EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 17 February 2012

on the terms of securities issued or guaranteed by the Greek State

(CON/2012/12)

Introduction and legal basis

On 2 February 2012, the European Central Bank (ECB) received a request from the Greek Ministry of Finance for an opinion on draft legislative provisions introducing rules for the modification of the terms of securities issued or guaranteed by the Greek State on the agreement of bondholders. Later on, these draft provisions have been further revised. This opinion refers to the latest received revised draft provisions of 16 February 2012 (hereinafter the 'draft provisions').

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/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions[1], as the draft provisions relate 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 provisions

The draft provisions authorise the Greek Ministerial Council, on a recommendation of the Minister for Finance, to launch a process for the modification of the terms of eligible securities, as defined in paragraph 1 of the first Article of the draft provisions, to determine such eligible securities and, in the event of an exchange, to define the principal, the interest rate, the duration and the English or other law governing the new securities to be issued by the Greek State. The Greek Public Debt Management Agency (PDMA) will invite the holders of eligible securities to decide, within a specific deadline, on the modification of the eligible securities' legal documentation. This invitation, which is to be notified to the process manager[2] and published on the Internet, will specify: (a) the eligible securities, (b) the terms on which modifications are proposed, (c) the new content of the terms, (d) any new terms, (e) in case of an exchange of eligible securities, the terms of the new securities, as determined by the Ministerial Council,

1 OJ L 189, 3.7.1998, p. 42.

2 The process manager will be the Bank of Greece, as operator of the dedicated system for monitoring transactions in book-entry securities under Law 2198/1994 (hereinafter the 'System'), including in Greek government bonds.

and any additional terms thereof, (f) the deadline by which bondholders will be invited to decide on the modification, and (g) other specific issues, including the bondholders' participation in the decision-making process. A quorum of bondholders holding at least half of the aggregate outstanding principal of all eligible securities is required, together with a majority of at least two thirds of the outstanding principal of eligible securities held by participating bondholders.

2. General observations

2.1 As a general proposition, it is important that the Member States preserve their ability to honour at all times their commitments, also with a view to ensuring financial stability. The case of the Hellenic Republic is exceptional and unique.

2.2 The aim of the draft provisions is to facilitate private sector involvement agreed by the Heads of State or Government of the euro area Member States on 26 October 2011[3], exceptionally and only for the Hellenic Republic, by introducing into Greek law a procedure to facilitate, in accordance with collective action clauses (CACs), bondholder negotiation of and agreement to an exchange offer by the Hellenic Republic for its government bonds. The adoption of the draft provisions, together with other fiscal and structural measures, will facilitate a possible restructuring of the sovereign debt of the Hellenic Republic to help place it on a path of debt sustainability.

2.3 The ECB welcomes that the terms of such exchange is the result of negotiations held between the Hellenic Republic and the institutions representing its bondholders.

2.4 The use of CACs as a procedure to achieve an exchange of bonds is broadly aligned with general practice. In 2002 the Group of Ten recommended[4] to issuers of sovereign bonds the introduction of CACs to allow amendments to their payment terms with the approval of a supermajority of bondholders and without a minority being able to obstruct the process. Subsequently, the Member States agreed in April 2003 that the Member States should include CACs in their international debt issuance to promote international efforts for orderly restructuring in the event of sovereign debt crises[5]. The terms and conditions of the sovereign debt issued by the Hellenic Republic under non-Greek law normally contain CACs. The Euro Group stated on 28 November 2010 that CACs should be included in the terms and conditions of all new euro area government bonds. Article 12(3) of the Treaty establishing the European Stability Mechanism signed by all euro area Member States on 2 February 2012 provides that following 1 January 2013, CACs must be included in all new euro area government securities with maturity above one year.

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3 Euro Summit Statement, Brussels, 26 October 2011, available on the website of the Council of the European Union at www.consilium.europa.eu.

4 Report of the G-10 Working Group on Contractual Clauses, 26 September 2002, available on the website of the Bank for International Settlements at www.bis.org.

5 See 'Common understanding on implementing the EU commitment regarding the use of Collective Action Clauses (CACs)', available at http://europa.eu/efc/sub_committee/pdf/common_understanding_cacs_en.pdf. See also 'Implementation of the EU commitment on Collective Action Clauses in documentation of International Debt Issuance', available at http://europa.eu/efc/sub_committee/pdf/cacs_en.pdf.

2.5 The explanatory memorandum to the draft provisions provides that "*The public sector (EU, ECB) has demonstrated its support to the programme of reforms of the Greek economy, including the earmarking of an amount of EUR 30 billion for the restructuring of debt held by private sector creditors; it has also demonstrated, via the Eurosystem and the European Central Bank's programme for intervening in the bond markets SMP, its commitment to the stability of the European financial sector. In the context of materializing the above-mentioned commitments and while waiting for the exchange to be proposed to private sector creditors, the Hellenic Republic acknowledges the above support of the European Central Bank and the other Eurosystem members considering the higher interests of the Greek economy and the continued functioning of the Eurosystem monetary policy framework*."

2.6 The ECB notes that it remains the sole responsibility of the Government of the Hellenic Republic to take the necessary action that will ultimately ensure its debt sustainability.

3. Definition of bondholders

The draft provisions define bondholders as participants in the System rather than as the beneficiaries of the bonds. However, they do not explain how System participants are to vote for the modification of the terms of eligible securities, including where they have no active portfolio management rights over them, or how the voting is to take place, both procedurally and substantively. For reasons of legal certainty, and with a view to protecting the legitimate expectations of the bondholders of eligible securities, the draft provisions should include such details.

4. Disenfranchisement

Paragraph 5 of the first Article of the draft provisions provides for the disenfranchisement of eligible securities directly owned by the Greek State, and also in the case of eligible securities guaranteed by the Greek State, eligible securities directly owned by the issuer. The ECB understands that, as provided for in the explanatory memorandum to the draft provisions, this provision does not disenfranchise certain public sector entities not forming part of the Greek State, i.e. public law legal persons, local government authorities or private law legal persons of the public sector. The Report of the G-10 Working Group on Contractual Clauses[6] recommended a mechanism for disenfranchising bonds directly or indirectly owned or controlled by the sovereign issuer, and its public sector instrumentalities, to address creditor concerns about manipulation of votes by a sovereign. The disenfranchisement provisions of the draft provisions could be widened to protect the integrity of the voting process.

6 See Report of the G-10 Working Group on Contractual Clauses, p. 5.

5. Calculation method

The draft provisions do not stipulate the calculation method for the outstanding principal of eligible securities issued as zero coupon, stripped or index-linked bonds. The matter is, instead, left to the PDMA's invitation. For reasons of legal certainty, reliable statistical measurement of the debt and protection of the legitimate expectations of the bondholders, the draft provisions should specify the calculation method for the above types of eligible securities.

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

Done at Frankfurt am Main, 17 February 2012.

[signed]

The President of the ECB

Mario DRAGHI