EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 16 May 2014

on the legal framework for credit institutions and financial companies

(CON/2014/34)

Introduction and legal basis

On 5 March 2014, the European Central Bank (ECB) received a request from the Portuguese Minister of State and for Finance for an opinion on a draft law (hereinafter the 'draft law') amending Decree-Law No 298/1992 of 31 December 1992 establishing the legal framework for credit institutions and financial companies and other closely related laws and decree-laws[1] (hereinafter the '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 on the third and sixth indents of Article 2(1) of Council Decision 98/415/EC[2], 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 legal framework whose main purpose is to implement Directive 2013/36/EU of the European Parliament and of the Council[3] by incorporating the relevant provisions in the banking law, and to effect changes and

1 The draft law also amends the following legal acts: Law No 25/2008 of 5 July 2008 establishing measures of a preventive and repressive nature to combat money laundering of illicit origin and terrorist financing which transposes Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 and Commission Directive 2006/70/EC of 1 August 2006 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and amends Law No 52/2003 of 22 August 2003 and repeals Law No 11/2004 of 27 March 2004; Law No 28/2009 of 19 June 2009 which reviews the legal framework on criminal and misdemeanour penalties in the financial sector; Decree-Law No 260/94 of 22 October 1994 establishing the legal framework for investment companies; Decree-Law No 72/95 of 15 April 1995 establishing the legal framework for financial leasing companies; Decree-Law No 171/95 of 19 July 1995 amending the legal framework for factoring companies; Decree-Law 211/98 of 16 July 1998 regulating the activity of mutual guarantee companies; and Decree-Law No 317/2009 of 30 October 2009 which approves the legal framework governing the taking up of the business of payment institutions and the provision of payment services.

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 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 (OJ L 176, 27.6.2013, p. 338).

clarifications to Portuguese law made necessary by Regulation (EU) No 575/2013 of the European Parliament and of the Council[4]. The draft law introduces changes with regard to, *inter alia*, capital buffers, risk management, corporate governance and administrative sanctions, as required by Directive 2013/36/EU. It also proposes amendments to several related laws, such as Decree-Law No 317/2009 of 30 October 2009 which approves the legal framework governing the taking up of the business of payment institutions and the provision of payment services.

1.2 The draft law also contains amendments to the resolution framework for credit institutions in order to clarify some of the provisions of Decree-Law No 31-A/2012 of 10 February 2012, which introduced a resolution regime into the legal framework for credit institutions and financial companies. In addition to the implementation of Directive 2013/36/EU, the draft law introduces the following amendments: (a) reduction of the list of entities that are considered as credit institutions; (b) in-depth revision of the sanctions regime; (c) express introduction of the 'no creditor worse off principle' in the resolution of credit institutions, which has until now only been implicit; (d) reorganisation of the bank accounts database regarding the disclosure of information to relevant authorities; and (e) revision of the regime for assessing suitability of members of the management body and its extension to key function holders.

2. General observations

The ECB generally welcomes the draft law, which implements Directive 2013/36/EU while reflecting the participation of the BdP in the single supervisory mechanism, and clarify the 'no creditor worse off principle' in the current framework. It is important that the transposition into national law of the micro- and macro-prudential tools contained in Directive 2013/36/EU and the implementation of the requirements that fall under the remit of the SSM Framework Regulation[5] are carried out accurately[6].

3. Implementation of Directive 2013/36/EU

3.1 The draft law revises the criteria and requirements for assessing the suitability of the members of the management body and of the key function holders of a credit institution in order to comply with Directive 2013/36/EU and with guidelines from the European Banking

4 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms (OJ L 176, 27.6.2013, p. 1).

5 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (ECB/2014/17), (OJ L 141, 14.5.2014, p. 1).

6 Namely the countercyclical capital buffer, minimum risk weights, loss given default floors on exposures secured by mortgages, the G-SII buffer and the O-SII buffer.

Authority (EBA)[7]. It also implements the options under Articles 412(5), 413(3), 458(1) and 493(3) of Regulation (EU) No 575/2013. By these means, the draft law helps promote consistency across all participating Member States, thereby helping to ensure a level playing field and lowering the risk of regulatory arbitrage[8].

3.2 The draft law also revises the sanctions regime in order to align it with Articles 64 to 72 of Directive 2013/36/EU and with the rules laid down in Directive 2005/60/EC of the European Parliament and of the Council[9] and in Commission Directive 2006/70/EC[10]. Furthermore, it contains new and clearer rules regarding the disclosure of information relating to bank accounts to certain entities in circumstances where exceptions to the obligation of professional secrecy apply[11].

3.3 The draft law provides that the categories of entities to be considered as credit institutions will be limited to: (a) banks; (b) savings banks; (c) central mutual agricultural credit banks and mutual agricultural credit banks; (d) credit financial institutions[12]; and (e) any other undertakings which fulfil the definition of credit institution and are classified as such in the law.

3.4 A new Article 4A lists the investment firms and specifies which of them are subject to the legal framework and to the prudential supervision of the BdP[13] (dealers, brokers, wealth management companies, foreign exchange and money market mediating companies).

3.5 Although the draft law leaves unchanged the definition of 'credit institution', it reduces the list of entities that may be considered as such in Portugal. It removes certain categories of credit institutions that are currently provided for in the banking law but not used in practice (e.g. credit purchase financing companies) and classifies certain other categories of credit institutions as 'financial companies' (e.g. investment companies, financial leasing companies, factoring companies)[14]. The ECB understands that 'financial companies' will not be authorised to accept deposits from the public and will not be subject to all of the

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7 See Articles 30 to 33 and the new Articles 30A to 30D and 31A to 33A of the draft law, and the guidelines on the assessment of the suitability of members of the management body and key function holders, EBA, 22 November 2012 (available on the EBA's website at www.eba.europa.eu).

8 See paragraph 2 of Opinion CON/2013/82 and paragraph 3.1 of Opinion CON/2014/21. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

9 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15).

10 Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of 'politically exposed person' and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis (OJ L 214, 4.8.2006, p. 29).

11 See Article 81A of the draft law.

12 The ECB notes that credit financial institutions will not be permitted to receive deposits from the public, although they will be permitted to accept repayable funds from the public and to engage in all other usual banking activities.

13 These were already classified as financial companies and subject to the prudential supervision of the BdP.

14 See Articles 3 and 6 of the draft law.

prudential provisions laid down in Directive 2013/36/EU and Regulation (EU) No 575/2013, and that the BdP will lay down rules specifically applicable to them.

3.6 The ECB considers that the above might allow financial companies to be more competitive by reducing their administrative costs in the context of European regulation. It is confident that a level playing field will be preserved, thus safeguarding all of the interests in a well-functioning banking system and the financial system as a whole[15]. The relevant authorities should, however, ensure that the transfer of these institutions, which were previously regulated as credit institutions, to a less onerous regime of prudential regulation is in line with Union law. This is particularly the case if they still fulfil the criteria for authorisation as credit institutions.

4 Amendments to the resolution framework

As mentioned above, the draft law introduces some amendments to the resolution framework to clarify some of its provisions. In particular, it introduces the 'no creditor worse off principle'[16], which is not expressly set out in the current legal framework. The ECB welcomes this amendment as it is an essential core principle of the European Commission's proposal for a directive on the recovery and resolution of credit institutions and investment firms[17] (hereinafter the 'proposed BRRD'). However, this does not preclude the need to amend more broadly the resolution framework in view of the entry into force of the proposed BRRD.

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

Done at Frankfurt am Main, 16 May 2014.

[signed]

The President of the ECB

Mario DRAGHI

15 Financial companies are allowed to carry on, on a professional basis, the activities of credit institutions referred to in Article 4(1)(b) to (i) and (q) to (s) of the legal framework with the exception of the consultancy activities referred to in (i).

16 See Article 145B(1) and (3) of the draft law and paragraph 3.2 of Opinion CON/2013/87.

17 Proposal for a directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms (COM(2012) 280 final).