



OPINION OF THE EUROPEAN CENTRAL BANK

of 10 July 2014

on the approval of payment systems

(CON/2014/53)

Introduction and legal basis

On 5 June 2014, the European Central Bank (ECB) received a request from the Central Bank of Malta (CBM) for an opinion on draft Directive No 13 on the approval of payment systems (hereinafter the 'draft CBM Directive').

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 and fifth indents of Article 2(1) of Council Decision 98/415/EC¹, as the draft CBM Directive concerns the CBM 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.

1. Purpose of the draft CBM Directive

- 1.1 Following legislation enacted in 2013² amending the Central Bank of Malta Act³ (hereinafter the 'CBM Act'), the CBM has the power to issue directives regulating the approval of payment systems⁴, as well as to order the closure, suspension or revocation of approval of non-compliant payment systems⁵.
- 1.2 The draft CBM Directive sets out both the parameters and the applicable terms and conditions for approving payment systems before they commence operations. It also sets out the procedure to close or suspend the operation of a non-compliant payment system pursuant to Article 34(2) of the CBM Act.
- 1.3 The draft CBM Directive will constitute a legally binding instrument and will be published shortly after the ECB issues its opinion. It is envisaged that the draft CBM Directive will enter into force upon publication.

¹ 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).

² Act XIII of 2013.

³ Chapter 204 of the Laws of Malta.

⁴ Article 34(5) of the CBM Act.

⁵ Article 34(2)(a) and (b) of the CBM Act.

2. General observations

- 2.1 The draft CBM Directive has already been subject to a public consultation procedure with prospective operators who may be interested in setting up a payment system in Malta.
- 2.2 The ECB has prepared [and adopted] a regulation on oversight requirements for systemically important payment systems (hereinafter the ‘SIPS Regulation’)⁶. The SIPS Regulation implements the CPSS-IOSCO principles in the euro area in a legally binding manner. It defines the criteria for a payment system to qualify as being systemically important and lays down requirements aimed at ensuring the efficient management of legal, credit, liquidity, operational, general business, custody, investment and other risks. It also sets requirements for sound governance arrangements, objective and open access and the efficiency and effectiveness of systemically important payment systems (SIPS).
- 2.3 The SIPS Regulation will be directly applicable in Malta and the rest of the euro area and enjoy supremacy over national law in the field of oversight of SIPS. The draft CBM Directive will require further review by the consulting authority in order to ensure full consistency with the SIPS Regulation in so far as the relevant definitions and the provisions on sanctions are concerned.

3. Temporal scope of the draft CBM Directive and definitions

- 3.1 There is some ambiguity concerning the temporal scope of the draft CBM Directive. Article 1(2) and Article 3(1) make it clear that payment systems are to be approved by the CBM prior to becoming operational. In addition, Article 3(3) states that the draft CBM Directive will apply to the approval of a ‘new payment system’, thus implying that pre-existing payment systems do not fall within its scope. Article 3(4) requires additional safeguards to be put in place when the CBM determines that a ‘proposed payment system’ can be classified as a SIPS. However, the definition of a SIPS in Article 2 refers to ‘... the only payment system in Malta, or ... the principal payment system in terms of aggregate value of payments’, or one which has been so designated under paragraph 5 and Annex I of CBM Directive No 2. It seems that these criteria can only be satisfied by payment systems already in operation prior to the entry into force of the draft CBM Directive.
- 3.2 If the intention is that the draft CBM Directive should only apply to the approval of a ‘new payment system’, the ECB recommends amending the definition of a SIPS and inserting a grandfather clause which makes it clear that payment systems that were in operation prior to the entry into force of the

⁶ Regulation (EU) No YYY/2014 of [20 June 2014] on oversight requirements for systemically important payment systems (ECB/2014/28). Not yet published in the Official Journal.

draft CBM Directive⁷ will continue to be subject to the conditions and legal provisions applicable at the time⁸.

- 3.3 In addition, the definition of a SIPS in the draft CBM Directive is narrower than that of Article 1(3) of the SIPS Regulation, which lists specific criteria for a payment system to be identified as a SIPS. In order to ensure consistency with the SIPS Regulation and the CPSS-IOSCO principles, and indeed a harmonised concept of what a SIPS is throughout the euro area, the ECB therefore recommends that the draft CBM Directive is amended accordingly.
- 3.4 The ECB notes that the draft CBM Directive does not define the term ‘systemic risk’. Since this is a key concept for the proper functioning of the draft CBM Directive, the ECB recommends that a definition of this term is inserted and that it fully reflects the definition in the aforementioned CPSS-IOSCO principles.

4. The CBM’s tasks under the draft CBM Directive

- 4.1 Under Article 34 of the CBM Act, the CBM is the competent authority to oversee and regulate the operation of, and participation in, payment systems. No person is authorised to set up and operate a payment system unless the payment system and its rules are approved by the CBM in accordance with the application procedure provided for in the draft CBM Directive.
- 4.2 In view of the resources required for the performance of these tasks, the ECB has consistently expressed its concern that, when allocating additional tasks to national central banks, it must be ensured that they have sufficient human and financial resources, both in terms of quantity and quality, for all of their tasks, and in particular that their capacity to fulfil their European System of Central Banks or Eurosystem-related tasks is not affected.

5. Sanctions

Under paragraph 7(3) of the draft CBM Directive, the CBM will have the right to impose sanctions in accordance with Article 56 of the CBM Act and the provisions of CBM Directive No 12 on Administrative Measures and Penalties for Infringements under the Central Bank of Malta Act⁹. The draft CBM Directive lays down a set of measures that the CBM may take in certain circumstances, including when a payment system or a SIPS ‘is failing or has failed to comply with any condition and/or requirement set out by the Bank’¹⁰. As the SIPS Regulation lays down specific corrective measures and sanctions, the CBM will have to apply the draft CBM Directive to SIPS in accordance with the

⁷ Namely TARGET2-Malta and MaltaClear, as designated in Annex I of CBM Directive No 2 on Payment and Securities Settlement Systems.

⁸ Namely the aforementioned CBM Directive No 2.

⁹ The ECB expressed its views on CBM Directive No 12 in Opinion CON/2011/105. All ECB opinions are published on the ECB’s website at www.ecb.europa.eu.

¹⁰ Article 6(1) and the following paragraphs of the draft CBM Directive.

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requirements of the SIPS Regulation, to ensure the availability of effective, proportionate and dissuasive sanctions, and to revoke any provisions of the draft CBM Directive which are not in conformity with the SIPS Regulation.

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

Done at Frankfurt am Main, 10 July 2014.

[signed]

The President of the ECB

Mario DRAGHI