

Poland implements rules regulating the penalties for infringing EMIR

Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ("EMIR") which came into force in mid-2012, requires EU Member States to, inter alia, implement into national law rules regulating the penalties for infringing EMIR. The Member States were to notify the European Commission of the introduction of these provisions by 17 February 2013. Poland will be able to fulfil this obligation only now, following the coming into force, on 30 January 2015, of the act amending, inter alia, the Act on Trading in Financial Instruments and the Act on Supervision of Capital Markets, pursuant to which rules regulating the issue of penalties for infringing provisions of EMIR were implemented into Polish law.

Administrative fines

Under EMIR, the penalties for infringing the rules related to clearing, reporting and risk mitigation must include at least administrative fines. In the amended Act on Trading in Financial Instruments, the Polish Financial Supervision Authority ("PFSA") (which is the "competent authority" in the meaning of EMIR) was granted the authority to impose fines on financial counterparties and non-financial counterparties for non-performance or inadequate performance of the obligations referred to in EMIR and in the provisions issued pursuant to it.

The fines may also be imposed on CCPs, clearing members, clients providing indirect clearing services and on trading venues in the meaning of EMIR. A fine may be imposed not only on these entities, but also on those persons responsible for those entities' not performing or inadequately performing the relevant obligations.

EMIR stipulates that the penalties provided for in national regulations must be effective, proportionate and dissuasive. Accordingly, the new regulations provide for different levels

of fines for financial counterparties, non-financial counterparties and other entities referred to in the amended Act, and, in specific cases, limit the fines to 10% of the annual revenue of the entity that is to be fined.

The possibility of imposing fines is not the only remedy the PFSA has at its disposal with regard to the obligations resulting from EMIR. In the event of a threat of non-performance or inadequate performance by a CCP of its obligations vis-a-vis its members or of a breach of the interest of market participants, the PFSA may, on the terms provided for in the new regulations, prohibit the CCP from investing its capital or order it to withhold any profit distribution, and may also prohibit the CCP from accepting all or certain types of transactions for clearing. However, before such measures are implemented, the President of the National Bank of Poland must be consulted.

As stipulated by EMIR, the penalties for infringements of Articles 4, 5 and 7 to 11 of EMIR (related to the clearing obligation, access to a CCP and a trading venue, reporting obligations, obligations of non-financial counterparties and risk mitigation techniques) should be disclosed to the public,

unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved. This is reflected in the Polish regulations with respect to Articles 4 and 7 to 11, with the PFSA being the body that has to determine if the disclosure should be made.

Criminal penalties

The amended Act on Trading in Financial Instruments introduces criminal sanctions (comprising of fine of up to PLN 1 000 000, or imprisonment of up to 3 years, or both) for infringement of the obligation under EMIR to keep information confidential and for using confidential information for purposes other than those specified in EMIR. Such sanctions might be imposed, among others, on the members of the risk committee established by a CCP who are bound by confidentiality, on natural and legal persons who use confidential information recorded in a CCP for commercial purposes without the prior written consent of the client to whom such confidential information belongs, as well as on persons who work or have worked for those authorities specified in EMIR and on auditors and experts instructed by them, and to whom the obligation of professional secrecy apply.

Other issues related to EMIR

To the extent it applies to EMIR, the amendment of the Act on Trading in Financial Instruments is not just confined to new regulations on penalties for infringing EMIR.

The amended Act incorporates a definition of a "CCP" stating that it means an entity that is a CCP in the meaning of EMIR which has its registered office in Poland.

Furthermore, the Act has been supplemented with provisions on acquisitions of a qualifying holding in a CCP (that is, acquisitions following which the acquirer's share in the voting rights or the share capital of a CCP would reach or exceed the thresholds of 10%, 20%, 30% or 50% or so that the CCP would become its subsidiary), including a list of information which must be attached to the notification of the intended acquisition. Pursuant to EMIR, the scope of the required information must be proportionate and adapted to the nature of the proposed buyer and the proposed

acquisition, and information that is irrelevant for the purposes of a prudency analysis should not be required. Under the new regulations, the scope of information required in the case of acquisitions of a qualifying holding in a CCP is similar to the scope of information required in the case of acquisitions of a qualifying holding in banks or insurance companies. It includes both information on the activity of the notifying entity, the structure of the group to which the entity belongs, the sanctions imposed on that entity and its managing officers, as well as any proceedings pending against them, and the plans for the future activities of the CCP the shares in which the notifying entity intends to acquire. Where a qualifying holding is acquired in breach of the applicable regulations, the voting rights under such shares cannot be exercised, furthermore, the PFSA may, inter alia, order that the shares be transferred by a deadline set by it.

Pursuant to the amended Act, the National Depository of Securities has been given the authority to assign legal entity identifiers (LEI) and the right to collect and store information on transactions in financial instruments as well as information on those instruments.

Contacts

Andrzej Stosio
Partner

T: 22 627 11 77

E: andrzej.stosio@cliffordchance.com

Anna Biała
Senior Associate

T: 22 627 11 77

E: anna.biala@cliffordchance.com

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Norway House, ul. Lwowska 19, 00-660 Warsaw, Poland

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