OPINION OF THE EUROPEAN CENTRAL BANK

of 24 March 2015

on the credit mediator legal framework

(CON/2015/12)

Introduction and legal basis

On 14 January 2015 the European Central Bank (ECB) received a request from the Portuguese Ministry of Finance for an opinion on a draft decree-law (hereinafter the 'draft law') amending Decree-Law No 144/2009 of 17 June 2009 establishing the Portuguese credit mediator legal framework.

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 third and sixth indents of Article 2(1) of Council Decision 98/415/EC[1], as the draft law relates to the Banco de Portugal (BdP) and to rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft law

1.1. The draft law introduces changes to the credit mediator legal framework, which was approved by Decree-Law No 144/2009 of 17 June 2009[2]. The main purpose of the credit mediator is to defend and promote the rights and interests of any natural or legal persons that: (a) have applied for a loan (including renewals of credit) and the credit institution refused to grant it; or (b) have received one or more loans from a credit institution and wish to restructure or consolidate, after the credit institution has denied such restructuring or consolidation. To that end, the mediation between customers and credit institutions, whenever the credit mediator is requested, aims at facilitating the debtor's relationship with the credit institution.

1.2. According to the draft law, despite the success of the introduction of the credit mediator, its services have been used almost exclusively by individuals and only by a very limited number of companies. The draft law intends, in view of the current focus of the credit mediator on facilitating the relationship of the debtor with the financial institutions, to raise awareness of the role the credit mediator could also play in streamlining the processes of restructuring corporate financial debt, both in terms of response times and, where applicable, of the level of coordination between the entities involved.

---

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).

2 Diário da República No 115 series 1 of 17 June 2009.

1.3. Therefore, the purpose of the draft law is to adopt measures that promote the use of the credit mediator's services by commercial companies, in particular in connection with financial debt restructuring. For this purpose, the draft law amends the credit mediator regime by expressly conferring on it the following functions: (a) to provide overall assistance with credit and financial restructuring activity, and (b) to coordinate mediation activity between bank customers and credit institutions for the purpose of helping to streamline financial debt restructuring. In addition, the draft law introduces procedural rules for when the mediation relates to debt restructuring.

1.4. Another purpose of the draft law is to promote better coordination between the credit mediator and the Portuguese Ministry of Economy. In addition, the annual report from the credit mediator will be not only sent for approval to the member of Government responsible for finance but also to the member of Government responsible for the economy. There are also specific content requirements for this annual report regarding corporate debt restructuring.

1.5. Under the current legal framework the credit mediator coordinates a council that assists in the performance of the mediator's duties. Under the draft law the credit mediator and the council will receive additional support from three consultative members with unpaid consultative functions who will be appointed by the member of Government responsible for the economy. They will assume particular responsibility for the overall assessment of cases relating to access to credit and corporate debt restructuring, where mediation has been requested.

1.6. As per the legal framework of the credit mediator, BdP will remain responsible for the technical, administrative and financial support of the credit mediator's duties.

2. General observations

2.1. The ECB welcomes the draft law as it establishes an additional mechanism to help relations between bank customers and credit institutions by means of fostering the use of the services of the credit mediator. Generally, the ECB recognises the purpose of supporting the rights of any natural or legal person in a credit relationship (or that wishes to enter into such relationship) with a credit institution, improving access to credit by individuals and companies and improving communication between these parties. Mediation provides an alternative form of solving or avoiding disputes and litigation if both parties can reach an understanding.

2.2. Specifically, the ECB acknowledges the purpose of developing policies that better support and strengthen the economy by helping to restructure debt in the financial sector, in particular for bank customers that are commercial companies and that can benefit from the intervention of a credit mediator. This assists companies in dealing with financial difficulties and possibly avoiding bankruptcy by restructuring financial debt.

3. Specific observations

3.1. *Scope of the intervention by the credit mediator*

3.1.1. While reiterating its support for the draft law, the ECB notes that the scope of the intervention by the credit mediator is already very wide. It encompasses all types of banking customers, without

any limitation related to the amount of credit involved or, specifically, to the nature of the banking customer, be they natural or legal persons, small or medium-sized enterprises or large companies.

3.1.2. Since the purpose of the draft law is to explicitly list commercial companies as key users of credit mediator services, in particular in connection with financial debt restructuring, it is possible that a positive reaction from the market could result in significant additional and unexpected demand for such services. In this case, it is possible that the quality and promptness of the service might suffer. Moreover, the credit mediator will potentially be requested to assess debt restructuring operations, including complex cases in a multi-creditor context, which may affect the financial position as well as, potentially, the reputation of the banks concerned.

3.1.3. Therefore the ECB encourages the Portuguese authorities to be aware of such potential impacts and to adopt measures to ensure the quality of the service is maintained, while at the same time trying to avoid inappropriate recourse to the credit mediator.

3.2. *Resources and funding of the credit mediator*

3.2.1. While the credit mediator will receive additional consultative resources under the draft law, in a potential scenario of intense use of the mediation mechanism by commercial companies, the credit mediator may be required to commit considerable own resources, including technical, financial and human, to the task of mediation in the restructuring of corporate financial debt in the private sector. As already indicated, this task will be in addition to all other tasks already referred to in the credit mediator legal framework. Moreover, the draft law increases the depth of reporting by the credit mediator to the government member responsible for finance, and extends the scope of the reporting to include the member responsible for the economy. This increase will also require the credit mediator to commit additional resources. Therefore the ECB encourages the Portuguese authorities to be aware of the resources implications of the draft law.

3.2.2. Under the current legal framework,which is not modified in this respect by the draft law, these resources will come from BdP. Although the credit mediator is independent from BdP, the bank pays for the services and provides the technical, administrative and financial support necessary for the credit mediator and the council to carry out their duties[3].

3.2.3. BdP's financing and support of the credit mediator, which is neither based on the Treaty or the Statute of the European System of Central Banks and of the European Central Bank, nor of a supervisory nature, gives rise to the following issues.

(a) BdP's resources would be used simultaneously for the mediation of credit relations between customers and credit institutions as well as for the supervision of those institutions, a task which falls upon BdP as the national supervisory authority. This contradiction will be amplified under the draft law as the credit mediator encompasses in its scope of intervention the coordination of the financial debt restructuring affecting credit institutions under the supervision of BdP. Subsequently, a solution that would ensure that the performance of the credit mediator's tasks was not dependent on BdP's resources would not only be beneficial

3 See Article 13 of Decree-Law No 144/2009 of 17 June 2009. This Article is not modified by the draft law.

from the point of view of BdP's independence but also from the point of view of the credit mediator's independence.

(b) The ECB underlines the importance of safeguarding compliance with the prohibition on monetary financing laid down in Article 123(1) of the Treaty. As already indicated, the tasks entrusted to the credit mediator under the original and the draft law are governmental and independent from BdP, yet BdP must assume their financing and provide all necessary support in order for these tasks to be carried out. Therefore, in this specific context, full compliance with the monetary financing prohibition would only be achieved if the credit mediator, its tasks and those of the council are fully financed in advance and not dependant on BdP's resources[4].

(c) In particular, in respect of the facilitating of debt restructuring which is pursued by the draft law, the ECB would like to reiterate that 'Member States may not put their NCBs in a position where they have insufficient financial resources to carry out their ESCB or Eurosystem-related tasks'[5]. Therefore, the Portuguese authorities will need to ensure that the performance of these additional tasks will not affect BdP's operational capacity to carry out tasks as part of the ESCB. Previous ECB opinions[6] have pointed out that the allocation to the NCBs of specific non-ESCB related tasks need to be accompanied by the allocation of adequate human and financial resources allowing such tasks to be carried out in a manner which will not affect the NCBs' ability to carry out their ESCB or Eurosystem-related tasks from an operational and financial point of view.

(d) In view of the abovementioned obstacles, the credit mediator should, ideally, be hosted or established outside BdP. If, in the end, this is not the case, the agreement of BdP will be necessary as regards the conditions under which BdP would be able to host the credit mediator without BdP's ability to carry out its ESCB/Eurosystem and supervisory tasks being affected from an operational and financial point of view, or the monetary financing prohibition being infringed.

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

Done at Frankfurt am Main, 24 March 2015.

[signed]

The President of the ECB

Mario DRAGHI

4 See the ECB's June 2014 Convergence Report, p. 29, as well as paragraph 2.1 of Opinion CON/2011/30 and paragraph 3 of Opinion CON/2013/29.

5 See the ECB's Convergence Report of June 2014, p. 25.

6 See for instance paragraph 3 of Opinion CON/2007/8, paragraph 3.3 of Opinion CON/2011/7, paragraph 9 of Opinion CON/2011/84, paragraph 3.1.2 of CON/2013/56 and paragraph 3.1 of CON/2015/2.