



OPINION OF THE EUROPEAN CENTRAL BANK

of 5 April 2012

on Belgian covered bonds and on measures to facilitate the mobilisation of credit claims

(CON/2012/28)

Introduction and legal basis

On 14 February 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 three pieces of draft legislation (hereinafter together the ‘draft legislation’) comprising: (1) a draft law establishing a legal framework for Belgian covered bonds (hereinafter the ‘draft law on Belgian covered bonds’); (2) a draft royal decree on the issuance of Belgian covered bonds by Belgian credit institutions (hereinafter the ‘draft royal decree’); and (3) a draft law on various measures to facilitate the mobilisation of claims in the financial sector (hereinafter the ‘draft law on mobilisation of credit claims’).

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 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions¹, as the draft legislation contains provisions concerning the NBB, payment and settlement systems, as well as 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 legislation

1.1 The draft legislation aims to set up a comprehensive legal framework in Belgian law to allow for the issuance of covered bonds that comply with European legislation², in order to facilitate the refinancing of credit institutions, whilst defining appropriate legal mechanisms to protect the holders of these new debt instruments³.

¹ OJ L 189, 3.7.1998, p. 42.

² Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (OJ L 302, 17.11.2009, p. 32) and Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ L 177, 30.6.2006, p. 1).

³ Explanatory memorandum to the draft law on Belgian covered bonds, p. 1.

1.2 The draft law on Belgian covered bonds defines: (a) the institutions allowed to issue Belgian covered bonds, i.e. all credit institutions incorporated in Belgium⁴ and the additional authorisation requirements to carry out such activity⁵; (b) the types of assets eligible for inclusion in the cover pool of Belgian covered bonds⁶, as well as the rules governing the valuation and composition of the cover pool; (c) the nature of the cover pool as a separate pool of assets of the issuer, segregated from its general assets but without separate legal personality and remaining on the issuer's balance sheet and set aside exclusively for the reimbursement of the holders of Belgian covered bonds⁷; and (d) the regime for managing that separate pool of assets, the conditions for appointing a portfolio manager and their powers⁸. Furthermore, the draft law on Belgian covered bonds addresses the consequences of the opening of an insolvency procedure with respect to the covered bonds issuer⁹, notably with regard to the rights of the covered bond holders and their preferential treatment. In the event of the issuer's insolvency, the covered bond holders are to have a claim to the proceeds of the realisation of the cover pool assets in priority to all creditors of the issuing credit institution, whether secured or unsecured¹⁰.

Further provisions in relation to the cover pool assets are set out in the draft royal decree¹¹. The draft royal decree also contains specific provisions concerning the register of cover pool assets, the NBB's power to impose a limit on the volume of covered bonds that may be issued by a specific institution, and the tasks of the portfolio monitor¹².

Finally, the draft law on the mobilisation of credit claims addresses some technical legal issues in order to make it possible, in practice, to mobilise a sufficient volume of credit claims¹³.

2. General observations

2.1 The ECB welcomes the draft legislation, as it will enable credit institutions to issue covered bonds that are attractive to a wide range of investors and expand their ability to use credit claims as collateral, thereby enhancing access to sources of refinancing by credit institutions.

4 The draft law on Belgian covered bonds will be inserted into the Belgian Law of 22 March 1993 on the status and supervision of credit institutions (hereinafter 'the Law of 22 March 1993'), within title II "Credit institutions incorporated under Belgian law".

5 New Articles 64/2 to 64/5, 64/21 and 64/22 of the Law of 22 March 1993.

6 Notably, mortgage claims and claims on public sector entities (new Article 64/3§3 of the Law of 22 March 1993).

7 New Articles 64/8§1 and 64/11 of the Law of 22 March 1993.

8 New Articles 64/12 to 64/15 of the Law of 22 March 1993.

9 New Article 64/16 of the Law of 22 March 1993.

10 New Article 64/11, of the Law of 22 March 1993, especially the second subparagraph.

11 Notably, these provisions concern: additional requirements for cover assets, conditions for including hedging instruments in the cover pool, the composition and valuation of cover assets, the liquidity of the cover pool (Articles 3 to 7).

12 Articles 9 to 11 of the draft royal decree.

13 See the explanatory memorandum to the draft law on the mobilisation of credit claims, p. 3. This includes measures such as removing restrictions for pledging and transferring claims on the adjudicating body arising from the public procurement legislation (proposed Article 3); disapplying certain requirements to third party enforceability of a set-off (proposed Article 6); in the context of Belgian covered bonds, protecting the transfer of claims against the insolvency of the transferor (proposed Article 8); ensuring ranking agreements concerning mortgage claims are automatically enforceable on third parties (proposed Articles 11 to 17), etc.

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- 2.2 The draft law on covered bonds provides that credit institutions may pledge their own covered bonds (i.e. covered bonds that they have issued themselves) as collateral for the intraday credit and monetary policy credit operations of the NBB, in accordance with the procedures and conditions determined by the NBB¹⁴. The draft law further provides that a credit institution may maintain minimum reserves for each separate pool of assets with the NBB¹⁵.
- 2.3 The ECB emphasises that it lies within the Eurosystem's exclusive competence to decide what collateral and which counterparties to accept for its monetary policy operations, as well as to determine how minimum reserves are to be held by credit institutions with the relevant national central bank¹⁶.

The ECB understands that the reference in the draft legislation to the eligibility of own covered bonds as collateral¹⁷ is exclusively aimed at maximising legal certainty with regard to the validity of the acquisition and holding of own securities under Belgian company law¹⁸. Hence, it does not appear necessary to specify the purpose for which such own covered bonds can be subscribed, acquired or held (i.e. 'notably to pledge them as collateral in NBB credit operations'). This specification should ideally be deleted to avoid any misinterpretation regarding the exclusive nature of the Eurosystem's competence.

The ECB understands that the draft legislation does not affect the minimum reserve requirements of individual credit institutions as imposed by the Eurosystem, but solely lays down an implementation rule at the national level, allowing an individual credit institution to divide the minimum reserves it is required to hold with the NBB between different accounts¹⁹. However, to fully respect the exclusive Eurosystem's competence in this field, this provision should not be specified by the national legislator but should be left to the NBB's discretion, subject to the requirements defined by the Eurosystem.

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

Done at Frankfurt am Main, 5 April 2012.

[signed]

The President of the ECB

Mario DRAGHI

14 New Article 64/17§1 of the Law of 22 March 1993.

15 New Article 64/17§3 of the Law of 22 March 1993.

16 See in this respect also ECB Opinion CON/2010/47, paragraph 2.3.

17 New Article 64/17§1 of the Law of 22 March 1993.

18 Explanatory memorandum to the draft law on Belgian covered bonds, p. 35.

19 New Article 64/17§3 of the Law of 22 March 1993.