EUROPEAN CENTRAL BANK

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OPINION OF THE EUROPEAN CENTRAL BANK

of 21 May 2019

on the revision of the legal framework of the Portuguese financial supervisory system

(CON/2019/19)

Introduction and legal basis

On 11 January 2019, the European Central Bank (ECB) received a request from the Portuguese Minister for Finance for an opinion on a draft law reforming the institutional governance of the Banco de Portugal (BdP) and the institutional framework for the Portuguese financial supervisory system (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 (TFEU) and the third and sixth indents of Article 2(1) of Council Decision 98/415/EC[1], as the draft law relates to a national central bank, 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 under Article 127(6) TFEU. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the ECB, the Governing Council has adopted this opinion.

1. Purpose of the draft law

1.1. The two main purposes of the draft law are to reform the institutional governance of the BdP and the institutional framework for the Portuguese financial supervisory system.

Reform of the Banco de Portugal's institutional governance

1.2. Under the draft law, the BdP's Management Board is slightly reduced in size, comprising the BdP Governor, one or two Vice-Governors and three or four, instead of the current three to five, other board members. Currently the Governor is appointed by the Ministerial Council on a proposal from the Minister for Finance, after consulting the competent commission of the Parliament, while the other members of the BdP's Management Board are appointed by the Ministerial Council on a proposal from the Governor, after consulting the competent commission of the Parliament. Under the draft law, the Governor is no longer to have a role in the appointment procedure for the other members of the BdP's Management Board, who, along with the Governor, are henceforth to be appointed by the Ministerial Council on a proposal from the Minister for Finance, after consulting the competent commission of the Parliament. The draft law also precludes the appointment or proposed appointment of members of the Management Board during the six months prior to the

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).

end of the current legislature, or between the call for elections for the Assembly of the Republic or the dissolution of the Government and the parliamentary investiture of the newly appointed Government, except if the positions in question are vacant and there is urgency in proceeding with the appointment, in which case the appointment or proposed appointment still depends on confirmation from the newly appointed Government. In addition, according to the draft law, the members of the Management Board of the BdP must be appointed from among persons of recognised good moral standing, aptitude, sense of public interest, professional experience, management ability, knowledge and relevant and appropriate technical competence for the exercise of their respective functions.

1.3. Currently the mandate of the members of the Management Board is five years, which may be renewed once, by the Ministerial Council, for a further five-year period. Under the draft law, the duration of the mandate is increased from five to seven years, but without being renewable.

1.4. Currently the members of the Management Board may only be relieved of their office by the Ministerial Council if any of the circumstances set out in Article 14.2 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB') apply. Under the draft law, a member of the Management Board may only be relieved of their office by a resolution of the Ministerial Council, on a proposal by the Minister for Finance or a recommendation by the Parliament, in exceptional circumstances, duly justified, if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. For this purpose, the draft law provides that the following constitute grounds for removal: (i) permanent incapacity; (ii) interdiction or inability has been judicially determined; (iii) incompatibility for the exercise of the mandate; (iv) final judicial conviction for a crime if it affects the fitness and propriety for the exercise of functions; or (v) the person in question has been imprisoned. The draft law also provides that the Assembly of the Republic may recommend that the Government relieve members of the BdP's Management Board from their office. The draft law also provides that the term of office of the members of the Management Board and of the Governor may cease due to the BdP's restructuring by merger or demerger.

1.5. Currently, the remuneration of the members of the Management Board is determined annually by a committee composed of the Minister for Finance (or a representative thereof), the President of the Board of Auditors and a previous Governor appointed by the Advisory Board, and it cannot include any variable component. Under the draft law, the remuneration is determined by a committee belonging to the Ministry of Finance, and cannot be determined retroactively or amended during the duration of the mandate.

1.6. The draft law requires the BdP to comply with the following principles when exercising its competences, in addition to the general principles of administrative law: quality and efficiency in its activity and in its financial and economic management; management by objectives; regular evaluation; transparency in its activity by disclosing information regarding its activity, organisation and functioning, including regarding the costs of its activity for the addressees of the BdP's powers; and transparency in the functioning of its bodies and in the management of its staff.

1.7. The draft law introduces a new duty to report information to the Minister for Finance regarding the BdP's budget implementation, accounts and annual and multi-annual plans and activity reports.

The draft law requires the BdP to send its annual report to the Assembly of the Republic, which would issue an opinion on such report, and makes provision for the disclosure of information to parliamentary committees by the members of the BdP's internal bodies, and for the disclosure of information on the internet.

1.8. The draft law maintains the current provision in the BdP's Organic Law according to which the BdP is not subject to controls by the Court of Auditors in relation to the BdP's participation in and performance of the tasks assigned to the European System of Central Banks (ESCB). At the same time, the draft law introduces a new provision establishing that the BdP is not subject to the regime of audits and inspections by the services of the State in relation to the BdP's participation in and performance of the tasks assigned to the ESCB.

1.9. The draft law amends the provisions governing the liability of the members of the BdP's internal bodies and staff, and provides that they may be held directly and personally liable for acts and omissions in the performance of their duties. In this respect, the draft law stipulates that the State's general civil liability legal framework applies to the BdP.

1.10. The draft law prohibits: (a) the delegation of the BdP's competences to other entities; (b) the BdP from exercising other activities outside its competences; (c) the BdP from using its resources for other objectives than those legally authorised; (d) the BdP from guaranteeing the compliance of obligations attributed to other entities; and (e) the BdP from participating in the creation of profit-making entities or acquiring shares in such entities, except when legally authorised. The draft law also imposes additional requirements for hiring external services, which is only allowed if the impossibility, inefficiency or the lack of a timely response of the BdP's own resources for the fulfilment of its tasks is duly demonstrated.

1.11. The draft law requires the members of the BdP's Management Board to avoid any situation that can influence, limit or impede their ability to act with full independence, probity and impartiality in the performance of their functions. The draft law establishes ethics rules on incompatibilities, private financial transactions, post-employment restrictions, including compensation, and gifts and benefits. The draft law establishes an Ethics Committee to analyse and issue declarations on matters regarding conflicts of interest and discharge certain specific responsibilities. The Ethics Committee is to be composed of a member appointed by the Management Board, a member appointed by the Board of Auditors and a third member, appointed by those other two members, as president of the Ethics Committee. The members of the Ethics Committee are to be chosen from among people of recognised fitness, propriety and independence not having any link or contractual relationship with the BdP. The draft law also makes provision for incompatibilities and conflicts of interest of the BdP's staff members and the recruitment of staff members.

1.12. In order to achieve efficiency, effectiveness and quality in the BdP's activities, the draft law introduces performance indicators for the BdP which aim to reflect the totality of the BdP's activities and results. The system of performance indicators, which is to be implemented by the BdP, must specifically relate to the BdP's activity plan and the management of human resources, including the evaluation of employees' performance.

1.13. The draft law reforms the BdP's Board of Auditors, amending its designation and composition, the duration of its members' mandate and their remuneration. The draft law also reforms the BdP's Advisory Board, amending its composition, the frequency of its meetings and its manner of functioning.

1.14. The draft law confers powers for the 'resolution of conflicts' on the BdP, alongside other regulatory, supervisory and sanctioning powers.

1.15. The draft law authorises the BdP to charge fees for its services and acts. The draft law also authorises the BdP to settle or charge fees in the name or on behalf of other national or European entities.

Reform of the Portuguese financial supervisory system

1.16. Apart from the changes introduced to the institutional governance of the BdP, the draft law establishes a National System of Financial Supervision (NSFS) composed of five authorities: the BdP, the Portuguese Securities Market Commission (hereinafter the 'Market Authority'), the Insurance and Pension Funds Supervisory Authority (hereinafter the 'Insurance Authority'), the Resolution and Administration of Guarantee Schemes Authority (hereinafter the 'Resolution Authority'), which is created by the draft law, and would be the new resolution authority, and the National Council of Financial Supervisors (NCFS), which would be responsible for coordination between supervisory authorities and would also be the new macro-prudential authority. As a consequence, the BdP would no longer be the Portuguese macro-prudential authority or the Portuguese resolution authority. The draft law introduces new statutes for the Market, Insurance and Resolution Authorities and the NCFS. The draft law also introduces provisions for collaboration and exchange of information between the different authorities.

1.17. The draft law establishes a Financial Stability National Committee (FSNC), an advisory body of the Minister for Finance in financial stability matters which is responsible for coordination between the NSFS and the economic, financial and budgetary policies of the State. The President of the FSNC would be the Minister for Finance and the other members comprise the BdP Governor and the Presidents (or heads) of the other entities comprising the NSFS.

1.18. The draft law introduces the possibility that supervisory tasks may be entrusted to the BdP but exercised by a different public legal entity under the BdP's dependency.

1.19. Several amendments to the Regime Geral das Instituições de Crédito e das Sociedades Financeiras (hereinafter the 'RGICSF')[2] and other legislation are introduced by the draft law to reflect the fact that the BdP would no longer be the macro-prudential authority or the resolution authority. Within the professional secrecy framework applicable to credit institutions, two additional possibilities of disclosure by the BdP to the NCFS and to the Resolution Authority have been added.

1.20. The draft law provides that the tasks of the NCFS in its capacity as the national macro-prudential authority are to be: (i) the definition of the national macro-prudential policy, in line with the macro-

2 Approved by Decree-Law No 298/92 on the legal framework of credit institutions and financial companies (Decreto-Lei n.º 298/92, de 31 de Dezembro).

prudential policy defined by the European Systemic Risk Board (ESRB); (ii) the identification, monitoring and assessment of systemic risks, taking the specific features of the national financial sector into account; and (iii) the adoption of measures for the prevention, mitigation or reduction of systemic risks and the monitoring of their implementation.

1.21. The draft law provides that the tasks of the NCFS in areas of a horizontal nature or impact on the financial sector are intended to safeguard the stability of the Portuguese financial sector. The draft law also provides that the supervisory authorities are to propose to the NCFS the adoption of macro-prudential measures with a horizontal impact on the financial sector designed to prevent or mitigate systemic risks. The draft law empowers the NCFS to adopt Union harmonised macro-prudential measures envisaged by Regulation (EU) No 575/2013 of the European Parliament and of the Council[3] and Directive 2013/36/EU of the European Parliament and of the Council[4], which concern credit institutions, in certain cases after a proposal by the BdP. The draft law also provides that the NCFS may delegate to the supervisory authorities the implementation of the adopted measures. The draft law further provides that the supervisory authorities are to inform the NCFS of their intention to adopt macro-prudential measures that will not have a horizontal impact on the financial sector.

1.22. Regarding the role of the BdP in the NCFS, the draft law provides that the NCFS Management Board is to be composed of seven members, including two BdP representatives. The BdP Governor would lead the meetings of the NCFS Management Board intended for the discussion of macro-prudential matters and represent the NCFS with a voting right at the ESRB's General Board.

1.23. The draft law provides that the NCFS must cooperate with the ESRB, the macro-prudential authorities of other States, the ECB, the European supervisory authorities and any relevant entities or organisations governing financial stability.

1.24. The draft law establishes a Remuneration and Evaluation Committee with the task of issuing technical opinions regarding the appointment of the members of the management body of all NSFS entities, including the BdP. These opinions are limited to an evaluation of legal requirements, in addition to a compliance check with reference to the rules on incompatibilities and impediments. The Committee is to be responsible also for setting the remuneration statutes of such members, taking account of criteria common to all entities comprising the NSFS, including the activity of each entity with reference to the results of a system of performance indicators. The Committee is to be composed of one member appointed by each supervisory authority that comprises the NSFS with a president appointed by the Minister for Finance. The Committee is to operate as part of the Ministry of Finance, with its operating costs being paid from the Ministry of Finance's general expenses.

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3 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).

4 Directive 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 (OJ L 176, 27.6.2013, p. 338).

The Banco de Portugal's partial financing of Portuguese Competition Authority

1.25. The draft law provides that the financing of the Portuguese Competition Authority is to be ensured by periodic payments by the BdP, in addition to payments by other sectoral authorities, as well as by the fees charged within the scope of the specific activity of the Competition Authority.

2. Observations

2.1 *Minimum term of office of the Banco de Portugal Governor and grounds for relieving him or her from office*

2.1.1. To guarantee the independence of the Governors of the national central banks (NCBs) and members of the Governing Council of the ECB, each Member State must ensure that the statutes of its NCB are compatible with the Treaties and the Statute of the ESCB with regard to the Governor's term of office and the grounds for relieving him or her from office[5].

Minimum term of office

2.1.2. While the draft law generally provides for a term of office of seven years[6], which is longer than the minimum period of five years required by Article 14.2 of the Statute of the ESCB, the provision regarding the appointment of the Governor from one of the members of the BdP's Management Board, during their term of office[7], is not compatible with the Statute of the ESCB insofar as it stipulates that the former member of the BdP's Management Board would serve as Governor only for the remainder of his initial term of office. As the remainder of the initial term of office of the former member of the BdP's Management Board (appointed as Governor) may be less than five years, the minimum term of office prescribed by the Statute of the ESCB would not be observed. Consequently, to bring it in line with the Statute of the ESCB, the draft law needs to be amended to ensure that also when the Governor is appointed from amongst the members of the BdP's Management Board, the Governor's term of office must be no less than five years.

Grounds for relieving the Governor from office

2.1.3. A Governor may be relieved from office only if he 'no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct'[8]. The ECB is of the view that the concepts underpinning the conditions under which a Governor may be relieved from office are autonomous concepts of Union law[9], the application and interpretation of which do not depend on a national context, irrespective of whether such concepts are embedded also in the BdP's Organic Law.

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5 Article 131 TFEU and Articles 14.1 and 14.2 of the Statute of the ESCB. See, in this regard, also ECB Convergence Report 2018, part 2.2.3, p. 23 and 24. Available on the ECB's website at www.ecb.europa.eu.

6 Article 33(2) of the BdP's Organic Law, as amended by the draft law.

7 Article 33(4) of the BdP's Organic Law, as amended by the draft law.

8 Article 14.2 of the Statute of the ESCB.

9 See, in a similar vein, the opinion delivered by Advocate General Kokott on 19 December 2018, *Rimšēvičs* v *Latvia*, Joined Cases C-202/18 and C-238/18, ECLI:EU:C:2018:1030, paragraph 77.

2.1.4. Seen in this light, the BdP's Organic Law is compatible with the Statute of the ESCB insofar as it replicates the wording of Article 14.2 of the Statute of the ESCB[10]. However, the BdP's Organic Law[11] would need to be clarified so that it does not aim at further defining the scope of application of Article 14.2 of the Statute of the ESCB[12], in particular as far as the conditions under which a Governor may be relieved from office are concerned.

2.1.5. Given that, once appointed, a Governor may not be relieved from office on grounds other than those mentioned in Article 14.2 of Statute of the ESCB, the BdP's Organic Law is incompatible with the Statute of the ESCB insofar as it provides for a case in which the appointment of the Governor will depend on a confirmation from a newly appointed government[13]. This is because the absence of such confirmation would have effects equivalent to relieving the Governor from office on grounds other than those mentioned in Article 14.2 of Statute of the ESCB, in particular since in such cases the objective of safeguarding the Governor's freedom from political influence could no longer be attained.

2.1.6. For the same reasons, the BdP's Organic Law is incompatible with the Statute of the ESCB insofar as it provides that the Governor's term of office may cease due to the BdP's restructuring by merger or demerger[14]. Irrespective of whether the BdP is subject to a reorganisation process, the Governor may be relieved from office only if he or she no longer fulfils the conditions required for the performance of his or her duties or if he or she is guilty of serious misconduct.

2.1.7. With regard to the procedure for relieving the Governor from office, the ECB notes that, following the amendments introduced by the draft law, not only the Government but also the Portuguese Assembly of the Republic may propose to the Ministerial Council that the Governor's term of office be terminated. While compatible with the Statute of the ESCB, this may introduce an additional level of political pressure in the exercise of the Governor's responsibilities.

2.2 *Safeguards for the independence of the other members of the Banco de Portugal's Management Board*

All members of the NCBs' decision-making bodies must exercise the powers and carry out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB independently[15]. Given that not only the Governor but also the other members of the BdP's Management Board are involved in the performance of ESCB-related tasks[16], the ECB welcomes the fact that, to safeguard their independence, the provisions of the BdP's Organic Law regarding security of tenure apply not only to the Governor but also to the other members of the BdP's Management Board. Accordingly, the consulting authority should consider the observations made in paragraph 2.1 also in respect of the other members of the BdP's Management Board.

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10 Article 33(8) of the BdP's Organic Law.

11 In particular, Article 33(9) of the BdP's Organic Law, as amended by the draft law.

12 Replicated in Article 33(8) of the BdP's Organic Law.

13 Article 27(5) of the BdP's Organic Law, as amended by the draft law.

14 Article 33(12)(d) of the BdP's Organic Law, as amended by the draft law.

15 Article 130 TFEU and Article 7 of the Statute of the ESCB.

16 See paragraph 2.2 of Opinion CON/2014/51 and paragraph 3.1.3 of CON/2018/23. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

2.3 *Appointment criteria for the Banco de Portugal's Governor and the members of the Banco de Portugal's Management Board*

The ECB notes that the criteria of a 'sense of public interest' and 'aptitude', introduced by the draft law amongst the criteria to be taken into account for the appointment of the BdP's Management Board, are somewhat vague and therefore might be difficult to interpret and use in practice. Consequently, the ECB suggests reducing the criteria to the other proposed terms which were either established a long time ago, such as 'standing' and 'professional experience'[17], or are more common in the monetary and banking field.

2.4 *Ethics rules and establishment of the Banco de Portugal's Ethics Committee*

2.4.1. The ECB notes that NCBs and national competent authorities (NCAs) should comply with Guideline (EU) 2015/855 of the European Central Bank (ECB/2015/11)[18] laying down the principles of a Eurosystem Ethics Framework and with Guideline (EU) 2015/856 of the European Central Bank (ECB/2015/12)[19] laying down the principles of an Ethics Framework for the Single Supervisory Mechanism (SSM). In this regard, the ECB notes that the BdP has already implemented these Guidelines. The draft law may thus be seen as complementing the three existing internal acts by which the BdP has implemented the Guidelines[20]. The ECB Guidelines set the minimum standards for ethics rules and do not prevent the application by an NCB or the NCAs of more stringent ethics rules to the members of the bodies of Eurosystem central banks and national authorities responsible for the prudential supervision of credit institutions.

2.4.2. The ECB welcomes the fact that the ethics rules are accompanied by the legal establishment of an Ethics Committee. As regards the composition of the Ethics Committee, the independence of its members should be beyond doubt. Although they may not have any link or contractual relation with the BdP, they should nevertheless avail themselves of a sound understanding of the BdP's objectives, tasks and governance. Furthermore, requiring unanimity for the Ethics Committee's deliberations[21] safeguards the probity and impartiality of its decisions, entailing that decisions cannot be taken against the vote of either the member appointed by BdP's Management Board or the member appointed by the BdP's Board of Auditors. However, the ECB notes that any intervention by the Ethics Committee in outsourcing procedures, as envisaged by the draft law[22], must not impair either the BdP's ability to efficiently perform its tasks or its organisational autonomy.

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17 See, for example, Article 283(2) TFEU and Article 11.2 of the Statute of the ESCB.

18 Guideline (EU) 2015/855 of the European Central Bank of 12 March 2015 laying down the principles of a Eurosystem Ethics Framework and repealing Guideline ECB/2002/6 on minimum standards for the European Central Bank and national central banks when conducting monetary policy operations, foreign exchange operations with the ECB's foreign reserves and managing the ECB's foreign reserve assets (ECB/2015/11) (OJ L 135, 2.6.2015, p.23).

19 Guideline (EU) 2015/856 of the European Central Bank of 12 March 2015 laying down the principles of an Ethics Framework for the Single Supervisory Mechanism (ECB/2015/12) (OJ L 135, 2.6.2015, p.29).

20 'Regulamento da Comissão de Ética e dos Deveres Gerais de Conduta dos Trabalhadores do Banco de Portugal', an internal regulation of the BdP establishing rules for the functioning of the Ethics Committee and the ethical behaviour of the BdP's staff; 'Código de Conduta dos Membros do Conselho de Administração do Banco de Portugal', an internal code of conduct for the members of the BdP's Management Board; and 'Código de Conduta dos Membros do Conselho de Auditoria do Banco de Portugal', the code of conduct of the BdP's Board of Auditors.

21 Article 49-C(4) of the BdP's Organic Law, as amended by the draft law.

22 Article 49-B(1)(f) of the BdP's Organic Law, as amended by the draft law.

2.4.3. Furthermore, the ECB clarifies that any ethics rules are subject to compliance with the principle of proportionality as a general principle of law. This means that also the application of the incompatibility rules to middle management positions, as established under the BdP's Organic Law, and the cooling-off periods applicable to the BdP's Board members and staff, as envisaged by the draft law[23], should not be disproportionate or unduly hamper the ability to recruit qualified staff. In this regard, the ECB refers to the relating rules under the ECB's Code of Conduct for High Level ECB-Officials as endorsed by the Governing Council.

2.5 *Provisions concerning the Banco de Portugal's recruitment and procurement procedures*

2.5.1. The draft law subjects the BdP to specific rules concerning: (a) the external recruitment of intermediate management positions; and (b) public procurement. The ECB considers competitive recruitment procedures, including external procedures, to be an important management tool for an NCB. At the same time, the BdP's ability to retain highly-qualified staff by designing internal career paths should be considered. To safeguard the BdP's ability to retain qualified staff[24], the ECB also suggests that the draft law should be clarified in order not to require such procedures to be conducted at fixed intervals such as every three years, given that the draft law establishes a three year term for management positions.

2.5.2. In the same vein, the additional conditions to be satisfied by the BdP when hiring external services[25] should not hinder its ability to effectively discharge its tasks. This operational principle is also reflected in Principle 2(6) of the Basel Core Principles for Effective Banking Supervision (the 'Basel Core Principles')[26] according to which supervisors should have adequate resources to conduct effective supervision and oversight.

2.6 *Auditing regime for the Banco de Portugal's activities*

2.6.1. The accounts of the ECB and the NCBs must be audited by independent external auditors recommended by the ECB Governing Council and approved by the EU Council. The auditors must have full power to examine all books and accounts of the ECB and the NCBs and obtain full information about their transactions[27]. Any national auditing framework of the activities of an NCB is expected to take these requirements into account.

2.6.2. The ECB notes that, under the draft law, the BdP remains subject to audits by the Court of Auditors, with the exception of the BdP's participation in and performance of the tasks assigned to the ESCB[28].

2.6.3. Following the amendments introduced by the draft law – according to which the BdP is not subject to the regime of audits and inspections by the State's services in relation to the BdP's

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23 Article 6(b) of the draft law and Articles 40-B(7), (8), (9) and (10) and Article 57-A(2) of the BdP's Organic Law, as amended by the draft law.

24 As consistently noted by the ECB in its Convergence Reports, Member States may not impair an NCB's ability to employ and retain the qualified staff necessary for the NCB to perform the tasks conferred on it by the Treaties and the Statute of the ESCB.

25 See Article 52-B of the BdP's Organic Law, as amended by the draft law.

26 Basel Committee on Banking Supervision, 'Core Principles for Effective Banking Supervision', available on the Bank for International Settlements' website at www.bis.org.

27 Article 27 of the Statute of the ESCB.

28 Articles 54(7) and 64(2)(d) of the BdP's Organic Law, as amended by the draft law.

participation in and performance of the tasks assigned to the ESCB[29] – the ECB understands that the BdP would, in addition to the abovementioned audits by the Court of Auditors, also be subject to other types of audits and inspections by the State's services[30] in all areas that do not relate to the BdP's participation in and performance of the tasks assigned to the ESCB. Such additional audits and inspections by the State's services would be carried out by administrative services of the State such as the *Inspecção-Geral de Finanças* (IGF, General Inspectorate of Finance)[31]. The IGF is an administrative body set up within the Ministry of Finance acting under the direct hierarchical control of the Minister for Finance, or the competent Secretary of State[32], which enjoys technical autonomy when exercising its tasks[33]. The IGF is responsible for exercising control over the financial management of the State, which includes legal compliance assessments, management and financial audits comprising inspections[34]. Among other tasks, the IGF is responsible for budgetary, economical, financial and asset-related audits and controls, as well as audits of systems and performances, inspections, financial-economic analysis and other types of examinations and controlling tasks related to the entities it inspects. The IGF is also responsible for carrying out inspections, inquiries, investigations and verifications of any public services or legal persons governed by public law, in order to assess the quality of services, through their effectiveness and efficiency, as well as for carrying out disciplinary proceedings, where applicable, for the entities it inspects.

2.6.4. The ECB also understands that, under the BdP's Organic Law, as amended by the draft law, the explicit exclusion concerning the BdP's participation in and performance of the tasks assigned to the ESCB from the inspections and audits that the State's services and the Court of Auditors may undertake[35] implies that all other activities of the BdP may be included within the scope of such inspections and audits.

2.6.5. In this respect, the ECB has repeatedly stated[36] that any State audit office or similar body entrusted with such tasks, such as the IGF or the Court of Auditors, must observe a number of safeguards that aim to preserve the NCB's independence: (a) the scope of the control should be clearly defined by the legal framework; (b) such control should be without prejudice to the activities of the NCB's independent external auditors to examine all books and accounts of the NCB; (c) the audit should comply with the prohibition on seeking to influence the members of the

29 Article 54(6) of the BdP's Organic Law, as amended by the draft law.

30 See Decree-Law No 276/2007 on the legal framework on inspections from the State services (Decreto-Lei n.º 276/2007, de 31 de Julho).

31 See Article 3(1) of Decree-Law No 276/2007 on the legal framework on inspections from the State services, as well as Decree-Law No 96/2012, of 23 April, on the General Inspectorate of Finance.

32 See Article 15 of Decree-Law No 276/2007. Also, pursuant to the Organic Law of the Ministry of Finance, as approved by Decree-Law No 117/2011, of 15 December, the IGF is established as a 'central service' integrating, within that Ministry, the State direct administration [Article 4(c) of Decree-Law No 117/2011]. 'Central services' are organisational structures within the State's direct administration subject to the hierarchical power of the corresponding member of Government [see Articles 2(1) and 3(2) of Law No 4/2004 which lays down the principles and rules governing the State direct administration].

33 See Article 10 of Decree-Law No 276/2007.

34 See Article 2 of Decree-Law No 96/2012.

35 Articles 54(6),(7) and 64(2)(d) of the BdP's Organic Law, as amended by the draft law.

36 See, for example, paragraph 3.1.1 of Opinion CON/2018/45, paragraph 2.2 of Opinion CON/2017/24 and paragraph 2.2 of Opinion CON/2016/59, as well as the ECB Convergence Report 2018, part 2.2.3, p.27.

NCBs' decision-making bodies in the performance of their ESCB-related tasks and be carried out on a non-political, independent and purely professional basis. In addition, audits concerning the BdP's supervisory activities should: (i) not extend to the application and interpretation of supervisory law and practices in the context of the SSM; and (ii) not interfere with or include the tasks conferred on the ECB by Council Regulation (EU) No 1024/2013[37]. Given the broad scope of the IGF's powers and the fact that the IGF is an administrative body set up within the Ministry of Finance under the direct hierarchical control of the Minister for Finance, the inspections and audits performed by such a body would not be compatible with the abovementioned safeguards aimed at preserving the BdP's independence.

2.7 *The Banco de Portugal's transparency obligations and reporting to Parliament*

2.7.1. As with any transparency duties, the rules on the information to be published on the BdP's website[38] must be compatible with professional secrecy obligations laid down in the Statute of the ESCB[39] and secondary Union law[40], in particular, having regard to the importance of confidentiality in the banking supervisory and crisis management contexts. Accordingly, the ECB understands that the considerations underlying the exceptions from publication of certain information provided for by the BdP's Organic Law would apply not only to the summaries of the meetings of the BdP's bodies but also to the opinions and reports of the Advisory Board and the Board of Auditors.

2.7.2. In addition, with regard to the opinions and reports of the Advisory Board and the Board of Auditors, the ECB suggests that careful consideration be given to the impact of the publication of the opinions and reports of these internal bodies of the BdP on the BdP's functioning and its decision-making process, also taking into account financial stability concerns resulting from such publication's impact on the market, in particular where they relate to internal matters of the BdP and are meant exclusively for the internal use of the BdP.

2.7.3. Finally, regarding the disclosure of information to parliamentary committees by the members of the BdP's internal bodies[41], the ECB notes that appropriate safeguards must be in place to ensure that professional secrecy obligations under Union law are observed, including the conditions for the disclosure of confidential supervisory information[42].

2.8 *Liability of the Banco de Portugal and its staff*

2.8.1 The draft law amends the liability framework applicable to the BdP's Management Board members and staff, inter alia, by eliminating the current provisions according to which liability claims related to the performance of the BdP's tasks by such persons may only be directed against the BdP itself, which may later have recourse to its staff with respect to any damages

37 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).

38 Articles 66(1) and 67 of the BdP's Organic Law, as amended by the draft law.

39 Article 37 of the Statute of the ESCB.

40 See, for example, Article 27 of Regulation (EU) No 1024/2013.

41 Article 66(3) of the BdP's Organic Law, as amended by the draft law.

42 See, for example, Article 59 of Directive 2013/36/EU.

incurred. According to the draft law[43], the members of the BdP's internal bodies (Governor, Management Board, Board of Auditors, Advisory Board and Ethics Committee), as well as members of staff, may be held personally liable for the performance of their tasks, with the possibility of legal proceedings being brought directly against them by third parties. In such a case, the legal support of the members of the BdP's internal bodies and staff would nonetheless be guaranteed by the BdP itself, without prejudice to the BdP's right of redress against them, if such is the case. In addition, under the draft law, the State's general civil liability legal framework[44] applies to the BdP, which confers on the BdP's Management Board members and staff a level of protection according to which they could be held liable for acts or omissions committed with minor negligence ('culpa leve'), which is a low degree of negligence, when performing their functions. This means that there is no requirement for such persons to have acted either with intention or with gross negligence[45].

2.8.2 The ECB notes that the new liability regime may have a particular impact on the BdP staff performing supervisory tasks, given that the adoption of individual supervisory decisions when pursuing such tasks is connected to the risk of litigation against the supervisor by the supervised credit institution or by other affected stakeholders. Such actions may relate, for example, to an alleged reduction of profit, the loss of business opportunity, injury to commercial reputation, etc. Litigation of this kind may be brought quite irrespectively of the correctness of any prudential measures adopted, especially where several categories of stakeholders with competing interests, e.g. the creditors of a failing bank, are involved. In order to address this litigation risk present in the operation of prudential supervisors, Principle 2 of the Basel Core Principles states that: (a) laws should protect the supervisor and its staff against lawsuits for actions taken and/or omissions made while discharging their duties in good faith; and (b) the supervisor and its staff should be adequately protected against the costs of defending any actions and/or omissions they make while discharging their duties in good faith[46]. The ECB notes that, while in principle it is a matter for national law to determine the scope of liability connected with the performance of the tasks of NCAs, it is also important for the functioning of the SSM that the national liability regimes offer standards of legal protection commensurate with the Basel Core Principles. If the legal protection offered to the staff of the BdP is inadequate, the position of any of the BdP staff members involved in joint supervisory teams (JSTs) within the SSM may be compromised, given that instructions given to such staff by the JST coordinator in line with Article 6(1) of Regulation (EU) No 468/2014 of the European Central Bank[47] may lead to personal liability claims against such staff. Therefore, the ECB suggests maintaining the present liability regime, which is aligned with the Basel Core Principles, whereby liability claims may be brought against the BdP only, thus

43 Article 62 of the BdP's Organic Law, as amended by the draft law.

44 Article 64(2)(c) of the BdP's Organic Law, as amended by the draft law.

45 See Article 7 of Law No 67/2007, of 31 December.

46 Principle 2, essential criterion 9.

47 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

excluding the direct individual liability of members of the BdP's governing bodies and the BdP's staff.

2.8.3 In this context, the ECB recalls that Basel Core Principle 2 requires that banking supervisors possess operational independence which implies, in particular, that: (i) there is no government or industry interference that compromises the operational independence of the supervisor and (ii) the supervisor has full discretion to take any supervisory actions or decisions regarding the banks and banking groups under its supervision.

2.8.4 The ECB notes that the new liability regime may have a particular impact on the BdP's Management Board members and staff also in the context of crisis management, when the BdP may need to act effectively and swiftly in order to protect the stability of the Portuguese financial system.

2.9 *Remuneration and Evaluation Committee*

As the ECB has repeatedly stated, Member States may not impair an NCB's ability to recruit and retain the qualified staff necessary for the NCB to perform independently the tasks conferred on it by the Treaties and the Statute of the ESCB[48]. Accordingly, the amendments to the rules on the exercise of the Remuneration and Evaluation Committee's powers for setting the remuneration of all members of the management body of all entities comprising the NSFS, including the BdP[49], concerning the remuneration of members of the BdP's decision-making bodies and its employees, would need to be decided in close and effective cooperation with the decision-making bodies of the BdP to ensure the ongoing ability of the NCB to independently carry out its tasks[50].

2.10 *Monetary financing prohibition*

2.10.1 The limits deriving from the prohibition of monetary financing under Article 123(1) TFEU should be taken into account when designing the new institutional framework for the financial supervisory system in Portugal, where the BdP is concerned. The ECB has repeatedly stated that national legislation may not require an NCB to finance the performance of functions by the public sector[51], as this would have effects equivalent to that of a credit facility. Hence, although a credit facility implies an obligation to repay the funds, Article 123(1) TFEU also applies to forms of financing that do not entail an obligation to repay the funds.

2.10.2 In particular, the ECB notes that the draft law makes provision for the financing of the Competition Authority by, inter alia, the BdP[52]. However, there are no indications that the authorisation given by the draft law to the BdP to settle or charge fees in the name or on behalf of other national or

48 See, for example, paragraph 2.2 of Opinion CON/2008/9; paragraph 3.2.2 of Opinion CON/2008/10; paragraphs 2.2 and 2.3 of Opinion CON/2009/45; paragraph 2.2 of Opinion CON/2009/47; paragraph 4.1 of Opinion CON/2010/42; paragraph 3.1.1 of Opinion CON/2010/51; paragraph 2.1 of Opinion CON/2013/92; paragraph 3.1.1 of Opinion CON/2014/12; and paragraph 4.1.1 of Opinion CON/2014/38.

49 Article 32 of the draft law.

50 See paragraph 2.1 of Opinion CON/2013/92 and paragraph 4.1.1 of Opinion CON/2014/38.

51 See ECB Convergence Report 2018, part 2.2.5.1, p. 30.

52 See Article 5(3) of the Competition Legal Framework and Article 35(1) of the Statutes of the Competition Authority, as amended by the draft law.

European entities[53] entrusts the BdP with the task of charging fees within the scope of the specific activity of the Competition Authority.

2.10.3 The proposed financing of the Competition Authority by the BdP would be incompatible with the prohibition of monetary financing under Article 123(1) TFEU, which, inter alia, prohibits overdraft facilities or any other type of credit facility with an NCB in favour of the public sector. To the extent that the performance of the Competition Authority is not only financed by funds provided by the sectorial regulatory authorities and by the fees charged within the scope of its specific activity, but also by funds provided by the BdP, the objective of Article 123(1) TFEU, i.e. the maintenance of a sound budgetary policy of Member States, is circumvented[54].

2.10.4 For the same reasons, the exercise by a different public legal entity of tasks entrusted to the BdP may not be established in a way such that the BdP would simply finance a public entity without having control over it, e.g. a set up similar to the proposed financing of the Competition Authority. In this respect, it would need to be assessed whether the BdP's financial contribution is proportionate to the BdP's overall participation and role in the performance of tasks by the public entity concerned.

2.11 Possibility of supervisory tasks entrusted to the Banco de Portugal being exercised by a different public legal entity

2.11.1 The ECB understands that, at this stage, the draft law only establishes the possibility that, in the future, a different public legal entity under the dependency or authority of the BdP may be entrusted with supervisory tasks[55]. The ECB would have to be consulted under Articles 127(4) and 282(5) TFEU on any further legislation creating or developing the framework under which supervisory tasks currently entrusted to the BdP are to be exercised by a different public legal entity. Moreover, the ECB recommends that any such potential activation of the enabling clause is preceded by close and effective cooperation with the BdP, taking due account of the BdP's views, to ensure the operational independence of the banking supervisor.

2.11.2 Basel Core Principle 2 requires that banking supervisors possess operational independence (with the implications referred above in paragraph 2.8.3). This principle is reflected in relation to the SSM in Article 19 of the SSM Regulation, which requires that the NCAs participating in the SSM must act independently and that the governments of the Member States and any other bodies must respect that independence. Therefore, the ECB recommends that the provisions regarding the establishment and operation of a separate public legal entity responsible for performing supervisory tasks under the authority of the BdP, should expressly include independence safeguards for such a legal entity analogous to those specified in the BdP's Organic Law.

2.11.3 The ECB recommends that the provisions regarding the establishment and operation of a separate public legal entity, together with the BdP's Organic Law, ensure the clear assignment of the NCA status in Portugal and specify the BdP's competence to steer the performance of the NCA functions within the SSM, in particular those connected to participation in the Supervisory

53 Article 52-A(3) of the BdP's Organic Law, as amended by the draft law.

54 See paragraph 2.3 and 2.4 of Opinion CON/2017/43.

55 Article 17(6) of the BdP's Organic Law, as amended by the draft law.

Board, the JSTs and other SSM structures. In addition, the creation of a separate public legal entity responsible for prudential supervision tasks under the authority of the BdP should not interfere with the effective performance of the BdP's other tasks related to the functioning of the European System of Financial Supervisors, such as the BdP's contributions to the work of the ESRB, as well as the BdP's ancillary tasks related to the operation of the Single Resolution Mechanism, such as tasks related to resolution planning.

2.12 The Banco de Portugal's powers regarding the resolution of conflicts

Regarding the powers for the 'resolution of conflicts' to be conferred on the BdP under the draft law[56], alongside other regulatory, supervisory and sanctioning powers, the ECB considers that the term 'resolution of conflicts' is not clear in this context. Such powers are not currently conferred on the BdP, as they are not included within the current set of powers conferred on the BdP for supervising relations between banks and their customers. The ECB suggests that the draft law be further clarified in this respect.

2.13 National Council of Financial Supervisors

The draft law is not clear regarding the NCFS's task of coordinating the answers to requests from national and foreign entities as well as international organisations[57]. The impact of this power should be carefully assessed, because if all queries need to be addressed to the NCFS and coordinated by this entity, this may substantially delay the BdP's ability to respond as an NCA within the SSM framework.

2.14 The Banco de Portugal's role in macro-prudential policy

2.14.1 The ECB supports the effective design of macro-prudential policy frameworks within the Member States, in line with the guiding principles expressed in Recommendation ESRB/2011/3 of the European Systemic Risk Board[58]. The attribution to the NCFS of coordination between supervisory authorities and the powers of acting as a new macro-prudential authority is noted. However, in Member States with a relatively small financial market, such as Portugal, there are arguments, from the perspective of efficiency and synergies, for concentrating supervisory and macro-prudential responsibilities within a single authority[59].

2.14.2 According to Recital 24 of Regulation (EU) No 1092/2010 of the European Parliament and of the Council[60] and Recommendation ESRB/2011/3, the ECB and the NCBs should play a leading role

56 Article 12-B of the BdP's Organic Law, as amended by the draft law.

57 Article 10(1)(a) of the draft NCFS's Statutes, attached as Annex III to the draft law.

58 Recommendation of the European Systemic Risk Board of 22 December 2011 on the macro-prudential mandate of national authorities (ESRB/2011/3) (OJ C 41, 14.2.2012, p.1).

59 See paragraph 4 of Opinion CON/2005/39 and paragraph 2 of Opinion CON/2013/56.

60 Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, 15.12.2010, p. 1). Recital 24 of the Regulation states: 'The ECB and the national central banks should have a leading role in macro-prudential oversight because of their expertise and their existing responsibilities in the area of financial stability. National supervisors should be involved in providing their specific expertise. The participation of micro-prudential supervisors in the work of the ESRB is essential to ensure that the assessment of macro-prudential risk is based on complete and accurate information about developments in the financial system. Accordingly, the chairpersons of the ESAs should be members with voting rights. One representative of the competent national supervisory authorities of each Member State should attend meetings of the General Board, without voting rights. In a spirit of openness, 15 independent persons should provide the ESRB with external expertise through the Advisory Scientific Committee'.

in macro-prudential oversight, given their expertise and existing responsibilities in the area of financial stability[61]. However, it is doubtful, or at least not clear, whether the draft law complies with this principle[62]. Notwithstanding the fact that the draft law envisages that the BdP Governor will lead discussions on macro-prudential matters during the meetings of the NCFS Management Board[63], given that the BdP would only have two representatives on the NCFS Management Board[64], it seems doubtful whether the BdP would maintain a leading role in macro-prudential policy. Furthermore, the fact that the BdP's Governor would represent the NCFS with a voting right at the ESRB General Board does not, of itself, seem to envisage a leading role for the BdP.

2.14.3 The interaction between the BdP and the NCFS regarding systemic risk assessment and the implementation of macro-prudential measures also seems unclear. Under the draft law, it seems that the NCFS and the BdP will assess systemic risk in parallel. However, the interaction between the BdP and the new macro-prudential or designated authority[65] is not clearly defined in the draft law, which raises concerns regarding the implementation of the new macro-prudential regime and in particular the activation of macro-prudential instruments. The BdP's participation in the NCFS should allow for effective follow-up of systemic risks identified in the course of the BdP's analytical activity. Consideration should be given to the assignment of a more prominent role to BdP, not only in the provision of analytical support to the NCFS, but also in steering the way in which the NCFS works. Also, the draft law could be clearer as regards the allocation of tasks concerning the activation of such instruments (see paragraph 2.15).

2.14.4 Finally, the ECB welcomes the provisions of the draft law requiring the NCFS to cooperate with, inter alia, the ECB, the ESRB and other national macro-prudential authorities[66]. As previously noted by the ECB[67], it should be ensured that the new macro-prudential authority also cooperates and exchanges data and information with the ECB and the ESRB, in accordance with the ESRB Recommendations.

2.15 Scope and allocation of powers between the macro-prudential authority and the BdP in its role as sectorial authority

2.15.1 Clear and expeditious procedures should be established for assigning instruments to the macro-prudential authority, which must have control over appropriate instruments for achieving its

61 See also paragraph 4 of Opinion CON/2005/39; paragraph 2 of Opinion CON/2013/56; paragraph 2.1 of Opinion CON/2013/66; paragraph 2.1 of Opinion CON/2013/54; paragraph 2.1 of Opinion CON/2013/45; paragraph 2.1 of Opinion CON/2013/30; paragraph 5.2 of Opinion CON/2014/46; paragraph 2.3 of Opinion CON/2014/21; and paragraph 3.1 of Opinion 2019/10.

62 As noted by the ESRB, a central bank's leading role is ensured by the fact that: (i) the central bank is the macro-prudential authority; (ii) the central bank accounts for the majority of representatives with voting power on the board when decisions are taken on a majority basis; or no veto power is conferred on other board members, as is the case when decisions are taken by consensus; (iii) the central bank conducts macro-prudential analysis; (iv) the central bank prepares the main documents to be discussed by the board; (v) and/or the central bank is responsible for providing the board's secretariat; (vi) and/or the central bank governor chairs the board and has a casting vote.

63 Articles 30(1) and 36(5) of the Statutes of the NCFS, attached as Annex III to the draft law.

64 Article 36 of the Statutes of the NCFS, attached as Annex III to the draft law.

65 It is assumed from the text of the draft law, although this is not entirely clear, that the NCFS becomes the designated authority as well as the macro-prudential authority, instead of the BdP.

66 Articles 19(2) and 22 of the Statutes of the NCFS, attached as Annex III to the draft law.

67 See paragraph 2.4 of Opinion CON/2013/54 and paragraph 2.6 of Opinion CON/2013/70.

objectives[68]. It is not clear in the draft law if the NCFS has decision-making power, or a power to make public recommendations on existing macro-prudential instruments, as well as the power to decide on new macro-prudential instruments or to make related recommendations to the legislature. Also, it could be clarified who will be responsible (NCFS or BdP) for enforcing macro-prudential decisions, including the exercise of powers to apply sanctions as well as which instruments are under the direct control of the NCFS and which fall under the control of the BdP. Furthermore, it is not clear what precisely is meant by measures of a horizontal nature, as there is no explicit criterion established by the draft law[69].

2.15.2 The draft law provides that the NCFS is responsible for the adoption of measures and the monitoring of their implementation[70]. However, it is not clear whether this adoption of measures concerns only measures with horizontal impact or also any of the other macro-prudential measures, since the NCFS is given powers to adopt the Union harmonised macro-prudential measures envisaged by Regulation (EU) No 575/2013 and Directive 2013/36/EU, which apply only to credit institutions, while under other provisions of the draft law the NCFS should only be informed by the supervisory authorities of their intention to adopt macro-prudential measures that do not have a horizontal impact on the financial sector. Furthermore, it is also unclear how the competent supervisory authority will interact with the macro-prudential/designated authority regarding the activation of Articles 124 and 164 of Regulation (EU) No 575/2013, which apply to the residential and commercial real estate exposures of banks on the basis of financial stability concerns.

2.15.3 A clear identification of macro-prudential instruments available to the NCFS and, where applicable, to sectoral supervisory authorities such as the BdP would thus be welcomed (including Union harmonised and non-harmonised measures), allowing for more clarity when exercising macro-prudential powers.

2.16 The Banco de Portugal's role relating to resolution planning

2.16.1 Although the draft law provides for the establishment of the Resolution Authority, which would take over the BdP's responsibilities as the designated national resolution authority (NRA), the BdP would retain specific competences related to resolution planning under the draft law[71], while the Resolution Authority would be responsible for exercising resolution powers and tools. It is worth noting that, under Directive 2014/59/EU of the European Parliament and of the Council[72], NRAs are responsible for drawing up resolution plans, while NCAs, within the meaning of Regulation (EU) No 575/2013, have a purely consultative role, unless such NCAs are also

68 Recommendation C(4) of Recommendation ESRB/2011/3.

69 See, in particular, Article 6 and Article 26(1) of the Statutes of the NCFS, attached as Annex III to the draft law.

70 Article 19 of the Statutes of the NCFS, attached as Annex III to the draft law.

71 Article 17-A of the BdP's Organic Law, as amended by the draft law; Article 2(1) and Article 8 of the Statutes of the Resolution Authority, attached as Annex IV to the draft law.

72 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).

designated as NRAs[73]. It seems that the BdP's role as an NCA[74] would, of itself, not provide a sufficient legal basis for the BdP to retain resolution planning competences, in the absence of its designation as an NRA.

2.16.2 In this context, it is also noted that the corresponding articles of the RGICSF regarding resolution plans[75] are amended by the draft law to replace the references to the BdP with general references to the 'resolution authority'. It could therefore be useful to clarify the legal basis on which the BdP would assume ancillary resolution-related tasks, given that it apparently would no longer be the NRA[76]. Identification of the resolution authority or authorities designated by Portugal in accordance with Article 3 of Directive 2014/59/EU in relation to all or part of the competences set out therein, as the case may be, can also be important for the NCA within the meaning of Regulation (EU) No 575/2013, as regards information exchange and cooperation activities vis-á-vis the relevant resolution authority or authorities, under the applicable legal framework.

2.16.3 Moreover, a segregation of resolution-related tasks, in particular, segregation of resolution planning and the exercise of resolution powers and tools, is permitted under Directive 2014/59/EU on an exceptional basis, to the extent that it is ensured that such separation does not hamper the effectiveness of resolution action. Separation creates a need for close cooperation and adequate information sharing between the Resolution Authority and the BdP, notably to ensure that timely resolution action can be taken. To this end, it would be advisable to review and reinforce the adequacy of the relevant cooperation provisions of the draft law, including the sharing of information between authorities. However, regardless of the adequacy of cooperation and information sharing mechanisms, consolidation of resolution functions can serve to enhance the effectiveness of the resolution process, which is already complex in its own right[77]. In the face of such a complex process, operational and practical difficulties due to eventual grey areas within the distribution of competences between authorities should be avoided. Given that the BdP would be in the lead for resolution planning and the Resolution Authority would be responsible for the execution of resolution tools, it would be important that there is a common understanding on the resolution plan[78], also considering that there is a reputational risk for the BdP in the event of the non-successful execution of resolution plans by the Resolution Authority.

2.16.4 Concerning the creation of a new authority responsible for the exercise of resolution powers and tools, Member States should ensure that, where the central bank is not itself the resolution authority, the competent authority and the resolution authority engage in an adequate exchange of information with the central bank[79].

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73 See Article 10 of Directive 2014/59/EU.

74 See Article 17 of the BdP's Organic Law, as amended by the draft law.

75 In particular, Article 116-J of the RGICSF, as amended by the draft law.

76 In particular, the relationship between the references in the RGICSF to 'resolution authority' outside Title VIII, Chapter III of the RGICSF and Article 2(1) of the Resolution Authority's draft Statutes, which qualifies the latter as the NRA, should therefore be clarified.

77 See International Monetary Fund (IMF), Spain: Financial Sector Assessment Program-Technical Note-Bank Resolution and Crisis Management Frameworks, 13 November 2017. Available on the IMF's website at www.imf.org.

78 See paragraph 3.2 of Opinion CON/2015/19.

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

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

Done at Frankfurt am Main, 21 May 2019.

[signed]

The President of the ECB

Mario DRAGHI