# NATIONAL EXPERIENCES IN ADDRESSING THE ISSUE OF INDEPENDENCE IN CENTRAL BANK STATUTES

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## ABSTRACT

*Il contributo evidenzia i principali cambiamenti negli statuti delle Banche Centrali Lituana, Maltese e Slovacca relativamente alla questione dell'indipendenza nel rispetto dei requisiti del Trattato UE e in particolare dello Statuto del SEBC. Particolare enfasi viene posta sulla maniera in cui gli aspetti personali, istituzionali, funzionali e finanziari di indipendenza sono stati riportati nei recenti emendamenti a tali statuti.*

*Lo studio si divide in tre parti principali, ciascuna delle quali esamina i principali emendamenti che hanno avuto ripercussioni rispettivamente sulla Law on Lietuvos bankas (N. I-678 del 1 dicembre 1994), sulla Central Bank of Malta Act 1967 (Cap. 204 delle Leggi di Malta) e sulla National Bank of Slovakia Act (N. 566/1992 coll. del 18 novembre 1992).*

*Mentre alcuni emendamenti sono comuni a tutti gli statuti (quali il mantenimento della stabilità dei prezzi come obiettivo primario, il termine di cinque anni della carica di Governatore, il divieto di chiedere istruzioni ex art. 108 del Trattato CE), altri sono tipici di uno o più statuti, per poter adeguatamente trattare a fondo la questione dell'indipendenza conformemente alla situazione contingente.*

# LITHUANIA

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## I CENTRAL BANK INDEPENDENCE – INTRODUCTORY REMARKS

Lietuvos bankas is the central bank of the Republic of Lithuania, and belongs to the State by the right of ownership. The State is therefore the sole owner of Lietuvos bankas. The principle of independence of Lietuvos bankas is established in Articles 125 and 126 of the Constitution of the Republic of Lithuania. The Republic of Lithuania Law on Lietuvos bankas (hereafter "the Law")[1] and other laws of the Republic of Lithuania are designed to ensure the implementation of the principle of independence of Lietuvos bankas in all constitutive parts of the legal system of the Republic of Lithuania.

The principle of central bank independence vis-à-vis Community institutions and bodies, governments of the Member States of the European Union (EU) and/or any other body is laid down, in particular, in Article 108 of the Treaty establishing the European Community (hereafter "the Treaty") and Article 7 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank (hereafter "the Statute"). The criteria of central bank independence are laid down in detail in the statutory requirements to be fulfilled by the national central banks (NCBs) of the Member States in order to become an integral part of the European System of Central Banks (ESCB). These requirements were approved by the European Monetary Institute (EMI)[2], and further refined by the European Central Bank (ECB).

Article 108 of the Treaty and Article 7 of the Statute prohibit Community institutions or bodies and the governments of the Member States from seeking to exert influence on the members of the decision-making bodies of the ECB and the NCBs in the performance of their duties. It establishes the independence of the ECB and the NCBs, and prohibits them from seeking or taking instructions from Community and/or national institutions of legislative and/or executive power. The provisions of the Treaty and the Statute do not oblige the ECB and the NCBs to implement these decisions.

The Treaty and the Statute distinguish between four basic criteria of central bank independence: functional independence, institutional independence, personal independence and financial independence.

1 The old version of the Law (No I-678 of 1 December 1994) has been amended and supplemented on several occasions. Two basic revisions of the Law were made in 2001 (No IX-205 of 13 March 2001) and 2004 (No IX-1998 of 5 February 2004) with a view to incorporating the provisions of the Treaty and of the Statute. These revisions dealt, in particular, with the establishment of statutory provisions designed to safeguard the independence of Lietuvos bankas. Other amendments and supplements of the Law in the areas of supervisory competences, provisions on settlement finality, powers to impose sanctions on reporting agents as well as provisions relating to financial collateral arrangements have since been added by other amendments. The ECB's comments have been observed while making these revisions.

2 *Progress towards Convergence 1996*, Chapter II: "Statutory Requirements to Be Fulfilled for NCBs to Become an Integral Part of the ESCB", EMI (1996), pp. 98–107.

## 2 FUNCTIONAL INDEPENDENCE

The ESCB unifies the primary objective, tasks and functions of the constituent parts of the ESCB, i.e. the ECB and the NCBs, as laid down in Article 105 of the Treaty and Article 2 of the Statute. The 11 Member States of the European Community as of 1 January 1999, and 12 as of 1 January 2001, became the participating Member States and members of Economic and Monetary Union (EMU), adopting the euro as the single European currency. Having adopted the euro, the ECB and the NCBs participating in Stage Three of EMU now share the primary objective of maintaining price stability.[3] In addition to implementing this objective, the ECB and the NCBs of the participating Member States (hereafter "the Eurosystem") are also responsible for defining and implementing the single monetary policy for all Member States of the Community; for conducting foreign exchange operations consistent with the Treaty; for holding and managing the foreign reserves of the Member States; and for ensuring the reliable operation of credit and settlement systems. To the maximum extent possible, these provisions have been reflected in the 2001 and 2004 revisions of the Law, which amended the following:

- Lietuvos bankas' primary objective (Article 7)
- finances (Chapter 3)
- instruments of monetary policy (Chapter 4)
- foreign reserves held by Lietuvos bankas and operations with foreign financial and credit institutions (Chapter 5)
- functions of the State Treasury agent (Chapter 6)
- financial accounting and reporting (Chapter 8).

Finally, some amendments were also incorporated into the Law with a view to safeguarding against possible conflicts of interest (Articles 3 and 15), along with provisions anticipating grounds for dismissal and ensuring the right of judicial review (Article 12), as well as the obligation of professional secrecy (Article 19).

Following the provisions of Article 14.4 of the Statute, NCBs may perform functions other than those specified in this Statute assuming that these functions do not interfere with the primary objective, tasks and functions of the ESCB. The ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system as provided in Article 105(5) of the Treaty and Article 3.3 of the Statute. Hence, the provisions of the Law establishing the functions of Lietuvos bankas on the licensing and supervision of credit institutions (Chapter 7 of the Law) are fully in line with the tasks of the ECB and of the ESCB, and do not contravene the primary objective of the ESCB.

3 As of the date of accession to the EU on 1 May 2004, the Republic of Lithuania and the other nine new Member States participate in EMU as Member States with a derogation within the meaning of Article 122 of the Treaty. The ECB has noted that it would be more consistent with one of the guiding principles of the Community, namely, price stability, as well as with the spirit of the Treaty, to adapt the statutes of the NCBs of the Member States with a derogation at the moment of joining the ESCB, as this would more accurately reflect the ultimate objective of monetary policy to maintain price stability. This would comply with the principle of functional independence, as Article 4 (3) of the Treaty also applies to Member States with a derogation.

## 3 INSTITUTIONAL INDEPENDENCE

Article 108 of the Treaty and Article 7 of the Statute establish the principle of institutional independence of the national central banks.

The above-mentioned articles prohibit Community institutions and bodies as well as the governments of the Member States from giving instructions to and/or exerting influence on the members of the decision-making bodies of the ECB and the NCBs in the performance of their duties. The provisions of the Treaty and the Statute do not oblige the ECB and the NCBs to implement the decisions of legislative and/or executive power at a Community and/or national level if these decisions fall within the scope of regulation by the ECB and/or the NCBs, or if they interfere with the primary objective and/or key tasks of the ESCB.

The principle of institutional independence of each NCB is embodied in the five basic prohibitions that apply to the state institutions of legislative and/or executive power, preventing them from influencing in any way the activities of the central bank:

1. Prohibition on giving instructions – the state institutions of legislative and/or executive power are prohibited from giving instructions to the central bank;
2. Prohibition on approving, suspending, annulling or deferring decisions – any rights of state institutions of legislative and/or executive power to approve, suspend, annul or defer decision of the central bank are prohibited;
3. Prohibition on censoring decisions on legal grounds – state institutions of legislative and/or executive power are prohibited from censoring, on legal grounds established by the law or any other legal act, the decision of the central bank, presuming, as a consequence, coordination of this decision with the institutions of political or state power;
4. Prohibition on participating in the decision-making bodies of an NCB with a right to vote – participation of representatives of state legislative and/or executive power in the decision-making bodies of the central bank with the right to vote is prohibited;
5. Prohibition on ex ante consulting on an NCB's decision – explicit statutory provisions obligating the central bank to coordinate its decisions with state institutions of legislative and/or executive power are prohibited.

The 2001 revision of the Law took into account the above prohibitions. Thus the provision of Article 1, Paragraph 5 of the Law on the accountability of Lietuvos bankas to the Seimas (Parliament of the Republic of Lithuania) has been abolished. As the central bank was formerly accountable to the state institutions of legislative and/or executive power, legal grounds for these institutions to interfere in the activities of the central bank had already been established; this was naturally incompatible with the prohibition on giving instructions to the central bank.

Before Lietuvos bankas joins the Eurosystem, this prohibition will be made more stringent. The uniform governance of the euro will require members of the decision-making body of Lietuvos bankas, when taking part in the activities of

the ECB's Governing Council, to be independent and not bound by the instructions of the decision-making body (Board) of Lietuvos bankas or indeed any other instructions. This means a certain exemption from the application of national and/or any other norms of law.

## 4 PERSONAL INDEPENDENCE

Article 109 of the Treaty and Article 14.1 of the Statute state that the statutes of NCBs that are part of the ESCB must be compatible with the provisions of the Treaty and the Statute. Compatibility of national legislation with the Treaty and the Statute is to be ensured at the latest at the date of the establishment of the ESCB.[4] Article 14.2 of the Statute contains the requirement that the minimum term of office of the Governor of an NCB is five years, which should be reflected in each NCB's statute.[5] Along with the requirement on the minimum term of office for governors, Article 14.2 of the Statute establishes a requirement to unify the grounds for the dismissal of governors from office prior to the expiration of their term of office. Governors may be relieved from office only if they no longer fulfil the conditions required for the performance of their duties, if they have been found guilty of serious professional misconduct or misconduct in office, or if they have been found guilty of a serious deed, i.e. an act or omission that is against the law. However, the concept of "serious misconduct" is not limited to any list of acts or omissions.

The provisions of Article 14.2 of the Statute require that the grounds for dismissal of governors of the NCBs are uniform in the NCBs' statutes. Article 108 of the Treaty and Article 7 of the Statute, while referring to "the independence of the members of decision-making bodies" of the ECB and of the NCBs in the performance of their duties vis-à-vis state institutions of legislative and/or executive power at a Community and/or national level, do not restrict the security of tenure of office with regard to governors of the NCBs exceptionally. The Governor of an NCB is deemed to be one of the members of the board appointed to govern it and has one voting right without privileges, i.e. he or she is first among equals (*primus inter pares*). Following this approach, it is presumed that the provision of Article 14.2 of the Statute implying the uniformity of grounds for dismissal of governors applies not only to governors of the NCBs, but also to other members of decision-making bodies of the NCBs involved in the performance of the tasks and functions of the ESCB and ECB. This applies in particular where a Governor is first among equals among colleagues with equivalent voting rights, or where other members may have to deputise for the Governor.

4 According to the EMI, the NCBs had to be independent at the date of the establishment of the ESCB and entry into force of the ECB (1 June 1998). See "Legal Convergence in the Member States of the European Union as at August 1997", EMI (1997), p. 2.

5 The indefinite term of office does not require the statutes of the NCBs to be adapted if the grounds for dismissal of a governor are in line with those of Article 14.2 of the Statute, as stated in *Progress towards Convergence 1996*, Chapter II: "Statutory Requirements to Be Fulfilled for NCBs to Become an Integral Part of the ESCB", EMI (1996), p. 101.

Along with the requirement to unify the grounds for dismissal of governors and other members of decision-making bodies of the NCBs involved in the performance of the tasks and functions of the ESCB and ECB, Article 14.2 of the Statute establishes the right for persons who have held such office to apply to the court with regard to a decision on their dismissal. Members of a decision-making body may deputise for the Governor, and are equal vis-à-vis the law. Following Article 230 (4) of the Treaty, they, as EU citizens[6], retain the right to apply to the European Court of Justice as far as their ESCB-related tasks are concerned, and assuming that the decision to dismiss them from office falls within the meaning of Article 230 (4) of the Treaty.

Article 108 of the Treaty and Article 7 of the Statute establish the independence of the members of decision-making bodies of the NCBs involved in the performance of the tasks and functions of the ESCB and ECB from the instructions of the state institutions of legislative and/or executive power at the European Community and/or national level. Article 11.1 of the Statute refers to the right of ECB Executive Board members to work only in this institution; the Article further states that the Governing Council may grant in exceptional cases an exemption from the application of this rule. Generally, any activities of the members of decision-making bodies of the ECB and of the NCBs may be deemed unacceptable if they result in a conflict of interest between the members of decision-making bodies and the NCBs. With regard to the governors of the NCBs, the conflicts between the interests of the Governor of every NCB and the interests of the ECB should also be taken into account.

Along with the features of personal independence mentioned above, the former provisions of Article 10, Paragraph 4 of the Law, which granted discretion to the national parliament to fix and/or change the salary of the Chairperson of the Board of Lietuvos bankas, have been identified by the ECB[7] as being incompatible with the criterion of personal independence of governors and other members of decision-making bodies of the central bank from the state institutions of legislative and executive power established by European Community law. This provision was abolished by the 2001 revision of the Law. Article 17, Paragraph 4 of the Law establishes the procedure for fixing the Chairperson's salary, which is independent from the Republic of Lithuania's state institutions of legislative and/or executive power.

The same revision of the Law took into account the ECB's proposal to admit only those grounds for dismissal which are listed in Article 14.2 of the Statute. Thus the grounds referred to in Article 14.2 of the Statute were inserted into Article 12, Paragraph 1 of the Law, and now constitute the grounds for dismissal of the

6 Every person holding the nationality of a Member State shall be a citizen of the European Union, as provided in Article 17 (1) of the Treaty. Only nationals of these Member States may be appointed to the Executive Board of the ECB. Article 11.2, third indent, of the Statute stipulates this provision. Article 10, Paragraph 2 of the Law makes this provision effective in case of Lietuvos bankas. As from 1 May 2004, citizens of the Republic of Lithuania enjoy the rights conferred by the Treaty and are subject to the duties imposed thereby (Article 17 (2) of the Treaty).

7 Article 10, Paragraph 4 previously provided that the salary of the Chairperson of the Board was fixed by the Seimas of the Republic of Lithuania.

Governor and other members of the Board of Lietuvos bankas, i.e. Deputy Chairpersons and members of the Board. The revision abolished an explicit list of grounds for dismissal, as the listed grounds were not incompatible with those mentioned in Article 14.2 of the Statute. However, the revision did not prescribe all possible cases of application of the grounds for dismissal referred to in Article 14.2 of the Statute. From the point of view of European Community law, only those grounds for dismissal referred to in Article 14.2 of the Statute are admissible in the law (statute) of an NCB which is a constituent part of the ESCB. European Community law does not restrict the enumeration in national legal acts of the cases of application of these grounds in the national legal system.

This doctrine might be appropriate in interpreting the provisions of Article 75 of the Constitution of the Republic of Lithuania, which grant certain discretion to the national parliament with regard to removing the Chairperson of the Board of Lietuvos bankas through a vote of non-confidence. Such grounds for dismissal must be abolished prior to joining the Eurosystem.

The 2004 revision of the Law took into account the ECB's proposal. As a result, Article 16, Paragraph 1 of the Law now restricts employment of all the members of the Board of Lietuvos bankas to only this institution. This provision applies to the Chairperson, Deputy Chairpersons and members of the Board.

## 5 FINANCIAL INDEPENDENCE

The financial independence of an NCB is to be evaluated in the context of ex ante influence on it as well as in the context of ex post influence on an NCB. State institutions of legislative and/or executive power are assumed to influence ex ante an NCB when these institutions and/or third parties may take part in the composition of the NCB's budget and/or allocation of its net profit (loss). The central bank will be influenced ex post when the state institutions of legislative and/or executive power and/or other third parties are permitted to review and evaluate the NCB's accounts, and such a review and/or evaluation takes the form of accountability of the central bank to the state institutions of legislative and/or executive power and/or any other third parties.

The 2001 revision of the Law abolished the former provision of Article 11, paragraph 1, sub-paragraph 15, which could have had an adverse effect on the allocation of the annual estimate of Lietuvos bankas' budget. The new version of Article 11, paragraph 1, sub-paragraph 15 of the Law, last revised in 2004, entrusts the Board of Lietuvos bankas with the right to approve Lietuvos bankas' budget. The abolition of the provisions of the Law on the accountability of Lietuvos bankas to the *Seimas* took place alongside the abolition of ex ante coordination of Lietuvos bankas' budget with the Seimas, the highest state institution of legislative power in Lithuania.

The profit (loss) of Lietuvos bankas is calculated by deducting expenses from income, as provided in the updated 2004 version of Article 22 of the Law. Article

23 of the Law establishes a revised order for the allocation of profit (loss) of Lietuvos bankas. Under this Article, the loss of a financial year may be covered from the reserve capital, the latter being accumulated by allocating on a regular basis the profit remaining from the accumulation of the authorised capital (Article 20, Paragraph 3 of the Law, in conjunction with Article 23, paragraph 3, sub-paragraph 3). The possibility of covering the losses of a financial year from the authorised capital of the central bank was abolished by introducing a statutory norm which ensures that any unsecured loss in a financial year should be covered from the reserve capital. This provision does not restrict the allocation of unsecured claims to the next financial year.

A certain safeguard clause granting the central bank the right to draw on the state budget in an emergency might be appropriate in this context. To the same extent, it is inappropriate for the central bank to favour the public sector in the form of regular donations and/or any other form of regular financing, as this contravenes the prohibition of monetary financing[8] and/or the prohibition of privileged access by the public sector to central bank refinancing.[9] These provisions were enshrined in the 2004 revision of Article 37 of the Law with respect to Lietuvos bankas.

Lietuvos bankas will manage its financial accounts following the ECB's recommendations concerning the NCBs of the ESCB (Article 49 of the Law). An independent audit firm will carry out the statutory audit of Lietuvos bankas (Article 50 of the Law)[10], in view of the fact that Article 27 of the Statute will take effect when Lietuvos bankas joins the Eurosystem.

## 6 APPLICATION OF THE CRITERIA OF CENTRAL BANK INDEPENDENCE TO LIETUVOS BANKAS AND THE FUTURE IMPLICATIONS OF THIS, IN VIEW OF THE FUTURE ADOPTION OF THE EURO

The Republic of Lithuania finally became an EU Member State on 1 May 2004. Following the provisions of Article 4 of the Act on the Conditions of Accession to the EU[11], the Republic of Lithuania, along with the other nine new Member States, now participate in EMU as Member States with a derogation within the meaning of Article 122 of the Treaty.

8 Article 101 of the Treaty and Council Regulation (EC) No 3603/93 of 13 December 1993, which specifies definitions for the application of Article 104 and Article 104b (1) of the Treaty (in *Official Journal of the European Communities,* 31 December 1993, OJ L 332 31.12.1993, p. 1).

9 Article 102 of the Treaty and Council Regulation (EC) No 3604/93 of 13 December 1993, which specifies definitions for the application of the prohibition of privileged access as referred to in Article 104a of the Treaty (in *Official Journal of the European Communities,* 31 December 1993, OJ L 332 31.12.1993, p. 4).

10 The 2004 revision of the Law took into account the ECB's proposal, and therefore abolished the second sentence of Article 50 of the Law, which had formerly prescribed coordination with the parliament of the terms of purchase of services from an audit company.

11 Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic, together with the adjustments to the Treaties on which the European Union is founded (in *Official Journal of the European Union*, 23 September 2003, No L 236, p. 34).

Article 124 (2) of the Treaty requires Member States with a derogation to treat their exchange rate policy as a matter of common interest. As new Member States of the EU, the Republic of Lithuania and the other nine new Member States are committed to eventually adopting the euro, with no opt-out clause possible.

The main instrument of exchange rate policy with regard to the currencies of the non-euro area Member States is the Exchange Rate Mechanism II (ERM II). As expected, the Republic of Lithuania joined ERM II in June 2004 as a precondition for the adoption of the euro.

However, the ECB (and before it, the EMI) has on a number of occasions stated that the most important element of the legal integration of the NCBs into the ESCB and hence into the Eurosystem was to remove any incompatibilities between national provisions and the Treaty and the Statute. National provisions should thus either be in line with the Treaty and the Statute, or should omit those statutory provisions that are already present in the Treaty and the Statute, as the provisions of the Treaty and the Statute take precedence over national provisions.

## 7 LIST OF REFERENCES


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7. "Protocol on the Statute of the European Monetary Institute", *Official Journal of the European Communities*, 31 August 1992, No C 224.
8. *Role of the Eurosystem in the Field of Payment Systems Oversight*, ECB (June 2000).

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# MALTA

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The Central Bank of Malta, a statutory body the capital of which is wholly owned by the government and which has a distinct legal personality, was established in 1968 subsequent to the enactment of the Central Bank of Malta Act of 1967.[1]

The Central Bank of Malta Act ("the CBM Act") may be divided into six main parts dealing with the establishment and principal business of the Central Bank of Malta[2]; the conduct of monetary policy; financial provisions[3]; the collection of information; relations with government, with credit and financial institutions[4], with the financial services regulator, and with international and other organisations; and with the issue of currency and protection against counterfeiting.

The CBM Act has been amended on a number of occasions. However, for the purposes of this paper, the more relevant amendments incorporating the principle of the independence of the Central Bank of Malta are those promulgated by Act No XVII of 2002 which entered into force on 1 October 2002. It was the Central Bank of Malta itself which, after extensive discussions with the Directorate-General Legal Services of the European Central Bank (ECB), took the initiative to draft these amendments way back in 1999 and to ensure their passage through Parliament in time for Malta's accession to the European Union.

These amendments were intended to mirror the requirements of independence of a central bank as laid down in the EC Treaty and the Protocol on the Statute of the European System of Central Banks and the European Central Bank annexed to the EC Treaty. Consequent to these amendments, the CBM Act now provides that the primary objective of the Central Bank of Malta is to maintain price stability.[5] The CBM Act further provides that the Bank forms an integral part of the European System of Central Banks (ESCB) and that it shall participate in carrying out the tasks and complying with the objectives conferred upon it by the Statute of the European System of Central Banks and of the European Central Bank ("the Statute"), and that it shall further assume all rights and obligations consequential to such a status.[6]

The aspects of central bank independence have been classified by the ECB itself (and previously by the European Monetary Institute) in its various Convergence Reports and by learned authors in this field in a number of categories.[7] For ease

1 Chapter 204 of the Laws of Malta.
2 This part, Part II of the CBM Act, includes provisions on the setting up of the Board of Directors.
3 This part, Part III, mainly deals with the capital and reserves of the Bank and financial reporting.
4 This part, Part V, includes provisions on the regulation and oversight of payment systems.
5 Article 4 of the CBM Act.
6 Article 38D of the CBM Act, as amended by Act No III of 2004, which entered into force on 1 May 2004.
7 See in particular R. Smits (1997), *The European Central Bank: Institutional Aspects* (The Hague: Kluwer Law International) pp. 155-58.

of reference, the amendments affected to the CBM Act shall be grouped into the following two main categories: the personal aspect of independence, concerning mainly the autonomy bestowed by law upon the Board of Directors; and the operational aspect, which broadly refers to the Bank's independence in determining and selecting monetary policy instruments and its financial autonomy.

## PERSONAL INDEPENDENCE

The Board of Directors of the Central Bank of Malta is composed of a Governor, a Deputy Governor and three other directors. In terms of the CBM Act[8], the Board of Directors is responsible for the policy and general administration of the affairs and business of the Bank, except in relation to matters of monetary policy, where decisions are taken solely by the Governor. The Governor presides as chairperson at Board meetings. Decisions are adopted by a simple majority of the votes of the directors present and voting. The Governor as chairman has a normal vote and, in the event of a tie, exercises a casting vote.

Prior to the 2002 amendments, the Governor and Deputy Governor were appointed for a period not exceeding five years, while the other three directors were appointed for a period not exceeding three years. The Governor and Deputy Governor were required to occupy an executive role within the Bank, and were authorised by law to act as chairmen or members of domestic or international boards or committees. In the event of the temporary absence of or in the case of a vacancy in the post of the Governor, the law empowered the Deputy Governor to assume the duties of the Governor. In addition, in the event of the temporary absence of both the Governor and Deputy Governor, the President of Malta, acting on the advice of the Prime Minister, could designate any other director or a senior official of the Bank to act as Governor during such a period of absence. On the other hand, in the case of a vacancy in the post of a director before the expiry of the term for which he or she was appointed, another person could be appointed to fill the vacancy for the unexpired term of office.

Evidently, this state of affairs did not augur well for the personal independence of the members of the Board of Directors. The 2002 amendments established that all members of the Board are appointed for a five-year period and are eligible for reappointment.[9] The Governor and Deputy Governor are still required by law to occupy an executive role; however, they may only occupy roles as chairmen or members of other boards in their capacity of Governor and Deputy Governor respectively and provided that this activity is not, in the opinion of the Board, in conflict with the performance of their duties under the CBM Act. The other three directors are as before not required to occupy executive roles within the Bank. However, the law now prohibits them from holding other positions which may be in conflict with their duties as directors.

8 Article 7 of the CBM Act.
9 Article 8 of the CBM Act in respect of the Governor and Deputy Governor, and article 9 in respect of the other three directors.

In the case of the temporary absence of or in the event of a vacancy in the post of the Governor, it is solely the Deputy Governor who may be appointed to perform the duties of the Governor. Alternatively, if a director dies or resigns or otherwise vacates his or her office before the expiry of his or her term of office, another person will be appointed in his or her stead for a whole term of five years.

Before the 2002 amendments, it was possible to dismiss any member of the Board on the grounds that he or she was incapable of carrying on his or her duties; was guilty of serious misconduct in relation to his or her duties; or was absent from the meetings of the Board without reasonable cause for a period deemed excessive by the Minister responsible for finance. In order to avoid any doubts as to whether this provision went beyond the grounds for dismissal as laid down in the Statute, the 2002 amendments changed this provision in the sense that any member of the Board may only be dismissed if he or she no longer fulfils the conditions required for the performance of his or her duties or if he or she has been guilty of serious misconduct.[10]

## OPERATIONAL INDEPENDENCE

The CBM Act provides in two instances that neither the Bank nor any member of the Board when exercising their functions, duties and powers under the law are to seek or take instructions from the Government or from any other body.[11] This is in stark contrast to the situation that prevailed before the 2002 amendments, when the law contained various requirements to obtain the consent, or to act upon the recommendation, of the Minister responsible for finance. The classic case of ministerial intervention prior to the 2002 amendments regarded the empowerment of the Minister, in cases when he or she deemed it necessary in the national interest, and after consultation with the Governor of the Bank, to give the Bank written directions as he or she deemed appropriate in the light of the objectives of the Bank, with which the Bank was obliged to comply.[12]

The requirement to obtain the Minister's approval or consent was pervasive throughout the CBM Act. Even in the case of the prerogative traditionally given to central banks to act as lenders of last resort, the CBM Act obliged the Bank prior to the 2002 amendments to obtain the prior approval of the Minister before advancing any loan to a bank incorporated in Malta (against security), whenever this was deemed necessary to safeguard monetary stability or in other exceptional circumstances.[13]

There are now no traces of the requirement to obtain the Minister's approval, save in the case regarding the auditing of the Bank's accounts, where the law

10 Article 11 of the CBM Act.

11 The relevant provisions are contained in article 7 of the Act in so far as concerns the Bank and members of the Board. On the advice of the Legal Services of the ECB, the provision was repeated in article 17A, which specifically refers to the Bank and members of the Monetary Policy Advisory Council.

12 Former article 32 of the CBM Act, substituted by the 2002 amendments.

13 Former article 15 (m) of the CBM Act, substituted by article 15 (1) (g) after the 2002 amendments.

provides that the accounts of the Bank are to be audited by independent external auditors appointed annually by the Board with the approval of the Minister. Since the government is the sole shareholder of the Bank, it was deemed appropriate that on the basis of company law principles, the government should retain the right to approve the Bank's external auditors, which are required by law to be independent.

A number of new provisions were introduced in 2002 to set up a new legal framework on monetary policy. Prior to these amendments, monetary policy matters were discussed by the Monetary Policy Council, a body set up by management and composed of a number of senior officers of the Bank and members of the Board of Directors. Decision-taking was however reserved to the Board of Directors who were (and still are) responsible for policy and general administration of the business of the Bank.

Following the 2002 amendments, the set-up of the Council was enshrined in law.[14] It has become an advisory body and is now known as the Monetary Policy Advisory Council. It is composed of the Governor, Deputy Governor, the other three directors and three members appointed by the Governor, after consultation with the Board, from among the senior officials within the Bank or from among suitably qualified individuals from outside the Bank.

The 2002 amendments mentioned so far simply transferred into written law the practice that obtained prior to that date. The one novelty in this area – and a radical one at that – regarded a change in decision-taking in monetary policy matters, which is now reserved solely to the Governor, and in his or her absence the Deputy Governor, after taking into account the advice of the Council. This role was removed from the remit of the Board of Directors since the Board is partly composed of three (possibly) non-executive directors and, in the light of the stringent requirements of the autonomy of decision-taking in monetary policy matters, it was deemed advisable to vest the Governor with sole authority and responsibility to take decisions on monetary policy.[15]

Ministerial intervention was perhaps most conspicuous in the financial provisions of the CBM Act.[16] In terms of the law, the Central Bank of Malta is obliged to maintain a General Reserve Fund and a Special Reserve Fund. Prior to the 2002 amendments, the law provided that the Special Reserve Fund was available for the purposes of investing in the shares, bonds or debentures of any public body approved by the Minister for the purpose of promoting or financing development in Malta, or for any similar purpose approved by the Minister. Moreover, allocations could only be made to either of these funds with ministerial approval.

The law prior to 2002 further provided that the profits and losses attributable to any revaluation of the Bank's net assets or liabilities made as a result of any

14 Part IIA of the CBM Act.
15 The 2002 amendments took on board the Irish model in this respect.
16 Part III of the CBM Act.

adjustment of the external value of the Maltese lira were to be credited or debited (as the case may be) to a special Revaluation Account. The Minister was, in such instances, required to make proposals as to how any debit or credit balance in this account at the end of the previous year was to be dealt with.

Clearly, this state of affairs was untenable in view of EU accession, and the law was amended to iron out these requirements for ministerial interventions. The law now provides that the General Reserve Fund is available for any purpose as may be determined by the Board of Directors[17], while the Special Reserve Fund is available for the purposes of crediting or debiting any profits or losses attributable to any revaluation of the Bank's net external assets or liabilities made as a result of the adjustment of the external value of the Maltese lira. The balance in this fund is then dealt with as determined by the Board.[18]

## OTHER ASPECTS OF INDEPENDENCE

The autonomy of the Central Bank of Malta stems from other equally relevant provisions of the law. The Bank is now prohibited from granting credit to the government or to a public undertaking, or to purchase government or public debt instruments from the primary market.[19] This replaced a number of provisions obliging the Bank to invest in government or public instruments in various instances[20], and in particular it replaced a former provision stating that any balance of a temporary advance made by the Bank to the government and still outstanding on 1 January 2000 was to be repaid in full by 31 December 2000.[21] This provision was intended as a temporary measure prior to the full enforcement of the provision on the prohibition of government financing.

An equally important provision evidencing the autonomy bestowed upon the Bank is that the Bank is now endowed with full responsibility to regulate and oversee domestic payment systems, including securities settlement systems, and has been delegated legislative powers to carry out this task.[22]

17 Article 18 of the CBM Act.
18 Ibid., article 24.
19 Ibid., article 27.
20 For instance, prior to the 2002 amendments, article 15 (f) of the CBM Act provided that the Bank could purchase, sell, discount or rediscount government Treasury bills that form part of a public issue; article 15 (h) provided that the Bank could purchase and sell publicly issued securities of or guaranteed by the government maturing in not more than twenty years; article 15 (i) provided that the Bank could subscribe to, purchase and sell shares, bonds or debentures of any body corporate in Malta established by law or sponsored by, or set up under the authority of, the government, or of any other corporate body as approved by the Minister, for the purpose of promoting or financing development in Malta or for the purpose of promoting the development of a money or a securities market in Malta; article 15 (j) provided that the Bank could invest its staff and pension funds and other internal funds of the Bank in government securities or other first-class securities approved by the Board; and article 29 provided that the Bank could be entrusted with the issue and management of Treasury bills and government loans publicly issued in Malta upon such terms and conditions as could be agreed between the Minister and the Bank.
21 Former article 27 of the CBM Act, substituted by the 2002 amendments.
22 Article 36 of the CBM Act.

## INCREASED ACCOUNTABILITY

The autonomy granted to the Central Bank of Malta and the persons entrusted with decision-taking within the Bank brought with it a strengthening of the reporting requirements incumbent upon the Bank.

The general reporting provisions were already contained in the CBM Act prior to the 2002 amendments and concern the obligation of the Bank to keep the Minister informed of the Bank's policy.[23]

The financial reporting mechanism has been strengthened in the sense that prior to the 2002 amendments, the Bank was only obliged to transmit to the Minister a copy of the audited annual accounts and a report on its operations to be presented before Parliament and eventually published. Since 2002 the Bank has also been obliged to transmit a statement of the Bank's investments to the Minister.[24] This is meant to counterbalance the full autonomy given to the Bank to manage its external reserves.

New reporting procedures have been created with respect to monetary policy matters. As reiterated earlier, the Governor is now vested with sole responsibility for monetary policy decisions. The Governor is obliged to keep the Monetary Policy Advisory Council informed of the discharge of the powers vested in him in this respect.[25] The Governor may also be requested by the House of Representatives to report on the conduct by the Bank of its monetary policy functions before a committee of the House appointed for this purpose, and to furnish the committee with any information deemed necessary. This parliamentary committee is empowered to question the Governor on any activities or decisions taken in the field of monetary policy, but it has no powers to order the Governor to change any decisions or to undertake a certain course of action. However, to ensure that such reporting does not constitute undue pressure, the Governor may not be requested to appear before the committee more often than once every six months.[26] Finally, after each meeting of the Monetary Policy Advisory Council, the Bank is obliged to publish a statement of the monetary policy decisions taken by the Governor.[27]

Of course, the implementation of the concept of independence of the Central Bank of Malta within the CBM Act is not an end in itself but a necessary measure to allow the Bank to conduct its monetary policy and to participate in the ESCB. With the eventual adoption of the euro it is envisaged that the Bank will again have to shed its operational autonomy, in part to recognise the competence of the ECB in ESCB-related tasks. At this time it will have to be assessed whether this actually means handing over autonomy to the ECB, or rather sharing autonomy with other central banks and the ECB acting together within the Eurosystem.

23 Ibid., article 31.
24 Ibid., article 23.
25 Ibid., article 17A.
26 Ibid., article 17B.
27 Ibid., article 17D.

# SLOVAKIA

**Milan Gašparík**

Národná banka Slovenska (the National Bank of Slovakia) is the independent central bank of the Slovak Republic as established by the National Bank of Slovakia Act No 566/1992 Coll., as amended (henceforth "the NBS Act").

The principle of the independence of Národná banka Slovenska is also declared in the Constitution of the Slovak Republic.[1]

As far as central bank independence is concerned, national legislation in the Member States has to be adapted to comply with the relevant provisions of the Treaty establishing the European Community ("the Treaty") and the Protocol on the Statute of the European System of Central Banks and the European Central Bank ("the Statute").

The Treaty in Article 108 and the Statute in Articles 7 and 14.2 identify central bank independence and require the compatibility of national legislation with these provisions, which has to be ensured at the latest upon joining the European System of Central Banks (ESCB).[2]

In 1997 the European Monetary Institute established a list of features that embody the concept of central bank independence. These form the basis for assessing the national legislation of the Member States, in particular of the statutes of the national central banks (NCBs).

The concept of central bank independence includes various types of independence that must be assessed separately; namely personal, institutional, financial and functional independence.

Over the past few years, these aspects of central bank independence have been further refined by the European Central Bank (ECB) and subsequently incorporated step by step into the statutes of the NCBs of the new Member States.

This is also the case for Národná banka Slovenska. The NBS Act has been amended several times since 1997, and the principle of central bank independence has been incorporated into Slovak legislation.

The following brief review is designed to cast some light on the way in which some of the key aspects of central bank independence are reflected in the current NBS Act.

1 Article 56 of Act No 460/1992 Coll., as amended (Constitution of the Slovak Republic).
2 Article 109 of the Treaty and Article 14.1 of the Statute.

## PERSONAL INDEPENDENCE

### MINIMUM TERM OF OFFICE FOR GOVERNORS

The statutes of the NCBs must, in accordance with Article 14.2 of the Statute, contain a minimum term of office for a governor of five years, although this does not preclude a longer term of office.

The NBS Act lays down that the members of the Bank Board shall be appointed for a term of office of five years, and that the membership of the Bank Board shall be limited to a maximum of two consecutive terms of office.[3]

### GROUNDS FOR DISMISSAL OF GOVERNORS AND SECURITY OF TENURE OF MEMBERS OF THE DECISION-MAKING BODIES OF NCBs INVOLVED IN THE PERFORMANCE OF ESCB-RELATED TASKS OTHER THAN GOVERNORS

NCBs' statutes must ensure that their governors may not be dismissed for reasons other than those mentioned in Article 14.2 of the Statute (i.e. that they no longer fulfil the conditions required for the performance of their duties or that they have been guilty of serious misconduct).

Personal independence would be jeopardised if the same rules for the security of tenure of governors were not also applied to other members of the decision-making bodies of NCBs who are involved in the performance of ESCB-related tasks. This applies in particular where the governor is primus inter pares between colleagues with equivalent voting rights or where other members may deputise for the governor.

To prevent the dismissal of a governor being at the discretion of the authorities involved in his or her nomination and appointment, in this case the Government of the Slovak Republic and the Parliament of the Slovak Republic, and to declare the security of tenure of other members of the decision-making bodies, the NBS Act provides for the following, in line with the Statute:

Article 7 (9)

A member of the Bank Board may only be recalled from his function in the event that:
a) he has been legally sentenced by court for an intentional criminal offence,
b) he no longer fulfils the preconditions for the performance by him of the function of a member of the Bank Board pursuant to paragraph 4,
c) he has taken up a function, occupation, employment or activity that is incompatible with membership of the Bank Board or has otherwise violated the provisions of paragraph 6.

3 Article 7 (4) and (5) of the NBS Act.

## RIGHT OF JUDICIAL REVIEW

The limitation of political discretion in the evaluation of grounds for dismissal justifies the fact that members of decision-making bodies have the right to have any dismissal decision reviewed by an independent judicial court. Article 14.2 of the Statute stipulates that an NCB governor who has been dismissed from his or her position may refer the decision to the Court of Justice. Moreover, national legislation should also grant national courts the right to review a decision to dismiss any other member of the decision-making body of the NCB who is involved in the performance of ESCB-related tasks.

The NBS Act declares that any disputes relating to the dismissal of a member of the Bank Board from his or her office shall be decided by a court in proceedings pursuant to a separate law. This shall however not apply in cases where, under an international treaty which is binding upon the Slovak Republic and which takes precedence over the law of the Slovak Republic, such a decision falls within the jurisdiction of the Court of Justice of the European Communities.[4]

## SAFEGUARD AGAINST CONFLICTS OF INTEREST

Personal independence also entails ensuring that no conflicts of interest arise between the duties of members of decision-making bodies of NCBs vis-à-vis their respective NCB (and additionally of governors vis-à-vis the ECB) on the one hand, and any other functions which such members of decision-making bodies involved in the performance of ESCB-related tasks may have and which may jeopardise their personal independence on the other.

The problem of conflict of interest has been eliminated in the wording of the NBS Act, as follows:

Membership of the Bank Board shall be incompatible with the post of President of the Slovak Republic, Member of the Parliament of the Slovak Republic, Member of the Government of the Slovak Republic, judge, public prosecutor, and any other function, office of employment in state authorities, self-government bodies or any other public bodies, position in the management or supervisory body of a legal person doing business, performing entrepreneurial or other economic or income-earning activities which may create conflict of interest. A member of the Bank Board may not perform any other function or non-income-earning activity which may create a conflict of interest between duties of the member of the Bank Board and that function or activity. If, at the time of his/her appointment, a member of the Bank Board holds a position or pursues an occupation, employment or activity that is incompatible with membership of the Bank Board, he/she shall be obligated to take without delay a demonstrable legal action aimed at terminating such office, profession, employment or activity and shall be obligated without delay to give up such office, profession, employment or activity.

4 Article 7 (10) of the NBS Act.

## INSTITUTIONAL INDEPENDENCE

Institutional independence is a feature of central bank independence that is expressly referred to in Article 108 of the Treaty as reproduced in Article 7 of the Statute. These Articles prohibit Member State NCBs and members of their decision-making bodies from seeking or taking instructions from Community institutions or bodies, from any Member State government, or from any other body. Some of the following rights of third parties were identified by the ECB as being incompatible with the Treaty and the Statute, and therefore needed to be amended in preparation for joining the ESCB:

– the right to issue instructions;
– the right to approve, suspend, annul or defer decisions;
– the right to participate in decision-making bodies of an NCB with a right to vote;
– the right to be consulted on an ex ante basis on an NCB's decision;
– the right to censor decisions on legal grounds.

Taking into account the rights of third parties mentioned above, several more or less significant inconsistencies have been identified and subsequently dealt with in the NBS Act, with the following outcome:

– extension of the prohibition for the members of the decision-making bodies of Národná banka Slovenska of seeking or taking instructions not only from the Government of the Slovak Republic, but also from any other bodies,
– elimination of the advisory role of the representatives of the Government of the Slovak Republic in the decision-making process,
– elimination of the NBS reporting obligations towards the Government of the Slovak Republic and the Parliament of the Slovak Republic, which obligations could be understood as ex ante consultations on the NBS's decisions,
– participation of the governor in the meetings of the Government of the Slovak Republic to be based on invitation rather than obligatory.

To cope with these issues, new provisions have been incorporated into the NBS Act. For example:

Article 7 (7)

In connection with the performance of their functions or with activities of the National Bank of Slovakia, members of the Bank Board may not seek or take instructions from state authorities, self-government bodies, any other public bodies, or any legal persons or natural persons. State authorities, self-government bodies, any other public bodies, or any legal persons or natural persons may not influence the National Bank of Slovakia or members of the Bank Board in connection with the performance of their function and the operations of the National Bank of Slovakia. The Governor of the National Bank of Slovakia may not seek or take instructions from the Bank Board in connection with the performance of his function in bodies of the European System of Central Banks and the European Central Bank. The same shall apply to a person acting for the Governor of the National Bank of Slovakia in these bodies.

Article 12 (2)

The National Bank of Slovakia shall fulfil its tasks pursuant to Article 2 hereof independently of instructions from state authorities, self-government bodies, any other public bodies and from legal persons and natural persons.

Article 8 (4)

Apart from its members, Bank Board meetings may be attended by a member of the Government of the Slovak Republic authorised by the Government of the Slovak Republic, persons designated in the Bank Board's rules of procedure, and other persons invited by the Bank Board.

## FINANCIAL INDEPENDENCE

In some countries third parties, particularly the government or parliament, were formerly in a position, either directly or indirectly, to influence the determination of an NCB's budget or the distribution of profit. The submission of a draft NCB budget to the government or parliament either for approval or an opinion would clearly exceed the boundaries of financial independence. This was also the case for Národná banka Slovenska, albeit only to a limited extent.

The former NBS Act stated that Národná banka Slovenska should submit an Annual Statement on the results of its activities for approval to the Parliament of the Slovak Republic. There was some doubt as to whether the Parliament could be in a position to have either a direct or indirect influence on the determination of Národná banka Slovenska's budget or the distribution of profit.

To avoid any confusion, the new NBS Act states that the competence of the Parliament of the Slovak Republic shall be purely limited to an ex post review which should be regarded as a reflection of the accountability of Národná banka Slovenska, without infringing its independence in any shape or form. Article 38.3 states that:

Within three months of the end of a calendar year, the National Bank of Slovakia shall submit to the Parliament of the Slovak Republic an annual report on the results of its operations; in addition to balance sheet data of the National Bank of Slovakia and an auditor's opinion verifying it, this report shall specifically state the data concerning the costs of the National Bank of Slovakia.

## FUNCTIONAL INDEPENDENCE

Article 2 of the former NBS Act stated that the primary task of Národná banka Slovenska should be to ensure the stability of the Slovak currency. In light of the ESCB Statute's distinction between objectives and tasks, and in order to reflect more accurately the primacy of price stability, the wording was changed to "primary objective", as follows:

Article 2.1

The primary objective of the National Bank of Slovakia shall be to maintain price stability.

In addition, the former Article 12 stipulated that Národná banka Slovenska should support the economic policy of the Government of the Slovak Republic. Because the ESCB's secondary objective is to support the general economic policies of the Community, the NBS Act has been amended accordingly. Article 12 (1) states that:

While respecting its primary objective and tasks, the National Bank of Slovakia shall support the economic policy of the Government of the Slovak Republic.

Article 2 (2) additionally states that:

With a view to accomplishing its primary objective pursuant to paragraph 1, the National Bank of Slovakia shall also perform the authority, activities, tasks, rights and obligations following from its participation in the European System of Central Banks.

In becoming an independent central bank, Národná banka Slovenska has embarked on the process of becoming a member of the ESCB, with the aim of finally joining the Eurosystem as planned in 2009.