EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 10 June 2013

on recovery and resolution plans

(CON/2013/42)

Introduction and legal basis

On 31 May 2013, 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 law amending the Law of 22 March 1993 on the legal status and supervision of credit institutions and 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 was requested to deliver an opinion as a matter of extreme urgency to allow for this element of the Belgian crisis management framework to be adopted before the Belgian Parliament's summer recess.

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[1], as the draft law relates to the NBB and contains rules applicable to credit institutions which 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 law

1.1 The draft law aims to strenghten the ability of Belgian credit institutions and public authorities to prevent future financial crises, or to prevent such crises from intensifying, and to react promptly in the event of a crisis, by introducing into Belgian law a framework governing the establishment and the assessment of recovery and resolution plans for credit institutions. Pending the designation of a resolution authority in Belgium, the draft law temporarily grants the NBB, in its capacity as supervisory authority, certain powers concerning recovery and resolution plans[2].

1.2 Under the draft law, all Belgian credit institutions must establish and keep up to date a recovery

1 OJ L 189, 3.7.1998, p. 4.

2 Explanatory memorandum, general introduction.

plan detailing the measures susceptible of being taken by the institution or its shareholders to correct a significant deterioration in its financial position, without having any significant adverse effects on the Belgian or the international financial system[3]. These measures may take various forms, and can include increasing the credit institution's own funds or reducing its risk profile by selling off branches, lines of business or subsidiaries, but they may not allow for any form of exceptional financial support from public authorities or the central banks. To ensure that this prohibition is fully effective, the concept of 'public authorities' is to be understood in the widest sense and covers, for example, the deposit guarantee scheme, the resolution fund, and the State in its capacity as shareholder of a credit institution[4]. The credit institutions must test their recovery plans by comparing them with various crisis scenarios, ranging from a crisis that is specific to an institution to a one that is systemic. Recovery plans are to be submitted to the NBB, which will assess their compliance with the standards set out in the draft law, taking into account the fact that other institutions might also implement a recovery plan in the same period[5]. The NBB will require an institution to revise its recovery plan within three months if it is found to have shortcomings or if there are obstacles to its implementation. If the shortcomings are not remedied within the deadline provided, the institution will be required to take any measures that the NBB deems necessary to remedy the situation, such as facilitate a reduction of the risk profile of the credit institution concerned, or modify its governance structure. Finally, if a credit institution is found to be in breach of regulatory requirements, if the manner in which it is managed or its financial situation adversely affect the proper fulfilment of its commitments or do not offer sufficient guarantees in terms of its solvability, liquidity or profitability, and where the credit institution concerned has no measures in place to remedy the situation as required by the NBB, the NBB has the power to request the credit institution to implement all or part of its recovery plan[6].

1.3 The NBB must establish, and keep up to date, resolution plans in respect of all Belgian credit institutions, which are to outline the measures to be taken in the event of a credit institution's failure in order, in particular, to safeguard the continuing operation of its critical functions[7], to avoid adversely affecting financial stability, and to protect the assets of the depositors covered by the deposit guarantee scheme[8]. Simplified resolution plans may be drawn up depending on (i) the potential impact of an institution's failure on financial stability, or (ii) the existence of a plan at group level. The measures outlined in the resolution plan may not take any account of the possibility of exceptional financial support by public authorities or the central banks. The NBB will be responsible for assessing the resolvability of credit institutions. If the NBB finds that there are obstacles to resolvability, and if it considers the remedial actions proposed by a credit institution

3 Article 6 of the draft law (new Article 45/1 of the Law of 22 March 1993).

4 Explanatory memorandum, comment on Article 6.

5 Article 8 of the draft law (new Article 45/2 of the Law of 22 March 1993).

6 Article 14 of the draft law (new Article 57/1 of the Law of 22 March 1993, referring to Article 57 §1).

7 Critical functions are defined as any activities, services and operations the interruption of which is likely to disrupt the economy or the financial system (Article 3 of the draft law, new Article 3 §1 26° of the Law of 22 March 1993).

8 Article 11 of the draft law (new Article 55/1 of the Law of 22 March 1993).

unsatisfactory, it will have the authority to impose certain measures on the institution in question, requiring it, for example, to enter into contracts for services, to limit risk exposure, to assign certain assets or to change its legal or operational structure. Where the institution concerned fails to comply with the NBB's request, it will be considered to be in breach of regulatory requirements such that the NBB will have the power to require it to implement its recovery plan[9]. Until the European Commission's proposal for a Directive on the recovery and resolution of credit institutions and investment firms dated 6 June 2012[10] (hereinafter the 'BRRD') is fully transposed, the resolution plans will not be submitted to the Ministry of Finance as this would conflict with the professional secrecy obligations which the NBB is bound by in its capacity as supervisory authority[11] pursuant to Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions[12].

2. General observations

2.1 The ECB welcomes the draft law as it strengthens the tools and procedures available to the national authorities for planning the recovery and resolution of credit institutions. The approach taken is in line with the Financial Stability Board's (FSB) Key Attributes of Effective Resolution Regimes for Financial Institutions[13] and the BRRD, whereby recovery and resolution plans are a key element of preparation for possible crisis scenarios and for taking swift and effective remedial action.

2.2 The ECB notes that the Belgian authorities have decided, in advance of the adoption of the BRRD, to transpose the provisions which they consider to be close to finalisation and which do not require institutional reform. The ECB understands that the responsibilities entrusted to the NBB by the draft law do not take into account the designation of a resolution authority in Belgium, which will be done at a later stage once the BRRD is adopted. Any resolution powers vested in the NBB would need to be functionally separate from its current supervisory tasks, in order to ensure independence and avoid conflicts of interest[14]. In the event that the NBB is not ultimately designated as the resolution authority, it is important that the designated resolution authority engages in an adequate exchange of information with the NBB in its capacity as central bank as well as supervisory authority[15]. In addition, the ECB understands that, once the BRRD is adopted, the framework established under the draft law will be reviewed in order to ensure full consistency

9 Article 14 of the draft law (new Article 57/1 of the Law of 22 March 1993, referring to Article 57 §1). See point 1.2 above.

10 Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010, COM (2012) 280 final. The ECB commented on this proposal in its Opinion CON/2012/99. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

11 Explanatory memorandum, general introduction.

12 OJ L 177, 30.6.2006, p. 1.

13 Key Attributes of Effective Resolution Regimes for Financial Institutions, October 2011, Financial Stability Board. Available on the FSB's website at www.financialstabilityboard.org.

14 See also Opinion CON/2013/28, paragraph 2.3.

15 See Opinion CON/2012/99, paragraph 3.1.

with developments at Union level.

3. Credit institutions subject to the establishment of recovery and resolution plans

3.1 The ECB welcomes the broad scope of application of the draft law, which will cover all Belgian credit institutions, including their branches and subsidiaries both in Belgium and abroad, in terms of the requirement for recovery and resolution plans[16]. This will allow all credit institutions to benefit from a clear plan for remedial action in the event of emerging difficulties, and will provide clarity regarding their resolvability. The existence of such plans for all credit institutions also addresses potential concerns as regards ensuring a level playing field. The ECB notes that, to balance the extent of the scope of application against the necessary proportionality, the NBB will have the power to grant exemptions from the requirement to establish a recovery plan, based on the impact that the failure of an institution would have on financial stability or because the institution is part of a group for which the competent authorities have already communicated a recovery plan to the NBB[17]. It is important to conduct a rigorous assessment as to why no potential threat to the system is considered likely in the event of the failure of an institution, demonstrating fully in the case in question why recovery planning is considered unnecessary[18].

3.2 The ECB notes that the NBB's power to lay down the minimum content of recovery plans in a regulation will allow developing international and European standards, in particular Recommendation of the European Banking Authority on the development of recovery plans (EBA/REC/2013/02) dated 23 January 2013, to be taken into account[19].

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

Done at Frankfurt am Main, 10 June 2013.

[signed]

The President of the ECB

Mario DRAGHI

16 Articles 6 and 11 of the draft law (new Articles 45/1 and 55/1 of the Law of 22 March 1993).

17 Article 6 of the draft law (new Article 45/1 §5 of the Law of 22 March 1993).

18 See Opinion CON/2013/28, paragraph 2.1.

19 Explanatory memorandum, comment on Article 6. See also Article 5(7) of the BRRD.