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Proposed legal solutions for unresolved issues following the bank recovery and resolution of 2013

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1 Introduction

On the basis of order number 2.09.3.1.00-467/2020, Banka Slovenije as the commissioning party and Prof Miha Juhart, Dr Miro Prek, Prof André Prüm and Franc Testen (hereinafter: the taskforce) as the contractors signed a contract of participation in the taskforce to draw up proposed legal solutions for unresolved issues following the bank recovery and resolution of 2013 (hereinafter: the contract). The contract was signed with each contractor separately.

LEGAL CAUTION / Limited liability - the taskforce drew up its report on the basis of extremely extensive documentation submitted by Banka Slovenije, but members of the taskforce also reviewed public data sources to create a complete picture of the issues set out in the contract. In the time available to the taskforce, they focused more on seeking solutions, including creative solutions and solutions outside the framework of current legal arrangements, than on thoroughly analysing the applicable regulations. The taskforce's objective was not to prepare legal-theory analysis of the facts or to pronounce judgment on the solutions advocated by various stakeholders in adopting and implementing legislation. The problems and proposed solutions are outlined in rough working form, and cannot be transposed into legislation without additional regulatory work, analysis and coordination. Our hope is that we have succeeded in drawing attention to the main aspects of an extremely complex issue; if our objective had been to draw attention to all aspects, to address them in detail and to transform them into regulations, then this would have exceeded the taskforce's working framework, particularly in terms of time.

Two sets of proceedings to assess the constitutionality of the laws referred to in this report are pending before the Constitutional Court of the Republic of Slovenia. The Constitutional Court referred the issues to the Court of Justice of the European Union (CJEU) for a preliminary ruling. The aforementioned facts dictated restraint on the part of the taskforce in pronouncing opinions on individual solutions, as the purpose for which the taskforce was set up was not to make an issue of decisions taken previously or to influence the decision-making of judicial bodies. It is therefore only for the purpose of presenting a complete picture that in this report the taskforce touches on certain findings of the Constitutional Court from previous decisions, not with the intention of criticising them, but rather as analysis of the current legal framework set out by the Constitutional Court judgments. In so doing the taskforce could not avoid those Constitutional Court findings that make changes to definitions of established terms or introduce new institutions; the taskforce took them as given, and intentionally avoided value assessments of whether the solutions were reasonable or not.

2 Arrangements for judicial relief granted to holders of qualified bank credit

2.1 Introduction

2.1.1 History and current status

2.1.1.1 Banka Slovenije extraordinary measures

Pursuant to the first paragraph of Article 253a, the first and second paragraphs of Article 261a and the first paragraph of Article 261c of the ZBan-1, on 17 December 2013 Banka Slovenije issued decisions on extraordinary measures referenced PBH 24.20-021/13-010, PBH 24.20-030/13-009, PBH-24.20-022/13-009, PBH24-20-29/13-009 and PBH-24.20-023/13-009 ordering Nova Ljubljanska banka d.d., Ljubljana, Nova Kreditna banka Maribor d.d., Maribor, Factor banka d.d., Ljubljana, Probanka d.d., Maribor, and Abanka Vipa d.d., Ljubljana (hereinafter: the commercial banks) to write-down all qualified bank liabilities referred to in the sixth paragraph of Article 161a of the ZBan-1 (hereinafter: the extraordinary measure).[1]

2.1.1.2 Judicial relief arrangements under the ZBan-1

The second paragraph of Article 337 of the ZBan-1 stipulated that the Administrative Dispute Act should apply *mutatis mutandis* to judicial relief proceedings against a Banka Slovenije decision (i.e. also the decision on extraordinary measures). The commercial bank against which the extraordinary measure was imposed was the (only) actively legitimate entity able to lodge the lawsuit (first paragraph of Article 347 of the ZBan-1). Success on the part of the plaintiff would only entail a *finding* that Banka Slovenije's decision was unlawful. The extraordinary measure itself was irrevocable, and the Constitutional Court would not be able to overturn its effects.

It should be noted that the former shareholders and creditors of a bank whose bank shares or bank credit were written down in part or in full and other persons whose rights were affected by the Banka Slovenije decision imposing the extraordinary measure (hereinafter: former holders) were also actively legitimate in the judicial relief proceedings under the first paragraph of Article 350a of the ZBan-1. This stipulated that former holders may request that Banka Slovenije reimburse them for damage, having regard for Article 223a of the aforementioned law, if they prove that the damage that arose from the effects of the extraordinary measure exceeds the damage that would have been incurred had the extraordinary measure not been imposed.

Article 223a of the ZBan-1 regulated the competencies of Banka Slovenije and persons acting on its behalf when exercising supervisory powers.

[1] For more details (in Slovene), see https://www.bsi.si/publikacije/sanacija-bank-20132014 (accessed 22 February 2021).

2.1.1.3 Contestation before the Constitutional Court and the Constitutional Court decision (Kotnik case)

The provisions of the ZBan-1 that regulated extraordinary measures to ensure the stability of the financial system (Articles 253, 253a, 253b, 261a, 261b, 261c, 261d and 261e), the provisions that regulated judicial relief proceedings against the decision to wind down a bank under an extraordinary measure (Articles 346, 347 and 350), and Article 350a, which regulated the protection of shareholders and creditors in the case of a decision on extraordinary measures, were all contested before the Constitutional Court by the National Council and the Human Rights Ombudsman as the eligible proposers and numerous other petitioners.

The Constitutional Court issued decision U-I-295/13 on the request and petitions on 19 October 2016, and it was published in the Official Gazette of the Republic of Slovenia (No. 71/16).

With regard to the provisions of the ZBan-1 that provided the basis for imposing extraordinary measures and the provisions that regulated judicial relief proceedings against the decision to wind down a bank under an extraordinary measure, the Constitutional Court ruled that they were not unconstitutional.

With regard to judicial relief under Article 350a of the ZBan-1, the Constitutional Court found that it failed to satisfy the constitutional requirement for effective judicial relief set out in the first paragraph of Article 23 of the Constitution. Due to the absence of special procedural rules for compensatory disputes of former holders vis-à-vis Banka Slovenije, an unconstitutional lacuna purportedly existed in the ZBan-1. The legislator purportedly decided to set out a special regime for the implementation of the right to judicial relief without considering all attributes of the former holders' *de facto* weaker position as potential plaintiffs compared with Banka Slovenije. In the phase before lodging the lawsuit, the plaintiffs (the former holders) were purportedly not granted access to information about facts based on which they would be able to formulate their statements and provide evidence, with regard to both the existence and the amount of the damage. The procedural imbalance between the former holders and Banka Slovenije could only have been remedied by special rules for conducting the proceedings that were tailored to the nature of the relationships. Special arrangements (here the Constitutional Court mentions representative test proceedings and collective judicial relief proceedings) were also purportedly required by the sheer number of disputes anticipated.

By virtue of these findings, the Constitutional Court found Article 350a of the ZBan-1 to be unconstitutional, and ordered the National Assembly to rectify the unconstitutionalilty within six months of the decision being published in the Official Gazette (Official Gazette of the Republic of Slovenia, No. 71/16). It instructed the legislator to provide for arrangements that enable the constitutional enforcement of the right to judicial relief for all compensatory actions filed in the past or in the future in connection with the write-down of qualified rights under the ZBan-1. It stayed the judicial proceedings pursuant to the first paragraph of Article 350a of the ZBan-1 until the rectification of the unconstitutionality, and ruled that the statute-barring period referred to in the first paragraph of Article 350a would begin to run six months after the entry into force of the law by which the National Assembly would address the identified unconstitutionality.

2.1.1.4 Draft law on payment of funds[2]

On 10 May 2019 Jože Tanko, a deputy in the National Assembly, lodged a draft law on the payment of funds to uninformed holders of subordinated bonds and small shareholders in banks under majority state ownership that were subject to extraordinary measures imposed on 17 December 2013, 19 November 2014 and 16 December 2014 by Banka Slovenije (the Tanko law). The draft law regulates the conditions and (administrative) procedures under which the state would pay compensation from the budget in specific one-off sums to small shareholders in banks under majority state ownership and to uninformed holders (natural persons) of subordinated bonds.

According to available information, the law is still undergoing the legislative procedure,[3] even though more than a year and a half has passed since the law regulating judicial relief for former holders was adopted (4 December 2019). The transitional provision of Article 11 also regulates (somewhat clumsily) the issue of potential multiple payments of compensation for the same damage on various bases.[4]

2.1.1.5 ZPSVIKOB

On 4 December 2019 the National Assembly responded to the Constitutional Court decision (*mandamus*) by adopting the Act on Judicial Relief Granted to Holders of Qualified Bank Credit (Official Gazette of the Republic of Slovenia, No. 72/19; hereinafter: the ZPSVIKOB or the law).

2.1.1.5.1 Procedure

The law regulates the position of shareholders and creditors whose bank shares or bank liabilities were written down as a result of Banka Slovenije's decision imposing the extraordinary measure of the write-down of qualified bank liabilities pursuant to Article 261 of the ZBan-1. The former holders also had other legal bases at their disposal, including against other entities (see below), but the law applies solely to proceedings in which a former holder is claiming compensatory protection under Article 350a of the ZBan-1. The subject of regulation under the aforementioned law is no impediment to the potential enforcement of the Tanko law.[5]

The issues to which the Constitutional Court drew attention and that require the adoption of special procedural rules for compensatory disputes of former holders vis-à-vis Banka Slovenije are resolved by the ZPSVIKOB as follows.

To balance the weaker position of the former holders as potential plaintiffs relative to Banka Slovenije, the ZPSVIKOB contains detailed provisions that grant the former holders access to all information necessary to them being able to formulate their own statements and to

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[2] Draft law on the payment of funds to uninformed holders of subordinated bonds and small shareholders in banks under majority state ownership that were subject to extraordinary measures imposed on 17 December 2013, 19 November 2014 and 16 December 2014 by Banka Slovenije.

[3] The deputy proposed withdrawal from the agenda of the National Assembly's finance committee while waiting for the Constitutional Court's decision on the request to assess the constitutionality of the ZPSVIKOB.

[4] Article 11 of the Tanko law: "*Should claimants... on the basis of final judgments be awarded compensation or refunds on this basis, the funds that have already been paid to them on the basis of this law shall be offset accordingly.*"

[5] The third paragraph of Article 3 of the ZPSVIKOB stipulates: "*This act shall not apply to... lawsuits by virtue of which compensatory protection under Article 350a of the ZBan-1 is not being claimed.*"

produce evidence (special arrangements for the duty of disclosure that are more favourable to the plaintiffs). Article 31 of the ZPSVIKOB further stipulates that Banka Slovenije must demonstrate the existence of the grounds referred to Article 253a and the fulfilment of the condition referred to in the fifth paragraph of Article 261a of the ZBan-1 (reversed burden of proof). Expert witnesses are not appointed at the proposal of parties, but are appointed by the court *ex officio*, the costs being borne by Banka Slovenije.

The ZPSVIKOB attempts to address the problem of the sheer number of disputes anticipated through a provision stipulating that the court should consolidate for joint treatment all actions in which plaintiffs are claiming compensatory protection under Article 350a of the ZBan-1 and that relate to the same Banka Slovenije decision. In the consolidated proceedings, until the judgment on the merits of the claim becomes final, the acts of an individual plaintiff should also take effect to the benefit of other plaintiffs who are late in carrying out an act of litigation or who have not carried out an act of litigation, if such an act would benefit them. After the judgment on the merits of the claim becomes final, the court may separate the actions if this speeds up the treatment of individual actions.

For proceedings conducted under the ZPSVIKOB, there is subsidiary application of the ZPP, the procedural rules in economic disputes applying. Maribor District Court is designated as having exclusive territorial jurisdiction.

In addition to the process provisions, the ZPSVIKOB also contains certain provisions of material law, including provisions on one-off compensation, provisions on amount, and provisions on parties obliged to pay compensation.

2.1.1.5.2 Payment of one-off compensation

Article 4 of the ZPSVIKOB stipulates that natural persons who purchased qualified bank liabilities referred to in point 2 of the sixth paragraph of Article 261 of the ZBan-1 (investors) from the issuer on the primary market have the right to payment of one-off compensation in the amount of 80% of the value that the investor paid at purchase, whereby the compensation may not exceed EUR 20,000 for an individual class. Only investors whose gross income in 2013 did not exceed EUR 18,278.16 are entitled to one-off compensation. The law also contains detailed rules on the procedure for claiming this entitlement. The key is the provision that Banka Slovenije is legitimate in the handling of the claims.

2.1.1.5.3 Amount of compensation

Article 39 of the ZPSVIKOB stipulates the upper limit on compensation: the plaintiff is entitled to the reimbursement of damage in the *maximum* amount of the value at which he/she acquired the individual qualified liability of the bank. Shareholders are entitled to a maximum of the book value of their shares according to the final audited annual report before the issuance of the decision on extraordinary measures. The compensation accrues interest as of the day of issuance of the decision on emergency measures After the voluntary deadline passes, default interest is charged.

2.1.1.5.4 Party obliged to pay compensation

The funds for the payment of one-off compensation and the payment of judicial compensation are provided from special-purpose Banka Slovenije reserves. Should the special-purpose reserves be insufficient, Banka Slovenije may use up to 50% of its general reserves. Should these funds not suffice for the payment of compensation, the shortfall is *provided* by the state,

and the funds temporarily provided by the state are repaid by Banka Slovenije from its current surpluses of revenues over expenses. Interest is charged on the funds provided.

2.1.1.6 Contestation of the ZPSVIKOB before the Constitutional Court

On 9 January 2020 Banka Slovenije lodged a request with the Constitutional Court to assess the constitutionality of the ZPSVIKOB and the ZBan-1, together with a motion to stay implementation, a motion for absolute priority treatment and a motion to refer the case for a preliminary ruling procedure at CJEU (hereinafter together: the request)

In the request Banka Slovenije is contesting Articles 4 to 7, 10 to 25, 27 to 29, 35 to 38, 40, 41, 43 and 44 of the ZPSVIKOB and Article 350a of the ZBan-1.

It is alleging breaches of Articles 2, 3, 14, 22, 23 and 152 of the Constitution, a breach of the principle of the autonomy of the European Central Bank (ECB) and national central banks (NCBs) referred to in Article 130 of the Treaty on the Functioning of the European Union (TFEU), and Article 7 of the Statute of the European System of Central Banks (ESCB) and of the European Central Bank, and a breach of the principle of the prohibition of monetary financing referred to in Article 123 of the TFEU in connection with Article 1 of Council Regulation (EU) No 3603/93 of 13 December 1993.

The primary allegation is the breach of the prohibition of monetary financing (Article 123 of the TFEU). This prohibition was allegedly breached by the legal arrangements under which Banka Slovenije was required to pay potential compensation (including one-off compensation) to former holders on the basis of objective liability *sui generis*. In this way it was required to pay liabilities that should have been borne by the state. On the same grounds, and on the grounds of a breach of the principle of the independence of Banka Slovenije (Article 152 of the Constitution and Article 130 of the TFEU), it is also contesting Article 350a of the ZBan-1, if (because) it needs to be understood as explained by the Constitutional Court in the judgment in the Kotnik case: it is a matter of objective liability with a reversed burden of proof. The arrangements under which Banka Slovenije is liable for the reimbursement of damage incurred irrespective of whether it acted with due care and diligence are significantly stricter than the liability of other public sector entities. Bank resolution via extraordinary measures was in the public interest, and was a competence of the state. Insofar as the state transferred the performance of its duty to Banka Slovenije, it should also bear the consequences that arose without any illegitimate actions on the part of Banka Slovenije.

Banka Slovenije is further contesting Articles 4, 5, 6 and 7 of the ZPSVIKOB with reference to Articles 14 and 152 of the Constitution and Article 130 of the TFEU. The one-off compensation is also borne by Banka Slovenije, which on the grounds cited below entails a breach of the prohibition of monetary financing. That it is indisputably a state liability proceeds from the mere fact that it has no basis even in such a strict *sui generis* liability for damages on the part of Banka Slovenije, but instead it is a matter of a social corrective that has its exclusive basis in the ZPSVIKOB. Independently of the conduct of Banka Slovenije, this sets out standalone criteria for this entitlement on the part of former holders. The entitlement to one-off compensation also allegedly breaches the principle of equality before the law (Article 14 of the Constitution), as it arbitrarily gives precedence to a certain category of former holders.

Banka Slovenije is further alleging that the publication of documents and information of a confidential nature (Articles 10 to 23 inclusive) is unconstitutional and contravenes EU law.

Article 10 of the ZPSVIKOB, which provides for the publication of documents online, is alleged to contravene Articles 53 and 54 of Directive 2013/36/EU of the European Parliament and of the Council. This provision and the arrangements for virtual data rooms (Articles 11 to 23 of the ZPSVIKOB) allegedly constitute a disproportionate encroachment on personal data protection. Such a broad disclosure of information is allegedly unnecessary for the lodging of lawsuits by former holders. The financial burden imposed on Banka Slovenije for the preparation of documentation for publication is also alleged to be disproportionate. Supervision of the use of documents and information from a virtual data room (Article 41 of the ZPSVIKOB) allegedly has the embedded risk of a conflict of interest.

Banka Slovenije also alleges that the provisions on the method of conducting the proceedings, the taking of evidence and the decision-making of the court are unconstitutional and fail to comply with the right to judicial protection under Article 23 of the Constitution and the right to equal protection of rights under Article 22 of the Constitution. In addition, by excessively burdening Banka Slovenije in connection with process requirements, the arrangements are alleged to threaten the functional independence of Banka Slovenije, thereby breaching Article 152 of the Constitution and Article 130 of the TFEU. Here Banka Slovenije draws attention to the provision instructing it to pay an advance for an expert appointed *ex officio* by the court. The provisions of Articles 25 and 31 of the ZPSVIKOB are alleged to be unclear, which allegedly constitutes a breach of Article 2 of the Constitution.

Banka Slovenije further states that the ECB conducted a comprehensive assessment of the current accuracy of the book value of assets of commercial banks as at 31 December 2013 in accordance with Article 33 of Council Regulation (EU) No 1024/2013. The asset quality review conducted by the ECB and the national competent authorities was based on a uniform methodology and harmonised definitions. In this connection Banka Slovenije is referring to the opinions issued by the ECB in connection with the proposals of the ZPSVIKOB. In these opinions the ECB highlights that the judicial assessment of the comprehensive assessment conducted by the ECB, including the uniform methodology underpinning it, lay outside the jurisdiction of national courts and was exclusively within the jurisdiction of the CJEU.

The arrangements for delivery of lawsuits (Article 27), the defence to a lawsuit (Article 28), the compensation claim (Article 38) and mandatory consolidation of actions (Article 29 of the ZPSVIKOB) are alleged to contravene the principle of the rule of law (Article 2), the right to equal protection of rights (Article 22) and the right to judicial protection (article 23 of the Constitution). The provisions are allegedly unclear: it is unclear which lawsuits the court delivers to the bank together. Having regard for the specific nature of the procedures under the ZPSVIKOB, these and other areas of insufficient clarity need to be assessed from the position that they entail the danger of arbitrary interpretation. Furthermore it is impossible to conceive how Banka Slovenije would be able to submit only one defence to a lawsuit (lawsuits), given the diversity of the claims and the various creditor classes of plaintiffs. In the event of the delivery of six groups of lawsuits (for the six banks against whom extraordinary measures were imposed), given the diversity of claims, and given the anticipated number of plaintiffs (around 100,000), and given the reversed burden of proof, a deadline of six or nine months for the preparation of all defences is a breach of Banka Slovenije's right to be heard, and thus a breach of the principle of equality of arms (Article 22 of the Constitution), given that each former holder has seven months to prepare his/her lawsuit.

Banka Slovenije further notes that Article 29 of the ZPSVIKOB, which introduces a special form of indispensable co-litigation on the active side, entails an encroachment on its right to be heard under Article 22 of the Constitution. It would have to respond to the statements of one of the former holders by taking account of the legal positions of all of the former holders, which might vary.

Article 38 of the ZPSVIKOB is also alleged to contravene Articles 2 and 22 of the Constitution. The deadline of 30 to 60 days available to Banka Slovenije for responding to all scheduling claims prevents Banka Slovenije from substantively exercising its right to be heard.

Article 36 of the ZPSVIKOB, which envisages written clarifications by EU institutions, is also alleged to breach Article 22 of the Constitution. The principle of equality of arms also applies to the evidentiary process, which should ensure no party has any advantage over another. The disputed provision breaches this principle, as the ZPSVIKOB does not contain special arrangements that would allow for (representatives of) these institutions to be invited to, to attend and to testify at hearings. Banka Slovenije must have the opportunity to prove the claims to be unfounded, and the involvement of EU institutions is essential to the clarification of the decisive disputed facts. The TFEU and, in particular, Protocol 7 allegedly prevent EU institutions and their officials for appearing as experts or witnesses in proceedings before national courts. They can, however, participate as friends of the court (*amici curiae*) The Civil Procedure Act (ZPP) does not recognise this institution; in Banka Slovenije's opinion it is therefore necessary to create the appropriate legal basis in this case.

The lacuna allegedly further constitutes a breach of equal protection of rights (Article 22 of the Constitution): the ZPSVIKOB does not regulate the reimbursement of Banka Slovenije's costs in the event that the latter is successful in the civil proceedings. Neither does the *mutatis mutandis* application of the ZPP resolve any issues of expenses with regard to the special nature of the procedures under the ZPSVIKOB.

Banka Slovenije further proposes that the Constitutional Court stay the implementation of the ZPSVIKOB in full until a final decision is made.

Finally Banka Slovenije states that the Constitutional Court should apply EU law in deciding on the request. It proposes the content of four questions that the Constitutional Court should refer to the CJEU pursuant to Article 267 of the TFEU in a proposal for the adoption of a preliminary ruling on the interpretation of EU law. On 29 January 2021 it was reported in the media that the Constitutional Court had suspended proceedings and referred the questions to the CJEU for a preliminary ruling.

2.1.1.7 Staying of the implementation of the ZPSVIKOB

The Constitutional Court has not yet ruled on the request to assess the constitutionality of the ZPSVIKOB.

By virtue of order U-I-4/20 of 5 March 2020, the Constitutional Court did stay the implementation of the ZPSVIKOB until a final decision, and set out the implementation of the order, including such that the civil proceedings referred to in Articles 25 and 45 of the ZPSVIKOB are suspended until a final decision, and the statute-barring period of the receivables referred to in the first paragraph of Article 350a of the ZBan-1 and the deadline for lodging a lawsuit referred to in the second paragraph of Article 6 of the ZPSVIKOB-1 do not run until a final decision.

The issuance of a temporary stay means, *inter alia*, that the Constitutional Court has already resolved the disputed question of whether Banka Slovenije holds the position in this dispute of an eligible proposer under the seventh indent of Article 23a of the Constitutional Court Act (hereinafter: the ZustS). The Constitutional Court recognised Banka Slovenije in the position of eligible proposer, referring in so doing to its previous decision (U-I-283/00) in which it advocated a broader interpretation, according to which it is necessary to regard the procedures that the proposer conducts not merely as concrete decision-making procedures but also as the performance of other matters within its competence. This interpretation was further augmented in order U-I-168/17, in which it took the position that it was sufficient for the conditions under the seventh indent of Article 23a of the ZUstS to be met if the issue in question concerned compliance with the principle of independence of the central bank. This position is important to the assessment of Banka Slovenije's position in any future constitutional law disputes.

By virtue of order U-I-4/20-45 of 14 January 2021, the Constitutional Court referred eight questions with regard to the interpretation of EU law to the CJEU: the first three in connection with issue of monetary financing, and the remaining five in connection with the issue of the confidentiality of information and the archives. The constitutional assessment proceedings are suspended until a decision has been made by the CJEU, which according to previous experience will delay a final decision by the Constitutional Court by at least two years. Based on the CJEU's responses to the questions posed, we can expect final and binding positions with regard to the key issues addressed by this report.

2.1.2 What motive could the legislator have to amend the ZPSVIKOB at this moment?

The ZPSVIKOB was published in the Official Gazette of the Republic of Slovenia (No. 72/19) and entered into force on 19 December 2019, i.e. three years after the publication of Constitutional Court decision U-I-295/13 of 19 October 2016, in which the Constitutional Court found Article 350a of the ZBan-1 to be unconstitutional, and in point 3 ordered the National Assembly to rectify the unconstitutionalilty within six months of the decision being published. In the constitutional law proceedings in which Banka Slovenije is contesting the constitutionality of the ZPSVIKOB, the National Assembly and the government are arguing that the law is constitutional. While these constitutional law proceedings are pending, it is impossible to imagine why the government and the National Assembly have embarked on the complex and lengthy process of amending the law, which was already greatly delayed when adopted, and was supposed to facilitate constitutional law proceedings to claim damages for the alleged mass harm that had occurred in 2013. The legislature is arguing the position that the law is not unconstitutional even now, and if the Constitutional Court finds it to be unconstitutional, it will provide appropriate guidance of what and how to amend it. Reasonable behaviour would therefore dictate that the legislator should wait until the decision is made by the Constitutional Court before making any amendments to the law.

Given that the unresolved constitutional law proceedings (might) constrain the legislator's willingness to amend the law, the taskforce also addressed the possibility that Banka Slovenije might withdraw the request to asses constitutionality. According to the Constitutional Court's clarification of 14 December 2020, the ZPSVIKOB is being contested by other eligible proposers and petitioners alongside Banka Slovenije. Even if Banka Slovenije were to withdraw its request, this would not halt the proceedings before the Constitutional Court. The proceedings would not be halted, and therefore the withdrawal of the request would not have any impact

on the imposed staying of the implementation of the law.[6] Although the staying was imposed at the request of Banka Slovenije, it should be borne in mind that the Constitutional Court can issue a temporary order (and even amend or withdraw it once issued)[7] *muto proprio*, and not solely at the proposal of a party.

Notwithstanding the above, according to documentation submitted by Banka Slovenije, even while the law was being adopted the Ministry of Finance (hereinafter: the MoF) predicted that it would need to be overhauled. Banka Slovenije's letter to the Constitutional Court of 20 March 2020[8] contains a statement that the MoF communicated to the Constitutional Court that the procedural provisions of the law had been drawn up in conjunction with the Ministry of Justice, having regard for the proposals of the judicial branch of power. Notwithstanding the above, in the closing phase of the process the Supreme Court put forward certain concerns that could not be addressed in the legislative process, as a result of which the MoF gave a *commitment* even before the third reading of the law that *it would draft an overhauled version* to improve arrangements by adding provisions with regard to the use of collective actions. It should be doing this now, but it is currently unable to submit the overhauled law, given the situation with the government. According to information from the MoF, potential amendments and additions to the ZPSVIKOB will be drafted at the ministry after the Constitutional Court judgment is pronounced. The *new provisions* will be adopted and will enter into force once the former holders have made preparations for lodging lawsuits. Other new circumstances that might encourage the legislator to overhaul the law even before the Constitutional Court decides on Banka Slovenije's request are the judgment pronounced by the CJEU on 17 December 2020, which in the European Commission's action against Slovenia in case C-316/19 ruled that in the police investigation of July 2016, which related to Banka Slovenije's role in the measures taken to resolve the banking sector in 2013, Slovenia breached EU law with regard to the confidentiality of the archives of the ECB. The government and the legislator would be acting prudently if, in light of this decision, they were to assess whether the provisions of the ZPSVIKOB on access to confidential information comply with EU law, without waiting for the Constitutional Court decision.

2.1.2.1 Are the proceedings to assess constitutionality a legal impediment to amending the law?

2.1.2.1.1 Amendment of law while proceedings to assess constitutionality are pending

Apart from the concerns cited above, there are no *legal impediments* to the legislature amending these regulations while proceedings to assess constitutionality are pending before the Constitutional Court. In this case the Constitutional Court calls on petitioners/proposers to clarify whether they are persisting in their petitions/requests, and to update them as necessary.[9] Even a temporary order by virtue of which the Constitutional Court would stay the implementation of individual provisions of the law cannot be an impediment to the legislator

[6] cf. Constitutional Court decision U-I-97/00 of 7 April 2001.
[7] See Constitutional Court decisions U-I-116/95 of 11 July 1996 and U-I-220/2003 of 20 February 2004.
[8] Banka Slovenije's response to the MoF's position on the motion to temporarily stay the law on judicial relief granted to holders of qualified bank credit submitted on 9 March 2020.
[9] Constitutional court order U-I-128/01: "*Because the law was amended after the petition was lodged, and the amendments related to the contested provisions, the Constitutional Court called on the petitioner to declare whether he is persisting with the petition, and if so, to clearly define which provisions of the amended law he is contesting, and on what grounds.*" Similar examples can be found in U-I-135/03, U-I-110/98 and U-I-86/08.

adopting amendments of individual provisions of the law during the temporary stay. Such amendment of the law might provide the basis for reconsideration by the Constitutional Court as to whether the conditions for the temporary stay are still in place. It is difficult to imagine reasons for amending individual provisions of a law, and the legal position that would be created by an overhaul of a law whose implementation has been stayed in full, as is the case with the ZPSVIKOB.

2.1.2.1.2 Amendment of the law after issuance of the Constitutional Court decision: possible decisions by the Constitutional Court

It is self-evident that amendment of a law is also possible once the Constitutional Court has ruled on its constitutionality. In the proceedings to assess the constitutionality of a law (on its merits), the following decisions are possible, and can have differing consequences for the legislator: a) the law is not unconstitutional; b) repeal of the law or individual provisions thereof; c) a (bare) finding that the law or individual provisions thereof are unconstitutional; d) an interpretative decision. In case c) and sometimes in case b), the Constitutional Court may also stipulate how the decision is to be implemented (second paragraph of Article 40 of the ZUstS). This operative part of the decision has the force of law.

2.1.2.1.2.1 The law is not unconstitutional

A finding that the law is not unconstitutional does not narrow the legislator's margin of appreciation. This decision does not mean that (subsequent) alternate legal arrangements for issues that have already been "approved" by the Constitutional Court would be unconstitutional. The legislator may also amend legal solutions deemed constitutional. In practical terms, this is unlikely in the case in question. Perhaps ten or more years might pass between the loss event (issuance of the decision on write-down in 2013) and the final decision by the Constitutional Court. In addition to delaying a solution, which is already an encroachment on the former holders' rights under Articles 22 and 23 of the Constitution, the legislator, who in this case has through the existing law succeeded in resolving highly complex issues in a constitutional manner, would, by enacting the amendments, expose itself to the danger of renewed contestation before the Constitutional Court.

2.1.2.1.2.2 Repeal of the law or individual provisions thereof

Having regard for the Constitutional Court decision in the Kotnik case, which found Article 350a of the ZBan-1 to be unconstitutional, the repeal of the ZPSVIKOB in full would urgently require new arrangements. In this event, in the grounds of its decision the Constitutional Court could be expected to provide clearer instructions for the legislator regarding how to regulate individual issues raised in the case in question. It would be a similar situation if the Constitutional Court were to repeal only some of the provisions of the law. A decision of this type would almost certainly open up lacunae in the law, which the legislator would be required to fill. In both cases there would be an expectation of temporary regulation of the resulting legal position (manner of implementation under the second paragraph of Article 40 of the ZUstS), and most likely also a certain narrowing of the legislator's margin of appreciation, which could mean that some of the amendments to the ZPSVIKOB proposed below in this report are constitutionally suspect before the fact.

2.1.2.1.2.3 Bare finding of unconstitutionality

This was the decision taken by the Constitutional Court in the Kotnik case. What the consequences of such a decision would be for the possibility (necessity) of new legal

arrangements, and what the other consequences are for the legal position are evident from the legislative and other activities after the enforcement of the aforementioned decision.

2.1.2.1.2.4 Interpretative decision

The likelihood of the Constitutional Court issuing such a decision is very low. An interpretative decision is a decision-making technique developed by the Constitutional Court itself. A decision of this type is issued when the contested regulation can be interpreted in several ways under the accepted methods of interpretation, and at least one interpretation is unconstitutional. The fact is that numerous regulations can formally and correctly be legally interpreted (applied) in several ways. The Constitutional Court only intervenes through an interpretation when an interpretation that is unconstitutional appears *in (judicial) precedent*. This restraint is dictated by the principle of separation of powers: the law should first be tested and applied by the ordinary judiciary, and only after by the Constitutional Court. The ordinary courts have not yet applied the ZPSVIKOB, and there is no judicial precedent, and therefore the likelihood that the Constitutional Court would intervene in the law in this phase and issue an interpretative decision is very low, albeit not impossible, particularly because claims of the lack of clarity in certain key provisions of the law are cited among the criticisms. The time component means that the Constitutional Court is certainly under pressure to intervene as little as possible in the contested law, and to enable proceedings to begin as quickly as possible. An interpretative decision *de facto* means that the law is *not* unconstitutional. A decision of this type therefore does not require intervention by the legislator, but does entail an end to the temporary stay on the implementation of the law, and allows for its immediate application to begin, while by virtue of its decision the Constitutional Court prevents any interpretation (application) that would be unconstitutional.[10]

2.2 Analysis

2.2.1 Monetary financing

2.2.1.1 Criterion

The issue of monetary financing is substantively connected to the issue of who should repay any curtailment suffered by the former holders as a result of the write-down, and on what legal basis. The ZPSVIKOB makes it sufficiently clear that the financial burden of favourable judgments will be borne by Banka Slovenije. The question is therefore merely whether on the basis of the ZPSVIKOB in this case Banka Slovenije will have to pay liabilities that according to the legal basis[11] should be borne by the state.

The entire argumentation in points 2.2.1 is based on the assumption that after the Constitutional Court's intervention in the Kotnik case, and according to the arrangements under the ZPSVIKOB, Article 350a of the ZBan-1 sets out objective liability on the part of Banka Slovenije. For arguments in support of this position, see below. This position was swayed by

[10] This applies since the Constitutional Court has changed its way of pronouncing interpretative decisions. Its pronunciations were initially made in the negative ("*not* unconstitutional if interpreted thus..."), but in more recent practice they have been expressed positively ("*is* constitutional if interpreted thus..."). While in the first case the Constitutional Court gave a binding interpretation, in the second case it excludes solely the unconstitutional interpretation from application, but allows the ordinary courts to find their own other constitutional interpretations.
[11] For more on the disputed nature of Article 350a of the ZBan-1 as the legal basis, see below.

the formulation of the question under point a) of Constitutional Court order U-I-4/20-45 of 14 January 2021 on the submission of questions to the CJEU for preliminary ruling. (The order was published after the writing of this opinion; its content is disclosed below.) It can be understood from the formulation of this question and points 24 and 26 of the grounds of the aforementioned order that the Constitutional Court is wavering from its assessment that Banka Slovenije should be objectively liable, irrespective of culpability. For the sake of clarity, the taskforce literally summarises the relevant part of the wording of the aforementioned question here:

"a) Whether Article 123 of the TFEU and Article 21 of Protocol No. 4 should be interpreted as prohibiting the national central bank... from being liable from its own assets to pay compensation to former holders... if it becomes evident in subsequent court proceedings that the principle that no holder of a financial instrument should be worse off than if the extraordinary measure had never been imposed was not upheld in the write-down, if the national central bank is held liable in that regard: (1) for damage that could be foreseen from the facts and circumstances that existed at the time the central bank made the decision, and that were known or should have been known to the central bank, and (2) for damage resulting from the conduct of persons who acted based on its authorisation in exercising the powers of the central bank, and in doing so, taking account of the facts and circumstances that were known to them or in view of these authorisations should have been known to them, did not act with the diligence of a good professional?"

The taskforce is of the opinion that the Constitutional Court was unable in the manner described to alter the principal reason referred to in point 120 of the grounds in the Kotnik case. Should it prove to be the case that in disputes under the ZPSVIKOB the court would assess Banka Slovenije's liability according to the principle of culpability, all the taskforce's findings in this section (2.2.1) would be called into question.

The question of what will happen if it maintains the interpretation that Banka Slovenije's liability is objective, while the CJEU answers the Constitutional Court's question, which in essence derives from the presumption that Banka Slovenije's liability is culpable, the taskforce leaves open for now. We can only say that any answer from the CJEU whereby Banka Slovenije having financial obligations on the basis of its culpable liability would not contravene EU law would not give an answer to the question of whether Banka Slovenije having financial obligations on the basis of its objective liability might contravene EU law. Meanwhile any answer from the CJEU whereby Banka Slovenije having financial obligations on the basis of its culpable liability would contravene EU law would *a fortiori* mean that objective liability on the part of Banka Slovenije would also contravene EU law.

2.2.1.2 Legal basis: objective liability

The basis for compensating any curtailment suffered by former holders during the time of decision by the Constitutional Court and under the ZPSVIKOB is Banka Slovenije's liability for damages under Article 350a in connection with Article 223a of the ZBan-1, having regard for the provisions of the Code of Obligations relating to the liability of legal persons and having regard for the special provision of Article 26 of the Constitution. With regard to legal persons' liability for damages, including Banka Slovenije in this explicit case, all of the aforementioned provisions are unambiguous in designating culpable liability.

The general rules of obligational law (in particular the first paragraph of Article 148 of the Code of Obligations) do not invoke the objective liability of the state. For a holder of public authorisations to bear liability for damages, all the general prerequisites of liability for damages must be in place cumulatively.[12]

According to the established methods of interpretation in law, Article 26 of the Constitution and Article 350a in connection with Article 223a of the ZBan-1 can only be interpreted such that they do not deviate from the general arrangements for liability for damages on the part of (public) legal persons under the Code of Obligations and the Constitution (for more on interpretations of Article 26 of the Constitutional and Article 350a in connection with Article 223a of the ZBan-1, see below).

The liability of the state and thus of public sector entities (including Banka Slovenije as a legal person with public authorisations[13]) is regulated specifically by Article 26 of the Constitution. Judicial precedent is unanimous in saying that even this constitutional provision does not entail the regulation of liability for damages in a way that deviates from the general arrangements under the Code of Obligations. Moreover, a special *qualified* form of culpability is required for liability on the part of the state.[14] Unlawfulness in the narrower sense (contravention of the law) is not sufficient in and of itself for the establishment of liability for damages on the part of the state. A subjective element is also required (unlawfulness in the broader sense, a qualified level of unlawfulness). Unlawful culpable conduct can only be spoken of when there is a failure when issuing a decision to apply the entirely clear provisions of forcible regulations, when the responsible person intentionally interprets regulations contrary to judicial precedent, commits a gross breach of procedural rules or deviates from established judicial precedent without justification, i.e. only in the event of errors that are entirely outside the boundaries of legally acceptable actions and that border on arbitrariness on the part of the authority. Only in this event is liability for damages established on the part of the public sector entity (for a legally erroneous decision).[15] Liability for damages under Article 26 of the Constitution is defined at the level of law by the general rules of tort law. The conduct of authority holders is unlawful when it deviates from the usual method of work and duty of service, and from the due level of diligence. Not every misapplication of material law or breach of procedural provisions by any means entails unlawful conduct. It must be evident from the circumstances of the case in question that a government authority deviated from the due level of diligence in performing its public function to the degree that its conduct became unlawful.[16]

Notwithstanding the above, the Constitutional Court *interpreted* the content of the first paragraph of Article 350a of the ZBan-1 as establishing objective liability on the part of Banka Slovenije. It expressly states that Banka Slovenije's liability for damages under Article 350a of the ZBan-1 cannot be equated with liability for unlawful conduct, which is the basis for the right to damages according to the general principles of tort law and for the right to compensation under Article 26 of the Constitution. According to the wording of Article 350a

[12] Supreme Court judgment III Ips 114/2009.
[13] Supreme Court judgment III Ips 114/2009: Conducts of authority holder... Health Insurance Institute of Slovenia, as holder of public authorisations.
[14] D. Možina: Liability for damages on the part of the state, Pravni Letopis 2013, pp. 158-164.
[15] Supreme Court judgment and order I Cpg 526/2019.
[16] Supreme court decision VS II Ips 645/2009; similarly decision III Ips 114/2009.

of the ZBan-1, the basis for Banka Slovenije's liability for damages need not be the unlawfulness of its conduct. For the former holders to have a successful outcome in compensation litigation on this basis, only proof of damage and a causal link between the extraordinary measure and this damage is supposedly necessary.

This interpretation of Article 350a of the ZBan-1 is surprising, and quite possibly erroneous. Article 350a of the ZBan-1 explicitly refers to Article 223a of the ZBan-1, which regulates an employer's traditional liability for culpable conduct (the standard of due diligence of a good expert) on the part of persons who acted on the basis of a Banka Slovenije authorisation (third and fourth paragraphs of Article 223a). Neither can any basis for the claim that Article 26 of the Constitution does not come into consideration in the assessment of this liability for damages be found in Article 223a. Article 223a does however regulate Banka Slovenije's liability in connection with supervision (title and first paragraph of Article 223a). However, even the second paragraph speaks of due diligence in the implementation... of other powers pursuant to the law in question. Any doubt as to whether the provisions of Article 223a on culpable liability also apply to the enforcement of Banka Slovenije's liability for damages under Article 350a is removed by the clear provision of the first paragraph of Article 350a, which stipulates that "shareholders, creditors and other persons whose rights are affected by a Banka Slovenije decision on an extraordinary measure may request that Banka Slovenije reimburse them for damages, having due regard for Article 223a of this act". The provision continues: "if they prove that the damage that arose from the effects of the extraordinary measure exceeds the damage that would have been incurred had the extraordinary measure not been imposed." This addition does not speak of culpability: the provisions of Article 223a apply in this regard, and do not deviate from the general regulation of culpable liability of employers or a legal person under Articles 147 and 148 of the Code of Obligations and Article 26 of the Constitution. Instead it only defines three additional elements of traditional liability for damages: a causal link, what constitutes unlawfulness in the narrower sense in this case, and, indirectly, the amount of legally recognised damage. Legal theory also admits the position that in the Kotnik case the Constitutional Court committed to a surprising interpretation of the first paragraph of Article 350a of the ZBan-1, having assessed that the rule stipulating that Banka Slovenije can be required to reimburse damage having regard for its obligation to act with the diligence of a good expert does not mean that a breach of this obligation is a condition for its liability. It is not completely clear how the obligation to act with the diligence of a good expert should be "taken into account in Banka Slovenije's obligation to reimburse damage".[17]

This interpretation of the nature of Banka Slovenije's liability was also applied by the legislator in the ZPSVIKOB. In essence the law stipulates that Banka Slovenije is "liable" for the payment of any curtailment to former holders, not on the grounds of its unlawful conduct, but because the state has so prescribed. The ZPSVIKOB stipulated *retroactively*, i.e. in breach of Article 155 of the Constitution, that Banka Slovenije should reimburse former holders for any curtailment irrespective of whether it is culpable for the curtailment. The legally defined option of one-off compensation is a further clear indication that it is a payment that has no basis of any kind in Banka Slovenije's conduct (liability), but in essence represents a settlement offer by the state (on the back of Banka Slovenije). The basis for the former holders' claims is therefore not the conduct of Banka Slovenije, but that of the state.

[17] Damjan, Podobnik and Vlahek: Write-down of qualified bank liabilities: Legal analysis of the Kotnik case, Institute of Comparative Law, University of Ljubljana Faculty of Law, p. 202, note 603.

This deviation from the established interpretation of Article 26 of the Constitution (a switch from the requirement of *qualified* culpability to objective liability) can be explained by the consequences of legally questionably decisions by the authorities generally being possible to rectify in proceedings with legal remedies (sometimes even in four instances of judicial testing). Any unlawfulness (albeit in the broader sense, i.e. culpability) of the decisions on extraordinary measures caused an irreversible situation: the sole legal remedy against a decision, the administrative dispute, could not yield any result other than the finding that the decisions were unlawful. This perhaps constitutes the background to the decision by the Constitutional Court where, contrary to the fundamental principles of interpretation of law, it ruled that the ZBan-1 sets out the objective liability of Banka Slovenije.

Given such a narrow (erroneous) constitutional interpretation of the ZBan-1 and the application of this interpretation in the ZPSVIKOB, the taskforce finds that the arrangements under which Banka Slovenije is liable for the reimbursement of the incurred curtailment irrespective of whether it acted with due care and diligence is significantly stricter than the liability of other public sector entities. Bank resolution via extraordinary measures was in the public interest, and was a competence of the state. Insofar as the state transferred the performance of its duty to Banka Slovenije, it should also bear the consequences that arose without any illegitimate actions on the part of Banka Slovenije.

2.2.1.3 The legislator did not overlook the issue

The legislator was evidently aware that the issue of who would bear the expense of any reimbursement of former holders and on what basis would also touch on the issue of impermissible monetary financing. Following the intervention of the Constitutional Court, which found (actually stipulated) that Article 350a of the ZBan-1 establishes Banka Slovenije's liability irrespective of culpability (unlawfulness?), the proposer of the ZPSVIKOB recognised that if Banka Slovenije were to pay compensation[18] without having acted unlawfully, it would *de facto* be financing the working of the state. How the legislator tried to resolve this issue (and in the end failed to do so adequately) is revealed by a look at the legislative process in the drafting of this law.[19]

2.2.1.3.1 Legislative process

The draft ZPSVIKOB from 2017 was supposed to regulate the issue of the obligation to pay compensation in cases when the extraordinary measure was not justified, and Banka Slovenije failed to act with the diligence of a good expert. The original draft ZPSVIKOB from March 2017 tried to resolve this problem by stipulating that both Banka Slovenije and the state were defendants, whereby Banka Slovenije would be partly or fully exculpated if it proved that it had acted with the diligence of a good expert in the process of imposing extraordinary measures. In this event the compensation would have to be paid by the state, irrespective of culpability. The bill that the government submitted into the legislative process in November 2017 was based on the same idea, except that it leads to the same result by a different path: only Banka Slovenije is a defendant, the substantiation of the claim is assessed irrespective of culpability, the state temporarily provides the necessary funds, and subsequently Banka Slovenije and the state regulate their mutual relations in a separate process in response to the

[18] The question is whether we can even speak of "compensation" in the civil law sense.
[19] Taken from Write-down of qualified liabilities... (pp. 201-204).

state's (potential) request for reimbursement of that part of the temporarily provided funds that constitutes compensation for damage incurred because Banka Slovenije and persons acting on the basis of its authorisation failed to act with the diligence of a good expert as required by Article 223a of the ZBan-1. In the case of this dispute, the burden of proof that the conduct was in accordance with the diligence of a good expert would be on Banka Slovenije.[20]

As adopted, the ZPSVIKOB ignores the problem of monetary financing: Banka Slovenije is the ultimate party obliged to pay compensation, which it is required to pay not because of its unlawful conduct, but merely because the state has so prescribed.

2.2.1.3.2 (Unnecessary) explicit regulation of who should foot the bill

Further evidence that the legislator did not overlook the problematic nature of these arrangements comes from the fact that it deemed it necessary to specifically regulate the question of who should pay assessed compensation, and with which funds. It is telling that Article 1 of the ZPSVIKOB, which sets out the subject of the law in five indents, makes no mention of the regulation of this issue (third paragraph of Article 7 and Article 40 of the ZPSVIKOB). Had there been no special circumstances in this case, there would also have been no need for such special arrangements. It is beyond dispute that Banka Slovenije is passively legitimate (in process and material terms) in disputes under Article 350a of the ZBan-1. Even without a special provision in the ZPSVIKOB, it would be self-evident that the defendant is required to meet the obligation under an adverse judgment. Had the Constitutional Court not intervened (the Kotnik case), the legislator would have had no need to specifically regulate who should pay compensation to former holders: were it to be proven that the prerequisites of damages had been met (including that Banka Slovenije acted with (qualified) culpability), Banka Slovenije would also be the correct bearer of the obligation to pay damages. That the legislator specifically regulated an issue that is self-evident at first sight is evidence that it is not so self-evident in this case. The legislator therefore deemed the issue necessary of specific regulation, but it regulated it incorrectly: by transferring the state's obligations to Banka Slovenije.

2.2.1.3.3 State as third-party intervenor

Only the above idea can also explain the provision of the ZPSVIKOB whereby the state (the Republic of Slovenia) acts as a third-party intervenor in these proceedings on the side of Banka Slovenije. The position of a third-party intervenor can only be obtained under the ZPP by someone who has a legal interest in the party being joined winning the civil case.[21] The interest must be legal, and must derive from the *legal relationship* between the third-party intervenor and the party being joined. An economic interest alone is not sufficient. By aiding one of the parties, the third-party intervenor is protecting its own (legal) interests.[22] Through this provision the legislator recognises that the state has a *legal* interest in Banka Slovenije winning its civil case, although it does not disclose this interest. What legal relationship might the legislator have in mind, where the state has an interest in Banka Slovenije winning its civil

[20] Reversed burden of proof with regard to culpability, which does comply with the general rule referred to in the first paragraph of Article 131 of the Code of Obligations.
[21] Article 199 of the ZPP: Anyone who is able to demonstrate a legal interest in one of the parties winning a civil case between two other parties may join this party.
[22] L. Ude in commentary on the ZPP, GV Založba Ljubljana, 2006, Volume 2, pp. 268-269.

case? It might simply be Banka Slovenije's right under certain conditions to demand reimbursement of the amounts paid from the state (right of recourse). For the sums of one-off compensation paid, it should be self-evident that Banka Slovenije could demand reimbursement of the funds paid from the state without additional conditions: there is no basis for Banka Slovenije bearing the costs of social compensation prescribed by the state. Even in the case of payments on the basis of favourable judgments in proceedings under the ZPSVIKOB, Banka Slovenije must have the right of recourse, if it proves that it acted in accordance with the required level of diligence (Articles 131, 147 and 148 of the Code of Obligations and Article 223a of the ZBan-1).

2.2.1.4 Banka Slovenije's recourse

If the burden of paying compensation does not fall on the state (reimbursement scheme, see below), the ZPSVIKOB should at least contain a clear basis for Banka Slovenije's recourse in cases when it is established that it did not act culpably in the issuance of decisions on extraordinary measures. A working draft of a suitable legal provision might read as follows:

"If civil proceedings under this act end in the final rejection of the declaratory claims, the Republic of Slovenia shall reimburse Banka Slovenije for the amounts that it paid to former holders as one-off compensation in accordance with Article 4 of this act.

The previous paragraph notwithstanding, Banka Slovenije may request that the Republic of Slovenia reimburse all amounts that it paid to former holders pursuant to this act, if it proves that in issuing decisions on extraordinary measures the persons acting on its behalf acted with the diligence of a good expert, having regard for the facts and circumstances that were, or in accordance with the law should have been, known to Banka Slovenije.

In cases referred to in the previous paragraph, the diligence of a good expert shall be assessed according to the criterion of a clear and obvious error."[23]

Notwithstanding the above, the taskforce is of the opinion that the problem of monetary financing would only be adequately resolved if the burden of payment for the amounts awarded to former holders in proceedings under the ZPSVIKOB is borne by the state through the establishment of a reimbursement scheme (see next point).

2.2.1.5 Potential solution: reimbursement scheme

2.2.1.5.1 Objective liability: argument for reimbursement scheme

The first paragraph of Article 131 of the Code of Obligations sets out the rule of culpable liability with a presumption of culpability (reversed burden of proof). The second paragraph sets out an exception to the rule: liability irrespective of culpability (objective liability) for damage from a thing or activity from which there is an inherent risk of major damage. The third paragraph envisages that the law could also set out other cases of objective liability.

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[23] See R. Pirnat: *Unlawful conduct of public authorities as an element of liability for damages*, in Seliškar, Toš et al.: Liability of central government, local authorities and other holders of public authorisations for the conduct of their bodies and officials, Proceedings of the Institute of Comparative Law, University of Ljubljana Faculty of Law. The "criterion of a clear and obvious error" in this working draft of the legal provision aims to capture the conditions cited for the liability of the state under Article 26 of the Constitution by the aforementioned Supreme Court precedent (also: *qualified culpability*).

Such cases of liability for damages without culpability are regulated for example in the Act Regulating the Compensation for Damage Sustained as a Result of Erasure from the Register of Permanent Residents.[24]Similarly, the Act Regulating the Enforcement of the European Court Of Human Rights Judgment in Case No 60642/08[25] and the Protection of Right to Trial without Undue Delay Act.[26] Another example of liability for damages irrespective of culpability comes from Title XXXII of the Criminal Procedure Act, which sets out the right to reimbursement of damage caused by unjustified convictions.[27] All of the aforementioned cases involve objective liability for certain consequences of acts issued by the authorities. In all cases it is also stipulated by law that compensation payments should be borne by the state from the state budget, either from a special fund on behalf of and for the account of the state, or from an item in the financial plan of the designated authority. On the grounds of objective liability, some of these regulations (trial without undue delay, the erased in part, the wrongfully convicted) limit the amount of compensation, or stipulate it in one-off amounts.

The theory is that these laws regulate the reimbursement of damage in cases when a compensation scheme was used as systemic solution for the payment of compensation that the affected parties could claim through traditional compensatory actions.[28] That they are able to exercise their claims via traditional compensatory actions does not mean that they would succeed in so doing. The traditional prerequisites for liability for damages, or even stricter prerequisites in the case of the claims for the reimbursement of damage incurred by decisions of authorities, constitute a much harder burden of evidence and proof for the damaged parties than does objective liability. This is a reason for the state to commit to the reimbursement of damage via reimbursement schemes. These are cases in which special circumstances dictate the socialisation of the damage, i.e. sharing of the financial burden between taxpayers.[29]

EU law also stipulates for cases of shareholders and creditors of banks that suffered damage as a result of the bank recovery and resolution process that damages should be paid to shareholders and creditors from a special scheme. Article 75 of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (the Bank Recovery and Resolution Directive or BRRD) stipulates: "Member States shall ensure that if the valuation... determines that any shareholder or creditor... has incurred greater losses than it would have incurred in a winding up under normal insolvency proceedings,[30] it is entitled to the payment of the difference from the resolution financing arrangements." The BRRD was adopted after

[24]Official Gazette of the Republic of Slovenia, Nos. 99/13, 24/18 (constitutional court decision) and 85/18 (ZPŠOIRSP). Article 11 of the law stipulates that the provisions of the Code of Obligations should apply to judicial decision-making, while a review of judicial precedent reveals that the courts are satisfied with a finding of unlawfulness in the narrower sense, i.e. irrespective of culpability.

[25] Official Gazette of the Republic of Slovenia, No. 48/15 (ZNISESČP) (foreign currency savers). The law makes no mention of culpability.

[26] Official Gazette of the Republic of Slovenia, Nos. 49/06, 117/06 (Zdoh-2), 58/09, 30/10 (constitutional court decision) and 38/12 (ZVPSBNO-B). Article 16 of the law explicitly stipulates that the state is objectively liable for the damage caused.

[27] The draft of the Tanko law is another such example: payment of one-off amounts from the budget, irrespective of culpability.

[28] Write-down of qualified liabilities... (p. 248).

[29] D. Možina, op. cit., p. 19 and p. 52.

[30] This is the subject of dispute under the ZPSVIKOB.

the issuance of the decisions on extraordinary measures, but its principles take account of the legal nature of extraordinary measures and follow the logic of fair arrangements in connection with the legal relationships thus created.[31] How the state designs the scheme for financing resolution is to a certain extent a matter of internal regulation, but it is indisputably evident from the directive that the burden of financing such schemes cannot fall on the institution that carried out or is carrying out the bank recovery and resolution on behalf of the state.

The Council of Europe also recommends to Member States that in cases when the prerequisites for liability for damages have not been met (culpability in the disputed case), they should provide reimbursement if it would be unjust to expect an injured party to bear the cost alone, having regard for circumstances such as the public interest and the number of injured parties.[32] Another component of schemes of this type is special procedural mechanisms aimed at resolving a mass of similar compensation claims in a faster and more procedurally efficient manner.[33]

The ZPSVIKOB also defines Banka Slovenije's objective liability for the curtailment suffered by the former holders. As soon as unlawfulness is established in the narrower sense, i.e. irrespective of culpability, Banka Slovenije must reimburse the former holders for the actual curtailment of their assets, namely the value that would have remained had the extraordinary measure not been imposed (i.e. if the bank had not received state aid and would potentially not have fallen into bankruptcy, or, in the event of bankruptcy, the former holders would have been repaid (at least in part)). Although the potential curtailment was directly caused for the former holders by Banka Slovenije's extraordinary measures, its liability for damages is not based on its culpable conduct: this is typical of a reimbursement scheme.

Further encouragement for the creation of funds for settling investors' claims is coming from the Directorate-General for Internal Policies of the European Parliament,[34] which cites how individual countries (Spain, Italy and Portugal) have created funds of this type, and provides basic guidance for their financing and rules of operation (caps on compensation, refutation of the presumption that the bank has breached the duty to explain, which should not apply to institutional investors, etc.). It should be noted that this document is addressing the liability of commercial banks to retail investors for breaches of the duty to explain. The basis of Banka Slovenije's potential liability under the ZBan-1 and the ZPSVIKOB is completely different, for which reason the conclusions of the aforementioned document are merely conditionally and to a limited extent applicable to resolving the issue that this report is addressing.

2.2.1.5.2 Impact of the BRRD on bases for judicial decision-making under the ZPSVIKOB

The taskforce was asked the question of how the BRRD affects legal positions created in connection with extraordinary measures imposed before its entry into force. The directive was adopted on 15 May 2014, i.e. after the issuance of Banka Slovenije decisions on extraordinary measures. The deadline for the transposing the directive into domestic law was 31 December

[31] The Constitutional Court provides substantively similar reasoning about this issue in point 57 of the grounds in case U-I-295/13: "It is true that the deadline for harmonising national legislation with the aforementioned directive (Article 130 of Directive 2014/59/EU) has not yet passed. However, Directive 2014/59/EU has already entered into force and been published, and can serve as an aid to interpretation."
[32] Council of Europe Recommendation R(84)15, quoted in Write-down of qualified liabilities, p. 248.
[33] Write-down of qualified liabilities, p. 249.
[34] Mis-selling of Financial Products: Subordinated Debt and Self-Placement, Pierre-Henri Conac, Directorate-General for Internal Policies PE 618.994, June 2018.

2014. The directive was transposed into Slovenian law by the Bank Resolution Authority and Fund Act (Official Gazette of the Republic of Slovenia, Nos. 97/14, 91/15, 44/16 [ZRPPB] and 17/17 [ZOSRB]) , which entered into force on 31 December 2014, then by the Banking Act (Official Gazette of the Republic of Slovenia, Nos. 25/15, 44/16 [ZRPPB], 77/16 [ZCKR], 41/17, 77/18 [ZTFI], 22/19 [ZIUDSOL], 44/19 [constitutional court decision] and 49/20 [ZIUZEOP]; the ZBan-2) and by the Resolution and Compulsory Winding Up of Banks Act (Official Gazette of the Republic of Slovenia, Nos. 44/16, 71/16 [constitutional court decision], 9/19, 72/19 [ZPSVIKOB]; the ZRPPB), and then by the Regulation on the application of the Guidelines on the range of scenarios to be used in recovery plans (Official Gazette of the Republic of Slovenia, No. 47/15) and the Regulation on the content of the recovery plans of banks and savings banks (Official Gazette of the Republic of Slovenia, No. 63/15).

Even if the circumstance that the directive was not yet in force at the time of the imposition of the extraordinary measures is taken into consideration, it is not insignificant that the Constitutional Court assessed the constitutionality of the ZBan-1 and that the ZPSVIKOB was adopted after Slovenian law was meant to be harmonised with the directive.

The Constitutional Court adopted the decision in the Kotnik case on 19 January 2016. The Constitutional Court's decision in the part addressing the (non-)compliance of judicial relief under Article 350a of the ZBan-1 and providing broad instructions for how effective judicial relief needs to be regulated by law makes no mention of the aforementioned directive, and does not take it into account as a criterion for assessing the compliance of the arrangements under the ZBan-1 with European law. The same applies to the ZPSVIKOB, which was published on 4 December 2019 and entered into force on 19 December 2019. This also envisages judicial relief that upholds all the principles of the ZPP, and only deviates from them when necessary to resolve the issue of information asymmetry between parties and the issue of multiplicity of disputes. Even the constitutional petitions and requests are not contesting the applicable arrangements by referring to the BRRD. In its questions referred to the CJEU in order U-I-4/20, the Constitutional Court has no need of interpretation of the aforementioned directive to decide on the petitions against the ZPSVIKOB: evidently it is not deemed an element of the above premise in decision-making.

In the Kotnik case the Constitutional Court itself defined the subject of the dispute as follows: whether the damage to the plaintiff that arose from the effects of the extraordinary measure exceeded the damage that would have been incurred had the extraordinary measure not been imposed, relying on the facts and circumstances that existed at the time Banka Slovenije made the decision and that were known or should have been known to Banka Slovenije. That situation would arise if the plaintiff in bankruptcy proceedings against the bank received more than he/she would have received after the write-down or conversion of the financial instrument, or even received the entire value from the financial instrument, since bankruptcy would not even have been initiated (obviously according to the financial position at the time that the extraordinary measures were imposed and excluding the effects of the extraordinary measures imposed). This would, for example, be the case if the assessments of the facts prepared by Banka Slovenije were erroneous, and therefore lacked any grounds for the imposition of the extraordinary measures and even lacked the grounds for bankruptcy.

This question should be assessed impartially by a court established by law, in accordance with the requirement under Article 22 of the Constitution. Under the existing arrangements of the ZPSVIKOB, a panel of experts will be responsible for making an economic assessment.

However, their findings and opinion will merely be one piece of evidence. The court may intervene in the experts' assessment, may decline to take it into account, or may take it into account in part (which is unlikely given the complexity and technical difficulty of the premises for decision-making). In any case an expert opinion can be contested by any party in judicial proceedings (including each individual former holder on the plaintiff side).

Leaving aside the question of the effect and validity of the BRRD, which was just about to enter into force when the extraordinary measures were imposed, and whose content was therefore well-known by that time, it should also be noted that the third paragraph of Article 85 does not regulate the question of the bank's liability (for damages). This provision requires Member States to ensure that all persons affected by a decision to take a crisis management measure have the right to appeal *against that decision*. In the Kotnik case the Constitutional Court has already pronounced that there is no (longer any) legal remedy against *that decision*, and that it is necessary to provide judicial relief to pursue potential compensation claims.

The third paragraph of Article 85 of the BRRD stipulates: "Member States shall ensure that all persons affected by a decision to take a crisis management measure have the right to appeal against that decision. Member States shall ensure that the review is expeditious and that national courts use the complex economic assessments of the facts carried out by the resolution authority as a basis for their own assessment." These provisions were transposed into Slovenian law by the Resolution and Compulsory Winding Up of Banks Act (Official Gazette of the Republic of Slovenia, Nos. 44/16, 71/16 [constitutional court decision], 9/19, 72/19 [ZPSVIKOB]), and specifically by the third paragraph of Article 235 of the ZRPPB, which regulates the limits of judicial testing:

"(3) In judicial relief proceedings against a decision on testing, the court shall apply:

1. complex economic assessments drawn up by Banka Slovenije that provide a basis for deciding on the use of resolution measures or compulsory wind-up measures;

2. an independent valuation of the assets and liabilities of the subject of resolution conducted in accordance the first paragraph of Article 66 of this act;

3. an independent assessment of the treatment of creditors and shareholders conducted in accordance with Article 130 of this act."

The above solution is clarified by Preamble 89 to the BRRD: "Crisis management measures taken by national resolution authorities may require complex economic assessments and a large margin of discretion. The national resolution authorities are specifically equipped with the expertise needed for making those assessments and for determining the appropriate use of the margin of discretion. Therefore, it is important to ensure that the complex economic assessments made by national resolution authorities in that context are used as a basis by national courts when reviewing the crisis management measures concerned. However, the complex nature of those assessments should not prevent national courts from examining whether the evidence relied on by the resolution authority is factually accurate, reliable and consistent, whether that evidence contains all relevant information which should be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn therefrom."

The aforementioned approach is known and established in EU law, but in judicial practice the limits and intensity of judicial oversight of decisions by authorities have varied, and are often

subject to dispute. Slovenian law takes the same conceptual approach, with the potential for similar issues as those facing the courts at European level.[35] This is confirmed by the fourth paragraph of Article 235 of the ZRPPB:

"(4) In judicial relief proceedings the court shall hear evidence to determine the circumstances referred to in the previous paragraph, if:

1. the assessments are based on evidently erroneous data and information;

2. there are clear inconsistencies and contradictions between individual assessments;

3. there is serious doubt with regard to the independence of the person that drew up the assessments, which suggests that these assessments cannot be considered an adequate basis for a decision."

In the case referred to in the fourth paragraph the court requires a new independent assessment if it assesses that the errors and deficiencies most likely led the shareholders and creditors of the subject of resolution to be treated worse than they would have been had normal insolvency proceedings been initiated against the subject of resolution. The costs in connection with drawing up a new independent assessment ordered by the court are covered by the state budget.

On this basis, and notwithstanding that these are two different procedures, the courts are certain to face issues concerning the scope and intensity (details) of oversight of the findings of (administrative) authorities or experts. In compensation litigation under the ZPSVIKOB, the courts will have to take a position on "complex economic assessments", whether the law explicitly prescribes it or not (it can be seen that the law explicitly prescribes it in connection with judicial relief in bank resolution processes); among the first such assessments will be the complex economic assessments conducted by Banka Slovenije, while the panel of experts referred to in Article 35 of the ZPSVIKOB will make another such assessment.

2.2.1.5.3 Qualified culpability of Banka Slovenije: basis for Banka Slovenije's recourse

As stated, the proposal for a reimbursement scheme financed by the state is based on the circumstance that the state is at least jointly liable for the damage incurred[36] and on the circumstance that the state retroactively prescribed Banka Slovenije's objective liability. This argument is also the basis for the criticism that the existing arrangements entail impermissible monetary financing. There are no such special circumstances for socialising the total damage if Banka Slovenije acted culpably in issuing the decisions on extraordinary measures. The law should therefore stipulate that the state can demand the reimbursement of paid amounts if it is proven for Banka Slovenije's liability that the prerequisites as prescribed at the time of the alleged damaging actions (qualified culpability) have been met. In this event Banka

[35] For the area of competition, see for example M. Prek and S. Lefèvre, Competition litigation before the General Court: Quality if not quantity? CMLRev Vol 53, No. 1, 2, 2016, pp. 65-90, in particular pages 68 and 69 for the definition of the problem, while for general questions in connection with oversight, see M. Prek and S. Lefèvre, Administrative discretion, power of appraisal and margin of appraisal in judicial review proceedings before the General Court, CMLRev Vol 56, No. 2, April 2019, pp. 339-380.

[36] For more on the state's liability for damage incurred by the write-down of liabilities of banks under majority state ownership, see the grounds of the bill for the Tanko law: the state should "*reimburse the damage incurred by minority shareholders at NKBM and NLB as a result of its political, uneconomic and unsuccessful management of these banks*".

Slovenije (except in the part in which the (joint) liability of the state is established) would genuinely pay its own liabilities, and there could be no talk of monetary financing of the state.

2.2.1.5.4 Creation, operation and funding of a reimbursement scheme

The reimbursement scheme is a solution that the taskforce believes would provide an effective answer to the prohibition of monetary financing. In previous discussions this option was not elaborated in detail even when it was mentioned (in legislative processes the prevailing position was that of the proposer of the ZPSVIKOB, whereby the state could not refer to liability in connection with the bank recovery and resolution), as a result of which the taskforce is merely raising certain ideas, while the set of ideas itself is neither comprehensive nor compiled in expert detail.

The taskforce believes that it is necessary to find and elaborate an alternative solution for financing compensation that will avoid the problem of monetary financing; this solution must be beyond dispute in terms of the laws on state aid declared by the European Commission as compatible with the internal market. One of the potential solutions would be for the funding for the reimbursement scheme to be provided by the BAMC, the state and Banka Slovenije in accordance with the rules that were already in place in various processes just before compliance.

Banka Slovenije has several different options with regard to the approach to the creation and operation of the reimbursement scheme:

First proposed solution: restriction of the burdens of the implementation of the ZPSVIKOB to the functioning of Banka Slovenije:

a) Spin-off within the framework of Banka Slovenije (ensuring the organisational and functional independence of a department to deal exclusively with issues in connection with the former holders' proceedings).

The advantage of this solution might mainly lie in the specialisation of the structure, which would deal exclusively with recovery and resolution issues, which would make for faster and better resolution of claims without any loss of continuity (of staff or know-how). Banka Slovenije remains on the hook as long as the regulation of liability is based on Article 350a of the ZBan-1, as in proceedings for determining and exercising claims it must be relieved of liability, which it can only do by participating actively in these proceedings itself.

b) Tasks in connection with bank recovery and resolution now performed by Banka Slovenije are transferred by law to any of the already functioning institutions. Issues with regard to this transfer are regulated by law.

c) A new public sector entity is established by law with the exclusive task of making repayments for which it is determined in judicial proceedings and amicable resolution proceedings that such repayments should be made, to whom and in what amount.

Banka Slovenije transfers all information and documentation at its disposal, to the existing or new legal person, together with some of the staff involved in bank recovery and resolution (possibly temporarily, until the operational establishment of the new legal person), and the information system containing the data.

The powers and responsibilities, in particular the power to negotiate, to make settlements, and to participate in alternative dispute resolution, are set out by law, together with any procedural rules and the general framework and rules for ensuring transparency and accountability to supervisory authorities (political and judicial).

Second proposed solution: create a system for the amicable resolution of claims, and submit it to stakeholders for discussion and confirmation in principle (having regard for the two major groups of creditors, namely large investors and retail investors, and the two categories of claimants, namely holders of bonds and similar rights, and shareholders), then adopt it in the form of a law and other legal rules.

The aforementioned solution and its components can also be applied (most likely sensibly) as part of other solutions.

2.2.1.6 Article 350a of the ZBan-1 as the wrong starting point

The following needs to be added to all of the above. The arrangements under Article 350a of the ZBan-1, which defines the former holders' right to the payment of the difference between what they received (nothing) and what they might have received had the banks been wound up under normal insolvency proceedings (or had it even be proved that the conditions for such proceedings were not met) as "damage" (first paragraph), and the former holders' claims as "compensation" (third paragraph), are inadequate. The aforementioned right of the former holders is not damage, and neither is it a compensation claim nor liability for damages. In particular it is not a liability on the part of Banka Slovenije. According to the BRRD,[37] the former holders' right to payment of the potential difference does not require the state authority to have acted culpably in the recovery and resolution of credit institutions. There is also no need for other compensation prerequisites. However, the directive clearly stipulates that the burden of payment to any unjustly curtailed former holders cannot be imposed on the entity that on behalf of the state conducted the bank recovery and resolution process. The Constitutional Court tried to follow this logic with its reckless and unconvincing interpretations of Article 350a of the ZBan-1, and to rectify the initial error of the ZBan-1 so that there was nothing left of the liability for damages under Article 350a of the ZBan-1. However it failed to go all the way: according to this interpretation of Article 350a of the ZBan-1, Banka Slovenije remains the passively legitimate entity and the obliged party, and not the state, which is responsible for the bank recovery and resolution. The correct path for resolving the problem in line with the principles derived from the BRRD would be an arrangement where the loss (i.e. not damage) suffered by a former holder, insofar as it is greater than what would have been incurred in the wind-up of the bank under normal insolvency proceedings, is paid by the state or, in line with the principles derived from the aforementioned directive, by an appropriate fund prescribed by the state and funded by the banking sector (industry). Under such arrangements potentially culpable conduct on the part of Banka Slovenije could merely be a basis for reimbursing any (additional) damage incurred by former holders as a result of an erroneous assessment that the aforementioned difference is zero.

[37] See for example Preambles 50 and 51 and Article 75 of the BRRD.

2.2.2 Banking secrecy, data confidentiality (virtual data rooms)

"The plaintiffs' options for seeking legal protection would have been effective only if they had been given full access to the documents in connection with the write-down or conversion that were available to Banka Slovenije, after which they would also have had to be provided with sufficient time to prepare the compensation claim."[38]

The aforementioned finding of the Constitutional Court is apparently uncontroversial in ideal circumstances that are not limited by various requirements to safeguard confidentiality, particularly on the side of the future defendant, Banka Slovenije. By disclosing confidential information, Banka Slovenije risks compensation claims; because it faces disclosure obligations under the ZPSVIKOB, Banka Slovenije requested an assessment of the constitutionality of the law in this part too (Banka Slovenije's allegations are not cited here). If the Constitutional Court judges that the provisions on the disclosure of information are beyond dispute, Banka Slovenije will organise itself as appropriate, but it cannot suffer any damaging consequences because it is compelled to disclose information after taking every opportunity under the domestic legal system to draw attention to the risks inherent in disclosure. Any liability (for damages in respect of those whose right to confidentiality of information has been breached, and as a result of a breach of EU law if the European Commission so determines) will be on the part of the state, similar to the case of the archives.

It is significant that the information asymmetry seen in the phase of drawing up the compensation claim under the ZPSVIKOB, which the Constitutional Court considers problematic, is balanced in full by Article 25 in connection with Article 38 of the ZPSVIKOB; the essential element of the balancing is Article 31 (reversed burden of proof). If the disputed arrangements apply, Banka Slovenije will be required to accept the burden of proving that the conditions for imposing extraordinary measures were met and that the former holders would not have received more if bankruptcy proceedings had been initiated. Here it is also necessary to take account of the general arrangements of the duty of disclosure under the ZPP, which provides for a sufficient (and constant) level of protection of documentation and information.

It is also possible to draw up a compensation claim (Article 25 of the law) even without information on the actual elements of the bank recovery and resolution to which the plaintiff does not yet have access when the lawsuit is being lodged.

2.2.3 Proceedings

In point 125 of the grounds of the judgment in the Kotnik case, the Constitutional Court noted in connection with the sheer number of disputes anticipated that the potentially high number of plaintiffs entails a considerable burden on the judicial system, despite the fact that Article 279b of the ZPP also envisages the possibility of representative test proceedings. Furthermore, the ZPP does not envisage special collective judicial relief proceedings that would ensure expedited, cost-effective and uniform decision-making. The former holders would have to act individually against Banka Slovenije, which in general does not place them in a fit position to be able to effectively pursue the grounds of their claims. The Constitutional Court did not draw attention to the difficulties that the sheer number of disputes anticipated would cause for the defendant, Banka Slovenije.

[38] Point 123 of decision U-I-295/13.

The ZPSVIKOB tries to resolve this problem through the mandatory consolidation of all civil cases relating to the same decision on extraordinary measures (Article 29). The law contains several other provisions that should reduce the number of lawsuits or civil cases (payment of one-off compensation [Article 4], indispensable co-litigation [third paragraph of Article 19], relief from court fees for certain former holders who lodge a single lawsuit together and have joint representation [third paragraph of Article 32]),[39] but it is questionable whether these measures could significantly reduce let alone eliminate the problems brought by the sheer number of disputes anticipated.

2.2.3.1 Mandatory consolidation of actions on merits

Judicial proceedings are divided into two phases: the court first decides on and issues a judgment (interim) with regard to the merits. *After receiving the defence to an action*, the court is required to issue an order consolidating all actions in which plaintiffs are claiming judicial relief under Article 350a of the ZBan-1 and that relate to the same Banka Slovenije decision. The clear background to this is the idea that the decision on the merits will be the same for all former holders, or at least for all former holders of the same class of qualified liabilities of a particular commercial bank. Decisions on the amount (the second phase, under new separate actions and claims) will (might) be different. The court may separate the actions in this phase.

In its constitutional request Banka Slovenije notes with justification that the new specific arrangements for proceedings under the ZPSVIKOB do not rectify the problem that the sheer number of proceedings entail for the court and the defendant, to which the Constitutional Court drew attention in the Kotnik case: the numerical burden on the judicial system will remain the same, the former holders will have to appear individually against Banka Slovenije, and the defendant will have to participate in as many hearings as there are lawsuits.

The consolidation of actions alone will not significantly help to resolve the problem.[40] Because the nature of the legal relationship means it is possible to resolve a dispute on the merits in a different way (differently for holders of different classes of qualified liabilities[41]), the court could have as many hearings as there are plaintiffs despite the consolidation of actions (without specific arrangements, see below): the effect of voluntary process actions would be limited to the individual relationship, while there would be as many process relationships from the perspective of material law as there are process pairs.[42] Even if the consolidation of cases could create a process position of indispensable co-litigation, the court and, in particular, the defendant will nevertheless face a deluge of lawsuits that will be difficult to manage. Each lawsuit will need to be defended, and each plaintiff will enjoy all process rights in the proceedings, which might be summarised under the joint label of the right to be heard

[39] By way of digression, this provision merely makes a slight reduction in the *logistical* problem: the quantity of paper, a single application, a single invitation, a single delivery. Plaintiffs consolidated in this manner would still have the position of co-litigants under Article 195 of the ZPP, and the right to participate in hearings and the right to be heard (second paragraph of Article 86 of the ZPP).

[40] In the request to asses the constitutionality of the ZPSVIKOB, Banka Slovenije estimated the number at around 100,000.

[41] Article 38 of the ZPSVIKOB stipulates that in the judgment on the merits the court should also determine the extent to which an obligation exists to reimburse damage across individual classes of qualified liabilities.

[42] N. Betetto in Ude et al.: Civil proceedings, commentary on the law, GV Založba Ljubljana, 2005-2006, Volume 2, p. 251.

(adversarial proceedings). The law does not restrict parties from producing evidence in the main hearing: in principle each party is allowed to participate in any hearing, with the opportunity to produce and hear witnesses and experts. The exclusive territorial jurisdiction of Maribor District Court also draws attention to certain practical difficulties. At a hearing with such a large number of parties it would be difficult to maintain order, the consolidation of actions would entail an increased possibility of motions to exclude judges, justifiable grounds on the part of individual plaintiffs to postpone a hearing would temporarily prevent the hearing from being conducted in full, the court would not be able to provide premises for the participation of all parties invited to the hearing,[43] and in a letter to the government[44] the Supreme Court states that the law could also set out the mandatory designation of a joint representative, arguing that if the law can set out the mandatory consolidation of actions, it could also set out the mandatory designation of a joint representative. This argument is highly contentious: while the mandatory consolidation of actions does not encroach in any way on the process position of parties, the mandatory designation of a common representative (for all plaintiffs?) would entail a constitutionally questionable encroachment on the right to equal protection of rights under Article 22 of the Constitution.[45]

2.2.3.2 Indispensable co-litigation?

The legislator has tried to rectify the aforementioned weakness of the effects of mandatory consolidation of actions through the third paragraph of Article 29 of the ZPSVIKOB. This stipulates that in the consolidated proceedings, until the judgment on the merits of the claim becomes final, the acts of an individual plaintiff should also take effect to the benefit of other plaintiffs who are late in carrying out an act of litigation or who have not carried out an act of litigation, if such an act would benefit them. The purpose of the provision is clear: the former holders' lawsuits constitute a *joint venture*, and should share a common fate, and the outcome with regard to the question on the merits will be the same for all plaintiffs, while the provision will also relieve the work of the court, which will be faced with an unmanageable number of individual lawsuits, and there will be no need for it to minutely assess the consequences of any omissions of process actions of individual plaintiffs in each civil action. This provision does not change the fact that the former holders will have to appear individually, that the court will be faced with as many hearings as there are plaintiffs, and, not least, that the defendant will have to respond to all the lawsuits (each application by each plaintiff) before the consolidation of actions (and also after).

The arrangements under the third paragraph of Article 29 of the ZPSVIKOB *are reminiscent* of the arrangements of indispensable co-litigation under Article 196 of the ZPP, but differ from them in important details. The ZPP regulates cases in which a dispute can only be resolved, by law or according to the nature of the legal relationship, in the same way for all co-litigants. The effects of the civil actions of an individual co-litigant therefore spread to all the co-litigants (according to theory, even to those who did not participate in the litigation),[46] proceeding from the logical presumption that each process action of each co-litigant is pursuing the (same) success in the litigation, which "according to the nature of the legal relationship"

[43] Comments of Maribor District Court of 4 November 2019.
[44] Comments of Supreme Court on updated draft of the ZPVSIKOB of 30 September 2019.
[45] Constitutional Court order Up 80/99 of 24 March 2000: "The right to... free choice of attorney proceeds from the right to equal protection of rights in proceedings under Article 22 of the Constitution."
[46] N. Betetto, op. cit., p. 255.

entails success for all co-litigants and for each separately, and that there cannot be a conflict of interest between indispensable co-litigants.

The legislator evidently did not overlook that former holders of various classes of qualified liabilities are appearing in civil cases under the ZPSVIKOB, and that the nature of the legal relationships being assessed in proceedings under this law do not necessarily mean that the dispute will be resolved in the same way for all former holders, not only in connection with the amount when proceedings will be consolidated (optional, third paragraph of Article 38), but also in connection with the merits. Therefore, it is a matter of certain types of *formal indispensable co-litigation*, which is an oxymoron. In legal theory it is beyond dispute that formal co-litigation is always ordinary, while only material co-litigation can be (ordinary or) indispensable.[47] The rule referred to in the third paragraph of Article 29 therefore includes a significant exception: the process act of a particular plaintiff also takes effect to the benefit of other plaintiffs who have not carried out an act of litigation, only if such a process act would benefit them. It is therefore a matter of (indispensable?) co-litigation *sui generis,* the effects of which cannot be equated to the effects of indispensable co-litigation under Articles 196 and 197 of the ZPP. In addition to the provision triggering questions about the effects of such "co-litigation" (or transgression of the rule of *res judicata jus facit inter partes*), it could also give rise to practical difficulties in its application. For individual acts of litigation that will not be carried out by all plaintiffs, the court will have to assess whether they really benefit all plaintiffs, and if not, which they do and which they do not.

In instances when in accordance with the first paragraph of Article 29 the actions of former holders of various classes of qualified liabilities are consolidated for collective treatment, the application of the third paragraph of Article 29 will cause problems in the determination of which process acts benefit which former holders (or not). Even greater problems might arise in the phase of the lodging of claims in connection with amount (Article 38 of the ZPSVIKOB). Which former holders are covered by a judgment on the merits and are entitled to lodge lawsuits in connection with the amount? Alongside process law effects, does such (indispensable?) co-litigation *sui generis* have material legal effects on all former holders, including those who have not (yet) lodged lawsuits and will not be able to do so, as they will miss the preclusive deadline under Article 26 of the law?

The third paragraph of Article 29 of the ZPSVIKOB is pursuing a reasonable objective, and it would be a shame to remove it because of the unclear elements described. It might be possible to attain the same objective, but without giving rise to a lack of clarity with regard to the process law and material legal effects, so that with regard to consolidated actions the law sets out true indispensable co-litigation with certain revisions required by the specifics of proceedings under the ZPSVIKOB. Henceforth we proceed under the assumption that co-litigation can also be created by the consolidation of actions, not solely when multiple persons sue or are sued under the same lawsuit.[48]

The wording of the third paragraph of Article 29 could be amended to read:

"With regard to the *de facto* and *de jure* basis for claims under this act, it shall be deemed that a dispute on the merits may only be resolved in the same manner, and that all former holders

[47] Write-down of qualified liabilities, p. 199.
[48] N. Betetto, Commentary on the ZPP, Volume 2, p. 640.

(indispensable co-litigants) who were holders of the following classes of qualified liabilities shall be deemed the indispensable party:

- indispensable co-litigants: group of former holders... class of qualified liabilities;

- indispensable co-litigants: group of former holders... class of qualified liabilities;

- indispensable co-litigants: group of former holders...”

The described approach to actions in connection with the merits would create groups of truly indispensable co-litigants, to whom all provisions of the ZPP on the process position and the effects of indispensable co-litigation, including the extension of the subjective margin of finality, would be directly applicable. An awareness that the decision on the merits will have effects on decision-making in proceedings where the plaintiffs are indispensable co-litigants could also have a significant impact in reducing the number of plaintiffs: in the event of a favourable declaratory lawsuit initiated by other former holders, those who would have remained passive would not be deprived of judicial relief for their own claims (scheduling claim: Article 38 of the ZPSVIKOB).

This might however raise the question of whether it complies with the constitutional right to judicial protection if the prevailing approach is that the effect of finality extends to former holders that did not lodge lawsuits, even in the event of a (partly) unfavourable judgment. In the case of special arrangements under the ZPSVIKOB, this idea can be rejected by the following argument. The extension of the subjective margin of finality to former holders that have not participated in the litigation could only be to their benefit, and cannot weaken their position. If the judgment is favourable, there is no need for further argument: they will reap the rewards of the successful litigation conducted by other former holders. If the judgment is unfavourable, they will also have lost nothing: the effect of the unfavourable judgment will not have weakened their position. They had already missed the preclusive deadline for lodging a lawsuit set out in Article 26 of the ZPSVIKOB.

2.2.3.3 Representative test proceedings, collective action?

In the Kotnik case, where there is a problematic circumstance that former holders who want to exercise their compensatory judicial relief would have to act against Banka Slovenije as individuals, and are not in any position to be able to effectively pursue their arguments, which by their very nature touch on complex issues of banking, the Constitutional Court merely hinted at a solution by mentioning representative test proceedings, but in so doing warned that the ZPP does not envisage special collective judicial relief proceedings that would ensure expedited, cost-effective and uniform decision-making in disputes between former holders and Banka Slovenije. In Banka Slovenije’s letter to the Constitutional Court of 20 March 2020, it is stated that the finance ministry had announced that it was drafting an overhaul to improve the arrangements under the ZPSVIKOB with regard to the use of collective actions. The collective action was also mentioned as a potential solution by the Supreme Court and by Maribor District Court.

In an assessment of what legal solutions to ensure judicial relief in mass disputes were available at the time that the Constitutional Court was making its decision and seeking suitable solutions, and at the time that the legislator was adopting the ZPSVIKOB, the following need to be taken into account. The decision in the Kotnik case was adopted on 19 October 2016. The provision of the ZPP on representative test proceedings was already in force at that

time.[49] The Constitutional Court evidently did not consider representative test proceedings to be an institution that would provide adequate judicial relief for former holders. It suggested special collective judicial relief proceedings as a potential solution, which were unknown to the Slovenian legal system at that time. The collective action was regulated by the Collective Actions Act,[50] which entered into force on 21 October 2017, i.e. just over two years before the adoption of the ZPSVIKOB. The legislator evidently judged that arrangements under this law do not adequately resolve the issue of judicial relief for former holders. Instead it decided to set out exclusive territorial jurisdiction, consolidation of actions, indispensable co-litigation, the encouragement of joint action by multiple plaintiffs, etc. In the previous points the taskforce has warned that the solutions chosen by the legislator do not satisfactorily resolve the main issues presented by the sheer number of actions anticipated. Below we argue that this problem cannot be fully resolved either by representative test proceedings or by a collective action.

2.2.3.4 Representative test proceedings: Article 279b of the ZPP

Under Article 279b of the ZPP, it is up to the court to decide whether, in the event of a large number of lawsuits in which the claims rest on the same or a similar factual basis and the same legal basis, to conduct representative test proceedings on the basis of a single lawsuit, and to suspend proceedings in the other lawsuits. At first sight[51] there is no obstacle to the court deciding to conduct representative test proceedings in the case of consolidated actions that proceed on the basis of the ZPSVIKOB: the court first consolidates all the actions, then, after receiving the defences to the lawsuits, conducts representative test proceedings on the basis of one lawsuit, and then, after the representative test judgment becomes final, it treats the suspended proceedings in consolidated fashion again. The existing arrangements therefore allow the court to conduct representative test proceedings without any intervention in the ZPSVIKOB, in contrast to the collective dispute. However, representative test proceedings only partly resolve the problem of the sheer number of disputes. It cannot prevent a deluge of lawsuits. Article 279b of the ZPP envisages a position in which a large number of lawsuits have already been lodged with the court. For the court to even make a decision to conduct representative test proceedings (on the basis of a single lawsuit), it must first submit all lawsuits for the defence to respond and wait to receive the defences (or for the deadline for responding to pass). As long as the representative test proceedings are pending, the other proceedings are suspended, which (temporarily) resolves the problem of conducting proceedings with an unmanageable number of plaintiffs for whom all process rights need to be ensured. Once the judgment issued in the representative test proceedings is final, the court must resume proceedings in all other actions in which proceedings were suspended. In these proceedings parties that did not have opportunity to participate in the representative test proceedings (in our case, all plaintiffs in the other proceedings that were suspended) may refute the factual and legal findings and positions taken by the court in the representative test proceedings. This might happen if the court were to dismiss the claim in the representative test proceedings, even only in part. In this event the court and the defendant would (again)

[49] Article 279b of the ZPP, which introduced the institution of representative test proceedings, was adopted under the ZPP-D (Official Gazette of the Republic of Slovenia, No. 45/08), which entered into force on 1 October 2008.
[50] Official Gazette of the Republic of Slovenia, No. 55/17 of 6 October 2017.
[51] This might also be disputed, in light of the provision of the ZPSVIKOB on mandatory consolidation of actions. It could be altered by minimal intervention in the law.

face a deluge of actions in which the plaintiffs could refute all factual and legal findings and positions taken by the court in the representative test proceedings.

2.2.3.5 Collective action

2.2.3.5.1 Collective (representative) disputes as a model of addressing mass harm situations

Mass claims by individuals or by individuals and legal persons that rely on the same legal basis and similar facts and circumstances constitute a problem in numerous legal systems. The problems faced by justice policy are primarily related to the overburdening of the courts by a mass of cases, which can slow their work, which is consequently having an impact on the speed of decision-making in other judicial proceedings and is thus encroaching on the right to trial without undue delay. Anglo-Saxon legal systems have created the institution of the class action. Despite the significant impact that the class action also has on the functioning of the justice system, theory mostly highlights the positive impact of the class action on the position of both litigants.[52] In a class action typically the lawsuit is lodged by an individual or a number of individuals as the representative(s) of an entire group with a similar legal position and similar interest in connection with the pursuit of the claim. Class actions are typically seen in Anglo-Saxon legal systems in compensation cases, where a group of injured parties typically appears for the plaintiffs. The main advantage of the class action for the plaintiffs is sharing the cost of the proceedings. Particularly in legal systems where costs of proceedings are high, and parties need to pay in advance, the class action allows the costs of proceedings to be shared between all members of the group, which allow for a reasonable sharing of risk if the lawsuit is unsuccessful. The class action is also beneficial to the defendant, who has no need to litigate in a disproportionate number of judicial proceedings, but can focus on one action in which all of the essential legal issues are decided.

The issue of mass compensation claims has also started to appear over the years in continental Europe, first in certain areas of consumer law. Consumers often appear as injured parties in cases relating to fair trade. Most notably in mass harm situations a position can arise where the damage to an individual injured party is relatively minor, but the total amount of benefit that accrued to the perpetrator can be very high, and it would certainly not be just for this benefit to remain with the perpetrator. Given the small value of the claim, individual injured parties have no interest in conducting their own action against the perpetrator, but are often willing to join an action that will be pursued against the perpetrator by a joint representative, particularly if the costs to each individual are relatively low. Some EU Member States have therefore adopted special regulations to establish legal institutions that allow for simpler and more efficient pursuit of claims in positions when there is a large number of claims based on the same or similar factual and legal bases. The solutions are mainly in the direction of the collective pursuit of claims and representative test judicial proceedings. The collective pursuit of claims is mostly undertaken as a special legal institution, where typically the lawsuit is conducted by a legal person that is the agent of the interests of the individuals affected by the alleged prohibited conduct. At first this approach to pursuing claims was limited to injunctive redress, where the omission of particular conduct is demanded to the benefit of all members of the group, but over time the option of collective action also shifted into compensatory redress. Opinion is highly divided with regard to the suitability of collective action in

[52] For details, see Dodson, S.: Civil Procedure: Model Problems and Outstanding Answers, Oxford University Press, 2013, p. 107.

compensatory redress, as the amount of damage often depends on the circumstances and traits of each individual.

Various legislative approaches to regulating the pursuit of mass claims were also taken by the European Commission. The European Commission provided detailed recommendations in connection with collective compensatory redress with the aim of Member States standardising the approach to judicial relief.[53] These recommendations primarily relate to the standardisation of the institutions of collective pursuit of claims as a special legal institution, while representative test proceedings more or less involve an adjustment to the general procedural rules for pursuing claims in civil cases. The European Commission's main recommendation is that the systems of collective protection of rights in Member States should be based on the principle of opt-in. This means that each injured party makes their own decision whether to join a group exercising judicial relief. Anyone who decides not join such a group may continue to independently pursue their claim against the perpetrator of the damage. Injured parties who were harmed by the same unlawful conduct should have the opportunity to join other plaintiffs at any time until a judgment or final settlement is issued. The defendant should be informed of the composition of the represented group, and any changes to its composition.[54] Another option is based on the presumption that all injured parties who meet certain conditions are members of the group. Each member of the group has the right to leave the group by a certain deadline (opt-out). An individual opting out of the group retains the right to independently pursue their claim.

2.2.3.5.2 Collective Actions Act

The idea of collective dispute resolution was transposed into Slovenian law by the Collective Actions Act (the ZKolT).[55] This is a relatively modern legislative approach, which is based on certain solutions from comparative law, and allows injunctive and compensatory collective redress. The main purpose of the ZKolT is to prevent an individual court from becoming overburdened as a result of an excessive number of individual actions in a mass harm situation, as the general arrangements for the work of the courts do not allow for a fast response to a sudden and disproportionate increase in caseload. The law eliminates the danger of a court that is overburdened with individual actions in a mass harm situation being unable to resolve them in a reasonable time, let alone all its other cases.[56] The set of claims that may be pursued via collective redress is limited to the cases referred to in the first paragraph of Article 2 of the ZKolT.

2.2.3.5.3 Principles of collective pursuit and dispositivity

The principles at the forefront of the ZKolT include the principle of the collective pursuit of claims and the principle of dispositivity and adversarial proceedings. The principle of the collective pursuit of claims relates to the definition of the plaintiff or the actively legitimate person who is pursuing the action as the agent of the common interest of multiple individuals included in the particular group. The essential attribute of this solution is that individual members of the group (in contrast to co-litigation or consolidation of actions in civil

[53] European Commission recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law
[54] Trstenjak, Verica, Weingerl, Petra: Group litigation in Europe: on the road to a standardised system for collective compensatory redress, Pravna Praksa, Nos. 31-32, 2013, p. 6.
[55] Collective Actions Act (Official Gazette of the Republic of Slovenia, No. 55/17).
[56] Draft Collective Actions Act (EVA 2016-2030-0007).

proceedings) are not parties to the proceedings, but the lawsuit is lodged to their benefit.[57] An individual injured party cannot lodge a collective action to the benefit of all injured parties; this can only be done by an eligible party defined as the agent of the collective interest. Standing entities who are active in the protection of the interests of persons who are victims of unlawful conduct come into consideration, while an entity may be designated or even created solely for the needs of a specific dispute. One of the key problems of the institution of collective actions certainly lies in the determination and definition of the person who is to act as the agent of the common interest and is actively legitimate in lodging the collective action. In accordance with the European Commission recommendation, a counsel for the state is also authorised to lodge a collective action. The argument for authorising the counsel for the state is that unlawful conduct often harms the public interest, which gives an opportunity for claims to be pursued even in cases when the injured parties are not suitably organised.

The second important principle is dispositivity and adversarial proceedings. The collective action is a special legal institution whose purpose is maintaining the efficiency of the judicial system, but even a special solution cannot overlook certain fundamental process rights of the individual. Owing to constitutional requirements (the right to be heard under Article 22 of the Constitution), it is not permissible for the outcome of litigation to harm a person who was unable even to participate in the litigation or who was unable to isolate themselves from the effects of litigation in which they were unable to participate. An extension of effects of this type, in which the outcome of litigation for individuals is binding in any case, i.e. not only in the event of a favourable outcome, but also in the event of unsuccessful litigation, requires precise regulation to avoid breaching the right to be heard (*inter partes*) and the autonomy of the parties.[58] An essential attribute of the special arrangements for the collective action is the free choice of each individual injured party to decide on the way to pursue their own claim. Collective pursuit of a claim is merely a special additional option for an injured party, but is not mandatory. An injured party may opt for a special approach to pursuing a claim through a collective action, but cannot be compelled into a situation where this is the sole approach to pursuing the claim. The injured party must have the possibility of not being bound by the outcome of the compensatory collective redress (neither negative nor positive), and of continuing to be guaranteed the right to judicial relief in an individual action.[59] This can be ensured through either an opt-in rule or an opt-out rule. In the first instance only those injured parties that express their intention to join the proceedings for the collective pursuit of judicial relief are covered by the collective action. In the second instance only those individuals who, within a specific deadline after being called on by the court, express their intention to withdraw from the collective approach are excluded from the collective pursuit of the claim. The advantage of the opt-in principle is that it fully ensures that the judgment in compensatory collective redress does not bind persons who had no knowledge of the action and were thus unable to effectively exercise their right to opt out.[60] The ZKolT therefore allows both options in principle, and leaves it to the court to stipulate in the order approving the collective action whether the opt-in or opt-out principle should be applied in the specific case. However, there are certain limitations that apply to the opt-out principle. The opt-out principle may not be applied if at least one of the claims in the compensatory collective redress relates to the

[57] Draft Collective Actions Act (EVA 2016-2030-0007).
[58] Draft Collective Actions Act (EVA 2016-2030-0007).
[59] Draft Collective Actions Act (EVA 2016-2030-0007).
[60] Draft Collective Actions Act (EVA 2016-2030-0007).

payment of compensation for non-material damage, or if at least 10% of the members of the class are estimated to be pursuing a claim of more than EUR 2,000 (second paragraph of Article 30 of the ZKolT).

2.2.3.5.4 Compensatory collective redress

The proceedings for compensatory collective redress are regulated separately in the ZKolT. In compensatory collective redress an eligible plaintiff requests that the court order the defendant to pay compensation to all injured parties in a specific mass harm situation. Compensatory collective redress may be lodged as the eligible plaintiff by a legal person of private law that pursues non-profit-making activities and in respect of which there is a direct link between the principal objectives of its functioning and the rights that were allegedly breached and in connection with which the action is being lodged, or by a senior counsel for the state (first paragraph of Article 4 of the ZKolT).

Proceedings are divided into four basic phases.[61] In the first phase of certification or allowance, the court assesses the eligibility of the applicant of the action, i.e. the applicant's representativeness and the suitability of the dispute for collective resolution. The decision on representativeness primarily concerns an assessment of the traits of the organisation lodging the action from the perspective of the fairness and suitability of its work to the benefit of all members of the class. In this phase the court also assesses all circumstances of the dispute, and determines whether conditions have been met that prove that judicial relief via compensatory collective redress is more suitable than individual litigation, and the options provided by the traditional system of civil proceedings, and above all whether common legal and factual issues prevail for the entire class, and whether the class is numerous enough for compensatory collective redress to be reasonable.[62] This phase ends with a court order allowing compensatory collective redress, if all conditions have been met, or the proceedings are ended with the denial of the action.

The certification phases is followed by an opt-in or opt-out phase. If the court allows the collective action, members of the class are first notified. The notification is tailored to the content and scope of the dispute, and allows for considerable elasticity of approach, which is defined by the court in its order (third paragraph of Article 31 of the ZKolT). An essential element of this phase is that the members of the class decide on participation in the proceedings. Here of course the essential question is whether the court has stipulated the opt-in or opt-out principle in the order allowing the action. Individuals make their declarations of opt-in or opt-out, and the court keeps a register of members of the class who are included in the collective action proceedings. An individual included in a collective action is not a party to the proceedings (first paragraph of Article 34 of the ZKolT), but retains the right to be heard. This is guaranteed as the right to submit a written statement (first paragraph of Article 37 of the ZKolT), and may be extended to the right to make a statement as part of the main hearing (third paragraph of Article 37 of the ZKolT).

This is followed by a merits phase. The court has an active role in the proceedings. This is vital, in light of the (frequent) complexity of the questions of material law and process law that arise in compensatory collective redress, and require the proceedings to be conducted with the

[61] This is an established approach to structuring compensatory collective redress. See for example https://www.bakermckenzie.com/en/insight/publications/2019/12/netherlands-class-action-type-litigation.
[62] Draft Collective Actions Act (EVA 2016-2030-0007).

requisite level of material and process formality.[63] The proceedings in the first instance end with the issuance of a judgment, whose formulation presents a problem of its own, given the particular nature of the dispute. An essential element of the judgment finding in favour of a claim under a collective action is the decision on the legal basis for the compensatory claim and its substantiation. This is the determination of the legal merits based on which members of the class who meet all the conditions are entitled to compensation. There are several options with regard to the scheduling of the compensation, which take account of the determination of the class and the content of the dispute (Article 40 of the ZKolT). The options that come into consideration are the determination of compensation claims of individuals (rare, because collective action proceedings do not establish whether an individual meets the conditions for membership of the class), the determination of aggregate compensation for the entire class with criteria for dividing it between the members of the class, or the determination of criteria for scheduling compensation for each injured party. A compensatory collective judgment is binding for all members of the class (Article 41 of the ZKolT).

The final phase of implementation first encompasses the realisation of the claim with regard to individual members of the class, and then the meeting of obligations by the defendant. The approach depends on the content of the court decision issued in the collective dispute. When aggregate compensation is determined for the entire class by the judgment, the law separately regulates the possibility of appointing an administrator of the collective compensation. The administrator's task is to first compile a list of the injured parties. In this process the administrator checks whether each individual who is a member of the class on the opt-in or opt-out principle meets the conditions for being an injured party. The draft list is handled by the court, which approves the list after the hearing is done. A person not included on the list is not deemed a member of the class, and is not subject to the effects of the compensatory collective judgment.

2.2.3.5.5 Suitability of compensatory collective redress for disputes under Article 350a of the ZBan-1

Even though the ZKolT began to be applied on 21 April 2018, Slovenia has not yet had any collective action proceedings that have ended in the issuance of a court decision on the merits. Three collective actions were entered in the register of collective actions on the sodisce.si website as at 17 February 2021.[64] One of the proceedings ended finally with the denial of the collective action, while two are in the phase before a decision on whether to allow the collective action is taken. Because there is barely any judicial precedent to date, it is very difficult to say much about the possibilities entailed by this approach to dispute resolution, as we do not know in which direction judicial practice will head in deciding on certain essential assumptions in connection with these specialised proceedings. In particular there remain questions in connection with the assessment of the representativeness of the claimant and the creation of the class.

Compensatory disputes that have their basis in Article 350a of the ZBan-1 have certain elements in common with mass compensatory disputes, for which a collective approach to

[63] Draft Collective Actions Act (EVA 2016-2030-0007).
[64] The register was viewed on 1 March 2021, and the state of the register on this date referred to the aforementioned date.

the pursuit of compensation claims could come into consideration. An essential element of the compensatory dispute is the existence of harm that is the difference between the damage incurred by an injured party from the effects of the extraordinary measure and the damage that would have been incurred had the extraordinary measure not been imposed. It is therefore a matter of the hypothetical determination of the damage that would have been incurred had Banka Slovenije not acted via extraordinary measures, and a determination of whether this hypothetical damage is less than the actual damage incurred by the individual as a result of the implementation of the extraordinary measure. This hypothetical calculation needs to be made separately for each bank on which extraordinary measures were imposed, and for each class of financial instrument to which an extraordinary measure related. All holders of each financial instrument of this type form a special class of injured parties, who are in the same legal and factual position with regard to the legal merits of the harm, while the amount of compensation depends on the quantity of the financial instruments that they held at the time of the enforcement of the measure. In substantive terms these are disputes that have an essential attribute of mass compensatory disputes. There are a large number of claims with the same legal and factual basis, for which the same decision with regard to the legal merits of the harm can reasonably be expected.

Because the application of the ZKolT is limited to cases set out by the first paragraph of Article 2 of the ZKolT, it can be concluded that the aforementioned law cannot be applied directly to compensatory claims under Article 350a of the ZBan-1. Among the disputes cited as covered by the option of compensatory collective redress are those relating to breaches of the rules of trading on organised markets and to the prohibition of market abuse in accordance with the law governing the market in financial instruments. Some of these disputes can be similar to disputes under Article 350a of the ZBan-1 in certain elements. Special rules of judicial relief for holders of qualified liabilities to which Banka Slovenije extraordinary measures related could therefore also extend the legal basis for the application of compensatory collective redress to these disputes. The legislator decided against this option, and did not envisage in the ZPSVIKOB that compensatory disputes under the aforementioned law that derive from Article 350a of the ZBan-1 would be pursued via compensatory collective redress, even though certain solutions tailored to compensation claims regulated by the ZPSVIKOB could have been set out by the aforementioned law.

Above all compensatory collective redress is merely a procedural solution that aims to lighten the load on the courts and parties to a compensatory dispute, by letting them avoid having to deal with an excessive number of cases unnecessarily. The arrangements for compensatory collective redress do not in any way encroach on questions of material law in connection with compensatory obligations as the legal merits of compensation claims in mass harm situations. In Banka Slovenije's request to assess constitutionality, the prevailing grounds are substantive issues of material law, although the consequences of an excessive number of claims cannot be overlooked, given that this might affect Banka Slovenije's constitutionally determined position.

It can be stated in particular that in compensatory claims regulated by the ZPSVIKOB, the question is raised of the agent of collective interest that would lodge the collective action for each class of injured parties. The collective approach to pursuing compensation claims makes most sense when there is already a collective organisation with the attributes of a legal person that is already established as an agent or representative of the interests of injured parties. An organisation of this type does not exist in the area of qualified liabilities, and it is difficult to

imagine that the collective pursuit of compensation claims under the ZPSVIKOB would be taken up by any existing organisation. Collective compensatory disputes are mostly pursued in areas where the class of injured parties have relative uniformity in their positions and their interests. The mass of holders of qualified liabilities is extremely heterogenous, and encompasses highly diverse members, from natural persons to qualified financial institutions. The amount of damage incurred by members of the class varies greatly, while the impact of the loss on the wealth of each member shows even greater variation. It is therefore very hard to imagine which organisation would come into consideration as the representative agent of the common interest. Here we did not overlook the possibility of creating the agent of the collective interest on an *ad hoc* basis for the case in question, but the heterogeneity of the class does not suggest a great chance of the creation of an organisation of this type as an acceptable agent of the common interest for a significant number of injured parties, which is an essential condition for reducing the number of proceedings.

It is also entirely unsuitable for a senior counsel for the state to act as the plaintiff in compensatory collective redress for claims under the ZPSVIKOB. In the case in question there is no preventive function in the collective action, as it is not possible to identify an interest in the pursuit of collective action deterring a repeat of the unlawful acts that led to the mass harm situation. An even more significant argument is the doubt on the part of the injured parties with regard to the impartiality of the counsel for the state, as the case in question involves claims whose cost is borne by the state, and that are based on the presumption that the imposed extraordinary measures were improper.

Even if we were to find a suitable organisation to act as the plaintiff in compensatory collective redress, it is highly questionable whether this approach to pursuing compensation claims would significantly reduce the number of proceedings before the court. There are several unresolved questions regarding which it is very difficult to predict how the court and the injured parties will decide in the case in question with regard to their own claims. The first such point is deciding on the approval of compensatory collective redress, where the court takes account of the following elements (fourth paragraph of Article 28 of the ZKolT): The court allows compensatory collective redress if: (1) it involves the pursuit of claims of the same type lodged on behalf of a determinable class of persons that are concerned with the same, similar or related factual or legal issues, that relate to the same mass harm situation and that are suited to treatment in collective proceedings; (2) the common legal and factual issues for the entire class prevail over the issues relating solely to individual members of the class; (3) the class is so numerous that pursuing the claims through independent actions or another form of consolidation of its members. e.g. co-litigation or consolidation of actions, would be less effective than lodging compensatory collective redress; (4) the plaintiff meets the conditions with regard to representativeness; (5) the compensatory collective redress claim is not evidently unsubstantiated; (6) the conditions with regard to agreements on the costs and financing of the proceedings have been met; and (7) the court is of the opinion that any agreement with the attorney on the payment of shares of the awarded amount is reasonable. In our opinion, in compensation claims under the ZPSVIKOB the essential prerequisites under point 1 to 3 have been met in individual classes, but the court's decision-making in the case in question is hard to predict.

There is uncertainty surrounding the court's decision whether to allow the compensatory collective redress, but even greater uncertainty with regard to the participation of injured parties in the collective action proceedings. Under the ZKolT, the opt-in approach should apply

to the pursuit of the claim. The major question is how many injured parties would decide in favour of this option, and how many would decide to pursue their claims independently. It is unlikely that there can be any expectation of enough injured parties opting for the collective pursuit of the claims to significantly reduce the number of unresolved proceedings to a reasonable number. This most likely also means that a collective approach to pursuing the claim would not resolve the essential process problems. For the court and the defendant it would still mean that a large number of actions would be conducted at the same time, where all parties have all process options to undertake their process actions, the result of which is a great overload of proceedings. Even if the opt-out approach were applied to this special case of claims under the ZPSVIKOB, many injured parties could be expected to opt to pursue their claims independently. It can therefore be concluded that the application of the compensatory collective redress mechanism to claims under the ZPSVIKOB is substantively not a solution that would satisfactorily resolve the problem of the sheer number of claims.

2.2.3.5.6 Introduction of a collective action option for compensatory redress under the ZPSVIKOB

Irrespective of our view that the institution of collective action does not resolve the problem of the sheer number of proceedings under the ZPSVIKOB, the regulation of this special form/type of proceedings could help to reduce the number of proceedings. It would therefore be reasonable to consider the amendment of the ZPSVIKOB to allow the compensation claims of qualified creditors to be pursued in this manner. If the law were to specifically set out the possibility of allowing the pursuit of these claims under proceedings set out by the ZKolT, and in addition to this option were to set out several suitable adjustments, this extension would probably not be questioned. Judicial precedent is supportive: "*A law may always set out more rights than need to be guaranteed under the Constitution, for which reason process law may in certain cases allow actions in which the plaintiff demands judicial relief to protect the rights of others (or the interest of a group). The provisions as such are not problematic, provided that they solely relate to the expansion of process legitimacy, i.e. someone else alongside the person claiming to be the agent with eligibility on the basis of material law can lodge a lawsuit to protect their rights. From the perspective of the constitutional right to judicial protection, provisions of law that entail the genuine transfer of process legitimacy are highly questionable; when those who claim to be the holder of a right under material law can themselves no longer lodge an action to protect this right, and instead the action may only be lodged by a person (or body) that on the basis of law is eligible to lodge an action to protect the rights of third parties (particularly if such person or body is not obliged to lodge an action under the instructions of a person who believes that their rights have been breached).*"[65] An amendment of this type would therefore be feasible, and would not be disputed even while proceedings before the Constitutional Court are pending; the impact of staying the law would also relate to any amendment with regard to a collective approach to pursuing compensatory actions.

Were the legislator to decide in favour of such a solution, it would then be reasonable to additionally regulate certain specifics related to the particular content of such disputes, in addition to the general provisions on the possibility of pursuing compensatory actions of qualified bank creditors under the ZPSVIKOB. In so doing it would first be necessary to determine the individual classes of injured parties (plaintiffs) who are in a comparable legal

[65] Supreme Court judgment and decision II Ips 263/2015.

and factual position to be able to have their claims pursued by a collective organisation. It seems as though the greatest problem in the collective pursuit of the action is that there is no organisation that would be suited to leading the action. Because the principles of collective redress allow for the creation of *ad hoc* organisations to pursue collective actions, it would probably be highly reasonable for the legal provisions to encourage injured parties to self-organise into suitable representative organisations. Here the most suitable form of legal person is a society, as a form of interest association of individuals. It is difficult to imagine any approach other than the opt-in principle being acceptable in a collective action. Under this approach, the key question becomes how the holders of individual rights can find sufficient motivation to take a (voluntary) collective approach to pursuing the compensatory action. It is mainly creditors with small claims that could be interested in this approach to pursuing actions, provided that the body undertaking the collective pursuit is sufficiently reputable and representative and this approach would be more cost-effective. Certain specific provisions with regard to financing the *ad hoc* creation of a representative organisation could be set out by law, which might help to raise the number of creditors opting for this approach to pursuing the compensatory action. The weakness of these arrangements is the multiple uncertainties. It is uncertain whether creditors will be at all willing to organise into a representative organisation, it is uncertain whether the court will recognise the representativeness of this form of organisation under the rules of the ZKolT and allow the collective action, and it is also uncertain how many creditors would opt in to this approach to dispute resolution.

2.2.3.6 Solution: transfer of process legitimacy?

2.2.3.6.1 Concept

The institution of process legitimacy is a fundamental presumption of process law.[66] Its content proceeds directly from the Constitution. Article 23 of the Constitution guarantees everyone the right to have their rights decided on by a court. The right to judicial protection is therefore limited, and there is no constitutional right to demand the protection of the rights of others from a court. The limitation of the right to judicial protection solely to the protection of the party's own rights is reflected in the presumption of process legitimacy. The purpose of this presumption of process law is defining the correct party in the proceedings: to determine who may act as the plaintiff and who as the defendant in specific proceedings. There is no need for the plaintiff to demonstrate material legitimacy for the proceedings to be defined as admissible. For the existence of process legitimacy, it is sufficient to simply *assert* that the plaintiff is the holder of entitlement under the material law relationship. An action lodged by a person that is demanding the protection of the rights of others is therefore *inadmissible* on the grounds of a lack of process legitimacy. Notwithstanding the above, existing legislation sets out cases in which certain entities (on their own behalf, i.e. not as representatives) exercise the rights of others.[67] However, these provisions do not exclude the process

[66] A description of the institution of process legitimacy is given below, taken from A. Galič: Constitutional process civil law, GV Založba Ljubljana, 2004, pp. 139-140.

[67] As examples of a transfer of process legitimacy of this type, Supreme Court judgment and order II Ips 263/2015 cites an action by state prosecutor to dissolve a marriage, a derivative action under Article 476 of the ZGD, an action by a consumer protection organisation (Articles 74 to 76 of the ZVPot), the collective exercise of copyright (Article 157 of the ZASP), the removal of the risk of damage (Article 133 of the Code of Obligations), the assignment of receivables for recovery (Article 120 of the ZIZ) and the alienation of property during litigation (Article 190 of the ZPP). In the judgment the court found that the manager of a multi-apartment building has legitimacy in the exercise of the rights of others (residents of the multi-apartment building).

legitimacy of persons who are legitimate under material law. This is the (allowed) expansion of process legitimacy; it is not a matter of denying materially legitimate entities the right to judicial protection of (their own) rights. In all of the aforementioned cases, actions are also allowed by entities who assert that they are holders of entitlements under the material law relationship (cumulative transfer of process legitimacy).

2.2.3.6.2 The exclusive transfer of process legitimacy is an appropriate means of resolving the problem, albeit extremely questionable constitutionally.

The taskforce also discussed the possibility of transferring process legitimacy such that the law would stipulate that the rights of former holders (rights of others) could only be pursued by a third party, while those who assert that they are the holders of the rights under material law would not even be able to lodge an action to protect these rights (exclusive transfer of active process legitimacy). The taskforce mentions this institution, because it would resolve most of the problems brought by the sheer number of lawsuits anticipated. However, it should be noted that it entails a major encroachment on the constitutional right to equal protection of rights (Article 22 of the Constitution) and the right to judicial protection (Article 23 of the Constitution and Article 6 of the ECHR). The admissibility of the encroachment would in any case be assessed against the criteria of the strictest test of proportionality. The chances that it would survive a constitutional test under certain presumptions are therefore very low, but cannot be excluded entirely. But the mere mention of this institution *cannot be construed as advice on the part of the taskforce* that the legislator should resolve the problem in this manner.

Galič[68] cites three examples of the transfer of (active) process legitimacy handled by the ECtHR. These are cases in which the legislator enacted a collective system for the protection of rights in mass disputes where the action can only be lodged by the (common) representative of the right holders stipulated by law.

In the Lithgow case,[69] the law enacted a collective system of the protection of the rights of persons whose assets were nationalised (expropriation of shareholders), where an action could only be lodged by a representative of the shareholders. The court ruled that an encroachment on the right of access to a court was not inadmissible in this case. It had the legitimate purpose of preventing the overloading of the courts, which could have been caused by claims by individual shareholders in the mass nationalisation. The court further found that the encroachment was not disproportionate, as it was necessary to consider that the shareholders' representative is obliged to follow the shareholders' instructions, and bears liability for damages with regard to due care in the representation of their interests, while the shareholders can also dismiss the representative.

In terms of their key attributes, the problems that the legislator was required to address in the Lithgow case are reminiscent of the issues of judicial protection of the rights of former holders, for which reason below we cite a few of the main attributes of the aforementioned legal arrangements, which were taken into account by the ECtHR during its assessment.

The plaintiffs had shares in a number of firms nationalised by the Aircraft and Shipbuilding Industries Act 1977. In connection with the determination of the (disputed) underlying value

[68] A. Galič, op. cit., pp. 49 and 141.
[69] Lithgow versus United Kingdom.

of the shares, the law envisaged the creation of a special tribunal: the Aircraft and Shipbuilding Industries Arbitration Tribunal. Two members were appointed following consultation with the shareholders.[70] Proceedings before the tribunal were regulated by a special law, the Aircraft and Shipbuilding Industries Arbitration Tribunal Rules (analogy with the ZPSVIKOB).

The law stipulated that a representative of the shareholders should be designated for each firm to represent the shareholders' interests in connection with the determination of the underlying value of the shares. They were to be selected by the shareholders at a meeting (general meeting), which was to be undertaken by a specific deadline; otherwise they would be designated by the secretary of state. Their fees and expenses were borne by the secretary of state. The shareholders were also able to dismiss the representative and appoint another at the general meeting.

The purpose of these arrangements was to avoid the negotiation process and judicial proceedings becoming unmanageable (ineffective) because of the sheer number of individual requests. Although shareholders had the right to vote at the general meeting, they did not have direct legitimacy in either the negotiations or in the proceedings before the tribunal (arbitration).[71] The shareholders' representative was also not obliged to seek the approval of the shareholders before agreeing the amount of compensation, and was also not obliged to submit the proposal to the shareholders for approval, even if requested to do so. The sole mechanism at the shareholders' disposal was dismissing the representative. In the case in question the shareholders' representative convened a general meeting, at which the proposed settlement was discussed and approved (by vote).

In the proceedings before the ECtHR, the plaintiffs alleged breaches of Articles 6, 17 and 18 of the ECHR (among others).

The principles of the right of access to an independent tribunal were summed up by the ECtHR as follows in the Ashingdane judgment:

a) The right of access to the courts is not absolute, but may be subject to limitations: the right of access by its very nature calls for regulation by the state.

b) In laying down such regulation, states enjoy a certain margin of appreciation. The limitations applied must not restrict or reduce the right to such an extent that the very essence of the right is impaired.

c) The regulation must pursue a legitimate aim, and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

On the basis of these criteria the ECtHR found that the disputed legal arrangements did not impair the essence of the plaintiff's right under Article 6 of the ECHR. The arrangements are pursuing a legitimate aim: avoiding the problems presented by the sheer number of disputes. The shareholders' representative was appointed by the shareholders and represented their interests, such that the interests of all shareholders were represented, albeit indirectly. This

[70] The ECtHR ruled that this tribunal meets the conditions of an independent and impartial tribunal established by law referred to in Article 6 of the ECHR.

[71] Contrary to the plaintiffs, the government stated that shareholders had legitimacy in the proceedings until a settlement was reached. The court stated in point 195 that it had not ruled on who was right: in its assessment it proceeded from the presumption that at no moment did the shareholders have access to the arbitration tribunal, or to any other tribunal to protect their rights.

is attributable to the law envisaging the general meeting, at which shareholders were able to give instructions to the representative and to express their opinions. In addition to the right to dismiss (and replace) the representative, individual shareholders also had judicial relief at their disposal, in which they were able to pursue the representative's liability for acting in bad faith in accordance with the special law (the Aircraft and Shipbuilding Industries Act 1977 in this case), or under the general rules of mandate as an agent. Having regard for the representative's powers and responsibilities, and the legislator's margin of appreciation, it is impossible to say that there is no proportionality between the means employed and the aim to be achieved.

The court did find an impermissible encroachment, i.e. a breach, in two other cases: *Philis*[72] and the *Holy Monasteries.*[73] In the aforementioned cases, the material circumstance in the finding that Article 6 of the ECHR had been breached was the absence of a legitimate aim (preventing the overloading of the courts), and the excessive independence of the person on whom process legitimacy was legally conferred.

2.2.3.6.3 Solution for exercising former holders' rights?

According to the above description, there is apparently a great deal of similarity between the issues resolved constitutionally by the Aircraft and Shipbuilding Industries Act 1977 and the issues faced by the legislator (and that will be faced by the courts and the parties) in judicial proceedings to protect former holders' rights.

The transfer of active process legitimacy resolves the majority of problems entailed by the sheer number of disputes. Only one action would be lodged, with one defence to the action (or perhaps one action and one defence for each class of qualified liabilities and for each decision on extraordinary measures). Conducting proceedings with a single plaintiff would make it much easier to procedurally provide for adversarial proceedings (the right to be heard). The plaintiffs' costs would also be significantly reduced, and should be covered by the state. The issue of information asymmetry and the issue of confidentiality and access to information would be significantly reduced.[74]

We are aware that the transfer of process legitimacy would be a demanding legislative project in legal terms. In addition to walking along the constitutional margins, which for a start would require precise study and consideration of the rules from the Lithgow case, and the examination of more recent precedent, the legislator would also encounter numerous practical questions. Here we only raise the issue of the method of determining the person who is to be the agent of the common interest.

2.2.3.7 Extra-judicial dispute resolution?

One of the deficiencies of the current system is the explicit exclusion of the possibility of the extra-judicial resolution of the claims of former holders: the ZPSVIKOB sets out its own

[72] Philis versus Greece, http://echr.ketse.com/doc/12750.87-13780.88-14003.88-en-19910827/ from 1990.
[73] Holy Monasteries versus Greece, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57906%22]} from 1994.
[74] By way of example, in case II Ips 263/2015 the Supreme Court cites the advantages of such a transfer of process legitimacy (to the manager of a multi-apartment building): in the action there is no need for the manager to cite all the divided co-owners, and a change in or the death of an individual co-owner does not affect the litigation; it is easier for the court to conduct the litigation, as it has no need to check the conditions under Article 80 of the ZPP for each divided co-owner, and problems do not arise with delivery or the absence of a large number of parties.

mandatory application, as under the first paragraph of Article 3 the former holders may pursue compensatory protection under Article 350a of the ZBan-1 solely via the proceedings set out by the ZPSVIKOB. The exclusion of extra-judicial dispute resolution was a decision made in good faith by the legislator, but we could find no substantive arguments to support this decision. One-off compensation could conditionally be deemed extra-judicial dispute resolution. Here it might be necessary to note that these arrangements are also constitutionally questionable: Banka Slovenije must accept such an approach to dispute resolution, but its own right to judicial relief is breached in these cases. In substantive terms there are also caveats applying to this category of eligible parties in connection with the prohibition of monetary financing.

In principle the decision that all disputes of the same type should be directed into a single class of (uniform) proceedings is understandable from the perspective of efficiency, quality and expediency, but it is also questionable, given that it deprives the former holders of the option of choice that exists under general regulations.

The exclusion of the possibility of extra-judicial dispute resolution for the former holders closes off one path that might prove useful and beneficial.

Although Banka Slovenije is endeavouring to resolve the disputes amicably and constructively, its room for manoeuvre is highly limited: in administrative proceedings it issued a decision on extraordinary measures that certain former holders believe entailed an unjustified encroachment on their right of ownership; the ZPSVIKOB fundamentally overhauled the regulation of the merits of Banka Slovenije's liability, but this does not mean that Banka Slovenije is able to freely negotiate the claims, settle them, participate in mediation, etc. The barrier to Banka Slovenije's freedom of action is the prohibition of monetary financing, which means that only judicial proceedings come into consideration for Banka Slovenije.

The position might be different if the regulation that will govern the reimbursement scheme were to set out rules that would explicitly grant the operator of the reimbursement scheme the option of negotiating on an individual or collective basis (by class of claims or rights), and of participating in extra-judicial dispute resolution, and to set out the scope and rules of transparency of such proceedings.

The taskforce is of the opinion that greater attention needs to be given to extra-judicial dispute resolution within this framework too, given the nature and number of proceedings under discussion, and also for the purpose of creating a general culture of extra-judicial dispute resolution in Slovenia.

In light of all of the above, it should be noted that no form of extra-judicial dispute resolution can be prescribed as mandatory. It can be offered to parties as an option, but they must still have access to a court (Article 23 of the Constitution and Article 6 of the ECHR). The creation of a special tribunal to resolve these disputes (modelled on Lithgow) might also satisfy the requirements of the ECHR, but almost certainly not the requirements of the Constitution. A specialist court (tribunal) of this type would have to meet all the requirements of Articles 125 to 134 of the Constitution. This circumstance significantly reduces the effectiveness of this solution to the problems brought by the sheer number of disputes.

2.2.3.8 What can be prepared for the time when judicial proceedings begin?

Banka Slovenije instructed the taskforce to find solutions that could make resolving the former holders' issues faster and easier. The taskforce's task has also been made harder by the wait for decisions by the Constitutional Court: by referring questions to the CJEU, the proceedings will undoubtedly be longer (the average preliminary ruling proceedings in 2018 took 16 months, the general average in 2019 was almost 15 months, and the annual report for 2020 is yet to be published; the Constitutional Court will also need time to make a decision after receiving answers to its questions). The question posed for itself by the taskforce was whether while waiting for the decisions by the competent courts (the CJEU and the Constitutional Court) it would be feasible and reasonable to draw up bases that would allow the courts to make an immediate start on their work, or at least to make it easier.

The question on which the fate of all compensation claims rests is whether damage was done to the former holders, and if so, how much. This is a complex question of expertise, which the general public and a professional audience might answer differently, but in the end it is the answer provided by the court that will prevail.

The only finding of possible curtailment that matters will be that pronounced by the court. No other body or institution can attend to a calculation with the same legal power and formal applicability as that of a court decision.

To study the options for drawing up solutions to be held in reserve and to review potential speed-up measures even before the competent courts have pronounced their decisions, the taskforce also generated the idea of carrying out a process to compile a list of domestic and foreign experts from which the court could select the panel of experts referred to in Article 35 of the ZPSVIKOB (in accordance with the general rules of civil proceedings under the ZPP); the court (and the parties) would thus have at their disposal a list of expert witnesses who have been vetted, and this would save considerable time.

Article 35 of the ZPSVIKOB stipulates that in order to establish and clarify facts regarding which the court lacks the necessary expertise, the court should appoint a panel of experts to jointly prepare testimony and opinions. There are likely to be very few such experts in Slovenia (perhaps too few), particularly when it is noted that they include experts who could not be appointed to the panel for reasons of incompatibility (on the grounds set out in the second paragraph of Article 35 of the ZPSVIKOB). It is highly likely that experts would need to be drawn from foreign ranks; creating a mixed panel of experts would probably be beneficial and desirable. There is no provision in the ZPSVIKOB that requires the court to include foreign experts; the taskforce also did not tackle the question of what the process would be at a practical level (budget, public invitation?) for the court to be able to attract foreign experts.

The option of formulating a methodology under which experts could work or even make a new calculation to try to determine whether curtailment occurred was not developed by the taskforce, because of a number of grounds for hesitation, including some of a constitutional nature.

2.2.3.9 Decision on compensation claims (scheduling)

The understanding is that a decision on scheduling only arises if the court finds (via an interim judgment under Article 37 of the ZPSVIKOB) that the claim is duly substantiated (at least in

part). Otherwise the court will issue a (final) dismissing judgment if it finds the compensation claims to be unsubstantiated, which will halt the proceedings. This warning is not superfluous, as the debate about the ZPSVIKOB seems to take place primarily under the silent presumption that the merits of the claims are duly substantiated at least in part.

In light of everything learned to date, neither the consolidation of actions, representative test proceedings, a collective action nor the transfer of process legitimacy would be a suitable and effective tool for deciding on the scheduling of claims. On the basis of the aforementioned proceedings it would be possible to obtain a final decision on the merits, from which it would be evident what *share* of the damage pertains to individual former holders in individual classes of qualified liabilities (Article 37), and also what applies in respect of the recognised damage (Article 39), while a decision on compensation claims should be made on an individual basis for each former holder: for however many former holders there are, this is the number of factual bases, the number of different claims, the number of actions that cannot be addressed in representative test proceedings, or in a collective action system or with the help of the transfer of process legitimacy. The result of the decision-making process needs to be a decision that represents enforceable title for each creditor. This is also the basis for the provision of the ZPSVIKOB stipulating that after the judgment on the merits becomes final, the court may separate the actions; a consolidated action would thus not entail any lightening of the load, either for the court or for the parties.

A solution to this problem can be modelled on the solution used by the legislator in the Denationalisation Act,[75] where there was also an expectation of a deluge of claims: administrative units should decide on compensation scheduling in administrative proceedings.[76] There are 58 different administrative units in Slovenia, and the burden entailed by the expected number of cases would be divided between multiple decision-making centres. The legal and factual basis for scheduling is simple, and cannot be compared to the complexities involved in denationalisation. What constitutes damage is clearly stipulated by the law (Article 39). What part of this damage pertains to a former holder with regard to their own class of qualified liabilities is decided finally in the judgment on the merits. Perhaps it is no exaggeration to say that scheduling might be simplified by the use of a computer algorithm, which after a very limited amount of data has been entered would be able to draw up standardised decisions, thereby also ensuring standard practice in the decision-making by administrative units. With regard to the requisite statements and evidence that the former holder must enclose in the claim for scheduling purposes, the suggested arrangement is modelled *mutatis mutandis* on the arrangements for the conditions for claiming one-off compensation (Article 5 of the ZPSVIKOB).[77] In order to satisfy the requirements of Article 23 of the Constitution and Article 6 of the ECHR, there also needs to be an option for (administrative) judicial relief (full jurisdiction)[78] against the administrative decision,[79]

[75] The constitutionality of this solution was confirmed by the Constitutional Court in judgment U-I-2/92 of 10 June 1993.
[76] Under the ZPŠOIRSP (law on erased persons) too, claimants may also request one-off monetary compensation in administrative proceedings.
[77] A former holder's claim should contain the information and documents set out in points 1, 2, 3, 4, 6 and 7 of the first paragraph of Article 5 of the ZPSVIKOB.
[78] ECtHR decision Albert and Le Compte versus Belgium; cited by A. Galič, op. cit., p. 43.
[79] See for example Constitutional Court decisions Up-2080/00 and Up 80/99.

although given the nature of the proceedings and the issues that will be addressed in these proceedings, there can be no expectation of a large number of such judicial disputes.

2.2.4 Possibility (admissibility?) of other legal bases

2.2.4.1 Litispendence?

The law applies solely to proceedings in which a former holder is claiming compensatory protection under Article 350a of the ZBan-1 versus Banka Slovenije. The former holders may also protect their legal position on other legal bases, and versus other entities (defendants).[80] In these cases, first the question of litispendence arises (third paragraph of Article 189 of the ZPP). Proceedings pending under the ZPSVIKOB are no impediment to the initiation of civil proceedings against other defendants,[81] although the question can arise of whether the former holders may initiate litigation against *Banka Slovenije* (in parallel) on other legal bases.

2.2.4.2 Damage caused by a criminal offence

The law explicitly mentions such a possibility with regard to a claim for the reimbursement of damage caused by a criminal offence in connection with a decision on extraordinary measures. The second paragraph of Article 3 of the ZPSVIKOB stipulates that the law does not apply if it has been established by final court judgment that a criminal offence was committed in connection with a Banka Slovenije decision, and if a former holder alleges that damage was incurred as a result of this offence. The existence of a criminal offence in this case constitutes a preliminary question of law (Article 13 of the ZPP), and not a question of identical facts (Article 14 of the ZPP). The wording of Article 3 of the ZPSVIKOB resolves in theory and practice the still-disputed question[82] of whether a civil court alone may resolve this preliminary question of law: it may not.

2.2.4.3 Negligent performance of supervisory function

The former holders might pursue Banka Slovenije's liability on the grounds of the negligent performance of the supervisory function. The basis for this claim would be that Banka Slovenije might have prevented the situation that provided the basis for the imposition of extraordinary measures had it performed its supervisory function diligently. The factual basis for this claim is completely different from the basis for the claim under Article 350a of the ZBan-1, and litispendence would be no impediment to the initiation of such (new) civil proceedings.[83]

2.2.4.4 Breach of the duty to explain by commercial banks

The former holders also have at their disposal claims against the commercial banks that were holders of qualified liabilities. One of the bases that the former holders have already

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[80] The third paragraph of Article 3 of the ZPSVIKOB stipulates: "*This act shall not apply to... other lawsuits... (of former holders)... by virtue of which compensatory protection under Article 350a of the ZBan-1 is not being claimed.*"

[81] The third paragraph of Article 189 of the ZPP stipulates: "*As long as the civil proceedings are pending, a new action concerning the same claim may not be initiated between the same parties.*"

[82] See Galič: Civil proceedings, commentary on the law, GV Založba Ljubljana, 2005, Volume 1, pp. 135-137.

[83] Supreme Court judgment II Ips 201/2000 of 12 October 2000: When money is the subject of the claim... it is only possible to establish the identity of the claim in connection with the factual basis.

(sometimes successfully)[84] claimed is a breach of the duty to explain.[85] In the case in question the Supreme Court found that when entering into the contract the bank breached the duty to explain, and upheld the judgment of the higher court that found the contract null and void on this basis and found in favour of the reimbursement claim of the plaintiff (the former holder). Caution is needed when assessing the precedent effects of this judgment. The Supreme Court took the decision in admissible review proceedings, in which it solely answered the question of whether there was a breach of the duty to explain. Within the framework of an admissible question, it did not taken an explicit position with regard to the question of whether a breach of this duty in any case genuinely causes the contract to be null and void (the correctness of the higher court's decision with regard to this question was not tested). It seems rather that the Supreme Court's position with regard to the consequences of a breach of the duty to explain is different, and more restrained. In case II Ips 201/2017 (borrowing in Swiss francs) the court ruled that if it were established that the bank failed to correctly meet its duty to explain, it would be necessary to carry out an assessment of whether the contractual terms were unfair, which only then could lead to the contract being null and void, and a reimbursement claim.[86]

2.2.4.5 Omission of (administrative) judicial relief by the senior management of commercial banks

The second potential basis for an action against a commercial bank would be that the bank omitted due diligence by failing to exercise legal protection against Banka Slovenije's decision on extraordinary measures (second paragraph of Article 337 and first paragraph of Article 347 of the ZBan-1). Only the commercial banks could have achieved the repeal or overturning of the decisions on extraordinary measures. The question of the justification of the extraordinary measures could have been resolved at that time.[87] This would have delayed recovery and resolution: through such (passive) conduct, the banks protected the interests of their (ordinary) clients, and favoured them over the interests of the qualified liabilities. It could prove to be the case (*ex post*) that the claim would have considerable chances of success, if in proceedings under the ZPSVIKOB and under Article 350a of the ZBan-1 it is shown that the bank was not in the position of bankruptcy at all.

2.2.4.6 Liability for causing insolvency

The next potential legal basis for a compensation claim against the commercial bank could be the bank's liability as a legal person for causing its own insolvency. If the plaintiffs succeed in proving that the insolvency of an individual bank occurred because it failed to adequately manage risks or to put in place adequate internal control mechanisms in accordance with banking regulations, this could be the basis for a compensation claim against the bank.[88]

[84] Supreme Court judgment II Ips 5/2020.
[85] This legal basis is also explicitly mentioned in the third paragraph of Article 3 of the ZPSVIKOB.
[86] The question of the commercial banks' liability on the grounds of a breach of the duty to explain (mis-selling) is addressed in detail in the Mis-Selling of Financial Products document (see op. cit. p. 30).
[87] Taken from: Write-down of qualified liabilities, p. 354.
[88] Write-down of qualified liabilities, pp. 350-352.

2.2.4.7 Liability of management and supervisory bodies

The former holders might also pursue claims against the banks' management and supervisory bodies, on the basis of obligational law (Code of Obligations) or corporate law (ZGD-1).

2.2.4.8 European Court of Human Rights

Finally it is necessary to mention the possibility of pursuing claims against the state on the basis of the European Convention on Human Rights. Several actions of this type have been lodged to date. The plaintiffs are alleging a breach of Article 1 of Protocol 1 of the ECHR, and a lack of access to legal remedies. The ECtHR consolidated eight cases into the case of Pintar and others versus Slovenia (49969/14). On 18 October 2018 the ECtHR issued a document posing three questions for Slovenia.[89] The taskforce has no information as to which phase of proceedings before the ECtHR the aforementioned case is currently in.

2.2.4.9 Banka Slovenije's claim of enrichment versus commercial banks

Referring to the answer by the CJU, the Constitutional Court ruled that the legal bases for the write-down (the European Commission's Banking Communication) did not contravene EU law or the Constitution. The potential success of the former holders in civil proceedings (a finding that their claims are at least partly substantiated) would therefore mean that Banka Slovenije was erroneous in establishing the bases for write-down when issuing the decisions on extraordinary measures: i.e. that the commercial banks were in a better financial state and received more aid than was necessary. They would also have been able to meet their liabilities even without the write-down (in the event of bankruptcy, the bankruptcy estate would have sufficed for at least partial payment of the liabilities). The full write-down of the liabilities would therefore have enriched the commercial banks, while Banka Slovenije, which had to cover the established shortfall by making payments to the former holders, would suffer curtailment. In such an outcome to the civil proceedings, Banka Slovenije would therefore acquire receivables from the commercial banks on the basis of unjustified acquisition. For Banka Slovenije to secure for itself the civil law effects[90] in subsequent proceedings to pursue these receivables (dismissal of objections for bad litigation, suspension of statute-barring, etc.), it should urgently inform the commercial banks of civil proceedings initiated by holders of qualified liabilities of the commercial banks.

[89] Write-down of qualified liabilities, p. 290, http://hudoc.echr.coe.int/eng?i=001-187658.
[90] Article 204 of the ZPP.

2.3 Conclusions and proposed solutions

a) **Article 350a of the ZBan-1 is not a suitable basis** for assessing the former holders' entitlement to the reimbursement of the loss suffered in the write-down. It is thus possible to clarify why the Constitutional Court interpreted the ZBan-1 such that it sets out objective liability for any losses incurred. Objective liability was then also enforced by the ZPSVIKOB. The described intervention by the Constitutional Court and the adoption of the ZPSVIKOB in essence mean that barely anything remains of the original content of Article 350a in connection with Article 223a of the ZBan-1. More precisely: only the provision that Banka Slovenije is passively legitimate and liable for payment (even under modified conditions).

b) **The enforcement of objective liability is in accordance with the concepts** on which Directive 2014/59/EU is based (although adopted subsequently), although these arrangements would require the compensation for the aforementioned curtailment to not be borne by Banka Slovenije. This means that in regulations governing judicial relief for former holders on the basis of Article 350a, the state should be designated the passively legitimate party (at least until the establishment of any scheme for financing resolution). Otherwise it would be a case of impermissible monetary financing: Banka Slovenije would have to settle the state's liabilities.

c) With regard to the existing legal arrangements (**passive legitimacy of Banka Slovenije**), a solution is offered by legislating for a claim of recourse by Banka Slovenije against the state on the basis of exculpation through proof of the absence of culpability. Or a solution that is even more in keeping with the nature of the legal relationship: a government scheme for financing resolution (potentially with a claim of recourse, under the principle of culpability on the part of Banka Slovenije).

d) According to the described arrangements for Banka Slovenije's objective liability, the possibility that former holders only formulate declaratory claims on the merits, and the general arrangements under the ZPP, the courts will be able to order the **submission of all necessary documents and the disclosure of all necessary information**, which Banka Slovenije will be required to submit and to disclose. The submitted documents and disclosed information will be properly protected, and provisions on virtual data rooms are not essential for the exercise of the former holders' rights.

e) The establishment of a **reimbursement scheme** to reimburse the curtailment, having regard for the precepts formulated in legislation in certain similar cases of curtailment, where it was not feasible or reasonable to substantiate a system of liability for damages, seems to be a suitable option for resolving issues in the pursuit of claims by former holders.

f) **Restricting the burdens of the implementation** of the ZPSVIKOB to the functioning of Banka Slovenije can be achieved by spinning off the resolution of disputes to a specialist department or by transferring these tasks by law to another (or new) public

sector entity, which can be a solution that helps Banka Slovenije to participate more effectively in judicial disputes of this type.

g) **Process mechanisms:** Stipulation of the exclusive territorial and material jurisdiction of a single court, mandatory consolidation of actions, encouragement of actions lodged via a joint representative, indispensable co-litigation, special provisions on lists of parties, etc. do not satisfactorily resolve the legal and practical problems faced by the court and in particular by the defendant as a result of the sheer number of plaintiffs expected. This problem (in the phase of proceedings after declaratory claims) may be partly alleviated by the amendment of the provision on co-litigation, such that genuine indispensable co-litigation is legislated for former holders of the same class at a particular commercial bank. The taskforce also assessed the feasibility and suitability of other solutions to this problem: representative test proceedings, the collective action, and the transfer of process legitimacy.

h) **Representative test proceedings:** There is an argument that the existing ZPSVIKOB allows for representative test proceedings to be conducted, under the *mutatis mutandis* application of the ZPP. If the provision on mandatory consolidation of actions is shown to prevent this, it would only require a minor revision to the ZPSVIKOB. However, representative test proceedings would significantly reduce the burden on the court solely in the event of them ending with a finding fully in favour of the claim. Otherwise the proceedings that would continue in suspended cases would face the same problems caused by the sheer number of disputes.

i) **Collective action:** Compensatory redress for qualified creditors could be pursued as a collective action, but it is highly uncertain what reduction in the number of proceedings would actually be brought by this solution. A solution of this type would in any case require an amendment of the law (the ZKolT, or even better, the ZPSVIKOB), which is not constitutionally questionable, as the collective action does not replace individual judicial relief, but merely augments the possibilities, provided that the opt-in principle is applied. Here the main issue seems to be the creation of a representative organisation for creditors. This approach to lodging compensatory redress might be appealing to creditors, if mechanisms for positively motivating creditors to join such an approach to pursuing redress were to be set out.

j) **Transfer of process legitimacy:** This is an almost perfect solution, but not only is it demanding in legislative terms, it is also constitutionally *extremely questionable*. It is a matter of the exclusive transfer of the right of access to a tribunal, which denies plaintiffs their right to judicial relief, and would find it hard to withstand a constitutional assessment under the strictest test of proportionality. The essential attributes of the transfer of process legitimacy and the necessary constitutional caveats addressed by the ECtHR in the Lithgow case are perhaps of interest, as they touch on certain issues that might be relevant in any decision to apply the institution of collective action under the opt-in principle to the disputed case of the former holders.

k) The taskforce draws attention to the **possibility of reducing the problem of the sheer number of disputes in the scheduling phase**. The solution of having the matter decided on by administrative units in administrative proceedings is worthy of consideration. This would ensure decentralisation and sharing of the burden of the large number of claims. The bases for scheduling are simple and standardised, while standardisation of the practices of administrative units could be ensured by the use of software to calculate compensation schedules.