EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 18 April 2011

on strengthening the governance of De Nederlandsche Bank and the Authority for the Financial Markets

(CON/2011/37)

Introduction and legal basis

On 28 February 2011, the European Central Bank (ECB) received a request from the Dutch Minister for Finance for an opinion on the draft law on strengthening the governance of De Nederlandsche Bank and the Authority for the Financial Markets (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 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 De Nederlandsche Bank (DNB). 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

The draft law will amend the 1998 Law on the Bank and the Law on financial supervision with a view to strengthening the governance of the financial markets supervisory authorities, i.e. DNB and the Authority for the Financial Markets (hereinafter collectively referred to as the 'supervisory authorities').

The main issues addressed by the draft law are: (a) the expansion of the tasks of the supervisory boards of the supervisory authorities; (b) the limitation on the number of reappointments of the Governing Board members of the supervisory authorities; (c) the introduction of general profiles, job profiles and fit and proper tests.

The draft law aims to enhance DNB's governance by further improving internal 'checks and balances' to ensure sufficient safeguards within DNB to allow for conscientious decision-making. For this reason, the draft law amends the 1998 Law on the Bank and the Law on financial supervision, in a way which takes account of DNB's independence, based on the requirements of the Treaty and the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB').

1 OJ L 189, 3.7.1998, p. 42.

2. Amendments under the draft law

2.1 *The role of DNB's Supervisory Board*

2.1.1 The ECB considers the provisions relating to the enhanced role of DNB's Supervisory Board to be positive and in line with governance-related developments in general. The provisions ensure that the relevant requirements follow current governance standards.

2.1.2 One of the Supervisory Board's new tasks is to draw up Governing Board profiles. There are two kinds of profiles. The first is a general profile or profile sketch to be drawn up under Article 1:27a (4) of the Law on financial supervision, which requires the Minister's approval. This profile will rely, to the extent deemed appropriate, on the general fit and proper criteria used for financial entities. The Supervisory Board will further refine these criteria, but will not go into detail as regards specific functions within the Governing Board. The second profile is the job profile referred to in Article 12(3) of the draft law. This profile will be based on the general profile and specify the suitability requirements and nature of the activities to be carried out for a specific function within the Governing Board. In this regard, the draft law's explanatory memorandum states that the job profile may set out the particular expertise, experience and skills needed for the relevant function[2]. In drawing up such profiles, care should be taken to ensure that the job profiles establish objective and clearly defined criteria related to the performance of duties in order to guarantee a level playing field for all qualified candidates.

2.1.3 It is also important that any profiles to be drawn up will only apply to future Governing Board members, and not to current ones.

2.1.4 The ECB understands that in supervising DNB's general affairs, the Supervisory Board will not interfere with policy implementation, i.e. decisions on individual cases. The ECB understands from the draft law's explanatory memorandum[3] that DNB's monetary policy and payment transactions, in implementation of its central bank tasks regulated under Article 3 of the 1998 Law on the Bank, fall outside the scope of the Supervisory Board's internal supervision. Consequently, such supervision will not interfere with the performance of Eurosystem-related tasks. Indeed, supervision should never interfere with the performance of any Eurosystem-related tasks provided for by the Treaty.

2.1.5 Furthermore, Article C of the draft law, which amends Article 13 of the 1998 Law on the Bank, requires the Supervisory Board to perform its internal supervision role with due regard to the provisions of the Treaty and the Statute of the ESCB. Hence, this provision covers the requirement for Eurosystem-related tasks to be performed independently. In this respect, the ECB also notes that the Supervisory Board is bound by the confidentiality clause of Article 20 of the 1998 Law on the Bank, so that confidentiality is guaranteed.

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2 See the draft law's explanatory memorandum, p. 8.

3 See the draft law's explanatory memorandum, p. 11.

2.2 *DNB's Governing Board*

2.2.1 Article 12(4) of the 1998 Law on the Bank addresses the dismissal of DNB's President and Executive Directors who are all members of DNB's Governing Board. The ECB understands that job profiles are relevant for the appointments and potential re-appointments of board members. Article 12(4) of the draft law now provides for the grounds of dismissal of the President and the Executive Directors in accordance with Article 14.2 of the Statute of the ESCB. While the ECB reiterates its support for objective profiles, any changes to a profile on the basis of which a member of the Governing Board was appointed would not qualify as a legally valid justification for the dismissal of that Governing Board member insofar as she/he does not comply with the terms of an amended profile. Hence, the ECB welcomes the fact that this is expressly stated in the draft law's explanatory memorandum.

2.2.2 Finally, the ECB notes that Article 12(4) provides for both the possibility of removal from office and suspension of DNB's President and Executive Directors. In this respect, the wording of Article 12(4) is different to the wording of Article 14.2 of the Statute of the ESCB and equivalent provisions in the statutes of other national central banks. The ECB understands that the grounds for the suspension of DNB's President and Executive Directors are the same as those for their removal, and these are in line with Article 14.2 of the Statute of the ESCB. Consequently, to avoid any misunderstanding, the ECB advises the consulting authority to use this opportunity to fully align the wording of Article 12(4) with that of Article 14.2 of the Statute of the ESCB.

2.2.3 The ECB understands that the allocation of tasks among one or more Governing Board members as proposed under Article 12a(1) of the draft law aims to make DNB more efficient. The ECB expects to be consulted with respect to the implementation of Article 12a(1) pursuant to DNB's Articles of Association. It is important that the allocation of tasks among the members of the Governing Board must not result in a situation where decisions affecting the financial resources of the central bank necessary for the performance of Eurosystem-related tasks will be taken independently from the control of the Governing Board as a collective decision-making body.

3. Amendments to the Law on financial supervision

3.1 *Sound governance of supervision*

It is important that the provisions set out in Article 1:25b of the proposed amendment to the Law on financial supervision are implemented while fully taking into account the internationally agreed principles of operational independence and sound governance of supervision.

3.2 *Budget approval*

3.2.1 Article II(E) of the draft law adds new paragraph 5 into Article 1:30 of the Law on financial supervision under which the Minister for Finance may withhold budget approval if the budget is contrary to law or public interest. The ECB understands that the budget within the framework of the

Law on financial supervision only concerns the supervisory tasks of the supervisory authorities[4]. However, the concepts 'contrary to law' and 'public interest' are very broad and might indirectly also impact DNB's financial independence as regards its Eurosystem-related tasks. To safeguard DNB's financial independence, the law should provide a safeguard clause so that the power of the Minister for Finance to withhold the approval of the budget and to set further criteria for the exercise of such powers is without prejudice to the financial means necessary for carrying out DNB's Eurosystem-related tasks[5].

It is important that the provisions set out in Article 1:30(5) of the proposed amendment to the Law on financial supervision are implemented while fully taking into account the internationally agreed principles of operational independence and sound governance of supervision.

3.2.2 In addition, the draft law's explanatory memorandum[6] only refers to international principles which require that supervisors always have sufficient means to carry out their supervisory tasks. The ECB would like to see explicitly stated that in further elaborating the criteria referred to in the first sentence of Article 1:30(5), the Minister will, in particular, take into account the fact that DNB will always need to have sufficient means to carry out its tasks.

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

Done at Frankfurt am Main, 18 April 2011.

[signed]

The President of the ECB

Jean-Claude TRICHET

4 See Article 1:30 (1) of the Law on financial supervision.

5 ECB's Convergence Report May 2010, p. 22.

6 See the draft law's explanatory memorandum.