EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 24 June 2009

on amendments to the rules governing the central securities depository

(CON/2009/55)

Introduction and legal basis

On 11 May 2009 the European Central Bank (ECB) received a request from the Marshall of the Polish Parliament for an opinion on a draft law amending the Law on trading in financial instruments and certain other laws[1] (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community 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 provisions[2], as the draft law relates to Narodowy Bank Polski (NBP), payment and settlement systems 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 European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft law and scope of the consultation

1.1 The draft law replicates the Law of 4 September 2008 on amendments to the Law on trading in financial instruments and to certain other laws[3] (hereinafter, the 'Law of 4 September 2008') which

1 The proposed amendments amend the Law of 29 July 2005 on trading in financial instruments (Dz. U. (*Dziennik Ustaw*) of 2005, No 183, Item 1538); the Law of 24 August 2001 on settlement finality in payment and settlement systems and on the supervision of such systems (Dz. U. 2001, No 123, item 1351; the Law of 29 August 1997 on banking (consolidated text: Dz. U. 2002, No 72, item 665); the Law of 25 July 2005 on supervision of the capital market (Dz. U. of 23 September 2005 No 183, Item 1537); and the Law of 21 July 2006 on supervision of the financial market (Dz. U. of 4 September 2006 No 157, Item 1119).

2 OJ L 189, 3.7.1998, p. 42.

3 As adopted together with the Law of 4 September 2008 on amendments to the Law on public offering and conditions for introducing financial instruments to the organised trading system, on public companies and on amendments to certain other laws (Dz. U. of 29 December 2008 No 231, Item 1547); the Law of 4 September 2008 on amendments to the Law on investment funds, the Law on banking and the Law on supervision of the financial market (Dz. U. of 29 December 2008 No 231, Item 1546).

aimed to transpose a number of Community directives into the Polish legal system[4], as well as to make other amendments to the Polish capital market regulation. The Law of 4 September 2008 has undergone the full legislative procedure in the Parliament but has not yet entered into force due to a challenge before the Constitutional Tribunal against some of its provisions relating to NBP's share ownership in the Polish central securities depository[5]. According to the explanatory memorandum to the draft law[6], the aim of the draft law currently presented for consultation is to re-enact those provisions of the Law of 4 September 2008 which are not subject to the constitutional challenge[7].

1.2 The ECB has previously commented on the draft versions of the Law of 4 September 2008 in its Opinions CON/2008/20 and CON/2006/53[8] as regards draft provisions other than those transposing Community directives. The present opinion refers to those previous ECB opinions. In particular, the provisions affecting the NBP's share ownership in the Polish central securities depository (i.e. the now constitutionally challenged provisions of the Law of 4 September 2008) were commented on in paragraphs 3.1 to 3.3 of ECB Opinion CON/2008/20.

2. General observations

2.1 The ECB reiterates some of its comments in its opinions CON/2008/20 and CON/2006/53, to the extent they have not been incorporated in the Law of 4 September 2008, and now in the draft law. Such ECB comments relate in particular to: (i) the need to adapt the statutory definition of 'settlement' to standards developed by the Committee on Payment and Settlement Systems of the Bank for International Settlements and by the ECB[9]; (ii) the need to prevent spillover of risks from the entity providing central counterparty services to the entity providing security settlement services[10]; (iii) the need to assign tasks related to ensuring the proper operation of the clearing and

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4 The Directives to be implemented by the draft law include: (i) Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1); (ii) Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (OJ L 177, 30.6.2006, p. 1); (iii) Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast) (OJ L 177, 30.6.2006, p. 201); and (iv) Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ L 241, 2.9.2006, p. 26).

5 See Article 19 of the Law of 4 September 2008. The constitutionality of that provision was challenged before the Polish Constitutional Tribunal by Poland's President on 23 September 2008 (see pending Case Kp 4/08).

6 See page 2 of the explanatory memorandum to the draft law.

7 See also judgment of the Court of Justice of the European Communities of 19 March 2009 in Case C-143/08 *Commission of the European Communities* v *Republic of Poland* declaring that, 'by failing to adopt, within the period prescribed, all the laws, regulations and administrative provisions necessary to comply with Commission Directive 2006/73/EC …, the Republic of Poland has failed to fulfil its obligations under that directive'.

8 All ECB opinions are available on the ECB's website at www.ecb.europa.eu.

9 See paragraph 2.3 of ECB Opinion CON/2006/53 and Article 45b(2) of the Law on trading in financial instruments, as amended by the draft law. The ECB notes, however, an amendment to the definition of 'clearing' which, following the ECB's suggestion, was broadened to include activities other than the establishment of mutual obligations of the counterparties to the transaction, as performed by entities providing third-party services to such direct counterparties.

10 See paragraph 2.4 of ECB Opinion CON/2006/53 and Article 68a(11) of the Law on trading in financial instruments, as amended by the draft law.

settlement process not only to Krajowy Depozyt Papierów Wartościowych (KDPW, the Polish central securities depository) but also to other clearing or settlement system operators which may be established in Poland[11]; (iv) the need for clearing and settlement system operators to submit rules on business continuity measures and on secondary sites as a prerequisite for obtaining a licence[12]; (v) the need to ensure express coverage of clearing houses under the Law on settlement finality[13]; (vi) the need 'for NBP to be expressly made responsible, as one of its tasks, for the oversight of all securities clearing and settlement systems that operate or will operate in Poland, including the systems' rules, and given access to all information and data relevant to the performance of such oversight tasks'[14].

2.2 Specifically, the ECB reiterates paragraph 4 of Opinion CON/2008/20 on the draft provision foreseeing that certain KDPW tasks may be delegated outside KDPW but solely to KDPW's own subsidiaries[15]. The ECB noted in this context that, while national laws may provide for authorisation or review requirements in respect of delegating or outsourcing to third parties of the activities of the central securities depositories (CSDs) conducting settlement functions, such laws normally do not require legal dependence by the CSD on third parties to which CSD activities are delegated or outsourced. It may also be desirable for the CSD to have more flexibility to outsource certain technical operations where the CSD retains management and control over the outsourced functions, which would not prejudice further evolution of the securities infrastructure in Poland, its integration with the European securities infrastructure and further market harmonisation.

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

Done at Frankfurt am Main, 24 June 2009.

The President of the ECB

Jean-Claude TRICHET

11 See paragraph 2.5 of ECB Opinion CON/2006/53 and Articles 48 and 68a-68e of the Law on trading in financial instruments, as amended/introduced by the draft law.

12 See paragraph 2.6 of ECB Opinion CON/2006/53.

13 See paragraph 2.10 of ECB Opinion CON/2006/53.

14 See paragraph 3(5)(i) of ECB Opinion CON/2008/20.

15 See Article 48(7) of the Law on trading in financial instruments, as amended by the draft law.