



EUROPEAN CENTRAL BANK
EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 5 August 2011

on amendments to the legal framework for payment systems and clearing and settlement systems

(CON/2011/62)

Introduction and legal basis

On 27 June 2011, the European Central Bank (ECB) received a request from the Polish Ministry of Finance for an opinion on a draft law amending the Law on settlement finality in payment systems and securities settlement systems and the rules for the supervision of such systems, the Law on financial collateral and the Law on bankruptcy and rehabilitation (hereinafter the ‘draft law’).

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, fifth and sixth 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 provisions¹, as the draft law relates to Narodowy Bank Polski (NBP), to payment and settlement systems and to rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. 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 The draft law amends the Law of 24 August 2001 on settlement finality in payment systems and securities settlement systems and the rules for the supervision of such systems² (hereinafter the ‘Law on settlement finality’), the Law of 2 April 2004 on financial collateral³ and the Law of 28 February 2003 on bankruptcy and rehabilitation⁴ (hereinafter the ‘Law on bankruptcy and rehabilitation’). The main purpose of the draft law is the transposition of Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims⁵, *inter alia*, by

¹ OJ L 189, 3.7.1998, p. 42.

² Dz. U. (*Dziennik Ustaw*) of 2010 No 112, Item 743.

³ Dz. U. of 2004 No 91, Item 871.

⁴ Dz. U. of 2009 No 175, Item 1361.

⁵ OJ L 146, 10.6.2009, p. 37.

introducing into Polish law the concept of interoperable systems⁶ and extending the scope of assets eligible as financial collateral to include credit claims⁷. Furthermore, the draft law recasts certain provisions previously transposing Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems⁸ in order to take into account, *inter alia*, the possibility of opening foreign insolvency proceedings against entities established in Poland⁹. Finally, several clarifying and streamlining amendments are introduced.

- 1.2 The draft law introduces two specific amendments related to NBP. First, an express legal basis is provided for NBP to request from entities suspected of operating payment systems on a *de facto* basis, i.e. without the required authorisation, information required for an application for such authorisation¹⁰. Second, the NBP's obligation to notify systemically important systems to the Commission is extended in line with Directive 2009/44/EC¹¹ to include also information on operators of such systems¹².

2. Transposition of Directives 2009/44/EC and 98/26/EC

In line with Article 1(2) of Council Decision 98/415/EC this opinion does not address provisions of the draft law exclusively transposing Directive 2009/44/EC into Polish law. Nevertheless, the ECB welcomes the intention expressed in the draft law of additionally reviewing the provisions transposing Directive 98/26/EC into Polish law. In view of a substantial rise in the number of cross-border insolvency cases, including foreign insolvency proceedings against entities established in Poland, the possibility of such proceedings against participants or system operators needs to be taken into account to ensure the completeness of protection given by the Polish legal framework with regard to payment systems and securities settlement systems in line with Directive 98/26/EC.

3. Specific observations

- 3.1 The ECB welcomes the clarification in the draft law of NBP's right to request information from the entities suspected of operating a payment system without the authorisation required by the Law on settlement finality. Providing an express legal basis for such right – although it is already acknowledged in practice – will enhance legal certainty and contribute to improving the efficiency of central bank oversight of payment systems.

⁶ See Articles 1(1)(b), 1(3), 1(5)-(8) of the draft law.

⁷ See Articles 2(1), 2(3)-(9) of the draft law.

⁸ OJ L 166, 11.6.1998, p. 45.

⁹ See Articles 1(1)(e) and 1(4) of the draft law.

¹⁰ See Article 1(9) of the draft law, introducing a new paragraph (6) to Article 18 of the Law on settlement finality; see also Articles 17 and 17a of the Law on settlement finality which define the scope of information to be provided in an application for an authorisation to operate a payment system.

¹¹ See Article 1(11) of Directive 2009/44/EC amending Article 10(1) of Directive 98/26/EC.

¹² See Article 1(10) of the draft law, amending Article 23 of the Law on settlement finality.

- 3.2 As mentioned in previous ECB opinions¹³, payment systems and securities settlement systems are interlinked, particularly in view of the use of the ‘delivery versus payment’ mechanism, under which settlements of securities and transfers of funds take place simultaneously. Such interlinking is further enhanced by the acknowledgment of interoperable systems under Directive 2009/44/EC and the draft law. There is therefore a strong argument in favour of the model used in some Member States of integrating the oversight of payment systems with the oversight of clearing and settlement systems, with national central banks performing the oversight function. In this regard, the ECB reiterates the observations made in previous ECB opinions¹⁴ regarding the need to ensure NBP’s responsibility for the oversight function in relation to clearing and settlement. An oversight function is inherent in the central banks’ task of promoting a sound market infrastructure, in order to safeguard the effectiveness of monetary policy and the overall stability of the financial system. Hence, the ECB reiterates its general recommendation that NBP is expressly made responsible for the oversight of all clearing and settlement systems operating in Poland, including the systems’ rules, and given access to all information and data relevant to the performance of such oversight tasks. Such change would then require extending the proposed powers of NBP to require information from *de facto* payment systems to cover also clearing and settlement systems.
- 3.3 In relation to the proposed amendment to Article 23 of the Law on settlement finality¹⁵, the ECB understands that the Polish legislator would shortly initiate another amendment in order to bring it in line with Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority)¹⁶, providing for the European Securities and Markets Authority to replace the Commission as the recipient of notifications of payment systems and securities settlement systems¹⁷.
- 3.4. Article 67 of the Law on bankruptcy and rehabilitation¹⁸ excludes assets provided as collateral in connection with participation in a system from the bankruptcy estate of the bankrupt system participant or any other entity which provided the collateral. In addition, the proposed second sentence introduced by the draft law in Article 77(4) of the Law on bankruptcy and rehabilitation¹⁹, which refers to Article 67, exempts those assets from the general rule according to which legal acts

13 See ECB Opinions CON/2006/20, CON/2007/7 and CON/2007/20. All ECB opinions are published on the ECB’s website at www.ecb.europa.eu.

14 See ECB Opinions CON/2006/15 and CON/2006/53.

15 As amended by Article 1(10) of the draft law.

16 OJ L 331, 15.12.2010, p. 120.

17 See Article 10(1) of Directive 98/26/EC, as amended by Article 1(2) of Directive 2010/78/EU. According to Article 13(1) of Directive 2010/78/EU, this provision should be transposed by the Member States by 31 December 2011.

18 As amended by Article 3(4) of the draft law.

19 As introduced by Article 3(5) of the draft law.

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of the bankrupt entity concerning the assets included in the bankruptcy estate are null and void. Doubts may arise as to how these two provisions interact, in particular as regards the moment when such assets may be provided as collateral by the bankrupt participant or used for that purpose by the system operator. Articles 67 and 77 would benefit from some more clarity in this respect.

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

Done at Frankfurt am Main, 5 August 2011.

[signed]

The President of the ECB

Jean-Claude TRICHET