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EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 28 January 2011

on the implementation of the principles for the development of financial supervisory structures in Belgium

(CON/2011/5)

Introduction and legal basis

On 23 December 2010, the European Central Bank (ECB) received a request from the Belgian Ministry of Finance for an opinion on a draft royal decree implementing the development of financial supervisory structures (hereinafter the 'draft royal decree').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union, and the third, fifth and sixth indents 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], as the draft royal decree relates to the Nationale Bank van België/Banque Nationale de Belgique (NBB), payment and settlement systems, and rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. In addition, the Eurosystem shall contribute to the smooth conduct of policies relating to the prudential supervision of credit institutions and the stability of the financial system under Article 127(5) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft royal decree

1.1 The draft royal decree is aimed at implementing the Law of 2 July 2010 amending the Law of 2 August 2002 on the supervision of the financial sector and financial services, as well as the Law of 22 February 1998 establishing the Organic Statute of the Nationale Bank van België/Banque Nationale de Belgique and containing various other provisions[2] (hereinafter the 'Law of 2 July 2010'). The Law of 2 July 2010 lays down the principles for the development of the Belgian financial supervisory structures towards a 'twin-peaks'-type model under which the NBB will become the sole authority responsible for the financial sector's micro- and macro-prudential stability.

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1 OJ L 189, 3.7.1998, p. 42.

2 Belgian Official Gazette, 28.9.2010, p. 59140. The validity of the empowering clause in Article 26 of the Law of 2 July 2010 that is the legal basis for the draft royal decree was extended to 31 March 2011 (Law of 6 January 2011 amending the Law of 2 July 2010). The ECB commented on an early draft of the Law of 2 July 2010 in Opinion CON/2010/7. All ECB opinions are published on the ECB's website www.ecb.europa.eu.

1.2 In order to implement the planned supervisory model, the draft royal decree will, on the one hand, extend the NBB's responsibilities to the prudential supervision of financial institutions[3], including the specific supervisory tasks relating to system-relevant financial institutions[4]. These new micro-prudential supervisory tasks will be in addition to the NBB's existing task of contributing to the stability of the financial system[5]. On the other hand, the responsibilities of the current Banking, Finance and Insurance Commission (BFIC) will cover the surveillance of all aspects related to financial markets, including the adherence to the rules of conduct[6], and the supervision of certain entities that are not subject to the NBB's prudential supervision[7]. The BFIC's name will be changed to the Financial Services and Market Authority (FSMA) to reflect its new mandate. The ECB understands that a preparatory committee composed of NBB and BFIC representatives provided their assistance in the context of drawing-up the arrangements put in place by the draft royal decree[8].

1.3 The NBB's prudential supervision will coexist with the tasks entrusted to the future FSMA. The ECB understands that in specifying the respective competences of the two supervisory authorities in the existing framework, the Belgian legislator has aimed to avoid both any duplication of tasks as well as the risk of conflicting decisions[9]. To this end, the draft royal decree provides for various information[10] and mutual consultation[11] requirements. In this respect, the conclusion of a Memorandum of Understanding aims to ensure smooth cooperation between the NBB and the future FSMA[12].

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3 New Article 12bis §1 of the Law of 22 February 1998 establishing the NBB's organic statute (hereinafter the 'Law on the NBB'), Article 187 of the draft royal decree, and new Articles 39 to 61 of the Law on the NBB (Article 195 of the draft royal decree). The financial institutions that are subject to the NBB's prudential supervision as listed in new Article 40 of the Law on the NBB are the following: (i) credit institutions, including electronic money institutions, (ii) stockbrokerage firms, (iii) insurance companies, reinsurance companies, surety companies, (iv) clearing institutions, securities settlement institutions and assimilated institutions, and (v) payment institutions..

4 New Article 41 §2 of the Law on the NBB. The concept of 'systemically relevant institutions' will not be generally defined in or under the draft royal decree (Explanatory Memorandum, pp. 48 and 49).

5 Article 12 of the Law on the NBB.

6 New Article 45 §1 3° of the Law of 2 August 2002 on the supervision of the financial sector and on financial services (Article 217 of the draft royal decree). The FSMA's supervisory responsibilities with regard to institutions subject to the NBB's prudential supervision only apply: (i) with regard to certain of these institutions; and (ii) with respect to a list of rules of conduct set out in the draft royal decree. This list may be completed by the King, acting upon advice from the BFIC and the NBB (new Article 45 §2). The draft royal decree also introduces rules of conduct with regard to settlement institutions (new Article 23 of the Law of 2 August 2002, Article 205 of the draft royal decree).

7 Notably portfolio management and investment advice companies, or intermediaries in insurance, banking and investment services (new Article 45 §1 2° of the Law of 2 August 2002).

8 The establishment of the preparatory committee was provided for in Article 26 §2 of the Law of 2 July 2010.

9 Explanatory Memorandum, p. 11.

10 See e.g. new Article 41§6 of the Law on the NBB (Article 195 of the draft royal decree) and new Article 59 of the Law of 22 March 1993 on the status and supervision of credit institutions (Article 131 of the draft royal decree).

11 For instance, when authorising a credit institution, the NBB will have to consult the future FSMA on a number of issues that relate to the latter's competence (e.g. new Article 9bis of the Law of 22 March 1993, Article 111 of the draft royal decree). The future FSMA's opinion will not be binding on the NBB, but it will have to provide reasons if it departs from it. Explanatory Memorandum, p. 31.

12 Articles 36, 125 and 176 of the draft royal decree with regard to, respectively, the supervision of insurance companies, credit institutions and investment firms.

1.4 The general framework governing the exercise of the NBB's new supervisory tasks[13] is largely modelled on that which applied to the BFIC and to the 'Committee for systemic risks and system-relevant financial institutions' (CSRSFI), with regard to the supervision over system-relevant institutions.

1.5 Finally, the draft royal decree addresses certain issues arising as a consequence of the transfer of new tasks to the NBB, such as issues relating to its governance structure and the human and financial resources necessary to carry out these tasks.

1.5.1 First, the royal decree establishes some limited changes affecting the NBB's organs and governance structure. These changes include, notably, the establishment of a Sanctions Committee as a new NBB body that will decide on the imposition of administrative penalties and fines applicable to the institutions subject to the NBB's prudential supervision[14].

1.5.2 Second, the staff members whose main responsibility is the execution of prudential tasks within the current BFIC will automatically be transferred to the NBB when the transfer of micro-prudential tasks to the NBB becomes effective[15]. In addition, the two members of the BFIC's Management Committee in charge of the BFIC departments responsible for the transferred prudential tasks will be assigned to the NBB for the remainder of their current terms of office; these two members will have the status of special representatives[16].

1.5.3 Third, the transfer of prudential tasks to the NBB will also cover the rights and obligations related to such tasks stemming from the BFIC's previous activities. The actual financial burden arising from any such obligations in the form of liabilities is however not supposed to be borne by the NBB, as the NBB will be authorised to charge such financial obligations to the supervised institutions to the extent that they would not be sufficiently covered by the provisions and reserves transferred from the BFIC to the NBB[17].

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13 In this respect, it is noted that the rules on professional secrecy will be split into a general provision applicable to all NBB tasks (new Article 35 of the Law on the NBB, Article 194 of the draft royal decree) and a set of provisions specifically covering the NBB's prudential supervisory tasks (new Articles 51 to 53 of the Law on the NBB). The NBB will also be subject to the same limitation of liability (Article 12bis §3 of the Law on the NBB, Article 187 of the draft royal decree, Explanatory Memorandum, p. 43).

14 New Articles 17 and 46 of the Law on the NBB (Articles 188 and 195 of the draft royal decree), Explanatory Memorandum, p. 8. The Sanctions Committee is composed of six members, of which four are judges, appointed by the King who can only be dismissed if they no longer fulfil the conditions for their appointment or in case of serious misconduct. In addition to the conflicts of interests rules applicable to the members of the other NBB organs under Article 25 of the Law on the NBB, the members of the Sanctions Committee will be subject to their own regime of conflicts of interests (e.g. three years before their appointment, they cannot have been members of the NBB's Board of Directors or members of the NBB or CSRSFI's staff, new Article 46 §4 of the Law on the NBB). The Committee is further required to establish its own ethics regime (new Article 46§8 of the Law on the NBB).

15 This also covers the staff providing the related legal, administrative and IT support (Article 336 of the draft royal decree). The ECB understands that the Preparatory Committee agreed on the number of persons to be transferred in accordance with this allocation principle, taking into account the need to ensure continuity in supervision and in the functioning of the two authorities and also identified the individuals concerned (Explanatory Memorandum, p. 5).

16 Article 337 of the draft royal decree, Explanatory Memorandum, pp. 9 and 69. They will be subject to the incompatibilities regime in Articles 25 and 26 of the Law on the NBB and will be assimilated to NBB Board Members for the purpose of the monitoring of the NBB's Code of Deontology, but will not be subject to the other provisions of the Law on the NBB applicable to NBB Board Members.

17 Article 335, second subparagraph, of the royal decree. Explanatory Memorandum, p. 67.

1.5.4 Fourth, the exercise of the prudential tasks transferred to the NBB will be financed by way of a contribution charged by the NBB to the institutions it supervises[18], i.e. in accordance with a similar system as the one currently applied to finance the BFIC's supervisory tasks[19]. To this end, the NBB's operational costs will be duly and separately identified in its books, which will be monitored by the NBB's audit committee. The NBB's external auditor shall audit the calculation method and the total amount of these costs.

2. General observations

2.1 The ECB notes that the draft royal decree implements the Belgian supervisory reform outlined in the Law of 2 July 2010, so that all comments and recommendations made in ECB Opinion CON/2010/7 apply equally in this case. However, the ECB notes that the exercise of the prudential supervisory tasks will be fully integrated into the NBB, without the creation of a distinct legal entity[20].

2.2 Cooperation between the NBB and the future FSMA in the exercise of their respective tasks should not impinge upon the NBB's independent execution of tasks within the framework of the European System of Central Banks (ESCB)[21]. This general principle should be given due consideration, in particular, when drafting the Memorandum of Understanding to be concluded between the NBB and the future FSMA pursuant to the draft royal decree[22].

3. Specific observations

Central bank independence and the monetary financing prohibition

3.1 As regards the financing of the prudential supervisory tasks transferred to the NBB[23], the ECB refers to the principle of financial independence under which a national central bank (NCB) must have sufficient means not only to perform its ESCB-related tasks, but also its own national tasks[24]. The tasks transferred to the NBB should not affect its ability to carry out its ESCB-related tasks from an operational and financial point of view. The ECB understands that, to this end, the draft royal decree provides that the exercise of the prudential supervisory tasks transferred to the NBB

18 New Article 12bis, § 4 of the Law on the NBB (Article 187 of the draft royal decree).

19 Pending the adoption of a Royal Decree on the financing of the NBB's prudential supervisory tasks under the new Article 12bis, § 4 of the Law on the NBB, it is the Royal Decree of 22 May 2005 on the financing of the operating costs of the BFIC that will, provisionally, apply to calculate the supervised institutions' contributions (Article 343 §1 of the draft royal decree). For 2011, the year of the transfer of tasks, the NBB will request the contributions as calculated by the BFIC under the Royal Decree of 22 May 2005. These are to be considered as an advance payment against the final amount due to the NBB for that year under the future Royal Decree on the financing of the NBB's prudential supervisory tasks (Article 343 §3 of the draft royal decree).

20 The possibility of having these prudential supervisory tasks exercised by a separate legal entity triggered certain concerns expressed in previous Opinion CON/2010/7.

21 Opinion CON/2003/19.

22 This Memorandum must cover all instances where the authorities' respective consultation or information is provided for by law or where they need to adopt a concerted action to ensure the uniform application of the law (Articles 36, 125 and 176 of the draft royal decree).

23 In accordance with a Royal Decree to be adopted by the King under new Article 12bis, § 4 of the Law on the NBB.

24 See the ECB's Convergence Report, May 2010, p. 21, and notably Opinion CON/2009/93, paragraph 3.1.5.

will be financed by way of a contribution that the NBB will be authorised to charge to the supervised institutions[25]. The ECB also notes that in the context of the work by the preparatory committee, the NBB was able to assess the additional financial and human resources that would be made available in the context of the transfer, including the conditions of employment of the transferred staff, as well as the costs related to the transfer. The ECB welcomes the provisions of the draft royal decree concerning the financing of the new NBB tasks, subject to the safeguards detailed in the following paragraphs.

3.2 Provisions under which an NCB becomes the legal successor to any liabilities of a distinct supervisory authority may raise issues of financial independence and compliance with the prohibition of monetary financing laid down in Article 123(1) of the Treaty[26], read in conjunction with Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty[27]. In this respect, the ECB understands that the assignment to the NBB of the BFIC's tasks and powers is accompanied by measures that insulate the NBB from financial obligations resulting from any BFIC activities from the period before the transfer of tasks[28]. The ECB understands that such financial obligations would include, for example, any pending or future legal proceedings from the period before the transfer of tasks to the NBB or any financial obligations deriving from employment relations that any new NBB staff member may have had with the BFIC[29].

3.3 The principle of financial independence requires that the new tasks transferred to the NBB are adequately financed by contributions from supervised institutions and that their exercise will not result in any loss for the NBB. The ECB understands that the concrete terms for financing the NBB's prudential supervisory tasks beyond the year 2011 will be laid down in a Royal decree that is still to be adopted[30]. This separate legislation should be the subject of a separate consultation based on Articles 127(4) and 282(5) of the Treaty.

3.4 Legal certainty would be enhanced if the draft royal decree would expressly provide that the transfer to the NBB of liabilities arising from the BFIC's[31] previous activities is accompanied by a concomitant transfer of assets, including the corresponding provisions and reserves which were at the BFIC's disposal for the performance of its tasks are transferred to the NBB.

3.5 Concerning the BFIC staff transferred to the NBB, the ECB stresses that from the perspective of central bank independence, the NBB should be free to retain the necessary personnel resources, in terms of quantity and quality, to carry out all its tasks and that it should also have control over its

25 Explanatory memorandum, p. 43.

26 Opinion CON/2010/33, paragraph 3.2.3.

27 OJ L 332, 31.12.1993, p. 1.

28 ECB's Convergence Report, May 2008, pp. 23 and 24; see Opinion CON/2005/24, paragraph 12, and Opinion CON/2005/39, paragraph 9.

29 Opinion CON/2010/33, paragraphs 3.2.3 and 3.2.4.

30 New Article 12bis, § 4 of the Law on the NBB (Article 187 of the draft royal decree) and Article 343 §1 of the draft royal decree, see also footnote 19.

31 Article 335 of the draft royal decree.

entire staff[32]. An express provision clarifying this aspect in the draft royal decree would be welcome.

Coexistence of the NBB's oversight competence with the FSMA's supervisory powers

3.6 Under the fourth indent of Article 127(2) of the Treaty and the fourth indent of Article 3.1 and Article 22 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'), in conjunction with the derogations provided for under Article 139 of the Treaty and 42.1 of the Statute of the ESCB, one of the basic tasks to be carried out through the ESCB is the promotion of the smooth operation of payment systems. In this respect, the ECB and the NCBs of the Member States whose currency is the euro may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Union and with other countries. The Eurosystem's oversight competence over payment, clearing and settlement systems derives from these provisions[33]. The oversight competence is also inherent to the ESCB's task of contributing to the stability of the financial system under Article 127(5) of the Treaty, as mirrored in Article 3.3 of the Statute of the ESCB. Moreover, the implementation of monetary policy in the euro area under the first indent of Article 127(2) of the Treaty, as mirrored in the first indent of Article 3.1 of the Statute of the ESCB, depends on the existence of reliable and effective market systems and infrastructures. The promotion of the smooth operation of payment, clearing and settlement infrastructures is, therefore, a basic task of the Eurosystem[34]. Moreover, the NBB has traditionally exercised broad oversight powers over settlement systems based on its national legal framework[35].

3.7 The ECB welcomes the fact that the draft royal decree provides that the supervision by the future FSMA shall not prejudice the exercise by the NBB of the powers it currently has[36]. This is particularly important for the tasks that the NBB has to execute pursuant to the Treaty and the Statute of the ESCB. In this respect, the ECB notes that cooperation between the NBB and the future FSMA in the exercise of their respective tasks should not impinge upon the NBB's independent execution of tasks executed within the framework of the ESCB, and notably its oversight tasks[37].

3.8 However, in view of the above context, the draft royal decree should be further elaborated to ensure that it adequately reflects the NBB's oversight competence over infrastructures, as laid down in the Treaty, the Statute of the ESCB and national legal acts. It must be ensured in the draft royal decree

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32 See Article 29(2) of the NBB's Articles of Association.

33 In addition, the oversight activities of some NCBs of Member States whose currency is the euro are carried out on the basis of national laws and regulations, which complement and, in some cases, repeat the Eurosystem's competence. The oversight competence of NCBs of the Member States whose currency is not the euro is laid down in national laws and regulations.

34 See also 'Eurosystem Oversight Policy Framework', 20 February 2009, published on the ECB's website at www.ecb.europa.eu.

35 Article 8 of the Law on the NBB and Article 23 §3 of the Law of 2 August 2002.

36 New Article 33 of the Law of 2 August 2002 (Article 212 of the draft royal decree), referring notably to Article 8 of the Law on the NBB regarding oversight.

37 Opinion CON/2003/19, see also paragraph 2.2 of this Opinion.

that the powers of the future FSMA are complemented and balanced by the adequate involvement of the NBB which oversees payment, clearing and settlement systems. Such an amendment of the draft royal decree would avoid the risk of duplication of work undertaken by the future FSMA from a supervisory perspective and by the NBB from an oversight perspective. It would also be more efficient for market infrastructures. For these reasons, the ECB considers that the respective roles of the future FSMA and the NBB should be explicitly reflected and specifically described in the draft royal decree to address these considerations.

Divergence between FSMA and NBB with regard to the adoption of individual measures against financial institutions

3.9 Under the draft royal decree, the future FSMA will be empowered, as part of its task to supervise compliance with the rules of conduct, to take measures against certain individual financial institutions that are subject to the NBB's prudential supervision[38]. Where such financial institution seriously breaches the rules of conduct, the future FSMA will inform the NBB of the alleged breach and may under specific conditions take the following measures against this institution: (i) prohibiting or suspending (in whole or in part) the activities of the institution concerned; or (ii) ordering the replacement of its management[39]. Where such breaches are systematic, this includes the power to request the NBB to revoke the licence of such financial institution[40]. In this context, the ECB understands that two main scenarios should be distinguished:

(a) Where the future FSMA requests the NBB to revoke a license, the NBB may only refuse if the withdrawal is likely to compromise the stability of the financial system. The NBB must issue a reasoned decision, which the future FSMA may challenge before the Ministry of Finance. Under such circumstance, the Ministry of Finance will render a final decision on the issue.

(b) Where the future FSMA measures do not concern the revocation of a financial institution's license, these will be notified to the NBB. The NBB may oppose such measures only where they would compromise financial stability or where they would result in the suspension or termination of a financial institution's activity as a whole[41]. If the future FSMA and the NBB disagree, an arbitration panel composed of three members appointed by the NBB and the FSMA (not belonging to their staff or decision-making bodies)[42], decides on whether the

38 i.e. credit institutions, stock broking firms or insurance companies (see new Article 36bis §1 and §2 of the Law of 2 August 2002, Article 215 of the draft royal decree).

39 New Article 36bis §2, 1° and 2°, of the Law of 2 August 2002. Explanatory Memorandum, pp. 38 and 57.

40 New Article 36bis §2, 3°, of the Law of 2 August 2002.

41 New Article 36bis §3, second and third subparagraphs, of the Law of 2 August 2002. The NBB's decision to oppose the envisaged measures must provide the reasons on which it is based. Explanatory Memorandum, p. 14 and 23.

42 One member of the arbitration panel is appointed by the NBB, another by the future FSMA and these two members choose a third member (new Article 36bis § 4 of the Law of 2 August 2002).

measures affect financial stability[43]. This decision is binding and it is not subject to recourse[44].

The ECB would welcome clarification in the draft royal decree of the allocation of statutory responsibilities conferred, on the one hand, to the future FSMA and, on the other hand, to the NBB as the authority responsible for the prudential supervision of financial institutions and as the central bank contributing to the stability of the financial system. Concerning the measures addressed in point (b), instead of resorting to an arbitration panel, the draft royal decree could provide the NBB with a right to veto the future FSMA's proposed measures for reasons of financial stability. Another possibility would be to provide the NBB with the right to issue a non-binding opinion, which is submitted to the future FSMA. After having considered the NBB's opinion, if the future FSMA decides to maintain its decision to adopt the proposed measures, it must adopt a reasoned opinion explaining the reasons for such decision despite the NBB's opinion in relation to the potential impact of the measures on the stability of the financial system. *Exchange of information*

3.10 The draft royal decree also provides that the NBB and the future FSMA may exchange information in so far as this information is necessary for the accomplishment of their respective tasks. Such transmission needs to be accompanied by appropriate protection measures to safeguard the confidentiality of the information. In line with this, the ECB understands that the draft royal decree allows for confidential data to be communicated to the ECB, not only in its capacity as a monetary authority but also for the performance of the ESCB tasks outlined in Article 127 of the Treaty[45]. Access to prudential information and cooperation with financial supervisory authorities is essential for macro-prudential monitoring which, in turn, is indispensable for the smooth conduct of monetary policy and helpful in reducing the reporting burden imposed on institutions. The recent financial crisis has shown that from a financial stability perspective, the ECB needs to be involved in the event of any financial market crisis and in that context, the availability of relevant information and the ability to interpret it are crucial.

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

Done at Frankfurt am Main, 28 January 2011.

[signed]

The President of the ECB

Jean-Claude TRICHET

43 New Article 36bis § 3, fourth subparagraph, of the Law of 2 August 2002. The measures can also be taken by the future FSMA if the NBB, despite its assessment that the measures could compromise financial stability, decides not to engage the arbitration procedure.

44 New Article 36bis §4, ninth subparagraph, of the Law of 2 August 2002

45 New Article 52 § 1, 1° and 2°, of the Law on the NBB (Article 195 of the draft royal decree).