



OPINION OF THE EUROPEAN CENTRAL BANK

of 7 December 2009

on the general terms and conditions, and the operating and technical requirements, of clearing service providers for the payment system in Hungary

(CON/2009/98)

Introduction and legal basis

On 16 November 2009, the European Central Bank (ECB) received a request from the Magyar Nemzeti Bank (MNB) for an opinion on two draft regulations: the first on the requirements for the general terms and conditions and regulations of clearing services providers for the payment system (hereinafter the ‘draft operational regulation’), and a second on the material, technical, security and business continuity requirements of clearing service providers for the payment system (hereinafter the ‘draft technical regulation’) (the draft operational regulation and the draft technical regulation are hereinafter referred to jointly as ‘the draft regulations’).

The ECB’s competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and the fifth indent 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 provisions¹, as the draft regulations concern 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 law

- 1.1 According to Article 4(5) of Law LVIII of 2001 on the Magyar Nemzeti Bank² (hereinafter the ‘the MNB Law’), one of the basic tasks of the central bank is to develop and regulate payment and clearing systems, and to oversee and monitor these systems. Pursuant to Article 19/C of Law CXII of 1996 on credit and financial institutions³, in the process of applying for authorisation to carry out clearing operations, applicants *inter alia* have to submit the general terms and conditions, as well as the internal regulations of the clearing house concerning operational, technical and security rules

¹ OJ L 189, 3.7.1998, p. 42.

² Published in *Magyar Közlöny* 2001/76 (VII. 5.), as amended.

³ Published in *Magyar Közlöny* 1996/109 (XII. 12.), as amended.

and requirements, and business continuity plans. Pursuant to Article 27(1) of the MNB Law, such general terms and conditions and their amendments are subject to prior authorisation by the MNB.

- 1.2 The smooth functioning of Hungarian payment and settlement systems is a crucial aspect of a sound currency and essential to the conduct of monetary policy at national level. These systems also have a significant bearing on the functioning of financial markets. Moreover, safe and efficient payment systems are critical to the maintenance of banking and financial stability. Therefore the purpose of regulating uniform preconditions is to reinforce a consistent legal framework for entities providing clearing services in Hungary.
- 1.3 The draft operational regulation lays down various general rules, such as requirements for the contents of the general terms and conditions and the regulations for clearing houses. The draft technical regulation governs certain risk management measures, such as the material, technical and general security conditions for operating the payment system. Furthermore, it also sets the rules for business continuity planning and regular testing, as well as recovery and resumption objectives.

2. General observations

- 2.1 The ECB understands that the draft regulations lay down preconditions for clearing service providers in Hungary, ensuring that they are subject to the same uniform minimum standards, thereby taking into account internationally accepted oversight standards; notably the Core Principles for Systemically Important Payment Systems⁴ (Core Principles), and the Business Continuity Oversight Expectations for Systemically Important Payment Systems⁵ (BCOE Principles), while also making it possible for entities providing clearing services to include additional provisions in the general terms and conditions and to introduce further or stricter measures to ensure the safety of their operations.
- 2.2 The ECB welcomes such preconditions as they are essential to the MNB's oversight function. The draft regulations enhance the soundness of clearing and settlement systems as the uniform standards clearly define the responsibilities and legal basis of organisations providing clearing services in Hungary, thereby greatly improving the transparency and accountability of such organisations and their operations. The ECB considers that the draft regulations follow the legal rules and standards established by the Eurosystem for payment and settlement systems, also taking account of recent developments in the financial markets.

⁴ Available on the Bank for International Settlement's website at www.bis.org.

⁵ Available on the ECB's website at www.ecb.europa.eu.

3. Specific observations

- 3.1 The ECB suggests that Article 11 of the draft operational regulation consider the whole life cycle of a payment and also cover the pre-settlement phase of the payment process. Besides the time of settlement finality, it would in particular be advisable to require the system to clearly define the time of acceptance and irrevocability of payment orders in the system's rules, in particular in the case of interconnections between systems, as it is one of the key requirements of Core Principle IV.
- 3.2 The tools and measures used for liquidity provision are key components of a system's overall risk management framework; the ECB therefore welcomes the requirements in Article 12 of the draft operational regulation in this respect. The ECB recommends that the terms and conditions of granting credit specify in particular whether and how intraday credit provided for eligible participants may be converted to overnight credit.
- 3.3 Article 15 of the draft operational regulation addresses rules for liability sharing, as well as for mitigation and compensation for damages. The MNB could consider extending this by requiring the clearing house to define evidence, i.e. that electronic or written records of the payment messages will be accepted as means of evidence, because these conditions usually form an integral part of the liability regime.
- 3.4 The ESCB has developed a glossary of main business continuity terms for market infrastructures with the aim of improving the consistency of the terminology used in business continuity planning and procedures. In order to take full advantage of these harmonisation efforts, it is recommended that the definitions listed in Article 2 of the draft technical regulation take these commonly agreed definitions into account.
- 3.5 The ECB suggests clarifying 'the great majority of the clearing days' in Article 13(7) of the draft technical regulation, because it could give rise to different interpretations. The ECB also considers it preferable to make an express reference in Article 13(12) to the different risk profiles, i.e. geographical location, infrastructure, personnel, of the secondary site as compared to the primary site.
- 3.6 As part of the overall business continuity framework, the BCOE Principles impose on the system operator the key responsibility for identifying critical participants and for assessing the potential risks they present to the smooth functioning of the system. Moreover, critical participants must implement some BCOE Principles, under the control of the operator. The ECB is of the view that the draft technical regulation should also clarify the tasks and responsibilities of organisations providing clearing services in this respect.

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

Done at Frankfurt am Main, 7 December 2009.

[signed]

The President of the ECB

Jean-Claude TRICHET