



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK
of 7 July 2015
on a new legal framework for savings banks
(CON/2015/23)

Introduction and legal basis

On 15 May 2015, the European Central Bank (ECB) received a request from the Portuguese Ministry of Finance for an opinion on a draft decree-law (hereinafter the 'draft decree-law') establishing a new legal framework for savings banks (hereinafter the 'new 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 the sixth indent of Article 2(1) of Council Decision 98/415/EC¹, as the draft decree-law relates 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-law

- 1.1 The draft decree-law sets out a new legal framework for savings banks (*caixas económicas*), and repeals the previous framework detailed in Decree-Law 136/79, of 18 May 1979². At present, savings banks are special credit institutions which carry out limited banking business, although the Banco de Portugal (BdP) may authorise them to carry out other operations which may be carried out by banks.
- 1.2 The main purpose of the draft decree-law is to adjust the rules governing savings banks to reflect the gradual expansion to full-service banking by certain savings banks that has taken place during the last few decades. The new legal framework, while maintaining the community-oriented purposes of the savings banks, aims to define their nature and the relationship with their owner institutions, to strengthen their governance, and to define the terms on which they carry out banking business.
- 1.3 To that end, the draft decree-law sets out two separate regimes, depending on the volume of assets of the already-existing savings banks, of which there are currently four in Portugal. Those which have assets greater than or equal to EUR 50 000 000 are classified as full-service savings banks (*caixas económicas bancárias*) and those whose assets are below that threshold are classified as affiliated savings banks (*caixas económicas anexas*). Both types of savings banks will

¹ 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).

² *Diário da República*, No 114 Series 1, of 18 May 1979.

continue to be controlled by a single institution, either a mutual society or other charitable institution. The full-service savings banks' owner institution will be required to retain, directly or indirectly, either a majority of the voting rights or a majority shareholding in the institution. For this purpose, full-service savings banks will assume the form of a public limited company with a public ownership structure. Additionally, the full-service savings banks will be comparable to regular commercial banks, and entitled to carry out all forms of business which may be carried out by banks in accordance with law, and they will be subject to the same prudential rules.

- 1.4 This distinction between full-service savings banks and affiliated savings banks will also apply to new savings banks that are incorporated after the draft decree-law enters into force. Although they are currently incorporated on the basis of an authorisation from the Ministry of Finance, which first consults the BdP, under the draft decree-law, authorisation from the BdP will be required for new savings banks.
- 1.5 The draft decree-law also ensures the separation and independence of the management and supervisory boards of savings banks from their respective owner institution, specifically prohibiting *ex officio* appointments³.

2. General observations

- 2.1 The ECB welcomes the draft decree-law as it adapts the legal framework for savings banks to take into account developments in the financial sector, in particular the fact that certain savings banks are already authorised to carry out other operations carried out by banks, approaching a full-service banking model and acquiring a profit-making dimension. Therefore, the ECB recognises, in general terms, the benefit of defining the nature of savings banks and the terms under which they conduct their business, as well as strengthening their respective governance models and clarifying the relationship with their owner institutions.
- 2.2 The ECB acknowledges that the draft decree-law aims at preserving the community-oriented purpose of savings banks, which accounts for the distinction between affiliated savings banks and full-service savings banks, as well as the legal requirement for the owner institutions of the latter to retain a majority of voting rights or shares. The ECB welcomes the possibility that private investors may participate in the share capital of full-service savings banks, since this could help stabilise the capital base of savings banks by opening up a new source of funding.

3. Specific observations

- 3.1 *Application of Directive 2013/36/EU and Regulation 575/2013 to savings banks*
- 3.1.1 According to point (19) of Article 2(5) of Directive 2013/36/EU of the European Parliament and of the Council⁴, savings banks in existence on 1 January 1986 fall outside the scope of application of

³ For the present purpose, this means the automatic appointment of members of the management bodies of the owner institution to the management and supervisory bodies of savings banks.

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).

that Directive and, therefore, of Regulation 575/2013 of the European Parliament and of the Council⁵, taking into account its scope of application as defined in Article 1 thereof. Exception is made, however, for those incorporated as limited companies, of which there are currently none, and to Caixa Económica Montepio Geral, as specified in Directive 2013/36/EU, which is explicitly subject to the prudential requirements of Directive 2013/36/EU and Regulation 575/2013.

3.1.2 Any new savings banks, whether affiliated or full-service, will be subject to the same prudential requirements as any other credit institution under Directive 2013/36/EU and Regulation 575/2013.

3.1.3 In addition, the ECB understands that transforming a savings bank into a public limited company would cause Directive 2013/36/EU and Regulation 575/2013 to be applicable, since the exemption in point (19) of Article 2(5) of Directive 2013/36/EU would no longer apply.

3.2 *Incorporation of new savings banks and maintenance of assets above EUR 50 000 000*

3.2.1 As indicated above, the draft decree-law generally permits the incorporation of new savings banks as either affiliated savings banks or full-service savings banks depending on whether the institution has assets below or above EUR 50 000 000. Taking into consideration the fact that, before incorporation takes place, there are no assets to account for except the initial capital proposed, it is possible to assume that this initial capital will determine the applicable category. This would mean that a new full-service savings bank would always need an initial capital of at least EUR 50 000 000, which is much higher than the lower limit established for banks (also full-service) referred to in Article 18(2) of the new legal framework. The Portuguese authorities may wish to explicitly address this question in the draft decree-law.

3.2.2 The draft decree-law does not indicate what happens if the assets of a full-service savings bank fall or remain below the EUR 50 000 000 threshold, as Article 6 of the draft decree-law only provides a solution for an affiliated savings bank which has assets greater than or equal to EUR 50 000 000 over two consecutive years, in which case it shall be converted, from the third year, to a full-service savings bank. One possible interpretation is that the draft decree-law allows full-service savings banks to maintain their nature and their services, even if their assets fall below the threshold of EUR 50 000 000, while keeping them subject to a more restrictive prudential regime. The Portuguese authorities may wish to explicitly address this issue as well.

3.2.3 Furthermore, from the point of view of legislative technique, the ECB notes that, as Article 6 of the draft decree-law does not seem to be limited to already-existing savings banks, its text could be included in the text of the new legal framework itself.

3.3 *Other specific observations*

3.3.1 For purposes of clarity, as well as to reinforce its interpretation, the ECB considers it useful and pertinent to make the following final comments regarding the draft decree-law:

- (a) Article 4(2) of the draft decree-law sets out a transitional rule according to which the BdP may require full-service savings banks existing at the date of entry into force of the draft

⁵ 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 and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

decree-law to be transformed, within a reasonable period of time, into public limited companies, depending on the complexity or risk profile of their business activities. While, in principle, given the purpose of the draft decree-law, a legally binding deadline would be justified rather than conferring responsibility for setting the relevant deadline on the BdP, the ECB understands that setting each deadline by means of an order issued by the BdP allows for the flexibility to adapt the transformation process according to the specific features of each savings bank.

- (b) It is not entirely clear from Article 5 of the new legal framework whether investors other than mutual societies or other charitable institutions can participate in the share capital of full-service savings banks. Since this is one of the main changes to the previous legal framework governing these institutions, the draft decree-law would benefit from some clarification in this regard.
- (c) Article 5(3) of the new legal framework provides, only for interpretation and clarification purposes, that the holdings of an owner institution in a savings bank are relevant for the assessment of qualifying holdings for the purposes of the legislation applicable to credit institutions. However, since other investors will also be allowed to participate in the share capital of full-service savings banks to a level up to 49%, the draft decree-law should clarify that such other holdings will also be assessed under the prudential rules on qualifying holdings.
- (d) Article 19(2) of the new legal framework provides that the members of the management and supervisory bodies of full-service savings banks are to be distinct and independent from the members of the bodies of their respective owner institution, further specifying that they are not to be appointed on an *ex officio* basis. In order to prevent an improper interpretation according to which the same person could be appointed both to the bodies of the owner institution and of the savings bank as long as it is not via *ex officio*, it would be convenient to adopt different wording to make clear that the prohibition of an *ex officio* appointment is merely by way of example.

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

Done at Frankfurt am Main, 7 July 2015.

[signed]

The President of the ECB

Mario DRAGHI