



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 20 July 2015

on recovery and resolution of credit institutions and investment firms

(CON/2015/25)

Introduction and legal basis

On 19 July 2015 the European Central Bank (ECB) received a request from the Greek Ministry of Finance (MoF) for an opinion on a draft law on the recovery and resolution of credit institutions and investment firms¹ (hereinafter the 'draft law'). The MoF asked for the adoption of the ECB's opinion on an urgent basis.

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 on the third and sixth indents of Article 2(1) of Council Decision 98/415/EC², 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. For elements of the draft law the exclusive purpose of which is the transposition of Union law, the ECB's competence to deliver an opinion is based on Article 25.1 of the Statute of the European System of Central Banks and of the European Central Bank. 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 purpose of the draft law is to implement into Greek law Directive 2014/59/EU of the European Parliament and of the Council (the Bank Recovery and Resolution Directive, or 'BRRD')³, thereby aligning the Greek legal framework for the recovery and resolution of certain types of entities active in financial markets, including credit institutions, investment firms, and financial holding companies that have their head office in Greece with the existing Union legislation in this field.
- 1.2 Greece has enacted comprehensive legislation that introduced mechanisms to resolve failing institutions since 2011, prior to the adoption of the BRRD⁴, on which the ECB has been consulted⁵.

¹ Draft law on the recovery and resolution of credit institutions and investment firms (transposition of Directive 2014/59/EU) and other provisions.

² Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

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).

⁴ See Articles 19, 62, 145 et seq. of Law 4261/2014 (formerly Law 3601/2007) and secondary legislation, Decisions of the Credit and Insurance Committee No 21/4.11.2011, 77/30.5.2013.

This framework authorised the Greek resolution and supervisory authorities to take action in order to prevent systemic crises, protect depositors, safeguard public confidence in the banking system and promote financial stability. Following the establishment of the new European framework for the recovery and resolution of credit institutions and investment firms it was necessary to replace the existing Greek legislation with a new framework addressing in a uniform manner all issues associated with the potential failure of financial sector entities.

1.3 The draft law comprises 20 chapters which in particular regulate the preparation of recovery and resolution plans, the provision of intragroup financial support, the exercise of early intervention powers, the adoption of resolution measures and their objectives, the powers of the resolution authorities, the provision of public financial support, the protection of the rights of shareholders and creditors in the context of resolution, and the use of resolution financing arrangements. The draft law also introduces necessary amendments to relevant existing legislation in order to ensure its compatibility with the new framework.

1.4 The main provisions of the draft law are as follows:

- The Bank of Greece, which is the national competent authority for supervising Greek credit institutions, in accordance with Regulation (EU) 575/2013⁶ (the Capital Requirements Regulation, or 'CRR') and Council Regulation 1024/2013⁷ (the 'SSM Regulation'), is designated as the national resolution authority for those institutions; and the Hellenic Capital Markets Commission, which is the competent authority for supervising Greek investment firms, is designated as the national resolution authority for those firms. The Greek resolution authorities shall exercise their resolution tasks separately and independently from their supervisory tasks⁸.
- The MoF is designated as the competent ministry under the draft law. The resolution authorities are required to inform the MoF of their decisions pursuant to the draft law and have its consent before adopting any decision: (a) to transfer to a purchaser shares or other ownership instruments issued by an institution under resolution, or all or any assets, rights or liabilities of an institution under resolution under the sale of business tool⁹; (b) to transfer to a bridge institution shares or other ownership instruments issued by an institution under resolution, or all or any assets, rights or liabilities of an institution under resolution under the bridge institution tool¹⁰; (c) to transfer assets, rights or liabilities and contractual arrangements of an institution under resolution or a bridge institution to one or more asset

5 See Opinions CON/2011/72, CON/2011/107, CON/2012/14, CON/2012/25 and CON/2012/39. All ECB opinions are available on the ECB website at www.ecb.europa.eu.

6 Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

7 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).

8 See Article 4(10) of Law 4261/2014 implementing Article 4(7) of Directive No. 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (CRDIV) (OJ L 176, 27.6.2013, p. 338).

9 See Article 38(1) of the draft law.

10 See Article 40(1) of the draft law.

management vehicles under the asset separation tool¹¹; (d) to give effect to the bail-in tool¹²; (e) to make a determination that, unless the write down or conversion power is exercised in relation to a subsidiary, the group will no longer be viable; and (f) having a direct fiscal impact or systemic implications.

- Competent authorities (as defined in the CRR¹³) are authorised to adopt early intervention measures and to appoint a commissioner in cases where there is a significant deterioration in a credit institution's financial situation or where there are serious infringements of law, regulations or the statutes of the institution, or serious administrative irregularities. The commissioner's expenses must be covered by the credit institution. However in cases where the credit institution is not able to discharge such obligations, the Bank of Greece must step in to cover the expenses¹⁴. The Bank of Greece will have a claim against the institution in accordance with Article 55E of its Statute.
- Resolution authorities may apply four resolution tools individually or in combination. These tools are the sale of business tool, the bridge institution tool, the asset separation tool, and the bail-in tool. It is worth noting that the provisions on the bail-in tool, along with the powers of write down and conversion associated with the bail-in tool, will be applicable in Greece only from 1 January 2016¹⁵.
- When exercising their powers, the resolution authorities are required to ensure the full protection of the deposits of the Greek State in any appropriate way.
- The bridge institution shall be a legal person wholly or partially owned by one or more public authorities, which may include the resolution financing arrangement or the resolution authority, and shall be controlled by the resolution authority. In this respect, the draft law deviates from the existing resolution framework which provides that a bridge institution shall be owned and controlled by the Hellenic Financial Stability Fund (HFSF)¹⁶.
- Public financial support may be provided through the adoption of the public equity support tool or the temporary public ownership tool.
- In accordance with the no creditor worse off principle, shareholders or creditors that have incurred greater losses in a resolution than they would have incurred in a winding-up under normal insolvency proceedings are entitled to the payment of the difference from the resolution financing arrangement.
- Procedural requirements are established to ensure that resolution actions are properly notified and that resolution authorities are subject to an adequate confidentiality regime. Resolution authorities, competent authorities and the MoF are also required to provide one

11 See Article 42(1) of the draft law.

12 See Article 43(1) of the draft law.

13 Article 2, point 5 of the draft law.

14 Article 137 of Law 4261/2014 as amended by Article 120 of the draft law.

15 Article 132(1) of the draft law.

16 The exercise of shareholder rights in bridge institutions is one of the HFSF's tasks under Article 2 of the HFSF Statute (Law 3864/2010).

another upon request with all the information relevant for the other authority to carry out its tasks.

- The Resolution Branch of the Deposit Guarantee Scheme is designated as the resolution financing arrangement for credit institutions. The Resolution Branch of the Investment Guarantee Fund is designated as the resolution arrangement for investment firms.
- Competent authorities and resolution authorities are authorised to impose administrative measures and administrative sanctions.
- With regard to the appointment of a commissioner¹⁷, as outlined above, where the removal of the senior management or the executive board of an institution is deemed to be insufficient to restore that institution's financial situation, the competent authority may appoint one or more commissioners to the institution. This complements the framework under which the commissioners are appointed¹⁸.
- The civil liability of resolution authorities towards third parties for actions or omissions in the performance of their duties under the draft law is limited to gross negligence and wilful misconduct. Resolution authorities are liable for damages suffered as a result of a decision that was annulled¹⁹. The civil liability of the governor, the deputy governors, all members of collective bodies and members of staff of the Bank of Greece towards third parties for actions or omissions in the performance of their duties related to any competence exercised by the Bank of Greece in its capacity as a public authority has been amended. The new provision will expose these officers and staff of the Bank of Greece to liability not only for wilful misconduct, but also for gross negligence²⁰.
- The ranking of creditors in the context of any future special liquidation of credit institutions has been amended so as to rank claims in the following order²¹: (a) preferential claims arising out of insolvency proceedings²² and claims in case the public equity support tool or the temporary public ownership tool are exercised²³; (b) claims arising out of deposits guaranteed under the deposit guarantee scheme; (c) general claims of the State; (d) the following claims will be satisfied on a pro-rata basis: (i) claims of the Resolution Fund, (ii) deposits above the guaranteed threshold for private individuals and micro, small and medium-sized enterprises; and (e) claims arising out guaranteed investment services.

2. General observations

- 2.1 The draft law arises out of the Euro Summit Statement of 12 July 2015, pursuant to which the Greek authorities committed to enact a series of measures by 22 July, including the transposition of

17 Article 29 of the draft law and amendments to Article 137 of Law 4261/2014.

18 Article 137 of Law 4261/2014, as amended by the draft law.

19 Article 110(3) of the draft law.

20 Amendment to Article 62(4) of Law 4261/2014.

21 Article 120 of the draft law, inserting a new Article 145a in Law 4261/2014.

22 Article 154 of the Insolvency Code.

23 Under Articles 57 and 58 of the draft law respectively.

- the BRRD, with support from the European Commission.
- 2.2 The ECB would like to stress that, given the very short time in which it has considered this important legislation, it has not been possible to assess all of the many legal and regulatory issues which this draft law undoubtedly raises.
- 2.3 The ECB welcomes the draft law, as it strengthens the tools and procedures available to the Bank of Greece to carry out effective preventive, early intervention and effective resolution measures in line with the common framework of intervention powers, rules and procedures laid down in the BRRD.
- 2.4 The ECB stresses, however, that it does not opine on whether the draft law effectively discharges the obligations of the Greek State to implement the BRRD in Greek law. Rather, the ECB focuses primarily on those provisions that may impact on the role and tasks of the Bank of Greece as a central bank and as a member of the European System of Central Banks (ESCB).
- 2.5 It is worth noting that the ECB has developed guidance, in the form of general and specific considerations, on the basis of which it may decide whether a new task conferred on an ESCB national central bank (NCB) is to be considered a central banking task or a government task for the purposes of assessing such conferral against the prohibition of monetary financing under Article 123 of the Treaty²⁴. This guidance applies to genuinely new tasks that either did not exist in the past or did not form an integral part of the central banking tasks assigned to the NCB in the past. The tasks currently discharged by an NCB as central banking tasks are not reviewed and re-categorised, but may be reassessed if they are subject to legislative amendments of substance. The ECB has clarified that resolution tasks can be considered central banking tasks, provided that they do not undermine an NCB's independence in accordance with Article 130 of the Treaty²⁵. In this respect, it is noted that the Bank of Greece has already been conferred with extensive powers to take specific resolution measures vis-à-vis credit institutions since 2011²⁶. Hence, the draft law does not constitute a substantive change in the supervisory, financial stability, and resolution tasks carried out by the Bank of Greece and is expected to have a limited impact on the overall functions carried out by it.
- 2.6 It is clear that the draft law does not authorise the Bank of Greece to provide any loan or financing under any circumstance to the Resolution Fund²⁷. The provision of such financing to the Resolution Fund would constitute a government task, and any such loan or financing by the Bank of Greece would therefore breach the prohibition of monetary financing under the Treaty²⁸.

²⁴ See Opinion CON/2015/22.

²⁵ See paragraph 2.3.2 of Opinion CON/2015/22. This position departs from the one set out in Opinions CON/2015/3 and CON/2015/2.

²⁶ *ibid.* See also Opinion CON/2011/72.

²⁷ Article 18(3)(b) of the draft law.

²⁸ *ibid.*

3. Specific observations

3.1 *Consent of the MoF*

3.1.1 The ECB notes that the Resolution Committee of the Bank of Greece is required, before deciding to take a resolution measure, to obtain the prior consent of the MoF in a broad range of circumstances. This provision purports to implement Article 3(6) of the BRRD. However, by requiring the MoF's prior consent for all decisions pertaining to the sale of a business, the setting-up of a bridge bank, asset separation, bail-in, write down or conversion²⁹, regardless of whether they have a direct fiscal impact or systemic implication, the draft law seems to go beyond Article 3(6) of the BRRD. Further, it is important that the Bank of Greece should have ultimate control over any decision related to a resolution matter that could affect the Bank of Greece's financial independence³⁰.

3.1.2 Moreover, in requiring the Bank of Greece as the resolution authority to obtain the MoF's prior consent before taking resolution actions in a broad range of circumstances, the question arises as to whether the MoF may be considered to be a second resolution authority alongside the Bank of Greece. The consulting authority is invited to consider whether the MoF's prior consent should be more appropriately limited to those cases in which the resolution measures have a direct fiscal impact or systemic implications, as required by Article 3(6) of the BRRD. This would avoid the MoF acting de facto as a joint resolution authority alongside the Bank of Greece, since if this were the case the MoF would need to ensure the operational independence of its resolution function³¹.

3.2 *Conflicts of interests with other tasks of the Bank of Greece*

3.2.1 The ECB has repeatedly noted³² that, in line with the BRRD³³, staff involved in carrying out the functions of a resolution authority in accordance with the Directive must be structurally separate and subject to separate reporting lines from those involved in carrying out prudential banking supervision tasks pursuant to applicable EU legal acts³⁴ or with regard to the other functions of the relevant authority. The BRRD 'exceptionally' allows one authority to carry out both resolution and supervisory functions on the condition that adequate structural arrangements are put in place in order to ensure operational independence and to avoid conflicts of interest between that authority's resolution function and its other functions. For example, the BRRD envisages structural separation being achieved by keeping the reporting lines for staff involved in carrying out resolution tasks separate from those used by staff involved in supervision activities³⁵. That separation should not, however, prevent the resolution function from having access to any necessary information which is available to the supervisory function³⁶.

²⁹ See Articles 38(1), 40(1), 42(1), 43(1) and 59(7) of the draft law.

³⁰ See paragraph 3.3 of Opinion CON/2015/2 and paragraph 3.2.2 of Opinion CON/2015/22.

³¹ See paragraph 3.3 of Opinion CON/2015/22.

³² See paragraph 3.2.6 of Opinion CON/2015/22, paragraph 4.3 of Opinion CON/2015/2, paragraphs 5.1 and 5.2 of Opinion CON/2015/3 and paragraph 3.1 of Opinion CON/2014/67.

³³ See the second subparagraph of Article 3(3) BRRD.

³⁴ See the CRR; and CRDIV.

³⁵ See paragraph 3.1 of Opinion CON/2014/67.

³⁶ See paragraph 4 of Opinion CON/2015/2.

3.2.2 Pursuant to existing law and the draft law, the Bank of Greece is required to ensure the operational and organisational independence of the department carrying out resolution functions and its staff to ensure there is no conflict of interest and to provide for the separation of tasks relating to the resolution function from the Bank of Greece's other tasks. The ECB welcomes these provisions, as they appear to adequately address potential conflicts of interest between the resolution function and the Bank of Greece's other tasks and functions.

3.3 *Liability of the Bank of Greece*

3.3.1 With regard to the provisions in the draft law on the liability of the Bank of Greece³⁷, the ECB notes that the Bank of Greece, as resolution authority, will now be held liable for gross negligence and wilful misconduct. It is not obvious why the Bank of Greece should assume the burden of those potential liabilities when the draft law requires it to obtain prior consent from the MoF before taking resolution actions in a broad range of circumstances³⁸. Against this backdrop, the ECB notes that, under the prohibition of monetary financing laid down in the Treaty, national legislation may not require an NCB to finance the public sector's obligations vis-à-vis third parties³⁹. Given that potential liability issues represent substantial financial risks for the Bank of Greece⁴⁰, this should be taken into account in determining the entity that is liable to pay damages to third parties and in assessing the Bank of Greece's ability to recover its resolution-related expenses.

3.3.2 The draft law contains provisions on the personal liability of the members of the decision-making bodies and the staff of the Bank of Greece. There may be concerns as to the proportionality of such liability, in particular, given that staff of other Greek public authorities are not subject to such personal liability in relation to third parties⁴¹.

3.4 *Ownership of bridge institutions and asset management vehicles*

3.4.1 With regard to the bridge institution tool and the asset separation tool, the draft law sets out that the bridge institution or asset management vehicle must be wholly or partially owned by one or more public authorities which may include the resolution authority or the Resolution Fund.

3.4.2 While this provision implements the BRRD⁴², where a central bank acts as resolution authority, it should be clarified, for the avoidance of doubt, that the central bank will in no event assume or finance any obligation of these entities. A central bank's role as owner of such an entity must remain consistent under all circumstances with the prohibition on monetary financing under Article 123 of the Treaty, as supplemented by Council Regulation (EC) No 3603/93⁴³. This prohibits, inter alia, any financing by a central bank of the public sector's obligations vis-à-vis third parties. Moreover, this role must be performed without prejudice to central bank independence, in particular

37 Article 72(4) of the draft law.

38 See paragraph 3.2.10 of Opinion CON/2015/22.

39 See the ECB's 2014 Convergence Report, p. 29.

40 See paragraph 3.2.9.3 of Opinion CON/2015/22.

41 See Article 38 of the Civil Servants Code (Law 3528/2007).

42 See Articles 40(2)(a) and 42(2)(a) BRRD.

43 Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty (OJ L 332 , 31.12.1993, p. 1).

its financial and institutional independence⁴⁴. The principle of financial independence requires NCBs to have sufficient means to carry out not only their ESCB-related tasks from an operational and financial point of view, but also their national tasks⁴⁵. For that reason, it should be ensured that if the Bank of Greece, as resolution authority, decides to become owner of such an entity, it is provided with sufficient financial and human resources to address the operational burden associated with it.

3.4.3 It is also worth noting that under the existing law, the HFSF is conferred with the role of shareholder of bridge institutions, and may be best placed in terms of expertise and resources to exercise the role of shareholder of bridge institutions and asset management vehicles under the draft law.

3.5 *Cooperation and exchange of information between the Bank of Greece and other relevant authorities, including the Hellenic Capital Markets Commission*

3.5.1 The ECB notes that the draft law provides for cooperation between the Bank of Greece, which is the resolution authority for credit institutions, and other relevant authorities, including the Hellenic Capital Markets Commission, which is the resolution authority for investment firms, in performing their respective tasks, each keeping in mind the impact of their performance on the other.

3.5.2 The ECB welcomes these provisions as they will enable the relevant entities to perform their statutory tasks in a coordinated fashion. In particular, they will facilitate the Bank of Greece's performance of its financial stability mandate. Such arrangements are also in line with current ECB doctrine and the requirements under the BRRD, pursuant to which Member States must ensure that, where the central bank is not itself the resolution authority, the competent authority (i.e. the authority responsible for the prudential supervision of institutions) and the resolution authority engage in an adequate exchange of information with the NCB⁴⁶.

3.6 *Resolution planning*

The draft law provides that recovery plans and resolution plans drawn up and maintained by an institution shall not assume any access to or entitlement to extraordinary public financial support beyond that granted by the Resolution Fund. However, they shall include, where applicable, a forward-looking analysis of how and when an institution may apply for the use of central bank liquidity in stressed conditions and what collateral is to be used in respect of such⁴⁷. While these provisions appear to be in line with the requirements of the BRRD, the ECB emphasises that they do not in any way affect the competence of the Eurosystem to decide independently and in its full discretion on the provision of central bank liquidity, based on the existing legal framework and within the limitations imposed by the monetary financing prohibition under the Treaty⁴⁸.

44 See paragraph 3.3 of Opinion CON/2012/99, paragraph 5 of Opinion CON/2011/84 and paragraph 3.6 of Opinion CON/2011/39.

45 See the ECB's 2014 Convergence Report, p. 25.

46 See paragraph 3.1 of Opinion CON/2012/99.

47 Article 18(4) of the draft law.

48 See paragraph 3.2 of Opinion CON/2012/99, paragraph 3.3 of Opinion CON/2014/67 and paragraph 3.4 of Opinion CON/2015/22.

3.7 *Withdrawal of authorisation*

With regard to Article 32(5) of the draft law, the SSM Regulation confers on the ECB the power to withdraw a credit institution's authorisation. This applies both to institutions under the ECB's direct supervision and to institutions under the supervision of the Bank of Greece. The drafting of Article 32(5) of the draft law should be clarified to reflect this.

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

Done at Frankfurt am Main, 20 July 2015.

[signed]

The President of the ECB

Mario DRAGHI