



OPINION OF THE EUROPEAN CENTRAL BANK
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
(CON/2008/46)

Introduction and legal basis

On 3 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 Ministry of Finance, for an opinion 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 (hereinafter the ‘draft law’). Given the current turbulence in the international financial markets, the consulting authority has requested the ECB to provide its opinion urgently to allow the draft law to be adopted as quickly as possible.

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 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 provisions¹, as the draft law relates to the NBB and to the 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 The draft law is motivated by the current financial market crisis and by the willingness of the Belgian authorities to reinforce the means available to them to take measures with a view to preserving confidence in the national financial system². *First*, the draft law introduces into Belgian law a legal basis empowering the King³ (hereinafter the ‘Belgian executive’) to take any urgent measures with a view to preserving the stability of the financial system⁴. The Belgian executive may, after consulting the Financial Stability Committee, take any measure to preserve the stability

¹ OJ L 189, 3.7.1998, p. 42.

² See the explanatory memorandum to the draft law, p. 1.

³ The reference to the King is understood as a reference to the Belgian Government.

⁴ Article 2 of the draft law, introducing a new Article 117bis into the Law of 2 August 2002 on the supervision of the financial sector and on financial services.

of the financial system in the event of a sudden financial market crisis or of a serious threat of a systemic crisis, including temporary derogations from certain prudential laws applicable to the financial sector⁵. *Second*, the draft law establishes a State guarantee covering the NBB for credits extended in the context of the NBB's contribution to financial stability under its organic law⁶ and provides to this end that 'the State shall ... guarantee to the [NBB] the repayment of any credit granted in the context of its contribution to the stability of the financial system and shall guarantee the [NBB] against any loss due to any transaction necessary in this respect'⁷. This provision of the draft law would enter into force retroactively, on 28 September 2008. The Belgian authorities consider this retroactivity justified by the circumstance that it is 'indispensable to safeguarding financial stability that the [NBB] [was] able to grant emergency liquidity with a State guarantee on 29 September 2008'⁸.

- 1.2 The draft law aims at remedying certain ambiguities in the NBB Law created by the distinction made currently in the structure of the NBB Law between tasks that are within the domain of the European System of Central Banks (ESCB) and tasks which are not, which the draft law proposes should no longer be made⁹. In this context, the draft law clarifies for instance that the lien granted to the NBB under the NBB Law¹⁰ is not limited to the NBB's claims arising from credit transactions carried out in the context of its ESCB-related tasks but also applies in the context of its non ESCB-related tasks¹¹.

2. General observations

- 2.1 The application of the special powers granted to the Belgian executive under the draft law with a view to preserving the stability of the financial system requires the adoption of royal decrees¹². Although the ECB understands that, under the draft law, these draft royal decrees are intended to be adopted under a 'fast-track' procedure and will not for instance require the opinion of the Belgian Council of State, this does not prejudice the duty to consult the ECB under Article 105(4) of the Treaty on such draft royal decrees, should they fall within the ECB's advisory competences.
- 2.2 As already mentioned in a recent ECB opinion on another draft national law relating to emergency measures arising out of the current financial turmoil¹³, the ECB is of the view that it is important

5 The laws concerned, as listed in Article 2 of the draft law, are as follows: (i) the Law of 22 March 1993 on the status and supervision of credit institutions; (ii) the Law of 6 April 1995 on the status and supervision of investment firms; and (iii) the Law of 2 August 2002 on the supervision of the financial sector and on financial services.

6 See Article 12 of the Law of 22 February 1998 establishing the organic statute of the Nationale Bank van België/Banque Nationale de Belgique (hereinafter the 'NBB Law').

7 Article 6 of the draft law amending Article 9 of the NBB Law.

8 See the commentary on Article 12 in the explanatory memorandum to the draft law, p. 7.

9 See especially Articles 3 and Articles 8 to 11 of the draft law concerning the structure of the NBB Law, as well as Article 7 of the draft law.

10 Under Article 7, first subparagraph, of the NBB Law, '[the NBB]'s claims arising from credit transactions shall entail a preferential claim on all securities which the debtor holds in an account with the [NBB] or in its securities clearing system as his own assets.'

11 Article 2bis of the draft law.

12 Proposed Article 117bis, second paragraph of the Law of 2 August 2002.

13 See ECB Opinion CON/2008/44 of 3 October 2008 at the request of the Irish Minister for Finance on a draft Credit Institutions (Financial Support) Bill 2008.

for national authorities to seek to coordinate their responses to the current financial situation with their EU partners. As a general matter, the ECB wishes to underline the importance it attaches to ensuring that the draft law, and any subsequent royal decrees, fully comply with the relevant provisions of Community law, including State aid rules.

3. Provision of emergency liquidity assistance by national central banks

- 3.1 One of the specific tools available to central banks in a crisis situation is the provision of emergency liquidity assistance to individual banks¹⁴. This tool consists of liquidity assistance provided by central bank in exceptional circumstances and on a case-by-case basis to temporarily illiquid but solvent institutions.
- 3.2 The extension of emergency liquidity assistance falls within the NBB's task of contributing to the stability of the financial system, which is set out in Article 12 of the NBB Law. Under the draft law, the State must guarantee to the NBB the repayment of any credit granted in the context of its contribution to the stability of the financial system and must guarantee the NBB against any loss due to any transaction necessary in this respect. The ECB notes that, in the explanatory memorandum to the draft law, the particular responsibility of the NBB in the event of a crisis is highlighted since, as the lender of last resort in the national financial system, it must evaluate if it is going to assist banks in difficulty by providing emergency liquidity. It is also pointed out that providing such emergency liquidity is an autonomous decision that the NBB must be in a position to take in exceptional circumstances and complete independence¹⁵.
- 3.3 As expressed in a recent opinion regarding another draft national law addressing the provision of emergency liquidity assistance by a Eurosystem central bank¹⁶, the ECB is of the view in this case that the draft law should unequivocally ensure the NBB's independence to decide on the provision of emergency liquidity assistance. To this end, the draft law should stipulate that the same degree of independence is granted to the NBB as regards the provision of emergency liquidity assistance as with respect to the performance of its ESCB-related tasks¹⁷.
- 3.4 The ECB notes that, except as regards tasks and transactions within the domain of the ESCB, Article 22(1) and 22(2) of the NBB Law provide for the possibility for the Minister of Finance (or their representative) to suspend and/or oppose transactions, measures and/or decisions adopted by the NBB which are contrary to the NBB Law, the NBB's statutes or the interests of the State. In this context and in view of the need to ensure the NBB's full independence in providing emergency liquidity assistance, the ECB would like to take the opportunity of this consultation to draw the attention of the Belgian authorities to the need to clarify these provisions, for instance by expressly excluding Article 12 of the NBB law from their scope.

¹⁴ See the ECB Financial Stability Review, December 2006, pp.171-172 and the ECB's Annual Report 1999, p. 98.

¹⁵ See the explanatory memorandum to the draft law, p. 2.

¹⁶ See ECB Opinion CON/2008/42 of 10 September 2008 at the request of the Banque centrale du Luxembourg on amendments to the draft law improving the legislative framework for Luxembourg as a financial centre and amending the Law of 23 December 1998 on monetary status and on the Banque centrale du Luxembourg, paragraphs 4.9 to 4.11.

¹⁷ Alternatively, a reference to the same level of independence as provided for in Article 108 of the Treaty could be considered (see ECB Opinion CON/2008/42, paragraph 4.11, footnote 20).

4. State guarantee and the prohibition on monetary financing

- 4.1 The monetary financing prohibition, as defined in Article 101 of the Treaty, is essential to ensure that the primary objective of monetary policy, namely to maintain price stability, is not impeded. Therefore, the prohibition must be interpreted extensively in order to ensure its strict application. It is noted that, under Article 237(d) of the Treaty, the ECB is entrusted with the task of monitoring the compliance of the NCBs with the prohibition on monetary financing¹⁸ and, as pointed out in a recent opinion, it is important, in the case of emergency liquidity assistance supported by a State guarantee, to provide for appropriate legal safeguards in terms of central bank independence and compliance with the monetary financing prohibition¹⁹.
- 4.2 The provision of emergency liquidity assistance is a central bank function, which consists in giving support in exceptional circumstances and on a case-by-case basis to temporarily illiquid but solvent credit institutions²⁰. However, it is the ECB's view that 'national legislation foreseeing the financing by NCBs of credit institutions other than in connection with central banking tasks (such as monetary policy, payment systems or temporary liquidity support operations), in particular to support insolvent credit and/or other financial institutions, is incompatible with the monetary financing prohibition'²¹. In this respect the ECB notes the clarification contained in the explanatory memorandum to the draft law, which states that a central bank extension of financial support to an insolvent financial institution must be considered as a form of prohibited monetary financing²². The ECB is of the view that this clarification should be contained in the draft law itself. In the same vein, it would be advisable to introduce into the draft law a direct reference to the prohibition on monetary financing as defined in Community law or alternatively to Article 101 of the Treaty²³.
- 4.3 Under the draft law, the State must guarantee to the NBB the repayment of any credit granted in the context of the NBB's contribution to the stability of the financial system and it must guarantee the NBB against any loss due to any transaction necessary in this respect. In order for emergency liquidity assistance provided with a State guarantee as collateral, as provided for in the draft law, to comply with the monetary financing prohibition, the following criteria should be met. *First*, as regards the need for the NBB to independently exercise full discretion regarding the decision whether to extend emergency liquidity assistance, the ECB notes that the NBB will take its decision fully independently, see however paragraphs 3.3 and 3.4, and that, while the NBB and the Commissie voor het Bank-, Financie- en Assurantiewezen/Commission Bancaire, Financière et des Assurances must inform the Minister for Finance in the event of a crisis endangering the financial

18 See Article 237(d) of the Treaty.

19 Since 2006, the ECB's Convergence Report has included an assessment of the compatibility of national legislation with the monetary financing prohibition.

20 See ECB Opinion CON/2008/42, footnote 16.

21 See the ECB's Convergence Report May 2006, p. 68; the Convergence Report December 2006, p. 30; the Convergence Report May 2007, p. 22 and the Convergence Report May 2008, p. 24, all of which are available on the ECB's website at www.ecb.europa.eu.

22 See the explanatory memorandum to the draft law, p.3.

23 ECB Opinion CON/2008/42, paragraph 4.11.

sector, the State guarantee is nevertheless granted *ex ante* under the draft law²⁴ and provided automatically without the need for any prior agreement of the Minister for Finance. *Second*, it should be ensured that the credit provided by the NBB is as short term as possible. The ECB would welcome any clarification in this regard, at least in the explanatory memorandum to the draft law. *Third*, there must be systemic stability aspects at stake. In the present case, the ECB understands that the granting of the above credit would be part of the NBB's statutory contribution to the stability of the financial system. *Fourth*, there must be no doubts as to the legal validity and enforceability of the State guarantee under Belgian law. In this respect, the ECB welcomes the fact that the establishment of the State guarantee is enshrined in the draft law. *Fifth*, there must be no doubts as to the economic adequacy of the State guarantee, which should cover both principal and interest on the loans, thus fully preserving the financial independence of the NBB. The State guarantee in this case is very broad since it covers any losses related to any operations necessary in the context of the NBB's contribution to financial stability.

5. Financial stability and exceptional derogations from supervisory rules

Under the draft law, the Belgian executive may take any measure to preserve the stability of the financial system in the event of a sudden financial market crisis or of a serious threat of a systemic crisis, including temporary derogations from the supervisory rules applicable to the financial sector²⁵. The ECB is of the view that this broad provision might be further clarified with a view to enhancing legal certainty and to ensuring its compatibility with Community law. Moreover, and as mentioned above, measures which are adopted with the aim of safeguarding financial stability should involve cooperation with the relevant authorities of the Member States, in line with applicable Community legislation and the arrangements in place, such as the Memorandum of Understanding on cooperation between the financial supervisory authorities, central banks and finance ministries of the European Union on cross-border financial stability²⁶. The ECB would also favour the adoption of common policy solutions at the European level on these issues rather than uncoordinated national legislative initiatives. The ECB is of the opinion that national law should expressly include this need for coordination at the European level.

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

Done at Frankfurt am Main, 8 October 2008.

[signed]

The President of the ECB

Jean-Claude TRICHET

²⁴ See the explanatory memorandum to the draft law, p. 4.

²⁵ See Article 2 of the draft law. The laws concerned are the following: (i) the Law of 22 March 1993 on the status and supervision of credit institutions; (ii) the Law of 6 April 1995 on the status and supervision of investment firms; and (iii) the Law of 2 August 2002 on the supervision of the financial sector and on financial services.

²⁶ As published on the ECB website, www.ecb.europa.eu.