



OPINION OF THE EUROPEAN CENTRAL BANK

28 February 2012

on the recapitalisation and resolution of credit institutions in Greece

(CON/2012/14)

Introduction and legal basis

On 25 February 2012 the European Central Bank (ECB) received a request from the Greek Ministry of Finance for an opinion on a draft law amending the legal framework for the recapitalisation and resolution of credit institutions in Greece (hereinafter the ‘draft law’).

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 ECB by national authorities regarding draft legislative provisions, as the draft law relates to the Bank of Greece and 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 law

1.1 The draft law amends the Greek legal framework for the recapitalisation and resolution of credit institutions. Article 1 amends Law 3864/2010 on the Hellenic Financial Stability Fund (hereinafter the ‘Law on the HFSF’). Article 2 amends Law 3601/2007 (hereinafter the ‘Law on banking’) and Article 3 amends Law 3746/2009 on the Hellenic Deposits and Investment Guarantee Fund (hereinafter the ‘Law on HDIGF’). These amendments are required by the Memorandum of Economic and Financial Policies¹.

1.2 Amendments to the Law on the Hellenic Financial Stability Fund

The draft law reforms the governance structure of the Hellenic Financial Stability Fund (HFSF) by establishing a General Council and an Executive Board and clarifying that the two bodies have responsibility for different functions. Furthermore, the draft law is intended to improve performance by the HFSF of its twofold mandate: management of its ownership interest in credit

¹ Annex V to Law 4046/2012. FEK A 28/14.2.2012.

institutions, on behalf of the Government, and management of transitional credit institutions (TCIs) established in accordance with Article 63E of the Law on banking.

1.3 Amendments to the Law on banking

The amendments to the Law on banking aim to clarify the procedures and allocation of tasks for valuing assets and liabilities and, thus, for the opening balance sheets of TCIs. Future resolutions will initially use, as their starting point, conservative asset valuations of failed banks' assets, based on their fair value, and subsequently allow for proper due diligence and revaluation followed by complementary asset transfers within a specified time period.

1.4 Amendments to the Law on the Hellenic Deposits and Insurance Guarantee Fund

The amendments to the Law on the HDIGF will strengthen the funding of the HDIGF depositor branch, *inter alia*, by: (i) increasing fees if its funds fall below a certain level of coverage of insured deposits, taking due account of developments in the financial system; and (ii) ensuring adequate diversification of re-deposits of HDIGF funds and gradually eliminating re-deposits in covered banks, in line with the restructuring of the Greek banking sector. The draft law also introduces rules on the management of conflicts of interest for HDIGF Board members.

2. General observations

2.1 The draft law will align the Greek legislative framework for recapitalisation and resolution of credit institutions with the financial sector objectives outlined by the Greek authorities in the Memorandum of Economic and Financial Policies. Moreover, the ECB understands that in addition, the national authorities also intend to harmonise the Greek financial legislative framework with other objectives in the Memorandum in accordance with the time frame foreseen therein. These other objectives relate, *inter alia*, to the need to: (i) clarify that the HDIGF's status as privileged creditor does not impinge on claims secured with financial collateral in the sense of Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements² and follows best practice with respect to secured creditors in general; (ii) introduce a clear separation of the supervisory and resolution responsibilities within the Bank of Greece; and (iii) reform governance arrangements in the Bank of Greece and revise the structure and rights of Bank of Greece shareholders to eliminate possible conflicts of interest in the Bank of Greece's public policy role by end-December 2012.

2.2 The ECB notes the strengthening of the HFSF's role and emphasises the need to clearly define its responsibilities, to ensure that the HFSF does not inadvertently interfere with the powers of the Bank of Greece as supervisory and resolution authority and as guarantor of the stability of the financial system.

² OJ L 168, 27.6.2002, p. 43.

3. Amendments to the law on the HFSF

- 3.1 In terms of the HFSF's new dual governance structure, the ECB notes that to enable practical decision-making and in line with usual corporate governance principles, it is important for the Executive Board members to be at the same time members of the General Council. In this respect, the ECB recommends amending the draft law to enable this governance structure within the HFSF.
- 3.2 The ECB welcomes the draft law's requirement for ECB observers and their alternates to be invited to participate without voting rights in the HFSF's General Council and Executive Board meetings³. The ECB's observer status in the HFSF's two bodies is consistent with the rationale of Law 3864/2010 establishing the HFSF, under which an ECB observer was to be invited to participate in the Board of Director meetings⁴.
- 3.3 In view of the Bank of Greece's role as prudential supervisor and guarantor of the stability of the financial system, the ECB also welcomes the fact that the Bank of Greece will appoint one member of the General Council and will designate one of the persons to be appointed as members of the Executive Board by the Minister for Finance. Moreover, the ECB welcomes that the Bank of Greece will also be represented in the Committee selecting the President and members of the General Council, the Managing Director and the members of the Executive Board⁵. The ECB notes that the draft law does not provide whether the member of the Executive Board designated by the Bank of Greece will at the time of appointment be a member of staff or an official of the Bank of Greece and suggests clarifying this in the draft law. Moreover, the ECB suggests that the draft law could provide for participation in this Selection Committee by a representative from the ECB, in addition to one from the European Commission.
- 3.4 The ECB draws attention to the fact that the draft law should foster best practice in terms of decision-making transparency and accountability within the HFSF's General Council and Executive Board. In this respect, the draft law should provide for the HFSF to adopt more detailed rules on how its affairs are managed as well as a code of conduct for members of the General Council and of the Executive Board. These should regulate, *inter alia*, procedures for both bodies' meetings and the preparation of agendas and minutes. They should also provide rules and procedures for decision-making in emergency situations.
- 3.5 According to Article 1(5) of the draft law, the HFSF may participate in the increase of the share capital of credit institutions also through the issuance of contingent convertible bonds. Article 1(7) of the draft law, inserting a new Article 7a in Law 3864/2010, provides that, in case of a capital increase of such a credit institution, the voting rights attached to the HFSF's shares will be restricted, if the participation of private sector investors in the capital increase is at least 10% of the

³ Articles 1(2) and 1(3).

⁴ Article 4(2)C of Law 3864/2010.

⁵ Article 1(2), 1(3) and 1(4).

amount of the share capital increase. The ECB understands that the contingent convertible bonds eligible for the own funds of the credit institution would not be included in the share capital increase of the bank when determining the Fund's voting rights unless and until the event for their conversion into common shares has been triggered. Furthermore, the ECB considers that the rights of private investors could be clarified if the 10% threshold of private sector participation in the capital increase under proposed Article 7a(3) is not reached. In that case the ECB understands the private investors would still be issued certificates representing rights to shares in proportion to their percentage participation in the capital increase, but this is not expressly stated. Indeed, the first sentence of proposed Article 7(1) suggests the share certificates are only issued if the 10% threshold in Article 7a(3) is reached.

4. Amendments to the Law on banking

- 4.1 Article 2(4) of the draft law amends Article 63B(4) of Law 3601/2007 on the conditions for activating resolution measures, which will provide that the Bank of Greece will, at its discretion, use adequate measures for the resolution of a credit institution, considering, *inter alia*, the need to allocate the eventual losses arising from the resolution of the credit institution to shareholders, to unsecured creditors and to depositors not covered by Law 3746/2009. While the ECB understands this reflects the need to limit the costs of resolution, it nevertheless notes that this may compromise, if not exclude, the transfer of uncovered deposits, which should in any case remain an option.
- 4.2 Article 2(6) of the draft law allows the Bank of Greece, within six months from the issuance of a decision activating a transfer of assets, to transfer further assets of the credit institution subject to the resolution measure or to transfer back to the latter assets that have already been transferred to the transferee credit institution. The difference between the value of the transferred liabilities and the value of the transferred assets will be adjusted accordingly. The same holds under Article 2(9) of the draft law in respect of further transfers to or from the TCI⁶. The ECB understands that these provisions serve the purposes of the resolution procedure, as defined in the Law on banking, and, therefore underlines that, for the sake of efficiency of the procedure and legal certainty, such decisions by the Bank of Greece should be implemented also by the HFSF in a timely and efficient manner.

5. Amendments to the Law on the HDIGF

As regards the regime on conflicts of interest for members of the Executive Board of the HDIGF, Article 3(5) of the draft law, which replaces the last sentence of Article 23(4) of Law 3746/2009, provides that 'the two members of the Executive Board nominated by the Hellenic Banks Association must not be

⁶ Pursuant to Article 63E of the Law on banking, the Minister for Finance may decide in the public interest and on recommendation from the Bank of Greece to establish a TCI to whom the Bank of Greece may compel a credit institution to transfer the whole or part of its assets and /or liabilities under the procedure set out in Article 63D.

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actively involved in the credit institutions participating in the HDIGF and, in relation to these, there must be no ground for conflict of interests stemming, on the one hand, from their participation in HDIGF's Board and, on the other hand, from any relationship they may have with participating credit institutions'. The ECB considers the criterion of 'active involvement in credit institutions participating in the HDIGF' is too vague to prevent conflicts of interest in respect of HDIGF Board members. The regime for members of the Executive Board of the HSFS should also apply to the HDIGF Board⁷.

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

Done at Frankfurt am Main, 28 February 2012.

[signed]

The President of the ECB

Mario DRAGHI

⁷ See Article 1(8) of draft law introducing a new Article 16B in the Law on the HSFS.