



EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 18 May 2004

**at the request of the Portuguese Ministry of Finance
on a draft decree-law on the reorganisation and winding up of credit institutions**

(CON/2004/18)

1. On 16 April 2004 the European Central Bank (ECB) received a request from the Portuguese Ministry of Finance for an opinion on a draft decree-law on the reorganisation and winding up of credit institutions (the 'draft decree-law').
2. The ECB's competence to deliver an opinion is based on the fifth 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 provisions¹, as the legislative proposal contains provisions on payment and settlement systems and financial institutions that would 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.
3. The draft decree-law will transpose into domestic law Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions². In addition, Chapters I and II contain a full review of the legal requirements applying to the process of winding up credit institutions with their head offices in Portugal, as defined by a legal act from 1940. Chapter IV also provides for professional secrecy under winding-up proceedings. As draft national legal acts exclusively transposing directives fall outside the scope of Article 2(1) of Council Decision 98/415/EC, the current opinion is restricted to these latter provisions of the draft decree-law.
4. Whereas Decree-Law No 298/92 of 31 December 1992, approving the general legal framework for credit institutions and financial companies (the 'Decree-Law No 298/92'), currently governs the reorganisation of credit institutions with their head offices in Portugal, Decree-Law No 30 689 of 27 August 1940 continues to regulate winding up. The ECB notes that the Portuguese legislator's initiative reviews the existing regime for winding up credit institutions with their head offices in

¹ OJ L 189, 3.7.1998, p. 42.

² OJ L 125, 5.5.2001, p. 15.

Portugal so that the legal framework can be brought closer to Community legal principles and standards on this matter.

5. Article 4 restricts the scope of application of Chapter II of the draft decree-law to the following:
- the winding up of credit institutions having their head offices in Portugal, and
 - with the necessary adaptations, to financial companies having their head offices in Portugal, and
 - the winding up of branches located in Portugal of credit institutions having their head offices in countries which are not Member States, and of branches located in Portugal of financial institutions.

The ECB assumes that the term ‘financial institutions’ in the draft decree-law is the legal term used by Decree-Law No 298/92 and Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions³, as amended by Directive 2000/28/EC⁴, which laid down the definition of those entities and specified which branches are subject to supervision by the Banco de Portugal. Therefore, the ECB understands that the scope of Chapter II, when read together with Article 1(1) of the draft decree-law, also includes those branches of ‘financial institutions’ when those branches are located in Portugal. The ECB notes from Article 4(2) that special legislation will continue to cover the winding up of the *caixas de crédito agrícola mútuo* (mutual agricultural credit banks).

6. According to Article 5(1) of the draft decree-law, credit institutions with their head offices in Portugal may only be wound up by either: (i) withdrawing the authorisation to pursue the business of banking; or (ii) shareholders’ decision.

Article 5(3) provides that decisions to withdraw authorisation shall indicate the date and time of the act, it being considered, in the event of omission, that the act occurred at 12.00 this being deemed, for all legal purposes, the moment when the winding up proceedings are opened. The ECB notes that the date and time of adoption of the act withdrawing the authorisation will thus constitute, for legal purposes, the moment when the winding-up proceedings are opened. Hence, the ECB understands that the date on which the Banco de Portugal applies to the competent court for a credit institution to be wound up is not deemed to be the moment when the winding-up proceedings are opened. The ECB also notes that the Banco de Portugal will give to the decision withdrawing authorisation the publicity it deems convenient pursuant to Article 23(3) of Decree-Law No 298/92, to ensure third parties are adequately informed. The ECB notes that this rule ensures legal certainty. The ECB considers however that this rule could be improved by clarifying that the omission should only concern the time but not the date, as otherwise it would not be possible to identify to which day the time rule established in Article 5(3) refers.

³ OJ L 126, 26.5.2000, p. 1.

⁴ OJ L 275, 27.10.2000, p. 37.

7. Articles 6 and 7 of the draft decree-law provide for winding up by shareholders' decision. Article 6(1) provides that voluntary winding up is governed by Article 35-A of Decree-Law No 298/92. This ensures that any plan to voluntarily wind up a credit institution is notified to Banco de Portugal at least 90 days in advance of the date of its implementation. The ECB understands that voluntary winding up of a credit institution entails its extra-judicial winding up within the terms and conditions set by Article 7 of the draft decree-law. Notwithstanding this, the ECB welcomes the power granted by Article 6(2) of the draft decree-law to the Banco de Portugal to request the judicial winding up of a credit institution, as foreseen in Article 8, even when wound-up by shareholders' decision. The ECB considers that such a discretionary power will allow the Banco de Portugal to strengthen creditor protection, where it deems necessary, in particular by allowing a request for the judicial application of interim measures.
8. Articles 8 to 15 of the draft decree-law regulate judicial winding up where the authorisation of a credit institution is withdrawn, with the abovementioned exception in Article 6(2). The ECB understands that these judicial winding up proceedings will be carried out within the framework of the Portuguese Insolvency and Company Reorganisation Code subject to the specific rules laid down in the draft decree-law. In respecting the Member States' procedural autonomy, the ECB recommends granting national supervisory authorities and national central banks, if not granted supervisory powers over credit institutions, ample intervention rights in winding-up proceedings. This reinforces the financial stability framework by allowing judicial authorities to consider the assessment and concerns of national supervisory authorities and national central banks, as the case may be⁵. This is also in line with the spirit of Directive 2001/24/EC, which highlights the important role played by the competent authorities of the home Member State before winding-up proceedings may continue during the process of winding-up so that these proceedings can be properly carried out⁶.

In this regard, the ECB welcomes the extensive set of rights granted to the Banco de Portugal in the context of the judicial winding-up proceedings by the draft decree-law. In particular, the ECB notes that Article 8(3) grants the Banco de Portugal exclusive standing to request the winding up of a credit institution before the appropriate court. The ECB notes further that, pursuant to Article 10(1) and (2) respectively, the judge appoints the liquidator or the liquidating commission, as the case may be, on proposal by the Banco de Portugal. The latter may propose the dismissal or substitution of the liquidator or of the members of the liquidating commission, as the case may be, or the substitution of a liquidator by a liquidating commission, or the latter by the former. The ECB notes also that the credit institution may only be continued pending winding-up, under the terms and conditions in Article 12(1), with the Banco de Portugal's approval under Article 12(2). Finally, the ECB supports the ample intervention rights of the Banco de Portugal in the judicial winding-up proceedings established in Article 14. In particular, it supports the possibility of examining the

⁵ See, in the same vein, the considerations made in paragraph 5 of ECB Opinion CON/2004/9 of 16 March 2004.

⁶ See recital 15 of Directive 2001/24/EC.

credit institution's accounts and requesting the liquidator or liquidating authority, as the case may be, to provide all information and documents deemed necessary by the Banco de Portugal.

9. The ECB welcomes the wide scope of Article 40 in Chapter IV of the draft decree-law, as all persons intervening in winding-up proceedings are subject to professional secrecy under Articles 78 to 84 of Decree-Law No 298/92.
10. The ECB confirms that it has no objection to the competent national authorities making this opinion publicly available at their discretion. This opinion will be published on the ECB's website six months after the date of its adoption.

Done at Frankfurt am Main, 18 May 2004.

The President of the ECB

Jean-Claude TRICHET