



OPINION OF THE EUROPEAN CENTRAL BANK
of 20 September 2017
on interbank clearing and settlements
(CON/2017/37)

Introduction and legal basis

On 26 July 2017 the European Central Bank (ECB) received a request from the President of Narodowy Bank Polski (NBP) for an opinion on a draft regulation of the President of NBP on the manner of performing interbank clearing and interbank settlements (hereinafter the 'draft regulation').

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 regulation relates to NBP 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 regulation

- 1.1. Pursuant to Article 68(1) of the Polish Banking Act of 29 August 1997², the President of NBP is authorised to determine, by means of a regulation (*zarządzenie*), the method of performing interbank clearing and interbank settlements, taking into account the need to ensure the efficient and secure conduct of financial clearing and the functioning of payment systems. Against this backdrop, the draft regulation establishes general rules for performing interbank clearing and interbank settlements in euro and zlotys.
- 1.2. The draft regulation defines interbank clearing as activities performed for the purpose of (a) transferring payment orders between banks related to payments between (i) banks, (ii) a bank customer and another bank, (iii) a bank and a holder of an account with another bank, and (iv) a bank customer and a holder of an account with another bank, or (b) determining mutual liabilities and claims between banks, resulting from the transfer of one or more of such payment orders.
- 1.3. The draft regulation specifies that in order to perform interbank clearing, a bank may direct a payment order either to (i) a Polish or foreign payment system, (ii) a bank operating its account, (iii) a bank operating an account for the recipient of a payment order by means of direct exchange of payment orders and resulting mutual liabilities and claims, or (iv) a foreign credit institution or a foreign bank. With respect to the clearing performed by another bank or clearing performed by a

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 The Polish Banking Act of 29 August 1997, consolidated text published in *Dziennik Ustaw* (Dz. U.) of 2016, item 1988, as amended.

- direct exchange of payment orders between the banks, the draft regulation prescribes the minimum content of the agreement that should be concluded between the banks.
- 1.4. The draft regulation defines interbank settlement as a transfer of funds between banks' accounts or between banks' accounts and own accounts of banks, which maintain banks' accounts, in order to meet a liability that has arisen as a result of interbank clearing. The draft regulation specifies that (i) settlement in zlotys may be conducted either by NBP in SORBNET2 or in its regional branches that maintain banks' accounts in zlotys or by other banks that maintain other banks' accounts in zlotys and that (ii) settlement in euro may be conducted by NBP in the TARGET2-NBP system or by other banks that maintain other banks' accounts in euro.
 - 1.5. The draft regulation provides for general requirements related to participation in the large-value payment systems operated by NBP, i.e. SORBNET2 (in zlotys) and TARGET2-NBP (in euro), including an indication of eligible participants and the conditions that the participants must fulfil. With respect to the SORBNET2 system, the draft regulation provides that its participants may include (i) NBP, (ii) banks other than NBP, provided they comply with the terms and conditions for opening and maintaining banks' accounts laid down by NBP, (iii) an entity managing an ancillary system, provided it obtains consent to open and maintain an account with NBP and complies with the terms and conditions for such account, (iv) the central bank of another country, provided it obtains the consent of NBP's President to open and maintain an account with NBP, (v) the National Cooperative Savings and Credit Union, provided it complies with the terms and conditions for opening and maintaining banks' accounts laid down by NBP and (vi) the Polish Bank Guarantee Fund, provided it complies with the terms and conditions for opening and maintaining banks' accounts laid down by NBP. With respect to the TARGET2-NBP system, the draft regulation provides that its participants may include (i) NBP, (ii) banks other than NBP, provided they comply with the terms and conditions for opening and maintaining banks' accounts laid down by NBP, (iii) an entity managing an ancillary system, provided it obtains consent to open and maintain an account with NBP and complies with the terms and conditions for such account, and (iv) the National Cooperative Savings and Credit Union, provided it complies with certain terms and conditions for opening and maintaining banks' accounts laid down by NBP.
 - 1.6. The draft regulation defines the precise time at which a payment order enters into a system and the point in time at which such an order cannot be revoked and becomes final. With respect to the SORBNET2 system, a payment order is deemed to be entered into the system upon its registration. It is final and irrevocable from the time of its execution, i.e. once the account in the SORBNET2 system as indicated in the payment order is debited. With respect to the TARGET2-NBP system, a payment order is deemed to be entered into the TARGET2-NBP system upon the debiting in the TARGET2 system of the participant's account as indicated in the payment order and may be revoked until it is entered into the TARGET2-NBP system. A payment order that is included in the algorithm referred to in the TARGET2-NBP agreement may not be revoked during the period of the algorithm's operation.
 - 1.7. In addition, the draft regulation regulates general issues relating to interbank settlement performed through a direct exchange of payment orders between banks, as well as those relating to calculating the net settlement positions resulting therefrom.

- 1.8. As described in the explanatory memorandum, the need to include interbank clearing within the scope of the draft regulation is driven by the recent occurrence in Poland of new, unsupervised, interbank clearing mechanisms that do not qualify as payment systems and are not subject to supervision by the President of NBP, but which pose certain risks to the safety and efficiency of interbank clearing in Poland. According to the explanatory memorandum, Polish banks have for a short period in the past used, for interbank clearing purposes, both the existing payment systems that are subject to NBP's oversight and intermediary services provided by companies that offer to make payments between banks using the companies' own bank accounts held with various banks. These mechanisms involve the temporary acquisition of funds transferred by the intermediary providing such services, which entails the potential risk that funds might be lost if the intermediary fails to transfer them to the beneficiary bank resulting in no interbank settlement taking place. Such risk is properly mitigated under NBP's oversight of settlements performed by typical clearing houses. For the time being, the Polish banks have stopped using non-regulated third-party intermediaries to exchange interbank transfer orders, but the changes proposed in the draft regulation aim to prevent the reoccurrence of such practices in the future.

2 General observation

The ECB notes that with respect to interbank settlements, the draft regulation is a recast of the existing Regulation No. 13/2013 of the President of Narodowy Bank Polski³. The draft regulation amends Regulation No. 13/2013 and expands its scope to include interbank clearing. The ECB was not consulted on Regulation No. 13/2013.

3 Specific observations

Interbank clearing

- 3.1 The organisation of payments is one of the duties imposed on NBP⁴. The President of NBP is responsible for the oversight of payment systems and payment schemes. In particular, the operation of a payment system or a payment scheme requires the consent of the President of NBP, who is also entitled to revoke such consent and receive information on the functioning of the payment system or the payment scheme⁵.
- 3.2 The ECB understands that the draft regulation intends to introduce a closed catalogue of permissible clearing methods in Poland in order to eliminate the use of interbank clearing mechanisms that use intermediary services that clear payments with own funds, since such mechanisms do not constitute a payment system subject to NBP's oversight. The ECB welcomes the fact that the draft regulation aims to strengthen NBP's oversight role in the area of interbank

³ Regulation No 13/2013 of the President of Narodowy Bank Polski of 24 May 2013 on the manner of performing interbank settlements. Available at http://www.nbp.pl/en/system_platniczy/regulation-13-2013.pdf.

⁴ Article 3(2)(1) of the Act on Narodowy Bank Polski of 29 August 1997. Available at https://www.nbp.pl/en/aktyprawne/the_act_on_the_nbp.pdf.

⁵ Article 16(1) of the Act of 24 August 2001 on settlement finality in payment and securities settlement systems and the rules of oversight of these systems. Available at https://www.nbp.pl/en/system_platniczy/angust.pdf. Article 14(2) of the Act of 19 September 2011 on payment services. No English translation available, the Polish text is available at <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20140000873>.

clearing and contributes to the reduction of counterparty risk in the financial sector. The draft regulation should enable NBP to use the powers available to it under Article 68(1) of the Banking Act to promote the smooth operation of all aspects of clearing and payment systems in Poland. Furthermore, the draft regulation does not contravene the Eurosystem oversight policy framework⁶, as it limits the interbank clearing and settlement facilities to the payment systems that are subject to oversight and to the correspondent banking arrangements that are subject to banking supervision and monitoring by the Eurosystem's oversight function.

Interbank settlements

- 3.3 With respect to the provisions of the draft regulation regarding interbank settlement, the ECB notes that these provisions repeat rules already laid down in the documentation for the SORBNET2 and TARGET2-NBP systems. For example, in accordance with Article 6(1) of the Act of 24 August 2001 on settlement finality in payment and securities settlement systems and the rules of oversight of these systems, a settlement order that has entered the system may not be revoked by a participant or by a third party after the point in time defined by the rules of that system. Related rules concerning settlement finality are laid down in the documentation governing the SORBNET2 and TARGET2-NBP systems. The ECB understands that the purpose of the draft regulation in this respect is to provide general rules for settlement systems in an official NBP legal act adopted on the basis of a delegation contained in the Polish Banking Act of 29 August 1997. In addition, the draft regulation is a general NBP legislative instrument that introduces a basis for the model participation agreements in the SORBNET2 and TARGET2-NBP systems. With respect to the TARGET2-NBP system, the ECB understands that the repetition in the draft regulation of the entry into the system and the irrevocability rules specified in Article 22 of the Harmonised Conditions for Participation in TARGET2 (Annex II to Guideline ECB/2012/27 of the European Central Bank⁷) is necessary to ensure legal certainty for irrevocable settlement in TARGET2-NBP under Polish law. The ECB agrees in principle with this approach. NBP should, however, closely monitor the draft regulation and the documentation of the large-value payment systems operated by NBP, and should, in particular, review any changes to Guideline ECB/2012/27 adopted by the ECB, in order to ensure their full alignment and avoid any potential discrepancy between the various applicable documents. Furthermore, in accordance with the second sentence of Article 3(3) of Directive 98/26/EC of the European Parliament and of the Council⁸, if there are conditions laid down in national law governing the system as to the moment of entry, the rules of that system must be in accordance with such conditions.
- 3.4 The ECB welcomes the fact that the draft regulation extends the eligibility criteria for participation in the SORBNET2 and TARGET2-NBP systems, which are generally open to banks, to entities managing ancillary systems, to the Bank Guarantee Fund and to the National Cooperative Savings and Credit Union. The ECB understands that the amendments are necessary to guarantee that

⁶ See Eurosystem Oversight Policy Framework, July 2016, available on the ECB's website at www.ecb.europa.eu.

⁷ Guideline ECB/2012/27 of the European Central Bank of 5 December 2012 on a Trans-European Automated Real-time Gross settlement Express Transfer System (TARGET2) (OJ L 30, 30.1.2013, p.1).

⁸ 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).

those entities will meet the corresponding requirements for participation in the SORBNET2 and in the TARGET2-NBP systems. The amendments are particularly important in the context of applications to open an account and the technical requirements specified in the participation agreement. As regards the National Cooperative Savings and Credit Union, it is important to ensure that NBP assesses its financial condition in a manner similar to that of banks.

- 3.5 The ECB notes that the draft regulation eliminates non-European Economic Area (EEA) entities from the scope of eligible participants in the SORBNET2 system due to the fact that the participation of such entities is not expected in the foreseeable future. The ECB understands that NBP is nonetheless open to considering the participation of a non-EEA entity on an individual basis subject to the satisfactory legal assessment of the laws applicable to such participant.

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

Done at Frankfurt am Main, 20 September 2017.

[signed]

The President of the ECB

Mario DRAGHI