EUROPEAN CENTRAL BANK

EUROSYSTEM

EN

ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 23 March 2021

on the creation of a transparency framework for contracts and related documents involving the use of public funds

(CON/2021/13)

Introduction and legal basis

On 5 February 2021, the European Central Bank (ECB) received a request from the Portuguese Assembly of the Republic for an opinion on two draft laws creating a transparency framework for contracts and related documents involving the use of public funds (hereinafter the 'draft laws')[1].

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 Article 2(1) of Council Decision 98/415/EC[2], as the draft laws relate to the specific tasks conferred upon the ECB concerning the prudential supervision of credit institutions under Article 127(6) of the Treaty. 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 laws

1.1 According to the explanatory memoranda accompanying the draft laws, their main objective is to reinforce the transparency and scrutiny of operations which involve the use of public funds by allowing the Assembly of the Republic to declassify certain contracts originally classified as confidential concluded by the State or other public entities which involve the use of public funds in several sectors if they are subject to confidentiality safeguards. The purpose is to increase transparency and allow these documents to be publicly available given their impact on public finances.

1.2 Both draft laws apply to contracts and agreements concluded by the State, or by any entities included within the scope of the State Budget, which involve the use of public funds in specific economic sectors, including the banking and financial sector. One of the draft laws expressly mentions that all operations involving the use of public funds in the context of the application of resolution measures, nationalisation, liquidation or capitalisation are included within this scope of application.

1.3 According to the draft laws, the Assembly of the Republic will be authorised to declassify such contracts stating the reasons for the declassification and weighing the reasons that justify confidentiality against taxpayer's right of information.

---

1 Projecto de Lei n.º 606/XIV/2ª – Aprova o regime jurídico da desclassificação de contratos ou outros documentos que comprometem o Estado ou outras entidades integradas no perímetro orçamental em sectores fundamentais; Projecto de Lei n.º 634/XIV/2ª – Aprova um regime jurídico de transparência dos contratos, acordos e outros documentos relativos a operações que determinem a utilização ou disponibilização de fundos públicos relativamente a entidades pertencentes a sectores estratégicos.

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).

1.4 Under both draft laws not only the contracts themselves, but also all documents and information considered to be connected or related to such contracts, are subject to the declassification decision by the Assembly of the Republic. Furthermore, the disclosure might also include the names of entities or individuals who have originated losses at the entity that is the beneficiary of public funds.

1.5 Non-compliance with the obligation to disclose after a decision to declassify is adopted by the Assembly of the Republic shall be subject to criminal liability.

1.6 Both draft laws provide that they will prevail over any other legal framework providing for banking or commercial confidentiality safeguards.

1.7 Finally, both draft laws expressly provide that they are to be applied not only to new contracts concluded by the State, or by the other public entities included within their scope of application, but also to all pre-existing contracts which have involved the use of public funds. One of the draft laws establishes a limitation for contracts which have been concluded more than 14 years ago, which would remain out of the scope of application of that draft law.

2. Observations

2.1 National legislation should be compatible with the obligation to maintain professional secrecy in respect of confidential prudential supervisory information under Union law, in particular Article 53 of Directive 2013/36/EU of the European Parliament and of the Council[3]. Disclosure of such confidential information can only be permitted in the cases specified in Article 53(1) of Directive 2013/36/EU.

2.2 The ECB takes particular note that Banco de Portugal ('BdP'), as the national competent authority responsible for the prudential supervision of credit institutions, is not included among the public entities to which the draft laws apply. However, while contracts concluded by the BdP as such would not be subject to public disclosure, contracts concluded with credit institutions by other public authorities, such as the Portuguese Resolution Fund, are included within the scope of application of the draft laws, as well as any contracts concluded between credit institutions and other public entities involving the use of public funds. In addition, both draft laws provide that all documents and information considered to be connected or related to such contracts are also subject to public disclosure. This means that these other documents and information, even if they do not form part of the contract itself, can still be subject to declassification and public disclosure.

2.3 The ECB understands that, because the BdP would not be subject to the draft laws, such documents or information would not include prudential supervisory documents in the possession of the authorities responsible for the prudential supervision of credit institutions, including the BdP and the ECB, even if those documents were related to contracts within the scope of application of the draft laws. Any prudential supervisory documents and information would remain subject to confidentiality protections, as both the BdP and the ECB are – and will remain – outside the scope of the draft laws. Moreover, the documents or information to be disclosed under the draft laws due to their connection to the contracts involving the use of public funds, even if they are not formally prudential supervisory documents, could not include confidential supervisory information, since the public disclosure of such documents or information would clearly undermine the professional secrecy protected by Article 53

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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

of Directive 2013/36/EU. Therefore, the public disclosure of such documents or information would inevitably contravene Article 53 of Directive 2013/36/EU. Any confidential supervisory information contained in such documents would therefore have to be redacted.

2.4 Both draft laws exclude from their scope of application other special frameworks, which remain applicable. One of the draft laws also excludes matters subject to State or judicial secrecy, which are not subject to declassification under the draft laws. However, both draft laws explicitly state that they prevail over any other legal framework providing for banking or commercial confidentiality safeguards. In order to establish a framework which safeguards both confidential information and the legitimate interest of the public in accessing the information, as well as the primacy of Union law over national law, the ECB understands that it would not be possible to declassify confidential supervisory documents and information under the draft laws, as such an interpretation would not be compatible with the protection of confidential supervisory information under Directive 2013/36/EU.

2.5 Regarding the provisions for the disclosure of operations involving the use of public funds in the context of resolution, Directive 2014/59/EU of the European Parliament and of the Council[4] confers powers not only on resolution authorities but also on competent supervisory authorities. Notably, Directive 2014/59/EU contains the only legal basis for the competent supervisory authorities' powers in relation to recovery planning and early intervention measures[5], with respect to which competent supervisory authorities have a leading role. Both of these powers relate to prudential supervisory tasks, as recognised in Council Regulation (EU) No 1024/2013[6]. In addition, while not in the lead, competent supervisory authorities are consulted by resolution authorities or cooperate with them in several other processes. In this regard, the ECB would like to recall that Directive 2014/59/EU also establishes confidentiality obligations as a necessary counterpart reinforcing the professional secrecy obligations in Directive 2013/36/EU. With regard to all the processes where competent authorities intervene (whether led by the competent supervisory authorities or by the resolution authorities) competent supervisory authorities have various obligations to disclose confidential supervisory information to resolution authorities (and in some cases to some other authorities mentioned). On their part, resolution authorities have even broader duties to disclose confidential information to other authorities. In particular, the ECB notes that the scope of the confidentiality obligation of Article 84 of Directive 2014/59/EU applies to resolution authorities and other public institutions and private individuals, such as ministries, deposit guarantee funds or acquirers participating in competitive processes, some of which would potentially be compelled to disclose information under the draft laws. Since the competent supervisory authorities are an important source of information for resolution authorities, which only collect information directly from credit institutions to the extent that it is not yet available at the competent authorities, in various situations resolution authorities may be required to disclose onward to another authority confidential information collected by and received from the competent supervisory authority. From a prudential supervisory perspective, care must be taken to ensure that the public disclosure of such documents

4 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

5 See Articles 5 to 9 and 27 to 30 of Directive 2014/59/EU.

6 See Article 4(1)(i) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

or information, in potential contravention of Article 84 of Directive 2014/59/EU, does not also lead to the disclosure of confidential supervisory information in breach of the professional secrecy protected by Article 53 of Directive 2013/36/EU. Any confidential supervisory information contained in such documents would therefore have to be redacted.

2.6 According to the draft laws, the declassification decision by the Assembly of the Republic might also include the disclosure of the names of entities or individuals who have originated losses at an entity that is a beneficiary of public funds. One of the draft laws also adds that the identification of shareholders and members of the management body of entities who have originated those losses would also be subject to such disclosure. Such information may constitute confidential supervisory information which must remain subject to professional secrecy requirements in order to comply with the confidentiality rules established in Directive 2013/36/EU.

2.7 Finally, it is important to consider that any unintended disclosure of confidential supervisory information which might be facilitated under the draft laws could also have a negative impact on the possibility for prudential supervisory authorities to exchange information with other authorities, by limiting the amount of information that supervisory authorities can disclose to other entities. According to Articles 56, 57 and 59 of Directive 2013/36/EU, the competent supervisory authority can exchange information with other authorities, such as national market authorities, oversight bodies and the central government. In all of these cases, the exchange of information can only occur if the information disclosed is subject to secrecy requirements at least equivalent to those referred to in Article 53 of Directive 2013/36/EU. This means that if the information in question to be shared by the competent supervisory authority is considered to be connected or related to a contract that could be made public according to the draft laws, then the competent supervisory authority could no longer disclose such information to the entities referred to in Directive 2013/36/EU. Currently, in the absence of the draft laws, such information could be exchanged.

This opinion will be published on EUR-Lex.

Done at Frankfurt am Main, 23 March 2021.

The President of the ECB

Christine LAGARDE