EUROPEAN CENTRAL BANK

EUROSYSTEM

EN **ECB-PUBLIC**

OPINION OF THE EUROPEAN CENTRAL BANK

of 26 March 2019

on changes to the governance structure of the Nationale Bank van België/Banque Nationale de Belgique

(CON/2019/12)

Introduction and legal basis

On 26 February 2019 the European Central Bank (ECB) received a request from the Belgian Minister for Finance for an opinion on a draft law amending the Law of 22 February 1998 establishing the Organic Statue 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 Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the third indent of Article 2(1) of Council Decision 98/415/EC[1], as the draft law relates to the Nationale Bank van België/Banque Nationale de Belgique (NBB). 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 introduces amendments to the Law of 22 February 1998 establishing the Organic Statue of the Nationale Bank van België/Banque Nationale de Belgique (hereinafter the 'Law of 22 February 1988)'[2] with a view to improving the governance structure of the NBB and creating a more balanced representation of both genders in the NBB's Council of Regency.

Current composition of the NBB's Council of Regency and Board of Censors

1.2 The NBB currently consists of a Governor, the Board of Directors, the Council of Regency and the Board of Censors. The General Meeting of Shareholders is not addressed in this Opinion.

1.3 The NBB Council of Regency is composed of a Governor, who presides over the Council, the other (maximum five[3]) Directors from the NBB's Board of Directors and ten Regents[4]. The King appoints the members of the Board of Directors, which is the NBB's main decision-making body[5], on a proposal of the Council of Regency[6].

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1 Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

2 "*Loi fixant le statut organique de la Banque Nationale de Belgique"/"Wet van 22 februari 1998 tot vaststelling van het organiek statuut van de Nationale Bank van België",* as published in the annexes to the Belgian Official Gazette ("*Moniteur Belge"/" Belgisch Staatsblad*") on 28 March 1998 , and as amended from time to time.

3 Article 19.1° of the Law of 22 February 1998.

4 Article 20.1° of the Law of 22 February 1998.

5 Article 19 of the Law of 22 February 1998.

6 Article 23.2° of the Law of 22 February 1998. They are appointed for a renewable term of six years, and may be relieved from office by the King only if they no longer fulfil the conditions required for the performance of their duties

1.4 The Council of Regency is responsible for:

(i) exchanging views on general issues relating to the NBB, monetary policy and the economic situation of the country and the EU; supervisory policy with regard to each of the sectors subject to the NBB's supervision; Belgian, European and international developments in the field of supervision; as well as, in general, any developments concerning the financial system subject to the NBB's supervision, without however having any competence to intervene at an operational level or take note of individual dossiers[7];

(ii) laying down the Rules of Procedure, containing the basic rules for the operation of the NBB's bodies and the organisation of its departments, services and outside offices on the proposal of the Board of Directors[8];

(iii) setting the individual salaries and pensions of the members of the Board of Directors[9];

(iv) approving the expenditure budget and the annual accounts submitted by the Board of Directors[10]; and

(v) determining the distribution of profits as proposed by the Board[11].

1.5 The Regents are elected for a renewable three-year term by the General Meeting of the NBB[12]. Two Regents are chosen upon the proposal of the most representative labour organisations; three Regents upon the proposal of the most representative organisations from industry and commerce, agriculture and small firms and traders; and five Regents upon the proposal of the Minister of Finance[13]. The Regents are subject to various incompatible activities rules which are aimed at, inter alia, guaranteeing their independence towards the Belgian State and the public authorities[14]. They are also subject to rules relating to the prevention and handling of conflict of interest situations.

1.6 The NBB Board of Censors is currently composed of ten members[15]. The Board of Censors acts as the NBB's audit committee and supervises the preparation and implementation of the NBB's budget[16]. The Board of Censors is entrusted with the following advisory tasks, as a minimum: (i) to

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or if they have been guilty of serious misconduct.

7 Article 20.2° of the Law of 22 February 1998.

8 Article 20.2° of the Law of 22 February 1998.

9 Article 20.3° of the Law of 22 February 1998.

10 Article 20.4° of the Law of 22 February 1998.

11 Article 20.4° of the Law of 22 February 1998.

12 Article 23.3° of the Law of 22 February 1998.

13 Article 23.3° of the Law of 22 February 1998. The methods of proposing candidates for these appointments are laid down in the Regent Decree of 5 October 1948 ("*Arrêté du Régent du 5 octobre 1948 déterminant les modalités de présentation des candidats aux fonctions de régent de la Banque Nationale de Belgique"*/ "*Besluit van de Regent van 5 oktober 1948 houdende vaststelling van de voordrachtsmodaliteiten der kandidaten tot de functies van regent in de Nationale Bank van België"*), as published in the annexes to the Belgian Official Gazette ("*Moniteur Belge"/" Belgisch Staatsblad"*) on 8 October 1948, and as amended from time to time.

14 Members of the Legislative Chambers, the European Parliament, the Councils of the Communities and the Regions, persons who hold the position of Minister or Secretary of State or of member of the Government of a Community or Region and members of the staff of a member of the Federal Government or of the Government of a Community or Region may not hold the office of Regent. The Regents may not be a member of the administrative, management or supervisory bodies of an institution subject to the supervision of the NBB or in an institution incorporated under Belgian law or foreign law established in Belgium or in a subsidiary of these institutions and subject to the supervision of the ECB, nor may they perform management duties in such an institution.

15 Article 21.1° the Law of 22 February 1998.

16 Article 21.2° of the Law of 22 February 1998.

monitor the financial reporting process; (ii) to monitor the effectiveness of the internal control and risk management systems, and of the NBB's internal audit; (iii) to monitor the statutory audit of the annual accounts, including compliance with the questions and recommendations formulated by the statutory auditor; and (iv) to review and monitor the independence of the statutory auditor, in particular the provision of additional services by the statutory auditor to the NBB[17]. In this latter respect, the Board of Censors proposes the appointment of the statutory auditor to the Board of Directors[18]. All audit functions of the Board of Censors are exercised without prejudice to the responsibilities of the bodies of the NBB and without prejudice to the execution tasks and transactions within the domain of the European System of Central Banks (ESCB) and their review by the statutory auditor[19].

Amendments to the role and composition of the NBB Council of Regency under the draft law

1.7 Under the draft law, the Board of Censors is abolished and its advisory tasks in the field of audit and budget is exercised by the Audit Committee of the Council of Regency. The Audit Committee, in a restricted composition, advises the Council of Regency in the execution of its powers with regard to the budget and the preparation of financial information. A Remuneration and Appointments Committee is established to provide its opinions to the Council of Regency. As a result of the integration of the Board of Censors' advisory functions into the Council of Regency, the number of Regents is increased from 10 to 14. Hence, under the draft law, the Council of Regency is composed of the Governor, the Directors and 14 Regents.

1.8 Subject to certain exceptions set out below, the Council of Regency is no longer chaired by the Governor, but by an independent[20] Regent appointed by Royal Decree as President of the Council of Regency. When appointing a new Governor, the King confirms the designation of the current President of the Council of Regency or designates a new president. The Governor continues to chair the meetings of the Council of Regency when the Council considers general issues relating to the NBB; monetary policy and the economic situation of the country and the European Union; supervisory policy with regard to each of the sectors subject to the NBB's supervision; Belgian, European and international developments in the field of supervision; as well as, in general, any development concerning the financial system subject to the NBB's supervision.

1.9 Under the draft law, at least one-third of the members of the Council of Regency must be of a different gender than the other members. This requirement has been carried over from a similar provision for listed companies under Article 518*bis* of the Law on companies. This provision does not apply to the NBB given its specific governance structure, which differs from that of an ordinary public limited company. However, it is considered that the arguments underlying the introduction of Article 518*bis* also apply to the NBB. Consequently, a gender quota is introduced and applied to the Council of Regency. For the same reasons, the draft law provides that the President of the Council of Regency must be of the opposite sex and linguistic background from the Governor.

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17 Article 21bis.1° of the Law of 22 February 1998.

18 Article 21bis.2° of the Law of 22 February 1998.

19 Article 21bis.1° of the Law of 22 February 1998.

20 In the sense of Article 526ter of the Law on companies ("*Code des sociétés"/ "Wetboek van vennootschappen*" - as published in the annexes to the Belgian Official Gazette ("*Moniteur Belge"/" Belgisch Staatsblad"*) on 6 August 1999, and as amended from time to time).

2. Observations

2.1 In November 1995, the former European Monetary Institute (EMI) established a list of features of central bank independence (later described in detail in its 1998 Convergence Report) which were the basis for establishing the national legislation of the Member States at that time and in particular the national central banks' statutes. The concept of central bank independence includes various types of independence that must be assessed separately, namely functional, institutional, personal and financial independence. Over the past few years there have been further refinements of the analysis of these aspects of central bank independence in the opinions adopted by the ECB.

2.2 On the independence of the NBB, the EMI noted with satisfaction that features of central bank independence of an institutional, personal, functional and financial nature were accomplished through various provisions, including the provision on the role of the Council of Regency, which is partly composed of representatives of different sectors of society and is restricted to advisory tasks without an ex ante right of consultation on ESCB-related tasks[21]. The EMI also noted that whereas under the Law on the Nationale Bank van België/Banque Nationale de Belgique the Council of Regency was competent to take certain monetary policy decisions, the draft law restricts the Council of Regency's involvement to an advisory role without an ex ante right of consultation.

2.3 The ECB understands that the NBB Board of Directors is responsible for the performance of its ESCB-related tasks[22], and therefore qualifies as a decision-making body within the meaning of Article 130 of the Treaty[23]. The ECB further understands that the Council of Regency does not intervene in the performance of ESCB-related tasks, nor in the decisions concerning those tasks, and that it therefore cannot be considered as a decision-making body within the meaning of Article 130 of the Treaty[24]. Under Article 130 of the Treaty, when exercising the powers and carrying out the tasks and duties conferred upon it by the Treaty and the ESCB Statute, neither a national central bank (NCB), nor any member of its decision-making bodies shall seek or take instructions from, inter alia, any government of a Member State 'or from any other body', which includes a statutory body such as the Council of Regency. Having regard to the structure of the Council of Regency as a constituent part of the NBB, the Council should not seek to influence the Board of Directors, in its capacity as the NBB's decision-making body responsible for the performance of the NBB's ESCB tasks[25].

2.4 As noted by the ECB, even if an NCB is fully independent from a functional, institutional and personal point of view, which is guaranteed by the NCB's statutes, its overall independence would be jeopardized if it could not autonomously avail itself of sufficient financial resources to fulfil its mandate and perform the ESCB-related tasks required of it under the Treaty and the ESCB

21 See paragraph 5 of EMI Opinion CON/96/10. All opinions of the EMI are published on the ECB's website at www.ecb.europa.eu.

22 Article 19 of the Law of 22 February 1998.

23 See the NBB's FAQ's on 'Independence and prohibition on monetary financing' available on the NBB's website at www.nbb.be.

24 See the NBB's FAQ's on 'Independence and prohibition on monetary financing' available on the NBB's website at www.nbb.be.

25 See paragraph 6 of Opinion CON/2002/16.

Statute[26].

2.5 Regarding the Council of Regency's competence to approve the expenditure budget and to determine the final distribution of profits, the ECB has noted that a third party having the power to determine or influence an NCB's budget is incompatible with financial independence unless the law provides a safeguard clause so that such a power is without prejudice to the financial means necessary for carrying out the NCB's ESCB-related tasks[27].

2.6 With regard to profit allocation, an NCB's statutes may prescribe how its profits are to be allocated. In the absence of such provisions, decisions on the allocation of profits should be taken by the NCB's decision-making bodies on professional grounds, and should not be subject to the discretion of third parties unless there is an express safeguard clause stating that this is without prejudice to the financial means necessary for carrying out the NCB's ESCB-related tasks as well as national tasks[28]. In this respect, there are a number of important statutory safeguards protecting the role of the Board of Directors in its capacity as the NBB's decision-making body responsible for the performance of the NBB's ESCB tasks. Firstly, it is the Board which submits the expenditure budget and proposes the distribution of profits to the Council of Regency[29]. Secondly, the members of the Board are also members of the Council of Regency. Thirdly, the ECB understands that under the draft law, the Governor continues to preside over the Council of Regency for all exchanges of views relating to ESCB-related matters, including general issues relating to the NBB such as any matter impacting the financial independence of the NBB within the meaning of Article 130 of the Treaty.

2.7 Regarding the Council of Regency's competence to approve the annual accounts, the ECB has noted that the annual accounts should be adopted by the NCB's decision-making bodies, assisted by independent accountants, and may be subject to ex post approval by third parties (e.g., the government or the parliament)[30]. This requirement is materially satisfied by an arrangement whereby the annual accounts are submitted by the Board of Directors to the Council of Regency, with the Council, as a constituent body of the NBB in which the Governor and the other Board members are represented, approving the accounts[31].

2.8 As noted above, the ECB understands that under the draft law, the Governor continues to preside over all exchanges of views by the Council of Regency relating to ESCB-related matters. In this respect, the ECB welcomes the provision which states that the Governor continues to preside over the Council of Regency whenever the Council holds exchanges of views on general issues relating to the NBB; monetary policy and the economic situation of Belgium and the EU; supervisory policy with regard to each of the sectors subject to the NBB's supervision; Belgian, European and international developments in the field of supervision; as well as, in general, any development

26 See the ECB Convergence Report (May 2018), p. 25.

27 See the ECB Convergence Report (May 2018), p. 26.

28 See the ECB Convergence Report (May 2018), p. 27; paragraphs 6 and 8 of ECB Opinion CON/2002/16; paragraph 3.1.13 of ECB Opinion CON/2010/30; paragraphs 3.1.12 and 3.1.14 of ECB Opinion CON/2010/48; and paragraph 3.2.2 of ECB Opinion CON/2017/17.

29 See paragraph 1 of ECB Opinion CON/2009/4; paragraph 1 of ECB Opinion CON/2012/81.

30 See the ECB Convergence Report (May 2018), p. 27.

31 See also paragraphs 7-8 of ECB Opinion CON/2002/18; paragraph 3 of ECB Opinion CON/2008/91.

concerning the financial system subject to NBB's supervision.

2.9 The ECB also welcomes the addition of four Regents to the Council of Regency under the draft law to allow the Council to perform the newly appointed tasks previously executed by the Board of Censors. This increase in the number of Regents should optimize and enhance the quality of the Council of Regents' advisory role and its new Audit and Remuneration and Appointments Committees.

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

Done at Frankfurt am Main, 26 March 2019.

[signed]

The President of the ECB

Mario DRAGHI