EUROPEAN CENTRAL BANK

EUROSYSTEM

ECB-PUBLIC

Mario DRAGHI
President

Mr Markus Ferber
Member of the European Parliament
European Parliament
60, rue Wiertz
B-1047 Brussels

Frankfurt am Main, 25 July 2019

L/MD/19/278

Re: Your letter (QZ-034)

Honourable Member of the European Parliament, dear Mr Ferber,

Thank you for your letter, which was passed on to me by Mr Roberto Gualtieri, Chairman of the Committee on Economic and Monetary Affairs, accompanied by a cover letter dated 12 June 2019.

The ECB recently delivered an opinion on the Slovenian draft law on judicial relief granted to former holders of qualified bank credit.[1] This opinion was issued in response to the consultation request received on 12 April 2019 from the Vice-President of the Slovenian National Assembly. As with earlier legislative initiatives in this respect, the main objective of this draft law is to remedy the unconstitutionality of certain provisions on judicial relief contained in the Slovenian Law on banking.[2] These provisions concern Banka Slovenije's liability for damages with respect to extraordinary measures adopted under the same law to write down or convert qualified liabilities during the reorganisation of a bank that had failed or was likely to fail to meet minimum requirements for capital and liquidity to an extent that could result in the withdrawal of its banking authorisation.

1 See Opinion of the European Central Bank of 28 May 2019 on judicial relief granted to former holders of qualified bank credit (CON/2019/20), available at https://www.ecb.europa.eu/ecb/legal/pdf/en_con_2019_20_f_sign.pdf.

2 As declared by the Constitutional Court of the Republic of Slovenia in Decision No U-I-295/13-260 of 19 October 2016. While the Constitutional Court confirmed that the legal basis for the extraordinary measures imposed in 2013 and 2014 by Banka Slovenije in respect of the write-down of subordinated instruments was in line with the Constitution of the Republic of Slovenia, it held that the provisions of Article 350.a of the Law on banking, providing for judicial relief, were unconstitutional. This conclusion was based on the Constitutional Court's finding that exercising judicial relief under Article 350.a of the Law on banking did not afford effective judicial protection to former holders of qualified bank credit affected by Banka Slovenije's extraordinary measures.

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In Opinion CON/2019/20, the ECB reiterated the observations related to the prohibition of monetary financing previously made in Opinion CON/2019/13 of 27 March 2019 on the same matter.[3] As noted therein, a requirement that Banka Slovenije must pay compensation for damages, to the extent that it results in Banka Slovenije assuming the liability of the Republic of Slovenia, would not be in line with the monetary financing prohibition laid down in Article 123 of the Treaty.[4] As repeatedly noted by the ECB, while resolution tasks may be considered to be central banking tasks, provided that they do not undermine the independence of a national central bank (NCB) in accordance with Article 130 of the Treaty, the discharge of these tasks by NCBs may not extend to the financing of resolution funds or other financial arrangements related to resolution proceedings, as these are government tasks. In this respect, the ECB further noted that Directive 2014/59/EU[5] provides that the resolution financing arrangements may be used to pay compensation to shareholders and creditors if the valuation carried out for the purposes of assessing whether shareholders and creditors would have received better treatment if the institution under resolution had entered into normal insolvency proceedings determines that any shareholder or creditor has incurred greater losses than they would have incurred under normal insolvency proceedings. The ECB also noted that Regulation (EU) No 806/2014[6] provides, on the one hand, that the resolution fund may be used to pay compensation to shareholders or creditors if, following a valuation, they have incurred greater losses than they would have incurred under normal insolvency proceedings and, on the other hand, that in the case of non-contractual liability, the Single Resolution Board should compensate for any damage caused by it or by its staff in the performance of their duties. The draft law should establish liability arrangements which clarify that Banka Slovenije is not liable to pay compensation for damages in circumstances that mirror the compensation provided for under Directive 2014/59/EU and Regulation (EU) No 806/2014, namely the compensation to be paid from resolution financing arrangements to shareholders or creditors when a second independent valuation (carried out after resolution actions have been effected) determines that shareholders or creditors have incurred greater losses than they would have incurred under normal insolvency proceedings. Otherwise, Banka Slovenije would *de facto* finance extraordinary measures akin to resolution proceedings. Banka Slovenije may not finance a government task.

3 See, in particular, paragraph 2.1.2 of Opinion of the European Central Bank of 27 March 2019 on judicial relief granted to former holders of qualified bank credit (CON/2019/13).

4 For the purposes of the monetary financing prohibition, Article 1(1)(b)(ii) of 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) defines "other type of credit facility", inter alia, as "any financing of the public sector's obligations vis-à-vis third parties".

5 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).

6 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).

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Furthermore, in relation to your inquiry on possible actions against a violation of the monetary financing prohibition, as noted by the ECB in Opinion CON/2019/20, Article 258 of the Treaty empowers the European Commission to bring a case before the Court of Justice of the European Union where a Member State has failed to fulfil an obligation under the Treaties, e.g. by way of enacting national legislation incompatible with the Treaties. Such action for infringement of Union law by a Member State also covers infringement proceedings in connection with the prohibition on monetary financing laid down in Article 123 of the Treaty. In addition, under Article 271(d) of the Treaty the Governing Council of the ECB has in respect of NCBs the same powers as those conferred upon the Commission in respect of Member States by Article 258 of the Treaty. Consequently, if the ECB considers that an NCB has infringed an obligation under the Treaties, including where the monetary financing prohibition is concerned, the ECB may bring an action for failure to fulfil obligations against that NCB before the Court of Justice of the European Union.[7]

Yours sincerely,
[signed]

Mario Draghi

[7] Article 35.6 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank. See also Recital 9 of Council Regulation (EC) 3603/93 according to which, notwithstanding the role assigned to the Commission pursuant to Article 258 of the Treaty, it is for the ECB, pursuant to Article 271(d) of the Treaty, to ensure that NCBs honour the obligations laid down by the Treaty.

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