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EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 25 March 2009

at the request of the Belgian Ministry of Finance
on a draft law amending the Law of 2 August 2002 on the supervision of the financial sector and on financial services

(CON/2009/29)

Introduction and legal basis

On 18 March 2009 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 2 August 2002 on the supervision of the financial sector and on financial services (hereinafter the 'draft law'). 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 as a matter of extreme urgency to allow the swift adoption of the draft law.

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 law 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 law

1.1 In the context of the current financial market crisis, the draft law extends in two respects the scope of the measures that, under Article 117*bis* of the Law of 2 August 2002 on the supervision of the financial sector and on financial services[2], the King is empowered to take, after consulting the

1 OJ L 189, 3.7.1998, p. 42.

2 Concerning Article 117*bis* of the Law of 2 August 2002, 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, in particular paragraphs 1.1, 2.1 and 5; 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, in particular paragraph 2.1. All ECB opinions are available on the ECB website at www.ecb.europa.eu.

Financial Stability Committee, in the event of a sudden crisis on the financial markets or of a serious threat of systemic crisis, in order to limit the scale or effects thereof.

1.2 *First*, the draft law adds three legislative acts to the list of financial sector legislation which can be complemented or derogated from by regulations adopted by the King. These three legislative acts govern in particular the holding of dematerialised and immobilised securities[3]. The draft law will allow the King to amend these legislative acts in order to enhance the protection of depositors of dematerialised or fungible financial instruments held with a financial intermediary that becomes insolvent with regard to certain legal risks revealed in the context of the current financial crisis and in particular by the Lehman bankruptcy[4].

1.3 *Second*, the draft law provides that, in addition to guarantees for the liabilities of supervised institutions[5], the King may also establish a system to grant the guarantee of the Belgian State for:

(i) certain claims *(schuldvorderingen/créances)* held by supervised financial institutions[6]. Reference is made, for example, to the loans granted by Fortis Bank to a special purpose vehicle established to acquire part of its structured products portfolio[7];

(ii) the repayment to natural persons who are partners of a cooperative company (*coöperatieve vennootschapp*/*société cooperative*) of their shares in such a company, provided it is a supervised institution or that at least half of its assets are invested in a supervised institution[8]. The aim of this provision is to ensure that the shares issued by such cooperative companies enjoy similar protection to that put in place for other substitutes for savings (i.e. deposits and 'branche 21' insurance products[9]) insofar as such shares have the same characteristics as savings (i.e. offering a regular return and guaranteeing the repayment of the invested capital on demand, subject to limited constraints)[10].

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3 New Article 117*bis*, first subparagraph 1°, of the Law of 2 August 2002. These legislative acts are: (i) the Law of 2 January 1991 on the market in public debt securities and on the monetary policy instruments; (ii) Book VIII, Title III, Chapter II, Section III of the Companies Code; and (iii) Royal Decree No 62 on the deposit of fungible financial instruments and the settlement of transactions involving such instrument coordinated by the Royal Decree of 27 January 2004.

4 Explanatory memorandum, comment on the new Article 117*bis*, first subparagraph 1°, of the Law of 2 August 2002.

5 Current Article 117*bis*, first subparagraph, (2°), of the Law of 2 August 2002, which is the legal basis for (i) the Royal Decree of 16 October 2008 (see Opinion CON/2008/50), and for the Royal Decree of 10 December 2008 (see ECB Opinion CON/2008/74 of 21 November 2008 at the request of the Belgian Ministry of Finance on a draft royal decree on the guarantee for certain risks assumed by financial institutions), which is to be amended shortly (on the draft amending royal decree see ECB Opinion CON/2009/25 of 19 March 2008 at the request of the Belgian Ministry of Finance on a draft royal decree amending the Royal Decree of 10 December 2008 on the guarantee for certain risks assumed by financial institutions).

6 New Article 117*bis*, first subparagraph 2°, of the Law of 2 August 2002.

7 Explanatory memorandum, comment on the new Article 117*bis*, first subparagraph 2°, of the Law of 2 August 2002.

8 New Article 117*bis*, first subparagraph 3°, of the Law of 2 August 2002.

9 See ECB Opinion CON/2008/61 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.

10 Explanatory memorandum, comment on the new Article 117*bis*, first subparagraph 3°, of the Law of 2 August 2002.

(iii) losses incurred by supervised institutions on certain assets (e.g. in the context of an asset protection scheme, losses on a portfolio of toxic assets that exceed a certain threshold)[11] or liabilities taken on by entities whose business is to acquire and manage assets held by supervised institutions (e.g. a guarantee granted to a 'bad bank', a special purpose vehicle created to acquire a portfolio of toxic assets held by supervised institutions)[12]. These two amendments are justified by the fact that similar measures have been put in place or are currently being considered in other countries and by the similarity of market expectations in different countries[13].

(iv) the liabilities taken on by *Gemeentelijke Holding NV/Holding Communal SA*[14].

2. General observations

2.1 The ECB has already delivered opinions on several elements of the general rescue package put in place by the Belgian authorities in response to the current turbulence in the financial markets[15]. All the comments and recommendations made in its previous opinions given in this context, and especially in Opinion CON/2008/46 and Opinion CON/2008/50, apply equally to the draft law.

2.2 As a general matter, it is important to ensure that the draft law and any subsequent implementing royal decrees fully comply with the relevant provisions of Community law, including competition and State aid rules. In particular, it is important that national authorities should seek to coordinate their responses to the current financial situation with their European Union partners. This is in line with the Declaration of 12 October 2008 on a concerted European action plan of the euro area countries made at the summit of the euro area Member States in Paris, which stressed the need for the Member States to 'act in a united manner and avoid that national measures adversely affect the functioning of the single market and the other Member States'[16]. Certain instruments have been adopted with the aim of guiding Member States when designing support measures to alleviate the tensions on the financial markets that can be relevant in the context of the draft law[17] and the ECB

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11 New Article 117*bis*, first subparagraph 4°, of the Law of 2 August 2002 and the comment on this provision in the Explanatory memorandum.

12 New Article 117*bis*, first subparagraph 5°, of the Law of 2 August 2002 and the comment on this provision in the Explanatory memorandum.

13 Explanatory memorandum, comment on the new Article 117*bis*, first subparagraph 4° and 5°, of the Law of 2 August 2002.

14 Article 117*bis*, first subparagraph 6°, of the Law of 2 August 2002.

15 The ECB has been consulted by the Belgian authorities on six other draft legislative provisions adopted in this context: (i) Opinion CON/2008/46; (ii) Opinion CON/2008/50; (iii) Opinion CON/2008/61; (iv) Opinion CON/2008/74; (v) ECB Opinion CON/2008/91 of 22 December 2008 at the request of the Belgian Ministry of Justice on a draft law aimed at enhancing the rules on the functioning of company bodies, in particular by introducing into the Companies Code provisions regarding a corporate governance statement and the establishment of a remuneration committee, by limiting severance payments for certain company representatives and by reforming the system of statutory disabilities in the banking and financial sector; and (vi) Opinion CON/2009/25.

16 See the Declaration of 12 October 2008, available on the website of the French Presidency, www.ue2008.fr.

17 See (i) the Recommendations of the Governing Council of the European Central Bank on government guarantees for bank debt, 20 October 2008, available on the ECB's website at www.ecb.europa.eu; (ii) Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, (OJ C 270, 25.10.2008, p. 8); (iii) the Eurosystem's Guiding principles for bank asset

recommends the consulting authority to take these into account when adopting measures pursuant to the enabling clauses in the draft law in order to ensure the existence of a level playing-field within the euro area. It is noted, in this respect, that royal decrees adopted pursuant to Article 117*bis* of the Law of 2 August 2002 are subject to the duty to consult the ECB under Article 105(4) of the Treaty when they fall within the ECB's advisory competences.

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

Done at Frankfurt am Main, 25 March 2009.

[signed]

The President of the ECB

Jean-Claude TRICHET

support schemes, 25 February 2009; and (iv) Commission Communication of 25 February 2009 on the treatment of impaired assets in the Community banking sector.