

DECISIONS

DECISION OF THE EUROPEAN CENTRAL BANK
of 20 April 2011
on the selection of TARGET2-Securities network service providers
(ECB/2011/5)
(2011/295/EU)

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB') and in particular Articles 3.1 and 12.1 and Articles 17, 18 and 22 thereof,

Whereas:

- (1) TARGET2-Securities (hereinafter 'T2S') aims to facilitate post-trading integration by offering core, neutral and borderless pan-European cash and securities settlement in central bank money so that central securities depositories (CSDs) can provide their customers with harmonised and commoditised delivery-versus-payment settlement services in an integrated technical environment with cross-border capabilities.
- (2) In the context of the Third Interim T2S Progress Report, in February 2010, the T2S Programme Board decided that the Deutsche Bundesbank, the Banco de España, the Banque de France and the Banca d'Italia (hereinafter the '4CB') would make necessary preparations to have up to three T2S network service providers to provide connectivity services to the T2S platform and that the Banca d'Italia would lead the selection procedure.
- (3) In the context of the Fourth T2S Progress Report, at its meeting of 21 April 2010, the Governing Council decided that the network provision in T2S would be subject to a competition and that a maximum of three licences would be granted.
- (4) In the context of the Fifth T2S Progress Report, in July 2010, the T2S Programme Board decided that the Banca d'Italia would act as the operating arm of the Eurosystem for the selection procedure. It also decided that the T2S Programme Board would be responsible for designating the selection panel members since the Eurosystem central banks would be responsible and liable for the selection criteria and for the outcome of the selection panel's decision based on the selection criteria. The Banca d'Italia would be responsible for correctly conducting the selection procedure and its specific liability related to the selection procedure would be separate from the liability assumed by the 4CB under the Level 2-Level 3 agreement.

- (5) On 13 August 2010, the T2S Programme Board decided that the Banca d'Italia's liability should be specified more precisely in a mandate from the Eurosystem central banks to the Banca d'Italia to carry out the selection procedure.
- (6) The purpose of the selection procedure is to entrust network service providers to provide a set of predefined connectivity services, on the basis of which the T2S network service providers design, implement, deliver and operate connectivity solutions intended to securely exchange business information between the directly connected T2S actors and the T2S platform.
- (7) Although a selection procedure for T2S network service providers falls outside the scope of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts⁽¹⁾, the rules laid down in Directive 2004/18/EC, the procedures laid down in Decision ECB/2008/17 of 17 November 2008 laying down the framework for joint Eurosystem procurement⁽²⁾ and the national law implementing Directive 2004/18/EC where applicable to the mandated central bank should be used as general guidelines.
- (8) Banca d'Italia has been appointed by the Governing Council to carry out the selection procedure for T2S network service providers.
- (9) Banca d'Italia had accepted the appointment and has confirmed its willingness to act in accordance with this Decision,

HAS ADOPTED THIS DECISION:

Article 1

Definitions

For the purposes of this Decision, the following definitions shall apply:

- (a) 'central bank' means the European Central Bank (ECB) or a euro area national central bank (NCB) or another central bank that makes its currency available in T2S;

⁽¹⁾ OJ L 134, 30.4.2004, p. 114.

⁽²⁾ OJ L 319, 29.11.2008, p. 76.

- (b) 'central securities depository' (CSD) means an entity that: (a) enables securities transactions to be processed and settled by book entry; (b) provides custodial services, e.g. the administration of corporate actions and redemptions; and (c) plays an active role in ensuring the integrity of issues of securities;
- (c) 'T2S Programme Board' means the Eurosystem management body established pursuant to Decision ECB/2009/6 of 19 March 2009 on the establishment of the TARGET2-Securities Programme Board⁽¹⁾, which has the task of developing proposals for the Governing Council on key strategic issues and executing tasks of a purely technical nature in relation to T2S, or its successor;
- (d) 'T2S network service provider' means a network service provider that has signed a licence agreement to provide connectivity services;
- (e) 'connectivity services' means the direct network connection to the T2S platform that a directly connected T2S actor requires a T2S network service provider to provide in order to benefit from, or perform tasks and responsibilities related to, the T2S services;
- (f) 'licence' means the act of conferring the right as granted by the Eurosystem central banks to a T2S network service provider to provide to the directly connected T2S actors a set of predefined connectivity services, on the basis of which a T2S network service provider shall design, implement, deliver and operate solutions intended to exchange securely electronic data between the directly connected T2S actors and the T2S platform;
- (g) 'selection panel' means a panel of five experts composed of one representative from each of the mandated central bank (acting as chairperson), the 4CB and EPCO, as well as two representatives from the Eurosystem central banks, each of them designated by the T2S Programme Board and formally appointed by the mandated central bank;
- (h) 'Eurosystem Procurement Coordination Office' (EPCO) means the body created under Decision 2008/893/EC (ECB/2008/17) to coordinate joint Eurosystem procurement;
- (i) 'Eurosystem central bank' means either a euro area NCB or the ECB;
- (j) 'Level 2-Level 3 agreement' means the supply and operation agreement that is negotiated between the T2S Programme Board and the 4CB, endorsed by the Governing Council and subsequently signed by the Eurosystem central banks and the 4CB. It contains the additional details of the tasks and responsibilities of the 4CB, the T2S Programme Board and the Eurosystem central banks;
- (k) 'directly connected T2S actor' means any entity that is authorised to exchange electronic data with the T2S platform;
- (l) 'mandated central bank' means the euro area NCB appointed by the Governing Council to conduct the selection procedure for the T2S network service providers and vested by the Eurosystem central banks with the power to sign the licence agreements with the selected participants in the name and interest of the Eurosystem central banks;
- (m) 'T2S services' means the services to be provided by the Eurosystem central banks to CSDs and central banks;
- (n) 'licence agreement' means an agreement governed by German law, as proposed by the T2S Programme Board and approved by the Governing Council, setting out the reciprocal rights and obligations of the Eurosystem central banks and of the relevant T2S network service provider;
- (o) 'selected participant' means a participant in the selection procedure for the T2S network service providers that has been awarded a licence agreement;
- (p) 'contract notice' means the notice of the selection procedure to be published in the *Official Journal of the European Union* and in the national official journal of the Member State where the mandated central bank is located;
- (q) 'awarding rules' means the detailed rules governing the selection procedure constituting part of the selection acts to be published;
- (r) 'selection acts' means the award announcement, the contract notice, as well as the awarding rules, and their annexes and attachments;
- (s) 'euro area NCB' means the NCB of a Member State whose currency is the euro;
- (t) 'proof of concept' means a test to be performed by a T2S network service provider after the signature of the licence agreement, aimed at verifying the compliance of its offered solution with basic functional, resilience and security requirements;
- (u) 'go-live date' means the date on which the first CSD starts using the T2S services.

Article 2

Mandated central bank

The mandated central bank shall for the benefit of the Eurosystem central banks:

- (a) carry out the selection procedure for T2S network service providers in full cooperation with the T2S Programme Board and the selection panel, in its own name and in the interest of the Eurosystem central banks, by providing the material and human resources required to ensure that the selection procedure complies with the law applicable in the Member State of the mandated central bank; and
- (b) in line with the selection panel's decision, sign the relevant licence agreement in the name and interest of the Eurosystem central banks, with the total number of T2S network service providers not exceeding two at any given time.

⁽¹⁾ OJ L 102, 22.4.2009, p. 12.

Article 3**Selection and awarding conditions**

1. The mandated central bank shall carry out the procedure for the selection of T2S network service providers in compliance with the general principles laid down in the Treaty on the Functioning of the European Union, including transparency, proportionality, equal treatment, equal access and non-discrimination.

2. The total number of T2S network service providers shall not exceed two at any given time.

3. When carrying out the selection procedure, the mandated central bank shall in particular observe the following conditions:

(a) it shall carry out an open procedure for the award of the licences whereby any interested economic operator may submit an offer;

(b) all selection acts shall be prepared jointly by the Eurosystem central banks and the mandated central bank, and approved by the T2S Programme Board;

(c) the T2S network service providers shall be selected on the basis of the lowest maximum price for a standard set of services to be provided to the community of directly connected T2S actors, according to the model approved by the T2S Programme Board;

(d) all selection acts shall be published in English. The mandated central bank may also publish the contract notice in its official language. The participants in the selection procedure shall submit their offers and all supplemental documents in English;

(e) the mandated central bank shall specify in the contract notice that the selection procedure is carried out in its name and interest as well as in the interest of the Eurosystem central banks;

(f) the mandated central bank shall publish the contract notice at a minimum in: (i) the *Official Journal of the European Union*; (ii) the national official journal used for contract notices by the mandated central bank; (iii) two national newspapers; and (iv) the *Financial Times* and *The Economist*. The selection acts shall be published on the mandated central bank's website. The contract notice shall also be published on the ECB's website, with a link to the mandated central bank's website in order to enable access to all the selection acts;

(g) the mandated central bank shall respond to requests for clarification in the selection procedure sent to the e-mail address specified in the contract notice. Any such response shall be published by the mandated central bank and the ECB on their respective websites;

(h) selection panel members shall be designated by the T2S Programme Board and formally appointed by the

mandated central bank immediately after the end of the bidding period;

(i) selection panel members shall be obliged to sign the declaration of absence of conflict of interest that has been approved by the T2S Programme Board;

(j) the mandated central bank shall undertake the operational aspects of the selection procedure;

(k) the selection panel shall, *inter alia*, examine the administrative and technical documentation, and decide on the exclusion from the selection procedure of participants not fulfilling the participation requirements. The selection panel shall evaluate abnormally low offers pursuant to the rules laid down in the selection acts. The selection panel shall rank the participants not excluded from the selection procedure in increasing order of their economic offers;

(l) The mandated central bank shall formally communicate all of the selection panel's decisions to the participants concerned using a secure and prompt means of written communication.

4. Once the selection panel has ranked the participants in accordance with paragraph 3(k) (preliminary awarding), the mandated central bank shall, under its responsibility, undertake an internal legitimacy check to verify that the selection procedure was carried out correctly. When this check has been successfully completed, the mandated central bank shall issue the final award and shall verify that the selected participants fulfil the participation requirements and that their self declarations are truthful. Should the legitimacy check be unsuccessful, the final award shall be deferred and the mandated central bank shall seek guidance thereon from the T2S Programme Board.

5. The mandated central bank shall act in its name and interest as well as in the interest of the Eurosystem central banks as regards all rights and obligations stemming from the selection procedure. It shall also report thereon to and comply with decisions taken by the T2S Programme Board.

6. The mandated central bank shall bear its own costs related to the tasks it carries out in the selection procedure.

Article 4**Licence agreement**

1. Once the selection and awarding procedure have been concluded by the mandated central bank under the conditions mentioned above, the mandated central bank and the selection panel shall undertake all necessary preparatory measures to enable the mandated central bank to enter into a licence agreement with each of the selected participants in the name and interest of the Eurosystem central banks. To this end, the Eurosystem central banks shall vest the mandated central bank with the power to sign the licence agreements, by way of a separate power of attorney to act in the name and interest of the Eurosystem central banks (disclosed agency).

2. Subsequent to signing the licence agreement, a T2S network service provider shall perform a proof of concept. If the T2S network service provider fails to successfully perform the proof of concept, the licence agreement shall be terminated. Under such circumstance, the mandated central bank shall award a licence to the participant in the selection procedure that ranked next highest in the ranking list after the selected participants.

3. Without prejudice to the following paragraphs, a licence awarded in the initial selection procedure shall expire 7 years following the go-live date.

4. Where a licence agreement with a T2S network service provider is terminated before the end of its duration, but after the successful performance of the proof of concept, at the T2S Programme Board's discretion, a licence agreement may either be offered to the participant in the selection procedure that ranked next highest in the ranking list after the selected participants, or be awarded to another network service provider following a new selection procedure to be carried out by the mandated central bank or by another Eurosystem central bank appointed by the Governing Council. The new licence agreement shall have a duration of 7 years.

5. Upon the T2S Programme Board's request, the mandated central bank shall extend the duration of all licence agreements twice by 1 year.

6. The mandated central bank shall be mandated to represent the Eurosystem central banks jointly vis-à-vis the T2S network service providers and other third parties in relation to the connectivity services as well as to manage the licence agreements in the name and interest of the Eurosystem central banks on an ongoing basis, both by, *inter alia*, enforcing the rights and obligations of the Eurosystem central banks, including in court proceedings, including but not limited to breach of contract, damages, termination, challenges or other alterations of contract. The mandated central bank shall report thereon to, and comply with the instructions issued by, the T2S Programme Board.

7. The mandated central bank shall take all measures necessary for the fulfilment of the Eurosystem central banks' and, if any, of the mandated central bank's, duties and obligations in relation to the licence agreements and shall report thereon to, and respect any related instructions from the T2S Programme Board.

8. The mandated central bank shall receive all notices, declarations and writs of claims, including the service of process, in relation to a licence agreement to enable it to fulfil the Eurosystem central banks' and, if any, the mandated central bank's, rights and obligations in relation to a licence agreement.

9. Without prejudice to Article 5, the Eurosystem central banks shall reimburse the mandated central bank for all reasonable expenses it incurs for the management and monitoring of the licence agreements pursuant to paragraphs 6 to 8.

Article 5

Compensation claims

1. The mandated central bank shall be liable to the Eurosystem central banks without limitation for any loss or damage resulting from fraud or wilful misconduct in the performance of its rights and obligations under this Decision. It shall be liable to the Eurosystem central banks for any loss or damage resulting from its gross negligence in performing its obligations under this Decision, in which case its liability shall be limited to a maximum total amount of EUR 2 000 000 per calendar year.

2. Where losses or damages are suffered by a third party arising from fraud or wilful misconduct of the mandated central bank in performing its duties under this Decision, the mandated central bank shall be responsible for any compensation to be paid to that third party.

3. Where losses or damages are suffered by a third party arising from the mandated central bank's gross or ordinary negligence in performing its duties under this Decision, the mandated central bank shall be responsible for any compensation to be paid to that third party. The Eurosystem central banks shall reimburse the mandated central bank for any such compensation that exceeds a maximum total amount of EUR 2 000 000 per calendar year, on the basis of a court statement or of a settlement agreement between the mandated central bank and any such third party, provided that the settlement agreement has been approved in advance by the T2S Programme Board.

4. The Eurosystem central banks shall fully and promptly reimburse the mandated central bank for any compensation paid by it to third parties where this stems from: (a) the participation requirements and award criteria; (b) a decision made by the selection panel on the basis of the participation requirements and award criteria; (c) the incorrect conduct of the selection panel, unless it acted in line with the written advice of the mandated central bank or has not received appropriate written advice from the mandated central bank on the issue concerned in advance; (d) any decision or event beyond the control of the mandated central bank including those which may affect the effectiveness of the licences granted.

5. The mandated central bank shall not be reimbursed by the Eurosystem central banks for compensation paid to third parties resulting from operational activities and other procedural acts which fall within its responsibility, unless the mandated central bank has acted, contrary to its own advice, in line with instructions from the T2S Programme Board pursuant to Article 3(5).

6. Where legal actions filed by third parties relate to acts or omissions with respect to the selection procedure for which the Eurosystem central banks have to assume exclusive liability, the Eurosystem central banks, having consulted the mandated central bank, shall instruct the mandated central bank on the measures it shall take, e.g. any representation by external counsel or by in-house legal services of the mandated central bank, in a timely manner. Once a decision as to the course of action in any such proceeding has been taken, the litigation costs and fees arising from any such action shall be borne by the Eurosystem central banks.

7. The Eurosystem central banks shall assume liability for acts and omissions of individual selection panel members in relation to the selection procedure.

8. Where legal actions are filed by third parties for acts or omissions connected to a selection procedure for which the mandated central bank assumes exclusive liability, the mandated central bank shall fully cooperate with the Eurosystem central banks on the measures it shall take, e.g. any representation by external counsel or by its in-house legal services, and shall bear the subsequent costs.

9. Where the Eurosystem central banks and the mandated central bank are jointly responsible for losses or damages

suffered by a third party, each of them shall bear an equal share of the costs.

Article 6

Final provisions

1. A mandate shall continue to be in force for 7 years from the go-live date.

2. The expiration of a mandate shall not affect the validity of the relevant licence agreements.

Article 7

Entry into force

This Decision shall enter into force 2 days after its adoption.

Done at Frankfurt am Main, 20 April 2011.

The President of the ECB

Jean-Claude TRICHET