



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 7 January 2020

on national defence

(CON/2020/2)

Introduction and legal basis

On 6 November 2019 the European Central Bank (ECB) received a request from the Estonian Ministry of Justice for an opinion on a draft law on national defence¹ (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/EC², as the draft law relates to Eesti Pank and the ECB's tasks concerning the prudential supervision of credit institutions pursuant to Article 127(6) of the Treaty. 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 revises and updates the legal framework for organising the defence of the Republic of Estonia in defence situations. The stated purpose of national defence and thereby the measures envisaged in the draft law is to preserve the independence and sovereignty of the State of Estonia, the 'inseparable and indivisible' integrity of its land, territorial waters and airspace and its constitutional order.
- 1.2 According to the draft law, a defence situation is an event or chain of events the consequences of which are a direct threat to the independence and sovereignty of the Republic of Estonia, to its territorial integrity, constitutional order or to society as a whole, the resolution of which is not possible without applying the organisational measures envisaged in the draft law, limiting the fundamental rights and freedoms of persons, and without the involvement of additional persons and material resources³. Under the draft law the Government of the Republic of Estonia is responsible for assessing whether a defence situation exists⁴. In addition, for the purposes of resolving a defence situation, the draft law allows the Estonian Parliament to declare, on the proposal of the President of the Republic of Estonia, a state of emergency or, in the case of an armed or equivalent attack or aggression against the independence, sovereignty or territorial

¹ Riigikaitseeadus, eelnõu.

² 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).

³ See Section 3(1) of the draft law.

⁴ See Section 9(1) of the draft law.

- integrity of the Estonian State, a state of war, if it is not possible to resolve the relevant situation without having recourse to additional powers or measures included in the draft law limiting the fundamental rights and freedoms of persons⁵.
- 1.3 The draft law introduces the concept of a defence task. Such tasks are either permanent or ad hoc and are necessary to resolve or support the resolution of a defence situation⁶. According to the draft law, Eesti Pank is assigned the following permanent defence tasks: (1) to help define the monetary policy of the Union and to implement the monetary policy set by the ECB's Governing Council; (2) to hold and manage official reserves in foreign currency; (3) to promote the stability of the financial system and exercise macroprudential supervision over the financial system; (4) to regulate the circulation of money, facilitate the issuance of euro banknotes and issue euro coins; (5) to collect and publish the statistics necessary for the performance of Eesti Pank's functions; (6) to contribute to the efficient functioning of payments systems; and (7) to ensure the continuity of payment services and cash circulation services as vital services. Eesti Pank already has such tasks under existing legislation⁷.
- 1.4 The draft law assigns to *Finantsinspektsioon* (the Financial Supervisory Authority) the following permanent defence tasks: (1) financial supervision over credit institutions and branches of foreign credit institutions in Estonia that are providers of vital services (currently four credit institutions are so designated, three of which are significant credit institutions and one is a less-significant credit institution); and (2) the resolution of a financial crisis during a defence situation. *Finantsinspektsioon* already has such tasks under existing legislation⁸.
- 1.5 The draft law does not include further details on how the performance of such permanent defence tasks should occur and how this differs from the fulfilment of these obligations in circumstances not covered by the draft law. According to the explanatory memorandum to the draft law⁹, the national defence plan will specify the defence duties and the manner in which these are to be fulfilled¹⁰. The national defence plan is not a legal act, but a document coordinating activities among and giving guidance to relevant entities, institutions and persons. The explanatory memorandum states that the primary aim of assigning permanent defence tasks is to ensure that an entity assigned a permanent defence task has the necessary resources and personnel to fulfil the tasks assigned to it¹¹.
- 1.6 In the event of a defence situation the authorities tasked with permanent defence tasks, including Eesti Pank and *Finantsinspektsioon*, must carry these out at the order of the head of the defence

⁵ See Sections 12(1) and 14(1) of the draft law.

⁶ See Section 52(1) of the draft law. Any reference in this opinion to a defence situation also encompasses states of war and emergency, unless specified otherwise.

⁷ See Section 2(2) of the Law on Eesti Pank (Eesti Panga seadus, RT I 1993, 28, 498, RT I, 19.03.2015, 39).

⁸ See Section 6 of the Law on the Financial Supervisory Authority (*Finantsinspektsiooni seadus*, RT I 2001, 48, 267, RT I, 04.12.2019, 5).

⁹ Riigikaitseeaduse eelnõu seletuskiri.

¹⁰ See the explanatory memorandum to the draft law, p. 28.

¹¹ See the explanatory memorandum to the draft law, p. 11.

- situation (the prime minister). In the event of a state of emergency or of war the carrying out of permanent defence tasks is at the initiative of the obliged entity¹².
- 1.7 During a defence situation the authority managing the defence situation (a governmental agency assigned by the Government of Estonia to manage the defence situation) may issue orders to entities. For constitutional institutions, such as Eesti Pank, such an order may be issued only if this does not interfere with the fulfilment of their main tasks¹³. The draft law does not define what such main tasks are. This provision does not apply to orders given by the authority managing the defence situation to Finantsinspektsioon as it is not a constitutional institution, ministry or security authority. Rather, Finantsinspektsioon is an agency with autonomous competence and a separate budget, which operates at Eesti Pank, meaning that Eesti Pank does not have control over Finantsinspektsioon, and that, under Estonian law, Finantsinspektsioon is not considered to be part of Eesti Pank¹⁴. The draft law envisages that the defence tasks of Finantsinspektsioon are to be specified in the national defence plan taking into account that Finantsinspektsioon acts independently in the conduct of financial supervision¹⁵. In addition, the explanatory memorandum to the draft law states that when the tasks of Finantsinspektsioon are specified the fact that it is a part of the Single Supervisory Mechanism must be taken into account¹⁶.
- 1.8 Under the draft law, persons are obliged to comply with measures taken during defence situations, and an administrative authority may issue orders to ensure the fulfilment of measures taken for resolving a defence situation¹⁷.
- 1.9 In addition, entities entrusted with permanent defence tasks have a preparedness obligation. The preparedness obligation obliges an entity assigned with a permanent defence task to prepare for the performance of the permanent defence task, this includes ensuring that it has the requisite supplies and personnel for fulfilling its tasks¹⁸. According to the explanatory memorandum to the draft law entities entrusted with permanent defence tasks must prepare and plan for carrying out their defence tasks. The explanatory memorandum goes on to state that this may include the need to acquire necessary supplies or to ensure contractually the delivery or access to necessary resources. Upon being appointed to perform a permanent defence task such entities have a duty to designate personnel and material resources for the fulfilment of defence tasks. The explanatory memorandum notes that the draft law does not specify how the preparedness obligation has to be fulfilled. It is intended that the relevant authorities should fulfil their preparedness obligations taking into account the national defence plan and strategic development documents of national defence¹⁹.

12 See Section 55(1) and (2) of the draft law.

13 See Section 20 of the draft law.

14 See Section 4(1) of the Law on the Financial Supervisory Authority.

15 See Section 133 of the draft law.

16 See the explanatory memorandum to the draft law, p. 196.

17 See Sections 29 and 109(1) of the draft law.

18 See Section 53 of the draft law.

19 See the explanatory memorandum to the draft law, pp. 104-105.

- The national defence plan is to function as a supra-institutional plan that gives guidance on how an entity having a permanent defence obligation should plan its activities related to national defence²⁰.
- 1.10 The draft law does not define the specific tasks and how Eesti Pank or Finantsinspektsioon would have to perform these in order to fulfil their preparedness obligation. Moreover, the draft law does not regulate the extent to which Eesti Pank or Finantsinspektsioon would be included in the national defence planning and to what extent their permanent defence tasks and the related preparedness obligations must be specified in the national defence plan and other strategic national defence documents.
- 1.11 The draft law does not specify any additional arrangements for supervising the fulfilment of the preparedness obligation. For Eesti Pank this means that the supervisory board of Eesti Pank would supervise the fulfilment of the preparedness obligation²¹. Similarly for Finantsinspektsioon its supervisory board would supervise the actions of Finantsinspektsioon²².
- 1.12 The draft law specifically requires that the Council of the European Union and the European Commission must be notified if measures taken under the draft law could undermine the functioning of the internal market within the meaning of Article 347 of the Treaty. The draft law envisages that such notification should take place prior to measures being implemented; however, if measures are needed immediately then notification can take place as soon as possible after the measures are adopted²³.
- 1.13 After the draft law is adopted, delegated regulations, the national defence plan and other strategic defence documents must also be adopted.

2. General observations

- 2.1 The ECB notes that under the Treaty several competences are conferred irrevocably on the Union. This includes the exclusive competence for monetary policy for Member States whose currency is the euro²⁴, and such Member States may not therefore adopt unilateral measures in this field²⁵. Therefore, in adopting the euro a Member State irreversibly transfers to the Union monetary policy and other powers enumerated in the Treaty and the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB') with regard to European System of Central Banks (hereinafter the 'ESCB') tasks. In these fields, including defining and implementing monetary policy, promoting the smooth operation of payment systems, conducting foreign exchange operations consistent with the exchange-rate policy for the euro in relation to non-Union currencies, holding and managing the official foreign reserves of the Member States, and authorising the issuance of euro banknotes, certain policy-making and legislative powers, including contingency planning with respect to the continued performance of these tasks,

20 See the explanatory memorandum to the draft law, p. 27.

21 See Section 9 of the Law on Eesti Pank.

22 See Section 7 of the Law on the Financial Supervisory Authority.

23 See Section 10(2) of the draft law.

24 See Article 3(1)(c) of the Treaty.

25 See paragraph 2.1 of Opinion CON/2014/24. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

belong exclusively, under Articles 8 and 12 of the Statute of the ESCB, to the decision-making bodies of the ECB²⁶. Moreover, under Article 127(6) of the Treaty and Council Regulation (EU) No 1024/2013²⁷ specific tasks concerning the prudential supervision of credit institutions have also been conferred upon the ECB. As previously noted by the ECB, pursuant to the principle of sincere cooperation under Article 4(3) of the Treaty on European Union, the Member States are obliged to assist the ECB in carrying out tasks which flow from the Treaties. This implies that Member States should refrain from taking any measures which could jeopardise the ECB's or the ESCB's objectives²⁸.

- 2.2 Article 347 of the Treaty envisages that a Member State may be called upon to take action in the event of serious internal disturbances affecting the maintenance of law and order, war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security. Accordingly, in the event of emergency conditions under Article 347, which may include situations that would be classified as defence situations under the draft law, national authorities may be justified in exercising, on a temporary basis, powers that fall within the exclusive competence of the ESCB²⁹.
- 2.3 Any reliance on Article 347 of the Treaty must take place strictly under conditions laid down in the Treaty itself, as interpreted by the Court of Justice of the European Union. As has been expressed earlier, this Article deals with exceptional cases which are clearly defined and are to be interpreted in a restrictive manner, and it can therefore be understood only as a 'hedging clause' and not as an expression of any residual Member State competence³⁰. Moreover, the Court of Justice of the European Union has held that when acting due to urgency in areas of exclusive Union competence Member States may act only as 'trustees of the common interest' and not bring into force any interim measures except as part of a process of collaboration with the Union³¹. Due to the exceptional nature of Article 347 of the Treaty, Member States should refrain from adopting preventive legislation in the absence of the conditions prescribed by Article 347 of the Treaty³². If the national legislature wishes to rely on this provision it is for the Member State to ensure that the conditions for applying Article 347 of the Treaty are specifically fulfilled at the time of adopting the measure that conflicts with that Member State's Treaty obligations.
- 2.4 The ECB understands that the national legislature approaches national defence taking a holistic approach whereby national defence includes not only the actions of specific defence authorities such as the armed defence forces and other specifically designated authorities, but also includes

²⁶ See paragraph 9 of Opinion CON/2002/27, paragraph 8 of Opinion CON/2006/6, and paragraph 2.1 of Opinion CON/2014/24.

²⁷ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

²⁸ See paragraph 2.1 of Opinion CON/2018/46.

²⁹ See paragraph 2.2 of Opinion CON/2014/24.

³⁰ Judgment of the Court of Justice of 19 December 1968, *Salgoil*, 13/68, ECLI:EU:C:1968:54; Gilsdorfer and Brandtner, 'Vorbem. zu den Artikeln 296 bis 298 EG', No 3-5, in Bardenhewer-Rating, Grill, Jakob and Woelker (eds.), *EG- und EU-Kommentar*, 6th ed. (2004), p. 1534; paragraph 13 of Opinion CON/2006/6.

³¹ See e.g. judgment of the Court of Justice of 5 May 1981, *Commission v UK*, 804/79, ECLI:EU:C:1981:93, paragraph 30; paragraph 13 of Opinion CON/2006/6.

³² See C. Zilioli, 'National Emergency Powers and Exclusive Community Competences – A Crack in the Dam?' *Legal Aspects of the European System of Central Banks*, ECB, 2005, pp. 115-133, at pp 131-132.

within national defence the actions of other public bodies and private persons within their respective fields of competence³³. As part of such a national defence policy the functions fulfilled by public bodies in usual circumstances, including central banking and prudential supervisory functions, support the resolution of national defence situations. This approach should not lead to a breach of Treaty obligations applicable to a Member State. By adopting the euro, Estonia transferred irreversibly to the Union monetary policy and other powers enumerated in the Treaty and the Statute of the ESCB. The decision-making for those tasks, including contingency planning with respect to the continued performance of those tasks, belongs exclusively, under Article 8 of the Statute of the ESCB, to the decision-making bodies of the ECB. Furthermore, Regulation (EU) No 1024/2013 conferred on the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions. According to Article 4 of the TEU, Member States have a duty to facilitate the achievement of the Union's tasks and to refrain from any measure which could jeopardise the attainment of the Union's objectives.

- 2.5 Under the draft law both Eesti Pank and Finantsinspektsioon are assigned permanent defence duties that correspond primarily to the tasks that these authorities already perform under applicable Union and national law. This cannot lead to setting aside or altering the obligations of Eesti Pank under the Treaty, specifically any obligations which Eesti Pank has due to its membership in the ESCB. In this respect, the ECB understands that, with the exception of the new national defence preparedness obligation (see section 3 below), the draft law does not aim at changing the existing obligations of Eesti Pank, including specifically under Union law, and merely seeks to ensure that the necessary resources and organisational arrangements for defence situations are in place³⁴.
- 2.6 The same considerations apply in respect of Finantsinspektsioon with regard to its duties arising from Article 127(6) of the Treaty and Regulation (EU) No 1024/2013. As the permanent defence tasks which the draft law assigns to Finantsinspektsioon have been partially conferred upon the ECB, the national legislative bodies might consider clarifying the draft law to confirm that this is without prejudice to the tasks and powers conferred on the ECB for prudential supervisory purposes under the Treaty and Regulation (EU) No 1024/2013. Also, the ECB notes that Article 4(4) of Directive 2013/36/EU of the European Parliament and of the Council³⁵ requires Member States to ensure that the competent authorities have the expertise, resources, operational capacity, powers and independence necessary to carry out the functions relating to prudential supervision, investigations and penalties set out in that Directive and in Regulation (EU) No 575/2013 of the European Parliament and of the Council³⁶. In addition, under the Basel Core Principles for effective banking supervision³⁷, the supervisor should have adequate resources for the conduct of effective

33 Explanatory memorandum to the draft law, p. 7.

34 Explanatory memorandum to the draft law, p. 104.

35 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).

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

37 The Basel Core Principles for effective banking supervision are available on the Bank for International Settlements' website at www.bis.org.

supervision and oversight. As also Finantsinspektsioon is assigned with a preparedness obligation, the consulting authority could consider clarifying in the draft law that the preparedness obligation is without prejudice to the effective performance of the prudential supervisory tasks and powers of Finantsinspektsioon under relevant Union law.

- 2.7 In addition, the draft law could further clarify that it does not interfere with the independence of Eesti Pank under the Treaty. As noted above, the central government, as the authority managing the defence situation, has the power to issue orders, including potentially to Eesti Pank³⁸. The ECB understands that as the draft law does not allow for any interference with the performance of the 'main tasks' of Eesti Pank as a constitutional institution³⁹, there could be no interference with the tasks and duties of Eesti Pank as part of the ESCB. This point should, however, be explicitly clarified, for the avoidance of any doubt.
- 2.8 The ECB welcomes the fact that the draft law requires the Council of the European Union and the European Commission to be notified in certain cases. However, it is for the Member State to ensure that the draft legislation is not in breach of the Treaty when it is adopted, meaning that it does not introduce preventive legislation (see paragraph 2.3).

3. Conferral of a new task on Eesti Pank

3.1 New task of Eesti Pank

- 3.1.1 The draft law confers upon Eesti Pank the task of preparing for the performance of defence tasks (the preparedness obligation). The draft law does not specify the tasks falling within the scope of this obligation. The draft law instead requires an authority or a person assigned with a permanent defence task to prepare for the performance of a permanent defence task and indicates that this includes ensuring that persons with this obligation have the resources, reserves and staff necessary to fulfil the preparedness obligation (see paragraph 1.9). Based on the explanatory memorandum to the draft law, the ECB understands that the preparedness obligation vis-à-vis Eesti Pank could be specified in the national defence framework, including the national defence plan and other strategic national defence documents. Although these documents are not legislative acts, the ECB understands that they could lead to changes in the actions of Eesti Pank (see paragraph 1.9). In addition, the ECB understands that the preparedness obligation would necessarily require the co-ordination of Eesti Pank's activities with the wider Estonian national defence framework and that this would likely lead to a need for Eesti Pank to contribute to Estonian defence planning.
- 3.1.2 The proposed national defence preparedness task of Eesti Pank would differ from internal contingency planning undertaken by ESCB central banks such as Eesti Pank. Contingency planning for the discharge of ESCB and other central banking tasks can take the form of an internally driven process whereby the ESCB central banks evaluate for themselves which resources they would need and how they should prepare for various emergency situations,

³⁸ See Section 20 of the draft law.

³⁹ See Section 20(3) of the draft law.

including situations that could be characterised as defence situations, based on their own targets and strategies. By contrast, the proposed national defence preparedness task of Eesti Pank is driven by external strategic plans and aims set by the Estonian Government, and would require Eesti Pank to take into account considerations external to Eesti Pank, most notably the overarching national defence framework. This could lead to Eesti Pank acquiring resources it might not otherwise have considered relevant, participating in planning processes it would not otherwise have taken part in and/or developing processes it would not otherwise have introduced. This means, in effect, that the national defence preparedness task introduces, alongside any internal contingency planning process, an additional process driven by the national defence framework. As such, the proposed national defence preparedness task would differ from an internal contingency planning performed by Eesti Pank, including within the framework of the ESCB, and therefore involves the conferral of a new task on Eesti Pank.

- 3.1.3 The national defence preparedness task envisaged in the draft law also differs from the current tasks of Eesti Pank under Estonian law. It is noted that, according to a decree of the Government of the Republic of Estonia, up to 50% of the employees of Eesti Pank are considered as fulfilling positions with national defence relevance⁴⁰. The ECB understands this to mean that Eesti Pank should be ready to fulfil its usual tasks also in national defence situations, but potentially with only up to 50% of its staff. Eesti Pank also participates in defence planning and preparations based on the Law on emergencies as it is responsible for organising the continuity of payment and cash circulation services as vital services⁴¹. This differs from the national defence preparedness task envisaged in the draft law. Under existing Estonian law, there is no specific legal obligation on Eesti Pank to follow the national defence framework, and to contribute to plans developed within the national defence framework, in particular for a wide range of Eesti Pank's tasks.
- 3.1.4 The ECB underlines that a proposed conferral of new tasks on a national central bank (NCB) in the ESCB must be assessed against the prohibition on monetary financing under Article 123 of the Treaty. For the purposes of that prohibition, Article 1(1)(b)(ii) of Council Regulation (EC) No 3603/93⁴² defines 'other type of credit facility', inter alia, as 'any financing of the public sector's obligations vis-à-vis third parties'.
- 3.1.5 Ensuring that Member States implement a sound budgetary policy is one of the key objectives of the monetary financing prohibition, which may not be circumvented⁴³. Therefore, the task of financing measures, which are normally the responsibility of the Member States, and which are financed from their budgetary sources rather than by the NCBs, must not be entrusted to NCBs. To decide what constitutes financing of the public sector's obligations vis-à-vis third parties, which can be translated as the provision of central bank financing outside the scope of central bank tasks, it is necessary to carry out, on a case-by-case basis, an assessment of whether the task to be

40 See Section 2(1)(2) of the decree of the Government of the Republic of Estonia dated 23 September 2016, No 103 (RT I, 27.09.2016, 2, RT I, 26.04.2019, 12).

41 See Section 36(3) of the Law on emergencies (Hädaolukorra seadus RT I, 03.03.2017, 1, RT I, 22.05.2018, 5).

42 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).

43 Article 123 of the Treaty also serves the objective of maintaining price stability and reinforces central bank independence.

undertaken by an NCB is a central bank task or a government task, i.e. a task within the responsibility of the Member States. In other words, adequate safeguards must be in place to ensure that circumventions of the objective of the monetary financing prohibition of maintaining a sound budgetary policy of Member States do not take place.

3.1.6 As part of its discretion in the exercise of its duty, on the basis of Article 271(d) of the Treaty and Article 35.6 of the Statute of the ESCB, to ensure that NCBs honour the obligations laid down by the Treaty, the Governing Council has endorsed safeguards of that kind in the form of criteria for determining what may be seen as falling within the scope of a public sector obligation within the meaning of Article 1(1)(b)(ii) of Regulation (EC) No 3603/93 or, in other words, what constitutes a government task as follows:

First, central bank tasks are in particular those tasks that are related to the tasks that have been conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB. These tasks are mainly defined in Article 127(2), (5) and (6) and Article 128(1) of the Treaty, as well as Article 22 and Article 25.1 of the Statute of the ESCB.

Second, as Article 14.4 of the Statute of the ESCB allows NCBs to perform 'other functions', new tasks, i.e. tasks that are not related to tasks that have been conferred upon the ECB and the NCBs, are not precluded *per se*. However, new tasks that are undertaken by an NCB and which are atypical of NCB tasks or which are clearly discharged on behalf of, and in the exclusive interest of the government or of other public sector entities should be considered government tasks.

Third, an important criterion for qualifying a new task as atypical of an NCB task or as being clearly discharged on behalf of and in the exclusive interest of the government or other public sector entities is the impact of the task on the institutional, financial and personal independence of that NCB.

In particular, the following aspects should be taken into account:

- (a) whether the performance of the new task creates conflicts of interest with existing central bank tasks which are not adequately addressed and does not necessarily complement those existing central bank tasks. If a conflict of interest arises between existing and new tasks, sufficient safeguards to mitigate that conflict should be in place. The complementarity between a new task and the existing central bank tasks should not be interpreted broadly, so as to lead to the creation of an indefinite chain of ancillary tasks. Such complementarity should be examined in relation to the financing of those tasks;
- (b) whether without new financial resources the performance of the new task is disproportionate to the NCB's financial or organisational capacity, and may have a negative impact on the capacity to perform properly the existing central bank tasks;
- (c) whether the performance of the new task fits into the institutional set-up of the NCB in the light of central bank independence and accountability considerations;
- (d) whether the performance of the new task harbours substantial financial risks;
- (e) whether the performance of the new task exposes the members of the NCB decision-making bodies to political risks which are disproportionate and may also have an impact on their

personal independence and, in particular, on the guarantee of term of office set out in Article 14.2 of the Statute of the ESCB.

3.1.7 Based on the criteria set out above, the following paragraphs assess whether the new task of Eesti Pank is in line with the prohibition of monetary financing.

3.2 *Tasks related to the tasks conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB*

3.2.1 According to the draft law the purpose of national defence is to preserve the independence and sovereignty of the Estonian State, the inseparable and indivisible integrity of its land, territorial waters and airspace and its constitutional order. The functions of the NCBs under the Treaty and the Statute of the ESCB do not encompass these aims. The preparedness task is not therefore related to the tasks that have been conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB.

3.3 *Tasks which are atypical of NCB tasks*

3.3.1 While the majority of NCBs of the ESCB do not appear to have been assigned national defence preparedness tasks, NCBs in several Member States have been assigned national defence preparedness tasks which are similar to the new task assigned to Eesti Pank⁴⁴. Based on this the

44 In 10 Member States (Bulgaria, the Czech Republic, Finland, Greece, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia) NCBs have been assigned some type of national defence preparedness obligations. In Bulgaria, pursuant to Article 42 of the Law on defence and armed forces of the Republic of Bulgaria, the Bulgarian National Bank (BNB) shall: (i) develop rules and norms for providing for the activity of the banking system during war time; (ii) in coordination with the Minister of Defence develop a plan for preparing the BNB in readiness for working during war time; and (iii) direct methodically the planning for preparing the banking system to be ready to work during war time. In the Czech Republic preparedness for crisis situations arises from Act No. 240/2000 Coll., Crisis law (Article 13) and from 241/2000 Coll., On Economic Measures for Crisis Situations (Article 23) and includes e.g. an obligation of the central bank to cooperate with the government, to adopt a proper crisis plan and to establish and operate a crisis crew. In Finland, the Law on emergency powers (2011/1552) applies to public organs and institutions such as Suomen Pankki, but only in emergency situations, and confers specific tasks on them. Emergency situations are explicitly defined in the Law on emergency powers. The Law on emergency powers also sets out a general preparedness obligation. In Greece, an Emergency Planning Office was established in the Bank of Greece in 1975, by virtue of Decision No 670/5/222984/24.9.1975 of the Minister of National Defence that was issued on the basis of Article 12 of Legislative Decree 17/1974 on emergency planning. The Emergency Planning Office deals with emergency planning policy issues including the design of emergency planning to the extent this is associated with the Bank of Greece's competences, the measures to be taken during peace-time with a view to implementing emergency planning policy, and the monitoring of preparedness as regards the execution of emergency planning policy. In Hungary, according to Article 18(3) of Law CXIII of 2011 on national defence and the Hungarian armed forces and the measures adoptable under a special legal order (Law on national defence), Magyar Nemzeti Bank shall participate in the preparation for national defence in the performance of its tasks, in its area of operations, but shall be exempted from the requirement of economic and material service obligations. In Latvia, the functions of Latvijas Banka also apply in national defence situations and thus Latvijas Banka plans the preparedness for such situations, inter alia, within contingency planning. Latvijas Banka also participates in national defence planning at national level. In Lithuania, according to the Law on mobilisation and adoptive country support, Lietuvos bankas is a civil mobilisation institution. Paragraph 3.5 of the Government resolution on the State mobilisation tasks for State municipal institutions and Authorities of the Republic of Lithuania determines the mobilisation tasks for Lietuvos bankas as follows: to ensure (i) the supervision of activities of essential financial market participants supervised by Lietuvos bankas; (ii) the management and usage of the foreign financial assets of Lietuvos bankas; (iii) the delivery of cash for subjects of the mobilisation system who perform vital State functions; (iv) the performance of credit operations of Lietuvos bankas as well as the effective operation of the necessary information systems and databases; (v) the functioning of the necessary payment systems of Lietuvos bankas; (vi) international relations related to financial support for the Republic of Lithuania, as well as representation of the Republic of Lithuania in international institutions. In Poland, under Article 11 paragraph 5 point 2 of the Law on Narodowy Bank Polski, the President of Narodowy Bank Polski (NBP) must perform tasks resulting from the universal duty to defend the Republic of Poland. Also, on the basis of Article 18 paragraph 3 and Article 22(1) of the Law on the general defence obligation and Article 11 paragraph 5 point 2 of the Law on Narodowy Bank Polski (and in some cases on the basis of Council of Ministers regulations), the President of NBP has issued various defence related ordinances. In Slovakia, according to Article 23 of Law No 179/2011 Coll. on economic mobilisation, as amended, Národná banka Slovenska (NBS) shall prepare and carry out measures in times of crisis in the foreign exchange field, including the

proposed national defence preparedness task of Eesti Pank could be considered a task which is not atypical of NCB tasks. In several Member States the related costs for the NCBs are required to be reimbursed by the central government⁴⁵.

3.4 *Tasks clearly discharged on behalf of and in the exclusive interest of the government*

3.4.1 According to the draft law, the purpose of national defence is to preserve the independence and sovereignty of the Estonian State, the inseparable and indivisible integrity of its land, territorial waters and airspace and its constitutional order. Eesti Pank's proposed national defence preparedness task would be clearly discharged on behalf of and in the exclusive interest of the Estonian Government.

3.5 *Extent to which performance of the new task creates conflicts of interest with existing central bank tasks*

3.5.1 The performance of the national defence preparedness task would be unlikely to give rise to any conflicts of interest with Eesti Pank's existing central bank tasks. Rather, it could be seen as contributing to the fulfilment of Eesti Pank's current tasks. However, it should be ensured that the assignment of permanent defence tasks to Eesti Pank does not conflict with Union law (see paragraph 2.5).

3.5.2 In addition, any supervision over the fulfilment of the national defence preparedness task rests with the supervisory board of Eesti Pank. This also means that Eesti Pank would be shielded from possible conflicts of interest and that Eesti Pank would be in a position to determine if the national defence preparedness task has been discharged properly.

3.6 *Extent to which performance of the new task is disproportionate to the financial or organisational capacity of Eesti Pank*

3.6.1 As previously noted by the ECB⁴⁶, the principle of financial independence requires that Member States may not put their NCBs in a position where they have insufficient resources to carry out both their ESCB-related tasks and their national tasks, from an operational and financial perspective. Furthermore, when allocating specific new tasks to NCBs, each NCB concerned should have

protection of foreign reserve assets. NBS shall also (i) provide the cash banking services necessary for the activities of the armed forces of the Slovak Republic, armed security corps, the Slovak Intelligence Service and the Military Police, upon written agreement concluded with the Ministry of Finance and the State Treasury; (ii) control, within its field of competence, the performance of the measures of economic mobilisation; (iii) process and update information necessary for the performance of the measures of economic mobilisation within the specific application program of the unified information software; (iv) process the emergency plan of economic mobilisation according to instructions provided by the Ministry of Economy and determine access rights for other users within the specific application program of the unified information software. In Slovenia, Banka Slovenije is engaged in national defence planning during peacetime. According to the Law on defence, the government, which adopts the country's defence plan, prescribes in detail the process of drawing up and the content of defence plans and the planning of production and services during wartime. This is done by the Decree on defence planning, which defines the scope and content of the defence plan, and the responsibility for defence planning (the scope of tasks related to the functioning of the defence system in emergency situations, war or crises).

⁴⁵ In Bulgaria, Article 13 of the Law on defence and armed forces of the Republic of Bulgaria provides that the financial provision for defence activities shall be borne by the State budget and other sources, provided for in a law or act of the Council of Ministers. In Lithuania, Article 31 of the Law on mobilisation and adoptive country support provides that the Ministry of Defence, the Mobilisation Department, the Lithuanian Army and civil mobilisation institutions shall be financed from the State budget for the implementation of the mobilisation system tasks established by the Law. In Slovakia, according to Article 1(2) of the Decree of the Ministry of Economy of the Slovak Republic No 552/2011 Coll. all expenses incurred by Národná banka Slovenska (NBS) as a result of economic mobilisation shall be reimbursed to the NBS from the State budget.

⁴⁶ See, for example, paragraph 4.6.1 of Opinion CON/2018/21.

sufficient financial and human resources at its disposal to ensure that the tasks can be carried out without impacting on the NCB's financial or operational capacity to perform its ESCB tasks. In order to ensure that Eesti Pank's capacity to perform its ESCB-related tasks is not impaired, Eesti Pank must, therefore, be in a position to avail itself of the necessary resources to carry out its duties under the draft law. At this stage, it is not possible for the ECB to comment what additional resources, if any, Eesti Pank will require in order to perform its new national defence preparedness task under the draft law. It is noted nevertheless that the draft law does not provide for Eesti Pank to be reimbursed for the costs of carrying out this new task, while in at least three Member States reimbursement mechanisms for the performance of similar tasks have been included in the relevant national legislation (see paragraph 3.3.1). Although the ECB is not aware that the potential financial burden on Eesti Pank will be significant, also considering that the performance of the task will be supervised Eesti Pank's supervisory board, the ECB invites the consulting authority to consider the impact of the draft law on the resources of Eesti Pank and to include a reimbursement mechanism in the draft law in order to avoid any potential breach of Article 123 of the Treaty.

3.7 *Extent to which performance of the new task fits into the institutional set-up of Eesti Pank, in the light of central bank independence and accountability considerations*

3.7.1 The potential impact of the new task on the institutional, financial and personal independence of Eesti Pank must also be taken into consideration. However, based on the draft law and the explanatory memorandum thereto, the ECB does not consider the new task as being in conflict with the institutional set-up. First, the supervision over the fulfilment of the task falls to the supervisory board of Eesti Pank, which in turn means that no other authority will gain control over Eesti Pank's performance of this task. Second, the draft law does not include detailed and specific obligations that Eesti Pank would have to undertake in order to comply with its preparedness obligations. Hence, it would fall primarily on Eesti Pank itself to decide which specific actions are relevant to comply with the preparedness obligation. Nevertheless, given that national defence obligations can be specified in implementing acts, due consideration for the independence of Eesti Pank should also be considered when drafting acts of this kind.

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

3.8.1 The draft law does not contain any specific provisions on liability in relation to Eesti Pank's fulfilment of its national defence preparedness task. Furthermore, this task would seem to primarily require planning and coordination within Eesti Pank and with the competent national authorities. Hence the ECB is not aware of significant financial liabilities for Eesti Pank arising out of this task.

3.9 *Extent to which the performance of the new task exposes members of the decision-making bodies of Eesti Pank to disproportionate political risks and impacts on their personal independence*

3.9.1 The ECB does not consider that the new task would expose the members of the decision-making bodies of Eesti Pank to disproportionate political risks or that it would impact on their personal independence. As previously noted, the supervision over the fulfilment of the national defence preparedness task rests with the supervisory board of Eesti Pank. Moreover, national defence preparations and planning are primarily the tasks of other authorities and the additional involvement of Eesti Pank in national defence preparations will likely not be substantial. In such

circumstances any impact on the members of Eesti Pank's decision-making bodies should be limited.

3.10 *Conclusion*

3.10.1 Although the proposed national defence preparedness task of Eesti Pank could be considered to be a task which is not atypical to NCBs in the ESCB, this task would be clearly discharged in the exclusive interests of the Estonian Government, in order to preserve the independence and sovereignty of the Estonian State, the inseparable and indivisible integrity of its land, territorial waters and airspace and its constitutional order. Given that this task goes beyond the internal contingency planning tasks of a central bank, it is a government, rather than a central banking, task. Therefore, similar to the arrangements existing in a number of Member States which have conferred comparable tasks on their NCBs, the draft law should introduce a mechanism for the reimbursement of Eesti Pank for any costs incurred in the performance of this government task.

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

Done at Frankfurt am Main, 7 January 2020.

[signed]

The President of the ECB

Christine LAGARDE