



OPINION OF THE EUROPEAN CENTRAL BANK

of 22 May 2012

on the introduction of legal framework for the operation of central counterparties

(CON/2012/41)

Introduction and legal basis

On 10 April 2012, the European Central Bank (ECB) received a request from the Marshal of the Polish Parliament (Sejm) for an opinion on a draft law amending the Law on trading in financial instruments and certain other laws (hereinafter the 'draft law'). A modified version of the draft law¹, as developed in the parliamentary legislative procedure, was made public following the original consultation request. This opinion takes these modifications into account.

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 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 provisions², as the draft law relates 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 29 July 2005 on trading in financial instruments³ *inter alia* with a view to adapting its provisions to the requirements to be introduced by the proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories⁴. The aim of this adaptation is to enable the clearing of transactions in financial instruments through a central counterparty (CCP)⁵.

¹ The draft law amending the Law on trading in financial instruments and the Law on public offering, conditions governing the introduction of financial instruments to organised trading, and public companies (version of 24 April 2012, parliamentary print no. 337).

² OJ L 189, 3.7.1998, p. 42.

³ Consolidated text published in *Dziennik Ustaw* (Dz. U) of 2010 No 211, item 1384.

⁴ COM(2010) 484 final.

⁵ See explanatory memorandum to the draft law, p. 1.

- 1.2 To this end, the draft law introduces clearing novation, a mechanism where the CCP assumes the rights and obligations of the original parties to the transaction. This is done, *inter alia*, by: (a) modifying the legal definitions of clearing and settlement and the parties involved in the clearing process⁶; (b) extending the protection against insolvency and similar proceedings of funds available in a counterparty's account and necessary for settling the transaction, to cover those over-the-counter (OTC) transactions with mandatory central clearing⁷; (c) introducing an obligation for counterparties to clear their transactions through clearing members together with corresponding rules on granting and revoking authorisation to clear such transactions⁸; (d) defining contractual rules for a CCP to assume the rights and obligations of the original parties to a transaction, with a separate set of steps for those transactions executed by clearing members directly and for those executed by counterparties required to execute their transactions through clearing members⁹.
- 1.3 In addition, the draft law provides that a trade repository may be established and operated by the National Depository for Securities (KDPW)¹⁰.

2. Specific observations

- 2.1 Article 45e(1) of the Law on trading in financial instruments as amended by the draft law specifies, *inter alia*, that where a counterparty has designated funds on its account to settle OTC transactions subject to mandatory central clearing, availability of such funds for settlement shall be protected against effects of insolvency of the counterparty providing such funds. The ECB understands that this provision extends the protection of parties to transactions in financial instruments against the effects of a counterparty's insolvency in specific cases not covered by the relevant provisions of Polish law¹¹, which transpose the Settlement Finality Directive¹² and the Financial Collateral Directive¹³. The ECB further understands that transactions not subject to mandatory central clearing, including repo transactions, would not be covered by this extended protection. In this context, the ECB notes that repo transactions are covered within the scope of 'title transfer financial collateral arrangements' protected under the Financial Collateral Directive¹⁴ and would therefore welcome extending the protection offered by amended Article 45e(1) of the Law on trading in financial instruments to cover repo transactions not subject to mandatory central clearing. Indeed, broad protection of repo transactions is encouraged as they constitute an effective tool for

⁶ See Article 45b of the Law on trading in financial instruments as amended by the draft law.

⁷ See Article 45e of the Law on trading in financial instruments as amended by the draft law.

⁸ See new Article 45g of the Law on trading in financial instruments inserted by the draft law.

⁹ See new Article 45h of the Law on trading in financial instruments inserted by the draft law.

¹⁰ See new Article 48(5a) of the Law on trading in financial instruments inserted by the draft law.

¹¹ See Article 22(1)(4), 66-67, 77(4), 80, 84(3), 85, 85a, 127(4), 135-137, 333(2) and 498(4) of Law on bankruptcy and rehabilitation of 28 February 2003 (consolidated text published in Dz.U. of 21 October 2009 No 175, item 1361).

¹² 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 (OJ L 166, 11.6.1998, p. 45).

¹³ Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.6.2002, p. 43).

¹⁴ See Article 4(1) together with Article 2(1) points (b) and (l) of the Financial Collateral Directive.

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mitigating counterparty credit risk, while stable repo markets are an important source of funding for the financial sector.

- 2.2 In the context of amended Article 45e of the Law on trading in financial instruments, the ECB notes that this provision currently includes paragraph 3, which extends its application to securities registration systems operated by Narodowy Bank Polski. This provision is, however, missing from Article 45e as amended by the draft law. The text currently included in Article 45e(3) should therefore be reintroduced.
- 2.3 The ECB also notes that to allow for KDPW's participation in T2S, the Law on trading in financial instruments should be further adapted in the future so that it cannot be interpreted as preventing KDPW from outsourcing certain functions related to securities settlement to the Eurosystem acting as operator of the T2S platform. Particular attention in this regard needs to be paid to Article 48(7) and Article 150(1)(13a) of the Law on trading in financial instruments, which may be interpreted as allowing KDPW to transfer information related to securities settlement solely to its subsidiaries to which it has delegated operation of the central securities depository¹⁵. The ECB recommends adequately amending or supplementing the above provisions to allow KDPW to outsource certain securities settlement functions to a third-party service provider, and to transfer relevant information to them. In this respect, the attention of the Polish authorities is also drawn to Article 28 of the proposal for a Regulation of the European Parliament and of the Council on improving securities settlement in the European Union and on central securities depositories (CSDs) and amending Directive 98/26/EC¹⁶.

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

Done at Frankfurt am Main, 22 May 2012.

[signed]

The President of the ECB

Mario DRAGHI

¹⁵ See also paragraph 4 of Opinion CON/2008/20, paragraph 2.2 of Opinion CON/2009/55 and paragraph 2.2 of Opinion CON/2011/63. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

¹⁶ COM(2012) 73 final.