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Working Group on TARGET 2
Sonnemannstrasse 20
60314 Frankfurt am Main
Germany

Subject: Revision or recast of the TARGET 2 Guideline

Dear Sylvain,

We would like to thank you for giving the TARGET Working Group the opportunity to comment on the drafting of the T2 Guideline. We have prepared our comments below on the basis of a full recast since we assume that this will be required at some stage even if a more limited revision is undertaken first. We hope you will find these remarks self-explanatory but, if you have any queries, please let us know. For information, we haven't cross-checked all the references.

T2 Guideline - Recital

1. We believe that an explanation of "inapplicability of sanctions to non – Union banks" would be helpful to readers. For example, we understand that although measures undertaken in respect of Banking Union include all banks in the euro area; EU countries outside the euro area have the option to subject their national banking regulators to decisions of the ECB under "close cooperation" agreements but this is only an option.
6. We suggest either that "ie" is changed to "eg" or a more comprehensive description is provided. An example of this could be "ie implementing the euro area's monetary policy, promoting the smooth operation of euro payment systems including the provision of final settlement in central bank money and settlement of payment and securities settlement systems expressed in euro including support for settlement of cash transactions emanating from T2S." We favour the more comprehensive description approach but you will note that we have suggested restricting this to euro. If the original wording arose from wording in the ECB's statutes, we would hope that a suitable compromise wording could be developed.

T2 Guideline

2. We strongly recommend that for ease of reference the definitions are put in alphabetical order.

2(25) We suggest the first line is amended to read “a credit balance on a participant’s PM and/or DCA accounts“. It is also suggested that consideration is given to extending the definition of available liquidity to situations where a CB suspends an account. In addition, we suggest minor redrafting to make it clear that reservation of liquidity can also take place on a PM account (see Article 17 of Annex II).

2(30) A minor point but is suggested that “via the ASI“ is amended to read “via an ASI procedure“.

2(49) We suggest “until it is settled“ is added to this sentence.

2(63) and (64) It is suggested that these two definitions are combined and rationalised including covering DCA to PM transfers.

6(2) It is not clear to us whether “aggregated“ is the appropriate word. For example, if novation takes place, we would suggest that this is stated explicitly.

8. It is suggested that the heading is amended to include reference to DCAs.

10(5) For clarity, we suggest adding “irrespective of the actual loss incurred“.

24. We refer to our correspondence in 2013-2014 (copies attached) in relation to this article. We have noted in particular the third paragraph of your letter dated 6 February 2014 in which you state, inter alia, “The TARGET 2 Guideline addresses the legal construction of TARGET 2 and governs the legal relationship between the Central Banks of the Eurosystem and their responsibilities vi-a-vis each other.” We also acknowledge that the publication “The Law of the European Central Bank“ referred to in the footnote states in section 2.2.2:-

“From the scheme of the Statute, it can be seen that ECB Guidelines are considered to be separate legal instruments to be used for determining legal relations within the ESCB“ However, it also makes the following two statements in the next section 2.2.3:

“The fact that both ECB Guidelines and ECB Instructions are, as a rule, legal instruments used only inside the ESCB does not preclude them from producing certain external effects.“

“The ECB has recognised the possibility that its guidelines and instructions may produce legal effects outside the ECB by publishing the contents of some ECB Guidelines.....“

For the reasons explained in our letter of 18 February 2013, we believe that Article 24 is an example of a Guideline provision which produces such external effects. We note and accept your statement that it is not within your remit to provide a detailed legal analysis but conversely we believe that this Guideline, and specifically Article 24, should be drafted in a clear and unambiguous manner in order to facilitate legal analysis by external parties who may be affected. Consequently, we recommend that redrafting is considered to achieve this.

Finally, we note that you state that implementation of the annexes should be considered for any matters regarding the commitments of the NCBs as TARGET 2 component operators vis-à-vis their national community. We don’t dispute this but whilst Article 37 of Annex II is arguably clearer, it still doesn’t answer all the questions in our letter of 18

February 2013. Our concern is, we believe, justified by the lengthy negotiations required to resolve this issue between Euroclear (UK and I) and the Central Bank of Ireland.

26. The dates presumably need to be updated if the Guideline is recast.

28(2) Since action was required by 20 December 2012, this sub-article does not appear to be relevant any longer.

Annex I – TARGET 2 Governance Arrangements

7. We recommend that Level 2 is allocated formal responsibility for implementing security policies, requirements and controls for the SSP as specified by Level 1.

Annex II – Harmonised Conditions for the Opening and Operation of PM account in TARGET 2

1. We again strongly recommend that for ease of reference the definitions are put in alphabetical order.

1(22) We suggest that this is amended to read “...upon a conforming direct debit instruction from a payee”.

1(44) We suggest that “until it is settled” is added to this sentence.

1(48) It is not clear to us why it is considered necessary to specify “PM to DCA liquidity order” separately.

3(2)(d) To future proof against any changes in oversight policy, we suggest adding “and any other euro retail payment systems which settle through TARGET 2”.

3(2)(e) Whilst this covers T2S transactions, it does not appear to cover situations where settlement of the cash leg takes place in the SSS. These still exist and are likely to do so even after T2S is fully implemented e.g. Euroclear (UK and I).

3(2)(f) We do not understand why this is restricted to “PM to DCA liquidity transfer orders” whereas Article 4(2)(f) of Annex Ila refers to “DCA to DCA liquidity transfer orders, DCA to PM liquidity transfer orders and PM to DCA liquidity transfer orders”.

3(2)(e) The second 3(2)(e) should read 3(2)(g)

13. Again, it is not clear why it is considered necessary to specify “PM to DCA liquidity transfers” separately which appears to be an unnecessary over complication.

24(7) We believe it would be helpful to explain why an executed CAI mode agreement should not be addressed to the managing NCB whereas Article 25(4) requires an executed AL agreement to be provided to the managing NCB.

- 28(2) At the end of the first sentence we suggest adding “which may affect TARGET 2 processing”
30. A minor point but since “technical malfunction of TARGET 2” is defined in Article 1(61), we suggest that it is capitalised. Such capitalisation is a general point.
- 31(2) In order to attempt to mitigate different interpretations dependent on the jurisdiction, we suggest that gross negligence and ordinary negligence are defined.
- 32(2) and (3) We suggest amendment to read “a certified copy of the saved or printed version”.
- 36(4) As defined terms, it is suggested that “event of default” and “insolvency proceedings” are capitalised. However, we suggest that all of this documentation should be reviewed to ensure consistency in the use of defined terms.
- 39(1) In view of their increasing importance, it is suggested that consideration is given to adding a reference to “applicable sanctions”. Also, in order to accommodate instances where the requirements are implemented by means of regulation, it is suggested that “applicable regulation and/or legislation” is substituted for “legislation”.

Appendix II – TARGET 2 Compensation Scheme

- 3(a) We suggest that the issue of negative interest rates should be addressed. If it would be helpful, we shall be happy to provide copies of the latest versions of the European Interbank Compensation Guidelines and European Interbank Liquidity Management Guidelines to show how we have addressed this issue in those documents.

Appendix IV- Business Continuity and Contingency Procedures

- 5(c) Assuming SSP failure affects the whole system, it would seem more logical for the ECB to advise all participants simultaneously. As well as probably being faster, this would also have the added advantage of ensuring a consistent message whilst still allowing participants to raise any queries with their CB. It would also still allow CBs to repeat the message in their own language if considered appropriate.
- 6(d)(i) If “real-time settlement of interfaced securities settlement systems” is intended to refer to use of an ASI, it is not clear why this is restricted to SSS. In any case we believe clarification is desirable.
- 6(d)(iii) It is not clear why DCA to PM liquidity transfers are included but not PM to DCA transfers since this could lead to failure to reimburse auto-coll. For consistency we suggest saying PM as opposed to PMA.
- 8(c) “preventive” is normally spelt “preventative” in English.

Appendix VI – Fee Schedule and Invoicing

1(a) and (b) are restricted to debit entries, so it is not clear why the last sentence refers to “liquidity transfer orders received on a participant’s PM account”.

Annex IIa – Harmonised Conditions for the Opening and Operation of a DCA in TARGET 2

1. For ease of reference, it is again strongly recommended that the definitions are listed in alphabetical order. For identification purposes, it would also be helpful if the definitions are numbered as is done in Annex II.
1. The definition of “Main PM account” should read “and to which any remaining balance” not “on”.
- 4(1) Whilst we accept that by virtue of Guideline ECB/2012/27 TARGET 2 provides RTGS services in respect of T2S transactions for DCA holders, we cannot find any reference in the T2 guideline to ensuring a link with a securities account at a participating CSD. If we are correct, we suggest redrafting to clarify this.
- 4(2) Similar comments apply as to Article 3 of Annex II.
- 18(2) We suggest that this requirement is restricted to incidents which may affect TARGET 2 and/or T2S processing.
- 21(2) Again we suggest that gross negligence and ordinary negligence should be defined in order to attempt to mitigate different interpretations dependent on the jurisdiction concerned.
- 29(1) It is suggested that “(including e-mail)” is added after “in writing” since e-mail is arguably as secure as facsimile if not more so.

Appendix I – Parameters of the DCAs – Technical Specifications

1. Since this appendix appears to relate exclusively to DCAs and use of the T2S technical infrastructure, it is not clear why the first sentence states “Technical requirements for participation in TARGET 2”.

Appendix II – TARGET 2 Compensation Scheme in relation to the opening and the operation of the DCA

2. It is again suggested that the implications of negative interest rates should be addressed.

Appendix III – Terms of reference for capacity and country opinions

- 3.3(a) It is not clear why this sub-section is restricted to processing of liquidity transfer orders and does not include auto-coll transactions including reimbursement thereof.

Appendix IV – Business Continuity and Contingency procedures

7(b) From an English point of view, it is suggested that “preventive” is amended to read “preventative”.

Annex V – Supplemental and modified Harmonised Conditions for the Opening and Operation of a PM account in TARGET2 using internet-based access

2. Again, for ease of reference we suggest listing the definitions in alphabetical order.

4(2)(b) Since we are not clear exactly what restrictions apply to participants using internet – based access we have not commented specifically on this section.

Kind regards,

Roger Jones
Chairman
TARGET Working Group

Denisa Mularova
Secretary
TARGET Working Group