

OPINION OF THE EUROPEAN CENTRAL BANK

of 17 November 2016

on a draft law abolishing the State guarantee provided in connection with emergency liquidity assistance

(CON/2016/55)

Introduction and legal basis

On 19 October 2016, the European Central Bank (ECB) received a request from the Governor of the Nationale Bank van België/Banque Nationale de Belgique (NBB), on behalf of the Minister of Finance, for an opinion on a draft law amending the Law of 22 February 1998 establishing the Organic Statute of the Nationale Bank van België/Banque Nationale de Belgique (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 and sixth indents of Article 2(1) of Council Decision 98/415/EC¹, since the draft law concerns the NBB and contains 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 abolishes the State guarantee extended to the NBB in respect of the repayment of credit granted in the context of its contribution to the stability of the financial system and the coverage of any losses due to any operations necessary in this respect.
- 1.2 This guarantee was introduced by the Law of 15 October 2008 on measures to promote financial stability and, in particular, setting up a State guarantee for loans granted and other transactions in the context of financial stability, which was enacted in the context of the financial crisis. In its Decision of 28 December 2012 on State aid implemented by the Kingdom of Belgium in favour, inter alia, of Dexia and Belfius², the Commission found that in providing such a guarantee in connection with emergency liquidity assistance (ELA), Belgium had unlawfully implemented aid in the form of ELA in breach of Article 108(3) of the Treaty. However, the Commission ultimately decided that this combination of ELA with a State guarantee was compatible with the internal

¹ Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

² Commission Decision of 28 December 2012 on State aid SA.33760 (12/N-2, 11/C, 11/N); SA.33763 (12/N-2, 11/C, 11/N); SA.33764 (12/N-2, 11/C, 11/N); SA.30521 (MC 2/10); SA.26653 (C9/09); SA.34925 (12/N-2, 12/C, 12/N); SA.34927 (12/N-2, 12/C, 12/N); SA.34928 (12/N-2, 12/C, 12/N) implemented by the Kingdom of Belgium, the French Republic and the Grand Duchy of Luxembourg in favour of Dexia, DBB/Belfius and DMA (notified under document C(2012) 9962) (2014/189/EU) (OJ L 110, 12.4.2014, p. 1).

market as it was intended to remedy a serious disruption to the economy, and could therefore be maintained provided that the guarantee was limited in its scope and duration in accordance with the Commission's Decision.

- 1.3 As explained in the preparatory work of the draft law³, the main objective of the draft law is to ensure that the ELA extended by the NBB no longer constitutes State aid within the meaning of Article 107(1) of the Treaty. As a consequence, the NBB may extend ELA without the need either to obtain the Commission's prior approval or to apply burden-sharing measures as between shareholders and subordinated creditors, which the Commission's Banking Communication stipulates as a condition in order for State aid to be regarded as compatible with the internal market⁴. The preparatory work emphasises the significant operational risk posed by the prior implementation of such burden-sharing measures. In abolishing the State guarantee for ELA, the draft law bolsters the NBB's autonomy and allows it to act in a swift and timely manner as a lender of last resort. The preparatory work of the draft law notes that this change is without prejudice to the right of the King⁵ (hereinafter the 'Belgian executive') under subparagraph 2 of subsection 1 of Article 36/24 of the Law of 22 February 1998 establishing the Organic Statute of the Nationale Bank van België/Banque Nationale de Belgique (hereinafter the 'Law of 22 February 1998') to issue, on the NBB's advice, an ad hoc guarantee in the event of a sudden crisis in the financial markets or a serious risk of systemic crisis, in order to limit the extent or impact thereof.

2. General observations

- 2.1 Euro area credit institutions may receive central bank credit not only through monetary policy operations, but exceptionally also through ELA. The provision of ELA means the provision by a Eurosystem national central bank (NCB) of central bank money and/or any assistance that may lead to an increase in the provision of central bank money to a solvent financial institution, or group of solvent financial institutions, that is facing temporary liquidity problems, without this operation being part of the single monetary policy. Responsibility for the provision of ELA lies with the NCB concerned. This means that any costs and risks arising from the provision of ELA are incurred by the relevant NCB. However, pursuant to Article 14.4 of the Statute of the European System of Central Banks and of the European Central Bank the Governing Council may restrict ELA operations if it considers that they interfere with the Eurosystem's objectives and tasks. The Governing Council must be informed of such operations in a timely manner in order for it to adequately assess whether such interference is occurring. A procedure to this end has been in place since 1999 and its key features are summarised in the ECB's ELA procedures⁶. Strict compliance with the ELA procedures, particularly in respect of the extension of ELA to illiquid but solvent banks, is of the utmost importance. The financing by an NCB of insolvent credit and/or financial institutions would be incompatible with the monetary financing prohibition under Article 123

³ See the commentary on Article 77 of the draft law amending Article 9 in the preparatory work of the draft law.

⁴ Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') (OJ C 216, 30.7.2013, p. 1).

⁵ The reference to the King is understood as a reference to the Belgian Government.

⁶ The ELA procedures are published on the ECB's website at www.ecb.europa.eu.

of the Treaty. The rationale behind this prohibition is that by financing an insolvent credit institution, an NCB would be assuming a government task.

- 2.2 Taking account of the reference in the preparatory work of this draft law to the possible issuance of an ad hoc guarantee by the Belgian executive, on the NBB's advice, in the event of a sudden crisis in the financial markets or in the event of a serious risk of systemic crisis, the ECB underlines that the criteria it has developed to ensure that an NCB does not assume a government task in breach of the monetary financing prohibition under Article 123 of the Treaty must be met. These criteria apply to operations in which ELA is granted by an NCB independently and at its full discretion to a solvent financial institution on the basis of collateral security in the form of a State guarantee, and are as follows: (a) it must be ensured that the credit provided is as short term as possible; (b) there must be systemic stability aspects at stake; (c) there must be no doubts as to the legal validity and enforceability of the State guarantee under applicable national law; and (d) there must be no doubts as to the economic adequacy of the State guarantee, which should cover both principal and interest on the loans⁷.
- 2.3 The ECB also notes that the Commission's Banking Communication states that while the ordinary activities of central banks relating to monetary policy, such as open market operations and standing facilities, do not fall within the scope of the State aid rules, the provision of dedicated support to a specific credit institution, which is commonly referred to as ELA, may constitute aid unless the following cumulative measures are met: (a) the credit institution is temporarily illiquid but solvent at the moment of the liquidity provision which occurs in exceptional circumstances and is not part of a larger aid package; (b) the facility is fully secured by collateral to which appropriate haircuts are applied, in function of its quality and market value; (c) the central bank charges a penal interest rate to the beneficiary; and (d) the measure is taken at the central bank's own initiative and, in particular is not backed by any counter-guarantee of the State.
- 2.4 In line with its previous opinion issued on the occasion of the introduction of the State guarantee backing the ELA measures taken by the NBB⁸, and consistent with the above-referenced criteria, the ECB wishes to reiterate that the provision of ELA is an autonomous decision that the NBB must be in a position to take in exceptional circumstances. In this respect the ECB welcomes the intention of the draft law to bolster the NBB's autonomy, free from the constraints imposed by Union State aid rules, in order for it to be able to act on a swift and timely basis to provide ELA. The ECB also notes that Article 12 of the Law of 22 February 1998 has been amended since 2008 to provide that for all decisions and transactions made in the context of its contribution to the stability of the financial system, the NBB shall enjoy the same degree of independence as provided for in Article 130 of the Treaty. In this respect Article 22, which provides for the possibility for the Minister of Finance (or his/her representative) to supervise transactions, and to oppose the implementation of measures, and suspend decisions, that are contrary to the Law of 22 February 1998, the NBB's statutes or the interests of the State does not apply to the tasks of the European System of Central

⁷ See the second paragraph of the 'Financial support for credit and/or financial institutions' section of Chapter 2.2.5.1 of the ECB's 2016 Convergence Report.

⁸ See paragraph 3.2 of Opinion CON/2008/46. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

Banks or to Chapter III/4 of the Law of 22 February 1998, which concerns the NBB's contribution to the stability of the financial system. The ECB welcomes these provisions which, taken together, prevent any interference by the Minister of Finance in the NBB's decision-making process as regards the extension of ELA. In order to ensure with greater certainty that the Minister of Finance cannot suspend or oppose decisions made by the NBB on ELA, a reference to Article 12, which relates more generally to financial stability, could be added to Article 22.

- 2.5. From the perspective of the financial independence required of an ESCB central bank under Article 130 of the Treaty, the ECB recalls that a national central bank (NCB) within the ESCB is required to have sufficient financial resources to perform its ESCB-related tasks. Member States may not put their NCBs in a position where they have insufficient financial resources and inadequate net equity to carry out their ESCB or Eurosystem-related tasks, as applicable.

Additionally, the principle of financial independence requires an NCB to have sufficient means not only to perform its ESCB-related tasks but also its national tasks, including the provision of ELA. Losses incurred by an NCB in the exercise of its national tasks could negatively impact on the exercise of ESCB-related tasks. As a consequence, the NCB could not autonomously avail itself of sufficient financial resources to perform the ESCB-related tasks required of it under the Treaty and the Statute. Hence, the determination if the NCB avails of sufficient means to perform its ESCB-related tasks cannot be considered in isolation. Otherwise, the financial independence of the NCB could be jeopardised.

For all these reasons, financial independence under the Treaty implies that an NCB should always be sufficiently capitalised. In particular, any situation should be avoided whereby for a prolonged period of time an NCB's net equity is below the level of its statutory capital or is even negative, including where losses beyond the level of capital and reserves are carried over. Any such situation may negatively impact on the NCB's ability to perform its ESCB-related tasks but also its national tasks. Moreover, such a situation may affect the credibility of the Eurosystem's monetary policy. Therefore, the event of an NCB's net equity becoming less than its statutory capital or even negative would require that the respective Member State provides the NCB with an appropriate amount of capital at least up to the level of the statutory capital within a reasonable period of time so as to comply with the principle of financial independence.⁹

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

Done at Frankfurt am Main, 17 November 2016.

[signed]

The President of the ECB
Mario DRAGHI

⁹ See ECB Convergence Report, June 2016, p. 25.