EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 12 December 2011

on the establishment and financing of a resolution fund and on the amended calculation of contributions to the deposit guarantee scheme

(CON/2011/103)

Introduction and legal basis

On 30 November 2011, the European Central Bank (ECB) received a request from the Nationale Bank van België/Banque Nationale de Belgique (NBB), on behalf of the Belgian Ministry for Finance, for an opinion on a draft law establishing a financial stability contribution and creating a resolution fund, on the one hand, and amending the calculation of contributions to the Belgian deposit guarantee scheme, on the other hand[1] (hereinafter the 'draft law'), and on two draft royal decrees implementing these two chapters of the draft law (hereinafter respectively the 'draft Royal Decree on the Resolution Fund'[2] and the 'draft Royal Decree on the calculation of contributions to the DGS'[3] and, together, the 'draft royal decrees'). The ECB was requested to deliver an opinion under extreme urgency.

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[4], as the draft law and the draft royal decrees relate to NBB 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.

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1 Draft law establishing a financial stability contribution and amending the Royal Decree of 14 November 2008 implementing the Law of 15 October 2008 on measures to promote financial stability and, in particular, to set up a State guarantee for loans granted and other transactions in the context of financial stability, as regards the protection of deposits, life insurance and the capital of authorised cooperative societies, and amending the Law of 2 August 2002 on the supervision of the financial sector and on financial services.

2 Draft Royal Decree on the organisation and functioning of the Resolution Fund and defining the terms for payment of the contributions.

3 Draft royal decree implementing Article 8, § 1, 1° bis, of the Royal Decree of 14 November 2008 implementing the Law of 15 October 2008 on measures to promote financial stability and, in particular, to set up a State guarantee for loans granted and other transactions in the context of financial stability, as regards the protection of deposits, life insurance and the capital of authorised cooperative societies, and amending the Law of 2 August 2002 on the supervision of the financial sector and on financial services.

4 OJ L 189, 3.7.1998, p. 42.

1. Purpose of the draft law and the draft Royal Decrees

1.1 The draft law establishes a Resolution Fund destined to ensure the financing of measures reducing the impact of a credit institution's default on the financial system and economic and social well-being in Belgium[5]. The Resolution Fund does not aim at preventing the failure of a credit institution[6] but rather at resolving ailing entities at the lowest economic and social cost. For this purpose, the Resolution Fund will finance resolution measures such as, according to the non-exhaustive list in the Explanatory Memorandum to the draft Royal Decree on the Resolution Fund[7]: (i) a bridge bank, with the resolution authority taking over the bank, to allow an insolvent institution's operations to continue, (ii) a total or partial transfer of assets and/or liability from the ailing entity to a third party, (iii) a good bank/bad bank split, or (iv) administrative, legal and advisory expenses and the need to preserve certain vital functions of the banks, such as payment systems. The King will adopt a royal decree deliberated in the Council of Ministers, after consulting the NBB[8], to activate the Resolution Fund, i.e. to finance a resolution measure.

Belgian credit institutions will pay an annual financial stability contribution to finance the Resolution Fund[9]. It will amount to 0.022 % of the credit institution's total liabilities at 31 December of the preceding year, after deduction of (i) the deposits eligible for reimbursement by the Belgian deposit guarantee scheme (hereinafter the 'eligible deposits'), and (ii) its regulatory capital[10]. The ECB understands that the basis for calculating the financial stability contribution, which excludes eligible deposits, is conceived as an incentive to limit systemic risk related to the financing structure of credit institutions[11]. The amount used to calculate the credit institution's annual financial stability contribution is communicated to the Resolution Fund by the NBB on request[12].

The Resolution Fund will be established within the Deposit and Consignment Office (*Deposito- en Consignatiekas/Caisse des dépôts et consignations*), a government department without legal personality under the Minister for Finance. The Resolution Fund will book the financial stability contributions in a resolution reserve, whose amount will be disclosed in the annual report on the Resolution Fund[13]. The Resolution Fund will transfer the annual financial stability contributions to the Belgian Treasury[14]. The draft law imposes a sanctioned[15] duty of confidentiality for the Deposit

5 Article 2 of the draft law.

6 Explanatory Memorandum to the draft Royal Decree on the Resolution Fund, comment on Article 1, p. 2.

7 Explanatory Memorandum to the draft Royal Decree on the Resolution Fund, comment on Article 2, p. 2.

8 Second paragraph of Article 2 of the draft law.

9 Third paragraph of Article 2 and Article 3 of the draft law.

10 Second paragraph of Article 3 of the draft law.

11 Explanatory Memorandum to the draft law, pp. 2 and 3.

12 Article 7 of the draft law; Explanatory Memorandum to the draft law, comment on Article 7, p. 10.

13 Articles 3 and 4 of the draft Royal Decree on the Resolution Fund.

14 Article 3 of the draft law. These amounts will thus be integrated in the resources of the Belgian State (Explanatory Memorandum to the draft law, comment on Article 3, p. 10).

15 Article 458 of the Criminal Code.

and Consignment Office agents who may not disclose the confidential information obtained when cooperating with the Resolution Fund.

1.2 The draft law also amends the method for calculating the annual contribution to the Belgian deposit guarantee scheme[16] (hereinafter the 'contribution to the DGS'); that contribution was annulled by the Belgian Constitutional Court with effect from 1 January 2012[17]. The Constitutional Court's decision is based notably on the consideration that: (i) the amount of deposits collected from the public is not, as such, an indicator of difficulties likely to trigger the DGS' intervention, and (ii) the uniform calculation of the contribution to the DGS, notably the absence of weighting according to the risk profiles of the credit institutions, created a disproportionate prejudice for institutions that mainly finance themselves through deposit-taking activities, compared to those that have recourse to wholesale financing.

The draft law replaces the currently applicable flat fee with an annual contribution to the DGS amounting to 0.10 % of the credit institution's stock of eligible deposits at 31 December of the preceding year[18] and will be risk-weighted based on three types of risk factors: capital adequacy, quality of assets and liquidity[19]. The draft Royal Decree on the calculation of contributions to the DGS further defines the risk indicators, as well as the scores that will be applied to each of them.

2. General observations

2.1 The ECB welcomes the establishment in Belgium of a resolution fund financed by contributions from Belgian credit institutions and the amendment of the calculation of the contribution to the DGS, as part of a broader range of initiatives strengthening financial stability. The Fund regime entails the further disengagement of the State in favour of restructuring primarily financed by the banking sector[20].

2.2 The ECB understands that the provisions submitted by the Belgian authorities concerning the Resolution Fund (paragraph 1.1) and the amended contribution to the DGS (paragraph 1.2) were drafted in the light of the corresponding Union legislative initiatives[21], in accordance with the general principle of sincere cooperation and loyalty pursuant to the Treaty on European Union. This approach reduces the risk of significant divergences in national legal frameworks and the corresponding counterproductive effects. It is crucial to strive for consistency and a level playing field across the Union and to minimise market distortions by national approaches to resolution funds. Therefore, it is important to ensure that the national regime fits well into the evolving Union

16 Special Fund for Protection of Deposit and Life Insurances organised by the Royal Decree of 14 November 2008 and amended by the Law of 23 December 2009.

17 Constitutional Court, 23 June 2011, N°115/2011; Explanatory Memorandum of the draft law, pp. 4 and following.

18 Article 8 of the draft law. An additional 0.13% contribution to the DGS will be collected in 2012.

19 Article 8 of the draft law; Explanatory Memorandum to the draft law, comments on Article 8, pp. 11 to 15.

20 See Opinions CON/2010/45 and CON/2010/83.

21 These initiatives are (i) the proposal for a directive…./…../EU of the European Parliament and of the Council on Deposit Guarantee Schemes [recast], COM(2010) 368, and (ii) the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the European Central Bank, Bank Resolution Funds, 26.05.2010, COM(2010) 254 final.

framework and to provide for the possibility to adapt it to future Union and international developments.

2.3 In addition, the ECB welcomes that the draft law and the draft royal decrees accommodate several recommendations in previous ECB opinions on resolutions funds. First, the risk of double charging[22] is avoided since only credit institutions incorporated in Belgium are subject to the payment of the financial stability contribution, which does not apply to branches of foreign credit institutions in Belgium[23]. Second, there is no automatic relationship between the financial stability contributions and pay-out by the Resolution Fund[24]. The draft royal decree on the Resolution Fund provides that the financial stability contribution creates neither an entitlement by the paying credit institution to intervention by the Resolution Fund, nor a duty for the Resolution Fund to intervene[25].

3. Resolution measures that may be financed by the Resolution Fund[26]

The ECB welcomes the Resolution Fund's objective of financing resolution measures to reduce the impact of a credit institution's default on the financial system and on economic and social well-being in Belgium[27].

The draft law does not specify the resolution measures that may be financed by the Resolution Fund. Only the Explanatory Memorandum to the draft royal decree on the Resolution Fund contains a non-exhaustive list of potential measures, such as financing of a bridge bank, a total or partial asset transfer or a good bank/bad bank split[28]. The ECB recommends setting out, either in the draft law or in the draft Royal Decree on the Resolution Fund, the different types of resolution measures that may be financed by the Resolution Fund. This would enhance legal certainty and hence also benefit financial stability. The necessary flexibility can be maintained if the list of potentially eligible resolution measures is non-exhaustive.

The financing of resolution measures through the Resolution Fund is subject to strict conditions under the Union State aid framework[29], which applies to the Resolution Fund's interventions. In particular, while it might be useful to have recourse to the Resolution Fund for the management of bad assets[30], this is

22 CON/2011/66, paragraph 2.1, and the reference to the European Council's call for 'further coordination between the different levy schemes in order to avoid double-charging' (conclusions of the European Council of 28-29 October 2010, available on the Council's website at www.consilium.europa.eu).

23 Third paragraph of Article 2 of the draft law and Article 2 of the draft royal decree on the Resolution Fund. Explanatory Memorandum to the draft law, p. 3.

24 CON/2011/29, paragraph 3.2; CON/2011/66, paragraph 3.2.2.

25 Article 2 of the Draft Royal Decree on the Resolution Fund. Explanatory Memorandum to the draft law, pp. 4 and 7.

26 CON/2010/83, paragraphs 6.2 and 6.3; CON/2011/29, paragraphs 3.2 and particularly 3.4; CON/2011/93, paragraph 5.2.

27 Article 2 of the draft law.

28 Explanatory Memorandum to the draft royal decree on the Resolution Fund, comment on Article 2, p. 2.

29 See in particular the latest Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis, (OJ C 356, 6.12.2011, p. 7).

30 Explanatory Memorandum to the draft royal decree on the Resolution Fund, comment on Article 2, p. 2.

subject to strict conditions under the framework, especially regarding the pricing of the assets, in order to avoid a bailout of shareholders or creditors of the ailing bank.

4. Funding and replenishment of the Resolution Fund

The ECB welcomes an ex ante levy on the financial industry, as this protects public funds and reduces moral hazard, and is in line with the countercyclical approach of building up funds before a crisis.

However, funds provided ex ante may be insufficient in a crisis situation and public funds may also become necessary. In such a case, the banking sector should be called on to reimburse the State. The principle of ex post recovery from the banking sector should promote additional market discipline and address moral hazard risk[31]. The same principles apply to any full or partial replenishment of the Resolution Fund by the national authorities. The ECB stresses that the central bank may not finance the Resolution Fund, in line with the prohibition of monetary financing[32].

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

Done at Frankfurt am Main, 12 December 2011.

[signed]

The President of the ECB

Mario DRAGHI

31 CON/2010/83, paragraph 6.3.

32 CON/2008/59, paragraph 3.2, CON/2011/39, paragraph 3.6, and CON/2011/93, paragraph 4.3.