



**OPINION OF THE EUROPEAN CENTRAL BANK**  
**of 18 May 2011**  
**on various amendments to the Central Bank of Malta Act**  
**(CON/2011/43)**

**Introduction and legal basis**

On 18 April 2011, the European Central Bank (ECB) received a request from the Central Bank of Malta (hereinafter ‘CBM’) for an opinion on draft amendments to the Central Bank of Malta Act<sup>1</sup> (hereinafter the ‘draft amendments’).

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, fourth and fifth indents of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the ECB by national authorities regarding draft legislative provisions<sup>2</sup>, as the draft amendments concern the Central Bank of Malta, statistics and payment systems. 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 amendments**

- 1.1 According to the consultation request received from the CBM, the Central Bank of Malta Act (hereinafter the ‘CBM Act’) is being amended primarily to better regulate the collection of information, to allocate a general enabling power to the CBM to regulate payments and payment services and to appoint the CBM as the competent authority in terms of Regulation (EC) No 924/2009 of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) No 2560/2001<sup>3</sup>. Other amendments relate to the authenticity and fitness checking of euro banknotes and coins.
- 1.2 In that context, the draft amendments also include three enabling provisions empowering the CBM to issue, amend or revoke directives (a) in the context of payment services (article 34A(1)); (b) on limitations on cash payments (article 43A); and (c) on the authenticity and fitness checking of currency notes and coins (article 50A).

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<sup>1</sup> Cap. 2014 of the Laws of Malta.

<sup>2</sup> OJ L 189, 3.7.1998, p. 42.

<sup>3</sup> OJ L 266, 9.10.2009, p. 11.

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- 1.3 The draft amendments also propose deleting article 24 of the CBM Act on the collection of statistical information and propose a new article 23 on the collection of statistical and other information which will reorganise, update and merge articles 23 and 24.
- 1.4 Finally, the draft amendments also fine-tune definitions, include references to the Treaty of Lisbon, reorganise provisions and delete unnecessary articles.

### **2. General observations**

- 2.1 The ECB welcomes the proposed insertion of a new article 18 into the CBM Act on the transfer of data or information. The ECB encourages measures promoting the exchange and transfer of information, including information subject to confidentiality and professional secrecy requirements, between the key public authorities in the financial markets, as well as the sharing of such information with decision-making bodies. In this regard, the ECB welcomes the aim of ensuring the transferability without any restriction or limitation of data or information within the CBM and/or between the CBM and other persons or entities.
- 2.2 Without prejudice to the specific observations in Section 3 below, the ECB however questions the need to include both a general provision on the CBM's powers to issue, amend and revoke directives and separate individual enabling provisions conferring such powers on the CBM with regard to specific areas.

### **3. Statistics**

- 3.1 The ECB welcomes the proposed new article 23 on the collection of statistical and other information since it also clarifies further the duties of the CBM in the field of statistics and encompasses the collection of statistical and other information in order to assist the ECB in the performance of the ESCB's tasks.
- 3.2 The ECB also notes the proposed deletion of the reference to 'reporting agent' and the detailed and exhaustive definition thereof in article 23(3) and the subsequent amendment of article 23(1), now referring to the duty of 'any person or entity which is licensed, authorised or registered by a competent authority, any branch of a foreign legal person, or any other person or entity, as may be determined by the CBM' to provide the CBM with any statistical and other information that may be necessary for it to carry out its tasks. The ECB acknowledges the need for this draft amendment, since article 23(1) will be worded in more general terms, providing a broader definition and a wider scope of applicability.

#### 4. Monetary policy

Article 18 on monetary policy is deleted. Amongst others, it conferred sole authority and responsibility within the CBM on the Governor to take decisions and perform any function or duty or to exercise any power relating to monetary policy and referred to the establishment of the Monetary Policy Advisory Committee. The ECB understands that the CBM has retained its powers to organise itself internally and that the deletion of article 18 does not in any way interfere with the possibility for the Governor to receive advice on matters relating to monetary policy at his request.

#### 5. Payment systems

5.1 The ECB notes the draft amendments in article 34(2) of the CBM Act, notably subsections (a) and (b) which refer to the right of the CBM to terminate, close, suspend or revoke a payment system. While welcoming the draft amendments, the ECB considers that they should clarify further that these two proposed amendments apply exclusively to domestic payment systems and therefore recommends modifying them accordingly.

5.2 The ECB notes the draft amendment of article 34(7) and specifically the definition of ‘payment system’ or ‘system’ which is a direct rendering of the definition provided by 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<sup>4</sup>. However, the definition of ‘participant’ in the first indent is inconsistent with the analogous definition in Article 2(f) of Directive 98/26/EC (as amended by Directive 2009/44/EC<sup>5</sup>), according to which a participant means an institution, a central counterparty, a settlement agent, a clearing house or a system operator, and an indirect participant may only be considered a participant if it is warranted on the grounds of systemic risk and on condition that the indirect participant is known to the system. The ECB takes the view that this could create some ambiguity, since both definitions should reflect Directive 98/26/EC if they are intended to transpose it. The wording of the first indent of article 34(7) of the draft amendments needs to be revised accordingly, in order to foster maximum transparency and legal certainty. Moreover, the ECB also recommends, in order to ensure consistency and greater clarity, including references to the applicable Union legal acts.

#### 6. Payment services

In the context of payment services, the ECB welcomes the proposed insertion of a new article 34A on payment services. By virtue of the draft article 34A(2), the CBM is appointed as competent authority for the purposes of Article 9 of Regulation (EC) No 924/2009 and will be responsible for monitoring compliance and taking all necessary measures to ensure compliance. Article 34A(1) empowers the CBM

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<sup>4</sup> OJ L 166, 11.6.1998, p. 45.

<sup>5</sup> OJ L 146, 10.6.2009, p. 37.

to issue, amend or revoke directives on the provision of payment services and to impose limitations on payments through the said directives. The ECB welcomes this new enabling provision, but also takes the view that this indent should clearly specify that such initiatives should be taken in line with the applicable Union legislation.

## 7. Currency matters

- 7.1 As regards the draft insertion of a new article 43A on limitations on cash payments, while noting that the draft amendment does not include any reference to justifications based on public reasons, the ECB refers to recital 19 of Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro<sup>6</sup>. The ECB is of the view that the wording of the new article 43A leaves some room for interpretation and restrictions on cash payments that would not necessarily be justifiable on the basis of public reasons. It therefore suggests further reconsidering this article's wording to ensure that any limitation on cash payments is justified by public reasons and complies with the general principle of proportionality with regard to the objectives pursued.
- 7.2 In the context of currency matters, reference is also made to the draft amendments concerning articles 50 and 50A. These amendments are linked to the implementation of Decision ECB/2010/14 of 16 September 2010 on the authenticity and fitness checking and recirculation of euro banknotes<sup>7</sup> and of Regulation (EU) No 1210/2010 of the European Parliament and of the Council of 15 December 2010 concerning authentication of euro coins and handling of euro coins unfit for circulation<sup>8</sup> and are welcomed by the ECB.
- 7.3 Nevertheless the ECB has concerns about the definition of 'professional cash handler' in Section 50(6) of the draft amendments, which is derived from the definition in Article 6(1) of Council Regulation (EC) No 1338/2001 of 28 June 2001 laying down measures necessary for the protection of the euro against counterfeiting<sup>9</sup>, but restricts the scope of the definition. On the contrary, by virtue of Section 5 of CBM Directive No 10, which implements Decision ECB/2010/14<sup>10</sup>, the said Directive 'applies to cash handlers as referred to in Article 6 of Council Regulation (EC) No 1338/2001 of 28 June 2001 laying down measures necessary for the protection of the euro against counterfeiting'. Consequently the definitions appear to be contradictory, which can give rise to ambiguity. The ECB questions the need, if at all, to distinguish between 'professional cash handler' in one legal act and 'cash handler' in another. The ECB is moreover of the view that the proposed definition of 'professional cash handler' in the CBM Act, which departs

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<sup>6</sup> OJ L 139, 11.5.1998, p. 1.

<sup>7</sup> OJ L 267, 9.10.2010, p. 1.

<sup>8</sup> OJ L 339, 22.12.2010, p. 1.

<sup>9</sup> OJ L 181, 4.7.2001, p. 6. Article 6 has been amended by Regulation (EC) No 44/2009 (OJ L 17, 22.1.2009, p. 1).

<sup>10</sup> CBM Directive No 10 was the subject of ECB Opinion CON/2010/90. All ECB opinions are available on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

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from the definition of ‘cash handler’ in CBM Directive No 10, should be revisited, particularly since articles 50 and 50A of the CBM Act and CBM Directive No 10 all relate to the same matter.

### **8. Administrative penalties**

The ECB notes the amendments to article 56 and proposed transfer to the CBM of the power to issue regulations providing for administrative penalties, currently vested in the Minister.

The ECB also notes the proposed deletion of the last proviso of the former version of article 56(1) according to which the Minister (who, following the entry into force of the amendments, would be replaced by the CBM) may not issue regulations providing for penalties or sanctions where regulations providing for similar penalties or sanctions have been adopted by the ECB under the Treaties or the Statute. In this regard, the ECB takes the view that this proviso should be reinserted into article 56, thereby clearly and unequivocally recognising the ECB’s power to impose sanctions.

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

Done at Frankfurt am Main, 18 May 2011.

[signed]

*The President of the ECB*

Jean-Claude TRICHET