



EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 11 October 2001

**at the request of the Portuguese Ministry of Finance
on a draft decree law amending the legal framework
of credit institutions and financial companies**

(CON/2001/32)

1. On 10 July 2001 the European Central Bank (ECB) received a request from the Portuguese Ministry of Finance for an opinion on a draft decree law (hereinafter referred to as the ‘draft decree law’), which amends the legal framework of credit institutions and financial companies approved by Decree Law No 298/92 of 31 December (*‘Regime Geral das Instituições de Crédito e Sociedades Financeiras’*).
2. The ECB’s competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and the third and sixth indents of Article 2(1) of Council Decision 98/415/EC on the consultation of the ECB by national authorities regarding draft legislative provisions¹, as the legislative proposal contains provisions dealing with national central banks and with rules applicable to financial institutions which can have a material influence on the stability of financial institutions and financial markets. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the ECB, this opinion has been adopted by the Governing Council of the ECB.
3. The draft decree law provides for a comprehensive review of the legal framework of credit institutions and financial companies in Portugal. The draft decree law addresses five main aspects. First, it restates the central banking tasks of the Banco de Portugal within this legal framework, which are relevant for the surveillance and oversight of markets and markets infrastructure. Secondly, it updates the list of types of credit institutions and financial companies and introduces the definition of electronic money institutions as credit institutions, which corresponds to a partial implementation of Directive 2000/28/EC of the European Parliament and of the Council of 18 September 2000 amending Directive 2000/12/EC relating

¹ OJ L 189, 3.7.1998, p. 42.

to the taking up and pursuit of the business of credit institutions². Thirdly, the draft decree law simplifies the authorisation procedures for credit institutions and financial companies, including the authorisation of subsidiaries of credit institutions located in third countries to the European Union. Fourthly, the draft decree law contains a number of provisions aimed at enhancing the framework for the conduct of prudential supervision. These include rules regarding the notification of qualified holdings in credit institutions and the suspension of voting rights in cases of a failure to notify, the fitness and propriety of holders of such qualified holdings and also of members of corporate bodies, the supervisory powers of the Banco de Portugal and, lastly, adjustments relating to prudential ratios and limits. Finally, the draft decree law modifies certain provisions regarding the procedures of reorganisation of credit institutions, in particular by enhancing the scope of the supervisory powers of Banco de Portugal and by assigning a more operational role to the Deposit Guarantee Fund. The following comments of the ECB regard primarily these aspects of the draft decree law. It may be recalled that some of the proposed amendments to the legal framework of credit institutions and financial companies were already considered by the ECB in its Opinion CON/99/15 of 27 October 1999 at the request of the Portuguese Ministry of Finance on two draft legislative provisions amending (i) the legal framework of credit institutions and financial companies concerning the Deposit Guarantee Fund and (ii) the executive order governing the activities of the Deposit Guarantee Fund.

4. First, in accordance with the proposed Article 92 of the draft decree law, the central banking tasks of the Banco de Portugal defined in Article 13(1), Article 14 and Article 15 of its Organic Law³ are recalled and reproduced in the legal framework of credit institutions and financial companies under the common heading of ‘Guidance and surveillance’ (in the original ‘*Orientação e fiscalização*’). The ECB understands that the reference to these functions (namely of (i) surveillance of the monetary and foreign exchange markets; (ii) regulation, oversight, and promotion of the smooth operation of payment systems; and (iii) collection and compilation of monetary, financial, foreign exchange and balance of payments statistics) in the context of the legal and supervisory framework of credit institutions and financial companies does not in any manner imply that they correspond to financial supervision functions. The tasks enumerated in the proposed Article 92 are typical central banking tasks and therefore remain within this sphere. For this reason, the ECB considers that it is unnecessary to maintain the proposed Article 92 in the draft decree law and suggests the deletion of its contents. The mere reproduction of central banking tasks assigned to the Banco de Portugal by its Organic Law and their re-classification and re-ordering under the common heading of ‘Guidance and surveillance’ does not seem to add value to the legal framework of credit institutions and financial companies and may not be seen as useful from the central banking perspective.

² OJ L 275, 27.10.2000, p. 37.

³ Law No 5/98 of 31 January, as amended by Decree Law No 118/2001 of 17 April.

5. Secondly, with regard to the introduction of electronic money institutions as credit institutions, the ECB understands that the authorisation and the commencement of activities of electronic money institutions may only be allowed when the relevant special legislation, implementing Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions⁴ has been adopted in Portugal.
6. Thirdly, with regard to the simplification of the authorisation procedures for credit institutions and financial companies, including the authorisation of subsidiaries of credit institutions located in third countries to the European Union, the ECB welcomes the revised procedures, which are broadly in line with international standards regarding the licensing of credit institutions.
7. Fourthly, the ECB welcomes the provisions of the draft decree law directed at enhancing and reinforcing the supervisory framework for credit institutions and financial companies. In particular, the ECB welcomes the revised concept of a qualifying holding, as established in the proposed Article 13(7) of the draft decree law. The ECB also welcomes the reinforcement of notification duties regarding qualified holdings, together with the suspension of voting rights in cases of a failure to notify in the proposed Articles 102 and 105, respectively, since they provide for an enhancement of the prudential tasks of the Banco de Portugal in this field. The ECB welcomes the possibility, under the proposed Article 116(2), for the Banco de Portugal to request special audits to be performed by independent entities. In addition, in accordance with the proposed Article 120(6), the Banco de Portugal may also request credit institutions to present reports on prudential supervision prepared by specialised entities. The ECB believes that these provisions, by providing a certain degree of flexibility, also enhance the effectiveness of prudential supervision which may contribute to an increased integration of financial markets in Europe, while respecting free competition among credit institutions.
8. The ECB notes that, in accordance with the proposed Article 118(2), the Banco de Portugal will be able to request a credit institution to abstain from engaging in an operation which may lead to the infringement or increase the gravity of an infringement of prudential rules or, alternatively, which may lead to the disregard of rules of prudent and sound management. The ECB recognises the need to provide the supervisory authority with adequate and flexible instruments to ensure the observance of prudential rules, with particular regard to institutions in difficulty. Notwithstanding, the attribution of such broad supervisory powers may involve certain risks for the Banco de Portugal itself since it may be seen by market participants as being entitled to oversee the credit institutions' managerial decisions. In addition, such attribution of powers should also not give rise to uncertainties regarding transactions among market participants. Therefore, the ECB suggests that the wording of the proposed

⁴ OJ L 275, 27.10.2000, p. 39.

Article 118(2) might merit some clarification in order to reduce the potential scope of supervisory influence over managerial decisions and market transactions.

9. The ECB takes note of the proposed Article 117A, according to which the Banco de Portugal may declare subject to its supervision those entities that perform activities deemed relevant for the functioning of payment systems. The ECB understands that the provisions of this Article will not limit the competences of the Banco de Portugal in its role as the payment system overseer.
10. Finally, the ECB would like to address the provisions relating to the procedures of reorganization of a credit institution and the role of Deposit Guarantee Fund, namely the proposed Articles 142, 155, 158, 159 and 167-A. The main purpose of these provisions is to enhance the supervisory powers of the Banco de Portugal relating to corrective action when an institution fails to meet prudential requirements, to enlarge the scope of activities of the Deposit Guarantee Fund, allowing for its intervention in situations of financial reorganisation of credit institutions and to provide for co-operation between the Banco de Portugal and the Deposit Guarantee Fund in such situations. The ECB would like to recall that it has already adopted Opinion CON/99/15 on the substance of similar draft. The ECB therefore recalls some of the comments put forward in that opinion, where applicable and with the necessary adaptations.
11. According to the legal framework of credit institutions and financial companies, the Banco de Portugal may decide to take exceptional measures whenever the interests of depositors, investors and other creditors, or the safeguard of the normal functioning of the money, financial and foreign exchange markets, are threatened. Among these measures, the Banco de Portugal may require the institution concerned to prepare a reorganisation plan, whose acceptance by the Banco de Portugal may be made conditional upon a capital reduction or increase, or disposal of shareholdings and other assets. The draft decree law allows the Banco de Portugal, in the context of its intervention in the institution concerned, to invite the Deposit Guarantee Fund to co-operate in the reorganisation process, particularly by granting monetary or financial support or by participating in possible capital increases. The ECB considers that the amendments in the proposed Article 142 of the draft decree law achieve this objective.
12. The ECB notes that, in relation to the amendments to Article 142, the Banco de Portugal will have an extended role over the financial reorganisation of a troubled institution. Namely, the Banco de Portugal may present an intervention plan defining a capital increase and further requiring that the capital increase is preceded by the absorption of the institution's losses by the relevant 'positive' items of own funds. The Banco de Portugal may also invite the Deposit Guarantee Fund or other institutions to co-operate in the reorganisation process, in particular, by granting adequate monetary or financial support, or through their participation in the capital increase decided by the Banco de Portugal, which shall be also responsible for guiding and defining such co-operation in terms of the timeframe. The ECB understands, in accordance

with the proposed Article 142(7), that such an intervention plan, as decided by the Banco de Portugal on a capital increase, does not give rise to an obligation for the shareholders of the institution or for any other investors and institutions, including the Deposit Guarantee Fund, to indeed subscribe to a capital increase.

13. The ECB notes, in relation to the proposed Article 159(2), that the Banco de Portugal will be able, in an urgent situation and under the conditions laid down in its Organic Law, to grant temporarily to the Deposit Guarantee Fund the financial resources required to meet the latter's immediate needs. The ECB takes note that the financial resources granted by the Banco de Portugal to the Fund under this provision are granted without prejudice to its obligations as part of the ESCB and based on adequate collateral (see Articles 24(1)(c) and Article 25(b) of the Organic Law of the Banco de Portugal). In this context, the ECB would like to recall that according to Article 14.4 of the ESCB Statute, national central banks may perform functions other than those specified in the ESCB Statute unless the Governing Council of the ECB finds, by a majority of two-thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB. The ECB does not anticipate that the possibility given to the Banco de Portugal under Article 159(2) would interfere with the objectives and tasks of the ESCB.
14. The ECB notes, in relation to the proposed Article 167A(1) relating to financial support rules, that the Deposit Guarantee Fund will be able to participate in operations deemed adequate to put an end to situations of financial distress involving member credit institutions. Moreover, the proposed Article 167A(2) provides that the Fund shall confine its financial support operations to the cases in which financial distress situations are likely to come to an end within a short period of time, the objectives are clearly outlined and defined and the manner in which the Fund's support will end is specified. In this respect, the ECB notes that the wording of the proposed Article 167A(2), compared with the previous wording of this Article as discussed in ECB Opinion CON/99/15, no longer specifies that the Fund shall confine its financial support operations to situations which do not involve recourse to loans or to special contributions from member credit institutions. The ECB therefore understands that, under the proposed Article 159(2), the Banco de Portugal may also grant financial resources to the Deposit Guarantee Fund for the purposes foreseen under the proposed Article 167A(1), which was not the case under the previous draft presented for consultation submitted to the ECB for its opinion. Therefore, the Banco de Portugal may decide to grant financial resources to the Deposit Guarantee Fund in order to finance any financial support operation involving credit institutions to be carried out by the Fund. On this issue, the ECB considers that the possibility that the Banco de Portugal grants financial resources to the Fund should in practice have a narrow scope, namely where systemic stability considerations are involved, in view of the responsibilities of the Banco de Portugal as overseer of the stability of the Portuguese financial system, in accordance with Article 12(c) of the Organic Law of the Banco de Portugal. Lastly, the ECB welcomes that the execution of any financial support operation by the Deposit

Guarantee Fund is made dependent on the Banco de Portugal's confirmation of the adequacy of the operation to resolve the situation in question.

15. The ECB would also like to draw attention to the minimum reserve requirements imposed on credit institutions by Regulation ECB/1998/15 of 1 December 1998 on the application of minimum reserves⁵, as amended by Regulation ECB/2000/8⁶, and to the statistical reporting requirements imposed on monetary financial institutions by Regulation ECB/1998/16⁷ of 1 December 1998 concerning the consolidated balance sheet of the monetary financial institutions sector, as amended by Regulation ECB/2000/8. According to the present wording of Regulation ECB/1998/15, the ECB may exempt from minimum reserve requirements an institution subject to winding-up proceedings or reorganisation measures⁸. In case a credit institution continues to hold its authorisation while being subject to reorganisation measures, its obligations as a reporting monetary financial institution (MFI) continue.
16. The ECB confirms that it has no objection to publication of this opinion by the competent national authorities at their discretion.

Done at Frankfurt am Main on 11 October 2001.

The President of the ECB

[signed]

Willem F. DUISENBERG

⁵ OJ L 356, 30.12.1998, p. 1.

⁶ OJ L 229, 9.9.2000, p. 34.

⁷ OJ L 356, 30.12.1998, p. 7.

⁸ It is noted that Regulation ECB/1998/15 is currently under review.