EN

EUROPEAN CENTRAL BANK

EUROSYSTEM

**OPINION OF THE EUROPEAN CENTRAL BANK**

**of 17 October 2008**

**at the request of the Belgian Ministry of Finance**

**on a draft royal decree adopted under Article 117*bis* of the Law of 2 August 2002 on the supervision of the financial sector and on financial services**

**(CON/2008/50)**

## Introduction and legal basis

On 14 October 2008 the European Central Bank (ECB) received a request from the Nationale Bank van België/Banque Nationale de Belgique (NBB), acting on behalf of the Belgian Ministry of Finance, for an opinion on a draft royal decree adopted under Article 117*bis* of the Law of 2 August 2002 on the supervision of the financial sector and on financial services (hereinafter the 'draft royal decree'). Considering that the draft royal decree is indispensable to preserving the stability of the Belgian financial system and that any delay in its adoption or publication would be detrimental to its effectiveness and its objective of strengthening the market's confidence in the measures announced, the consulting authority has requested the ECB to provide its opinion as a matter of extreme urgency.

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and on 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], as the draft royal decree 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 royal decree

1.1 The draft royal decree is motivated by the current financial market crisis and by the Belgian authorities' wish to preserve the stability of the Belgian financial system[2]. The legal basis for the draft royal decree is to be found in Article 117*bis* of the Law of 2 August 2002 on the supervision of the financial sector and on financial services[3].

1 OJ L 189, 3.7.1998, p. 42.

2 See the first recital of the draft royal decree.

3 See also paragraph 2.1.

1.2 The draft royal decree would empower the Belgian Minister of Finance to grant a State guarantee[4] to cover liabilities entered into by credit institutions and/or financial holding companies (*financiële holding/compagnies financières*) (hereinafter the 'beneficiaries') incorporated under Belgian law vis-à-vis other credit institutions (and/or professional counterparts belonging to the categories identified by the Minister of Finance[5]) between 9 October 2008 and 31 October 2009, provided that such liabilities mature at the latest on 31 October 2011[6].

The decision to grant a State guarantee would be subject to the conditions that: (i) the beneficiary takes measures aimed at supporting its financial situation, its solvency and its liquidity (or commits itself to taking such measures); and (ii) the granting of the guarantee is justified in the interests of the Belgian economy and by the protection of all depositors[7]. The Minister of Finance would be empowered to lay down further modalities and conditions for a State guarantee, including setting its ceiling, specifying the remuneration to be paid for the granting of the guarantee, and any other modality aimed at ensuring compliance with the two abovementioned conditions[8]. Moreover, beneficiaries would only be entitled to invoke a State guarantee granted to them if they prove: (i) that it is not possible for them to meet the liabilities covered by the State guarantee at their maturity; and (ii) that the enforcement of the State guarantee is necessary to ensure their continuity[9]. The Minister of Finance would be entitled to terminate a State guarantee at any time, without prior notice or compensation, if the conditions for granting the guarantee were no longer met[10]. The draft royal decree would enter into force retroactively, on 9 October 2008[11].

## 2. General observations

2.1 As mentioned above, the legal basis for the draft royal decree is to be found in Article 117*bis* of the Law of 2 August 2002 on the supervision of the financial sector and on financial services. The ECB was recently consulted on an early version of Article 117*bis* and stressed in its Opinion CON/2008/46 that this broad provision needed 'to be further clarified with a view to enhancing legal certainty and to ensuring its compatibility with Community law'[12]. The final version of Article 117*bis*, as the ECB understands has been adopted by the Belgian Parliament on 15 October 2008, provides that the King may, after consulting the Financial Stability Committee[13], in the event of a sudden crisis on the financial markets or a serious threat of systemic crisis, and in order to limit the

4 See Article 1 of the draft royal decree.

5 It is noted that the term 'professional counterparts' is not defined in the draft royal decree.

6 See Article 2 of the draft royal decree.

7 See Article 3 of the draft royal decree.

8 See Article 4, first paragraph, of the draft royal decree.

9 See Article 4, second paragraph, of the draft royal decree.

10 See Article 4, third paragraph, of the draft royal decree.

11 See Article 5 of the draft royal decree.

12 Opinion CON/2008/46 of 8 October 2008 at the request of the Belgian Ministry of Finance on a preliminary draft law on measures promoting financial stability and in particular establishing a State guarantee for the provision of credit in the context of financial stability, see in particular paragraph 5. All ECB opinions are available on the ECB website at www.ecb.europa.eu/ecb/legal/opinions/html/index.en.html

13 The Financial Stability Committee comprises the members of the Management Committee of the Commissie voor het Bank-, Financie- en Assurantiewezen/Commission Bancaire, Financière et des Assurances and of the Board of Directors of the NBB, and is chaired by the Governor of the NBB (Article 117(3) of the Law of 2 August 2002).

scale or effects thereof: (i) adopt regulations which may complement or derogate from certain supervisory laws in the financial sector[14]; and (ii) establish, by decree deliberated within the Council of Ministers, a system to grant a State guarantee for liabilities entered into by the supervised institutions as further identified by such a decree[15]. The ECB welcomes the amendment made to Article 117*bis* since it clarifies the scope of the powers given to the King with regard to complementary or derogatory measures in the case of financial crisis. In this respect, the ECB notes that the reference to the possibility for the King to take 'any measure' to preserve the stability of the financial system has been deleted. Without prejudice to the comments made below on the substance of the draft royal decree, the ECB welcomes the introduction of an explicit legal basis in the law for the granting of a State guarantee.

2.2 The ECB notes that there is an ongoing discussion at both the international and European levels with a view to coordinating the many diverse actions of countries aimed at preserving confidence and stability in the international financial markets. The following common principles to guide the actions of Member States were agreed at the Ecofin meeting on 7 October 2008: (i) interventions should be timely and the support should in principle be temporary; (ii) the interests of taxpayers should be protected; (iii) existing shareholders should bear the due consequences of the intervention; (iv) the government should be in a position to bring about a change of management; (v) management should not retain undue benefits; (vi) governments may have, inter alia, the power to intervene with regard to remuneration; (vii) legitimate interest of competitors must be protected, in particular through the State aid rules; and (viii) negative spill-over effects should be avoided[16]. Moreover, the ECB notes that on 12 October 2008 the Heads of State of the euro area issued a 'Declaration on a concerted European action plan of the euro area countries'[17], in which they confirmed their commitment to act together in a decisive and comprehensive manner to restore confidence in and proper functioning of the financial system, with the aim of restoring appropriate and efficient financing conditions for the economy. They agreed on common principles to be followed by governments, central banks and supervisors in the euro area and the EU to avoid national measures which could adversely affect the functioning of the single market and the other Member States. This coordinated approach includes initiatives aimed at: ensuring appropriate liquidity; facilitating the funding of banks through various means; providing additional capital resources to financial institutions; and recapitalisation of distressed banks. Against this background, the ECB highlights that all of the initiatives put in place by national governments to restore confidence in financial markets should be aimed at implementing such common principles, in the spirit of close cooperation with other Member States and EU institutions.

14 New Article 117*bis* (1) of the Law of 2 August 2002.

15 New Article 117*bis* (2) of the Law of 2 August 2002.

16 See the press release of the 2894th Council meeting (13784/08), available on the Council website at www.consilium.europa.eu.

17 See the declaration of 12 October 2008, available on the French Presidency's website at www.ue2008.fr.

2.3 On a general note, the ECB would like to underline that the draft royal decree defines in very broad terms: (i) the possible beneficiaries of a State guarantee[18]; (ii) the type of liabilities that can be covered[19]; as well as (iii) the modalities and conditions which can be imposed on the beneficiaries by the Minister of Finance[20]. The draft royal decree therefore leaves a wide margin of discretion to the Minister of Finance in his decision whether to grant a State guarantee and in specifying further the modalities and conditions for granting the guarantee. In this respect, the ECB recommends that the draft royal decree (in its recitals) or the report to the King relating to it should refer to the abovementioned Declaration and specify that the draft royal decree, as well as any implementing measure and/or decision, are adopted in the context and should be read in the light of the said Declaration.

2.4 The ECB underlines that the recommendations made in this opinion in relation to the draft royal decree should be read together with the recommendations previously made by the ECB in its Opinion CON/2008/46[21]. In this respect, the ECB recalls more specifically the importance it attaches to coordinated responses from national authorities and to the compliance of the draft royal decree, as well as any implementing measure and/or decision, with Community law, including State aid rules[22]. The ECB also wishes to draw the consulting authority's attention to the recent ECB opinions issued at the request of other Member States, in which the ECB has commented on legislative proposals sharing some of the features of the draft royal decree[23]. It is the ECB's intention to facilitate coordination of the various national efforts addressing the current financial situation, inter alia through timely adoption and publication of ECB opinions on such national legislative proposals.

## 3. Specific comments

3.1 *Selection of the beneficiary institutions*

The ECB reiterates the stance taken in its Opinion CON/2008/44, according to which arrangements which may be seen as providing preferential treatment to specified credit institutions should be avoided[24]. In the present case, the Minister of Finance may decide to guarantee the liabilities of any credit institution or financial holding company incorporated under Belgian law provided that it complies with the conditions outlined in the draft royal decree[25]. The ECB would recommend clarifying in the draft royal decree or in the report to the King that the State guarantee will be

18 I.e. credit institutions and/or financial holding companies incorporated under Belgian law which have taken, or have committed themselves to taking, all measures which are useful in order to support their financial situation, their solvability and their liquidity (see Articles 2 and 3 of the draft royal decree).

19 I.e. liabilities entered into vis-à-vis other credit institutions and/or professional counterparts belonging to the categories identified by the Minister of Finance, provided that they have been entered into between 9 October 2008 and 31 October 2009 and mature at the latest on 31 October 2011; see Article 2 of the draft royal decree.

20 On these modalities, see paragraph 1.2, concerning Article 4 of the draft royal decree.

21 Opinion CON/2008/46.

22 Opinion CON/2008/46, in particular paragraphs 2 and 5.

23 See Opinion CON/2008/48 of 15 October 2008 at the request of the Irish Minister for Finance on a draft Credit Institutions (Financial Support) Scheme 2008.

24 See Opinion CON/2008/44, paragraph 2.3.

25 For these conditions, see paragraph 1.2.

granted to these entities in accordance with the requirements of EC competition law and State aid rules. In this context, it should be ensured that the beneficiary institution(s) will not be unfairly advantaged by making undue use of their guaranteed status[26].

3.2 *Types of liabilities covered by the guarantee*

The ECB understands that the draft royal decree does not define what is encompassed by 'liabilities' (*verbintenissen/engagements*) eligible to be covered by a State guarantee. In this respect, the Belgian authorities publicly announced before the present consultation that such liabilities would encompass all of the financing raised by a beneficiary institution in order to obtain refinancing from credit institutions and institutional counterparties and would cover instruments such as bonds and debt securities issued by the beneficiary to institutional investors, as well as interbank deposits, fiduciary deposits, deposits of central banks, deposits of institutions, commercial paper, certificates of deposits and medium-term notes, provided that they were contracted or renewed by the beneficiary institution between 9 October 2008 and 31 October 2009 and that they mature before 31 October 2011[27].

The ECB also notes that, in line with the abovementioned Declaration, Member States have to act in coordinated manner to avoid significant differences in national implementation which could have a counter-productive effect, creating distortions in global banking markets. The euro area Heads of State also acknowledged the need to work in cooperation with the ECB so as to ensure consistency with the management of liquidity by the Eurosystem and compatibility with the operational framework of the Eurosystem. Against this background, the ECB notes that uncoordinated decisions among Member States should be avoided as they may involve a fragmentation of the euro area money market. In this context, the ECB would make a number of observations. First, it is the ECB's view that the extension of the State guarantee to cover interbank deposits should be avoided. This could entail a substantial distortion in the various national segments of the euro area money market by potentially increasing short-term debt issuance activity across Member States and therefore impairing the implementation of the single monetary policy, which is an exclusive competence of the Eurosystem under Article 105(2) of the Treaty[28]. Second, it appears crucial to ensure the harmonisation of the price determination of such a guarantee within the euro area and the EU where a level playing field is of essence. The ECB should be involved in such concertation and coordination, and would welcome this being explicitly foreseen in any subsequent legislation.

3.3 *Involvement of supervisory authorities*

The ECB notes that the Minister of Finance's decision to grant the State guarantee is, inter alia, subject to the condition that the beneficiary has taken (or has committed itself to taking) all measures which are useful in order to support its financial situation, its solvency and its liquidity[29].

26 See for example Opinion CON/2008/48, paragraph 3.4.

27 See the press release of 10 October 2008 issued by the Secretariat of the Belgian Deputy Prime Minister and Minister of Finance.

28 See also Opinion CON/2008/48, in particular paragraph 3.7.

29 See Article 3 of the draft royal decree.

In this respect, the ECB notes that proper coordination with the supervisory authority will have to be ensured.

3.4 *Relationship with the preservation of the stability of the financial system*

As mentioned above, the draft royal decree is in particular motivated by the Belgian authorities' wish to preserve the stability of the Belgian financial system[30]. However, under the draft royal decree, the Minister of Finance's decision to grant a State guarantee is subject to the condition that the granting of the guarantee is justified 'in the interest of the Belgian economy and by the protection of all depositors'[31]. In addition, the ECB notes that, in its final version, Article 117*bis* of the Law of 2 August 2002 empowers the King to establish the State guarantee 'in the event of a sudden crisis on the financial markets or of a serious threat of systemic crisis, and in order to limit the scale or effects thereof'. Therefore, the ECB recommends that this apparent discrepancy is clarified in the draft royal decree.

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

Done at Frankfurt am Main, 17 October 2008.

[signed]

*The President of the ECB*

Jean-Claude TRICHET

30 See paragraph 1.1 and the reference to the first recital of the draft royal decree.

31 See Article 3 of the draft royal decree.