EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 27 August 2013

on the macro-prudential mandate of the Banco de Portugal

(CON/2013/66)

Introduction and legal basis

On 17 July 2013, the European Central Bank (ECB) received a request from the Portuguese Minister of State and for Finance for an opinion on two draft decree-laws, one amending the Organic Law of the Banco de Portugal (hereinafter the 'draft decree-law on the BdP') and the other amending Decree-Law No 228/2000 of 23 September 2000 that established the National Council of Financial Supervisors (NCFS) (hereinafter the 'draft decree-law on the NCFS') (hereinafter collectively the 'draft decree-laws').

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

1.1 The draft decree-law on the BdP amends the Organic Law of the Banco de Portugal[2] in order to, *inter alia*: (a) provide for the BdP's participation in the Single Supervisory Mechanism; (b) expressly state the banking resolution responsibilities that the Legal Framework of Credit Institutions and Financial Companies already conferred on the BdP[3]; and (c) nominate the BdP as the competent authority to implement macro-prudential policy. In particular, the draft decree-law implements Recommendation ESRB/2011/3 of the European Systemic Risk Board of 22 December 2011 on the macro-prudential mandate of national authorities[4].

1.2 The draft decree-law on the NCFS amends Decree-Law 228/2000 of 23 September 2000 in order to, *inter alia*, expressly give the NCFS advisory functions to the BdP, and in the exercise of these

1 OJ L 189, 3.7.1998, p. 42.

2 Law No 5/98 of 31 January 1998.

3. Decree-Law No. 298/92 of 31 December 1992, as amended.

4 OJ C 41, 14.2.2012, p. 1. See also recital 24 of Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 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).

functions, to: (a) identify, monitor and evaluate risks to the stability of the financial system and (b) assess concrete proposals of macro-prudential policy aimed at mitigating or reducing systemic risks, in order to strengthen the stability of the financial sector. The main purpose of the draft decree-law on the NCFS is to implement Recommendation ESRB/2011/3.

2. Macro-prudential mandate of the Banco de Portugal

2.1 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. Moreover, the ECB considers that the ECB and national central banks should play a leading role in macro-prudential oversight, given their expertise and current responsibilities in the area of financial stability[5].

2.2 In the light of the above, the ECB welcomes the arrangement whereby the BdP is the national authority responsible for the conduct of macro-prudential policies[6], with the NCFS serving as advisor, thus acting in cooperation with other authorities whose actions have a material impact on financial stability, in particular the Portuguese Securities Market Commission and the Insurance and Pension Funds Supervisory Authority.

3.4 At the same time, the ECB notes that the BdP should perform its macro-prudential tasks in such a way to not affect: (a) the BdP's institutional, functional and financial independence; or (b) the performance by the European System of Central Banks of its tasks under the Treaty and the Statute of the European System of Central Banks and of the European Central Bank[7].

2.4 While acknowledging the limited scope of the draft decree-law on the BdP, the ECB recommends that either the draft-decree law on the BdP or other relevant legal acts should expressly mandate the BdP, in its capacity as a macro-prudential authority, to cooperate with the European Systemic Risk Board (ESRB) and, where needed, with the macro-prudential authorities of other Member States, in particular as regards the exchange of information[8].

2.5 The ECB notes the absence, in the draft decree-law on the BdP, of a specific provision regarding the implementation of Recommendation D4 of Recommendation ESRB/2011/3, which calls for legal protection of the macro-prudential authorities and their staff when acting in good faith in the context of its macro-prudential mandate. This legal protection should either be provided for in the

5 See paragraph 5.1 of Opinion CON/2012/44, paragraph 3.1 of Opinion CON/2012/55, paragraph 2.1 of Opinion CON/2013/30 and paragraph 2.1 of Opinion CON/2013/45. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

6 See Article 12(c) and (d) of draft decree-law on the Organic Law and Article 2(1) of draft decree-law on the NCFS.

7 See paragraph 3.2 of Opinion CON/2012/55, paragraph 2.3 of Opinion CON/2013/30 and paragraph 2.2 of Opinion CON/2013/45.

8 See paragraph 5.3 of Opinion CON/2012/44, paragraph 4.1 of Opinion CON/2012/55 and paragraph 2.3 of Opinion CON/2013/30. Recommendation B4 of Recommendation ESRB/2011/3 also proposes mandating the macro-prudential authority for cross-border cooperation and information exchange, in particular by informing the ESRB of the actions taken to address systemic risks at national level.

draft decree-law on the BdP or, if it is already contained in other laws[9], the ECB recommends that clarification be provided on how these laws should apply to macro-prudential supervision.

2.6 The ECB welcomes the specific provisions of the draft decree-law on the BdP which, when read in conjunction with existing provisions[10], state the BdP´s independence with regard to macro-prudential policy decisions.

2.7 This opinion does not prejudice the conclusions of the follow-up assessment of the above mentioned recommendations that the ESRB will issue in accordance with Article 17 of Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board[11].

3. Extension of NCFS functions

3.1 The ECB welcomes the extension of the NCFS functions which, in line with the implementation of Recommendation B2 of Recommendation ESRB/2011/3[12], will include coordinating between the financial system supervisory authorities when they regulate and supervise their respective financial entities.

3.2 The ECB also welcomes that the BdP, in its role as the national authority defining and carrying out macro-prudential policy for the national financial system, will benefit from the NCFS's advice, i.e. in identifying, monitoring and assessing risks to the stability of the financial system, as well as from the NCFS's macro-prudential policy proposals that are specifically aimed at mitigating or reducing systemic risks, in order to reinforce the stability of the financial system[13].

4. Other issues

4.1 The ECB welcomes the specific provisions intended to safeguard the BdP´s participation in the Single Supervisory Mechanism[14] and notes the redrafting of the provisions referring to the designation of the BdP as the national resolution authority, which now include specific references

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9 See Article 12(3) of the Legal Framework of Credit Institutions and Financial Companies. The same reservations were raised in paragraph 2.6 of Opinion CON/2013/45.

10 See Article 16A of draft decree-law on the BdP and Article 27(2) of the Organic Law of the Banco de Portugal. Recommendation B3 of Recommendation ESRB/2011/3 suggests that Member States ensure the central bank plays a leading role in the macro-prudential policy and that macro-prudential policy does not undermine its independence in accordance with Article 130 of the Treaty. Recommendation E1 of that same Recommendation advises that the macro-prudential authority, in the pursuit of its objective, should be as a minimum operationally independent, in particular from political bodies and from the financial industry, and Recommendation E2 proposes that organisational and financial arrangements do not jeopardise the conduct of macro-prudential policy.

11 OJ L 331, 15.12.2010, p. 1.

12 According to Recommendation B2 of Recommendation ESRB/2011/3, if a single institution is designated as the macro-prudential authority, Member States should establish mechanisms for cooperation among all authorities whose actions have a material impact on financial stability, without prejudice to their respective mandates.

13 See Article 2(1) and (3) of draft decree-law on the NCFS.

14 See Article 17(2) of draft decree-law on the BdP.

to the tasks of drawing up resolution plans, applying resolution measures, and arranging for the removal of potential obstacles to the application of such measures[15].

4.2 The ECB noted in its Convergence Reports[16] that financing by an NCB granted independently and at its full discretion to credit institutions would be incompatible with the monetary financing prohibition if it would be granted other than in connection with central banking tasks (such as monetary policy, payment systems or temporary liquidity support operations), in particular the support of insolvent credit and/or other financial institutions. To this end, the ECB advised that inserting references to Article 123 of the Treaty should be considered. Acknowledging that Article 12(c) of the Organic Law of the Banco de Portugal currently in force already expressly safeguards *«the requirements derived from its participation in the ESCB»* when entrusting on BdP the task to *«provide for the stability of the national financial system, performing for the purpose, in particular, the function of lender of last resort»,* the ECB would recommend inserting a reference to Article 123 of the Treaty in order to avoid any possible incompatibility with the monetary financing prohibition.

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

Done at Frankfurt am Main, 27 August 2013.

[signed]

The President of the ECB

Mario DRAGHI

15 See Article 17_A of draft decree-law on the BdP.

16. See pp. 29-30.