EUROPEAN CENTRAL BANK

EUROSYSTEM

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OPINION OF THE EUROPEAN CENTRAL BANK

of 27 February 2019

on a draft law for the protection of primary residences

(CON/2019/9)

Introduction and legal basis

On 19 and 22 February 2019 the European Central Bank (ECB) received requests from the Greek Ministry of Finance for an opinion on a draft law for the protection of primary residences of natural persons in financial difficulty (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 sixth indent of Article 2(1) of Council Decision 98/415/EC[1], as the draft law relates to rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets and the specific tasks conferred upon the ECB concerning the prudential supervision of credit institutions pursuant to Article 127(6) of the Treaty. 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 *Objectives of the draft law*

The stated objectives of the draft law are fourfold: first, to protect targeted groups of society from the repossession of their primary residence; second, to contribute to the deleveraging of the stock of non-performing exposures (NPEs) in the banking system by converting them into performing loans, thereby contributing to more robust bank balance sheets; third, to strengthen social cohesion; and fourth, to encourage a good repayment culture by incentivising debtors to make prompt repayments and avoid re-defaulting.

1.2 *Eligible applicants and eligible debt*

The draft law entitles all natural persons who have a right *in rem* over real estate property used as their primary residence in Greece to protect this property from compulsory sale by restructuring, in accordance with the draft law, debt of any kind owed to credit institutions (including those that are subject to a special liquidation procedure) that has been in arrears for at least 90 days as from 31 December 2018 and is secured on the property. Applicants can be natural persons with or without the capacity to be declared bankrupt, i.e. both merchants and non-merchants. An applicant can

1 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).

also request the restructuring of debt owed to credit institutions by a third person (i.e. not the applicant him or herself) if such debt is secured on the applicant's primary residence. The applicant's *in rem* right over the real estate property may comprise full or bare ownership, or the right to use, and may be exclusive or based on a notional share (e.g. co-ownership).

1.3 *Eligibility thresholds*

An applicant is eligible to apply for debt restructuring provided that the following conditions, set out in the draft law, are met: (a) the tax value of the primary residence to be protected does not exceed EUR 250,000 at the time of the submission of the application;[2] (b) a mortgage or pre-notation of a mortgage is registered on the primary residence prior to the submission of the application; (c) the applicant's family income in the last year in which a tax return could be filed was no more than 170% of reasonable living expenses[3]; (d) the total outstanding debt (including principal and compound interest) on the debt that is eligible to be restructured under the draft law on the date of submission of the application does not exceed EUR 130,000; (e) the total value of the applicant's deposits and securities does not exceed 50% of the total debt brought under restructuring at the time the application is submitted; (f) the total value of the real estate property owned by the applicant other than his or her primary residence does not exceed 200% of the total amount of debt brought under restructuring at the time the application is submitted.

1.4 *Application through online platform*

As a first step, applicants will submit their application via an online platform that is to be developed and operated by the Special Secretariat for Private Debt in collaboration with the General Secretariat for Computer Systems of the Greek Ministry of Finance. An applicant who has already benefitted from a restructuring procedure under the draft law the draft law cannot submit a second application, even if this second application seeks the restructuring of different debts than under the first application or if the applicant has forfeited the restructuring arrangement resulting from the first application. An applicant who has already benefitted from a restructuring procedure under the draft law may request the restructuring of debt that has fallen in arrears for at least 90 days after the final submission of the first application where, following submission of the application, the applicant or the applicant's spouse or dependent becomes subject to a specified disability or is registered with the Registry for Unemployed Persons of the Labour Employment Office. However, an applicant who has already submitted an application may submit a second application if the first was withdrawn prior to completion of the restructuring through the platform procedure or if the previous application was not successful vis-à-vis any of the creditors (i.e. where no debt restructuring took place). Eligible applicants may apply within one year of the entry into force of the draft law, while people who are registered with the Registry for Unemployed Persons may apply within three years from the entry into force of the draft law and people with a specified disability may apply at any

2 The property value is determined by the tax base of the real estate tax owed or, where no such tax is owed, by the objective value of the property as determined under Law 1249/1982 and Ministerial Decision 1310/1998.

3 "Reasonable living expenses" are defined by the draft law as the household's most basic living expenses plus additional catering costs as determined by the Secretariat for Private Debt. The draft law further provides that until such time as they are set, the reasonable living expenses determined from the annual economic budgets survey conducted by the Hellenic Statistical Authority shall be taken as reasonable living expenses.

point in time.

1.5 *Pre-screening of eligibility*

The platform does not allow the final submission of an application if the documentation uploaded does not allow it to conclude that the eligibility requirements or the deadlines for submitting an application have been met. An applicant may request permission from the Secretary for Private Debt for the final submission of his/her application if he/she can prove that the platform wrongly classified him/her as ineligible or wrongly deemed that his/her application was not submitted within the deadline set. The Secretary decides on the matter within 30 days of the applicant's relevant request. This decision may be appealed, within two months of its issuance, to the head for the first instance administrative courts of the region where the primary residence is located[4].

1.6 *Restructuring proposals*

Once the application has been submitted in a final way as set out above, the platform notifies the creditors whose claims are covered by the application. The creditors are required to submit restructuring proposals, on a stand-alone basis or jointly, within one month from such notification. A creditor who can establish that the applicant is ineligible or that the creditor's claim is ineligible to be restructured may refuse to submit a restructuring proposal but must substantiate this by uploading the relevant documentation to the platform. The applicant must state which of the creditors' restructuring proposals he or she accepts or rejects within one month of their submission.

1.7 *Restructured amount payable and mandatory debt write-off*

To protect his or her primary residence, an applicant must pay in monthly amortising instalments either 120% of the commercial value of the primary residence at the time of the application plus interest calculated on the basis of the three-month Euribor interest rate plus 2%; or, if 120% of the commercial value of the primary residence exceeds the total amount of debt included in the restructuring application, then such latter amount. In each case, payments are to be made over a period of 25 years, which may not extend beyond the applicant's 80th birthday. Any debt exceeding this amount is mandatorily written off.

1.8 *State subsidy*

Upon the application of either the applicant or any creditor participating in the restructuring process, the State subsidises the restructured monthly instalments, provided that all debt eligible to be restructured under the draft law has been restructured through the platform or the courts, and that the restructuring complies with the relevant requirements. Subsidisation by the State lasts for the duration of the restructuring. The conditions applicable to, and the amount of, the State subsidy will be reviewed by the State every three years. After one year from the first determination or the latest adjustment of the amount of the State subsidy, the applicant may request a change to such amount, if changes in the applicant's income or reasonable living expenses or changes in the benchmark interest render compliance with the terms of the restructuring impossible for the

4 The hearing date for ruling on the appeal is set within two months of submission of the appeal. The ruling is irrevocable, is published within two months from the hearing date, and is notified within two months from the publication (i.e. within four months from the hearing date) to the Secretary for Private Debt, who has to implement it within one month of such notification.

applicant. The State subsidy will be discontinued if the applicant delays payment of his or her portion of the restructured instalment such that a creditor establishes a right to declare the applicant to be in default, even if this right is not exercised. The joint ministerial decision determining the amount and conditions for granting the State subsidy must comply with Union legislation on State aid and ensure that the State subsidy is granted to applicants who are unable to pay the restructured monthly instalments and that the amount of the subsidy must be such that the applicant will be in a position to repay such instalments from income alone after taking into account reasonable living expenses.

1.9 *Judicial restructuring*

The applicant may apply to the courts for the protection of his or her primary residence within 30 days from the termination of the platform restructuring process if this restructuring process is unsuccessful in respect of one or more creditors. The petition to the court must be uploaded to the platform, which notifies it to the creditors who participated in the restructuring.

The court determines the monthly instalments in line with the requirements of the draft law, namely the amount to be mandatorily written off and the 25-year mandatory duration of the restructuring scheme, deducting whatever amount the applicant has paid in the interim.

1.10 *Stay on enforcement*

All pending enforcement measures in relation to the applicant's primary residence, whether of a permanent or temporary, individual or collective nature, are automatically suspended as from the notification of the application to the creditors through the platform, until the expiration of the 30-day deadline set for the applicant to have recourse to the courts. This automatic stay of enforcement is binding on all creditors participating in the process and applies only for the applicant's first application under the scheme.

At any point in time during the hearing procedure at first or second instance the court may order, on its own initiative or the applicant's request, an extension of the stay on enforcement until it issues its ruling on the merits of the case. Such extension is granted where the judge has reasonable grounds to believe that the applicant's petition has merits and that the applicant's primary residence will have been liquidated before the issuance of the court's ruling on the merits, and on condition that the applicant pays a sum amounting to 30% of the last instalment payable before the submission of the restructuring application to each creditor who is a party to the court proceedings. However, the court may reduce or even waive such interim instalment in its entirety, and in some cases it is required to grant an extension of the stay on enforcement[5]. The court may revoke the extension order at any point.

The stay on enforcement outlined above does not prevent enforcement on the applicant's primary residence by an unregulated private sector creditor whose claims have not been restructured and who has registered a lien (i.e. a mortgage or pre-notation of mortgage) before submission of the finalised application by the applicant. In such a case, all creditors may lodge all their claims in their

5 For example, where a creditor failed to submit a restructuring proposal without having alleged that the applicant's debt, or the relevant claim, was ineligible for restructuring, or where the applicant requested an interim order in the petition to the court outlined in paragraph 1.9.

entirety.

The stay on enforcement does not prevent the taking of enforcement measures over the applicant's other assets, or the filing of petitions or orders of payment for claims covered by the restructuring application.

1.11 *Consequences of restructuring through the platform or the courts*

After a successful restructuring agreement has been reached involving at least one creditor, a stay of enforcement on the applicant's primary residence applies and is binding on all creditors whose claims were restructured through the platform or through the courts and for all creditors whose claims were not eligible for restructuring, except for (a) private sector creditors whose claims against the applicant were not eligible for restructuring under the draft law and who had registered a mortgage or a mortgage pre-notation against the applicant's primary residence before the final submission of the application, and (b) creditors whose claims against the applicant were eligible for restructuring under the draft law but were ultimately not restructured. These two categories of creditors may launch their claims against the applicant in their entirety, but only after the auctioning of the property.

Notwithstanding the above, private sector creditors whose claims against the applicant were not eligible for restructuring under the draft law may only enforce their claims if the court grants them permission to do so. Such permission is granted only if the applicant's remaining liquidable property is insufficient to satisfy the claims of all creditors. However, even in this situation the applicant may still request a period of up to three years to pay the amount enforcing creditor would receive if the residence were auctioned; the creditor may only enforce if the applicant (re)defaults on these payments and by following the procedure outlined in paragraph 1.12 below.

If the applicant consents, a creditor may register a mortgage over the primary residence for a claim which comes into existence during the restructuring period. No stay of enforcement applies to that creditor.

After a successful restructuring and upon full compliance of the applicant, the portion of the restructured claims exceeding the restructuring amount payable by the applicant (see paragraph 1.7 above), as well as all liens on the primary residence that secure the restructured debt, are extinguished.

1.12 *Applicant's (re)default during the restructuring period*

If the applicant delays payment of restructured monthly instalments such that the total amount that is in arrears exceeds the sum of three monthly instalments, the relevant creditor whose debt is in arrears must notify the applicant and request compliance with the repayment schedule within 30 days. If the applicant does not comply, the creditor may apply to the court for the applicant to be taken out of the scheme by submitting a statement to the platform, and thereafter enforce on the applicant's primary residence, in which case all creditors may launch their claims against the applicant in their entirety. The applicant may still challenge this by proving that the delay in payment was due to force majeure events, or that the creditor abused his or her rights.

2. General observations

2.1 *Appropriate time to consult the ECB*

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. However, the ECB has emphasised on several occasions in its opinions[6] that even in cases of particular urgency, or where the legislation has reached an advanced stage, the national authorities are not relieved of their duty under Articles 127(4) and 282(5) of the Treaty to consult the ECB at an appropriate stage in the national legislative process[7] that allows sufficient time for: (a) the ECB to examine the draft legislative provisions, and (b) 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 European 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].

2.2 *Secondary legislation under draft law*

The ECB underlines that this opinion is based only on the latest version of the draft law that was provided to it on 22 February 2019. In this respect, the draft law delegates the regulation of significant aspects of the new scheme to secondary legislation, most notably ministerial decisions to be issued jointly by four ministries. Given the critical nature of these aspects and their bearing on the overall scheme, and given the fact that no secondary legislation was submitted to it, it is difficult for the ECB to assess the scheme in a comprehensive way.

2.3 *Basic principles governing debt restructuring schemes*

Any private debt restructuring scheme should be formulated in a manner that safeguards financial stability, promotes market efficiency and liquidity and solvency of banks, and supports the adequate flow of credit to the economy. While partial write-down of debt can sometimes offer a solution in cases where the borrower's solvency can be restored, and where creditor losses can be minimised, it is important to ensure that any such scheme should: (a) not result in blanket debt forgiveness, without taking both the debtors' repayment capacity and banks' loss absorption capacity into account; (b) promote a prompt payment culture and prevent moral hazard, namely the creation of incentives not to service debt in a timely manner; (c) be geared towards minimising the risk of abuse, ensuring the bona fide conduct of debtors; and (d) preserve financial stability and the soundness of credit institutions. Any relevant measures, including primary and secondary legislation, and the supportive administrative and IT infrastructure that is necessary for the

6 See, e.g., paragraph 2.2 of Opinion CON/2011/87, paragraph 2 of Opinion CON/2012/27, paragraph 2.1 of Opinion CON/2014/59, paragraph 2 of Opinion CON/2014/72, paragraph 2.1 of Opinion CON/2014/85 and paragraph 2 of Opinion CON/2014/87. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

7 See second sentence of Article 4 of Council Decision 98/415/EC.

8 Judgment of the Court of Justice of 10 July 2003, *Commission of the European Communities* v *European Central Bank*, C-11/00, ECLI:EU:C:2003:395, paragraphs 110 to 111.

implementation of such measures, should above all prove workable and efficient in the long term, increase the efficiency and speed of both out-of-court and court restructurings, while at the same time mitigating moral hazard and maintaining credit discipline[9].

2.4 *Swift and proper implementation*

Proper and swift implementation of the envisaged scheme, both by all authorities administering and/or involved in the scheme and by credit institutions and other entities affected by it, is of crucial importance for ensuring the balance described in paragraph 2.3 above and thereby preventing serious adverse consequences for banks' asset quality and capital positions. Proper implementation of the envisaged framework involves, inter alia, devoting sufficient resources and ensuring the establishment of efficient procedures and infrastructures for facilitating the conclusion of restructurings, whether through the platform or through the courts.

2.5 *Need for impact assessment*

The draft law is being introduced without the benefit of any financial and economic impact assessment. The ECB stresses the critical importance of thoroughly assessing beforehand the impact of the draft law on the capital adequacy and financial position of credit institutions in the short and medium term as well as its effects on the functioning of the financial system and the economy as further described in paragraphs 3.1 to 3.3 below, also taking into account moral hazard risks and the interaction of the draft law with existing legislation as further described in paragraphs 3.4 to 3.5 below. It is only by making such a prior assessment that it may be possible to mitigate potential negative implications[10]. In the absence of such impact assessments or other background information explaining the underlying rationale for the specific parameters of the scheme, for example the proposed thresholds for eligibility and mandatory restructuring parameters, and illuminating the comparative advantages of the proposed scheme as opposed to other ways of protecting primary residences, it is difficult for the ECB to be confident that the stated objectives of the draft law will be achieved[11].

3. Specific observations

3.1 *Effects on banking sector*

3.1.1 In the context of its direct responsibility for the supervision of significant credit institutions in the euro area, the ECB directly supervises four significant credit institutions in Greece. The elevated level of nonperforming loans in Greece has been one of the key areas of focus in recent years and is being closely monitored from a supervisory perspective. The four significant Greek credit institutions have committed to achieve certain NPE reduction targets by 2021. The Greek authorities have also committed to 'implement reforms aimed at restoring the health of the banking system, including NPL resolution efforts by ensuring the continued effectiveness of the relevant

9 See paragraph 2.4 of Opinion CON/2010/8, paragraph 2.4 of Opinion CON/2012/40, paragraph 2.3 of Opinion CON/2012/70, paragraph 3.1 of Opinion CON/2013/34, and paragraph 2.2.2 of Opinion CON/2018/13.

10 See paragraph 3.4 of Opinion CON/2010/8, paragraph 2.2 of Opinion CON/2010/34, paragraph 2.1 of Opinion CON/2012/40, paragraph 2.3 of Opinion CON/2012/70, and paragraph 2.2.2 of Opinion CON/2018/13.

11 See paragraph 2.2 of Opinion CON/2010/34, paragraph 2.3 of Opinion CON/2012/40, paragraph 2.3 of Opinion CON/2012/70, and paragraph 2.2.2 of Opinion CON/2018/13.

legal framework'[12]. It is suggested that the draft law, including the parameters set out by related secondary legislation, gives due consideration to these commitments.

3.1.2 The proposed scheme appears to be a far-reaching initiative, with an extensive scope of application and a mandatory nature. The draft law may have negative implications for credit institutions, especially for their capital adequacy, provisioning needs and asset quality, as they may have to adjust the valuation of their loan books. This could have a potentially significant impact on their provisioning levels and capital given the uncertainty introduced by the draft law in terms of, for example, the number of debtors that will eventually apply to the scheme, the amount of debt to be included, the level of haircuts to be applied, and the valuation that may need to be performed for supervisory and accounting reasons upon the introduction of the scheme.

3.1.3 The draft law may also have an adverse effect on loan sales and securitisations as it allows for debt securitised under the Law 3156/2003 on bond loans, securitisation of claims and other provisions[13], and debt transferred under the Law on servicing of non-performing loans[14], also to be restructured under its provisions, and affords legal protection to a wide range of debt, including business debt[15]. There is a risk that these provisions may disincentivise future NPL sales and securitisations and also impact already concluded NPL sales and securitisations. In this respect the draft law may encumber credit institutions' access to securitisation markets in order to transfer non-performing loan portfolios and obtain liquidity and, consequently, the extension of credit to the economy.

3.1.4 The ability of credit institutions to effectively manage credit risk depends on a reliable, predictable and stable legal framework that adequately balances the interests of both creditors and debtors. However, the draft law introduces changes that may affect the ability of lenders to give effect to the agreed terms of secured credit in Greece, which could undermine legal certainty and the adequate management of credit risk in credit institutions. In this respect, it is important to carefully consider the impact of the draft law on credit agreements in order to ensure legal certainty and avoid undue interference with the contractual and property rights of credit institutions, and to prevent moral hazard from arising in the relationship between creditors and debtors[16].

3.2 *Effects on financial stability*

3.2.1 Given the wide scope of the types of debt covered by the draft law, including business debt, and the importance of portfolios collateralised by primary residences in total bank assets, the draft law may have a potentially significant negative impact on the credit institutions affected and implications for financial stability. Potential concerns impacting on credit institutions that need to be assessed from the outset stem particularly from the mandatory haircut imposed on all debt exceeding the relevant amounts described, the mandatory 25-year duration of the restructuring period, the stay on enforcement for potentially long periods of time, and the interaction of the draft

12 See Annex to the Eurogroup Statement on Greece of 22 June 2018, available on the Council's website at https://www.consilium.europa.eu.

13 Government Gazette Issue A 157/25.6.2003.

14 Government Gazette Issue A 176/16.12.2015.

15 See Article 1(3), (4) and (5) and Article 17(2) and (3) of the draft law, and Opinion CON/2010/8.

16 See paragraph 2.2 of Opinion CON/2015/56 and paragraph 2.2.3 of Opinion CON/2018/13.

law with existing legislation, most notably the household insolvency law. To resolve some of these concerns, it is suggested to refine the scope of the debt and debtors covered by the draft law, and set the relevant parameters only after a thorough assessment of their likely impact on creditors has been undertaken.

3.2.2 Given the above, the ECB suggests that the consulting authority engages in meaningful and timely consultations with all relevant stakeholders, including with the Bank of Greece as the national macroprudential authority, as such consultations might shed light on aspects of the draft law which are not immediately apparent.

3.3 *Effects on Greek economy*

As noted above, the scope of possible mortgage debt restructuring under the draft law is extensive. The draft law gives rise to risks of deterioration in the payment culture, moral hazard risks and risks that the new scheme will be abused by strategic defaulters, as also described in paragraph 3.4 below. As a result, the draft law may adversely affect the future supply of credit and the pricing of mortgages. Credit institutions could respond by unduly tightening lending conditions, in particular to compensate for credit losses resulting from the application of the draft law, and thus increase the cost of financing for the economy generally, in particular for those firms and households that may be in financial distress but continue to service their debt. The implications of the draft law for the real economy are therefore uncertain.

In addition, the potential for interference with the ability of lenders to give effect to the agreed terms of secured credit in Greece might render the secured lending market less attractive, discouraging new entrants. This could stifle competition in financial services in Greece, due to a perceived increase in legal uncertainty. It might also possibly hinder, rather than support, the flow of credit in the economy.

3.4 *Moral hazard risks and overall impact on payment culture*

The automatic stay of enforcement which starts upon notification of the application to the creditors through the platform, and can be extended to cover the procedure at the court, could encourage strategic defaulters to apply, especially where court proceedings are not swift. Moreover, the fact that a court may grant at first or second instance an order extending the automatic stay on enforcement granted at the platform stage of the restructuring, coupled with the option afforded to applicants under the draft law to submit any number of restructuring applications if previous applications were unsuccessful or the applicant withdrew them, could also encourage strategic defaulters to apply, if these two elements lead in practice to a suspension of all enforcement measures over the primary residence for protracted periods of time. It is also understood that there are currently no provisions covering the interim period between the entry into force of the draft law and the date on which the platform becomes operational. In addition, even assuming that the stay on enforcement starts after the pre-screening of eligibility of the applicant by the platform[17], it is not clear whether enforcement will in practice take place during the period between the filing of the application by the applicant and the notification of such filing to the relevant creditors through the

17 See Article 6 of the draft law.

platform, as the final decision on eligibility lies with the administrative court and thus any enforcement measures taken by creditors until such final decision might be overturned. Suspension of enforcement for long periods of time is detrimental for the overall payment culture, as the application of the household insolvency law has shown since 2010, and endangers the path of the four significant credit institutions towards their NPE reduction targets, as it curtails their ability to collect under their loans. This detrimental effect is increased by the fact that the new scheme is intended to apply in parallel with the household insolvency law, which also provides automatic stays on enforcement over all assets of the debtor for very long periods of time until the relevant court cases are ruled upon. In addition to the above, certain provisions of the draft law bear the risk of being open to manipulation by applicants. Considering all the above, a risk of contamination for currently performing loans and a further undermining of the overall payment culture cannot be excluded[18].

3.5 *Interaction of draft law with existing legislation*

3.5.1 The draft law is not being introduced in a legal and judicial vacuum. The following laws are of particular relevance to the draft law: Law 3869/2010 on restructuring of debt of overindebted individuals also provides for debt write-off and restructuring through court proceedings, allows for a stay on enforcement over all assets of the debtor for very long periods of time, and sets out State subsidisation options[19]; Law 4469/2017 on out of court workout mechanism allows for out-of-court restructuring of debt for a different category of borrowers[20]; the Code of Civil Procedure sets out auctioning and foreclosure procedures[21]; the laws regulating bankruptcy, special administration and other collective proceedings[22]; the Bank of Greece's Code of Conduct, which lays down rules and procedures to be followed by banks when dealing with borrowers whose debt is in arrears[23]; laws that provide for benefits related to housing, particularly for low-income households[24]; and various tax and accounting rules are also relevant to the draft law.

3.5.2 No explanatory memorandum has been submitted alongside the draft law explaining why a completely new scheme which will apply on top of, and in parallel with, existing legislation is needed in order to achieve the objectives of the draft law, or what the envisaged consequences of the interaction of the draft law with existing legislation are expected to be. Harmonising existing and new legislation and aligning its implementation enhances regulatory consistency and limits opportunities to strategic defaulters to exploit potential gaps in the regulatory framework or in the way it is applied. In addition, new legislation that affords protection to borrowers should not unduly impede the process of NPE restructuring and the ability of banks to pursue strategic defaulters, for

18 See also paragraph 3.7 below.

19 Law 3869/2010, Government Gazette Issue A 130/3.8.2010.

20 Law 4469/2017, Government Gazette Issue A 62/3.5.2017.

21 Presidential decree 503/1985, Government Gazette Issue A 182/24.10.1985.

22 Law 3588/2007, Bankruptcy Code, Government Gazette Issue A 153/10.70.2007 and Section D of Law 4307/2014 on measures to deal with the consequences of the financial crisis and to enhance employment: incentives to settle debt of small businesses and professionals to credit institutions and special procedures to settle debt of corporates, Government Gazette Issue A 246/15.11.2014.

23 Decision of the Credit and Insurance Committee of the Bank of Greece 195/29.7.2016.

24 Article 3 of Law 4472/2017 on housing benefit, Government Gazette Issue A 74/19.5.2017 and Ministerial Decision D13/oik.33474/1934, Government Gazette issue B/2282/15.6.2018.

example by facilitating misuse of the framework to block the carrying out of already scheduled and notified auctions.

3.5.3 It is understood that the new scheme is intended to apply in parallel with the existing household insolvency law, debtors will be allowed to apply under either or both frameworks, and this option is also open to debtors with an application that is pending under one of the two frameworks. Debtors who have already benefited from debt restructuring and write-off under the household insolvency law may benefit from a second restructuring and write-off of debt under the draft law. Payments made by a debtor under one framework will be deducted from those payable by the debtor under the other framework. The stay of enforcement over all assets of the borrower applicable under the household insolvency law will remain in place for all other assets except for the primary residence until the court issues a ruling on a case under the draft law. Even debtors who have been deemed by the courts to be ineligible under the Law on household insolvency because of fraudulent behaviour will be eligible to apply under the draft law if they meet the relevant thresholds. An eligibility criterion under the household insolvency law is that the debtor must be 'cooperative' as such term is defined in the Code of Conduct adopted by the Bank of Greece. It is not clear why this criterion has not been included in the draft law as well. Lastly, it is understood that the courts designated by the draft law as competent to deal with the restructuring and write-off process under the draft law are the same as those currently competent for household insolvency petitions.

3.5.4 Allowing the two frameworks to interact in such a way gives rise to a number of risks. First, there is a risk of further delaying household insolvency proceedings currently pending and creating additional backlogs in the courts. Court backlogs coupled with stays on enforcement affect the ability of banks to collect on their loans and thus ultimately their ability to lend. In addition, measures taken or planned by the authorities to gradually reduce and eliminate the household insolvency backlog might be undermined[25]. Second, there is a risk of increasing (re)defaults of debtors who have already benefited from debt restructuring and write-off under the household insolvency law. Third, there is a risk of allowing debtors to benefit twice from debt restructuring and write-off. All of these risks in turn increase moral hazard risks.

3.6 *Valuation of security and property under the draft law*

The draft law introduces two different methods for valuing security and property[26], leaves undefined the method for valuing assets that are relevant in order to determine negative eligibility[27], and does not determine how the 'commercial' value of property will be determined, when this term is used. This aspect of the draft law may give rise to increased litigation between creditors and applicants regarding the value of the property, which may in turn lead to longer stays on enforcement. In addition, the fact that the draft law leaves the means of determining the commercial value of the property undefined may open the door to the use of non-expert witnesses in the courts, thus

25 In June 2018 the Greek Ministry of Justice produced an action plan containing measures to gradually reduce and ultimately eliminate the household insolvency backlog of cases by the end of 2021, in accordance with the relevant policy commitment. See Annex to the Eurogroup Statement on Greece of 22 June 2018, available on the Council's website at https://www.consilium.europa.eu.

26 See Articles 3(1) and 3(2) of the draft law.

27 See Articles 1(2)(e) and 1(2)(f) of the draft law.

encouraging strategic defaulters to apply under the scheme. Legal certainty for the valuation of security and assets is of central importance for the entire scheme as well as for the protection of secured creditors' rights since the draft law determines eligibility to participate in the scheme based on the value of the primary residence collateralising such debt and on the value of certain other assets of the applicant[28].

3.7 *Legal certainty*

3.7.1 Clear formulations of the rights and obligations created by the draft law, as well as a careful consideration of the impact of the draft law on existing legal relationships between creditors and debtors, are necessary in order to ensure legal certainty and prevent moral hazard. There are provisions in the draft law that suffer from legal uncertainty and could be helpfully reformulated in order to enhance clarity and reduce risks[29]. Legal uncertainty arising out of the draft law may lead to further delays in the restructuring process, necessitating an increased involvement of the courts in the application of the draft law. Legal uncertainty may also provide an incentive for strategic defaulters to exploit this uncertainty by bringing court proceedings under the draft law in order to benefit from the stay on enforcement.

3.7.2 Added uncertainty arises from the wide range of discretions conferred on executive bodies involved in the restructuring process under the draft law. The draft law assigns to the Secretary for Private Debt the competence to decide, where the platform rejects an application, on eligibility under the new scheme, subject to judicial review. The following issues may be addressed by means of ministerial decisions: the operating parameters of the online platform and details pertaining to the platform restructuring process; the contents of the application, the list of documents required to support it and the deadlines for the submission of each; the conditions governing and the method for calculating the amount of the State subsidy; the State body responsible for deciding on the State subsidy and any other specific matter pertaining to such subsidy. The way in which secondary legislation will determine the operating parameters of the platform and the documentation required by applicants is crucial because the draft law appears to base the restructuring and write-off of debt through the platform on these two elements without giving creditors the opportunity to contest the amount of debt as declared by the applicant, or to justify their refusal to offer a restructuring proposal (which they can do only if the applicant or the debt covered by the application is ineligible) on the basis of documentation of their own. This is expected to lead to increased litigation regarding the exact amount of debt to be restructured and/or the eligibility of the debtor or the debt covered by the application, with the implications described in the previous paragraph. This also increases the necessity to safeguard the duty of disclosure at the application stage but also throughout the duration of the restructuring period. Lastly, given that the amount of the State subsidy will determine the collections made by credit institutions under the scheme during the restructuring period together with payments made by the applicants, it is important to have legal certainty as to the elements related to the subsidy.

28 See Article 7 of the draft law and paragraph 4 of Opinion CON/2012/70.

29 See Articles 1(2)(c), 1(2)(d), 1(2)(f), 3(2) and 8(1), 9(2), 10(1), 12(2), 12(3), 11(3) of the draft law.

3.8 *Compliance with basic legal principles and State aid rules*

It is for the Greek authorities to assess whether the draft law complies with applicable principles of Greek constitutional law, including the basic legal principles of fairness, equal treatment and proportionality.

It is for the Commission to assess the draft law's compliance with Union state aid rules.

3.9 *Regular reviews*

In order to ensure the effectiveness of the framework, an independent body should regularly review and assess the effectiveness of the scheme by reference to its objectives, its impact on Greek credit institutions and the overall payment culture in the short and medium term, and its interaction with other laws. One year following its introduction might be a reasonable point at which to review the overall operation of the new scheme[30].

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

Done at Frankfurt am Main, 27 February 2019.

[signed]

The President of the ECB

Mario DRAGHI

30 See also Opinion CON/2013/34.