



OPINION OF THE EUROPEAN CENTRAL BANK

of 14 February 2014

on the status and supervision of credit institutions

(CON/2014/17)

Introduction and legal basis

On 3 January 2014, the European Central Bank (ECB) received a request from the Belgian Minister for Finance for an opinion on a draft law on the status and supervision of credit institutions (hereinafter the ‘first draft law’) and a draft law on various related provisions (hereinafter the ‘second draft law’). The ECB has been asked to deliver its opinion within one month so that the opinion can be taken into consideration before the draft law is submitted to the Belgian Parliament.

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, fifth and sixth indents of Article 2(1) of Council Decision 98/415/EC of 29 June 1998¹, since the first and second draft laws relate to the Nationale Bank van België/Banque Nationale de Belgique (NBB), payment and settlement systems and 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 first draft law replaces the Law of 22 March 1993 on the legal status and supervision of credit institutions with a new law under the same name, and introduces several important changes. Firstly, it implements Directive 2013/36/EU of the European Parliament and of the Council² into Belgian law and effects changes to and clarifications of Belgian law made necessary by Regulation (EU) No 575/2013 of the European Parliament and the Council³. Secondly, the first draft law adapts the legal framework for the supervision of credit institutions in the light of the participation of the NBB in the Single Supervisory Mechanism (SSM), governed by Council

¹ OJ L 189, 3.7.1998, p. 42.

² Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (OJ L 176, 27.6.2013, p. 338).

³ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms (OJ L 176, 27.6.2013, p. 1).

Regulation (EU) No 1024/2013⁴. Thirdly, in accordance with the Structural Reforms Report of the NBB⁵, issued pursuant to the Final Report of the High-level Expert Group on reforming the structure of the EU banking sector⁶, the first draft law contains provisions ensuring the separation of the activities of credit institutions by reference to the level of risk posed to investors' deposits. Anticipating the adoption of the European Commission's Proposal for a directive on the recovery and resolution of credit institutions and investment firms⁷ (hereinafter the 'proposed BRRD'), the first draft law also contains comprehensive rules on the resolution and recovery of credit institutions. It also takes into account the outcome of the Financial Sector Assessment Program (FSAP) conducted by the International Monetary Fund in Belgium, which recommended specific changes intended to ensure the overall compliance of the first draft law with the Core Principles for Effective Banking Supervision⁸. In addition to pursuing the abovementioned objectives, the first draft law implements the recommendations issued by the parliamentary committees established by the Belgian Parliament following the financial crisis with a view to restoring investor confidence in the stability of the financial and banking system⁹.

- 1.2 The main purpose of the second draft law is to amend various items of Belgian legislation that are directly impacted by the first draft law. In particular, the second draft law amends the Organic Law of the NBB¹⁰ by providing for the establishment of a resolution board within the NBB, the disclosure of legal acts and decisions taken by the NBB in implementing Directive 2013/36/EU and the amendment of the procedures followed by the NBB in imposing administrative fines. The second draft law also assigns to the NBB the task of identifying critical infrastructures in the financial sector, in accordance with Council Directive 2008/114/EC¹¹. In this capacity, the NBB already monitors compliance with the Belgian rules implementing Directive 2008/114/EC, including the Law of 1 July 2011 on the security and protection of critical infrastructures (hereinafter the 'Belgian law on critical infrastructures') and may for this purpose use any information in its possession in the context of its responsibilities for banking supervision and oversight.

4 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

5 'Réformes bancaires structurelles en Belgique: rapport final', July 2013, available on the NBB website at www.nbb.be.

6 2 October 2012, available on the European Commission's website at www.ec.europa.eu.

7 Proposal for a directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms (COM(2012) 280 final).

8 Available on the Bank for International Settlements' website at www.bis.org.

9 'Accord de Gouvernement 1 décembre 2011', available on the Belgian Prime Minister's website at www.premier.fgov.be, especially Section 2.4.3, p. 115 and following.

10 Law of 22 February 1998 establishing the Organic Law of the NBB.

11 Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection (OJ L 345, 23.12.2008, p. 75).

2. General observations

- 2.1 The ECB welcomes the first draft law, which consolidates within one clear, concise and well-structured legal act all the relevant provisions relating to credit institutions. It implements Directive 2013/36/EU, reflects the participation of the NBB in the SSM and anticipates the adoption of the proposed BRRD.
- 2.2 The ECB nevertheless recommends that the Belgian authorities closely monitor any further EU legal developments in the areas covered by the draft laws, including the anticipated adoption of the proposed BRRD and the Proposal for a regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions¹² (hereinafter the ‘proposed Structural Measures Regulation’), and amend the draft laws accordingly.

3. New tasks entrusted to the NBB

- 3.1 In line with the ‘twin peaks model’ introduced in Belgium by the Law of 2 July 2010¹³ and the Royal Decree of 3 March 2011¹⁴, the first draft law makes the NBB, which is already the sole entity responsible for the financial sector’s micro- and macro-prudential stability, the national authority responsible for implementing Directive 2013/36/EU and the SSM. In addition, the second draft law establishes a resolution board within the NBB. Furthermore, the NBB will also act as the relevant authority for the purposes of the Belgian law on critical infrastructures. In line with its previous opinions¹⁵, the ECB welcomes the further integration of the financial institutional framework within the NBB, which will enhance the ability of the NBB to ensure financial stability and prevent or mitigate systemic risks.
- 3.2. In the interest of transparency, the ECB recommends that the NBB be given a more formal mandate in the field of banking recovery and reform, which could be achieved by means of a separate provision in Chapter II of the Organic Law of the NBB (‘missions and operations’). In line with Article 8(a) of the proposed BRRD, such a provision should also limit the liability of the NBB and its staff in the course of carrying out the relevant tasks.
- 3.3 From an operational and financial point of view, any new task allocated to an NCB should not affect its ability to discharge its ESCB-related tasks. Financial independence, which is an element of the principle of central bank independence referred to in Article 130 of the Treaty, requires that an NCB must have sufficient means to carry out its national tasks as well as its ESCB- or Eurosystem-related tasks. Such financial independence is assessed in terms of whether any third party is able to exercise either direct or indirect influence over an NCB task and whether the NCB

12 COM(2014) 43 final.

13 The ECB commented on an early draft of the Law of 2 July 2010 in Opinion CON/2010/7. All ECB opinions are published on the ECB’s website at www.ecb.europa.eu.

14 The ECB commented on an early draft of the Royal Decree of 3 March 2011 in Opinion CON/2011/5.

15 Opinion CON/2013/56.

is able to fulfil its mandate, both operationally in terms of manpower, and financially in terms of appropriate financial resources.

- 3.4 The ECB welcomes the fact that the second draft law¹⁶ extends the existing mechanism of expense recovery set out in the Royal Decree of 17 July 2012¹⁷ to the expenses incurred by the NBB in the context of Directive 2013/36/EU and the SSM. The ECB also welcomes Article 272 of the first draft law, which authorises the NBB to recover ‘any reasonable expenses properly incurred in connection with the use of the resolution tools or powers’. Such recovery may be made directly from the institution under resolution, or indirectly from other institutions involved in the implementation of such resolution tools, and is protected by a statutory lien on all movable assets of the institution under resolution. Article 245(2) of the first draft law expressly provides that the valuation fees payable to experts must be ‘reasonable expenses properly incurred in connection with the use of the resolution tools or powers’. However, the ECB would welcome the introduction of a more general provision, similar to Article 12bis(4) of the Organic Law of the NBB relating to banking supervision, allowing the NBB to recoup all costs associated with the exercise of this new mandate.
- 3.5 It is noted that the new mandate of the NBB to monitor due compliance with Belgian law on critical infrastructures will be exercised in respect of financial institutions that are already subject to the supervisory powers of the NBB. In accordance with the first and second paragraphs of Article 12 of the Royal Decree of 17 July 2012, the expenses of the NBB incurred in the exercise of this mandate shall be reimbursed in full by the institutions so supervised, which means that no issue of financial independence will arise.

4. Implementation of Directive 2013/36/EU

The ECB welcomes the fact that the first draft law implements the optional provisions of Directive 2013/36/EU, in particular the systemic risk buffer, thereby providing the NBB and ECB with the broadest possible range of prudential tools. The first draft law also requires credit institutions to submit any proposed strategic decision to the competent supervisory authority for prior approval¹⁸, and promotes the use of internal risk assessment methods. By these means, the first draft law contributes to consistency in the implementation of these tools and this process across all participating Member States, thereby helping to ensure a level playing field and lowering the risk of regulatory arbitrage. These aims will be further promoted by precise implementation of the transposition into and application under national law of the micro- and macro-prudential tools

¹⁶ See the amendments contained in the second draft law to Article 12bis, first paragraph of the Organic Law of the NBB.

¹⁷ Royal Decree of 17 July 2012 on covering the operating expenses of the NBB in connection with the supervision on financial institutions.

¹⁸ Article 77 of the first draft law.

contained in Directive 2013/36/EU and the requirements falling under the remit of Regulation (EU) No 1024/2013¹⁹.

5. Participation of the NBB in the SSM

- 5.1 Regulation (EU) No 1024/2013 allocates the competences and powers in respect of the macro-prudential supervision of credit institutions between the ECB and the national competent authorities. The first draft law seeks to reflect, for the sake of transparency, the set of regulatory tools at the ECB's disposal to perform its micro- and macro-prudential competences, irrespective of whether such tools are extensively described in Regulation (EU) No 1024/2013, and hence common to all participating Member States; or are those only available to the national authorities, and hence specific to Belgium. For this purpose, given that it is impossible at this stage to determine whether the national authority or the ECB is competent to exercise certain prerogatives or take specific measures, the first draft law refers to 'the supervisory authority', defined in Article 3(4) as 'the NBB or the ECB, depending on the allocation of competences provided for or stipulated in accordance with Regulation (EU) No 1024/2013 in the field of supervision of credit institutions'. Transitional provisions²⁰ also lay down, with effect from 4 November 2014, a more precise allocation of competences between the NBB and the ECB as regards the licensing process, changes in the structure of the capital of credit institutions, the withdrawal of licences and exceptional recovery measures.
- 5.2 The ECB welcomes this legislative approach, which aims to provide the public with comprehensive information on the set of tools available to the NBB and/or the ECB, depending on the area and timing of supervision, and also welcomes the fact that this approach is appropriately documented in the explanatory memorandum to the first draft law. The ECB notes that in the event of inconsistencies EU legislation prevails over national law.

6. Introduction of parts of the BRRD

- 6.1 The first draft law implements into Belgian law the provisions of the proposed BRRD relating to recovery plans, resolution plans, resolution instruments (including the sale of business tool, the bridge institution tool and the asset separation tool), as well as safeguards and procedural requirements.
- 6.2 However, some of the provisions of the proposed BRRD have not been implemented at this stage and some existing provisions in Belgian law may need to be amended once the proposed BRRD is adopted. The ECB trusts that the Belgian authorities will monitor EU legal developments in this regard and amend the first draft law in a timely manner.

¹⁹ CON/2013/82, Section 2.1.

²⁰ See the first draft law, Article 390 onwards.

6.3 Without prejudice to the above, the ECB notes that in Article 245(1)(7), the application of resolution instruments should be without prejudice to the equal treatment of creditors of the same *rank*, which is stricter than the corresponding Article 29(1)(e), which refers to the equal treatment of creditors of the same *class*. In order to ensure a broader application of the former provision, it should be aligned with the relevant provision in the proposed BRRD.

7. Separation of activities

7.1 In line with the recommendation of the NBB in its Structural Reforms Report, the first draft law imposes on credit institutions that collect deposits or issue securities governed by the Belgian deposit protection scheme a mandatory separation of their activities related to trading on their own account²¹. Credit institutions must conduct own-account trading activities via a separate legal entity unless such activities exclusively relate to the provision to clients of investment and auxiliary services, market-making activities, activities for the hedging of risk for credit institutions, sound and prudent management of the liquid assets of credit institutions and the purchase and sale of financial instruments acquired as long-term holdings²² and are carried out in accordance with certain governance, internal control and reporting requirements^{23 24}.

7.2 This measure, the very purpose of which is to protect the deposits, seeks to reduce the overall exposure of credit institutions to trading activities and encourage such institutions to focus on their core activities, thereby also simplifying their resolution in the event of financial difficulties. To this end, the Belgian authorities had already adjusted the financial stability contribution²⁵ in accordance with the level of risk of the assets held by Belgian credit institutions²⁶. Moreover, following a recommendation made in its Structural Reforms Report, the NBB had already imposed additional own funds requirements on credit institutions, which shall be amended in order to ensure its compatibility with Directive 2013/36/EU. The same report also urged the immediate introduction in Belgium of the abovementioned separation of own-account trading activities in the absence of any structural reform at EU level. However, it also recommended that such measures be reviewed in the event of any such structural reform at EU level²⁷.

7.3 The proposed Structural Measures Regulation contains a provision to the effect that proprietary trading in financial instruments and commodities be conducted through a separate legal entity. This provision would apply to credit institutions deemed to be of ‘global systemic importance’ in terms of the significance of their total assets (more than EUR 30 billion for three consecutive years) and their total trading assets and liabilities (more than EUR 70 billion or 10 per cent of their total

21 Article 119 of the first draft law.

22 Article 121(1) to (5) of the first draft law.

23 Article 122 of the first draft law.

24 Article 128 of the first draft law.

25 See the Law of 28 December 2011 on the financial stability contribution.

26 See Opinion CON/2013/13.

27 See the NBB Structural Reforms Report, p. 17, Section 4 *in fine*.

ECB-PUBLIC

assets). Proprietary trading is defined narrowly as the taking of positions for making a profit for own account, without any connection to client activity or hedging the entity's risk, thereby excluding cash management. Article 21(1) of the proposed Structural Measures Regulation provides that the Commission may grant a derogation from this prohibition to a credit institution that is subject to primary legislation adopted by 29 January 2014, provided that the Commission declares such legislation to be compatible with the proposed Structural Measures Regulation.

- 7.4 In view of the above, the ECB trusts that the Belgian authorities will closely monitor the evolution of the proposed Structural Measures Regulation and consider whether it would be appropriate to immediately impose requirements on the separation of own-account trading activities on all Belgian credit institutions, irrespective of the thresholds described in the proposed Structural Measures Regulation. As highlighted in previous ECB opinions²⁸, given that these measures primarily address internationally active credit institutions, the ECB considers coordination and consistency to be important at Union level, in order to avoid regulatory arbitrage and to ensure a level playing field.

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

Done at Frankfurt am Main, 14 February 2014.

[signed]

The President of the ECB

Mario DRAGHI

²⁸ Opinions CON/2012/106 and CON/2013/28.