EUROPEAN CENTRAL BANK

EUROSYSTEM

# OPINION OF THE EUROPEAN CENTRAL BANK

**12 March 2013**

**on the recapitalisation of credit institutions**

**(CON/2013/17)**

## Introduction and legal basis

On 4 March 2013, the European Central Bank (ECB) received a request from the Greek Ministry of Finance for an opinion on draft legislative provisions amending the law on the Hellenic Financial Stability Fund. On 6 March 2013, the ECB received a supplementary request on additional draft provisions amending the same law (hereinafter jointly referred to as 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 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 provisions

1.1 Pursuant to the explanatory memorandum for the draft provisions, their purpose is: (a) to reinstate the pre-emption rights of existing shareholders, thereby facilitating private investor participation in a common equity capital increase of the banks under recapitalisation; (b) to broaden the scope for shortening initial and adjourned general meeting notice periods, to speed up the process of a bank's recapitalisation; and (c) to eliminate counter motives for private investors to participate in the recapitalisation of Greek banks. The draft provisions amend Law No 3864/2010[2] establishing the Hellenic Financial Stability Fund (hereinafter the 'Law on HFSF').

1.2 In particular, the following changes are made: (a) the third indent of Article 7(1) of the Law on HFSF is amended to restore existing shareholders' pre-emption rights, by abrogating the abolition of such rights under the law currently in force; (b) the fourth indent of Article 7(2) of the Law on

1 OJ L 189, 3.7.1998, p. 42.

2 FEK A 138/9.8.2010.

HFSF is supplemented to extend the shortened time limits currently in force[3] to the convocation of general shareholders meetings deciding on any issue referring to the implementation of the Law on HFSF[4]; and (c) Article 7(5) of the Law on HFSF is amended to provide that HFSF shares will, unlike the regime currently in force, be taken into consideration when calculating the thresholds activating the exercise of a mandatory takeover bid under Article 7(1) of Law No 3461/2006[5].

## 2. General observations

The ECB welcomes the draft provisions, to the extent that they aim to complement the Greek legal framework for the recapitalisation of credit institutions, established in line with the financial sector objectives outlined by the Greek authorities in the Memorandum of Economic and Financial Policies, as applicable from time to time[6]. In relation to the development of such a national legal framework, the ECB refers to its previous relevant opinions[7]. Without prejudice to this general observation, the ECB has the following specific observations.

## 3. Reinstatement of the shareholders' pre-emption rights

The ECB attaches the utmost importance to the completion of the recapitalisation of credit institutions in Greece. In this respect, it supports the reinstatement of existing shareholders' pre-emption rights, as it expects that this will enable the efficient and effective participation of private investors in the recapitalisation of Greek banks.

## 4. Timely completion of corporate proceedings for the recapitalisation

4.1 The ECB stresses the importance of completing the issuance of common stock in a timely manner, thereby ensuring the prompt finalisation of the recapitalisation process. Without prejudice to the observations below, the ECB notes the proposed amendment to Article 7(2) of the Law on HFSF, as a result of which the application of the shortened minimum time limits for calling the general shareholder meetings will be extended to any general meetings deciding on issues related to the implementation of the Law on HFSF related to the recapitalisation process.

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3 Currently the shortened time limits apply only to shareholders meetings deciding on the issuance of convertible bonds or other financial instruments and to the submission of documents to the supervisory authorities.

4 The draft law stipulates that this amendment to the fourth indent of Article 7(2) will be deemed to have entered into force upon submission of the draft law to the Parliament.

5 Law 3461/2006 (FEK A 106/30.5.2006) transposes into Greek law Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (OJ L 142, 30.4.2004, p. 12).

6 Annex V to Law No 4046/2012 on the approval of the draft financing agreements between the European Financial Stability Fund, the Hellenic Republic and the Bank of Greece and of the draft Memorandum of Understanding between the Hellenic Republic, the European Commission and the Bank of Greece and other provisions of utmost importance for reducing the public debt and saving the national economy (FEK A 28/14.12.2012), as amended.

7 See in particular Opinions CON/2012/90, CON/2010/54, CON/2011/72, CON/2012/014, CON/2012/25 and CON/2012/39.

4.2 In previous opinions[8], the ECB underlined that any provision permitting the shortening of minimum time limits required by law for the convocation of general meetings of shareholders should be considered by the consulting authorities having regard to both the Greek corporate law framework and to the relevant Union legislation. In this respect, the ECB notes that any restriction on shareholders' rights would require careful consideration in light of the protection of shareholders' rights enshrined in Union legislation, in this case Article 5 (Information prior to the general meeting) of Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies[9].

## 5. Application of takeover bid provisions in the recapitalisation process

5.1 Following recapitalisation by the HFSF, viable Greek banks will, pursuant to the Law on HFSF, be managed by their private shareholders, provided that the latter have achieved a minimum equity participation representing 10% of the bank's total share capital as a result of the recapitalisation. For as long as such minimum private sector participation is maintained, the HFSF can only exercise its voting rights in specific cases provided for in the Law on HFSF[10].

5.2 The ECB acknowledges the need to facilitate and encourage private participation in the process of recapitalising Greek banks. Furthermore, it understands that the shareholding structure of Greek banks may warrant the proposed amendment in Article 7(5) of the Law on HFSF disapplying the obligation for a mandatory takeover bid, at least at the stage of the initial common equity capital increase. However, the ECB notes that Article 5(1) of Directive 2004/25/EC requires the submission of a mandatory bid in such circumstances and does not currently allow Member States to dispense with this obligation on acquirers, be they State or private entities. Although the mandatory bid is designed primarily to protect the rights of minority shareholders, which is not the primary purpose of the draft provisions, the ECB considers it important that the Union regime for takeover bids is effectively applied to the recapitalised banks in the long term, taking into account, *inter alia*, the need to safeguard the interests of the HFSF both as a shareholder and investor and restore confidence in the smooth operation of the Greek capital market. The ECB would therefore invite the consulting authority to consider the proposed amendment in a more comprehensive context that will ensure an efficient application of the takeover bids provisions that duly takes into

8 Opinion CON/2012/90, paragraph 6.1.

9 Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies (OJ L 184, 14.7.2007, p. 17). On this point, account should be taken of the ongoing legislative initiative at Union level aimed at amending, *inter alia*, Directive 2007/36/EC to provide for the shortening of minimum time limits for the convocation of a general meeting to decide on a capital increase subject to the fulfilment of certain conditions. See in particular proposal for a directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010 (COM (2012) 280 final).

10 Namely, on decisions concerning an amendment of the company's charter, a capital increase or decrease or core corporate events, such as the bank's merger or the selling off of the bank's assets, including subsidiaries; see Article 7a(1) of Law on HFSF.

account all relevant recapitalisation parameters, e.g. the exercise of warrants, as well as exit options for the HFSF in the context of future reprivatisation**.**

## 6. ECB representation and HFSF governance structure

In the context and on the occasion of the proposed amendments to the Law on HFSF, the ECB would like to invite the consulting authority to also address aspects of the HFSF framework already highlighted in previous ECB opinions. In particular, Article 4(15) of the Law on HFSF should clarify that the ECB representative in the HFSF governing bodies participates without voting rights[11]. Furthermore, the provision in Article 4(13) of the Law on HFSF entitling the ECB's representative to request a convocation of a meeting of the General Council should be deleted, given that this goes beyond the mere observer status[12]. Finally, the HFSF's two-tier governance structure should be amended in line with the ECB's recommendation that members of the Executive Board should at the same time be members of the General Council[13].

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

Done at Frankfurt am Main, 12 March 2013.

[signed]

*The President of the ECB*

Mario DRAGHI

11 A draft law amending the Law on HFSF, on which the ECB was consulted and issued its Opinion CON/2012/90, explicitly mentioned that the ECB representative in the HFSF participates without a voting right. However, the final text of the law following its adoption did not contain this explicit statement.

12 Opinion CON/2012/90, paragraph 8.

13 Opinion CON/2012/14, paragraph 3.1.