

DECISION (EU) 2019/137 OF THE EUROPEAN CENTRAL BANK**of 23 January 2019****on the selection of Eurosystem Single Market Infrastructure Gateway (ESMIG) network service providers (ECB/2019/2)**

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union,

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

Whereas:

- (1) The Eurosystem Single Market Infrastructure Gateway (ESMIG) is a technical component to be delivered as part of the T2-T2S Consolidation project that consolidates access by directly connected market participants to all market infrastructures provided by the Eurosystem. The ESMIG will give such participants one and the same technical set-up for accessing TARGET2 (T2) including the TARGET Instant Payment Settlement (TIPS) service, TARGET2-Securities (T2S), the Eurosystem Collateral Management System (ECMS) and possibly other Eurosystem market infrastructure services and applications.
- (2) In its meeting from 23 to 24 April 2018 the Market Infrastructure Board decided that the Deutsche Bundesbank, the Banco de España, the Banque de France and the Banca d'Italia (hereinafter the 'providing NCBs') would make the necessary preparations to have up to three network service providers to provide connectivity services to the ESMIG and that the Banca d'Italia would lead the selection procedure.
- (3) In that meeting, the Market Infrastructure Board further decided that the Banca d'Italia would act as the operating arm of the Eurosystem for the selection procedure. It also decided that the Market Infrastructure 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 providing NCBs under the Level 2-Level 3 agreement.
- (4) 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 ESMIG network service providers design, implement, deliver and operate connectivity solutions intended to securely exchange business information between the directly connected market participants and the Eurosystem market infrastructures via the ESMIG.
- (5) The selection procedure for ESMIG network service providers falls under the scope of Directive 2014/23/EU of the European Parliament and of the Council ⁽¹⁾ as implemented in the national law of the Member State of the mandated central bank.
- (6) The Banca d'Italia has been appointed by the Governing Council to carry out the selection procedure for the ESMIG network service providers.
- (7) The Banca d'Italia has 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) 'Market Infrastructure Board' means the governance body, which has as its mission to support the Governing Council by ensuring that the Eurosystem's market infrastructures and platforms, in the fields of cash settlement, securities settlement and collateral management, are maintained and further developed in line with the Treaty objectives of the European System of Central Banks (ESCB), the ESCB's business needs, technological advances, as well as regulatory and oversight requirements, as applicable from time to time;

⁽¹⁾ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

- (b) 'ESMIG network service provider' means a network service provider that has signed a concession contract to provide connectivity services;
- (c) 'connectivity services' means the direct network connection to the ESMIG that a directly connected market participant requires an ESMIG network service provider to provide in order to benefit from, or perform tasks and responsibilities related to the Eurosystem market infrastructure services;
- (d) 'concession' means the right as granted by the Eurosystem central banks to a network service provider to provide to the directly connected market participants a set of predefined connectivity services, on the basis of which the ESMIG network service provider shall design, implement, deliver and operate connectivity solutions intended to exchange securely electronic data between the directly connected market participants and the Eurosystem market infrastructures via the ESMIG;
- (e) 'selection panel' means a panel of three experts composed of two representatives from the mandated central bank (including the chairperson), as well as one representative from a Eurosystem central bank, all designated by the Market Infrastructure Board and formally appointed by the mandated central bank;
- (f) 'Eurosystem central bank' means either the European Central Bank (ECB) or a national central bank of a Member State whose currency is the euro;
- (g) 'Level 2-Level 3 agreement' means the supply and operation agreement that is negotiated between the Market Infrastructure Board and the providing NCBs, endorsed by the Governing Council and subsequently signed by the Eurosystem central banks and the providing NCBs. It is to contain the additional details of the tasks and responsibilities of the providing NCBs, the Market Infrastructure Board and the Eurosystem central banks;
- (h) 'directly connected market participant' means any entity that is authorised to exchange electronic data with a Eurosystem market infrastructure;
- (i) 'mandated central bank' means the national central bank of a Member State whose currency is the euro appointed by the Governing Council to conduct the selection procedure for the ESMIG network service providers and vested by the Eurosystem central banks with the power to sign a concession contract with each of the selected participants in the name and interest of the Eurosystem central banks;
- (j) 'Eurosystem market infrastructure services' means the services provided by the Eurosystem central banks' market infrastructures, comprising TARGET services (including the T2 service, TARGET Instant Payment Settlement (TIPS) service and the TARGET2-Securities (T2S) service), the Eurosystem Collateral Management System (ECMS) and other services to be provided by the Eurosystem's market infrastructures, platforms and applications in the fields of cash settlement, securities settlement and collateral management;
- (k) 'concession contract' means an agreement governed by the national law of the Member State of the mandated central bank, as proposed by the Market Infrastructure Board and approved by the Governing Council, setting out the reciprocal rights and obligations of the Eurosystem central banks and of the relevant ESMIG network service provider;
- (l) 'selected participant' means a participant in the selection procedure for the ESMIG network service providers that has been awarded a concession contract;
- (m) 'contract notice' means the notice of the selection procedure to be published by the mandated central bank in accordance with Article 3(2)(e);
- (n) 'awarding rules' means the detailed rules governing the selection procedure constituting part of the selection acts to be published;
- (o) 'selection acts' means the award announcement, the contract notice, as well as the awarding rules, and their annexes and attachments;
- (p) 'Network Acceptance Test' means a test to be performed by an ESMIG network service provider after the signature of the concession contract, aimed at verifying the compliance of its offered solution with basic functional, resilience and security requirements;
- (q) 'go-live date' means the date on which the first Eurosystem market infrastructure starts using the connectivity services for daily operation in production.

*Article 2***Mandated central bank**

1. The Banca d'Italia shall be the Eurosystem central bank appointed by the Governing Council to conduct the selection procedure for the ESMIG network service providers and to sign concession contracts with selected participants in accordance with this Decision.
2. The mandated central bank shall for the benefit of the Eurosystem central banks:
 - (a) plan the selection procedure and draft the selection acts and all relevant documentation in accordance with Article 3(2)(b);
 - (b) conduct the selection of ESMIG network service providers in full cooperation with the selection panel, in its own name and interest 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 national law of its Member State;
 - (c) in line with the selection panel's decision, sign each concession contract, with the total number of ESMIG network service providers not exceeding three at any given time, in accordance with Article 4(1);
 - (d) represent the Eurosystem central banks vis-à-vis the ESMIG network service providers and other third parties and manage the concession contracts in accordance with Article 4(5).

*Article 3***Selection and awarding conditions**

1. The mandated central bank shall carry out the procedure for the selection of ESMIG network service providers in compliance with Directive 2014/23/EU as implemented in the national law of the Member State of the mandated central bank. The total number of ESMIG network service providers shall not exceed three at any given time.
2. When carrying out the selection procedure, the mandated central bank shall in particular observe the following conditions:
 - (a) the mandated central bank shall carry out an open procedure for the award of the concessions 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 Market Infrastructure Board;
 - (c) the ESMIG 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 market participants, according to the model approved by the Market Infrastructure Board; 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;
 - (d) 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;
 - (e) the mandated central bank shall publish the contract notice at a minimum in: (a) the *Official Journal of the European Union*; (b) the relevant national official journal of the Member State of the mandated central bank; (c) two national newspapers; and (d) 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;
 - (f) the mandated central bank shall respond to requests for clarification in the selection procedure sent to the email address specified in the contract notice. Responses of general interest shall be published by the mandated central bank and the ECB on their respective websites;
 - (g) selection panel members shall be designated by the Market Infrastructure Board and formally appointed by the mandated central bank immediately after the end of the bidding period;

- (h) selection panel members shall be obliged to sign the declaration of absence of conflict of interest that has been approved by the Market Infrastructure Board;
- (i) the mandated central bank shall undertake the operational aspects of the selection procedure;
- (j) the selection panel shall, inter alia, examine the administrative 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;
- (k) 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.

3. Once the selection panel has ranked the participants in accordance with paragraph 2(j) (award proposal), 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 each selected participant fulfils 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 take all necessary actions under the national law of its Member State in order to ensure that the irregularity is resolved and that a new legitimacy check is performed and successfully completed. Without prejudice to the independence of the mandated central bank as a contracting authority under the national law of its Member State, it may consult the Market Infrastructure Board on policy matters relating to the resolution of any irregularities.

4. 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 report to the Market Infrastructure Board on the progress of the selection procedure and, without prejudice to its independence as a contracting authority under the national law of its Member State, it shall consult the Market Infrastructure Board upon the occurrence of any event adversely affecting the project plan.

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

Article 4

Concession contract

1. Once the selection and awarding procedures have been concluded by the mandated central bank under the conditions mentioned above, the mandated central bank shall undertake all necessary preparatory measures to enter into a concession contract with each of the selected participants in the name and interest of the Eurosystem central banks. To this end, the Eurosystem central banks vest the mandated central bank with the power to sign the concession contract, 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 concession contract, an ESMIG network service provider shall perform a Network Acceptance Test. If the ESMIG network service provider fails to successfully perform the test, the concession contract shall be terminated. Under such circumstances, the mandated central bank shall award a concession to the participant ranked next highest in the ranking list after the selected participants, under the same conditions as the original concession contract and on the basis of the offer that the next ranked participant submitted during the selection procedure.

3. Without prejudice to the following paragraphs, a concession awarded in the selection procedure shall have a duration of 10 years following the go-live date in order to allow the ESMIG network service provider to recoup the investments made in operating the services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives.

4. Where a concession contract with an ESMIG network service provider is terminated before the end of its duration, but after the successful performance of the Network Acceptance Test, the Market Infrastructure Board, at its sole discretion, may either not award a replacement concession contract, offer it to the participant in the selection procedure that ranked next highest in the ranking list after the selected participants or, if the ranking list does not allow for the previous option, award a new concession contract to another network service provider following a new selection procedure to be carried out by the mandated central bank. The new concession contract shall have a duration of 10 years.

5. The mandated central bank shall be vested with the power to represent the Eurosystem central banks vis-à-vis the ESMIG network service providers and other third parties in relation to the connectivity services as well as to manage the concession contracts in the name and interest of the Eurosystem central banks on an ongoing basis 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 Market Infrastructure Board.
6. 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 concession contracts, and shall report thereon to, and respect any related instructions from the Market Infrastructure Board.
7. The mandated central bank shall receive all notices, declarations and writs of claims, including the service of process, in relation to a concession contract to enable it to fulfil the Eurosystem central banks', and, if any, the mandated central bank's, rights and obligations in relation to a concession contract.
8. 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 concession contracts pursuant to paragraphs 5 to 7.

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 Market Infrastructure 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 prior written advice from the mandated central bank on the issue concerned provided that such advice was sought in writing well in advance; (d) any decision or event beyond the control of the mandated central bank including those which may affect the effectiveness of the concessions 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 Market Infrastructure Board pursuant to Article 3(5).
6. Where legal actions are filed by third parties related to acts or omissions with respect to the selection procedure for which the Eurosystem central banks have 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 takes 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. This mandate shall continue to be in force for 10 years from the go-live date.
2. The expiration of a mandate shall not affect the application of the relevant concession contracts.

Article 7

Entry into force

This Decision shall enter into force on 25 January 2019.

Done at Frankfurt am Main, 23 January 2019.

The President of the ECB
Mario DRAGHI
