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EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 4 November 2009

on the ranking of the lien of the Nationale Bank van België/Banque Nationale de Belgique

(CON/2009/90)

Introduction and legal basis

On 21 September 2009 the European Central Bank (ECB) received a request from the Belgian Ministry of Finance for an opinion on a draft law amending, *inter alia*, the Law of 22 February 1998 establishing the Organic Statute of the Nationale Bank van België/Banque Nationale de Belgique (NBB) (hereinafter the 'draft law'). By letter dated 30 October 2009, the Belgian Deputy Prime Minister and Minister of Finance informed the ECB that the Belgian Government had decided to introduce before the Belgian Parliament an amendment withdrawing Article 89 of the draft law concerning the retirement age of the NBB's Governor. In the light of this withdrawal, this opinion does not comment on the related issue.

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and on the third, fifth 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 (a) national central banks; (b) payment and securities settlement systems; and (c) 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 law

The draft law relates to the lien granted to the NBB over all securities held by the debtor in an account with the NBB or in its securities clearing system as the debtor's own assets in order to secure claims arising from the NBB's credit transactions[2]. The Law of 22 February 1998 currently provides that this lien ranks equally with the rights of the pledgee. According to the draft law, it would prevail over the rights granted to individual account holders by virtue of the Belgian laws governing the immobilisation

1 OJ L 189, 3.7.1998, p. 42.

2 See Article 7 of the Law of 22 February 1998, which provides that the NBB is granted a lien covering claims arising from credit transactions over all securities which the debtor holds in an account with the NBB or in its securities clearing system as the debtor's own assets. See ECB Opinion CON/2006/40; all ECB opinions are published on the ECB website at www.ecb.europa.eu.

and dematerialisation of securities in order to protect them against the insolvency of the financial intermediaries through which they hold the accounts[3] [4]. According to the explanatory memorandum, this amendment would not introduce a new substantive rule: the NBB's lien, similar to other cases of liens, relies on the possession by the NBB of the assets subject to the lien, which would derive from the crediting of the securities to an account held with the NBB. On the ground of such possession, the NBB's lien would hence prevail over the concurrent rights of the abovementioned account holders which are specifically enumerated in the draft law. In this vein, the priority of the NBB's lien over the other creditors' rights would be a mere confirmation in the draft law, for reasons of legal certainty, of the application of general principles of security law[5].

2. Ranking of the NBB's lien

2.1. Under Article 18 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'), credit operations conducted by the national central banks (NCBs) must be based on adequate collateral. Moreover, pursuant to Standard 1 of the 'Standards for the Use of EU Securities Settlement Systems in ESCB Credit Operations' (hereinafter the 'User Standards') the NCBs' rights in respect of securities held in their accounts in securities settlement systems must be adequately protected[6]. This principle has been further elaborated in the Recommendations for Securities Settlement Systems issued in November 2001 by the Committee on Payment and Settlement Systems (CPSS) and the International Organization of Securities Commissions (IOSCO). Section 3.5 of the CPSS-IOSCO Recommendations states that 'the claim of the SSS ... against collateral posted by a participant with the SSS should in all events have priority over the claims of such participant's non-system creditors'. Otherwise, as the ESCB-Committee of European Securities Regulators Recommendation 1 on the legal framework provides[7]: 'If the framework is inadequate or its application uncertain, it can give rise to credit or liquidity risks for system participants and their customers or to systemic risks for financial markets as a whole.'

2.2. In view of the above, the ECB welcomes the draft law, insofar as Article 7(2) of the Law of 22 February 1998 would provide that the preferential claim secured by the NBB's lien has priority over the counterparty's creditors' claims based on Article 8(3) of the Law of 2 January 1991 on the market in public debt securities and monetary policy instruments, Articles 12(4) and 13(4) of Royal Decree No 62 on the deposit of fungible financial instruments and the settlement of operations concerning those instruments, coordinated by the Royal Decree of 27 January 2004, and

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3 See Article 8(3) of the Law of 2 January 1991 on the market in public debt securities and monetary policy instruments, Articles 12(4) and 13(4) of Royal Decree No 62 on the deposit of fungible financial instruments and the settlement of operations concerning those instruments, coordinated by the Royal Decree of 27 January 2004, and Article 471(4) of the Companies Code.

4 See Article 88 of the draft law.

5 See the explanatory memorandum, commentary on Article 88.

6 See in this sense paragraph 8 of ECB Opinion CON/2005/12 and section 1 of ECB Opinion CON/2006/40.

7 See especially the comments made in section C.1 of this Recommendation.

Article 471(4) of the Companies Code. This amendment would, moreover, improve the transparency of risks and the risk management procedures of the securities clearing system operated by the NBB (see Standards 5 and 6 of the User Standards). Finally, at a time of financial turmoil, it is of the utmost importance that the NCBs of the Eurosystem can discharge their duties in an environment which strives for legal soundness and certainty in line with international standards.

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

Done at Frankfurt am Main, 4 November 2009.

[signed]

The President of the ECB

Jean-Claude TRICHET