

Decision of the European Central Bank of 14 November 2008 on the implementation of Regulation ECB/2008/11 of 23 October 2008 on temporary changes to the rules relating to eligibility of collateral (ECB/2008/15) (2008/874/EC)

DECISION OF THE EUROPEAN CENTRAL BANK

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(ECB/2008/15)

(2008/874/EC)

THE EXECUTIVE BOARD OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty establishing the European Community and in particular to the first indent of Article 105(2) and to Article 110,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank and in particular to the second indent of Article 34.1, in conjunction with the first indent of Article 3.1 and Article 18.2,

Having regard to Article 8 of Regulation ECB/2008/11 of 23 October 2008 on temporary changes to the rules relating to eligibility of collateral,

Whereas:

- (1) On 15 October 2008, the Governing Council of the European Central Bank (ECB) decided to temporarily admit credit claims arising under syndicated loans governed by the laws of England and Wales as eligible collateral for the purposes of Eurosystem monetary policy operations. On 23 October 2008, the Governing Council gave effect to its decision by adopting Regulation ECB/2008/11⁽¹⁾.
- (2) Under Article 3(2) of Regulation ECB/2008/11, for syndicated loans governed by the laws of England and Wales, the total number of governing laws applying to the mobilisation of such loans may not exceed three. The legal complexities inherent in the mobilisation of syndicated loans, when up to three different governing laws can apply, require the conduct of legal and risk assessments by the national central banks of the Member States that have adopted the euro (hereinafter 'the NCBs'), when providing liquidity against such collateral.
- (3) The legal complexity involved in the mobilisation of the above loans requires the adoption of implementation criteria relating to the acceptance, as eligible collateral, of syndicated loans governed by the laws of England and Wales,

HAS DECIDED AS FOLLOWS:

Article 1

Definitions

For the purposes of this Decision:

- ‘General Documentation’ means Annex I to Guideline ECB/2000/7 of 31 August 2000 on monetary policy instruments and procedures of the Eurosystem⁽²⁾,
- ‘syndicated loans’ means credit claims represented by shares of syndicate member institutions in syndicated loans, as described in Chapter 6.2.2 of the General Documentation and governed by the laws of England and Wales.

Article 2

Mobilisation techniques for syndicated loans

- 1 An NCB shall mobilise syndicated loans directly from its relevant counterparty in accordance with its respective domestic procedures for credit claims. The mobilisation agreement shall be governed by the law of a Member State belonging to the euro area.
- 2 Chapter 6.6 of the General Documentation shall not apply to the mobilisation of syndicated loans.

Article 3

Transferability of loans

Only fully transferable syndicated loans shall be eligible. For the purposes of the fourth indent of Appendix 7 of Annex I to the General Documentation, syndicated loans shall not be considered to be fully transferable and capable of being mobilised without restriction as collateral for Eurosystem credit operations unless the loan agreement unconditionally permits:

- (i) the lender to charge, assign or otherwise create a security interest in or over its rights to secure obligations of that lender to an NCB; and
- (ii) the relevant NCB to enforce its security interest over such loan by way of collecting payments under the loan directly or indirectly from the underlying debtor and by way of assigning or transferring the loan to a bank or financial institution or to a trust fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets.

Article 4

Notification to the debtor

- 1 The counterparty shall be required to notify the debtor under a syndicated loan agreement of the mobilisation of such syndicated loan as collateral before or immediately following mobilisation of such loan. Such notification shall be given in accordance with the applicable procedures as specified in the syndicated loan agreement.
- 2 Paragraph 1 is without prejudice to the right of the relevant NCB to notify the debtor.

Article 5

Registration certificate

Counterparties shall provide the relevant NCB with a copy of the confirmation received from the Registrar of Companies of England and Wales that mobilisation of the syndicated loan has been registered at Companies House.

Article 6

Submission by the counterparty of a diligence letter from external legal counsel

Before mobilisation of syndicated loans, counterparties shall deliver to the relevant NCB a diligence letter from external legal counsel addressing, in a manner and form satisfactory to the Eurosystem, certain diligence issues, as these may be elaborated on from time to time by the ECB and published on its website.

Article 7

Special purpose vehicles as debtors

1 A special purpose vehicle (SPV) shall be an eligible debtor under a syndicated loan only if (i) the SPV is the beneficiary of a guarantee that is issued by a non-financial corporation eligible as a guarantor within the meaning of Chapter 6.2.2 of the General Documentation; (ii) the guarantee complies with the requirements set out in Chapter 6.3.3 of the General Documentation; and (iii) the relevant NCB is legally entitled to enforce the guarantee following the mobilisation of the syndicated loan.

2 Credit claims arising under syndicated loans with SPVs as debtors shall be eligible collateral for Eurosystem credit operations only if the SPV and the guarantor are established in the euro area.

3 The requirement to provide legal confirmation, as provided for in Chapter 6.3.3 of the General Documentation, shall also apply where the debtor is an SPV benefiting from a guarantee in accordance with paragraph 1.

Article 8

Currency of denomination

For the purposes of Chapter 6.2.2 of the General Documentation, syndicated loans shall be considered to be denominated in euro only insofar as the relevant loan agreement does not allow the debtor or the debtor's agent, on its behalf, to vary the currency in which the syndicated loan is denominated or payable at any time before the maturity of the relevant Eurosystem credit operation.

Article 9

No set-off or counterclaim

Syndicated loans shall only constitute eligible collateral for Eurosystem credit operations if the relevant syndicated loan agreement includes an express provision pursuant to which all payments to be made by the debtor are made free and clear of any deduction for set-off or counterclaim.

Article 10

Restrictions on realisation of collateral

1 Syndicated loans containing contractual provisions requiring a majority of lenders to adopt syndicate decisions vis-à-vis the debtor shall be eligible collateral for Eurosystem credit operations.

2 Syndicated loan agreements containing contractual provisions authorising certain terms of the relevant syndicated loan agreement to be amended or waived with the consent of a majority of lenders shall be eligible collateral for Eurosystem credit operations; provided, however, that the loan agreement for such loans does not provide that majority decisions may be taken with respect to: (i) an extension to the date of payment of any amount due under the agreement; or (ii) a reduction in margin or in the amount of any payment of principal or interest; or (iii) a change to the principle that each lender's obligations under the agreement are several.

3 Syndicated loans involving a facility agent for the collection and distribution of payments shall be eligible collateral for Eurosystem credit operations only where the facility agent is a credit institution with a minimum long-term rating of 'A-' by Fitch or Standard & Poor's, 'A3' by Moody's or of 'AL' by DBRS.

Article 11

Replacement of lender clauses

A syndicated loan containing contractual provisions permitting the debtor to replace the lender in exchange for an outstanding loan shall only be eligible collateral for Eurosystem credit operations where, prior to mobilisation, the counterparty provides the relevant NCB with an enforceable security interest in or over the counterparty's right to receive cash in respect of such exchange.

Article 12

Disclosure of confidential information

A syndicated loan shall only constitute eligible collateral for Eurosystem credit operations if the syndicated loan agreement permits the lender to disclose confidential information to a Eurosystem central bank in connection with any charge, assignment or security interest created by the lender in or over its rights under the agreement to secure obligations of that lender to a Eurosystem central bank.

Article 13

Taxation and Indemnity

1 A syndicated loan shall only be eligible collateral for Eurosystem credit operations if the counterparty fulfils the conditions set out in this Article.

2 The counterparty shall provide confirmation from UK tax counsel to the effect that either: (a) the debtor will not be required to retain UK withholding tax as a result of any transfer, under either English or any other law, of the beneficial ownership of the loan asset to the NCB; or (b) the debtor will be required to retain UK withholding tax as a result of such transfer of beneficial ownership to the NCB, but that the NCB should be eligible to benefit from the tax treaty between the UK and the jurisdiction of the NCB, such that once a direction has been issued by Her Majesty's Revenue & Customs (HMRC) under the relevant treaty, the debtor will be entitled to make interest payments to the NCB without withholding UK tax and the NCB will be entitled to recover tax previously withheld; or (c) the debtor will be required to retain UK withholding tax as a result of such transfer of beneficial ownership to the NCB and the NCB will not be eligible to benefit from the tax treaty between the UK and the NCB's jurisdiction or any other exemption.

3 Where UK tax counsel confirms that the transfer of beneficial ownership of the loan asset to the NCB falls under either category (b) or (c) in paragraph 2 above, the counterparty will be required to agree to indemnify the NCB for any UK withholding tax that is withheld by the debtor (and not grossed up pursuant to the syndicated loan agreement), and for all adverse cash-flow consequences of any UK withholding tax that is first retained from, and then refunded to, the NCB.

4 The counterparty shall assume any and all responsibility for notifying the debtor of any transfer of the beneficial ownership of the loan asset to the NCB that results in the debtor being required to withhold UK tax (or to withhold UK tax at a different rate).

5 The counterparty shall bear the full cost of any UK stamp duty (as well as any penalty and interest thereon) that is payable as a result of any transfer, under either English or any other law, of the beneficial ownership of the loan asset, and that the NCB reasonably considers has to be paid in order for the NCB to be able to adduce the loan asset as evidence in an English court or use the loan asset for some other purpose in the UK. The counterparty shall also bear the full cost of any UK stamp duty reserve tax payable as a result of any such transfer, if applicable.

6 The counterparty shall provide confirmation from appropriate tax counsel in such jurisdictions that the counterparty considers applicable, to the effect that the debtor will not be required to retain non-UK withholding tax as a result of any transfer, under either English or any other law, of the beneficial ownership of the loan asset to the NCB, and that any such transfer will not trigger liability to any non-UK stamp or transfer duty.

7 The counterparty shall fully indemnify the relevant NCB in respect of any fees due to the facility or paying agent, or any other fees or costs related to the administration of the loan.

Article 14

Final provisions

1 This Decision shall enter into force on 17 November 2008.

Status: This is the original version (as it was originally adopted).

2 This Decision shall apply until 30 November 2008.

Done at Frankfurt am Main, 14 November 2008.

The President of the ECB

Jean-Claude TRICHET

- (1) OJ L 282, 25.10.2008, p. 17.
- (2) OJ L 310, 11.12.2000, p. 1.