EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 3 August 2006

at the request of the Belgian Ministry of Finance
on a draft law amending the Organic Statute of the Nationale Bank van België/
Banque Nationale de Belgique

(CON/2006/40)

Introduction and legal basis

On 8 May 2006 the European Central Bank (ECB) received a request from the Belgian Ministry of Finance for an opinion on a draft law amending Article 7 of the Law of 22 February 1998 establishing the Organic Statute of the Nationale Bank van België/Banque Nationale de Belgique (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and on the 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 law concerns the conditions under which claims (*schuldvorderingen*/*créances*) can be pledged to the Nationale Bank van België/Banque Nationale de Belgique (NBB) as collateral for the NBB's credit operations. 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

The purpose of the draft law is to introduce in Belgian law a specific technique for pledging claims to the NBB, thereby strengthening the protection of the NBB's rights as a pledgee without this protection being dependent on ex ante notification of the pledge to the debtor. This protection should be viewed in the light of the requirement under primary Community law that Eurosystem credit operations are based on adequate collateral (Article 18.1 of the Statute of the European System of Central Banks and of the European Central Bank). As a result, the ECB has to ensure that appropriate legal rules and/or other measures exist. The ECB understands that the draft law will, in this respect only, replace the general Belgian regime applicable to pledges (see paragraph 2.2 below). The technique introduced by the draft law consists of entering the pledge in a register held by either the NBB or a third party authorised by the

1 OJ L 189, 3.7.1998, p. 42.

NBB (hereinafter the 'register'). This entry results, amongst other things, in the pledge being effective against third parties (erga omnes tegenwerpelijk/opposable *erga omnes*) except the debtor of the pledged claim, to whom the pledge is generally not notified ex ante (see paragraph 3.3 below). The register may only be consulted by third parties who are considering accepting *in rem* rights (including *in rem* security rights) over claims which are eligible to be pledged to the NBB. Only third parties who are entitled to consult the register are deemed by law to be acting in bad faith if they seek to exercise their right to a claim that has already been pledged to the NBB and entered in the register. The ECB understands that other third parties are only deemed to be acting in bad faith if they have actual knowledge of the pledge (e.g. the pledgor).

2. General observations

2.1 The pledging technique in the draft law enables the NBB to avoid certain legal risks relating to issues of priority that might arise under the general Belgian regime applicable to pledges (see paragraph 2.2 below). The ECB therefore welcomes the draft law. The draft law will become particularly relevant when the NBB accepts credit claims meeting the Eurosystem eligibility criteria as collateral following the introduction of a single list of eligible collateral for the Eurosystem's credit operations, which will include credit claims (see also the explanatory memorandum accompanying the draft law, p. 1) from 1 January 2007[2].

2.2 The present opinion is restricted to the draft law and does not cover claims collateralisation rules under the laws of other Member States that have adopted the euro (hereinafter 'participating Member States'). The ECB nonetheless understands that Belgium is one of the participating Member States in which claims can be validly collateralised (e.g. through a pledge) without such validity being dependent on ex ante notification to, or recognition by, the debtor. Under the general Belgian regime applicable to pledges, the mere conclusion of the pledge agreement renders this pledge effective against all third parties, except against the debtor of the pledged claim (against whom the pledge is only effective if the pledge has been either notified to the debtor or the latter has recognised it). As a consequence, any debtor which has not been notified and which has not recognised the pledge can validly continue to pay the original creditor, provided that the debtor is acting in good faith (i.e. without having actual knowledge of the pledge through other means). Such notification or recognition is also relevant in determining the priority of claims in the event that two or more parties, acting in good faith, seek to exercise conflicting rights to the pledged claim (e.g. because the claim has been re-pledged or because ownership of the claim has been transferred), as the party which first notified the pledge to the debtor or to whom the debtor first recognised the pledge will have priority. This notification or recognition also determines whether the debtor, acting in good faith, is entitled to diminish or extinguish its debt through set-off or

2 See the document entitled 'Decisions taken by the Governing Council of the ECB (in addition to decisions setting interest rates)' for July 2005 and the related ECB press release of 22 July 2005 entitled 'Eurosystem collateral framework: Inclusion of non-marketable assets in the Single List', available on the ECB's website at www.ecb.int.

another similar mechanism. Thus, while debtor notification might, in participating Member States such as Belgium, not be a statutory requirement for the validity of collateralisation of a claim, such notification may nonetheless be relevant for the value and effectiveness of the rights of the party that the collateral is intended to protect (in the present case the NBB).

2.3 In view of the diversity of national law regarding debtor notification, the consequences of an absence of such notification and the methods to address these consequences[3], the ECB does not require such notification in participating Member States where ex ante notification is not required for collateralisation of a claim to be valid. The pledging technique in the draft law guarantees the priority of the NBB's rights in relation to a pledge that has been registered over *in rem* (security) rights that third parties subsequently establish on this pledged claim, since the pledging technique in the draft law deems such third parties by law to be acting in bad faith. However, given that the right to consult this register is restricted to third parties who intend to accept 'an *in rem* (security) right' on a claim that is eligible to be pledged to the NBB, the ECB understands that, for instance, the substitution of the debtor (*delegatie*/*délégation*) does not fall within this category. Consequently, as this technique and other similar techniques may still affect the rights of the NBB, it might be necessary to address this issue through other rules (e.g. contractual arrangements) or techniques. Also, it is not clear whether under the pledging technique in the draft law, a third party which had acquired an *in rem* right to a claim which was subsequently pledged to the NBB and entered in the register would have priority in the event that the third party's right was notified to, or recognised by, the debtor after the NBB's pledge was entered in the register. The ECB questions whether, in this specific case, making priority of the third party's right dependent on its notification to, or recognition by, the debtor before the entry of the NBB's pledge in the register might not provide more legal certainty than a 'declaration of honour' by the credit institution (pledgor) to the NBB of the absence of such a right. The ECB understands that there is a similar rule under the general Belgian regime applicable to pledges. Finally, the ECB notes that the benefit of the draft law is currently limited to claims pledged to the NBB and therefore does not apply to claims pledged under the pledging technique in the draft law to another Eurosystem central bank. Such an extension could, for instance, be relevant for the cross-border collateralisation of claims in the framework of Eurosystem credit operations if the NBB acts as correspondent agent for another Eurosystem central bank. In any event, the ECB understands that, even if the benefit of the draft law remains only applicable to claims pledged to the NBB, the general Belgian regime applicable to pledges, i.e. with ex ante notification not being a precondition for the pledge's validity (see paragraph 2.2 above), will still allow such cross-border collateralisation.

2.4 While debtor notification might not be required for collateralisation of a claim to be valid under the general Belgian regime applicable to pledges (see paragraph 2.2 above), it might still affect the

3 See also the abovementioned document entitled 'Decisions taken by the Governing Council of the ECB (in addition to decisions setting interest rates)' for July 2005 and related ECB press release of 22 July 2005, the latter under the subheading 'Additional legal requirements'.

value and effectiveness of the pledgee's rights. Indeed, the question of whether or not the debtor can validly pay its creditor (the pledgor) or a third party (e.g. in the event of a subsequent pledge of the same claim) or validly diminish or even extinguish its debt through set-off depends on whether and when the pledge has been notified to, or recognised by, the debtor. The pledging technique in the draft law does not entirely eliminate the possibility of such payment and set-off, as Article 6 of the draft law only contains a prohibition on set-off by the debtor and an obligation for the debtor to pay the claim to the NBB in the event of the insolvency of the credit institution that pledged the claim to the NBB (see also paragraph 3.4 below). The NBB would be fully legally protected if the pledge would, by the mere fact of registration, also be effective against the debtor. In the absence of such a provision, the effects of the debtor's payment and set-off possibility may be similar to in other participating Member States where debtor notification is not required for the collateralisation of a claim to be valid.

3. Specific observations

3.1 Article 6 of the draft law lists certain specific consequences of the pledge in the event that the credit institution that pledged the claim to the NBB becomes insolvent. Since the Eurosystem's and the NBB's credit operations also include intraday credit operations and as the counterparties who are eligible to conduct such operations are not restricted to credit institutions, the scope of Article 6, which only covers credit institutions, might be too narrow. Even though the ECB understands that, in practice, the NBB only envisages receiving credit claims as collateral from counterparties that are credit institutions, it might be more appropriate to instead refer to any counterparty that is eligible for central bank credit operations and thus eligible to pledge a claim to the NBB.

3.2 One specific consequence of the credit institution's possible insolvency is that, if the NBB notifies the pledge to the debtor, the debtor can thereafter only validly make payment to the NBB. Although this is not explicitly stated in the draft law, which is a *lex specialis* compared to the general Belgian regime applicable to pledges, the ECB understands the draft law leaves the NBB the possibility of notifying the pledge to the debtor outside the specific situation of the credit institution's insolvency, if the NBB wishes to have recourse to such notification for whatever reason. Such notification will then result in the debtor being deemed to be acting in bad faith because of its actual knowledge of the pledge and, hence, will ensure that only a payment to the NBB validly releases the debtor from its obligation to pay. Furthermore, irrespective of whether or not the credit institution is insolvent, the NBB will not have any repayment claim against the payee if the payee is not an entity that is entitled to consult the register (as only such entities can be deemed to be acting in bad faith; see paragraph 1 above) or an entity that has actual knowledge of the pledge, the latter possibility being less likely in practice.

3.3 The ECB also understands that the prohibition in Article 6 of the draft law on set-off in the event of insolvency of the credit institution (i.e. the NBB's pledgor) does not prevent a valid reduction or even extinction of the claim through set-off, if the conditions for such set-off have been fulfilled before the credit institution's insolvency (see paragraph 2.4 above).

3.4 Finally, the ECB welcomes the fact that Article 6 of the draft law applies the simplified enforcement procedure laid down in Belgian law[4] in relation to *in rem* collateral arrangements and loans for financial instruments, with regard to claims pledged to the NBB[5]. The ECB notes that the application of this procedure is normally not limited to insolvency proceedings, but encompasses, for instance, attachments. In view of the benefits of such a wide scope of application in the event of enforcement of the NBB's pledge under the draft law, the ECB suggests including this simplified enforcement procedure in a separate provision of the draft law instead of in Article 6, as this Article seems to limit the procedure to insolvency situations.

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

Done at Frankfurt am Main, 3 August 2006.

[signed]

The President of the ECB

Jean-Claude TRICHET

4 Article 8 of the Law of 15 December 2004 on financial collateral and various tax provisions in relation to *in rem* collateral arrangements and loans for financial instruments.

5 See also paragraph 8 of ECB Opinion CON/2005/43 of 3 November 2005 at the request of the Belgian Ministry of Finance on a draft law abolishing bearer securities and a draft royal decree concerning dematerialised corporate securities.