

OPINION OF THE EUROPEAN CENTRAL BANK

of 21 July 2020

on the amendment of the appointment criteria of Banco de Portugal's Governor and other members of the Management Board

(CON/2020/19)

Introduction and legal basis

On 18 June 2020, the European Central Bank (ECB) received a request from the Portuguese Assembly of the Republic for an opinion on a draft law amending the criteria for the appointment of the Governor and other members of the Management Board of Banco de Portugal ('BdP') (hereinafter the 'draft law').

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 third indent of Article 2(1) of Council Decision 98/415/EC¹, as the draft law relates to the BdP. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the ECB, the Governing Council has adopted this opinion.

1. Purpose of the draft law

- 1.1 According to the explanatory memorandum accompanying the draft law, the two main objectives of the draft law are to reinforce the powers of the Assembly of the Republic and prevent conflicts of interest by amending the criteria for appointing the Governor and other members of the BdP's Management Board. This will guarantee an adequate level of independence of the BdP, which in turn will enable it to resist pressures both from supervised entities and from the Government, according to the explanatory memorandum. In particular, the draft law seeks to amend Article 27 of the BdP's Organic Law on the appointment criteria of the Governor and other members of the BdP's Management Board.
- 1.2 Currently, the Governor is appointed by the Ministerial Council on a proposal from the Minister for Finance, after consulting the competent commission of the Parliament (hereinafter the 'Parliamentary Commission'). The other members of the BdP's Management Board are appointed by the Ministerial Council on a proposal from the Governor, after consulting the Parliamentary Commission. In making its decision on an appointment, the Government is not bound by the report produced by the Parliamentary Commission².
- 1.3 The draft law introduces new incompatibility rules for the appointment of the BdP's Governor and the other members of the BdP's Management Board³. According to the draft law, the following

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 Article 27(1) of the BdP's Organic Law.

³ Article 27(3) of the BdP's Organic Law, as amended by the draft law.

persons may not be appointed as Governor or as members of the BdP's Management Board: (a) office-holders in *Órgãos de Soberania* (sovereign bodies)⁴, as well as in autonomous regional governments and local governments; (b) persons who, in the five years preceding appointment, have held the position of Prime Minister or have held a position as a member of the Government that is responsible for the area of finance or have held the position of Secretary of State in areas related to finance; (c) persons who, in the five years preceding appointment, have been members of corporate bodies, or who have performed any activities or provided services, remunerated or not, in entities subject to the supervision of the BdP or in whose supervision the BdP participates within the SSM, as well as in groups of companies controlled by such entities; (d) persons who, in the five years preceding appointment, have been members of the corporate bodies, or who have performed any activities or provided services, whether paid or not, in audit or consultancy companies that provide or have provided support to the BdP in the relevant period of five years or at the time of appointment; and (e) persons who, at the time of appointment, occupy or exercise other positions or functions that may affect their independence or conflict with the interests of the BdP.

- 1.4 Under the draft law, the Governor and the other members of the BdP's Management Board must be appointed from among persons of recognised standing, aptitude, professional experience, management capability, knowledge and relevant and appropriate technical competence for the exercise of their respective functions⁵. The criterion 'aptitude' is introduced by the draft law.
- 1.5 The intervention of the Parliamentary Commission is given a binding nature. Under the draft law, prior to an appointment of an individual to the position of Governor or to the BdP's Management Board, the Parliamentary Commission must provide a positive opinion as to the suitability of the person in question for that position⁶. In addition, with the aim of enhancing transparency, the conclusions of that opinion will be published in the *Official Journal* along with the resolution of the Ministerial Council designating the members of the BdP's Management Board to be appointed⁷. The Assembly of the Republic can request the Portuguese Minister of Finance to attend a hearing concerning the suitability of the persons intended for appointment to the BdP's Management Board, before the finalisation of the Parliamentary Commission opinion⁸. Under the draft law, the Parliamentary Commission opinion has to be approved by a majority of two thirds of the members of Parliament⁹, in order to reach a broad political consensus concerning the appointment of the BdP's Governor and of the other members of the BdP's Management Board.
- 1.6 Finally, the draft law changes the minimum threshold for the representation of each gender in the BdP's Management Board from 33% to 40%¹⁰, in line with the Recommendation Rec (2003) 3 of the Committee of Ministers of the Council of Europe and the explanatory memorandum thereto¹¹.

⁴ Sovereign bodies (*Órgãos de Soberania*) comprise the President of the Republic, the Assembly of the Republic, the Central Government and the Courts, according to Article 110(1) of the Constitution of the Portuguese Republic.

⁵ Article 27(1) of the BdP's Organic Law, as amended by the draft law.

⁶ Article 27(2) of the BdP's Organic Law, as amended by the draft law.

⁷ Article 27(6) of the BdP's Organic Law, as amended by the draft law.

⁸ Article 27(5) of the BdP's Organic Law, as amended by the draft law.

⁹ Article 27(4) of the BdP's Organic Law, as amended by the draft law.

¹⁰ Article 27(7) of the BdP's Organic Law, as amended by the draft law.

2. Observations

- 2.1 The ECB notes that the draft law would not only strengthen the involvement of the Portuguese Parliament in the new appointment procedure for the Governor and other members of the BdP's Management Board, but would also introduce a new set of incompatibility rules designed to prevent conflicts of interests in the exercise of the functions of the Governor and the other members of the BdP's Management Board. In this regard, the ECB recalls that Member States are free to set the conditions required for the appointment of the members of the decision-making bodies of their NCBs¹², provided that they do not conflict with the features of central bank independence flowing from the Treaties.
- 2.2 The ECB considers that the new appointment procedure for the Governor and other members of the BdP's Management Board does not conflict with the requirement of central bank independence as laid down in Article 130 of the Treaty and Article 7 of the Statute of the European System of Central Banks and of the European Central Bank. In this context, the ECB considers that the fifth criterion, as set out in point (e) of paragraph 1.3 above, preventing the appointment as Governor or members of the BdP's Management Board of persons who, at the time of appointment, occupy or exercise other positions or functions that may affect their independence or conflict with the interests of the BdP, is rather vague and would benefit from further clarification.
- 2.3 Similarly, the ECB notes that the criterion of 'aptitude', introduced by the draft law amongst the criteria to be taken into account for the appointment of the the BdP's Governor and of the other members of the BdP's Management Board, is also rather vague and therefore might be difficult to interpret and use in practice¹³.
- 2.4 The ECB notes that, should the provisions of the draft law become subject to further amendments in the course of the parliamentary process, and should these amendments substantially alter the draft law compared to the version on which the ECB was consulted, then the ECB would need to be re-consulted on these amendments¹⁴.

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

Done at Frankfurt am Main, 21 July 2020.

[signed]

The President of the ECB

Christine LAGARDE

¹¹ Available on the Council of Europe's website at www.coe.int.

¹² See Opinion CON/2009/13, paragraph 3.4; Opinion CON/2015/28, paragraph 2. All ECB opinions are published on the EUR-Lex website at <https://eur-lex.europa.eu/browse/institutions/bank.html>.

¹³ See Opinion CON/2019/19, paragraph 2.3.

¹⁴ See, for example, Opinion CON2006/32, paragraph 4.1; Opinion CON/2015/28, paragraph 3.4.