EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 13 January 2010

on restructuring of business and professional debts owed to credit institutions and on credit bureau data processing

(CON/2010/8)

Introduction and legal basis

On 23 December 2009 the European Central Bank (ECB) received a request from the Greek Ministry of Economy, Competitiveness and Shipping for an opinion on a draft law on the restructuring of business and professional debts owed to credit institutions, provisions governing credit bureau data processing and other provisions (hereinafter the 'draft law'). On 29 December 2009 the Ministry submitted an addendum to its consultation request with some clarifications and additional information on specific aspects of the draft law.

The ECB's competence to deliver an opinion is based on Article 127(4) of the Treaty on the functioning of the European Union and the sixth indent 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 provisions[1], as the draft law relates 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 According to its explanatory memorandum, the draft law serves as the starting point for the Greek Government's implementation of a broader strategic plan for strengthening the market and developing the economy. The draft law seeks to introduce measures intended to enhance liquidity in the market by supporting, in particular, business, professional and agricultural activities. The draft law is aimed at enabling natural and legal persons in economic distress, pursuing the above-mentioned activities, to restructure their overdue debts, thus providing liquidity support and ensuring the viability of their activities under the current adverse economic circumstances. Moreover, on the basis of specific criteria, the draft law also provides for repayment arrangements in relation to debts that have not become overdue (performing debts). Furthermore, the draft law amends the existing legal framework on the recording and processing of credit bureau data in an effort to strike a balance between the availability of information on debtors, which is necessary for

1 OJ L 189, 3.7.1998, p. 42.

the efficient assessment of credit risk, and the unwarranted exclusion of debtors from access to credit necessary for the pursuit of economic activities.

1.2 More specifically, under Article 1(1) of the draft law, natural and legal persons that have entered into loan or credit agreements with banks or other credit institutions for business, professional or agricultural purposes may apply to have their debts restructured if such debts have become overdue between 1 January 2008 and the date of publication of the draft law[2]. Article 1(4) of the draft law also provides for the restructuring of debts that have become overdue after 1 January 2005 under certain conditions[3]. In accordance with Article 1(5) of the draft law, applications for debt restructuring, as described above, must be submitted by 15 March 2010, with credit institutions being obliged to communicate to debtors the amount of the debt within 30 days following the date of submission of an application.

1.3 Moreover, Article 2(1) of the draft law enables natural and legal persons that have entered into loan or credit agreements with banks or other credit institutions for business, professional or agricultural purposes to apply for any of the following measures in relation to performing debts, provided that they have no outstanding tax or national insurance liabilities and the conditions set out in Article 2 of the draft law have been met[4]: (i) a one-year grace period with a respective extension of the contractual term of the loan and capitalisation of interest on expiry of the grace period; (ii) a two-year suspension of repayments of outstanding capital with a respective extension of the contractual term of the loan and payment of interest over the suspension period in accordance with the interest periodicity provided for in the agreement; or (iii) a three-year extension of the contractual term of the loan. In accordance with Article 2(4) of the draft law, applications for debt repayment must be submitted, also in these cases, by 15 March 2010.

1.4 Article 3(1) of the draft law provides for the deletion of adverse data on repaid debts from records kept by or managed for the benefit of credit or financial institutions, provided that the relevant debt has already been or will be fully repaid within three months of publication of the draft law. In the same vein draft Article 3(2) lifts any restriction on issuing new cheque books imposed pursuant to

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2 Where the agreement has not been terminated, the restructuring requires that a debt be overdue for at least three months. Default interest and compound interest, less that already paid up to the date of entry into force of the draft law, will be deducted from the total outstanding amount subject to restructuring and will be written off. The total debt subject to restructuring may not exceed one million euro per credit institution and three million euro for all credit institutions.

3 Such an option is possible, provided that by 15 April 2010 the debtor pays off a sum equal to 10 % of the resulting debt, excluding default interest and compound interest, for which separate accounts will be kept. If the debtor pays off half the debt in accordance with the arrangement, default interest and compound interest (less that already paid up to the date on which the draft law enters into force) will be written off.

4 Under Article 2(2), the following persons may apply for the measures referred to in Article 2(1) where the outstanding capital does not exceed EUR 250 000 per credit institution and EUR 1 million for all credit institutions: (i) natural and legal persons who keep category III books in accordance with the Code of Books and Records, have an annual turnover of less than EUR 2,5 million during the last financial year up to and including June 2009 and have incurred a loss during that financial year; and (ii) agricultural cooperatives, associations of agricultural cooperatives and producers groups, regardless of the category of books they keep, provided that the conditions set out in (i) above are met. Under Article 2(3), the following persons may also apply for the measures referred to in Article 2(1) where the outstanding capital does not exceed EUR 100 000 per credit institution and EUR 300 000 for all credit institutions: (i) natural and legal persons engaged in a commercial activity with a gross annual revenue of less than EUR 150 000 during the 2008 financial year; (ii) natural persons engaged in an agricultural activity as their main occupation; and (iii) undertakings which have incurred substantial damages from fire or natural disasters between 2007 and the date of publication of the draft law.

Decision No 234/23/11.12.2006 of the Banking and Credit Committee of the Bank of Greece[5] in relation to cheques that have been or will be paid within three months of publication of the draft law. With regard to credit bureau data processing, Article 4 of the draft law introduces changes to the current legal framework, in particular by reducing by one year the current maximum periods during which such data may be kept and used by credit or financial institutions or credit bureau data archives in relation to debts that have been fully repaid[6]. In particular, cheques paid within 30 days of being returned to a drawer will not be recorded in the above mentioned archives, while those recorded will be deleted[7]. In relation to debts that have not been repaid, Article 4(4) of the draft law provides for the deletion of the relevant data ten years after such data have been recorded.

1.5 Article 5 of the draft law introduces the obligation for credit and financial institutions that have passed adverse debt data to lawfully operating credit bureau data archives to inform the person in charge of processing such data within two working days of obtaining proof of debt payment. In addition, Article 6 of the draft law states that, under certain conditions, debtors may obtain provisional judicial protection by preventing registration of credit bureau data in archives provided that it is deemed probable that an overdue debt does not exist.

1.6 Article 7 of the draft law enables credit institutions to issue new cheque books while a restriction on issuing such books still applies, provided that a third party guarantor, namely a natural or legal person not subject to such restriction, guarantees up to EUR 5 000 for each cheque. Article 8 of the draft law provides for sanctions to be imposed by the Minister for the Economy, Competitiveness and Shipping in cases of infringement of the obligations under the draft law. Finally, Article 9 of the draft law addresses tax issues where the draft law entails writing-off claims of credit institutions in accordance with its provisions.

2. Procedural and general observations

2.1 Before introducing its specific comments on the draft law, the ECB wishes to draw the consulting authority's attention to one procedural and several general observations.

2.2 Procedurally, in cases of particular urgency that do not allow for a normal consultation period, the consulting authority may indicate urgency in the consultation request and ask for a shorter time limit for the ECB's opinion to be adopted. This does not prejudice the national authorities' duty under Articles 127(4) and 282(5) of the Treaty to consult the ECB on national draft legislative provisions falling within its fields of competence in due course of the national legislative process. The second sentence of Article 4 of Decision 98/415/EC states that the ECB must be consulted 'at an appropriate stage' in the legislative process. This implies that the consultation should take place

5 FEK 63B/2007.

6 Under Article 4(1), such periods are reduced to two, three and four years depending on the three categories of payment facilities provided for therein.

7 In this respect, Article 4(5) provides that from the point in time when such cheques no longer appear in the relevant information records in accordance with the provisions of Article 4 of the draft law, the restriction on issuing new cheque books imposed pursuant to Decision No 234/23/11.12.2006 is lifted.

at a point in the legislative process that affords the ECB sufficient time to examine the draft legislative provisions and to adopt its opinion in the required language versions and which also enables the relevant national authorities to take the ECB's opinion into consideration before the provisions are adopted. In this respect, it is worth recalling that, as noted by the Court of Justice, the obligation to consult the ECB under the Treaty is intended 'essentially to ensure that the legislature adopts the act only when the body has been heard which, by virtue of the specific functions that it exercises in the Union framework in the area concerned and by virtue of the high degree of expertise that it enjoys, is particularly well placed to play a useful role in the legislative process envisaged'[8]. Given that the consulting authority has indicated to the ECB that the draft law is scheduled to be voted into law within a very short time frame, the ECB considers that the minimum consultation period of one month provided for in Article 3(1) of Decision 98/415/EC applies. According to Article 3(4) of Decision 98/415/EC, Member States are obliged to suspend the process for the adoption of draft legislative provision pending submission of the ECB's opinion. This means that the adopting authority must have a real opportunity to consider the ECB's opinion in a meaningful manner prior to taking its decision on the substance.

2.3 The consulting authority views the draft law as containing one-off temporary measures of limited material scope, which should support liquidity for business, professional and agricultural activity. However, the ECB notes that the proposed measures could have a negative impact on market liquidity, especially against the backdrop of the current adverse economic conditions in Greece. In particular, a deterioration of these conditions could have systemic implications within Greece and, possibly, also cross-border effects[9]. Moreover, in key respects, some of the measures envisaged in the draft law are not consistent with the principle of an open market economy, as reflected in Article 3 of the Treaty on the European Union, and could therefore possibly hinder, rather than support, the flow of credit even under normal market conditions. In view of the above, the ECB stresses the importance of thoroughly assessing beforehand the impact of the draft law on the capital adequacy and liquidity position of credit institutions, as well as its effects on the functioning of the financial system, so as to safeguard financial stability, promote market efficiency and liquidity and support the adequate flow of credit to the economy.

2.4 Moreover, the draft law applies to debtors and governs their relationships vis-à-vis credit institutions. Clearer formulations of the rights and obligations introduced by the draft law, as well as a careful consideration of its impact on existing legal relationships between creditors and debtors, are necessary in order to ensure legal certainty, avoid undue interference with the ownership positions of credit institutions and prevent moral hazard, namely the creation of incentives not to service debt in a timely manner. The potential moral hazard generated through the

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8 Case C-11/00 *Commission of the European Communities* v *European Central Bank* [2003] ECR I-7147, paragraphs 110 and 111.

9 Even if the draft law only covered the Greek branches of credit institutions domiciled in other EU Member States, its effects could extend beyond Greece, requiring credit institutions domiciled in other EU Member States to make provisions for the suspension of debt repayment envisaged in the draft law. This could have an impact on financial stability in other EU Member States.

proposed restructuring of currently performing loans could have serious adverse consequences on banks' capital and liquidity positions, as well as on the overall cost of financing.

2.5 Further to its general observations in paragraphs 2.3 and 2.4 above, the ECB has the following specific comments to make on the draft law.

3. Specific observations

3.1 The ECB understands that Articles 1 and 2 of the draft law entitle debtors falling within its scope of application to benefit from restructuring arrangements in relation to overdue debts and performing debts, respectively, provided that the conditions set out therein are met. However, the ECB is of the view that the draft law should explicitly stipulate that debtors entitled to apply for the restructuring of their debts should prove their ability to repay such debts in accordance with the terms set out in the draft law. Indeed, restructuring a debt without the debtor's proven ability to repay would only postpone the occurrence of default, thus increasing the level of credit risk in the financial system and impinging on the ability of credit institutions to fund the recovery of the economy as a whole. Moreover, from a legal certainty perspective, the ECB finds that the corresponding obligations on the part of the credit institutions in relation to the rights of debtors to apply for debt restructuring under Articles 1 and 2 of the draft law are not sufficiently clear and should be reformulated in the draft law in order to enhance clarity and reduce credit risk.

3.2 Under Article 1(4) of the draft law, debtors that have entered into loan or credit agreements in accordance with Article 1(1) thereof may, under certain conditions[10], apply for the restructuring of debts that have become overdue after 1 January 2005. Without prejudice to its comments in paragraph 2.4, above, the ECB suggests including, in Article 1(4) of the draft law, the date of 31 December 2007 as the end-date for debts falling due after 1 January 2005, as this would clarify the scope of the draft law by differentiating between the two categories of debt subject to restructuring, i.e. (i) debts that have become overdue between 1 January 2005 and 31 December 2007, and (ii) debts that have become overdue between 1 January 2008 and the date of publication of the draft law. Furthermore, the inclusion of such end-date would discourage perverse incentives that could result if debtors could avail themselves of the possibility to apply for the restructuring of debt becoming overdue following the draft law's publication and up to 15 March 2010, which is the deadline for applying for debt restructuring for both categories of debt.

3.3. Article 2 of the draft law enables natural and legal persons that have entered into loan or credit agreements with banks or other credit institutions for business, professional or agricultural purposes to apply for debt restructuring in relation to performing debts under certain conditions and for the amounts set out therein. In this respect, the ECB would like to draw the consulting authority's attention to the potential legal uncertainty risk that the inclusion of securitized debts

10 See footnote 3.

into the scope of such debt restructuring could create, encumbering credit institutions' access to securitisation markets to obtain liquidity and, consequently, the extension of credit to the economy.

3.4 The ECB understands Article 3 of the draft law as being aimed at providing entrepreneurs that face difficulties in repaying their debts, but who will settle their debts within three months of publication of the draft law, the opportunity to continue their activity without being penalized on the basis of adverse data records on their economic behavior. However, the prospect of such information no longer being available to credit institutions would not be in line with best practice, and could affect negatively the efficient evaluation of debtors' credit risk, by encumbering the ability of credit institutions to differentiate among debtors representing varying levels of risk. The proposed deletion of credit history data could, in short, make credit institutions more cautious in their lending and increase the cost of financing the economy, in particular of the firms and households that service their debt. The same observations also apply to draft Article 4(1) on credit bureau data processing, which, *inter alia*, reduces by one year the current maximum periods during which data on debts that have been fully repaid may be kept and used by credit or financial institutions or credit bureau data archives. The ECB would welcome an assessment of the effects of the proposed restrictions provided for in Article 3 and Article 4(1) of the draft law, also taking into account the practice in other Union Member States.

3.5 Finally, under Article 7 of the draft law, read in conjunction with Article 3(2) thereof, credit institutions may issue new cheque books while a restriction pursuant to Decision No 234/23/11.12.2006 of the Banking and Credit Committee of the Bank of Greece on issuing such cheque books still applies, provided that a third party guarantor guarantees up to EUR 5 000 per cheque. The ECB is concerned that the guarantee of EUR 5 000 per cheque may not suffice, as cheques could be issued for amounts well above that level. Therefore, it is advisable that a debtor subject to the above-mentioned restriction is provided with a cheque book only if the full amount of the cheque is guaranteed. Furthermore, the creditworthiness of the guarantor as well as the relevant concentration risk should be assessed when providing a cheque book subject to a guarantee. Finally, the ECB notes that, by lifting restrictions imposed pursuant to the aforementioned Decision adopted by the Bank of Greece in accordance with the regulatory powers conferred upon it by its statute, the proposed arrangement could interfere with the Bank of Greece's powers and with its ability to adequately perform its relevant tasks.

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

Done at Frankfurt am Main, 13 January 2010.

[signed]

The President of the ECB

Jean-Claude TRICHET