



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 4 November 2015

on the institutional framework for resolution of institutions

(CON/2015/42)

Introduction and legal basis

On 24 September 2015, 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 for Finance, for an opinion on a draft law relating to various financial provisions, creating an administrative service with an autonomous accounting 'social activities' and containing a provision with regard to equality between women and men (hereinafter the 'draft law'). The ECB has been asked to deliver an opinion within one month in order to enable the Belgian government to take the ECB opinion into consideration before submitting the draft law to the 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 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, since the draft law relates to the NBB 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 Law of 24 April 2014 relating to the status and supervision of credit institutions (hereinafter the 'Law on banking'), which was the subject of a previous ECB opinion², anticipated the adoption of Directive 2014/59/EU of the European Parliament and of the Council³, in designating NBB as the national resolution authority and introducing resolution mechanisms for institutions that are under resolution under Directive 2014/59/EU.

¹ OJ L 189, 3.7.1998, p. 42.

² Opinion CON/2014/17. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

³ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

- 1.2 The draft law aims first to adapt the Law on banking to Directive 2014/59/EU (the final text of which slightly differs from the draft on the basis of which the Law on banking was drafted) as well as to Regulation (EU) No 806/2014 of the European Parliament and of the Council⁴. In particular, the draft law reflects the delineation of the respective resolution powers of the Single Resolution Board and the NBB, the former being competent for credit institutions incorporated under Belgian law that are considered to be significant in accordance with Article 6(4) of Council Regulation (EU) No 1024/2013⁵ or in relation to which the ECB has decided in accordance with Article 6(5)(b) of the same Regulation to exercise directly all of the relevant supervisory powers.
- 1.3 The draft law also allows the NBB to waive the obligation to draft a resolution plan for an institution subject to the NBB's competence which participates in an institutional protection scheme or for a credit institution which participates in a federation of credit institutions. The resolution authority may also deviate from the specific obligations stipulated in Directive 2014/59/EU as regards the resolution plan, taking into account the nature of the institution's or group's business, its shareholding structure, its legal form, its risk profile, size and legal status, interconnectedness to other institutions or to the financial system in general.
- 1.4 Furthermore, the draft law stipulates that the reduction or conversion into equity of a liability to which the bail-in tool has been applied does not benefit co-debtors or third parties that have provided a personal guarantee or collateral security in respect of the bailed-in liability. In the same vein, the reduction or conversion into equity of the liability of a credit institution governed by the laws of another Member State to which a bail-in tool has been applied does not benefit co-debtors or third parties that have provided a personal guarantee or collateral security governed by Belgian law. The explanatory memorandum to the draft law explains that these clarifications are needed now in the Law on banking; the royal decree providing for the technical specifications of the bail-in tool will only enter into force on 1 January 2016. In the meantime, a guarantee issued under Belgian law to a credit institution located in a country that has already adopted legislation regarding bail-ins may already trigger questions as regards the impact of such bail-in on the obligations of third party guarantors. As clarified in the explanatory memorandum, this situation applies, in particular, as regards the guarantee granted by France, Belgium and Luxembourg in connection with certain debts of Dexia Crédit Local SA. Following the example of German insolvency law and German legislation implementing Directive 2014/59/EU, which is referred to in the explanatory memorandum, the draft law would therefore provide that the bail-in of liabilities of an institution under resolution does not entail a corresponding benefit in respect of the obligations of third-party guarantors. The parties may however opt out of this principle set down in the draft law by expressly agreeing that a guarantee or financial collateral would not be protected against a bail-in. As a consequence of the approach chosen by the Belgian authorities, subsequent claims brought by

4 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

5 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).

third parties against the failing credit institution, whether by means of subrogation or in some other manner, would be governed by the effects of the bail-in under Belgian law and would no longer be capable of being exercised, to the extent that the debt had been written off, or might need to be assigned against the securities into which the debt had been converted. To achieve a similar result when the bail-in is governed by a foreign law, such bail-in would be considered, under the draft law, as an exception inherent to the debtor (as opposed to an exception inherent to the debt itself) within the meaning of Article 2036 of the Belgian Civil Code, such that the effects of the guarantee or collateral provided by third parties would be lasting, irrespective of the potential extinction of the bailed-in liability (or part of it) under the applicable foreign law.

- 1.5 The draft law amends the Organic Statute of the NBB in order to: (a) adapt the composition of the Resolution College, which was the subject of a previous ECB opinion⁶, so that the chair of the Financial Services and Markets Authority now has a merely consultative role; and (b) fine-tune the conflict of interest and incompatibility rules of the NBB decision-making bodies. In particular, so far as concerns restrictions on taking up employment with private entities, the draft law stipulates that the cooling-off period of one year for the NBB's governor, deputy governor and board members applies to all institutions 'subject to the supervisory power of the NBB as well as any other institutions incorporated under Belgian or foreign law established in Belgium, or subsidiaries of such institutions and which are subject to the ECB's supervisory power'. Reference is made to the same set of institutions in order to define the incompatibility rules applicable to the regents and the majority of the censors of the NBB.
- 1.6 Finally, the draft law abolishes the task previously entrusted to the NBB to manage the deposit guarantee scheme, which will now be discharged by the Treasury.

2. General observations

The ECB welcomes the draft law, as it strengthens the tools and procedures available to the national authorities for effective preventive measures, early intervention in institutions and, if necessary, the effective resolution of institutions, in line with the common framework of intervention powers and rules laid down in the BRRD.

3. Conflict of interest and incompatibility rules

- 3.1 As regards the restrictions on taking up employment with private entities, the ECB notes in particular the expansion of the list of institutions for which cooling-off periods must be observed, to include credit institutions now supervised by the ECB. The ECB welcomes this provision, which takes into account the role the NBB plays as a national competent authority (NCA) in assisting the ECB in the tasks conferred upon the ECB pursuant to Council Regulation (EU) No 1024/2013. This should be interpreted without prejudice to the Code of Conduct of the members of the Supervisory

⁶ Opinion CON/2015/2.

Board of the ECB, which includes in its scope any credit institution supervised by the ECB and provides for the possibility of extending the cooling-off periods up to a maximum of two years for Supervisory Board members.⁷

Concerning the intention to extend the incompatibility provisions as regards mandates in a financial institution subject to NBB/ECB supervision to a majority of the censors, the ECB would see merit in examining whether a uniform regime for all censors would not be preferable.

3.2 Resolution procedures

The ECB notes the specific provisions introduced in the Law on banking, in order to ensure that co-debtors and third parties that have provided personal guarantees or collateral security in respect of bailed-in liabilities are not discharged of their respective obligations towards the creditors of the bailed-in liabilities. It would be appropriate to make clear in the draft law that the parties may opt out of this arrangement, as explained in the explanatory memorandum. In the same vein and in line with Article 53 of Directive 2014/59/EU, it would also be advisable to specify clearly in the draft law or the royal decree implementing the Law on banking that no subsequent claims may be brought by third parties by way of recourse against the institution under resolution (for example, by way of exercising a guarantor's subrogation rights), except in respect of the securities into which the debt has been converted, if any.

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

Done at Frankfurt am Main, 4 November 2015.

[signed]

The President of the ECB

Mario DRAGHI

⁷ See Article 8.4 of the Code of Conduct for the members of the Supervisory Board of the European Central Bank. Available on the ECB's website at www.ecb.europa.eu.