

Yves Mersch
Member of the Executive Board

[COURTESY TRANSLATION¹]

Mr. Eduardo Ferro Rodrigues
President of the Assembly of the Republic
Palácio de São Bento
1249-068 Lisboa
Portugal

18 February 2019

Dear Mr. Ferro Rodrigues,

It has come to the attention of the European Central Bank (ECB) that in January 2019 the Portuguese Parliament passed a law (Law No 15/2019, of 12 February, as published in the Portuguese Official Journal) amending the bank secrecy rules in the context of parliamentary enquiry committees and determining the disclosure of operations involving the use of public funds in credit institutions (hereinafter referred to as the “Law”).

The ECB understands that the Law (i) amends the Portuguese Legal Framework of Credit Institutions and Financial Companies (LFCIFC) establishing the right of parliamentary enquiry committees (PECs) to access confidential banking and supervisory information and (ii) creates new disclosure duties for Banco de Portugal (BdP) in case of operations involving the use of public funds in credit institutions.

Regarding the professional secrecy duties of BdP, the Law introduces two new exceptions allowing BdP to exchange information with the following entities as long as the information is relevant for the exercise of their tasks: (i) PECs, specifically in what is deemed necessary for the fulfilment of their mandate; and (ii) the Parliament itself, following the implementation of a specific legal framework of transparency and scrutiny of operations involving the use of public funds within operations regarding the capitalisation, resolution, nationalisation or liquidation of credit institutions.

This specific legal framework creates new ‘transparency duties’ (disclosure obligations) for BdP in such cases. Within 20 days from the date of the decision allowing the use of public funds in such an operation, BdP is required, under the Law, to publish specific information on the Internet regarding the amount of, and the conditions and repayment period for, the public funds being applied in the beneficiary credit

¹ The official ECB letter is addressed in the official language of the concerned Member State.

institution. In such a case, BdP is also required to publish on the Internet a report with a summary, in an aggregated and anonymised format, of 'relevant information' related to 'big financial positions'.

The Law imposes additional disclosure duties on BdP. Specifically in the case of an application of a resolution measure that involves selling, segregating or transferring an activity to third parties, BdP must gather and disclose 'relevant information' regarding all 'big financial positions' that existed before the application of the resolution measure, identifying also the entity to which each big financial position relates. Furthermore, BdP is required to gather 'relevant information' from relevant entities and disclose it to Parliament within 120 days after the decision to use public funds in the credit institution (whether the public funds have been used for the purposes of the application of resolution measures or for the nationalisation, liquidation or capitalisation of credit institutions).

Within 100 days after the publication of the Law, BdP is also required to disclose to Parliament an extraordinary report with 'relevant information' regarding credit institutions in which public funds have been used in the last 12 years. It is expressly provided that professional secrecy rules do not apply to the access by BdP to 'relevant information' and its disclosure to Parliament. However, the members of Parliament who have access to such information are bound by secrecy, but only regarding the information that is subject to supervisory or banking secrecy.

Based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union and on Article 2(1) of Council Decision 98/415/EC², national authorities are required to consult the ECB on draft legislative provisions concerning matters that fall within its competence, including in particular on national central banks, rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets and the ECB's tasks concerning the prudential supervision of credit institutions pursuant to Article 127(6) of the Treaty.

The Law creates new duties for BdP and could potentially materially influence the stability of financial institutions and markets given that it will allow information regarding private and institutional clients of credit institutions that would otherwise remain confidential to be revealed publicly, which might have an impact on the confidence of the public in credit institutions where public funds have been used.

The Law also has an impact on the ECB's tasks relating to the prudential supervision of credit institutions. First, the information that credit institutions have to disclose (which would be then disclosed by BdP to Parliament) might include confidential supervisory data regarding significant institutions supervised by the ECB. This raises the question whether the ECB's authorisation would be needed or whether the ECB itself would have to gather and disclose the information itself as the competent supervisory authority of the institution to which the information refers. Also regarding disclosure of information by the ECB to PECs, and in accordance with Article 27(2) of the SSM Regulation³, the conditions of Article 59(2) of CRD-IV⁴ would have to be fulfilled. Second, the Law raises serious doubts regarding its compatibility with

² 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).

³ 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).

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 framework for the exchange of information and professional secrecy of CRD-IV (Title VII, Chapter 1, Section II of CRD-IV), in particular the fulfilment of the conditions for the exceptions to the duty of professional secrecy, not only because the persons in the Parliament receiving the information might not be under an equivalent professional secrecy regime as set out in the CRD-IV, but also, particularly, because the Law also requires some information (which might include confidential information) to be disclosed by BdP publicly on the Internet and not only exchanged with specific entities as allowed by the applicable CRD-IV provisions.

For the purposes of the conferral of new tasks on BdP in relation to the collection and disclosure of information under the Law, such conferral should have been assessed against the criteria for determining what constitutes a governmental task from the perspective of the monetary financing prohibition laid down in Article 123 of the Treaty.

The ECB would appreciate the Portuguese Parliament giving due consideration to the above observations by honouring the obligation to consult the ECB in the future where applicable.

Yours sincerely,

[signed]

Yves Mersch

Cc: Mr C. da Silva Costa, Governor of the Bank of Portugal
Mr. V. Dombrovskis, Vice-President, European Commission
Mr. L. Romero Requena, Director-General of the Legal Service, European Commission

Encl. Guide to consultation of the ECB by national authorities regarding draft legislative provisions