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THE SOCIAL DIMENSION OF THE ASSET QUALITY REVIEW IN THE EUROPEAN UNION

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Abstract

During the financial crisis that started in 2008, banks in the European Union (EU) needed state aid to stay afloat. After years of bailing out failing banks with public money, which led to high public debt levels across the EU, the European Commission introduced the bail-in approach. This approach required stress tests and asset quality reviews (AQR) to identify capital shortfalls in the various banking systems. The idea was to review the quality of banks' assets, including the collateral valuations and the adequacy of assets and other collateral provisions. This study focuses on the case of Slovenia, the first EU member state that applied a bail-in approach even before it became a legally binding law at the EU level. The Slovenian bail-in led to the cancellation of all subordinated obligations (shares or bonds) held by thousands of investors, mainly private individuals. The information asymmetry and data confidentiality argument together with the applied assumptions in AQR and stress tests have raised questions about the reliability and credibility of the national and EU authorities in this respect. This paper focuses on the social/human dimension of this case by presenting the current situation through the lens of the temporal dimension of former investors' plight in their legal attempts to challenge those extraordinary measures. The paper revolves around data confidentiality and other issues that have contributed to the fact that this situation remains unresolved, more than ten years after the nationalisation measures. The finding of this analysis is that former investors have had no legal means to effectively challenge nationalisation measures because the authorities in Slovenia have failed to provide an appropriate tool that would be effective and available in practice.

Keywords*: bail-in, AQR, subordinated debt, lack of judicial remedies, nationalisation measures*

I. INTRODUCTION

The global financial crisis that spilled over to Europe in 2008 had a more serious and profound impact on the European Union and the Eurozone member states compared to some other developed countries. The crisis exposed weak and/or non-existent tools in the Eurozone monetary policy architecture

needed to respond to the contagion timely and accurately.[1] The European Monetary Union (EMU) became fully functional in 1999. Its primary objective as set by the Treaty on the Functioning of the European Union was monetary policy and price stability.[2] The mandate to implement monetary policy was entrusted to the European Central Bank (ECB). Other functions, such as the supervision and control of banks and other financial institutions were the competence of the national central banks in the European Union (EU). There was also no proper regulatory framework at the EU level to prevent the build-up of significant fiscal imbalances and to enhance economic and financial surveillance of euro-area member states threatened with serious financial difficulties.[3] In its Communication to the European Council of 4 March 2009 on 'Driving the European Recovery'[4], the European Commission announced a reform program to address general weaknesses in the regulatory framework applicable to financial institutions operating in the EU. In addition to the lack of regulatory framework, there was no proper institutional framework at the EU level to respond to save failing banks and stabilise the banking systems.[5] There were no EU system-wide asset quality reviews (hereinafter AQR) and stress tests in order to react quickly in cases of a widespread banking crisis in an environment that is not an optimum currency area.[6] The ECB in 2015 even acknowledged that without the crisis, "[the ECB] would most likely not be here today discussing stress testing nor would the macroprudential policy area be so much under the spot light."[7] The use of system-wide stress tests has been one of the results of the financial crisis in the EU and although those tests initially

[1] Bank for International Settlements. Fernando Restoy Chairman, Financial Stability Institute, "The European banking union: what are the missing pieces?" Public lecture at the International Centre for Monetary and Banking Studies. Geneva, Switzerland, (October 2018):3.

[2] Consolidated version of the Treaty on the Functioning of the European Union. Official Journal of the European Union C 326/47 from 26.0.2012.

[3] Heather D. Hibson, Theodore Palivos and George S. Tavlas, "The Crisis in the Eurozone: An Analytic Overview," Special Conference paper no.28. Bank of Greece. (July 2013):11. www.bankofgreece.gr/Publications/SCP201328.pdf.

[4] European Commission, Communication to the European Council on 4 March 2009. COM (2009) 114.

[5] Jörg Bibow, "Lost at Sea: The Euro Needs a Euro Treasury." *Levy Economics Institute of Bard College Working Paper* no.780, 21. (2013):1-64. https://www.levyinstitute.org/pubs/wp_780.pdf.

[6] Alain Durré, 'The future of the euro as a suboptimal currency area." *Reflets et perspectives de la vie économique* 2017/4, 34-35 (Tome LVI):31-45. https:/www.cairn-int.info/article.php?ID_ARTICLE=E_RPVE_564_0031.

[7] ECB, "The role of stress testing in supervision and macroprudential policy." Keynote address by Vítor Constâncio, Vice-President of the ECB, at the London School of Economics Conference on "Stress Testing and Macroprudential Regulation: a Trans-Atlantic Assessment," London October 2015.

reflected mostly a micro supervision perspective,[8] it was recognised that there was a need to include the macro dimension to stress testing. Such a dimension entails accounting for macroeconomic impacts along the horizons of stress testing exercises[9] in an AQR as a forward-looking tool for determining a capital buffer in cases of future deterioration in the real economy. The AQR supposedly identifies problem assets in the financial system. The quality of data used for AQR and its availability for examination are therefore crucial for credibility and reliability in this respect.

This paper presents these issues through the case study of Slovenia, the first country in the EU that applied the new bail-in principle even before it became legally mandated at the EU level. The bail-in rescue of banks essentially means that banks were nationalised. This research revolves around the AQR's "data confidentiality" argument that has been used by the authorities in Slovenia in a rescue scheme of major Slovenian banks. Affected investors had no effective judicial remedy to establish whether their creditors' rights had been justifiably cancelled, and if not, to seek compensation. Since the focus of this paper is on former investors and their legal avenues to challenge extraordinary measures, this paper touches on factors and important legal questions that have arisen in that process. This examination includes, for example, how "soft" the EU soft law is considering that soft law is not subject to the typical legislative process of the European Parliament. Slovenia was the first EU member state that applied the particular-soft law (i.e., the Banking Communication of 2013) and it was the first EU member state to ask the Court of Justice of the European Union (hereinafter: the CJEU) for a preliminary ruling in this respect. The Slovenian bank-rescue operation in 2013 also led to questions of inviolability of the archives of the ECB resulting from the protocol on the privileges and immunities of the EU in situations when the Central bank Governor and the Vice-Governors are suspected of the abuse of power. Slovenia was the first EU member state that was referred to the CJEU by the European Commission on that basis. This paper does not delve into the two questions above because they are only important procedurally regarding the legal processes initiated by former investors. The paper also does not elaborate on the question of funding the costs entailed in the liability regime in such situations when the central

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[8] ECB. "STAMP€: Stress-Test Analytics for Macro-Prudential Purposes in the Eurozone." (February 2017): 7-9 https://www.ecb.europa.eu/pub/conferences/shared/pdf/20170511_2nd_mp_policy/DeesHenryMartin-Stampe-Stress-Test_Analytics_for_Macroprudential_Purposes_in_the_euro_area.en.pdf.

[9] Bank for International Settlements, "Supervisory and bank stress testing: a range of practices." Basel Committee on Banking Supervision. (December 2017): 6-9. https://www.bis.org/bcbs/publ/d427.pdf.

bank of the Eurozone might be liable. This was also an issue that appeared in the legal proceedings of former investors and was also the question that Slovenia referred to the CJEU for preliminary ruling.

The controversy of the Slovenian bank-rescue operation has been already analysed[10] and various legal questions were examined by academics.[11] The problem has been explored through the lens of interplay between the supranational authorities and the domestic political game[12], the crisis of democracy point of view and others.[13] It has been argued that the restructuring of banks coordinated by the Bank of Slovenia resulted in "exaggerated capital need for bank recapitalization, increased public debt, and destined the two largest and directly state-owned banks (NLB and NKBM Banka) for privatisation."[14] Moreover, it has been argued that the AQR has not only been a very expensive undertaking because only multinational audit firms that ECB recommended can be hired employed, but it also "produced the result that the total capital need of the banks was much higher than originally estimated by the Bank of Slovenia."[15]

Despite the solid body of research on the subject by domestic and foreign academics, there has been no research focused on the thousands of former investors, mostly private individuals, who lost millions of euros due to nationalisation measures. It must be explored whether their right to know led to adequate answers and if they were deprived of their assets due to arbitrary, varying, or otherwise problematic assumptions. There has been no research regarding what happened to the right of former investors to peacefully enjoy their possessions and what the legal outcome is.

This paper aims to fill this gap. The paper does not introduce a new theory or upgrade the existing ones. Nor does it aim to prove anything. Accordingly, there is no testing of any hypotheses. Rather, the focus of the paper is on

[10] Matija Damjan, Klemen Podobnik, and Ana Vlahek, "Izbris kvalificiranih obveznosti bank. Pravna analiza primera Kotnik." Ljubljana: Institut za primerjalno pravo pri Pravni fakulteti. (2019): 1-402. https://www.ipp-pf.si/uploads/File/Izbris%20kvalificiranih%20obveznosti%20bank%20-%20knjiga.pdf.

[11] Ana Vlahek and Matija Damjan, "European Commission's Banking Communication: Question of Validity in the Slovenian Banking Bail-in Puzzle," *European State Aid Law Quarterly.* 15, no. 3 (2016): 458-467. https://doi.org/10.21552/estal/2016/3/14.

[12] Marko Lovec, "Politics of setting an example: The European Banking Union and the case of Slovenia". *L'Europe en Formation.* 2-3, no. 383-384 (2017): 85. https://www.cairn.info/revue-l-europe-en-formation-2017-2-page-84.htm.

[13] Ana Podvršič and Dora Piroska. "New European Banking Governance and Crisis of Democracy: Bank Restructuring and Privatization in Slovenia". *New Political Economy.* 25, no. 6 (2019): 998. https://doi.org/10.1080/13563467.2019.

[14] Ibid, 1000.

[15] Ibid, 1001.

former investors from the perspective of their right to peacefully enjoy their possessions and the fact that they are still at the beginning of the understanding of why their assets were wiped out. By taking a qualitative research approach, this study presents their long legal journey from the Constitutional Court of Slovenia at the end of 2013, to the CJEU, to the European Court of Human Rights, back to the CJEU again and back to the Constitutional Court of Slovenia again. Now, as of March 2024, former investors find themselves at the same point as in December 2013. The finding is that this long legal road has been partly the result of the lack of the relevant regulatory and institutional setting at the EU level. In the legal architecture of the EU member states have the obligation to respect and apply EU laws. However, the larger part of the answer to why this legal avenue has taken more than a decade lies with the Slovenian authorities. They have not responded timely or adequately, despite the urgency to resolve the situation, as called by the Constitutional Court of Slovenia in 2016 and the European Court of Human Rights in 2021.

II. METHODOLOGY AND DATA SOURCES

This research lies at the intersection of law and certain social sciences (economics, sociology and political science). Law has an influence on society,[16] making the interaction between law and social forces a complex process. The term "social dimension" in this paper is defined as the inability of former investors to take a proper course of action due to the lack of legal remedies to challenge the decisions of the Bank of Slovenia. Therefore, the social dimension is strongly associated with transparency about why their assets were wiped out. Time is also closely associated with this. Time is embedded in the social dimension term. The time taken for resolution of a certain issue is critical to the justice experience,[17] in line with the famous quote that "justice delayed is justice denied." There is a relationship between substantive/procedural legal rules and time, which is a necessary element of human comprehension and experience.[18] Although the passage of time does not necessarily change people's relative rights, uncertainty is one of its major costs. That is particularly relevant in this case.

In line with its focus, the methodology of the paper is qualitative. Although it has been argued that qualitative methods are being pushed in the direction

[16] W.A.Bogart, *Consequences: The Impact of Law and its Complexity* (Toronto: University of Toronto Press, 2002).

[17] Tanya Sourdin and Naomi Burstyner. "Justice Delayed is Justice Denied." *Victoria University Law and Justice Journal* 4, no. 1 (2014): 49–62.

[18] Richard A. Epstein. "Past and Future: The Temporal Dimension in the Law of Property." *Washington University Law Quarterly (*1986) 64:3.

of mimicking quantitative research,[19] the research methodology in this paper is qualitative and it is also explanatory, which is in line with theoretical works that highlight the importance of understanding the whole story and the legal process before and after formal institutionalization. According to theoretical works on qualitative methods, a textual analysis and explanatory interpretation is about explaining how and why things happen;[20] this case begs the question of why there has not been an adequate legal solution more than 10 years after the nationalization measures and why the former investors still have no proper legal tools to challenge those measures. This qualitative and explanatory approach looks at the reasons that have influenced this outcome by examining EU regulatory and institutional contexts. Data sources are the Treaty on European Union, the Treaty on the functioning of the European Union, case law from the CJEU, as well as the decisions of the European Court of Human Rights and others. The textual analysis also includes reports, documents, press statements, and similar sources from the European Commission, European Central Bank and other EU institutions and authorities.

In compliance with established methods of qualitative research[21] the qualitative approach in this paper also includes a case study. The case study of Slovenia is important because it was the first country in the EU that applied the bail-in approach even before it became legally mandated at the EU level. Data sources in this respect are reports and other documents from the Bank of Slovenia, the government of Slovenia, and other sources such as decisions of the Constitutional Court of Slovenia. Since case studies typically examine certain phenomena in context[22] this case study looks at the legal, economic, and regulatory context in Slovenia before and after the enforcement of extraordinary measures. The advantage of case studies is that they make it possible to look at the importance of policy formulation for particular outcomes.[23] Case studies may be quite efficient at presenting certain causal links.

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[19] Joep P. Cornelissen. "Preserving Theoretical Divergence in Management Research: Why the Explanatory Potential of Qualitative Research Should Be Harnessed Rather than Suppressed," *Journal of Management Studies* 54, no. 3 (2017): 368-383.

[20] Robert K. Yin, *Qualitative Research from Start to Finish* (2nd edition) (The Gilford Press. New York. 2016).

[21] Joachim K. Blatter, Markus Haverland and Merlijn Van Hulst, *Qualitative Research in Political Science* (SAGE Publications Ltd., 2016).

[22] Lisa Webley. "Stumbling Blocks in Empirical Legal Research: Case Study Research" *Law and Methods. (*2016). Westminster Research. https:// westminsterresearch.westminster.ac.uk/download/d7fc6d5c9c7234f627b94b7206daf7448a2a9c35c2ebfb32a18f9b49681647c1/205286/Stumbling_Blocks_in_Empirical_Legal_Research_Case_Study_Research.pdf.

[23] Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge: MIT Press, 2005).

III. THE CONTEXT

State aid rules are set forth in the Treaty on the Functioning of the EU (hereinafter, the TFEU). According to the provisions of the TFEU any state aid granted by a member state must first be approved by the European Commission. Even though state aid to EU companies is in principle prohibited under the EU law, it can be authorised in certain circumstances. State aid to banks was approved by the European Commission's Directorate-General for Competition in the form of guarantee schemes, liquidity schemes, recapitalisation, and restructuring aid.[24]

III.A. European Union

From 2008 to 2013 the European Commission introduced a series of Communications about how the European Commission would evaluate EU member states' notifications of state aid to financial institutions based on the EU rules on state aid (Table 1 below). However, in the legal architecture of the EU, these Communications are considered soft law and are not legally binding on EU member states.[25]

Table 1.
Communications from the European Commission 2008-2013

25th October 2008	Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis.
15th January 2009	Communication from the Commission — The recapitalization of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition.
26th March 2009	Communication from the Commission on the treatment of impaired assets in the Community banking sector.
19th August 2009	Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules.
7th December 2010	Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis.
6th December 2011	Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis.
30th July 2013	Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication').

Source: EUR-Lex, 2024

[24] European Commission. "State Aid: Commission adapts crisis rules." Press release from 10 July 2013. https:// ec.europa.eu/commission/presscorner/detail/en/IP_13_672.

[25] European Parliament. "Better regulation and the improvement of EU regulatory environment". (March 2007). https://www.europarl.europa.eu/RegData/etudes/note/join/2007/378290/IPOL-JURI_NT(2007)378290_EN.pdf.

When the financial crisis hit the EU in 2008, there was no particular EU legislation that was applicable as a responsive tool on the EU level to resolve a financial crisis that was followed by a banking crisis and sovereign debt crisis.[26] As a result, policymakers in the EU had to find other options. They discovered that state aid provisions of the Article 107(3b) of the TFEU could be used as a legal basis for approving state aid in bank rescue operations. Article 107(3b) of the TFEU provides the European Commission with wide discretion to approve state aid measures on the grounds of remedying a serious disturbance in a member state's economy.[27] The European Commission used this Article of the primary EU law (i.e., TFEU) to approve member states' requests for state aid to banks and to coordinate a response to the financial crisis at the EU level.[28]

The crisis was not just temporary, and it was not just a liquidity[29] problem as some economists and policy makers in the EU initially believed in the early phases of the crisis. As the crisis dragged on after 2008, soft law in the form of European Commission's Communications began piling up; so were non-performing loans. As a result, state aid to banks led to the growing public debt in the Eurozone.[30] On average, public debt in the Eurozone as a percentage of GDP reached record highs.[31] Since the conventional wisdom at the time was that rising public debt required austerity, harsh austerity measures were imposed on EU member states, particularly in Southeastern Europe where public debt was growing at an alarming rate. As a result, the macro-economic situation there deteriorated more severely, producing acute economic and social pain.[32] In addition, interest rates on government (and private) debt in many countries of the Eurozone exploded and public debt rose to unsustainable

[26] European Commission. "A comprehensive EU response to the financial crisis: substantial progress towards a strong financial framework for Europe and a banking union for the Eurozone." Memo from 24 January 2014. https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_57.

[27] European Court of Auditors/ "Control of State aid to financial institutions in the EU: in need of a fitness check". https://op.europa.eu/webpub/eca/special-reports/state-aid-banks-21-2020/en/#:~:text=During%20the%20financial%20crisis%2C%20the,kept%20to%20the%20minimum%20necessary. Special Report (21/2020): 7.

[28] Ibid.

[29] ECB. "The response of the Eurosystem to the financial crisis. Speech by José Manuel González-Páramo, Member of the Executive Board of the ECB Keynote Speech at the European Parliament's Special Committee on the Financial, Economic and Social Crisis (CRIS)" Brussels, 10 November 2009.

[30] ECB. "Government debt reduction strategies in the Eurozone" Economic Bulletin No.3, Article 2 (2016): 3-4. https://www.ecb.europa.eu/pub/pdf/other/eb201603_article02.en.pdf.

[31] Philip R. Lane, "The European Sovereign Debt Crisis," *Journal of Economic Perspectives,* 26, no.3 (2012):51.

[32] Martin McKee, et al. "Austerity: A Failed Experiment on the People of Europe," *Clinical Medicine* 12, no.4 (2012): 346-350. https://doi.org/10.7861%2Fclinmedicine.12-4-346.

levels. International rating agencies started downgrading government debt of many Eurozone members, leading to speculations that the Eurozone would fall apart. It was the time when the then ECB President Mario Draghi famously stated that the ECB is ready to do "whatever it takes" to save the Euro.[33]

In that situation, the EU approach to rescuing banks with taxpayers' money via state aid provisions reached a limit.[34] So, the idea of bail-in and burden sharing to save banks was born. Therefore, in July 2013[35] the European Commission published the Banking Communication that was a move away from taxpayer-funded bailouts to a "bail-in" approach. This approach means that certain losses had to be imposed on investors before state resources could be provided to banks to save them. This did not apply to depositors and ordinary bonds owners. The Banking Communication established that if the capital of a bank no longer fulfilled relevant requirements, before granting any state aid, the burden should be shared by equity owners, hybrid investors, and subordinated debt[36] (through conversion into shares or write-downs). However, the European Commission had the discretion to decide when this requirement could be waived. The burden-sharing, or in other words, the bail-in approach, pursues the objective of keeping public expenditures for the rescue of banks to the minimum. However, since the Banking Communication of 2013, as other European Commission's Communications were "soft" law that were not legally binding on EU member states, the legal EU architecture had to evolve further. The first relevant legally binding text, the Bank Recovery and Resolution Directive (hereinafter, the BRRD), published in 2014 and effective in 2016 enforced the bail-in principle on all EU member states.

III.B. Developments in Slovenia

From 2004, when Slovenia joined the EU to 2007, when it joined the Eurozone, the country experienced high economic growth of around 5% on average. After becoming a member of the EU, Slovenian banks started borrowing on the EU internal market where interest rates were lower. As a result, the indebtedness of companies and households grew. When the crisis hit Europe in 2008 and continued through 2009 and after, the macroeconomic trends in Slovenia turned. GDP fell by almost 8% in 2009 while the cheap borrowing

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[33] ECB. Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London on 26 July 2012. https:// www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html.

[34] European Commission. "Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favor of banks in the context of the financial crisis". Official Journal of the European Union C 216/1 from 30.7.2013.

[35] Ibid

[36] In the case of liquidation, subordinated bonds were given lower priority than other classes of bonds.

from the EU markets was brought to a halt. The unemployment rate rose. The highly indebted private sector suddenly found itself underwater. Corporate debt kept growing in banks' accounts as non-performing loans.

The Slovenian banking system is small. At the end of 2012 it was the third smallest in the Eurozone with its balance sheet being 139% of BDP (46.1 billion EUR).[37] Until 2013, before the controversial bank rescues, the banking system in Slovenia comprised 17 banks that included three savings banks and three branches of foreign banks. Slovenia had the highest share of state-ownership of banks (44%) in the Eurozone at the time. As the crisis intensified from 2008 onward, the government of Slovenia tried to solve liquidity problems in directly or indirectly state-owned banks NLB, NKBM, and Abanka. Slovenia provided notice of its guarantee scheme and the package of measures. All were approved by the European Commission which, in its press release, stated that the "scheme was an appropriate means to resolve serious disturbance in Slovenian economy"[38] and that it was "non-discriminatory and not limited by time or purpose, although it is so designed that it prevents abuse" and that the safeguards are such that they will "minimise state aid to the level that is required for the stabilisation of the financial sector so that the impact of the negative spillover will be only minimal." This scheme was then continued twice, each time for six months.

Slovenia gave notice of the second and the third extension of the liquidity scheme in 2010 and in January 2011 it notified the European Commission that it would recapitalise NLB bank with 250 million EUR. In 2011, 2012, and 2013, Slovenia provided state aid to banks in various forms, including the continuing recapitalization of the largest state-owned bank, NLB bank. As a result, public debt grew rapidly to reach 80% of GDP by 2015, although it was less than 25% of GDP in 2003, a few years before the start of the crisis. At the same time, Slovenia experienced the deterioration of the financing conditions on international financial markets, which, due to the high share of state-owned banks, added to uncertainty for the banking system. At the end of 2012, the European Commission in its report on the Alert Mechanism found that the banking sector in Slovenia had large problems[39] and that the share of non-performing loans in banks required additional adjustments regarding the evaluation of collateral. The European Commission requested an immediate

[37] Bank of Slovenia, "Report on the comprehensive review of the banking system," 23.11. 2013. https://bankaslovenije.blob.core.windows.net/uploaded/Financial%20Stability%2FSTRES%20TESTS%2FKratko_poročilo_FINeng_FULL.pdf.

[38] European Commission, "State aid: Commission Approves Slovenian Support for Credit Institutions," Press Release IP/08/1964 from 12 December 2008.

[39] European Commission, Report from the Commission on the Alert Mechanism Report 2013. 28. 11. 2012 (COM (2012)751 FINAL, (2012):16–17.

reaction in order to improve credibility of the state and access to financial markets and strengthen banks' balances and recommended the asset quality (AQR) and stress tests.

Before the AQR began, both directly state-owned banks, the NLB and NKBM bank, asked again for state recapitalization and public sources to cover the capital shortfall at the time. The main problem for the government was a rapid increase in budget deficits and cumulative public debt. With the bail-out, the deficit and public debt would increase to 15% and 71% of the GDP, respectively. Simultaneously, in 2013, the expected return on Slovenian 10-year bonds reached 7%. In order to avoid an international bailout (i.e., the famous "Troika": IMF, ECB and European Commission) and the accompanying harsh conditions, Slovenia needed to "bail-in" creditors.

III.C. AQR and Stress Tests

The Bank of Slovenia undertook AQR and stress tests. The banks accounting for 70% of the banking sector were included in AQR and stress tests. At first, 10 banks were included in the AQR (Probanka and Factor banka were later excluded from the comprehensive review). AQR and stress tests were undertaken by consulting firms that acted as international advisors under the auspices of the special Directional Board (also called Steering Committee)[40] consisted of the representatives of the Bank of Slovenia, the Slovenian Ministry of Finance and the EU/EMU authorities such as the ECB, and the European Banking Authority. The starting point for stress tests in comprehensive review were banks' balances at the end of 2012. The European Commission and the ECB set the rules for the assessment of the capital shortfall based on two economic scenarios, the basic and the adverse scenario for the three-year projection period (2013-2015). The alignment of both entry data for stress tests was then confirmed by the Directional Board. Based on the macroeconomic projections for the baseline scenario and adverse scenario, the Bank of Slovenia assessed the response of banking variables under the two scenarios.[41]

The basic scenario was based on the macroeconomic outlook for Slovenia as set by the European Commission's Spring forecast. This scenario was later revised so that the forecast was downgraded considering macroeconomic data in the first quarter of 2013 and the fact that the GDP growth was slightly negative. This scenario envisioned a further significant deterioration of economic activity in the remainder of 2013 and in the year 2014. According to the hypothetical adverse scenario, Slovenia would have experienced a strong recession in the following three years which implied that investors would

[40] Ibid, 3

[41] Bank of Slovenia, "Report on the comprehensive review of the banking system," 3

demand higher risk premia for investments in Slovenian sovereign debt. The adverse scenario was therefore based on negative assumptions because it envisaged 9.5% contraction of GDP by the end of 2015.[42] Real data for the period under stress tests later proved that there was no strong GDP contraction by the end of 2015. The results of stress tests of banks included in the comprehensive review showed that the potential capital shortfall at the end of three-year period (by the end of 2015) would be:

1. on the basis of basic scenario and the fulfilment of »Core Tier 1« capital of 9%, the capital shortfall would be between EUR 2,725 million (according to *Top-down* approach) and EUR 4,046 million (according to *Bottom-up* approach);
2. on the basis of the second, adverse scenario, and the fulfilment of »Core Tier 1« capital of 6 %, the capital shortfall would be between 3,280 million EUR (according to *Top-down* approach) and EUR 4,778 million (according to *Bottom-up* approach).[43]

On 17 December 2013, the Bank of Slovenia issued its decisions about extraordinary measures with which it ordered that all qualified liabilities ceased to exist at the NLB, NKBM, Factor banka, Probanka and Abanka.[44] The next day, on 18 December 2013, the European Commission approved measures of state aid and restructuring plans for NLB and NKB and aid for the orderly winding down of Factor Banka and Probanka, and rescue aid in favour of Abanka, for reasons of financial stability. Joaquín Almunia, the Vice President of the European Commission and in charge of competition policy said *that "today's decisions on NLB, NKBM, Factor Banka, Probanka and Abanka will strengthen confidence in Slovenian banks. Following the results of the asset quality review and stress test, the restructuring and resolution measures foreseen will ensure that Slovenia's economy can count on a viable, healthy banking sector.*"[45]

IV. EXTRAORDINARY MEASURES AND LEGAL ISSUES

IV.A. Timeline of Extraordinary Measures

On 23 October 2012, the National Assembly of Slovenia adopted the Act Regulating Measures of the Republic of Slovenia to Strengthen the Stability of Banks (the Stability of Banks Act), which identified measures that allowed

[42] Real GDP figures for 2013, 2014 and 2015 were considerably better than assumed by the projections of the European Commission.

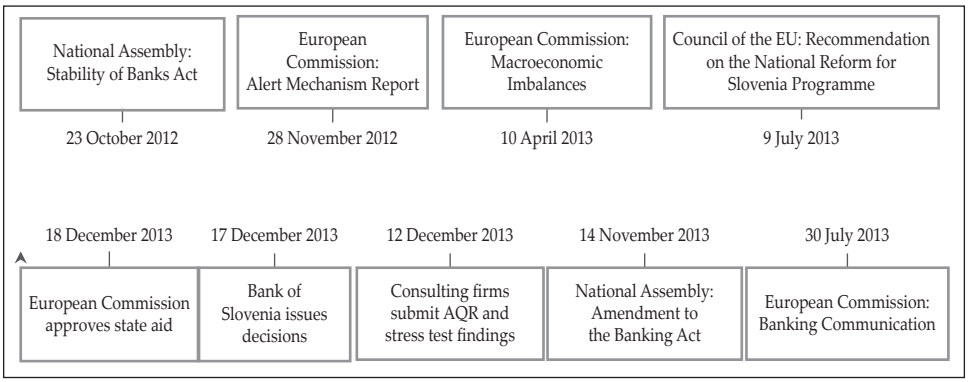
[43] Bank of Slovenia. "Report on the comprehensive review of the banking system", 3

[44] European Commission, "State aid: Commission approves rescue or restructuring aid for five Slovenian banks." Press release IP/13/1276 from 18 December 2013

[45] European Commision, "State aid: Commission approves rescue or restructuring aid for five Slovenian banks."

direct recapitalization of banks through the use of public funds and the transfer of non-performing assets to a particular state-owned company, the Bank Asset Management Company (BAMC).[46]

Figure 1. Time dimension of introducing extraordinary measures in Slovenia



Sources: Bank of Slovenia, European Commission, 2024

On 28 November 2012, the European Commission issued its report on the Alert Mechanism Report 2013, in which it was noted that the situation in Slovenia regarding banking stability remained fragile and suggested that an in-depth analysis be carried out (Figure 1). On 10 April 2013, the European Commission published a report "Macroeconomic imbalances - Slovenia 2013", which established that the banking sector was one of the main reasons for excessive macroeconomic imbalances in Slovenia. It noted that Slovenia had upgraded the legal framework for bank supervision, which provided the national central bank, the Bank of Slovenia, with new powers, including the power to take "extraordinary measures".

On 9 July 2013 the Council of the EU issued the Recommendation on the National Reform Programme 2013 for Slovenia that the Republic of Slovenia undertook various measures in order to ensure the stability of the banking sector. On 30 July 2013, the Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ("the Banking Communication") was published. It indicated that state aid should be granted based on terms representing an adequate burden-sharing by those who invested in the subject banks. Specific provisions concerning burden sharing state that hybrid capital

[46] European Court of Human Rights Judgement, *Pintar and others v Slovenia.* (Applications nos. 49969/14 and 4 others – see appended list), (14 September 2021):4 https://hudoc.echr.coe.int/fre?i=001-211787

and subordinated debt holders should contribute to reducing the capital shortfalls to the maximum extent. In cases where the bank could no longer meet the minimum regulatory capital requirements, the subordinated debt would be converted or written down, in principle before state aid is granted. State aid should not be granted before equity, hybrid capital, and subordinated debt could fully contribute to offsetting any losses.

On 14 November 2013, the National Assembly of Slovenia adopted the Amendment to the Banking Act which introduced and defined the conditions and powers of the Bank of Slovenia with regard to the application of extraordinary measures of cancelling the bank's shareholder equity and/or cancelling or converting subordinated instruments of banks in order to prevent a bank's failure and to preserve the stability of the financial system. In the meantime, between May 2013 and September 2013, the NLB, the NKBM, and three other banks applied for state aid.[47]

On 12 December 2013, the various consulting firms submitted stress test results and their findings concerning the AQR. As a result of that, the Bank of Slovenia established that the shareholder equity of all five banks that had applied for state aid would have been negative at the end of the financial year and that the conditions for the commencement of bankruptcy due to insolvency were met by all five banks, because the banks lacked the necessary assets to repay their liabilities (Figure 1). On 17 December 2013, the Bank of Slovenia issued decisions putting in place extraordinary measures with respect to the five banks which had applied for state aid. With these decisions the Bank of Slovenia cancelled all existing eligible liabilities. The decisions stated that the share capital of the banks concerned be reduced to zero and at the same time increased by issuing new shares and that these provisions were to replace a decision by the shareholders' meeting. The increase in capital was done, in full, by monetary and in-kind contributions provided by the state. The holders of eligible liabilities (former investors) were denied priority in obtaining new shares. The decisions concerning the extraordinary measures were given to the banks, which were required to provide that information to the former investors.[48] The information about the extraordinary measures were published on the special online service of the Ljubljana Stock Exchange and the Bank of Slovenia's website.[49]

Former investors lost about 960 million Euros in the process. The government of Slovenia then injected more than 3 billion euros in banks. In order to get the approval for state aid from the European Commission, the

[47] ECHR, Judgement *Pintar and others v Slovenia*, 3
[48] ECHR, Judgement *Pintar and others v Slovenia*, 3
[49] ECHR, Judgement *Pintar and others v Slovenia*, 3

government had to commit to some obligations, including the full privatisation of NKBM by the end of 2016 and the reduction of state ownership in NLB banka to 25% plus 1 share by the end of 2017. These commitments were added to the privatisation program adopted by the National Assembly in 2013 that included certain strategic companies such as the national airport[50].

On 18 December 2013, the European Commission approved state aid to the five banks. In its decision on state aid for the NLB bank, issued on 18 December 2013, the European Commission stated:

> *In that respect, Slovenia committed that before any State aid is granted to [the] NLB (...), the latter will write-down in full its shareholders' equity and outstanding subordinated debts so ensuring compliance with the requirements of 2013 Banking Communication. The Commission positively notes that the contribution of subordinated debt holders is achieved to the maximum extent possible, thus ensuring adequate burden-sharing. The State capital injections will only be implemented after the complete implementation of the wipe-out of the subordinated debt holders. That sequence ensures that all existing subordinated debt holders have to fully contribute to the restructuring costs of the bank prior to the State stepping in.*[51]

Apart from certain information that was published publicly, the content of the above decisions was classified as strictly confidential. It later became available to some extent. However, several other documents including the material produced by the consulting firms (relating to the AQR and stress tests), which underpinned the mentioned extraordinary measures by the Bank of Slovenia, were treated as confidential and continue to be inaccessible to the former investors.[52]

After that several criminal complaints against the members of the Governing Board of the Bank of Slovenia were filed in connection with the above measures. In June and July 2016, the law enforcement authorities, acting on suspicion of abuse of power and of official functions, carried out wide-scale investigative measures, including police searches and seizure of documents and electronic data at the premises of the Bank of Slovenia, the NLB and the consulting firms that had conducted the AQR and stress tests. Bank of Slovenia[53] refused to submit the documents. According to the Slovenian police, there were suspicions concerning an assessment of one of the banks rescued by the state in 2013, which meant that that bank could have

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[50] Drzavni zbor, Sejni zapisi Drzavnega zbora, 39 *Izredna seja.* 21 June 2013. https://fotogalerija.dz-rs.si/datoteke/Publikacije/Sejni_zapisi_Drzavnega_zbora/2011-2014/2013-06-21_IS_39.pdf

[51] European Commission Press release, "State aid: Commission approves rescue or restructuring aid for five Slovenian banks," 18 December 2013

[52] ECHR, Judgement *Pintar and others v Slovenia*, 5

[53] Reuters. "Slovenia cbank defends 2013 bank overhaul, says police raid took unrelated documents". 7 July 2016. https://www.reuters.com/article/slovenia-cenbank-idUKL8N19U1VF

gained financial benefits and reduced its obligations towards former investors due to decisions taken by "official persons."[54] Although the Bank of Slovenia argued that the police raid had infringed the principle of the inviolability of the "archives of the European Central Bank (ECB)" resulting from the Protocol on the privileges and immunities of the EU and requiring that any access by the national authorities to those archives be subject to the express agreement of the ECB, the Slovenian authorities continued with their search and seizure of documents.

The then Governor of the Bank of Slovenia, Bostjan Jazbec, immediately alarmed the European Commission and the ECB about the police raid. The then President of the ECB, Mr. Mario Draghi wrote a letter to Slovenian authorities,[55] threatening legal action in this respect.

IV.B. Former investors attempted to start legal proceedings

Many former investors, private persons found out about the Bank of Slovenia's decisions of 17 December 2013 from the media. For instance, Mr. Pintar, who on 17 January 2014 sent an email to the Bank of Slovenia asking for a formal document confirming that his shares had been cancelled.[56] On 21 January 2014 he received a reply that no formal document could be issued to that effect and that his shares had been cancelled once the NKBM had been notified of the Bank of Slovenia's decision.[57] Another investor, Mr Jukič brought an action against the Bank of Slovenia and the state before the Administrative Court, seeking annulment of the Bank of Slovenia's decision or a finding that it interfered with his human rights. On 10 June 2014, the Administrative Court rejected the action, finding that the impugned decision was administrative in nature but subject to special regulation of the Banking Act which allowed only the banks to challenge it. In the meantime, on 2 January 2014 Mr Jukič lodged a constitutional complaint against the aforementioned decision of the Bank of Slovenia, arguing that he had no effective remedy at his disposal and that he had no access to the Bank of Slovenia's decision and had learned of it only from the media. It was rejected by the Constitutional Court of Slovenia on 16 December 2016 for failure to exhaust legal remedies. Mr Jukič also filed a petition for the initiation of proceedings for review of constitutionality of section 261a and 347 of the Banking Act. Two other investors, Mr. Kotnik and

[54] Republika Slovenija, Ministrstvo za notranje zadeve, "Preiskovalci NPU za dokazi zlorabe v bancnem sektorju," 6.7.2016.https://www.policija.si/index.php/component/content/article/35-sporocila-za-javnost/84883-preiskovalci-npu-za-dokazi-zlorabe-v-bannem-sektorju-sporoilo-za-javnost

[55] ECB, Letter from Mario Draghi. Frankfurt, 6 July 2016. L/MD/16/345. https:// www.ecb.europa.eu/pub/pdf/other/160706letter_fiser.en.pdf

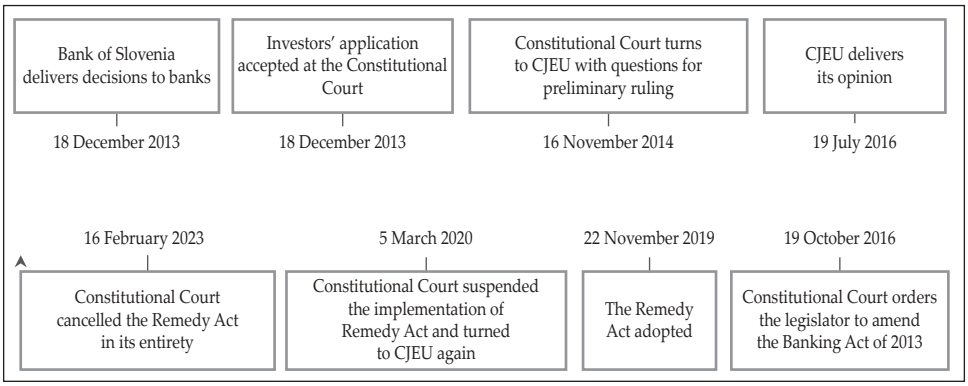
[56] ECHR, Judgement *Pintar and others v Slovenia*, 6

[57] ECHR, Judgement *Pintar and others v Slovenia*, 6

Mr. Peterlin, on 7 December 2015 lodged a constitutional complaint against the above court decisions.

At the request of the National Council, the Ljubljana District Court and the Human Rights Ombudsman, and upon the petitions of several individual petitioners at the end of 2013, the Constitutional Court decided to review the constitutionality of certain provisions of the relevant legislation. After almost a year since their request was submitted to the Constitutional Court, the Court decided on 6 November 2014 to refer a number of questions to the CJEU for a preliminary ruling,[58] the first question being whether the European Banking Communications is a legally binding text for EU member states (Figure 2).

Figure 2. Time dimension of investors' legal conundrum



Sources: Constitutional Court, CJEU and European Court for Human Rights, 2024

On 19 July 2016, the CJEU delivered a judgement (*Kotnik and others*, case C-526/14) in which it found that the Banking Communication should be interpreted as meaning that it was not binding on the EU member states.[59] The CJEU therefore answered to the Constitutional Court's question on the validity of the Banking Communication that the European Commission's Banking Communication was not legally binding for EU member states[60]. After this CJEU ruling, it was then up to the Slovenian Constitutional Court to assess the constitutionality of the Banking Act of 2013. The Constitutional Court on 19 October 2016 followed the CJEU by stating that the European Commission's Banking Communication was not legally binding for Slovenia

[58] Republika Slovenija, Ustavno sodisce, Sklep U-I-295/13/132 z dne 6.11.2014. https://www.us-rs.si/media/u-i-295-13-132.pdf

[59] Court of Justice of the European Union, Judgement in case C-526/14. 19 July 2019. Reference for a preliminary ruling. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62014CJ0526&from=EN

[60] CJEU, Judgement in case C-526/14, 11

but that it was still relevant for the assessment of state aid[61]. In its decision the Constitutional Court established that under the Banking Act as amended in 2013 it was only the banks that could challenge the Bank of Slovenia's decisions on extraordinary measures. The Court found that former investors could not be aware of specific economic and financial valuations that had underpinned the Bank of Slovenia's measures. The former investors had been denied access to information and data concerning the assessment of the value of bank assets and other documentation of the Bank of Slovenia which was crucial for the legal grounds for damages. The task of proving the grounds and the damages in these cases was impossible. Finally, the Constitutional Court noted that the proceedings could be effective only if the plaintiffs had full access to documents relating to the impugned measures (which were available to the Bank of Slovenia) and only if they were left sufficient time to prepare their civil action after having such access[62]. The Constitutional Court stated that under the existing rules it was not possible for the plaintiffs to act collectively and that the legal avenue under section 350a of the Banking Act did not comply with the requirements of the right to effective judicial protection. It found that in view of the absence of special rules regulating the legal disputes between the former investors and the Bank of Slovenia there was an "unconstitutional legal lacuna".

As a result of those findings, the Constitutional Court instructed the National Assembly to remedy the established unconstitutionality within six months. The Constitutional Court ordered that in the meantime all proceedings instituted pursuant to Section 350a (1) of the Banking Act be stayed. In the meantime, that is before the introduction of the Remedy Act in 2019, in 2017 the European Commission launched infringement proceedings against Slovenia at the CJEU over a police raid at the central bank, Bank of Slovenia in July 2016. The CJEU held that the unilateral seizure of documents that are part of archives of the EU constitutes an infringement of the principle of the inviolability of those archives of the EU. [63]

IV.C. Remedy Act, Constitutional Court again and the European Court of Human Rights

Although the Constitutional Court gave the legislator a deadline of six months to change and prepare the appropriate legislation, the law implementing the

[61] Republika Slovenija, Ustavno sodisce RS Odlocba U-I-295-13-260, 19.10.2016 https://www.us-rs.si/media/u-i-295-13.odlocba.pdf

[62] Republika Slovenija, Ustavno sodisce RS Odlocba U-I-295-13-260, 12-14

[63] CJEU judgement in case C-316/19, *Commission v Slovenia*. 17 December 2020. https://curia.europa.eu/juris/document/document.jsf?text=&docid=235706&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4302107

2016 Decision of the Constitutional Court was adopted in 2019, three years later (Figure 2). On 22 November 2019 the National Assembly adopted the Act on Judicial Protection Procedure for Former Holders of Eligible Liabilities of Banks (hereinafter: the Remedy Act). It was published on 4 December 2019 and came into force on 19 December 2019.

The Remedy Act set out rules regarding access to documents and information, which were or should have been relied on by the Bank of Slovenia, the manner of providing documents and information related to the extraordinary measures (including the so-called "virtual data room" operated by the Ministry of Finance for each bank, in which relevant documents can be accessed), the publication of the decisions putting in place the extraordinary measures and the proceedings in which the former investors could seek access to information or documents and/or compensation for the loss resulting from the extraordinary measures. The Remedy Act provides for a possibility of collective litigation, a formation of a group of experts, and the resumption of the proceedings which were previously suspended. According to the Remedy Act former investors should be able to file actions within seven months of the publication of the notice of the establishment of the virtual data room in the Official Gazette.

The Bank of Slovenia objected to the Remedy Act with an argument that it would make it directly liable for any damages awarded to former investors. It stressed that the Remedy Act would not only severely interfere with its financial independence but would also breach the prohibition on monetary financing as set by the TFEU. The Bank of Slovenia filed a request to the Constitutional Court for the temporary suspension of the implementation of the Remedy Act and for a review of the constitutionality of the Remedy Act. As a result of those objections by the Bank of Slovenia, the Constitutional Court suspended the implementation of the Remedy Act on 5 March 2020 (Figure 2). The Constitutional Court noted that the deadline for the implementation of its 2016 Decision had expired on 15 May 2017 and that the concerns about the lack of an effective remedy available within a reasonable time could thus not be ignored; however, it considered it nevertheless necessary to suspend the implementation of the Remedy Act. After that the Constitutional Court referred eight questions with regard to the interpretation of EU law to the CJEU. Those questions concerned, among other things, the prohibition of monetary financing, the independence of the Bank of Slovenia and professional secrecy and confidentiality related to the supervision of banks. The CJEU delivered its judgement on 13 September 2022[64].

[64] CJEU Judgement in case C-45/21, 13 September 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62021CJ0045

In the meantime, some of the private former investors who were affected by the decisions of the Bank of Slovenia filed their applications to the European Court of Human Rights (hereinafter: ECHR) alleging that they had no effective legal procedure at their disposal to challenge the decisions imposed by the Bank of Slovenia. They also claimed that they should have received compensation for the cancellation of their shares and subordinated bonds and that the measures by the Bank of Slovenia were not justified[65]. The judgement of the ECHR in *Pintar and Others v. Slovenia* that was delivered in 2021 provided two important conclusions[66]. First, the value of shares and bonds in a failing bank that had lost most of their value still constitute "possessions" according to Article 1 of Protocol No.1 of the ECHR based on proprietary nature. The ECHR ruling about the extraordinary measures taken by the Bank of Slovenia in 2013 (and 2014), resulting in the cancellation of all shares or subordinated bonds, was that those measures breached the right to property under Article 1 of Protocol No.1 to the European Convention on Human Rights. The second important conclusion by the ECHR is that the system of compensatory remedies under the Banking Act was incompatible with the right of property. The ECHR in its judgement stated that the Banking Act from 2013 was not providing a reasonable opportunity to challenge the Bank of Slovenia's impugned decisions and/or seek compensation.

IV.D. Arbitrariness, Data Confidentiality and AQR

The Court of Audit of Slovenia on 10 November 2016 published a report that the criteria for the selection of non-performing loans and their re-valuation used for the transfer to the Bank Asset Management Company (BAMC) in December 2013 were neither clearly determined nor consistently followed while the bank's available documentation failed to reveal who was responsible for the decision-making in the re-valuations, as reported in the media[67]. This report was not fully accessible to the public.[68] Particularly relevant is the case of bail-in of NLB, the largest state-owned bank at the time which had a series of management and other operational/transparency problems[69]. Another report

[65] ECHR, Judgement *Pintar and others v Slovenia*, 27

[66] ECHR, Judgement *Pintar and others v Slovenia*, 30

[67] Dnevnik, "Kup skrivnosti okoli slabih terjatev NLB ostaja," By Katja Svensek. 11, November 2016. https://www.dnevnik.si/1042754398

[68] Republika Slovenija, Informacijski pooblascenec, "Sodba upravnega sodisca," Številka: 090-243/2016 z dne 07.12.2016. https://www.ip-rs.si/informacije-javnega-značaja/iskalnik-po-odločbah/605091cb1da74

[69] VMZD. PanSlovenian Stakeholders' Association, 11.11.2016. https://www.vzmd.si/novice/se-revizija-racunskega-sodisca-potrdila-da-je-sanacija-bank-2013-oskodovala-vlagatelje-ter-vse-drzavljane-apel-vzmd-ki-na-to-opozarja-ze-tretje-leto-kdaj-se-bodo-najvisji-odlocevalci-prebudili-iz-triletnega-spanca

from the Court of Audit of Slovenia published in 2020 established that the central bank, the national regulator and supervisor of banks, Bank of Slovenia, had failed to provide evidence to support its claim that the financial situation of banks had been such that it called for the controversial 2013 bailout. In its almost 400-page report the Court of Audit could not confirm that those measures were urgently required to such an extent[70]. Here it must be noted that the Bank of Slovenia was fighting for years against any oversight by the Court of Audit. It argued that the Bank of Slovenia was an independent institution,[71] implying that it could not be audited by the national Court of Audit.

The capital of banks was just enough negative in all of (directly or indirectly) state- owned banks to allow for complete wipeout without exceptions. The "data confidentiality" argument and the way the Bank of Slovenia undertook rescue operation (based on the amendments to the banking law in 2013) did not give former investors a fair chance to recover their damages after their savings in shares and subordinated bonds of those banks were totally wiped out. They have not been given the possibility to examine whether there was an exaggerated capital need for bank recapitalization or not and whether there truly was the need for complete wipeout without exceptions.

The Bank of Slovenia at some point argued that it was forced to do this bail-in by the EU but some of its arguments in the period afterwards, including with regard to the Remedy Act from 2019 reveal that the Bank of Slovenia does not seem able or willing to understand some of the principles of effective judicial protection, professional secrecy and even data protection with regard to the interference with property rights. For example, one of the arguments of the Bank of Slovenia was[72] that the provisions of the Remedy Act in regard to the availability of the AQR data in a "virtual data room" available to former investors would cause considerable damage to banks and their clients[73]. It is not clear why the Bank of Slovenia believes that, considering that it has been more than 10 years since those measures were imposed and some banks that were subject to them do not exist anymore while other banks have been rescued, restructured and operate normally, with huge profits exceeding hundreds of millions of euros. What kind of additional damage would those banks suffer in terms of their today's reputation and their current operations? How would

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[70] Republika Slovenija, Racunsko sodisce, "Revizijsko porocilo," St. 3265-1/2019/176. 9.decembra 2020. Izvajanje nadzorstvenih funkcij Banke Slovenije. https://www.rs-rs.si/fileadmin/user_upload/Datoteke/Revizije/2020/BankaSlovenije_smotrnost/BS_rev_por_web.pdf

[71] IUS-INFO, "Banka Slovenije: Revizija računskega sodišča posega v našo neodvisnost," 10.12.2020. https:// www.iusinfo.si/medijsko-sredisce/dnevne-novice/275828

[72] Republika Slovenija. Ustavno sodisce, Odlocba U-I-4/20-66, 16.2.2023, https://www.us-rs.si/wp-content/uploads/2023/03/U-I-4-20_Odlocba.pdf

[73] Republika Slovenija. Ustavno sodisce, Odlocba U-I-4/20-66, 16.2.2023, 37-38

they be affected by revealing data from the-then AQR and stress tests of 10 years ago? The same is true for banks' then clients who could be, perhaps in an extremely rare case, identified in the documentation related to the data about AQR and stress tests from 10 years ago. The fact that a client had problems repaying a loan 10 years ago, cannot lead to the conclusion that that revelation can cause significant damage today, neither to the person, nor to the bank.

The ambiguity of the "confidential nature" of the Bank of Slovenia's decisions that continue to be hidden 10 years after the expropriation and the documents on which those decisions were based, prevent the former investors from understanding the circumstances in which the interference with their property rights had taken place and the grounds on which it was based. It remains questionable why the valuations from the AQR have to be treated as a military secret after such an extensive period of time. This raises questions with regard to the accountability and responsibility of the authorities of the EU/EMU and the Bank of Slovenia in the bank-rescue operation in 2013.

The investors of the expropriated financial instruments are at the beginning again. They still have no adequate legal option in regard to their constitutional right of an effective legal remedy against the imbalance in the position of the former investors vis-à-vis the Bank of Slovenia. In February 2023, after the Constitutional Court of Slovenia took into account the last CJEU judgement from September 2022, it annulled the Remedy Act of 2019 in full (not just in part that related to the monetary financing question that was the key objection of the Bank of Slovenia). The Constitutional Court ordered the legislator to prepare a new law by taking into account its findings. Again, an unconstitutional legal vacuum was created. That situation still remains muddy despite the latest development in 2024 as the draft of the new "remedy" law has been prepared by the government of Slovenia on 22 February 2024.[74] It is expected that this law, prepared a year after the decision of the Slovenian Constitutional Court in February 2023, will be subject to another review by the Constitutional Court of Slovenia because former investors have already announced that possibility. The draft of the new law, instead of offering a simple way to the prospect of compensation to affected former investors, makes an already cumbersome and lengthy legal situation even worse. Since this law has to be approved at the National Assembly, the unconstitutionality of the situation that was first established by the Constitutional Court's decision of 19 October 2016 has not yet been eliminated as of end of March 2024 and will likely continue for quite some time to come.

[74] Republika Slovenija. Gov.si. "Vlada sprejela predlog zakona o sodnem varstvu nekdanjih imetnikov kvalificiranih obveznosti bank". 22.2.2024 https://www.gov.si/novice/2024-02-22-vlada-sprejela-predlog-zakona-o-sodnem-varstvu-nekdanjih-imetnikov-kvalificiranih-obveznosti-bank/

V. CONCLUDING REMARKS

This paper is about the unique situation in the Eurozone. On one hand it touches the developments caused by the financial crisis that hit Europe in 2008 that revealed the weaknesses of the banking regulatory infrastructure in the EU. On the other hand, it points out that the banking sector was one of the main reasons for excessive macroeconomic imbalances in Slovenia. That led to the extraordinary nationalisation measures by the Bank of Slovenia in 2013. More than 10 years after that bank-rescue operation and despite the rulings from the Constitutional Court of Slovenia and the European Court of Human Rights, former investors in assets in Slovenia are left without any transparency about why their assets were wiped out while they are burdened with large legal fees in various futile attempts to recover damages. They believe that AQR and stress tests were based on arbitrary, varying and otherwise problematic assumptions that enabled under-pricing of the market value of banks and overcapitalisation. Sadly, since 2013 the legislator of Slovenia has not remedied the national legislation (that interfered with the former investors' possessions) so as to provide sufficient procedural guarantees against arbitrariness. It therefore remains unclear whether the nationalisation measures enforced by the Bank of Slovenia (as a result of which the former investors' shares and bonds were cancelled) were in the general interest of the people of Slovenia and, if so, whether an appropriate and fair balance had been struck between the demands of the general interest, and the protection of the former investors' right to peaceful enjoyment of their possessions.

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