



OPINION OF THE EUROPEAN CENTRAL BANK
of 15 December 2006
at the request of the Central Bank of Malta
concerning amendments to the Central Bank of Malta Act
(CON/2006/58)

Introduction and legal basis

On 21 November 2006 the European Central Bank (ECB) received a request from the Central Bank of Malta for an opinion on draft amendments to the Central Bank of Malta Act (hereinafter the 'Act'), to be inserted in an existing bill amending the Act¹ (hereinafter the 'bill').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and the third and fourth 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 provisions², as the amendments relate to the Central Bank of Malta (CBM) and the collection, compilation and distribution of statistics. 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 amendments

The main purpose of the draft amendments is to bring the Act into line with the Treaty and the Statute of the European System of Central Banks and of the European Central Bank, in particular with regard to the legal integration of the CBM into the Eurosystem. The draft amendments concern, inter alia, provisions relating to the CBM's performance of its tasks, the management of foreign reserves, the collection of statistical information and administrative penalties.

2. General observations

2.1 The ECB welcomes the draft amendments as they seek to address most of the issues raised in the ECB's recently adopted December 2006 Convergence Report and aim to recognise the ECB's powers in relation to foreign reserve management, financial instruments and statistical obligations.

¹ The ECB has already commented on the original amendments contained in the bill; see ECB Opinion CON/2006/23 of 22 May 2006 at the request of the Central Bank of Malta concerning a draft law amending the Central Bank of Malta Act.

² OJ L 189, 3.7.1998, p. 42.

- 2.2 Article 2(2) of the bill provides that the Minister for Finance establishes, by notice in the Government Gazette, a date for the entry into force of the bill or different dates for different provisions. The Community has exclusive competence in matters relating to economic and monetary union, and national legislation should not in any way prejudice the EU Council's decision regarding the abrogation of the relevant Member State's derogation and the date on which this abrogation takes effect. Thus, for reasons of clarity and legal certainty, it would be advisable for the bill clearly to specify that the entry into force of certain provisions is related to the abolition of Malta's derogation.
- 2.3 Concerning the references in the Act to the Statute, where applicable it would be advisable to complement them with references to the Treaty.
- 2.4 For ease of reference, when article numbers are quoted below these do not refer to the bill, but rather to the numbering in the Act if it is amended in accordance with the bill (hereinafter referred to as the 'amended Act').

3. Specific observations

Part II 'Establishment and Conduct of Affairs of Bank'

- 3.1 The ECB observes that Article 4 of the amended Act should be adjusted to provide that the CBM has to support the general economic policies 'in' rather than 'of' the Community, in order to comply with Article 105(1) of the Treaty.
- 3.2 Article 7(1) of the amended Act assigns to the Board of Directors responsibility 'for the policy and general administration of the affairs and business of the Bank, except in relation to the functions imposed and the exercise of powers conferred on the Bank by or under the Treaty or the Statute'. However, Article 8(6) of the amended Act states that 'the Governor shall provide the Board with information about the exercise of powers conferred, upon the Governor or the Bank, by or under the Treaty or the Statute'. The relationship between these two provisions is unclear, in particular as regards the functions and powers of the Board of Directors, as well as the scope and implications of the Governor's reporting duty concerning ESCB-related tasks, which tasks are under the Governor's exclusive responsibility. Therefore, the ECB recommends further clarifying the respective powers of the Board of Directors and the Governor concerning ESCB-related tasks.
- 3.3 Article 11(1) of the amended Act provides for the disqualification, resignation and filling of vacancies of the Board of Directors; the latter includes the Governor and the Deputy Governor, pursuant to the definition of 'director' in Article 2 of the amended Act. The ECB observes that this extends the grounds on which the Governor can be dismissed from office from those provided for in Article 14(2) of the Statute (namely if the Governor no longer fulfils the conditions required for the performance of their duties or if they have been guilty of serious misconduct). For this reason, Article 11(1) of the amended Act should be aligned with the wording of Article 14(2) of the

Statute, as far as the Governor, Deputy Governor and other members of the Board of Directors involved in the performance of ESCB-related tasks are concerned.

- 3.4 The ECB welcomes Article 17(2) of the amended Act, which expressly provides that the CBM will act in accordance with the ECB's guidelines and instructions when managing and maintaining foreign reserve assets.

Part III 'Financial Provisions'

- 3.5 Article 20 of the amended Act concerning audit to a large extent reproduces the wording of Article 27 of the Statute. Given the primacy of Community law and for the sake of legal clarity, the ECB recommends replacing this with an explicit reference to Article 27 of the Statute.
- 3.6 Moreover, regarding Article 21 of the amended Act on the CBM's financial reporting, it is recommended to include an explicit reference to Article 26(4) of the Statute in order to recognise the Eurosystem's regime for the financial reporting of NCBs' operations.

Part V 'Relations with Government'

- 3.7 Article 27(1) of the amended Act states that the CBM is not permitted to grant 'overdrafts or any other type of credit facility to Community institutions or bodies or the government or to any public undertaking, public authority or government-owned corporation of any Member State' or to 'directly purchase their debt instruments'. However, Article 27(1) should fully mirror Article 101 of the Treaty, to avoid any confusion as to which entities are covered by the monetary financing prohibition. It is therefore recommended that Article 27(1) of the amended Act also includes 'bodies governed by public law', as provided for in Article 101 of the Treaty.
- 3.8 Article 29 of the amended Act provides that the CBM shall keep the Minister for Finance informed of the CBM's policy. In its Convergence Reports, the ECB has noted that an express statutory obligation for an NCB to consult third parties ex ante provides the latter with a formal mechanism to influence the final decision and is therefore incompatible with the Treaty and the Statute. However, dialogue between NCBs and third parties, even when based on statutory obligations to provide information and exchange views, is compatible with central bank independence provided that: (a) this does not result in interference with the independence of the members of the NCB's decision-making bodies; (b) the special status of Governors in their capacity as members of the ECB's General Council is fully respected; and (c) confidentiality requirements resulting from the Statute are observed. The ECB recommends amending Article 29 of the amended Act in the light of the abovementioned requirements.

Part VII 'Payment Systems'

- 3.9 Concerning Article 34(5) of the amended Act, on payment systems and the CBM's related power to issue directives, it is recommended explicitly to state that this CBM power is exercised in accordance with the Treaty, Article 22 of the Statute and any regulations issued under Article 22 of the Statute.

Part X 'Currency'

3.10 Although Articles 42 and 43 of the amended Act make it clear that, once the euro is introduced in Malta, euro banknotes and coins will be issued in compliance with the ESCB legal regime, the ECB also suggests inserting an explicit reference to Article 106 of the Treaty and Article 16 of the Statute.

3.11 Article 51 of the amended Act provides that the CBM 'may, acting in accordance with the provisions of Decision ECB/2003/4 of 20 March 2003 on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes, authorise the reproduction of euro banknotes or euro coins'. The ECB recommends that any reference to euro coins in this Article be deleted, as Decision ECB/2003/4³ only applies to euro banknotes. Furthermore, the ECB notes that rather than allowing an NCB to authorise a reproduction of a euro banknote, Article 2(4) of Decision ECB/2003/4 provides that an NCB may, in certain cases, provide confirmation that a reproduction of a euro banknote – even if it does not comply with the criteria under which certain reproductions are automatically deemed to be lawful, pursuant to Article 2(3) of Decision ECB/2003/4 – is deemed to be lawful in so far as it cannot be mistaken by the general public for a genuine euro banknote. Therefore it is suggested that Article 51 of the amended Act is adjusted accordingly.

Part XI 'General'

3.12 Concerning the publication of reference rates, covered in Article 61 of the amended Act, it is suggested to replace the phrase 'key interest rates of the Eurosystem' with 'key interest rates of the ECB'.

³ OJ L 78, 25.3.2003, p. 16.

3.13 Finally, the ECB suggests deleting Schedule One to the Act, given that the contents of this Schedule are all already contained in Annex II to Council Regulation (EC) 2182/2004 of 6 December 2004 concerning medals and tokens similar to euro coins⁴, which is directly applicable. Consequently, Article 55 of the amended Act needs to be amended: it should contain a general reference to Regulation (EC) 2182/2004, and in accordance with Article 6 of Regulation (EC) 2182/2004 it should only establish the sanctions applicable to infringements of the Regulation. Article 60 of the amended Act also needs to be adjusted accordingly.

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

Done at Frankfurt am Main, 15 December 2006.

[signed]

The President of the ECB

Jean-Claude TRICHET

⁴ OJ L 373, 21.12.2004, p. 1.