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EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 28 October 2008

at the request of the Belgian Minister for Finance

on a draft royal decree implementing the Law of 15 October 2008 on measures promoting financial stability and in particular establishing a State guarantee for the provision of credit in the context of financial stability, in relation to the protection of deposits and life insurance and amending the Law of 2 August 2002 on the supervision of the financial sector and on financial services

(CON/2008/61)

Introduction and legal basis

On 24 October 2008 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 Minister for Finance, for an opinion on a draft royal decree implementing the Law of 15 October 2008 on measures promoting financial stability and in particular establishing a State guarantee for the provision of credit in the context of financial stability, in relation to the protection of deposits and life insurance and amending the Law of 2 August 2002 on the supervision of the financial sector and on financial services (hereinafter the 'draft royal decree'). Given the current turbulence in the financial markets and the need for firm intervention by the authorities involved, the consulting authority has requested the ECB to provide its opinion urgently to allow the swift adoption of the draft royal decree.

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and on the sixth indent 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 royal decree relates 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 royal decree

1.1 The draft royal decree is motivated by the current turbulence in the financial markets and by the Belgian authorities' wish to take the necessary measures to preserve confidence in the financial system and, notably, to reinforce the protection of depositors and to provide for a similar protection

1 OJ L 189, 3.7.1998, p. 42.

scheme for the holders of certain life insurance products[2]. In addition, the draft royal decree identifies the institutions[3] referred to in Article 117bis 2° of the Law of 2 August 2002[4]. The ECB understands that the aim of this provision is to ensure that, were a State guarantee to be granted, its scope could be extended to all financial undertakings belonging to a consolidated group. The ECB has no further comment on this part of the draft royal decree.

1.2 Concerning the protection of depositors and the holders of certain life insurance products, the draft royal decree would:

(i) raise from EUR 20 000 to EUR 50 000 the protection for deposits[5] under the existing deposit-guarantee and investor-protection scheme managed by the Fund for the protection of deposits and financial instruments (hereinafter the 'existing Fund')[6]; and

(ii) establish a special Fund for the protection of deposits and life insurance[7] (hereinafter the 'special Fund') in order to provide clients that exercise no banking and/or financial activity[8] with:

(a) a EUR 50 000 protection for deposits[9] in addition to the abovementioned EUR 50 000 to be reimbursed by the existing Fund, i.e. total protection of EUR 100 000; and

(b) a maximum EUR 100 000 protection for certain life insurance products, i.e. life insurance products with guaranteed return pertaining to the 'branche 21' as defined in Annex 1 to the Royal Decree of 22 February 1991 (hereinafter the 'branche 21

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2 Report to the King accompanying the draft royal decree. The draft royal decree is part of the general rescue package put in place by the Belgian authorities in response to the current turbulence in the financial markets. The ECB has already been consulted by the Belgian authorities on two other draft legislative provisions adopted in this context: see ECB Opinion CON/2008/46 of 8 October 2008 at the request of the Belgian Ministry of Finance on a preliminary draft law on measures promoting financial stability and in particular establishing a State guarantee for the provision of credit in the context of financial stability, and ECB Opinion CON/2008/50 of 17 October 2008 at the request of the Belgian Ministry of Finance on a draft royal decree adopted under Article 117*bis* of the Law of 2 August 2002 on the supervision of the financial sector and on financial services. All ECB opinions are available on the ECB website, www.ecb.europa.eu.

3 Article 11 of the draft royal decree. These institutions are: financial holding companies incorporated under Belgian law, credit institutions, investment firms incorporated under Belgian law, as well as other financial undertakings belonging to a group over which the *Commissie voor het Bank-, Financie- en Assurantiewezen/Commission bancaire, financière et des assurances* exercises consolidated supervision.

4 See ECB Opinion CON/2008/50 in relation to this provision, which empowers the King to establish a system to grant a State guarantee for liabilities entered into by certain supervised institutions.

5 As defined in Article 1 of the draft royal decree. The assets that benefit from this extension are: (i) the deposits and assets covered by the existing deposit-guarantee scheme (i.e. deposits and bank savings certificates *(kasbons/bons de caisse)*, bonds and other bank debentures certificates denominated in euro or in a currency of a Member State that has not adopted the euro, as set out in Article 110bis2 §2 of the Law of 22 March 1993 on the legal status and supervision of credit institutions); and (ii) cash deposits covered by the existing investor protection scheme (i.e. deposits held on behalf of investors waiting to be refunded to the investor or used for purchasing financial instruments, as set out in Article 113 §2 second subparagraph of the Law of 6 April 1995 on the legal status and supervision of investment firms), but not financial instruments covered by the latter scheme.

6 See the Law of 22 March 1993 (Article 110 to 110 sexies), the Law of 6 April 1995 (Article 112 to 116), and the Law of 17 December 1998 establishing a fund for the protection of deposits and financial instruments and reorganising the deposit-guarantee and investor-compensation scheme.

7 Article 2 of the draft royal decree.

8 Article 4 *in fine* of the draft royal decree.

9 As defined in Article 4, 1° and 2°, of the draft royal decree.

insurance products')[10], whereby the special Fund's intervention is limited to the value of the policy as at the day preceding the insurance company's failure[11].

1.3 The special Fund would be established within the Deposit and Consignment Office (*Deposito- en Consignatiekas/Caisse des dépôts et consignations*), a government department without legal personality. Participation in the special Fund would be mandatory for those institutions that already participate in the existing Fund ('mandatory participants')[12], whereas it would be optional for life insurance undertakings authorised to offer branche 21 insurance products[13]. The special Fund would be funded by its participants[14] by means of annual contributions to be paid by all participants[15] and in addition a one-off entry fee to be paid by participating insurance companies[16]. Finally, the ECB understands that if the means available to the special Fund are insufficient for an intervention, the necessary funds will be advanced by the Deposit and Consignment Office and that this advance will be reimbursed either by: (i) allocating 50 % of the (ordinary) annual contributions to be paid by mandatory participants; or (ii) allocating a special annual contribution to be paid by participating insurance companies, depending on whether the failing institution falls within the first or the second category[17].

2. General observations

2.1 The ECB welcomes the proposed increase in the total amount of protected deposits to EUR 100 000 in accordance with the conclusions of the Ecofin Council held on 7 October 2008[18]. In this respect, the ECB would repeat that Member States must act in a coordinated manner to avoid significant differences in national implementation from having a counter-productive effect and creating distortions in global banking markets. In particular, harmonisation as regards the guaranteed amount and the duration of the guarantee are necessary within the euro area and the EU. Moreover,

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10 Article 4, 3° of the draft royal decree. These products are not covered by the existing Fund.

11 Article 5, first and second subparagraphs of the draft royal decree.

12 Article 3 §1 of the draft royal decree. The ECB understands that these mandatory participants are: credit institutions established in Belgium, investment firms established in Belgium and authorised as stock broking firms or as portfolio management and investment advice companies, UCITs management companies established in Belgium, as well as branches operating in Belgium of such entities governed by the law of another Member State where these entities have opted for optional participation in the existing Fund.

13 Article 3 §2 of the draft royal decree.

14 Article 6 to 8 of the draft royal decree.

15 Article 7 §1 of the draft royal decree, laying down a different contribution for mandatory participants (0,31 ‰ of their stock of deposits eligible for protection as at 31 December of the preceding year) and for participating life insurance companies (0.50 ‰ of the payments capitalised at the guarantee minimum interest rate, increased by profits attributed until 31 December of the preceding year).

16 Article 7 §2 of the draft royal decree (025 % of the payments capitalised at the guarantee minimum interest rate, increased by profits attributed until 31 December of the preceding year).

17 Article 8 of the draft royal decree.

18 The Council (Ecofin) agreed in its 7 October meeting that 'all Member States would, for an initial period of at least one year, provide deposit-guarantee protection for individuals for an amount of at least EUR 50 000, acknowledging that many Member States determine to raise their minimum protected amount to EUR 100 000'. See the press release of the 2894th Council meeting (13784/08), available on the Council website, www.consilium.europa.eu.

the ECB also emphasises how important it is that these measures should comply with Community law, including EC competition law[19].

2.2 The ECB notes that the draft royal decree is justified by the sudden crisis in the financial markets and that it is designed to limit the scale or effects of that crisis[20]; also that once adopted, the draft royal decree will cease to apply unless it is confirmed by a law within 12 months of its entry into force[21]. In summary, the ECB understands that the draft royal decree is an emergency measure to be adopted without prejudice to further legislative initiatives to be undertaken in Belgium, notably in the context of the ongoing work at Community level concerning further harmonisation of deposit-guarantee schemes[22].

3. Specific comments

Funding of deposit-guarantee schemes

3.1 As the ECB has already noted deposit protection is an important element of the financial safety net and contributes to safeguarding financial stability[23]. Further, as confirmed also by international standards, sound funding arrangements are critical to the effectiveness of deposit-guarantee schemes and to the maintenance of public confidence in the banking system[24]. At the same time, Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes[25] does not currently prescribe a method for financing deposit-guarantee schemes, provided that: (i) the costs of financing are borne, in principle, by credit institutions themselves; (ii) the financing capacity of the scheme is in proportion to credit institutions' liabilities; and (iii) the stability of the banking system of the Member State concerned is not jeopardised[26]. The arrangements for the special Fund should therefore be inspired by these broad principles. As confirmed by recent experience in some countries, the effectiveness of deposit-guarantee schemes depends crucially on depositors being confident that they will receive timely and sufficient compensation. Therefore, appropriate funding mechanisms should be in place to ensure the prompt reimbursement of depositors' claims.

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19 See notably ECB Opinion CON/2008/46, in particular paragraphs 2.1 and 5, and ECB Opinion CON/2008/50, paragraphs 2.2 and 3.1.

20 Article 117 *bis* 1° of the Law of 2 August 2002 on the supervision of the financial sector and on financial services. See ECB Opinion CON/2008/46 and ECB Opinion CON/2008/50, in particular. paragraph 2.1

21 Article 117 *bis*, *in fine*, of the Law of 2 August 2002.

22 See the Commission's proposal for a directive of the European Parliament and of the Council amending Directive 94/19/EC on Deposit Guarantee Schemes as regards the coverage level and the payout delay (COM(2008) 0661) (hereinafter the 'proposed amending Directive').

23 Paragraph 8 of ECB Opinion CON/2005/50 of 1 December 2005 at the request of Národná banka Slovenska on a draft law amending the Act No 118/1996 Coll. on the protection of bank deposits and on amendments to certain laws, as last amended; see also paragraph 2.5 of ECB Opinion CON/2007/26 of 27 August 2007 at the request of the Polish Minister for Finance on a draft law amending the Law on the Bank Guarantee Fund.

24 Financial Stability Forum, 'Guidance for Developing Effective Deposit Insurance Systems', September 2001, point V.4 ('Funding arrangements'), p. 26. IADI, Core Principles for Effective Deposit Insurance Systems, 29 February 2008.

25 OJ L 135, 31.5.1994, p. 5.

26 See the twenty-third recital to Directive 94/19/EC. The proposed amending Directive calls for the Commission to submit a report on a harmonisation of the funding mechanisms of deposit-guarantee schemes by 31 December 2009 to the European Parliament and the Council (see Article 1(6) of the proposed amending Directive, introducing changes to Article 12 of Directive 94/19/EC).

Prohibition on monetary financing

3.2 In line with its previous opinions, the ECB reiterates that it is important that the draft royal decree complies with the prohibition on monetary financing as laid down in the Treaty[27]. In this respect, the ECB notes: (i) that the draft royal decree specifies that if the special Fund's assets are insufficient to allow for an intervention, the Deposit and Consignment Office would advance the funds necessary to allow for reimbursement of the clients of the failing institution[28]; and (ii) that the NBB is not entrusted with the performance of any activity related to the special Fund.

Coordination with the existing scheme

3.3 The ECB notes that the draft royal decree does not define the conditions, detailed rules and limitations of the reimbursement to be made by the special Fund but delegates them to the King[29]. In this respect, the ECB welcomes the statement in the Report to the King that these conditions, detailed rules and limitations will be aligned to the greatest possible extent with those provided for in the context of the existing Fund and notes the importance of a clear framework ensuring that smooth procedures are in place to allow depositors to obtain prompt reimbursement of all their claims when both the existing and the special Funds are involved.

Consumer protection

3.4 The ECB notes that the protection of individual branche 21 insurance products by the special Fund is optional and notably depends on whether the issuing insurance company has been admitted as participant in the Fund by the Minister for Finance and has paid the requested contributions[30]. Arrangements should be in place to ensure widespread consumer awareness of the scope of the protection.

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

Done at Frankfurt am Main, 28 October 2008.

[signed]

The President of the ECB

Jean-Claude TRICHET

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27 See paragraph 3.1 of ECB Opinion CON/2008/57 of 21 October 2008 at the request of the German Ministry of Finance on a Law on the implementation of a package of measures to stabilise the financial market and an order on its implementation; see also paragraph 3.2 of ECB Opinion CON/2008/59 of 24 October 2008 at the request of the Swedish Ministry of Finance on a draft proposal on stabilising measures for the Swedish financial system. In this context, the ECB emphasises that the special Fund should not be allowed to benefit from any type of lending or overdraft facilities from the NBB. If the NBB were to perform any activities for the benefit of the special Fund, these activities would also need to comply with the above prohibition as far as the remuneration of such activities is concerned. Similarly, the ECB notes that as the special Fund has no legal personality, it will not be in a position to issue debt instruments.

28 Article 8 of the draft royal decree. The Report to the King further clarifies that if necessary, the Deposit and Consignment Office may borrow the necessary funds from the Belgian Debt Agency (*Agentschap van de Schuld/Agence de la dette*).

29 Article 5, *in fine*, of the draft royal decree.

30 Article 3 §2 of the draft royal decree.