Restructuring Financial Institutions in Angola

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The Angolan Government approved the "Lei de Bases das Instituições Financeiras" on June 17, 2015 (Law No. 12/2015 or the "Financial Institutions Framework Law") in response to the need to modernize Angola's financial regulatory system in line with the current organization and development requirements of the international markets, thus contributing to the development of the national economy, as well as to fully integrate Angola in the international economic system. The Financial Institutions Framework Law provides for a special regime for the restructuring of financial institutions.

Like several other African countries, Angola is presently facing financial difficulties as a result of the effects of the marked drop in crude oil prices since 2015, which resulted in a significant reduction in the demand for imports and foreign services, and, consequently, in a decrease in foreign investment and a deterioration of several other indicators, such as employment and external debt. The reduction of the volume and value of international transactions affected parts of the financial sectors, namely merchant and investment banks, some of which registered significant reductions in income and an increase in non-performing loans. Thus, this new regime, which specifically creates rules and instruments for the Central Bank to

intervene to control and redress the distress situation of a bank and prevent it from spreading to other entities, currently plays a key role for investors providing financing in Angola, including to Angolan banks.

Overview of the Financial Institutions Framework Law

Purposes and Guiding Principles

According to the Financial Institutions Framework Law, the entity mainly responsible for the regulatory oversight of the banking sector is the *Banco Nacional de Angola* or the "Central Bank of Angola." To a smaller extent, the Ministry of Finance and other entities, such as the Securities Commission ("Comissão do Mercado de Capitais"), may also be involved regarding specific activities and operations of Angolan banks. The Central Bank may impose restructuring/intervention measures upon financial institutions in order to:

1. ensure that essential financial services continue to be provided;
2. avoid systemic risks;
3. protect the interests of the Angolan State and of the taxpayers; and
4. maintain depositors' confidence.

The application of the restructuring measures is subject to the principles of appropriateness and proportionality, taking into consideration (a) the risk or the degree of non-compliance by the financial institutions with the legal or regulatory rules which govern their activity, as well as (b) the seriousness of the consequences of any such risks or non-compliance. The financial strength of the affected financial institution, the interests of the depositors and the stability of the financial system as a whole are factors taken into consideration to assess such seriousness of consequences.

On the other hand, the Central Bank must ensure that the institution's shareholders and creditors bear the risk for the losses of the institution and, in the case of the creditors, according to the respective ranking and equally with the other creditors of the same class.

Duty to Report

When a financial institution becomes unable to meet its financial obligations, or there is a serious risk that it will be unable to do so without engaging in extraordinary measures, the directors or the supervisory board must immediately report the situation to the Central Bank, acting in its capacity as the banking sector supervision agency. The notification should be submitted as soon as possible, though there is no fixed timeline set by the rules and there are no legal consequences to the directors or members of the supervisory board in the event a bank chooses to delay complying with the reporting requirement.

Remedial Measures

If a financial institution is found unable to meet its financial obligations, the Central Bank may recommend one or more of the following remedial measures:

— additional prudential requirements;

— stricter rules, proceedings, mechanisms and strategies concerning corporate governance, internal control and risks self-assessment;

— limitations on the riskiness of the financial institution's activities, products and systems;

— limitations on the amount that may be paid to executives under variable remuneration schemes, whenever the underlying criteria is not directly tied to shareholder value creation;

— restrict or suspend certain persons from management functions in the financial institution, as well as order the suspension or replacement of managers or directors;

— restrict or suspend any payment to the company's shareholders or with respect to transactions involving the company's shares;

— subject any operational activities of the financial institution to the prior approval of the banking sector supervision agency;

— a full or partial audit of the financial institution by an independent entity appointed by the banking sector supervision agency;

— restrictions to the granting of credit and to the application of capital in certain assets; and

— restrictions to the acceptance of customer deposits.

It should be noted that, apart from these measures, the Central Bank may, in addition, impose penalties on the financial institution.

Recovery Plan
In the event the financial institution's solvency is under serious risk, the Central Bank has sole authority to instruct such financial institution to submit a recovery plan (creditors of the financial institution have no role in the development/negotiation of the recovery plan). The Central Bank may establish conditions for the approval of the plan, such as a capital increase or a disposal of shares and/or other assets. If the affected financial institution does not accept the conditions set by the Central Bank, or if it fails to comply with the approved recovery plan, the Central Bank may order the total or partial amendment of the recovery plan, the suspension or replacement of management or directors, or other measures, such as the appointment of a provisional management team, which may also be applied jointly with any other remedial measure. In more serious cases, the banking license of the financial institution may be revoked.

Supervisory Committee
The Central Bank may also appoint a Supervisory Committee for the affected institution in the event such financial institution does not accept the remedial measures taken by the agency or fails to comply with the approved recovery plan. The Supervisory Committee is appointed for a maximum period of one year, which may be renewed for an additional year. The Supervisory Committee has the powers and duties provided under the law and by the By-Laws to the Audit Committee or to the Sole Auditor.

Provisional Directors

The Central Bank may appoint one or more provisional directors to serve on the board of any financial institution in any of the following circumstances:

— when the financial institution is at risk of ceasing payments to creditors;

— when the institution is in a financially imbalanced situation which, due to its size or duration, constitutes a serious danger to its solvency;

— when management fails to discharge its responsibilities in a sound and prudent manner, thus endangering creditor interests;

— when the internal accounting team or the internal control proceedings have serious deficiencies;

— when a serious or repeated breach of legal or regulatory rules which govern the activity of the financial institution is detected;

— when there are sufficient reasons to suspect that the shareholders and directors are unable to ensure a sound and prudent management or the financial recovery of the institution; or

— when there are sufficient reasons to suspect the existence of other irregularities endangering depositor and creditor interests.

The appointed provisional directors have, among others, the following powers and duties:

— to veto rights over any actions derived from the general shareholders meeting and the institution's other corporate bodies, such as the Board of Directors, the Executive Committee or the Supervisory Committee and any committees thereof;

— to overrule previous decisions taken by the management body;

— to require a detailed assessment of the assets and financial situation of the institution;

— to present to the banking sector supervisory agency proposals aiming at the financial recovery of the institution;

— to strive to correct previous irregularities committed by the affected institution's corporate bodies or by any of their members;

— to facilitate an agreement between the shareholders and the creditors regarding measures aimed at the financial recovery of the institution, such as debt restructuring; and

— to provide all the information and collaboration as may be required by the banking sector supervision agency regarding any issue related with its activity.

Once provisional directors are appointed to any affected financial institution, the banking sector supervision agency will suspend the institution's management body members, as well as the members of the institution's other corporate bodies with similar functions.

The provisional directors are appointed for a maximum period of one year, which may be extended once, for a new period of up to one year.

It should be noted that the appointment of provisional directors can be effected simultaneously with the application of other remedial measures.

Other Measures

Apart from the aforementioned remedial measures, the banking sector supervisory agency may also:

— order a temporary exemption regarding the compliance of rules concerning the ratios/standards of own funds or monetary policy;

— authorize a temporary waiver of the deadlines relating to the compliance of other ongoing obligations previously undertaken; or

— the temporary closure of branches or other facilities where public transactions are maintained.

Said measures may be applied for a period of up to one year, which can be extended once, for the same period of time.

Suspension of Enforcement Proceedings

Whilst any remedial measures are in place, all the enforcement proceedings, including tax enforcement proceedings, against the affected institution, are suspended; the suspension extends the statute of limitations on the enforcement proceedings for the same period of duration.

Appeals

In general, appeals may be filed by any party who has a direct and personal interest in the outcome of the proceeding, including any unsuccessful parties and the public prosecutor, and such parties are afforded two ordinary appeals (one to the Central Bank and another to the Supreme Court).

The decisions of the Central Bank, which are related to the above-mentioned remedial measures, are deemed to have been made in the public interest. Therefore, appeals against such decisions do not suspend the effectiveness thereof, unless there is evidence that such suspension would not entail a serious injury to the public interest.

Resolution Measures

When a financial institution fails to comply, or is at risk of not complying, with the requirements for the maintenance of its banking license, the Central Bank may apply the following resolution measures if it determines that such measures are essential to ensure the continuity of the provision of essential financial services, to avoid the systemic risk, to protect the interests of the State and the taxpayers or to maintain depositor confidence:

1. partial or total disposal of the activity to another already existing financial institution authorized by the Central Bank to develop the same activity; and

2. partial or total transfer of the activity to one or more financial institutions created for that purpose.

Resolution measures are applied in the case the banking sector supervisory agency considers that the financial institution will not be able, within an appropriate time, to execute the necessary actions in order to return to adequate conditions regarding the soundness and performance of its management practices and prudential standards.

An institution is at serious risk of not complying with the requirements for maintenance of its banking license when:

— the institution has registered losses capable of consuming its equity, or there are serious reasons to consider that the institution will incur such losses;

— the institution is in insolvency, or there are reasons to consider that it will become insolvent; or

— the institution is unable to comply with its ongoing obligations, or there are serious reasons to consider that it may become unable to comply with said obligations.

It should be noted that the application of resolution measures is independent of the remedial measures mentioned previously.

It is the responsibility of the executive branch, led by the President of the Angolan Republic, to establish the terms and conditions governing the application of resolution measures.

The Financial Institutions Framework Law sets specific rules for dealing with the insolvency of financial institutions and the general preventive mechanisms in case of insolvency. The Framework Law does not contemplate a fund to provide the financial support to any bank executing the resolution measures (elsewhere referred to as the Resolution Fund) and states that only the President of the Republic has the necessary authority to create a fund which intends to guarantee the deposits of ordinary depositors in the event the bank must execute resolution measures that require the transfer/disposal of its activity to another financial bank (elsewhere known as the Deposit Guarantee Fund). However, the Deposit Guarantee Fund is not regulated in detail under the Framework Law. For example, no reference is made to the guaranteed deposit amounts, which is left for the President of the Republic to regulate when he creates the fund. This unresolved issue can contribute to reduced depositor confidence levels and increase the possibility of a "deposit run" in case of warning signals.

Regarding the ranking of credits, the Framework Law makes no explicit reference to who must first bear the losses, although the law states that the institution's shareholders and creditors must absorb the losses of the institution and, in the case of the creditors, according to the respective ranking and equally with the other creditors of the same class. In practice, this often means that the civil and commercial law ranking of credits should apply and thus shareholders should absorb the losses first and subsequently creditors according to their legal priority ranking.

The Framework Law does not have any references to set-off or novation agreements, nor any provisions concerning the immediate consequences on the mandate of the members of a financial institution's management and supervision bodies when a resolution measure is applied.

Finally, the Framework Law does not state that creditors and shareholders cannot assume, as a consequence of the resolution measure, a larger loss than they would bear if the institution had been liquidated, i.e., the no creditor worse off principle. That said, as mentioned above, the Central Bank must ensure that creditors bear the risk for the losses of the institution according to the respective ranking and equally with the other creditors of the same class. As to the shareholders, it is not clear if their equity is transferred to institution serving as the transferee, and if all shareholders are affected by such decision.

There are certain details from the arrangement between transferor bank and the transferee bank that are not adequately addressed in the Financial Institutions Framework Law, such as the terms of the agreement, whether or not the transferor bank should be permitted to continue its activity and whether or not the banking sector supervision agency may/must revoke its banking license.

Liquidation of a Financial Institution

In case the adopted measures are not enough to enable the institution to recover, the Central Bank will revoke its banking license. The revocation of an institution's license often leads to its dissolution and liquidation. The office of the General Attorney of the Republic ("Ministério Público") will then ex-officio seek the judicial declaration of insolvency of the institution.

Directors considered to be responsible (under negligence or willful misconduct) for the insolvency of the institution are personally liable for the institution's debts.

There are no special legal provisions applicable to the insolvency of the financial institutions, which may lead to awkward results as the general insolvency regime applicable to commercial companies is not properly suited for financial institutions. In fact, the liquidation of commercial companies and financial institutions have different goals. The liquidation of financial institutions aims to protect the depositors, investors and certain creditors' interests, in order to ensure the normal working conditions of the monetary, financial and foreign exchange markets. On the other hand, the liquidation of commercial companies aims to satisfy the creditors for the all patrimony of the debtor, in accordance with the *par conditio creditorum* principle (i.e., the equal treatment of creditors).

Typical Liquidation Proceedings in Angola

The guiding principle of the commercial companies' insolvency in Angola is the liquidation of the company which limits the possibility of its recovery. In fact, there are only two cases in which the debtor is granted the possibility of continuing to exercise its business activity after the liquidation procedure: (i) in the case in which the debtor presented a restructuring agreement (a "Concordat") approved by 75% of its creditors and (ii) in the case where the debtor's creditors agree to the creation of a limited liability company whereby the creditors are the shareholders of this new company.

The insolvency may be due to a force majeure cause or to a wrongful or fraudulent conduct and in some cases may involve a penalty as a result.

It should be noted that this aspect of the Framework Law has been criticized, particularly with respect to the need of restructuring measures in order to allow the debtor's recovery.

Recent case studies of restructuring of Angolan Banks

Banco Espírito Santo Angola

In 2014, the Central Bank detected that Banco Espírito Santo Angola ("BESA") had registered an extremely high value of non-performing loans (approximately US$5 billion dollars). In response to this situation, the Angolan State issued a sovereign guarantee.

Subsequently, on August 4, 2014, the Central Bank decided to apply extraordinary reorganization measures to BESA. Provisional directors were appointed, and a temporary waiver of the prudential rules was adopted. Following the implementation of these measures, the Central Bank decided that there was no longer a need for the sovereign guarantee and withdrew it shortly thereafter. A detailed assessment of the institution's loan portfolio, as well as a list of the assets which should be disposed of in the event of liquidation or restructured, were prepared. Simultaneously, restrictions were imposed on the commercial activity of the bank.

Considering the existence of high losses in the credit portfolios and in relation to other assets, which were not provisioned, the Central Bank deemed it necessary to adjust the bank's equity and to reinforce existing provisions in order to ensure the bank's sustainability.

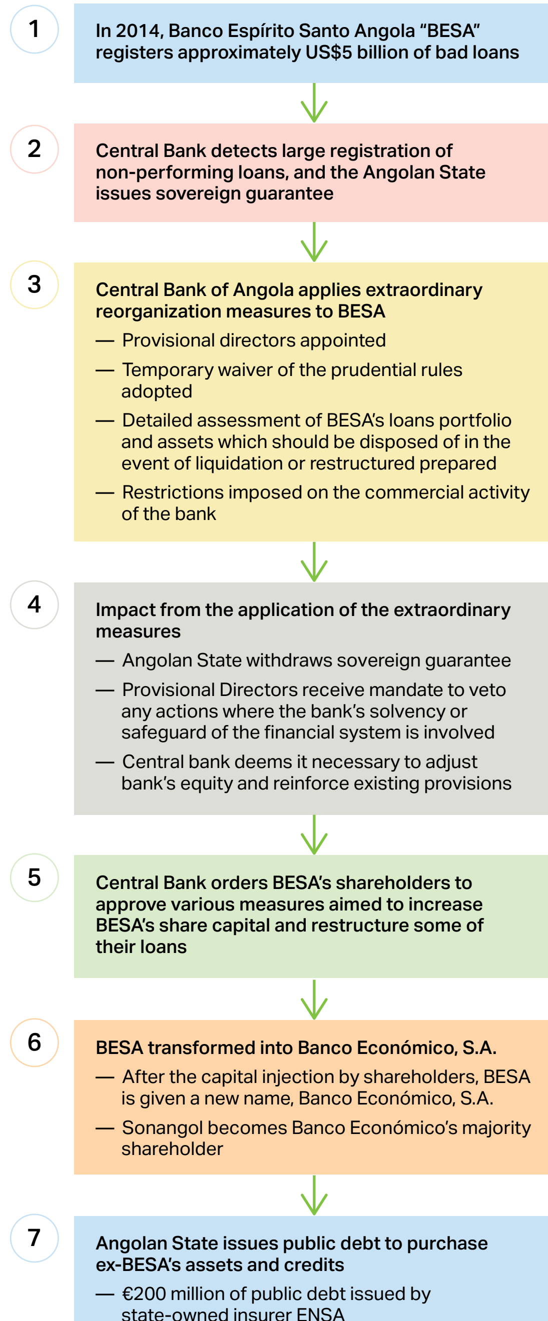
The provisional directors received a mandate to veto any actions from BESA's general shareholders meeting, its board of directors and any other of its corporate bodies, in cases where the institution's solvency or the safeguard of the financial system is involved. Despite this, the board of directors remained in office together with the provisional directors, maintaining their powers and responsibilities with respect to BESA's current management.

At this stage, the Angolan State did not intervene in BESA's share capital, neither were any public funds allocated to the rescue of the institution.

On October 20, 2014, the Central Bank, after determining that BESA's equity was negative, ordered the shareholders of the bank to approve the following measures:

— an increase of the share capital by conversion of part of the senior interbank loan, followed of a reduction of the shareholders' equity by absorption of all of the accumulated losses;

— an increase of the share capital, paid in cash, to rebuild the share capital and ensure the performance of the minimum prudential standards;



— a conversion of part of the senior interbank loan into share capital;

— a conversion of part of the senior interbank loan into a common loan;

— a conversion of part of the senior interbank loan into a subordinated loan; and

— the placement of additional subordinated instruments to the market.

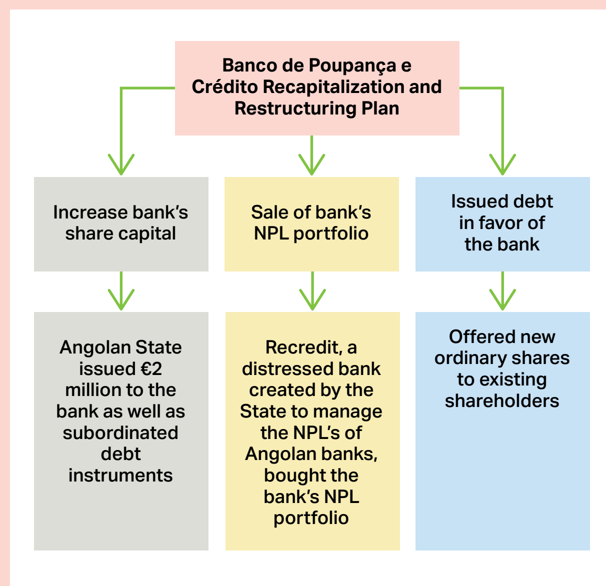
Subsequently, by decision of the new shareholders in accordance with the requirements imposed by the Central Bank, BESA was renamed Banco Económico, S.A. ("Banco Económico"). In June 2015, at the final stage of this procedure, and as a result of the measures that were adopted as per above, Sonangol (the State-owned oil company) became Banco Económico's majority shareholder.

Recently, the Angolan State issued public debt of approximately €200 million in order to ensure the purchase of ex-BESA's assets and credits by the state-owned insurer ENSA – Seguros de Angola. This represents a part of the public intervention through ENSA Group in the ex-BESA's restructuring procedure. It should be noted that in the Angolan State's communication of the mentioned measure it was highlighted that "considering the absence of a resolution fund [Angola already approved rules for those purposes but further regulation is still needed for their implementation] temporary resources of the National Treasury are necessary to enable the purchase of the referred assets by ENSA, through the issuance of Treasury Bonds in the amount corresponding to 10% of the assets and credit agreements to be purchased by ENSA." ENSA will deliver to the National Treasury the amounts resulting from assets sale and recuperation of credit agreements.

Banco de Poupança e Crédito

Banco de Poupança e Crédito, the biggest commercial Angolan bank, with a large non-performance loans (NPL) portfolio (approximately €2.640 million) is expected to implement a recapitalization and restructuring plan, which was approved by the Government in March 2017.

In this case, it was decided by the general shareholders meeting to increase the bank's share capital through an offering of new ordinary shares to existing shareholders and to proceed with the sale of the bank's NPL portfolio to "Recredit", a distressed bank created by the State with the purpose of managing the "toxic credits" (NPL) of the Angolan banks. The Angolan State issued debt (in multiple tranches) of approximately €1.200 million in favor of Recredit in order to purchase the Banco de Poupança e Crédito's NPLs. Currently, this bank is owned by the Finance Ministry of Angola. Subordinated debt instruments were also issued.



Conclusion

Following Angola's recent economic slowdown, it has become evident that a sound restructuring regime for financial institutions is important to maintain foreign investors' confidence in Angola. Instead of ad hoc State intervention of the past, the remedial and resolution measures highlighted in this article are now being used to effect restructurings for Angolan financial institutions. That said, certain practical obstacles remain, such as the regulations regarding the Resolution Fund and the Deposit Guarantee Fund, as well as the provision of a clear framework of who should bear the losses resulting from these restructuring measures. ■

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