

Content of question:

Who can be the counterparty to a netting agreement pursuant to Annex 8, III?

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Approved by: **Pavel Vacek**

Date: **3 March 2009**

Piece of law	Decree No. 123/2007 Coll. (as amended)
Provision	Annex 8
Explanation	<p>The provision of Annex 8, III, 1, a) to the Decree transposes the introductory text of the provision of letter a) of Part 7 of Annex III to Directive 2006/48/EC (as amended). However, none of the mentioned pieces of law lays down more detailed requirements concerning the person that can be eligible in the given context as the counterparty to a netting agreement. Nevertheless, the Directive explicitly states that both a natural person and a legal person can become an entity eligible to conclude a netting agreement.</p> <p>In order to appropriately apply the given provision of the Decree, it is thus necessary to start from the provisions of the pieces of law which determine the legal status of persons, both generally and specifically. These pieces of law are especially the Civil Code, the Commercial Code and the Act on Private International Law and Procedural Law, if the person concerned is a foreign person. Relevant international treaties binding for the Czech Republic are left outside the scope of this explanatory text.</p> <p>In general, it is necessary to assess the issue of the capability to have rights and duties (legal personality) and the issue of the capability to gain rights and duties by own acts (legal capacity). The matters connected with the issues of the legal personality and the legal capacity are not identical in the cases of natural persons and legal persons. In the case of a natural person the focus is chiefly on the issue of the full legal capacity (for further information see Article 8 of the Civil Code) and, on the contrary, in the case of a legal person it is the issue of the legal personality that is crucial (for further information see Article 19a paragraph 2 of the Civil Code).</p> <p>There are some specific requirements imposed on the participants of a legal relationship (contracting parties), which can become relevant in some instances. A classical example is a concurrent application of the institute of financial security (see Article 323a et seq. of the Commercial Code) and the institute of close-out netting (see Article 197 of the Act on Business Activities in the Capital Market). Whereas the law does not impose any specific requirements on the capacity of persons concluding a close-out netting agreement per se, financial security can be negotiated only between legal persons and at least one of them must belong to the category of persons</p>

	listed in Article 323a paragraph 3 of the Commercial Code. Failing to meet this criterion does not prevent the valid conclusion of a close-out netting agreement per se; however, it prevents the setting up of valid financial security.
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