EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 5 April 2013

on financial collateral arrangements

(CON/2013/24)

Introduction and legal basis

On 13 February 2013, the European Central Bank (ECB) received a request from the Ministry of Finance, the Economy and Investment of Malta for an opinion on draft regulations amending the Financial Collateral Arrangements Regulations of 2004[1] (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 second and sixth 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[2], as the draft law concerns means of payment and 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 ECB, the Governing Council has adopted this opinion.

1. Purpose of the draft law

1.1 The Financial Collateral Arrangements Regulations (hereinafter the 'Regulations'), issued pursuant to Article 7 of the Set-off and Netting on Insolvency Act[3], transposed Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements[4] as well as Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009[5] insofar as it amends Directive 2002/47/EC as regards linked systems and credit claims.

1.2 The draft law amends the definitions of 'credit claims', 'instrument', 'non-natural person' and 'recognised jurisdiction' in Section 2(1) of the Regulations. It also inserts a new provision in Section 2(2), providing for an interpretation of 'control' where financial collateral is held by a third party. In addition, the draft law extends the list in the Regulations of who may constitute a

1 Legal Notice 177 of 2004.
2 OJ L 189, 3.7.1998, p. 42.
3 Chapter 459 of the Laws of Malta.
4 OJ L 168, 27.6.2002, p. 43.
5 OJ L 146, 10.6.2009, p. 37.

collateral taker and a collateral provider to include 'a corporation or other legal person established by statute', 'non-natural persons' and 'securitisation vehicles'.

1.3 Furthermore, the draft law amends the existing notification requirements where credit claims are provided as collateral as well as the provisions on the enforcement of financial collateral arrangements. Finally, it clarifies that in certain situations the Regulations shall prevail over the Companies Act (Investment Companies with Variable Share Capital) Regulations of 2006[6].

2. General observations

Subject to the specific observations on the points mentioned below, the ECB welcomes the amendments to the Regulations and notes that they generally constitute implementation or clarification measures.

3. Credit claims

3.1 The ECB notes the proposed extension of the definition of 'credit claim' in Section 2(1) of the draft law, to include 'pecuniary claims due to a non-natural person, provided that the debtor of the claims granted as collateral is also a non-natural person'. This amendment goes beyond the definition of credit claim set out in Directive 2002/47/EC, i.e. 'pecuniary claims arising out of an agreement whereby a credit institution, as defined in Article 4(1) of Directive 2006/48/EC[7], including the institutions listed in Article 2 of that Directive, grants credit in the form of a loan'.

3.2 The ECB has no objection to this extension of the definition of credit claims, currently restricted in the Regulations to those claims where the creditor of a claim is a bank or credit institution. The ECB understands that the proposed extension of the definition of credit claims is intended to include within the ambit of the Regulations further categories of credit claims which may be provided as collateral. The ECB notes that credit claims due to or owed by individuals are not included in the proposed amendment. In this context, the ECB notes that the definition of 'non-natural person' in the draft law as 'any legal person, unincorporated firm or body of persons or partnership not being an individual' was included as a consequential amendment of the proposed amendment to the definition of 'credit claims'.

4. Definition of instrument

The ECB understands that the current definition of 'instrument' in the Regulations could generate doubts about whether Article 2 of the Investment Services Act[8] includes financial instruments for which the Regulations are intended to cater. In this regard, it notes the revision of the definition of 'instrument' in

6 Also known as the SICAV Regulations. Legal Notice 241 of 2006.

7 OJ L 177, 30.6.2006, p. 1.

8 Chapter 370 of the Laws of Malta.

Section 2(1) of the draft law and welcomes the closer alignment achieved with the wording in Directive 2002/47/EC.

5. Recognised jurisdiction

The ECB notes that the amended definition of 'recognised jurisdiction' in Section 2(1) of the draft law is a definition already used in Maltese law and welcomes the further clarification of this concept through its proposed inclusion.

6. Control

6.1 The new provision in Section 2(2) of the draft law provides that a collateral taker shall also be deemed to have control over financial collateral when 'this is held by a third party, non-natural person, who acts on the instructions of the collateral taker or of a person acting on his behalf, whether throughout the duration of the financial collateral arrangement or upon the occurrence of an event of default under the financial collateral arrangement'. The ECB understands that this provision is being introduced to provide clarity in cases where financial collateral is held by a custodian on behalf of the collateral taker.

6.2 The ECB acknowledges that the concept of control set forth in Directive 2002/47/EC seeks to maintain a balance between market efficiency and transactional security, but notes that any clarification of the term 'control' must be aligned with Directive 2002/47/EC. The ECB understands that the new provision in Section 2(2) of the draft law is added for reasons of legal certainty, to further clarify the validity and enforceability of financial collateral arrangements concluded in the circumstances referred to.

7. Collateral taker and collateral provider

As regards the proposed amendments to Section 4(1) of the Regulations on the list of collateral takers and collateral providers, specifically paragraphs (a), (k), (m) and (n), the ECB has no objection to the inclusion of 'a corporation or other legal person established by statute' in paragraph (a), the inclusion of 'securitisation vehicles' in paragraph (k), and that of 'non-natural persons' in paragraphs (m) and (n).

8. Enforcement of financial collateral arrangements

The ECB notes the inclusion of the new paragraph (c) in Section 6 of the draft law, which refers to the enforcement of financial collateral arrangements and provides that 'in relation to instruments consisting of securities of a SICAV, the financial collateral may also be realised in the manner and in accordance with the value as contemplated in Regulation 14(6)(iii) of the Companies Act (Investment Companies with Variable Share Capital) Regulations'. The ECB notes that the Companies Act (Investment

Companies with Variable Share Capital) Regulations already provide for the scenario where the collateral taker may realise any financial collateral provided in relation to instruments consisting of the securities of a SICAV. In this context, the process of realisation of financial collateral is clarified by including a reference to the relevant provision in these Regulations.

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

Done at Frankfurt am Main, 5 April 2013.

[signed]

The President of the ECB

Mario DRAGHI