of Banka Slovenije and of the members of its decision-making bodies

(CON/2015/8)

### Introduction and legal basis

On 20 February 2015 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 Law on Banka Slovenije (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<sup>1</sup>, 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 The draft law, which was submitted to the legislative procedure of the National Assembly by a group of its deputies, amends the legal framework of Banka Slovenije by amending the Law on Banka Slovenije<sup>2</sup> (hereinafter the 'Law') and the Law on the Court of Audit<sup>3</sup>. The draft law:
  - (a) introduces changes to the procedure for removing a member of Banka Slovenije's Governing Board from office, in particular in cases of serious misconduct<sup>4</sup> and incompatibility of functions<sup>5</sup>;
  - (b) provides that Banka Slovenije be audited by the Court of Audit of the Republic of Slovenia<sup>6</sup>;
  - (c) provides that, in addition to the representative of the committee of the National Assembly in charge of finance and monetary policy and the Minister for finance, additional representatives of the National Assembly's committees may participate in meetings of Banka Slovenije's Governing Board<sup>7</sup>;
  - (d) increases Banka Slovenije's reporting requirements to the National Assembly, in particular with regard to banks that received State aid;

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<sup>1</sup> 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).

<sup>2</sup> *Zakon o Banki Slovenije (ZBS-1)* (Ur. l. RS No 72/2006 – official consolidated text, 59/11).

<sup>3</sup> *Zakon o računskem sodišču (ZRacS-1)* (Ur. l. RS No 11/01 and 109/12).

<sup>4</sup> See amendments to Article 39 of the Law.

<sup>5</sup> See amendments to Article 39 of the Law in connection with amendments to Article 38 and Article 32 of the Law.

<sup>6</sup> See amendments to Article 25 of the Law on Court of Audit.

<sup>7</sup> See amendments to Article 33 of the Law.

- (e) provides for an exemption whereby the duty to protect confidential information does not apply to information relating to banks receiving State aid, if such information is requested by the National Assembly, its working bodies or its Investigatory Committee<sup>8</sup>;
- (f) stipulates a larger voting majority for the appointment of a governor and other members of the Governing Board of Banka Slovenije by the National Assembly and limits the number of their reappointments to two<sup>9</sup>;
- (g) provides for the possibility that Banka Slovenije's Governor may dismiss directors or deputy directors of its departments without providing any grounds<sup>10</sup>.

## 2. General observations

The ECB notes that early in 2014 it was consulted by the Slovenian authorities on draft legislation amending the Law on Banka Slovenije, which was also prepared by a group of deputies of the National Assembly and which proposed amendments to the Law on Banka Slovenije, some of which are identical to the amendments under the draft law<sup>11</sup>. The ECB issued Opinion CON/2014/25<sup>12</sup> on the previous legislative initiative and expressed some concerns. The previous legislative initiative was not endorsed in the deliberations in the Slovenian National Assembly, who took into consideration, inter alia, the concerns raised by the ECB in particular as regards the protection of central bank independence.

The ECB reiterates the views expressed in Opinion CON/2014/25 and has the following additional comments to make in relation to the draft law.

## 3. Removal from office of a member of Banka Slovenije's decision-making bodies

- 3.1 Article 130 of the Treaty lays down the principle of personal independence, which is a key aspect of the principle of central bank independence for the members of the European System of Central Banks (ESCB). This principle is reflected in Article 7 and Article 14.2 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'). In particular, Article 14.2 provides, inter alia, that governors may only be relieved from office if they no longer fulfil the conditions required for the performance of their duties or if they have been guilty of serious misconduct, with the possibility of recourse to the Court of Justice of the European Union.

The purpose of Article 14.2 of the Statute of the ESCB is to prevent the authorities involved in the appointment of governors, particularly the government or parliament, from exercising their discretion to dismiss a governor. Since Article 14.2 is directly applicable, national central bank

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8 See amendments to Article 26 and Article 47 of the Law.

9 See amendments to Articles 35, 36 and 37 of the Law.

10 See amendments to Article 40 of the draft law.

11 In particular those described in points c) to f) above in paragraph 1 of this Opinion. The draft law now contains two different proposals in comparison to the previous legislative initiative and these two proposals relate to the grounds and procedure for the removal from office of members of Banka Slovenije's Governing Board and to the audit of Banka Slovenije's operations.

12 All ECB Opinions are available on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

(NCB) statutes should either contain grounds for dismissal in line with Article 14.2, or should omit any mention of such grounds.

Personal independence would be jeopardised if the same rules did not also apply to other members of the decision-making bodies of NCBs involved in the performance of ESCB-related tasks. Various provisions of the Treaty and the Statute of the ESCB require comparable security of tenure. Article 14.2 of the Statute of the ESCB does not restrict the security of tenure of office to governors, while Article 130 of the Treaty and Article 7 of the ESCB Statute refer to 'members of the decision-making bodies' of NCBs rather than to governors specifically. This applies in particular where a governor is 'first among equals' with colleagues with equivalent voting rights or where such other members are involved in the performance of ESCB-related tasks<sup>13</sup>.

- 3.2 Article 39(1) point 4, as proposed under the draft law, provides that a member of Banka Slovenije's Governing Board may be removed from office if they have committed serious misconduct. The subsequent paragraphs of Article 39, as proposed under the draft law, set out a procedure for bringing this ground for dismissal, by reference to the evidence of a breach of law or constitution, and provide for the assessment of the initiative and any subsequent proposal to the National Assembly to dismiss a member of the Governing Board on the basis of a found breach of law or constitution. The ECB notes that not just any breach of law or of the constitution is inherently tantamount to or analogous with serious misconduct, and as such this provision broadens the scope of the Union law concept of 'serious misconduct' to such breaches. Accordingly, the national legislator should not specify what amounts to serious misconduct<sup>14</sup>.

Furthermore, the ECB has previously commented favourably on dismissal procedures where the finding of a breach of law had been the remit of the judicial system<sup>15</sup>. However, the draft law entrusts a working body of the National Assembly, and not an independent judicial body, with the competence to establish breaches of law or of the constitution. Thus, the dismissal of a member of the Governing Board may be based on a discretionary assessment by a working body of the National Assembly whereas the purpose of Article 14.2 of the Statute of the ESCB is to prevent competent authorities, typically the government or parliament, from exercising discretion on the grounds to dismiss a governor. Article 39, as proposed under the draft law, should be fully aligned with Article 14.2 of the Statute of the ESCB, or omit any mention of grounds of dismissal, as Article 14.2 is directly applicable.

- 3.3 The incompatibility of functions referred to in point 2 of Article 39(1) of the Law only addresses the situations defined in Article 38 of the Law. In this respect, the ECB reiterates the view expressed in its Convergence Report of May 2006 and in Opinion CON/2014/25<sup>16</sup> that inserting a cross-reference to Article 38 in point 2 of Article 39(1) would be welcome for legal certainty reasons. In addition, it should be clarified that point 2 of Article 39(1) of the Law is a condition required for the

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<sup>13</sup> See, for example, the ECB's Convergence Report 2014, p. 24. All ECB Convergence Reports are available on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

<sup>14</sup> See Opinion CON/2012/73.

<sup>15</sup> See Opinion CON/2012/73 and CON/2012/49.

<sup>16</sup> Paragraph 2.4 of the Opinion CON/2014/25.

performance of duties and not a ground for dismissal in addition to the two grounds provided by Article 14.2 of the Statute of the ESCB.

- 3.4 According to Article 38(4), as proposed under the draft law, the existence of an incompatibility of functions of a member of the Governing Board is established by the National Assembly. As provided for in Article 38(2) point 5 of the Law 'other work or activities that might affect their independence or could conflict with Banka Slovenije's interests' may constitute a function which is incompatible with the position of a member of the Governing Board. These provisions involve a discretionary assessment by the National Assembly on what impacts the independence or constitutes a conflict of interest of the members of the Governing Board. Given that incompatibilities may lead to the dismissal of members of the Governing Board and that their dismissal should not be discretionary in nature, the mentioned provisions raise concerns as regards the personal independence of the members of the board. Therefore, the ECB recommends that Banka Slovenije's Governing Board retain its current powers to determine the existence of incompatibilities of the members of the Governing Board at least with regard to incompatibilities which may arise under Article 38(2) point 5 of the Law.

#### **4. Auditing of regularity of business operation of Banka Slovenije by the national Court of Audit**

- 4.1 The draft law amends Article 25 of the Law on Court of Audit, pursuant to which the operations of Banka Slovenije should be audited yearly by the Court of Audit of the Republic of Slovenia.
- 4.2 According to Article 1 of the Law on the Court of Audit, the Court is the supreme audit institution for the supervision of 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. In relation to its auditing powers Article 20 of the Law on the Court of Audit states that the Court should audit the business operation of users of public funds, and more concretely (a) it may carry out regularity and performance audits; and (b) it may audit any act on past operations as well as any act on planned business operation, including acts prescribed by law or any special financial statement or report which the users of public funds is obliged to prepare at the request of the Court.
- 4.3 Article 27.1 of the Statute of the ESCB requires the accounts of the ECB and NCBs to be audited by independent external auditors recommended by the ECB's Governing Council and approved by the Council of the European Union and this is duly reflected in Articles 52 and 65 of the Law. The established procedure as approved by the ECB's Governing Council in the 'Good Practices for the selection and mandate of external auditors', and as currently followed by Banka Slovenije<sup>17</sup> is to appoint independent auditors or firms of auditors as external auditors with a specific audit multi-year mandate.
- 4.4 The ECB notes that whereas a state auditor may not be charged with the audit of the financial accounts of an NCB, it would be in principle possible to give competences to a state audit office or similar body charged with controlling the use of public finances, such as the Court of Audit, in

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<sup>17</sup> Council Decision 2012/444/EU of 24 July 2012 amending Decision 1999/70/EC concerning the external auditors of the national central banks, as regards the external auditors of Banka Slovenije (OJ L 202, 28.7.2012, p. 21), approving the external auditors of Banka Slovenije for the period 2012-2014.

respect of NCB activities and use of public finances. However, such competence of the Court of Audit should be subject to a number of safeguards of central bank independence: (a) the scope of the control should be clearly defined by the legal framework; (b) the activities of the NCB's independent external auditors should not be prejudiced; (c) in line with the principle of institutional independence, as enshrined in Article 130 of the Treaty and Article 7 of the Statute of the ESCB, the audit should: (a) comply with the prohibition on giving instructions to an NCB and its decision-making bodies, (b) not interfere with the NCB's ESCB-related tasks, and (c) be carried out on a non-political, independent and purely professional basis.

- 4.5 The ECB considers that the broad scope of the mandate that the proposed amendment gives to the Court of Audit in respect of Banka Slovenije is not compatible with Article 27 of the Statute of the ESCB and with the principle of independence.
- 4.6 In addition, and without prejudice to the above, the ECB notes an inconsistency in the Law resulting from the proposed deletion of point 1 of Article 32(1) of the Law. Point 1 of Article 32(1) provides that the Governing Board of Banka Slovenije shall be competent to propose the external auditor. Deleting the competence of the Governing Board to propose the external auditors from Article 32(1) is not consistent with its role established in Article 52(2). According to Article 52(2) of the Law, the auditor is selected by the Governing Board on the basis of a preliminary call for bids and is then, in accordance with Article 52(1) and 65 of the Law proposed in line with the rules of Article 27.1 of the Statute of the ESCB. The ECB understands that this inconsistency may have been caused in light of the fact that the draft law is largely based on the text of the previous legislative initiative from 2014. The deletion of point 1 of Article 32(1) should be removed.

## 5. Other amendments

### 5.1 *Previous legislative initiative of 2014 to change the Law on Banka Slovenije*

The ECB reiterates its views expressed in Opinion CON/2014/25 where applicable to the draft law, and complements them, as follows.

### 5.2 *Participation by representatives of third parties in Banka Slovenije's Governing Board meetings*

The principle of central bank institutional independence, enshrined in Article 130 of the Treaty and Article 7 of the Statute of the ESCB, renders the participation by representatives of third parties in an NCB's decision-making body with a right to vote on matters concerning the performance by the NCB of ESCB-related tasks incompatible with the Treaty and the Statute of the ESCB, even if such a vote is not decisive<sup>18</sup>. Furthermore, the principle of central bank institutional independence also renders the participation of third party representatives, without a right to vote in the meetings of an NCB's decision-making body entrusted with the performance of ESCB-related tasks, incompatible with the Treaty and the Statute of the ESCB, if such participation interferes with the performance of ESCB-related tasks<sup>19</sup> by that decision-making body or endangers compliance with the ESCB's confidentiality regime.

<sup>18</sup> See, for example, the ECB's Convergence Report 2013, p. 22.

<sup>19</sup> Pursuant to Article 2 of the Law, the principle of central bank independence should be respected not only when Banka Slovenije performs ESCB-related tasks, but also when it performs national tasks.

### 5.3 *Reporting by Banka Slovenije to the National Assembly and confidentiality of information*<sup>20</sup>

5.3.1 The ECB notes that the proposed amendments to Article 26 of the Law on the reporting of Banka Slovenije to the National Assembly and the proposed amendment to Article 47 of the Law on the protection of confidential data should be assessed with regard to the relevant Union law.

5.3.2 First, the proposed new Article 26(3) of the Law provides that the report addressed to the National Assembly should contain a report on the work and on the performance of tasks of the members of the Governing Board of Banka Slovenije. However, the Governing Board is a collegial body accountable to the National Assembly as a whole. Depending on the level of detail of this report, this provision raises concerns regarding the institutional independence of Banka Slovenije and the personal independence of the members of the Governing Board. The Law should contain adequate safeguards in order to ensure that: (a) the reporting obligations do not result in an interference with the independence of the members of Governing Board as provided for in Article 130 of the Treaty and Article 7 of the Statute of the ESCB; (b) the special status of governors in their capacity as members of the ECB's decision-making bodies is fully respected; and (c) confidentiality requirements resulting from the Statute of the ESCB are observed<sup>21</sup>.

5.3.3 Second, as pointed out by the ECB in its Convergence Reports<sup>22</sup>, the obligation of professional secrecy for ECB and NCB staff under Article 37 of the Statute of the ESCB may give rise to similar provisions in NCBs' statutes or in Member States' legislation. The primacy of Union law and rules adopted thereunder also means that national laws on third party access to documents may not result in infringements of the ESCB's confidentiality regime. Access to an NCB's information and documents must be without prejudice to the ESCB's confidentiality regime, to which the members of NCBs' decision-making bodies and staff are subject. Where access to NCB's information and documents is allowed under Union law, the NCBs should ensure that such bodies protect the confidentiality of information and documents disclosed at a level corresponding to that applied by the NCBs themselves. Therefore, any provision of information permitted by the proposed amendments to Article 26 of the Law on the reporting of Banka Slovenije to the National Assembly and the proposed amendment to Article 47 of the Law on protection of confidential data should comply with the relevant Union laws, including those governing the exchange of statistical and supervisory information, as well as the obligation of professional secrecy. Therefore, Article 26 of the Law should refer not only to national laws in this respect but also to Union law including Article 37 of the Statute of the ESCB. Furthermore, without prejudice to the ECB's observations regarding the specific protection of statistical or supervisory information laid down in Union law and referred to in the next paragraphs, the ECB emphasises that confidential information may be exchanged only if necessary for the performance of the tasks of the body that receives the information. In this context, the ECB notes that a representative of the National Assembly's Committee for finance and monetary policy may participate, subject to compliance with the conditions set out in paragraph 5.2 above regarding the participation by representatives of third parties in Banka Slovenije's Governing Board meetings, in meetings of the Governing Board of

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20 See paragraph 5.1 and 5.2 of the Opinion CON/2014/25.

21 See, for example, p. 22 of the ECB's Convergence Report 2013.

22 See, for example, p. 27 of the ECB's Convergence Report 2013.

Banka Slovenije<sup>23</sup> where they can become acquainted with any confidential information, including the details relating to granting State aid to credit institutions.

5.3.4 Third, with respect to the exchange of confidential statistical information, according to Article 8(3) of Council Regulation (EC) No 2533/98<sup>24</sup>, the ESCB members shall take all the necessary regulatory, administrative, technical and organisational measures to ensure the physical and logical protection of confidential statistical information. The ECB recalls that confidential statistical information may only be used for the exercise of the tasks of the ESCB and, as regards NCBs, in the field of prudential supervision or for other statutory NCB tasks.

5.3.5 Fourth, with respect to supervisory information, Union law provides a framework for cooperation and collaboration with relevant authorities and other entities. These arrangements reflect the need to protect confidential information and also the need to allow cooperation. Any exchange of information may only be performed under those arrangements. Against this background, the ECB further notes that Article 47(2) as proposed under the draft law – suspending the duty to safeguard confidential information relating to banks and savings banks that received State aid or were subject to measures under the Law on measures for strengthening bank stability, if such information was requested by the National Assembly, a working body of the National Assembly, or the Investigation Committee of the National Assembly – raises concerns with regard to a number of provisions from Union law.

In particular, Article 47(2) as proposed under the draft law is not compatible with Article 59 of Directive 2013/36/EU of the European Parliament and of the Council<sup>25</sup>. Pursuant to Article 59(2) of Directive 2013/36/EU, Member States may authorise disclosures of certain information relating to the prudential supervision of institutions to parliamentary inquiry committees subject to specific conditions which apply when disclosing such information to parliamentary enquiry committees in the relevant Member State: (a) the parliamentary enquiry committee must have a ‘precise mandate’ under national law; (b) the information must be ‘strictly necessary’ for fulfilling that mandate; (c) persons with access to the information are subject to professional secrecy requirements under national law at least equivalent to those referred to in Article 53(1) of Directive 2013/36/EU; (d) where the information originates in another Member State, that it is not disclosed without the express agreement of the competent authorities which have disclosed it and, solely for the purposes for which those authorities gave their agreement; and (e) to the extent that the disclosure of information relating to prudential supervision involves processing of personal data, any processing by the parliamentary enquiry committee must comply with national law transposing Directive 95/46/EC of the European Parliament and of the Council<sup>26</sup>. These conditions have to be respected and implemented when disclosing confidential information to an enquiry committee of

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<sup>23</sup> See Article 33(1) of the Law.

<sup>24</sup> Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank (OJ L 318, 27.11.1998, p. 8).

<sup>25</sup> 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).

<sup>26</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

the National Assembly<sup>27</sup>. The ECB notes that the provisions in Directive 2013/36/EU on the exchange of information and professional secrecy do not provide a legal basis for the disclosure of confidential information to the National Assembly *per se*. Similar concerns may also be raised as regards Article 26(4), as proposed under the draft law. Accordingly, Article 26 should clearly state that the laws governing the protection of confidential information apply to any report that Banka Slovenije submits to the National Assembly. Second, under Directive 2014/59/EU of the European Parliament and of the Council<sup>28</sup> the sharing of confidential information on resolution (actions, tools, plans etc.) with parliamentary enquiry committees is not wholly unrestricted. Article 84(5) of Directive 2014/59/EU provides that Member States may authorise the exchange of information with parliamentary enquiry committees in their Member State 'under appropriate conditions'. Member States should take into account the general purpose behind professional secrecy in this context as expressed, for example, in recital 86 of Directive 2014/59/EU which states that '... therefore [it is] necessary to ensure that there are appropriate mechanisms for maintaining the confidentiality of such information, such as the content and details of recovery and resolution plans and the result of any assessment carried out in that context'<sup>29</sup>.

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

Done at Frankfurt am Main, 2 March 2015.

[signed]

*The President of the ECB*

Mario DRAGHI

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<sup>27</sup> See ECB Opinion on the disclosure of confidential information to a national parliamentary inquiry (CON/2014/89), Ireland, 19.12.2014, p. 2.

<sup>28</sup> 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).

<sup>29</sup> See ECB Opinion on the disclosure of confidential information to a national parliamentary inquiry (CON/2014/89), Ireland, 19.12.2014, p. 3.