EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 1 February 2013

on a State guarantee covering certain commitments of subsidiaries of Dexia SA

(CON/2013/8)

Introduction and legal basis

On 14 December 2012, the European Central Bank (ECB) received a request from the French Ministry of Economy and Finance for an opinion on a draft finance law for 2012 granting a State guarantee covering certain loans granted to Dexia SA and Dexia Crédit Local SA (hereinafter the 'draft law'). The ECB was requested to deliver an opinion under extremely urgent circumstances.

The ECB's competence to deliver an opinion is based on Article 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the sixth indent of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions[1], since the draft law relates to rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft law

1.1 The draft law amends Article 4 of the Finance (Amendment) Law for 2011 (Law No 2011-1416 of 2 November 2011) on which the ECB has been consulted (CON/2011/85) and which authorised the Minister for the Economy and Finance to grant in return for payment a State guarantee, jointly with the Belgian and Luxembourg States, for financing raised or issued by Dexia SA and Dexia Crédit Local SA before 31 December 2021. The current maximum ceiling of liabilities guaranteed by the three States is EUR 90 billion of which 36.5% is borne by France; that is a share of EUR 32.85 billion.

As the main features of the guarantee scheme set up at that time remain unchanged, Opinion CON/2011/85 still applies and is therefore reiterated by the ECB for the purpose of the current opinion.

1 OJ L 189, 3.7.1998, p. 42.

1.2 In the context of the gradual break-up of the Dexia Group and further to the agreement reached by the Belgian, French and Luxembourg Governments on 8 November 2012 leading to the recapitalisation of Dexia SA, the draft law would now modify the guarantee scheme set up by the Finance (Amendment) Law for 2011 (Law No 2011-1416 of 2 November 2011) to specify the financing guarantee and to modify France's share in the guarantee and the amount of its ceiling.

Article 4 of the draft law clarifies the financing guarantee in four aspects:

(a) it introduces the concept of 'qualified investor' which includes direct and indirect subsidiaries of Dexia SA or of Dexia Crédit Local SA;

(b) it clarifies that 'guarantee' includes the principal, interest, costs and accessories of the guaranteed financing, bonds and securities;

(c) it specifies the regime for foreign currency issues[2];

(d) it increases the amount of the maximum ceiling on liabilities guaranteed by France which may not exceed 45.59 % of the total amount guaranteed by the three States.

The scope of the guarantee would first be extended to commitments taken by the subsidiaries of the Dexia Group. The Dexia Group intends to issue, via its US subsidiaries, guaranteed bonds denominated in euro and US dollars which would be placed with US investors, given the limited interest of European investors for these instruments amid the European sovereign bond crisis.

The draft law clarifies that the commitments covered by the guarantee can take the form of loans, bonds and debt securities. It also specifies that the amount of the principal of the liabilities guaranteed may not exceed the ceiling of EUR 38.76 billion, taking into account the euro exchange value at the time the State guarantee is granted, of the financing, bonds or securities in US dollars, Canadian dollars, pounds sterling, yen and Swiss francs.

The allocation of the total amount of the guarantee, which would now amount to EUR 85 billion instead of EUR 90 billion, among Belgium, France and Luxembourg, would be adapted. France would now guarantee 45.59% of such amount, namely EUR 38.76 billion instead of the previous EUR 32.85 billion, which corresponded to 36.5% of EUR 90 billion.

The guarantee – which would still be payable under the Finance (Amendment) Law for 2011 (Law No 2011-1416 of 2 November 2011) – will apply unless provided otherwise by agreements entered into by the Minister for the Economy and Finance. This change creates more flexibility in enforcing the guarantee, which may be called preventively to avoid a default at maturity or without mentioning the precise amounts due and payable on a specific date, such modalities being difficult to meet when the guaranteed securities are held within a securities settlement system.

1.3 The provisions of the Finance (Amendment) Law for 2011 on the duration of the guarantee that covers all commitments taken on by 31 December 2021[3], the requirement of remuneration to be

2 In 2011 and 2012, the funding in foreign currencies represented up to 45% of Dexia issues. See Sénat preparatory work, report 203 by Mr François Marc.

paid by the Dexia Group and the powers of the Minister for the Economy and Finance to take the implementation measures remain unchanged.

2. Breach of the consultation obligation

The ECB received the request from the French Ministry of the Economy and Finance for an urgent consultation on the draft law on 14 December 2012. The legislative process had started in Parliament on 14 November 2012. The consultation request specified that the French authorities would like to receive the ECB's opinion 'as quickly as possible and in any case before 17 December 2012'. The French Parliament adopted the draft law at its 19 December 2012 session[4].

According to Article 4 of Decision 98/415/EC, the ECB must be consulted 'at an appropriate stage' in the legislative process. This implies that the consultation should take place at a point in the legislative process that affords the ECB sufficient time to examine the draft legislative provisions and adopt its opinion.

Pursuant to Article 3(4) of Decision 98/415/EC, Member States are obliged to suspend the process for adoption of the draft legislative provision pending submission of the ECB's opinion to allow the relevant national authorities to meaningfully deliberate the ECB's opinion prior to adoption of the provisions.

In this respect, the ECB stresses that even cases of particular urgency do not relieve national authorities from their duty to consult the ECB and to allow sufficient time to take into account its views in accordance with Decision 98/415/EC. The French authorities should have consulted the ECB earlier or postponed the final vote on the draft law until such time that would have allowed for a proper consultation with the ECB, as well as due consideration of the ECB's opinion. The ECB would appreciate the Ministry honouring its obligation to consult the ECB in due time in the future.

3. Specific observations

3.1 The ECB welcomes the coordinated efforts by Belgium, France and Luxembourg in the context of the reorganisation of the Dexia Group. It notes with satisfaction that the draft law mainly purports to achieve greater consistency in the concepts used under Belgian, French and Luxembourg law to describe the scope, nature and modalities of the guarantee extended to the Dexia Group. This would contribute to improving the legal certainty and a level playing field in the three Member States as regards the implementation of the guarantee.

3.2 The ECB understands that the extension of the guarantee scheme to bonds and debt securities would benefit issues of such instruments by the subsidiaries of Dexia SA and Dexia Crédit Local SA. As a consequence, and provided that these measures are necessary to limit the scale or effects of a sudden crisis in the financial markets or a serious threat of systemic risk, a State guarantee may

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3 Article 4 of Finance Amendment Law for 2011 (Law No 2011-1416 of 2 November 2011).

4 The law was published on 29 December 2012 in the *Journal Officiel*. Finance (Amendment) Law for 2012 (Law No 2012-1510 of 29 December 2012).

therefore be issued under French law for the benefit of such subsidiaries, even though they are located in foreign countries. When determining which subsidiary would effectively benefit from the guarantee and agreeing with the Dexia Group its specific terms and conditions, including the remuneration, the Minister for the Economy and Finance would nevertheless need to abide by Union competition and State aid rules. The Minister would also need to follow the principles identified in previous ECB opinions[5], namely that government guarantees should (i) address the funding problems of liquidity-constrained solvent banks, by improving the functioning of the market for bank debt of longer-term maturity, (ii) preserve the level playing field among financial institutions and avoid market distortions, and (iii) ensure consistency in the management of Eurosystem liquidity.

3.3 The ECB notes, however, that one of the objectives of the extension of the guarantee is to enable the issuance of bonds denominated in euro, US dollars, Canadian dollars, pounds sterling, Japanese yen or Swiss francs for placement with foreign institutional investors. Should the underlying instruments not be issued and held within the euro area, these instruments would therefore not be eligible for monetary policy purposes in view of Article 1(2) of Guideline ECB/2012/18 of 2 August 2012 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral[6].

3.4 For instruments issued and held within the euro area, the quantitative restriction provided by Article 5 of Guideline ECB/2012/18 would apply. In both cases, the ECB welcomes that the issuance of these guaranteed bonds would not affect the conduct and implementation of monetary policy in the euro area.

3.5 For the sake of transparency, the ECB recommends specifying in the draft law the subsidiaries which will be covered by and benefit from such guarantees. A general reference to any direct or indirect subsidiaries of Dexia SA or Dexia Crédit Local SA might be misleading at a time when, in the course of the restructuring of the group, some of the subsidiaries are sold while others are in the process of resolution or liquidation.

3.6 The ECB understands that the guarantees provided to the Dexia Group could develop their effect until 31 December 2031. The draft law could clarify whether the need for such guarantees may change in view of transposition in 2015 of the proposal for a directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2001/35/EC and Regulation (EU) No 1093/2010[7]. This Directive could provide additional tools also for the resolution of the Dexia Group.

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5 CON/2011/79, paragraph 3, CON/2012/85, paragraph 2.2 and CON/2012/4, paragraph 3.

6 OJ L 218, 15.8.2012, p. 20.

7 COM(2012) 280/3.

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

Done at Frankfurt am Main, 1 February 2013.

[signed]

The President of the ECB

Mario DRAGHI