OPINION OF THE EUROPEAN CENTRAL BANK

of 26 November 2015

on the deposit guarantee scheme

(CON/2015/52)

Introduction and legal basis

On 9 October 2015 the European Central Bank (ECB) received a request from the Dutch Minister of Finance for an opinion on a draft legislative decree on the Dutch Deposit Guarantee Scheme (hereinafter the 'draft decree'), which transposes Directive 2014/49/EU of the European Parliament and of the Council on deposit guarantee schemes[1] into Dutch law.

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 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, as it relates to De Nederlandsche Bank (DNB) and 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 decree

1.1. The draft decree implements Directive 2014/49/EU and amends inter alia the Dutch Decree on special prudential measures, investor compensation and deposit guarantee (hereinafter the 'Decree'), which was adopted pursuant to the Dutch Law on financial supervision. The draft decree should be read in the light of the Law on financial supervision as currently in place and the proposed amendments to it under another draft law that implements Directive 2014/59/EU of the European Parliament and of the Council[2] (hereinafter the 'draft law on BRRD Implementation')[3].

1.2. The draft decree concerns the Dutch deposit guarantee scheme (DGS), which is presently operated by DNB. Based on the legislation currently in place, if a credit institution is no longer able to meet its obligations vis-à-vis depositors, the DGS is activated and the costs are apportioned among other participating credit institutions. Hence, the DGS is funded on an ex post basis by

1 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 12.6.2014, p. 149).

2 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 and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

3 The draft legislation is available on the website of the Dutch government at www.overheid.nl.

contributions from the participating credit institutions and DNB advances the amounts needed for its operation.

1.3. Under the draft decree ex post funding arrangements for the DGS are replaced with ex ante funding arrangements. It establishes a deposit guarantee fund (hereinafter the 'Fund') which is a legal entity under public law with its own board, which is the owner of the financial resources in the Fund and is responsible for the management of the Fund's resources. The Fund is financed through ex ante contributions imposed on participating credit institutions[4]. Reimbursements that are paid under the DGS are charged to the Fund[5]. The draft decree also provides for the possibility to call upon the participating credit institutions for extraordinary contributions if the pre-collected resources are insufficient. The Fund may enter into agreements with third parties to obtain financing from them if the extraordinary contributions are not available immediately[6].

1.4. The Law of financial supervision as currently in place, together with the draft law on BRRD implementation and the draft decree, assign certain tasks to DNB in the context of the operation of the DGS.

(i) The Law on financial supervision as currently in place provides that DNB decides when the DGS is invoked and is responsible for granting the reimbursements within the applicable payment deadline[7]. Moreover, insofar as depositors receive a reimbursement, DNB acquires the claims of these depositors and seeks recovery from the assets of the institution in relation to which the DGS has been activated[8].

(ii) The draft law on BRRD implementation adds two provisions to the Law on financial supervision regarding new tasks of DNB in the context of the operation of the Dutch DGS. These provisions require that DNB (a) supports the Fund in the exercise of its tasks; (b) provides the Fund with the financial means that are necessary for the exercise of its tasks[9]; and (c) decides on the appointment, suspension and discharge of the Fund's board members[10]. These provisions form the legal basis for the draft decree. The ECB notes that it has not been consulted on the draft law on BRRD implementation.

(iii) The draft decree provides for the following new tasks for DNB: (a) DNB determines the level of the ex ante contributions and of the extraordinary contributions of each participating credit institution and the period within which the ex ante contributions must be paid[11]; (b) DNB determines the currency in which the reimbursements are paid and, if reimbursements at the DGS's expense cannot be granted and made payable within seven days, it grants the deposit holder an appropriate amount, at the expense of the Fund, so that they are able to

4 See Article 29.12 and Annex B of the draft decree.
5 See Article 29.05 of the draft decree.
6 See Article 29.14 of the draft decree.
7 Article 3:260 and 3:261(3) of the Law on financial supervision.
8 See Article 3:261(4) and 3:265(1) of the Law on financial supervision.
9 See Article 3:259a(4) of the Law on financial supervision (not yet in force).
10 See Article 3:259a(3) of the Law on financial supervision (not yet in force).
11 See Article 29.12(2) and 29.14(3) of the draft decree.

meet their living expenses[12]; and (c) any revenues obtained by DNB as a result of the exercise of its right of recourse[13]are paid to the participating credit institutions or credited to the Fund[14], as applicable.

(iv) The draft decree restates the following tasks that DNB already performs on the basis of the Decree: (a) DNB grants the reimbursements to deposit holders[15]; (b) DNB gives notice of its decision to apply the DGS in the Dutch Government Gazette and in national newspapers of its own choosing and publishes its decision to grant a reimbursement to a deposit holder on a website which deposit holders can use to make arrangements for the payment of the reimbursement[16]; and (c) DNB requests administrators or receivers of the institution in relation to which the DGS has been activated to draw the attention of deposit holders to the applicability of the DGS[17].

2. General observations

2.1. The ECB supports the establishment of an ex ante funded DGS in the Netherlands, in line with the common framework for DGSs laid down in Directive 2014/49/EU. Harmonised arrangements and conditions for deposit protection are necessary to ensure a level playing field in the context of the Union's single market for financial services[18]. Ex ante funding of DGSs, supported by ex post funds collected if necessary, has the advantage of greater reliability and availability and considerably enhances financial stability, in particular because the reliance on ex ante contributions from the participating institutions may have a counter-cyclical nature[19].

2.2. The ECB stresses, however, that it is not addressing whether the draft decree effectively implements Directive 2014/49/EU in Dutch law. Rather, the ECB focuses on those provisions that may impact on the role and tasks of DNB as a central bank and as a member of the Eurosystem and the European System of Central Banks (ESCB). In this respect, as far as central bank involvement is concerned, funding arrangements for DGSs must comply with the monetary financing prohibition laid down in the Treaty, and in particular with the prohibition of national central banks (NCBs) providing overdraft facilities or any type of credit facility within the meaning of Article 123 of the Treaty[20].

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12 See Article 29.07(2) and 29.08(1) of the draft decree.

13 DNB has this right of recourse based on the current Law on financial supervision, see point (i) above.

14 Article 29.15 of the draft decree which refers to Article 3:261(4) and 3:265(1) of the Law on financial supervision.

15 See Article 29.05(1) of the draft decree.

16 See Articles 27.07(1), 29.04(1), and 29.09 of the draft decree.

17 Article 29.04(3) of the draft decree.

18 See paragraph 4 of Opinion CON/2011/12. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

19 See paragraph 4.3 of Opinion CON/2011/60 and Commission staff working document, Impact Assessment, Accompanying document to the Proposal for a Directive …/…/EU of the European Parliament and of the Council on Deposit Guarantee Schemes (recast) and to the Report from the Commission to the European Parliament and to the Council Review of Directive 94/19/EC on Deposit Guarantee Schemes, (COM(2010) 368), p. 58, available on the Commission's website at www.ec.europa.eu.

20 See paragraph 9.3 of Opinion CON/2011/12.

2.3. The ECB has developed the guidance set out in paragraphs 2.3.1 to 2.3.3 of this opinion on the basis of which it may decide whether a new task conferred on an NCB is to be considered a central banking task or a government task for the purposes of assessing such conferral against the prohibition of monetary financing[21]. This guidance applies to genuinely new tasks that either did not exist in the past or did not form an integral part of the central banking tasks assigned to an NCB in the past. In recognition of the different Member States' legal frameworks, central banking traditions and national set-ups, the tasks currently discharged by an NCB as central banking tasks are not reviewed and re-categorised, but may be reassessed if they are subject to legislative amendments of substance. In this regard, the ECB notes that the tasks previously conferred on DNB in relation to the operation of the Dutch DGS are, in part, different from the tasks conferred on DNB by the draft decree, which aims at changing essential elements of the set-up of the Dutch DGS. As a consequence, the tasks currently performed by DNB differ substantially from the tasks envisaged and should therefore be reviewed. Therefore, it should be assessed whether the new role of DNB in the operation of the DGS is compatible with the prohibition of monetary financing under Article 123 of the Treaty. The concrete assessment of whether DNB's tasks in the context of the operation of the Dutch DGS are to be considered central banking tasks or government tasks is undertaken in paragraph 3.2 of this opinion.

2.3.1. *General considerations*

First, the principle of financial independence requires that the Member States may not put their NCBs in a position where they have insufficient financial resources to carry out their ESCB − or Eurosystem − related tasks, as applicable.

Second, central banking tasks comprise in particular those tasks that are related to the tasks listed in Article 127(2), (5) and (6) of the Treaty.

Third, new tasks conferred on an NCB which are atypical of NCBs' tasks, or which are clearly discharged on behalf of and in the exclusive interest of the government or of other public entities, should be considered as government tasks. In that context, a distinction should be drawn between liquidity- and solvency-related tasks of NCBs. While, for the purposes of the monetary financing prohibition, solvency support is a government task, liquidity-related tasks, the ultimate objective of which are to finance the economy, are central banking tasks.

2.3.2. *Specific considerations*

In principle, tasks related to a DGS can be assigned to central banks provided that they do not undermine an NCB's independence in accordance with Article 130 of the Treaty. However, the discharge of these tasks by central banks may not extend to the financing of DGSs as these are government tasks. This is without prejudice to the possibility for central banks to provide short-term financing to DGSs provided that such financing addresses urgent situations, systemic stability aspects are at stake and decisions are at the discretion of the NCB[22].

21 See Opinion CON/2015/22.

22 See the ECB's 2014 Convergence Report, p. 30, available on the ECB's website at www.ecb.europa.eu, and paragraph 3.1.3 of Opinion CON/2011/76.

An important criterion for qualifying a new task as a government task is the impact of the task on the institutional, financial and personal independence of the NCB. In particular, the following should be taken into account.

First, it should be assessed whether the performance of the new task creates inadequately addressed conflicts of interests with existing central banking tasks, and does not necessarily complement those existing central banking tasks. If a conflict of interest arises between existing and new tasks, there should be sufficient mitigation in place to adequately address that conflict. Complementarity between the new task and existing central banking tasks should not, however, be interpreted extensively, so as to lead to the creation of an indefinite chain of ancillary tasks. Complementarity should also be examined from the point of view of the financing of those tasks.

Second, it should be assessed whether without new financial resources the performance of the new task is disproportionate to the financial or organisational capacity of the NCB and may negatively impact its capacity to properly perform existing central banking tasks.

Third, it should be assessed whether the performance of the new task does not fit into the institutional set-up of the NCB in the light of central bank independence and accountability considerations.

Fourth, it should be assessed whether the performance of the new task harbours substantial financial risks.

Fifth, it should be assessed whether the performance of the new task exposes the members of the NCB's decision-making bodies to political risks which are disproportionate and may also impact on their personal independence and, in particular, the guarantee of the term of office under Article 14.2 of the Statute of the European System of Central Banks and of the European Central Bank.

2.3.3. Any final assessment on the qualification of a task given to an NCB as either falling within the scope of a central banking task or a government task will be guided by the objective of ensuring the consistent application of the prohibition of monetary financing within the Eurosystem and the ESCB to the extent that it applies to its members.

3. Specific observations

3.1. *The role of DNB in the operation of the DGS*

The ECB welcomes the draft decree, as it establishes an ex ante funded DGS.

The ECB stresses, that the tasks to be discharged by DNB under the proposed reallocation of responsibility for the performance of the functions related to the DGS need to comply with the monetary financing prohibition under Article 123 of the Treaty[23]. To this end, it is of the utmost importance that the role of DNB is clearly defined in the legislative framework on the DGS by further aligning the Law on financial supervision with the aims of the draft decree and clearly

23 See paragraphs 3.1.1-3.1.3 of Opinion CON/2011/76.

embedding the distribution of tasks and responsibilities between DNB and the Fund, as is further discussed in paragraphs 3.2.5 and 3.2.9.

3.2. *Conferral on DNB of tasks related to the DGS*

DNB is designated as the authority which, together with the Fund, operates the DGS. The draft decree aims to change DNB's role in the context of the operation of the DGS and assigns some additional tasks to DNB. In the light of the guidance set out in paragraphs 2.3.1 to 2.3.3, it must be assessed whether DNB's tasks and responsibilities in this field could constitute a breach of the monetary financing prohibition.

3.2.1. *New tasks*

It is noted that DNB currently has tasks in the context of the operation of the DGS under the Decree and the Law on financial supervision. DNB continues to perform these tasks, although the draft decree revises the set-up of the DGS and thereby, on the one hand, aims to change some of DNB's responsibilities relating to the DGS and, on the other, assigns additional tasks to DNB, such as the determination of the level of ex ante contributions and of the extraordinary contributions each participating credit institution must pay[24] and the granting to deposit holders of an appropriate amount, at the expense of the Fund, so that they are able to meet their living expenses if reimbursements at the DGS's expense cannot be granted and made payable within seven days. In addition, the draft law on BRRD implementation requires that DNB: (a) supports the Fund in the exercise of its tasks; (b) provides the Fund with the financial means necessary for the exercise of its tasks[25]; and (c) decides on the appointment, suspension and discharge of the Fund's board members[26]

3.2.2. *Principle of financial independence*

The principle of financial independence requires an NCB to have sufficient means not only to perform its ESCB-related tasks but also its own national tasks (e.g. financing its administration and own operations)[27]. When allocating specific non-ESCB related tasks to the NCBs, such as tasks in the area of deposit protection, additional human and financial resources must also be allocated for these tasks to be carried out in a manner that will not affect the NCBs' operational capacity to perform their ESCB-related tasks[28].

In this regard, the ECB notes that the Law on financial supervision stipulates that the credit institutions bear the costs of the DGS[29]. The ECB understands that this provision refers to both the reimbursements that are paid under the DGS and the costs of DNB's tasks related to the operation of the DGS. The possibility for DNB to recover its operational costs from the participating credit institutions has a positive impact on DNB's financial capacity to assume those tasks. However, the

24 See Article 29.12(2) of the draft decree.

25 See Article 3:259a(4) of the Law on financial supervision (not yet in force).

26 See Article 3:259a(3) of the Law on financial supervision (not yet in force).

27 See the ECB's 2014 Convergence Report, p. 25. See also paragraph 3.1.5 of Opinion CON/2009/93, paragraph 3.1 of Opinion CON/2011/5, paragraph 4 of Opinion CON/2012/74 and paragraph 4 of Opinion CON/2013/29.

28 See, for example, paragraph 4 of Opinion CON/2012/74.

29 Article 3:259(2) Law on financial supervision.

ECB notes that no reference is made in the draft decree to the costs incurred by DNB in carrying out its DGS-related tasks. According to the explanatory memorandum, it will be necessary to levy a separate charge to cover the costs incurred in relation to the DGS. Such a separate levy will be charged based on the Law on financial supervision funding. The ECB understands that it is being examined whether the current allocation criteria regarding the charging of the costs associated with the execution of the DGS require any amendment[30]. Taking into account the principle of financial independence, which is a key aspect of the principle of central bank independence as laid down in Article 130 TFEU, it needs to be ensured that DNB has sufficient funds for fulfilling its task of operating the DGS.

3.2.3. *Links to tasks listed in Article 127(2), (5) and (6) of the Treaty*

As the ECB observed in an earlier Opinion[31], central banks are in general in a good position to take on responsibility for financial stability, given their insight into money and financial market developments and their involvement in payment systems and monetary policy operations. At the same time, DGSs are a key element of the financial safety net. Therefore, the governance framework should ensure that the important function of such schemes is carried out professionally and efficiently. Moreover, effective coordination with the overall role of central banks in safeguarding financial stability should be ensured. This aim may be achieved through, among other things, maintaining an adequate level of involvement of the central bank in the governance and regulation of the national DGS.

3.2.4. *Atypical tasks*

A number of Member States have conferred on their NCBs a role in the operation of their DGSs. The tasks of an NCB with regard to the operation of the DGS could therefore be regarded as being tasks not atypical of a central bank. As noted in paragraph 3.2.1, DNB currently has tasks related to the operation of the Dutch DGS.

3.2.5. *Discharge of tasks on behalf of and in the exclusive interest of the Government or of other public entities*

DNB is designated as the authority which, together with the Fund, operates the Dutch DGS. DNB is an independent public body that is not subordinate to the Minister[32]. DNB is accountable for the performance of these particular tasks to the Minister and the Minister has, among other things, the right of access of information on DNB's tasks[33].

As noted above, the tasks to be discharged by DNB under the proposed reallocation of responsibility for the performance of the functions related to the DGS still need to be clarified. Unless the Law on financial supervision is aligned with the aims of the draft decree, the responsibilities and the functions to be performed by DNB under the Law on financial supervision,

30 See the explanatory memorandum to the draft decree, p. 23.

31 See paragraph 3.3 of Opinion CON/2007/26.

32 Article 1:30 of the Law on financial supervision and Article 1 of the framework Law on non-departmental public bodies.

33 Article 1:30, 1:37 and 1:42 of the Law on financial supervision and Article 18 of the framework law on non-departmental public bodies.

i.e. to grant the reimbursements within the applicable payment deadline and, insofar as depositors receive a reimbursement, to acquire the claims of these depositors and to seek recovery from the assets of the institution in relation to which the DGS has been activated, appear to be tasks discharged by DNB in the exclusive interest of the Government.

Moreover, the ECB notes that in the explanatory memorandum to the draft decree the functions to be performed by DNB are seen in the light of the draft law on BRRD implementation that requires DNB to provide the Fund with the financial means necessary for the exercise of its tasks[34]. In addition, the explanatory memorandum states that it cannot be excluded that DNB may, if necessary and in the interests of efficiency, be authorised to carry out certain (payment) transactions on behalf of the Fund[35]. Insofar as DNB would be required to provide the necessary financial resources to the Fund and to carry out the Fund's tasks, these would be tasks discharged by DNB in the exclusive interest of the Government.

3.2.6. *Extent to which conflicts of interests with existing DNB tasks are addressed and the performance of tasks fits into DNB's institutional set-up in the light of central bank independence and accountability considerations*

The conferral of the tasks on DNB does not, prima facie, raise any issues of conflicts of interest. The performance of DNB's new tasks in the context of the Dutch DGS fits into DNB's institutional set-up, which was adapted to DNB's functions as regards the operation of the current DGS. The complementarity between the tasks related to the operation of the DGS and the supervisory tasks discharged by DNB, could be regarded as being reflected in the common system for the financing of DNB's tasks via contributions from the supervised entities. The performance of these tasks does not raise any issues arising out of accountability considerations. The draft decree requires close cooperation between DNB and the Fund. It provides that the Fund is accountable to DNB in the exercise of its tasks by, among other things, providing DNB an annual financial report that describes the exercise of the Fund's tasks and the pursued policy[36]. DNB is, in its turn, accountable for the performance of its tasks to the Minister[37].

3.2.7. *Extent to which the performance of tasks is proportionate to DNB's financial and operational capacity and its ability to perform its ESCB-related tasks*

In order to remain financially independent, DNB must have sufficient means to carry out not only its ESCB-related tasks from an operational and financial point of view, but also its national tasks. In this regard the ECB welcomes the fact that the Law on financial supervision stipulates that credit institutions bear the costs of the Dutch DGS. However, further clarifications are needed so as to ensure that DNB is adequately remunerated for the costs of operating the DGS.

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34 See Article 3:259a(4) of the Law on financial supervision (not yet in force).

35 See the explanatory memorandum to the draft decree, p. 21.

36 Article 29.10(2) and (3) of the draft decree and Articles 18(1), first and second sentence, 20, 26, 34(1) and 35(1) of the framework Law on non-departmental public bodies.

37 Article 1:30 and 1:42 of the Law on financial supervision and Article 18 of the framework Law on non-departmental public bodies.

According to the explanatory memorandum to the draft decree, DNB will incur one-off, structural and incidental costs that relate to the support it provides to the Fund for its payment and management tasks, to the provision of the necessary financial means to the Fund, and to its own tasks. These costs will, inter alia, relate to the transition from an ex post to an ex ante funded DGS, to the determination of the amount of the contributions payable by the credit institutions and to the supervision of the institutions' fulfilment of the payment commitments. Given that it is not clear to what extent the charges to be levied would cover the financial resources required with regard to the operation of the DGS, the ECB recommends that the draft decree should explicitly specify that sufficient funds will be made available to DNB for fulfilling its task of operating the DGS.

3.2.8. *Extent to which the performance of tasks involves substantial financial risks*

As noted in paragraph 3.2.5, the Law on financial supervision stipulates that, insofar as the depositors received a reimbursement, DNB acquires the claims of these depositors on, and seeks recovery from, the assets of the institution in relation to which the DGS has been activated. It is not clear to what extent DNB is affected financially by the task to recover on its own behalf the claims on the institution in relation to which the DGS has been activated. Hence, the ECB recommends aligning the provisions in the Law on financial supervision with the distribution of tasks and responsibilities between DNB and the Fund as laid down in the draft decree.

3.2.9. *Conclusion*

The ECB welcomes the shift of responsibilities from DNB to the Fund as well as the Fund's role in the provision of reimbursements under the DGS. However, it is of the utmost importance that the role of the DNB is clearly defined. This clarification is all the more needed in relation to any financing of the Fund's tasks which the ECB considers to be a discharge of a government task. As consistently emphasised by the ECB, in line with the prohibition on monetary financing, an NCB may not finance DGSs[38]. In addition, clarification would be recommended with regard to the costs of operating the DGS.

The ECB emphasises the importance of having all the rules according to which the ex ante Fund is being established fully compliant with the rationale that it is the Fund itself, rather than DNB, which finances the tasks of the DGS, including the pay-outs of the guaranteed deposits. As noted above, insofar as DNB would be required to provide the necessary financial resources to the Fund and to carry out the Fund's tasks, these would be tasks discharged by DNB in the exclusive interest of the Government. Consequently, the ECB recommends that the Law on financial supervision is further aligned with the aims of the draft decree. To that end, it should be made clear that: (i) the Fund is responsible for paying out the reimbursements under the DGS; and (ii) the Fund, rather than DNB, acquires depositors' claims and seeks recovery from the assets of the institution in relation to which the DGS has been activated. In addition, the draft decree should provide for the Fund's, rather than

38 In line with Opinion CON/2011/76, which relates to another draft law on the Dutch DGS, the ECB would reiterate its view that the only forms of central bank financing of a national DGS for credit institutions compatible with the monetary financing prohibition are: (i) intraday credit in line with the general rules on provision of such credit by the central bank; and (ii) short-term funding addressing urgent situations in cases in which systemic stability aspects are at stake and the decisions are at the central bank's discretion.

DNB's, right of recourse and disbursement by the Fund of any revenues to the participating credit institutions.

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

Done at Frankfurt am Main, 26 November 2015.

[signed]

The President of the ECB

Mario DRAGHI