EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 22 May 2006

at the request of the Central Bank of Malta
concerning a draft law amending the Central Bank of Malta Act

(CON/2006/23)

Introduction and legal basis

On 31 March 2006, the European Central Bank (ECB) received a request from the Central Bank of Malta for an opinion on a bill amending the Central Bank of Malta Act (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and the first, second, third, fourth and fifth indents of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions[1], as the draft law relates to currency matters, means of payment, national central banks (NCBs), the collection, compilation and distribution of statistics and payment and settlement systems. 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.

The ECB welcomes the amendments contained in the draft law intended to integrate the Central Bank of Malta ('CBM') into the Eurosystem. They also address the issues raised in the ECB's 2004 Convergence Report[2], as well as some additional issues relevant to the introduction of the euro in Malta. The amendments relate mainly to the CBM's tasks, including monetary policy, foreign reserves, euro banknotes and coins and payment systems. They also cover the CBM's relations with the Maltese Government and the appointment of auditors for the CBM. In addition, these amendments provide transitional provisions to regulate the exchange of Maltese lira banknotes and coins after the euro adoption date.

1. Comments on Part I 'Preliminary'

1.1 The bill defines 'coins denominated in euro'. It is understood that the purpose of this definition is to clarify that any reference to euro coins also includes the coins of the subdivisions of the euro, i.e. the euro cent coins. The ECB proposes deleting this definition, given that any reference to the euro

1 OJ L 189, 3.7.1998, p. 42.

2 Available on www.ecb.int.

should always be construed as a reference to a currency, of which the currency unit is one euro and which is subdivided into 100 cent[3].

1.2 The ECB would also like to draw attention to the fact that in the definition of the term 'Treaty', the correct date should read '25 March 1957'.

2. Comments on Part II 'Establishment and Conduct of Affairs of Bank'

2.1 The ECB welcomes the comprehensive Article 3 to be inserted in the Central Bank of Malta Act as it will be amended (hereinafter the 'amended CBM Act'), establishing that the CBM will be an integral part of the European System of Central Banks as established under the Treaty. This Article also refers to the CBM's rights and obligations due to such status, and imposes the obligation to comply with the objectives conferred on it by the Statute of the European System of Central Banks and of the European Central Bank.

2.2 Although this introductory Article asserts the compatibility of the CBM's functions with those prescribed to it by the Statute and the Treaty, and that any interpretation of the following provisions of the amended CBM Act should be construed within an ESCB context, the ECB nevertheless suggests that some provisions of the amended CBM Act should make more explicit references to the Statute and the Treaty. To this end, Article 5 of the amended CBM Act should be clearer in establishing that the CBM will execute any of its tasks in accordance with the Statute and the Treaty rather than providing for action 'within the framework of the ESCB'. Hence, the strict approach adopted in Articles 3 and 4 should also be used in Article 5.

2.3 Article 5(2) of the amended CBM Act prohibits the CBM, or any of its officials or members of its Board of Directors when exercising any function, duty or power under the same Act, from seeking or taking instructions from the Government or any other body. For the sake of clarity, however, this Article should mirror in the amended CBM Act Article 108 of the Treaty, including the prohibition on the Government from seeking to influence the CBM, its Board of Directors or any of its officials.

2.4 Article 17(1)(g) of the amended CBM Act provides that the CBM safeguards financial stability or in other exceptional circumstances may grant a loan or advance to any credit institution incorporated in Malta against such forms of security as the Board may consider appropriate. The ECB understands that the purpose of this provision is to provide for the possibility of emergency liquidity assistance. While similar provisions can be found in several NCBs' statutes, Article 17(1)(g) should also provide that such loans or advances are provided without prejudice to the requirements derived from the CBM's participation in the ESCB. In any event, compliance with the prohibition on monetary financing in Article 101 of the Treaty must be ensured.

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3 Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (OJ L 139, 11.5.1998, p. 1). Regulation as amended by Regulation (EC) No 2596/2000 (OJ L 300, 29.11.2000, p. 2).

2.5 Article 17(3) of the amended CBM Act should also refer to the wider general term 'financial instruments' rather than 'securities', given the risk usually associated with investing solely in the latter type of instrument.

2.6 Once Malta introduces the euro and the CBM effectively becomes part of the Eurosystem, monetary policy will no longer be subject to national scrutiny. Article 15 of the Statute provides that the ECB's President, on behalf of the ESCB, will report to the European Parliament, the Council, the Commission and the European Council. In addition, the CBM's Governor may still ask to be heard, or be requested to provide information or answer any questions related to the implementation of the Eurosystem's monetary policy and decisions before the Maltese House of Representatives, provided that the CBM's independence and the Eurosystem's communication rules are respected. In view of this, the ECB recommends inserting in Article 18(4) of the amended CBM Act the necessary safeguards.

3. Comments on Part III 'Financial Provisions'

3.1. The ECB welcomes the fact that Article 19 of the amended CBM Act establishes a minimum level for the CBM's legal reserves since this reinforces the principle of financial independence. Nevertheless, the CBM might consider including in the amended CBM Act the procedures describing the recapitalisation of the reserves if they have been exhausted by a financial loss.

3.2. Article 20 of the amended CBM Act does not adequately reflect the proceedings under Article 27.1 of the Statute. The independent external auditors appointed to verify the CBM's accounts, whilst appointed by the CBM's Board of Directors, also have to be recommended by the ECB's Governing Council and approved by the EU Council under Article 27.1 of the Statute. In the current wording of Article 20, these requirements seem to be covered by the concluding phrase 'in accordance with the Statute'. However, Article 20 also provides for the approval of the external auditors by the Maltese Minister for Finance, which is incompatible with Article 27.1 of the Statute since the latter provision establishes that they have to be approved by the EU Council. For this reason, Article 20 of the amended CBM Act should provide that the CBM's accounts are to be audited by independent external auditors recommended by the ECB's Governing Council and approved by the Council, and authorise the Board to appoint such auditors.

4. Comments on Part IV 'Collection of Information'

4.1. The ECB recommends slightly amending Article 24(1) of the amended CBM Act to clarify that the CBM's power to issue directives is subject to their conformity with Article 5.1 of Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank[4]. This reference would recognise the primacy of

4 OJ L 318, 27.11.1998, p. 8.

secondary Community legislation over national law in the field of statistics and is in the interests of legal certainty.

4.2. Along the same lines, in Article 24(2) concerning the CBM's right to verify the accuracy and quality of statistical information submitted under Article 24(1) of the amended CBM Act, a reference to Article 6 of Regulation (EC) No 2533/98 would be beneficial.

5. Comments on Part V 'Relations with Government'

5.1. National legislation mirroring the directly applicable provisions of Article 101 may not narrow the scope of application of the monetary financing prohibition. Therefore, Article 27(1) of the amended CBM Act needs to be extended to be consistent with the Treaty and to fully mirror the content of Article 101 of the Treaty to avoid any confusion as to the entities covered by the monetary financing prohibition, or alternatively could contain a reference to Article 101 of the Treaty, or be deleted.

6. Comments on Part VI 'Relations with Credit and Financial Institutions'

6.1. The ECB proposes including in Article 32 of the amended CBM Act a clear reference to Article 14.4 of the Statute. In this way, any cooperation with credit and financial institutions for the furtherance of policies in the national interest would be emphasised, given this clearly falls outside the functions specified in the Statute. It will be carried out under the CBM's responsibility and liability, and permitted unless decided otherwise by the ECB's Governing Council. Alternatively, the ECB proposes deleting Article 32 of the amended CBM Act.

6.2. It appears that Article 33 of the amended CBM Act refers to minimum reserve requirements, although using slightly different terminology ('reserve deposits'). The proposed amendments to Article 33 do not bring Maltese reserve requirements fully into line with the regime adopted under Article 19 of the Statute and the relevant Community law, namely (i) Council Regulation (EC) No 2531/98 of 23 November 1998 concerning the application of minimum reserve requirements by the European Central Bank[5]; and (ii) Regulation ECB/2003/9 of 12 September 2003 on the application of minimum reserves[6]. This legislation, which is directly applicable to and binding on credit institutions in the euro area, is intended to ensure that the terms and conditions for the Eurosystem's minimum reserve system are uniform throughout the euro area. Article 33 of the amended CBM Act should therefore use wording closer to the wording for the minimum reserve system established under Article 19 of the Statute.

5 OJ L 318, 27.11.1998, p. 1.

6 OJ L 250, 2.10.2003, p. 10.

7. Comments on Part VII 'Payment Systems'

7.1. Part VII of the amended CBM Act is entitled 'Payment Systems'. Article 35(7) makes equivalent the definition of 'payment system' and 'system'. It is not entirely clear whether or not the amended CBM Act also covers securities clearing and settlement systems. In fact, as noted in previous ECB opinions[7], payment systems and securities clearing and settlement systems are interlinked, particularly in view of the use of the 'delivery versus payment' mechanism, which ensures that delivery of securities occurs only if payment occurs. There is therefore a strong argument in favour of the model used in some Member States of integrating the oversight of payment and securities settlement systems, and for the central bank to perform this function. Settlement of both legs of such transactions should be subject to similar safeguards in order to avoid asymmetries with systemic implications. Therefore, the amended CBM Act should clarify that it expressly also covers securities clearing and settlement systems. In this context, the ECB recommends aligning the terms and concepts used in national law as closely as possible to the corresponding concepts of Community legislation, notably the definition and concept of 'participant' in systems in the Settlement Finality Directive[8].

7.2. Payment systems oversight is a core Eurosystem competence and the common oversight policy defined by the Governing Council is the basis for the central banks' oversight activity. The ECB is of the opinion that it would be useful if the amended CBM Act reflected the role of the Eurosystem more clearly by, for example, stating that the CBM would continue to conduct oversight within the Eurosystem's framework on the basis of requirements and standards endorsed by the ECB's Governing Council.

7.3. The current draft law gives the CBM very general regulatory rights over payments. Article 35(5) of the amended CBM Act mentions several different aspects of payments, e.g. participation in payment systems, cross-border credit transfers and electronic payment services. Community legislation[9] already covers these areas to some extent. To avoid any confusion regarding the CBM's regulatory powers within an ESCB context and for the purposes of clarity and legal certainty, the ECB strongly recommends inserting in Article 35(5) a reference to the relevant Community legislation as well as to the national regulatory regime implementing it.

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7 See for instance paragraphs 10 to 14 of ECB Opinion CON/2003/14 of 7 August 2003 at the request of the Banca d'Italia on a draft regulation on payment systems, payment infrastructures and payment instruments; paragraphs 13 to 16 of ECB Opinion CON/2005/24 of 15 July 2005 at the request of the Ministry of Finance of the Czech Republic on a draft law on the integration of financial market supervisors.

8 Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45).

9 For instance, Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers (OJ L 43, 14.2.1997, p. 25); Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ L 126, 26.5.2000, p. 1), Directive as last amended by Commission Directive 2006/29/EC (OJ L 70, 9.3.2006); Directive 2000/46/EC of the European Parliament and of the Council of 18 October 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions (OJ L 275, 27.10.2000, p. 39), Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ L 125, 5.5.2001, p. 15); Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.6.2002, p. 43); Regulation (EC) No 2560/2001 of the European Parliament and of the Council of 19 December 2000 on cross-border payments in euro (OJ L 344, 28.12.2001, p. 13).

8. Comments on Part IX 'Relations with International and Other Organisations'

8.1. Although it is understood that Article 40 of the amended CBM Act also has to provide for the CBM's participation in international organisations involving tasks outside the ESCB, such Article should refer to Article 6 of the Statute in so far as international cooperation involving tasks entrusted to the ESCB is concerned. With regards to the latter type of cooperation, the ECB decides on the representation of the ESCB. Hence, Article 40 of the amended CBM Act should reflect this through a reference to the Statute.

9. Comments on Part X 'Currency'

9.1. In addition to the reference to the Statute, Article 52 of the amended CBM Act should refer to Decision ECB/2003/4 of 20 March 2003 on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes[10], in particular to Articles 2 and 3 thereof.

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

Done at Frankfurt am Main, 22 May 2006.

[signed]

The President of the ECB

Jean-Claude TRICHET

10 OJ L 78, 25.3.2003, p. 16.