OPINION OF THE EUROPEAN CENTRAL BANK

of 21 January 2015

on the Resolution College

(CON/2015/2)

Introduction and legal basis

On 3 December 2014, 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 establishing the modalities of the organisation and functioning of the Resolution College of the NBB, on the exchange of information between the Resolution College and third parties and measures to prevent conflicts of interests (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 indent of Article 2(1) of Council Decision 98/415/EC[1], as the draft royal decree relates to the 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 royal decree

The draft royal decree partly complements the transposition of Directive 2014/59/EU of the European Parliament and the Council[2] (hereinafter the 'BRRD'). The BRRD was largely transposed into Belgian law by the Law of 25 April 2014[3] which anticipated the BRRD.[4]

Article 12ter (1) of the Organic Law of the NBB[5], as amended by the Law of 25 April 2014, establishes the NBB as the resolution authority empowered to apply resolution tools and exercise resolution powers in accordance with the BRRD. Article 21ter (1) of the Organic Law of the NBB established the Resolution College as a new body of the NBB in charge of all relevant tasks related to the resolution function. The draft royal decree is proposed in application of Article 21ter (4) of the Organic Law which mandates the King to adopt the rules governing the organisation and functioning of the Resolution College, as well as the conditions of exchange of information with third parties and the measures to prevent conflicts of interests.

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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 Directive 2014/59/EU of the European Parliament and 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/EC, and Directives 2001/24/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 the Council (OJ L 173, 12.6.2014, p. 190).

3 Law of 25 April 2014 regarding the statute and the control of credit institutions; Law of 25 April 2014 amending the Organic Law of the NBB.

4 The ECB commented on the draft of the Law of 25 April 2014 in Opinion CON/2014/17.

5 Law of 21 February 1998 establishing the Organic Law of the NBB.

2. General lines of policy and annual action plan

The ECB welcomes the draft royal decree as it strengthens and clarifies the organisation and the functioning of the NBB's Resolution College, in line with the common framework of intervention powers and rules laid down in the BRRD. The ECB also welcomes the fact that, in determining general lines of policy and priorities that apply in regard to resolution, and in drawing up an annual action plan on the subject of resolution, the NBB's Resolution College will take account of international developments, specifically of the implementation of the single resolution mechanism, as stated in the explanatory memorandum to the draft royal decree.

3. Consequences for the NBB - independence and compliance with the prohibition on monetary financing

3.1 The ECB acknowledges that the NBB has been empowered to carry out resolution tasks. In this respect, any performance by the NBB of tasks as resolution authority should not affect: (a) the NBB's functional, institutional and financial independence; and (b) the NBB's performance of its Eurosystem-related tasks[6]. In particular as regards financial independence, previous ECB opinions[7] have pointed out that the allocation to the NCBs of specific non-ESCB related tasks needs to be accompanied by the allocation of adequate human and financial resources allowing such tasks to be carried out in a manner which will not affect the NCBs' ability to carry out their ESCB-related or Eurosystem-related tasks from an operational and financial point of view. Against this background, the ECB would like to make the observations set out in the following.

3.2 The ECB notes that the draft royal decree stipulates that the NBB has to provide the Resolution College with the material and human resources it requires in order to carry out its tasks[8]. The ECB understands that, according to Article 12ter (2) of the Organic Law of the NBB, the costs of the Resolution College's functioning will be ultimately covered by credit institutions. From this perspective, the ECB welcomes the introduction of Article 12ter (2) in the Organic Law of the NBB, which was recommended in its Opinion of 14 February 2014[9].

However, the draft royal decree does not contain any provisions detailing the expense recovery mechanism that is required by Article 12ter (2) of the Organic Law which the King is mandated to adopt. As it is expected that the NBB's Resolution College will be carrying on its tasks from the date on which the draft royal decree enters into force, and in the absence of an expense recovery mechanism, the NBB will thus be required to commit additional resources, both human and financial, to these tasks. All actual costs involved in fulfilling the NBB's resolution-related tasks should be covered. For this reason, the NBB should be involved in setting up the expense recovery mechanism.

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6 See for example paragraph 3.2.2 of Opinion CON/2013/56.

7 See for instance paragraph 3 of Opinion CON/2007/8, paragraph 3.3 of Opinion CON/2011/7, paragraph 9 of Opinion CON/2011/84 and paragraph 3.1.2 of CON/2013/56.

8 See Article 7(1) of the draft royal decree.

9 See Opinion CON/2014/14, paragraph 3.4.

3.3 In addition, given that the NBB's Resolution College is placed within the NBB, it is important to ensure that decisions adopted by the Resolution College do not endanger the NBB's finances as a whole. Therefore, the NBB decision-making body that is responsible for Eurosystem-related tasks should be given ultimate control over any decision of the Resolution College that could affect the NBB's independence and in particular its financial independence[10]. Furthermore, the ECB underlines the importance of safeguarding compliance with the prohibition on monetary financing laid down in Article 123(1) of the Treaty. Irrespective of the fact that an NCB may act as a resolution authority under the BRRD, resolution in the financial market is neither a Eurosystem-related task, nor a traditional central banking task. Rather, it is a Government task and, as such, it is performed in the interest of the Belgian State. Therefore, if the NBB is to be entrusted with such a task, it needs to be adequately remunerated in advance, to ensure compliance with the monetary financing prohibition[11].

3.4 The ECB recommends that the Belgian authorities adopt as soon as possible the details of the expense recovery mechanism[12] in application of Article 21ter (2) of the Organic Law, and that the expenses incurred by the NBB during the period between the establishment of the Resolution College and the adoption of the expense recovery mechanism should be covered retroactively by the same mechanism.

4. Exchange of information and the separation between the supervision and resolution functions

4.1 In view of the NBB carrying out both resolution and supervisory functions, the ECB welcomes the mechanisms provided for in the draft royal decree to exchange information between the NBB's Resolution College and the NBB's supervisory services. The ECB understands that the Resolution College may request[13] a credit institution to provide it with information by virtue of Articles 226, section 2, or Article 276, section 1 of the Law on banking. For the sake of legal certainty and alignment with the BRRD, this provision should be refined to specify that the Resolution College has to first request such information from the competent authority supervising the credit institution.

4.2 The ECB understands that the Resolution College will receive and use, inter alia, confidential statistical information collected under Council Regulation (EC) No 2533/98[14]. Such exchange and use would be covered by Article 8(1)(d) of Regulation (EC) No 2533/98, according to which NCBs may use statistical information for the exercise of functions other than those specified in the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the "Statute of the ESCB"), in accordance with Article 14.4 of the Statute of the ESCB. The ECB notes that Article 8(3) of Regulation (EC) No 2533/98 provides that the NCB, i.e. in the present situation

10 See the ECB's June 2014 Convergence Report, p. 27.

11 See the ECB's June 2014 Convergence Report, p. 29, as well as paragraph 2.1 of Opinion CON/2011/30 and paragraph 3 of Opinion CON/2013/29.

12 See for instance Opinion CON/2012/35.

13 See Article 10 of the draft royal decree.

14 Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank (OJ L 318, 27.11.1998, p. 8).

the Resolution College, has to take all necessary measures to ensure the physical and logical protection of the confidential statistical information.

4.3 The BRRD 'exceptionally' allows one authority to carry out both resolution and supervisory functions on condition that adequate structural arrangements are put in place to ensure operational independence and to avoid conflicts of interest between that authority's resolution function and its other functions. In this respect, the BRRD stipulates that staff carrying out the functions of the resolution authority must be structurally separated and that their reporting lines must also be separated from staff carrying out tasks pursuant to the CRR and CRD IV or the other functions of the relevant authority[15]. Since it is important to ensure the operational independence of the resolution function and to avoid conflicts of interests between the resolution function and other functions[16], the ECB would appreciate it if future regulations of the NBB's Resolution College, which should provide for the tasks and operations of the Resolution College's services[17], clearly reflect the requirements for adequate structural separation as laid down in the BRRD. That separation should not, however, prevent the resolution function from having access to any necessary information which is available to the supervisory function.

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

Done at Frankfurt am Main, 21 January 2015.

The President of the ECB

Mario DRAGHI

15 See Article 3(3) of the BRRD.

16 See Opinion CON/2014/62 and Opinion CON/2014/60.

17 See Article 7 of the draft royal decree.