



OPINION OF THE EUROPEAN CENTRAL BANK

of 30 November 2012

on a State guarantee covering certain commitments of subsidiaries of Dexia SA

(CON/2012/100)

Introduction and legal basis

On 28 November 2012, 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 royal decree amending the Royal Decree of 18 October 2011 granting a State guarantee covering certain loans granted to Dexia SA and Dexia Crédit Local SA (hereinafter the 'draft royal decree'). The ECB was requested to deliver an opinion under extremely urgent circumstances.

The ECB's competence to deliver an opinion is based on Article 127(4) and 282(5) of the Treaty on the Functioning of the European Union and 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 provisions¹, since the draft royal decree 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 royal decree

1.1 Article 36/24 of the Law of 22 February 1998 establishing the Organic Statute of the Nationale Bank van België/Banque Nationale de Belgique² empowers the King, on advice from the NBB, to adopt certain measures, notably the establishment of a system to grant a State guarantee covering liabilities entered into by certain supervised institutions, including their direct or indirect subsidiaries³, or covering certain claims held by these institutions⁴ in the event of a sudden crisis in the financial markets or a serious threat of a systemic crisis. Based on this empowering provision,

¹ OJ L 189, 3.7.1998, p. 42.

² This provision was originally adopted as Article 117*bis* of the Law of 2 August 2002 on the supervision of the financial sector and on financial services, whose substance was transferred to the Law of 22 February 1998 on the Nationale Bank van België/Banque Nationale de Belgique in the context of the recent reform of the Belgian supervisory architecture. The ECB adopted Opinions CON/2010/7 and CON/2011/5 on the reform. All ECB opinions are available on the ECB's website at www.ecb.europa.eu.

³ See Article 36/24, par. 2 of the Law of 22 February 1998.

⁴ See in particular Article 36/24, §1, 2° of the Law of 22 February 1998.

the King adopted on 18 October 2011 a royal decree setting up a guarantee scheme covering particular loans of certain entities of the Dexia group in the context of the group's restructuring, on which the ECB adopted Opinion CON/2011/79. As the main features of the guarantee scheme set up at that time remain unchanged, Opinion CON/2011/79 still applies and is therefore reiterated by the ECB for the purpose of the current opinion.

- 1.2 In the context of the gradual break-up of the Dexia Group and further to the agreement reached by the Belgian, French and Luxembourg Governments on 8 November 2012 leading to the recapitalisation of Dexia SA, the draft royal decree would now modify the guarantee scheme set up by the Royal Decree of 18 October 2011 in respect of (a) the scope of the guarantee, (b) the allocation of the shares in the guarantee between the Belgian, French and Luxembourg States, and (c) the procedures for calling the guarantee.
- (a) The scope of the guarantee would first be extended to commitments taken by the subsidiaries of the Dexia Group. The Dexia Group intends to issue, via its US subsidiaries, guaranteed bonds denominated in euro and US dollars which would be placed with US investors, given the limited interest of European investors for these instruments amid the European sovereign bond crisis. Second, the draft royal decree clarifies that the commitments covered by the guarantee could take the form of loans, bonds and debt securities issued to institutional or qualified investors, including direct or indirect subsidiaries of Dexia SA or Dexia Crédit Local SA. Third, since all guaranteed loans have exclusively been issued by Dexia Crédit Local SA⁵, the guarantee would be abolished for Dexia SA.
- (b) The allocation of the total amount of the guarantee, which would now amount to EUR 85 billion instead of EUR 90 billion, among Belgium, France and Luxembourg would be adapted. Belgium would now guarantee 51,41% of such amount, namely EUR 43,7 billion instead of the previous EUR 54,47 billion, which corresponded to 60,5% of EUR 90 billion.
- (c) The guarantee – which would still be payable on first demand under the Royal Decree of 18 October 2011 – could also be payable ‘according to other procedures established by the Minister for Finance’⁶. This change creates more flexibility in enforcing the guarantee, which may be called preventively to avoid a default at maturity or without mentioning the precise amounts due and payable on a specific date, such modalities being difficult to meet when the guaranteed securities are held within a securities settlement system.
- 1.3 The draft royal decree uses, to the greatest extent possible, the same terminology as the legal acts setting up in France and Luxembourg the other component parts of the guarantee to the Dexia Group. The objective of this common terminology is not only to reassure the investors⁷, but also to

⁵ See the preparatory works of the draft royal decree, p. 6.

⁶ Article 4 of the draft royal decree.

⁷ See the preparatory works, p. 9.

enable Belgium, France and Luxembourg to stipulate their joint liability in the context of a specific transaction⁸.

- 1.4 The provisions of the Royal Decree of 18 October 2011 on the duration of the guarantee that covers all commitments taken by 31 December 2021, the requirement of remuneration to be paid by the Dexia Group and the powers of the Minister for Finance to take the implementation measures remain unchanged.
- 1.5 The draft royal decree would enter into force on execution of the first guarantee agreement entered into between the Ministry for Finance and Dexia Crédit Local SA, or any subsidiaries of the Dexia Group, in implementation of the draft royal decree.

2. Specific observations

- 2.1 The ECB welcomes the coordinated efforts by Belgium, France and Luxembourg in the context of the reorganisation of the Dexia Group. It notes with satisfaction that the draft royal decree mainly purports to achieve greater consistency in the concepts used under Belgian, French and Luxembourg law to describe the scope, nature and modalities of the guarantee extended to the Dexia Group. This would contribute to improving the legal certainty and a level playing field in the three Member States.
- 2.2 The ECB understands that the extension of the guarantee scheme to the bonds and debt securities issued by the subsidiaries of the Dexia Group is expressly allowed by Article 36/24, § 2 of the Law of 22 February 1998, according to which direct and indirect subsidiaries of credit institutions are considered an inherent part of the credit institutions subject to supervision by the Belgian authorities. As a consequence, and provided that these measures are necessary to limit the scale or effects of a sudden crisis in the financial markets or a serious threat of systemic risk, a State guarantee may therefore be issued under Belgian law for the benefit of such subsidiaries, even though they are located in foreign countries. When determining which subsidiary would effectively benefit from the guarantee and agreeing with the Dexia Group its specific terms and conditions, including the remuneration, the Minister for Finance would nevertheless need to abide by Union competition and State aid rules. The Minister would also need to follow the principles identified in previous ECB opinions⁹, namely that government guarantees should (i) address the funding problems of liquidity-constrained solvent banks, by improving the functioning of the market for bank debt of longer-term maturity, (ii) preserve the level playing field among financial institutions and avoid market distortions, and (iii) ensure consistency in the management of Eurosystem liquidity.
- 2.3 The ECB notes, however, that one of the objectives of the extension of the guarantee is to enable the issuance of bonds denominated in euro or US dollars by US subsidiaries of the Dexia Group and placed with foreign institutional investors. Should the underlying instruments not be issued and

⁸ See the preparatory works, p. 13.

⁹ CON 2011/79, paragraph 3, CON/2012/85, paragraph 2.2 and CON/2012/4, paragraph 3.

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held within the euro area, these instruments would therefore not be eligible for monetary policy purposes in view of Article 1(2) of Guideline ECB/2012/18 of 2 August 2012 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral¹⁰.

- 2.4 For instruments issued and held within the euro area, the quantitative restriction provided by Article 5(3) of Guideline ECB/2012/18 would apply. This means that entities of the Dexia Group would be prevented from using such instruments in excess of the nominal value of these instruments already submitted as collateral on 3 July 2012. In both cases, the ECB welcomes that the issuance of these guaranteed bonds would not affect the conduct and implementation of monetary policy in the euro area.
- 2.5 For the sake of transparency, the ECB would recommend that the draft royal decree be more specific as to the subsidiaries which will be covered by and benefit from such guarantees. A general reference to any direct or indirect subsidiaries of Dexia SA or Dexia Crédit Local SA might be misleading at a time when, in the course of the restructuring of the group, some of the subsidiaries are sold while others are in the process of resolution or liquidation.
- 2.6 The ECB understands that the guarantees provided to the Dexia Group could develop their effect until 31 December 2031. The draft royal decree could clarify whether the need for such guarantees may change in view of transposition in 2015 of the 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 and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2001/35/EC and Regulation (EU) No 1093/2010¹¹. This Directive could provide additional tools also for the resolution of the Dexia Group.

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

Done at Frankfurt am Main, 30 November 2012.

[signed]

The President of the ECB

Mario DRAGHI

¹⁰ OJ L 218, 15.8.2012, p. 20.

¹¹ COM(2012) 280/3.