



OPINION OF THE EUROPEAN CENTRAL BANK

of 16 January 2009

at the request of the Belgian Minister for Finance

on a draft law amending the financial provisions of the Law of 22 February 1998 establishing the Organic Statute of the Nationale Bank van België/Banque Nationale de Belgique

(CON/2009/4)

Introduction and legal basis

On 9 December 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 Minister for Finance, for an opinion on a draft law amending the financial provisions of 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 Article 105(4) of the Treaty establishing the European Community and the third 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 provisions¹, as the draft law relates to the NBB. 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 purpose of the draft law is to adapt the current rules governing the distribution of the NBB's income to ensure that after payments of the NBB's costs, maintenance of its reserves and remuneration of its capital, the balance of the NBB's income is allocated to the Belgian State, without prejudice to the rights of the NBB's shareholders including rights to dividends². To this end, the draft law introduces two changes. First, it repeals the current so called '3 % rule' which determines how much of its financial proceeds the NBB may retain to cover its costs, maintain its reserves and remunerate its capital³. Second, it amends the current rule governing the distribution of the NBB's annual profits⁴ by providing that⁵:

¹ OJ L 189, 3.7.1998, p. 42.

² See the Explanatory memorandum to the draft law, in particular p. 4.

³ Pursuant to the '3 % rule', the net financial proceeds in excess of 3 % of the difference between the average amount, calculated on an annual basis, of the NBB's profit-earning assets and remunerated liabilities is assigned to the Belgian State (current Article 29 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'). This provision is repealed by Article 2 of the draft law.

⁴ Under the current Article 32 of the NBB Law, one fifth of the NBB's annual profit is allocated to the Belgian State, after payment of a first dividend of 6 % of the NBB's capital to shareholders and allocation of 10 % of the remainder of the annual profits to the reserve fund, and 8 % of the same remainder to the NBB's staff or to institutions in its favour.

(i) from the excess of these profits after allocation to shareholders of a first dividend of 6 % of the NBB's capital, an amount proposed by the NBB's Board of Directors and established by its Council of Regency is independently allocated to the reserve fund or to the available reserves⁶; (ii) then, from the second excess, a second dividend established by the Council of Regency of a minimum of 50 % of the net proceeds from assets forming the counterpart to the reserve fund and available reserves is allocated to shareholders; and (iii) finally, the balance is allocated to the State. The ECB understands that as these provisions enter into force on 1 January 2009, they do not modify the rules governing the distribution of the NBB's income for the financial year 2008.

2. General observations

- 2.1 The draft law should be analysed from the angle of the requirements of central bank independence, namely financial independence⁷. The concept of financial independence should be assessed from the perspective of whether any third party is able to exercise either direct or indirect influence not only over the tasks of a national central bank (NCB), but also over its ability - understood both operationally in terms of manpower⁸, and financially in terms of appropriate financial resources - to fulfil its mandate. The NCBs must also, at all times, have sufficient financial means to carry out their other functions, i.e. to perform their national tasks, to meet their international obligations and properly cover their administrative and operational expenses. It should be noted that Articles 28.1 and 30.4 of the Statute of the European System of Central Banks and of the European Central Bank provide for further calls on the NCBs to make further contributions to the capital of the ECB and to make further transfers of foreign reserves. The principle of financial independence requires that compliance with these provisions leaves an NCB's ability to perform its functions unimpaired. With regard to profit allocation, an NCB's statutes may prescribe how profits are to be allocated. In the absence of such provisions, the decision on allocation of profits should be taken by the NCB's decision-making bodies on professional grounds, and should not be subject to the discretion of third parties unless there is an express safeguard clause stating that this is without prejudice to the financial means necessary for carrying out the NCB's tasks related to the European System of Central Banks.
- 2.2 The ECB generally welcomes the draft law as it makes the rules governing distribution of the NBB's income clearer and allows the NBB's bodies the necessary discretion to decide on the allocation of profits. In this respect, the draft law expressly refers to the independence of the NBB's

⁵ Article 3 of the draft law, amending Article 32 of the NBB Law.

⁶ The draft law introduces provisions enabling the maintenance of an available reserve. The available reserve can be used to offset losses or for the distribution of profits (see the Explanatory memorandum to the draft law, p. 5).

⁷ On the concept of central bank independence and in particular financial independence, see the ECB's Convergence Report May 2008, p. 17 and in particular p. 20 et seq.; see also ECB Opinion CON/2008/82 of 2 December 2008 at the request of the Spanish State Secretary for Economic Affairs on a draft royal decree on the arrangements for paying the Banco de España's profits to the Treasury. All ECB opinions are available on the ECB's website at www.ecb.europa.eu.

⁸ See ECB Opinion CON/2008/9 of 21 February 2008 at the request of the German Ministry of Finance on a draft law amending the Law on the Deutsche Bundesbank; also ECB Opinion CON/2008/10 of 21 February 2008 at the request of the Italian Ministry of Economic Affairs and Finance on some provisions of the Law on the State annual and pluriannual budget (2008 Budget law).

bodies in deciding on the NBB's reserves policy⁹. The ECB also understands that, as is already the case under the current rules, if the NBB's annual profits are lower than 6 % of its capital, the amount of this first dividend¹⁰ is drawn on the NBB's reserve fund¹¹. If the reserve fund is insufficient to cover this amount, distributed profits would be adjusted accordingly.

3. Specific comments

Besides amending the financial provisions of the NBB Law, the draft law allows the NBB's ordinary general meeting of shareholders to be postponed to the last Monday of May (instead of March, as is currently the case)¹². The ECB understands that this postponement takes account of the extension of the legal deadlines for making the necessary documents available to shareholders prior to the general meeting and, in this context, aims to avoid a situation where the ECB's results might be deducible from the NBB's annual accounts before the ECB publishes its own annual accounts. In this respect, the Explanatory memorandum to the draft law¹³ would benefit from a clarification that the ECB's annual accounts are published on the ECB's website before the publication of the ECB's annual report, which takes place in April.

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

Done at Frankfurt am Main, 16 January 2009.

[signed]

The President of the ECB

Jean-Claude TRICHET

⁹ Article 3 of the draft law, introducing a new Article 32, 2° in the NBB law. See also the clarification in the Explanatory memorandum to the draft law that such decisions are not subject to the monitoring and suspension powers of the Minister of Finance's representative (p. 7).

¹⁰ See paragraph 1 and footnote 4 above.

¹¹ Article 50 of the NBB's statutes in conjunction with Article 31 of the NBB Law. The ECB understands that the NBB's reserve fund comprises retained earnings and is notably intended to supplement any shortfall in the annual profit up to a dividend of 6 % of the NBB's capital (Article 31 of the NBB Law). In such case, any amount drawn on the reserve fund must be refunded to the reserve if, in the following year, such refund can be made without reducing the profit for distribution to below 6 % of the NBB's capital.

¹² Article 4 of the draft law.

¹³ See the Explanatory memorandum to the draft law, comments concerning Article 4, p. 8.