

# The 2019 proposed amendments to the Treaty establishing the European Stability Mechanism

*This document presents the proposed amendments to the Treaty establishing the European Stability Mechanism, following the decisions taken by the Eurogroup and the June 2019 Euro Summit. It complements an EGOV briefing on the ESM features, instruments and accountability. The note outlines the relevant changes and provides a comparison between the current ESM Treaty and the proposed amended one.*

## 1. Overview

The European Stability Mechanism ([ESM](#)) was set up in October 2012, following an *ad hoc* Intergovernmental Treaty ([ESMT](#)) signed on 2 February 2012 by the then 17 Euro Area Member States (EAMS). The ESM provides financial assistance to EAMS facing financial difficulties, conditionally on the implementation of policy measures. Following the accession of Latvia (1 January 2014) and Lithuania (1 January 2015) to the euro, the ESM is now composed of 19 members. A specific [EGOV briefing](#) describes the ESM features, instruments, accountability and recent developments.



The 2019 reform of the ESMT is part of the agenda on deepening the Economic and Monetary Union (EMU). In December 2017, the European Commission presented a [proposal for a Council Regulation](#) on the establishment of the European Monetary Fund, aimed at integrating the ESM into the EU legal framework. Following discussions held in Eurogroup meetings (in particular [December 2018](#) and in [June 2019](#)), the [14 December 2018](#) and the [21 June 2019](#) Euro Summits defined the broad terms of the ESM reform, which maintain its current structure as an intergovernmental arrangement. Finalisation of such amendments is expected by the Euro Summit in December 2019. Following final agreement of the amendments, the draft agreed ESMT would be subject to ratification by the Euro Area Member States.

The proposed ESMT amendments focus on four main areas, briefly discussed below:

- The activities of the ESM, including clarifying and expanding the ESM mandate on economic governance;
- ESM governance issues;
- The precautionary financial assistance instruments; and
- The establishment of the ESM as a backstop to the Single Resolution Fund (SRF).

The Annex provides a comparison of the texts of the draft ESMT agreed by Eurogroup on [14 June 2019](#) and the current version in force.



## 2. Clarifying and expanding ESM mandate on economic governance

The amendments being introduced in the ESMT aim at clarifying and expanding the ESM mandate on economic governance, in particular *vis-a-vis* the Commission. This enhanced role is reflected particularly in Article 3 (“Purposes”), which allows the ESM to “*follow and assess the macroeconomic and financial situation of its Members including the sustainability of their public debt and carry out analysis of relevant information and data.*” Further provisions are presented in Articles 5(6) (g), 12 and 13, as well as in recitals 5A, 5B, 10, 12A, 15A (see the Annex to this document for detailed changes).

Regulation [472/2013](#)<sup>1</sup> does not foresee a specific role for the ESM in the design, implementation or monitoring of financial assistance programmes. Notwithstanding, the Commission and the ESM reached an agreement in [April 2018](#) on their working relations in the context of financial assistance to euro area Member States. The revised ESMT will grant a clear mandate<sup>2</sup> to the ESM Managing Director to be involved in assessing Member States debt sustainability, will provide an explicit legal basis for the Commission and ESM Managing Director “*cooperation within and outside financial assistance*”<sup>3</sup> and will clarify that “*the ESM should not serve the purpose of economic policies coordination among ESM Members for which Union law provides the necessary arrangements.*”<sup>4</sup>.

Specifically, the revised ESMT grants a clear mandate to the ESM Managing Director, together with the Commission and in liaison with the ECB, to:

- negotiate the economic policy conditionality attached to financial assistance and sign the corresponding Memorandum of Understanding (MoU);
- assess Member States debt sustainability and their capacity to repay the received support; and
- monitor compliance with the conditionality attached to the financial assistance facility.

Furthermore, the revised ESMT sets out that actions by the ECB or the Commission under the ESM Treaty commit solely the ESM (recital 10). The text makes explicit the respective role of the institutions (whereas the revised ESMT also adds that the Commission is responsible for ensuring compliance with the EU law, - Article 12(5)).

On debt sustainability analysis, the revised ESMT states that it “*will be carried out on a transparent and predictable basis, while allowing for sufficient margin of judgement*” (recital 12A). Together with the reinforced independence of the Managing Director and of ESM staff, such amendments could facilitate appeasing market concerns as to the potential disturbing impact of a possible debt restructuring following a negative assessment of debt sustainability. The debt sustainability assessment is to be conducted by the Commission in liaison with the ECB and the ESM (and IMF). In case of disagreement between the Commission and the ESM, the Commission will make the overall assessment of the sustainability of public debt<sup>5</sup>, while the ESM will assess the capacity of the ESM Member concerned to repay the ESM.

References to private sector involvement (PSI) and collective action clauses (CACs) are also amended in the revised ESMT. Both instruments may, at least in principle, contribute to reinforcing “market discipline”.

The ESM is given a new mandate related to PSI in case of debt restructuring, namely to “*facilitate the dialogue*” between the Member State requiring financial assistance and its private investors<sup>6</sup>, “*on a voluntary,*

<sup>1</sup> Regulation on the strengthening of economic and budgetary surveillance of member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

<sup>2</sup> Article 13(8) of the revised ESMT.

<sup>3</sup> Recital 5B.

<sup>4</sup> Recital 15A.

<sup>5</sup> See also an EGOV [note on Debt Sustainability Analysis](#)

<sup>6</sup> Public investors seem to have been left out, as was the case in the Greek debt restructuring.

*informal, non-binding, temporary, and confidential basis.*" (recital 12). The current reference to the exceptional nature of PSI remains in the Treaty, although slightly adjusted (recital 12B)<sup>7</sup>.

In what concerns CACs, the amendment foresees introducing single limb aggregation clauses in euro area government bonds from 2022 (Article 12(4) and recital 11). The Economic and Financial Committee will further detail legal modalities to ensure similar legal impact of introducing the new conditions. Single limb aggregation clauses facilitate debt restructuring, as it would allow a single deliberation to amend terms and conditions of bonds across all issuances (i.e., avoiding separate decisions in each issuance and thus limiting holdouts).

### 3. Governance issues: independence, accountability and role of the Managing Director

Interestingly, the revised ESMT establishes ESM Managing Director (and staff) independence and reinforces submission to EU law (Article 7(4) and recital 16). That could help in establishing a clearer separation between the ESM managing Director and staff and the ESM Member States.

In the revised Treaty, ESM members acknowledge *"the current dialogue between the Managing Director and the European Parliament"* (recital 7), and Article 30(5) adds the European Parliament to the list of recipients of the annual report of the ESM Board of Auditors. These are the only references to ESM accountability towards European institutions (contrary to the Commission proposal on a [European Monetary Fund](#) as an EU institution, which would clearly define accountability of the mechanism towards the EP).

The revised ESMT also specifically expands (and clarifies) the Managing Director mandate to encompass:

- (a) Collaborate with the Commission and the ECB to *"ensure full consistency"* of debt sustainability analysis with the framework for economic policy coordination as foreseen in EU law<sup>8</sup>;
- (b) Be entrusted by the Board of Governors to negotiate the economic policy conditionality attached to financial assistance, together with the Commission and the ECB;
- (c) Be entrusted to assess conditions for granting financial assistance (under Article 13), namely whether stability support would be repaid;
- (d) Proposing to grant financial assistance (Article 13(2));

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<sup>7</sup> It may be noted that an initial version of the ESMT, signed on [11 July 2011](#), and which never entered into force (see a Commission [explanatory note](#) on the (then) main features of the ESMT), had a stronger wording on PSI. The (then) Article 12(2) conditioned financial assistance to a Member State, whose debt sustainability could not be restored, to securing private sector involvement. Such Member State would have been required to have a credible plan to restore its debt sustainability with the involvement of the private sector and be subject to ongoing monitoring by the other Member States. In the cases where debt sustainability would be restored through the macroeconomic adjustment programme, the Member State was nevertheless required to *"take initiatives aimed at encouraging the main private investors to maintain their exposure (...)"*. Article 12(2) at the time read: *"An adequate and proportionate form of private-sector involvement shall be sought on a case-by-case basis where financial assistance is received by an ESM Member, in line with IMF practice. The nature and the extent of this involvement shall depend on the outcome of a debt sustainability analysis and shall take due account of the risk of contagion and potential spill-over effects on other Member States of the European Union and third countries. If, on the basis of this analysis, it is concluded that a macro-economic adjustment programme can realistically restore public debt to a sustainable path, the beneficiary ESM Member shall take initiatives aimed at encouraging the main private investors to maintain their exposure. Where it is concluded that a macro economic adjustment programme cannot realistically restore the public debt to a sustainable path, the beneficiary ESM Member shall be required to engage in active negotiations in good faith with its non-official creditors to secure their direct involvement in restoring debt sustainability. In the latter case, the granting of financial assistance will be contingent on the ESM Member having a credible plan for restoring debt sustainability and demonstrating sufficient commitment to ensure adequate and proportionate private-sector involvement. Progress in the implementation of the plan will be monitored under the programme and will be taken into account in the decisions on disbursements."*

<sup>8</sup> The Commission remains, nevertheless, responsible for ensuring that financial assistance operations and the policy intentions reflected in a Letter of Intent are consistent with EU law and any measures of economic policy coordination provided for to the financed Member State

- (e) Be entrusted to negotiate the memorandum of understanding with the assisted Member State, together with the Commission, the ECB and the IMF, whenever possible;
- (f) Preparing the proposal for a financial assistance facility agreement;
- (g) Signing the memorandum of understanding with the assisted Member State and the Commission;
- (h) Be entrusted to monitor conditionality compliance, together with the Commission and whenever possible, the IMF;
- (i) Proposing maintenance of precautionary assistance, despite failure to comply with the attached conditionality;
- (j) Reporting to the Board of Directors on granting disbursement of financial assistance;
- (k) Extending the deadline for a decision on whether to use the backstop to finance a resolution action; and
- (l) Proposing a backstop facility to the Board of Governors and signing the respective facility agreement; propose disbursements under such facility and be entrusted by the Board of Governors to take decisions on disbursement.

#### 4. The ESM precautionary financial assistance instruments

The revised ESMT includes amendments to the precautionary financial instruments in Articles 5(6) (f), 13 (3) and (4), and 14, Annex III and recital 5A. The new features aim at *“enhancing their [the precautionary financial instruments] effectiveness while ensuring the appropriate level of conditionality”*<sup>9</sup>.

The current ESMT foresees two types of precautionary financial assistance instruments: the precautionary conditioned credit line (PCCL) and the enhanced conditions credit line (ECCL). Article 14 of the ESMT does not draw substantial differences between the two precautionary instruments, and entrust the Board of Directors to adopt detailed guidelines on the modalities for its implementation. The current [ESM Guideline on precautionary financial assistance](#), published in October 2012, provides additional details, namely defining the pre-established conditions a Member State has to comply with to have access to the precautionary financial assistance (the so called *“eligibility criteria”* ) and the conditions upon which a Member State may have access to one or the other instrument. Access to both instruments is currently reserved to Member States where the economic and financial situation is still fundamentally sound. Access to the ECCL is open to ESM members that do not fully comply with the criteria for accessing the PCCL and are, therefore, in *“worst”* economic and financial conditions.

The current Article 14 is being extensively revised and strengthened, in particular concerning the conditionality and eligibility criteria. It will also specify that access to a PCCL no longer require a MoU detailing conditionality. [Annex III](#) of the revised ESMT further details the eligibility criteria and the conditions for making available one or the other instrument.

Table 1 below documents the differences introduced by the revised ESMT.

<sup>9</sup> See Eurogroup’s President [letter](#) of 25 June 2018 to the President of the European Council.

**Table 1: Comparison of eligibility and conditionality criteria to access ESM precautionary financial assistance**

	Current ESMT + ESM Guideline 2012	Revised ESMT 2019
General	Fundamentally strong conditions	Fundamentally sound conditions
Eligibility criteria	Respect of commitments under the Stability and Growth Pact or recommendations issued thereunder, even if in Excessive Deficit Procedure	Not in EDP Quantitative benchmarks to be met in the two years preceding the request: <ul style="list-style-type: none"> <li>• general government deficit not exceeding 3% of GDP</li> <li>• structural budget balance at or above the country specific minimum benchmark (*)</li> <li>• general government debt to GDP ratio below 60% or a reduction in the differential with respect to 60 % over the previous two years at an average rate of one twentieth per year</li> </ul>
	Sustainable general government debt	Sustainable general government debt
	Respect of commitments under the macroeconomic imbalance procedure or recommendations issued thereunder, even if under Excessive Imbalance Procedure	Not been identified as experiencing excessive imbalances
	Track record of access to international capital markets on reasonable terms	Track record of access to international capital markets, where relevant, on reasonable terms
	Sustainable external position	Sustainable external position
	Absence of bank solvency problems that would pose systemic threats to the stability of the euro area banking system	Absence of severe financial sector vulnerabilities putting at risk the ESM Member's financial stability
Attached conditionality	Policy conditions detailed in a Memorandum of Understanding	PCCL - Continuous respect of eligibility criteria documented by a Letter of Intent ECCL - Conditionality to be detailed in a Memorandum of Understanding

(\*) The minimum benchmark is, in accordance with Annex III of the revised ESMT, the level of the structural balance providing a safety margin against the 3% Treaty threshold under normal cyclical conditions. It is mainly used as one of three inputs into the calculation of the minimum MTO. See also [here](#).

The comparison shows that the eligibility criteria for acceding precautionary financial assistance are being made more precise and objective, with the goal of clarifying the rules and the role of these instruments for all relevant stakeholders, market players and Member States. This is notably the case for the criteria relating to financial markets stress: in the current ESMT the requirement is linked to financial (in)stability of the euro area as a whole, whilst in the revised ESMT only the financial stability in the concerned Member State is mentioned. At the same time, a Member State that is eligible for PCCL is no longer required to negotiate a MoU; the revised ESMT and Annex III allow *simplified conditionality* ("*continuous compliance with the eligibility criteria*"), to be documented in a Letter of Intent<sup>10</sup>, that reflects whether the Member State' policy intentions "*are fully consistent with the measure of economic policy coordination provided for in the TFEU, in particular with any act of EU law, including any opinion, warning, recommendation...*".

<sup>10</sup> It is not clear whether the substance of a Letter of Intent (LoI) would be different than a MoU. One can argue that a LoI is drafted by the concerned Member State, therefore reinforcing its ownership of the policy. In any case, the LoI would have to contain at least a commitment to continuous compliance with the eligibility criteria and sufficient elements for the ESM BoG to assess whether "*the policy intentions are consistent with the measures of economic policy coordination provided for in the TFEU, including any opinion, warning, recommendations...*").



Notwithstanding, the revised eligibility criteria are stricter than in the current precautionary instruments. First of all, under the current ESMT, Member States in EDP or under a procedure for excessive imbalances could still be eligible for precautionary assistance<sup>11</sup>. That element is absent in the revised ESMT. Secondly, the revised ESMT requires compliance with the eligibility criteria for the two years preceding the request for financial assistance; currently this is not required, at least explicitly.

It remains unclear whether a precautionary credit line would qualify for access to the ECB outright monetary transactions programme (OMT)<sup>12</sup>, which might be one of the reasons why a Member State could consider a precautionary financial assistance<sup>13</sup>. The current wording of the ESMT and the ECB technical explanatory note on OMT do not clarify this either.

The new Article 14 also details extensively the procedure for reviewing access to the precautionary financial assistance, requesting reports from the Commission (as currently foreseen) and the Managing Director on monitoring of assistance granted. The provision will also allow the Board of Directors to decide to maintain financial assistance even if the Member State in question is no longer fulfilling the eligibility requirements. In such cases, the Board of Directors may require an additional margin if the Member State has drawn funds from the facility. The current ESMT does not provide for that increased margin, nor for maintaining the precautionary assistance despite conditions not been complied with. Directors may also decide not to increase the margin if the non-compliance is due to events outside the assisted Member State control. The draft also clarifies that if the credit line is not maintained, another form of financial assistance may be requested and granted.

## 5. The ESM as a backstop to the Single Resolution Fund

From its inception, it was discussed whether the setup of the Single Resolution Fund (SRF) would require a credible (public) backstop allowing it to withstand a more pronounced or generalised banking crisis in the Euro Area<sup>14</sup>. Currently, the ESM may provide funding to failing financial institutions either indirectly - via the indirect recapitalisation instrument - or directly - via the Direct Recapitalisation Instrument (DRI). The DRI will be replaced by the ESM backstopping the SRF, as decided at the 14 December 2018 Euro Summit. The Eurogroup worked on a common backstop for the SRF for some time, as part of its work on completing the Banking Union. The main elements of such new ESM function were outlined in the Eurogroup President's [letter](#) to the the President of the European Council of June 2018. The [4 December 2018 Eurogroup](#) agreed on [terms of reference](#) detailing the main elements of the SRF backstop, which were endorsed by the [14 December 2018 Euro Summit](#).

The backstop facility will take the form of a revolving credit line, under which loans may be provided by the ESM to the SRB. The loans granted will enjoy preferred creditor status, junior only to the International Monetary Fund (IMF) loans. The size of the credit line will be aligned with the target level of the SRF, which is 1% of covered deposits in the Banking Union (currently estimated at around €55 billion). It will be

<sup>11</sup> The current ESM guideline foresees that Member States under EDP or EIP remain eligible insofar they "fully abide[s] by the Council decisions and recommendations aimed at ensuring a smooth and accelerated correction of its excessive deficit (...)" or that they remain "committed to addressing the imbalances identified by the Council".

<sup>12</sup> The ECB technical [explanatory note on OMT](#) states "A necessary condition for Outright Monetary Transactions is strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme. Such programmes can take the form of a full EFSF/ESM macroeconomic adjustment programme or a precautionary programme (Enhanced Conditions Credit Line), provided that they include the possibility of EFSF/ESM primary market purchases. The involvement of the IMF shall also be sought for the design of the country-specific conditionality and the monitoring of such a programme."

<sup>13</sup> A paper by Gregory Claeys and Antoine Mathieu Collin ([Bruegel](#)) suggest reviewing ECB guidance to clarify that even without a MoU a Member State requesting access to a precautionary credit line should have access to the OMT.

<sup>14</sup> The need for a common backstop for dealing with banks under resolution has been discussed at least as early as the [ECON report](#) on the Single Resolution Mechanism Regulation Commission proposal (2013). The EP final report does not refer to the backstop. The [December 2013](#) Ecofin Council agreed a statement on the design of such backstop to "be developed during the transition period [of setting up the SRF]" when adopting the [Council general approach](#) on the Single Resolution Mechanism Regulation. Ministers reverted to the backstop two years later when adopting a [transitional mechanism](#) to facilitate the SRF access to additional financing.

introduced in 2024, but can be available earlier, provided that banks make sufficient progress in reducing their exposure to risks (to be assessed in 2020).

In accordance with the agreement reached at the [June 2019 Eurogroup](#), Articles 3, 5(4) and (6), 6, 12(2), 18A, 20 and 37(4), [Annex IV](#) and recitals 5A, 9A, 13, 14, 15B, 18 of the draft revised ESM Treaty further detail the terms of ESM granting loans to backstop the SRF. In particular, the revised ESM Treaty foresees the ESM backstop being available only insofar the current resolution framework remaining in place, establishes a complex decision making process and foresees the setting up of an early warning system for the ESM to be able to ensure timely receipt of funds disbursed. These aspects are further discussed below.

### 5.1 Conditions to have access to the backstop; *permanence of the legal framework*

Access to the ESM backstop is made dependent of a number of conditions, among them, the *"permanence of the legal framework"*. Such conditions are set out in recital 15B, Article 18A and Annex IV:

- (a) the backstop is a last resort<sup>15</sup>;
- (b) it needs to be fiscally neutral over the medium term<sup>16</sup>;
- (c) there needs to be full compliance with the EU resolution framework (Banking Recovery and resolution Directive and the Single Resolution Mechanism Regulation);
- (d) the legal framework needs to remain in place (*"permanence of the legal framework"*);
- (e) availability of funds to the ESM;
- (f) compliance with the obligations stemming from the Intergovernmental Agreement of 21 May 2014 on the transfer and mutualisation of contributions to the SRF by the relevant authorities of the Member States where resolution is taking place;
- (g) no ongoing event of default on borrowings of the SRB from the ESM or from any other creditor, or, the SRB has presented a satisfactory remedy plan in respect of any such ongoing event of default;
- (h) the relevant resolution scheme is fully compliant with European Union law and has entered into force in accordance with European Union law.

If all the conditions are complied with, the ESM backstop can be required and used to *"support the application of resolution tools and exercise of resolution powers of the SRB as enshrined in European Union law."*

On the other hand, Article 18A(9) of the ESMT defines *permanence of the legal framework* as *"the permanence (...) of the rules defined in Article 9(1) IGA<sup>17</sup>; (...) the permanence of the principles and rules relating to the bail-in tool and to the framework on the minimum requirement for own funds and eligible liabilities laid down in BRRD, the SRM Regulation and Regulation (EU) No 575/2013 (...) to the extent that these principles and rules are relevant for preserving the financial means of the SRF."*<sup>18</sup>. Annex IV further spells out that the BoG may determine *"further provisions on the procedure on the verification of compliance with this condition and on the consequences for the backstop facility and its use"*. A dispute among ESM members as to the compliance with

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<sup>15</sup> Annex IV specifies that this means previous depletion of available SRF funds, ex-post contributions are not sufficient or not immediately available and the Single Resolution Board is not able to borrow on terms and conditions considered acceptable by the Single Resolution Board.

<sup>16</sup> Neutrality over the medium term implies the SRF repaying the loan with money from bank contributions within three years. This period can be extended by up to another two years.

<sup>17</sup> Inter-Governmental Agreement

<sup>18</sup> The backstop facility and its use is dependent upon the maintenance of the rules relating to the adoption of a resolution scheme (Article 18 of SRMR), the SRB decision-making rules (Articles 52 and 55 of SRMR), the general principles concerning resolution (Article 15 of SRMR) and rules on the resolution tools referred to under Article 22(2) of the SRM Regulation (notably those concerning the application of the bail-in tool and their specific thresholds on the imposition of losses on shareholders and on creditors and the contribution of the Fund to a particular resolution action). In simpler terms, should the resolution framework (e.g. bail-in, the 8% bail-in rules or the level of subordinated debt that banks shall hold in accordance with BRRD) be changed or re-negotiated, the backstop facility could lapse.

the *permanence of the legal framework* can be submitted directly to the European Court of Justice in accordance with Article 37(4) of the revised Treaty.

The Commission June 2019 [communication](#) on deepening of the EMU voiced concerns about such clause arguing that “*the Treaty establishing the European Stability Mechanism must not create obstacles to future amendments of EU legislation, which would give rise to fundamental problems affecting the autonomy of the EU legal order. The EU’s banking legislation must remain open to further developments in accordance with the Community method to adjust to changing market circumstances and complete the Banking Union*”.

## 5.2 Governance and decision making

The ESM Board of Governors is entrusted with the main decisions relating to the backstop, namely, to grant and terminate the backstop facility, to define and amend its terms<sup>19</sup>, change the pricing policy and to assess “*permanence of the legal framework*”<sup>20</sup>. A two step procedure is foreseen: first the Board of Governors decide on the setting up of a backstop facility, which can then be activated for a specific resolution.

Within the boundaries set out by Governors in the backstop facility agreement, in the ESMT and its Annex IV, the Board of Directors decides by mutual agreement on loans and disbursements under the backstop facility. This power may be temporarily delegated to the Managing Director. In any case, a decision to activate the backstop should be taken within 12 hours of a request being made by the SRB, but in the case of a particularly complex resolution operation it can be lengthened up to 24 hours.

The Board of Directors’ decision to activate the backstop facility is to be based on assessments of the SRB repayment capacity. An emergency decision making is foreseen when there is a threat to the economy and financial sustainability of the euro area, as separately assessed by the ECB and Commission. Such procedure requires a majority of 85% of the votes cast and cannot be used while an assessment of the *permanence of the legal framework* is ongoing<sup>21</sup>. The ESM will require timely access to the relevant information to be able to make such assessment.

Non-euro area member states that have established a close cooperation with the European Central Bank (ECB) as foreseen in the Single Supervisory Mechanism Regulation are expected to participate alongside the ESM in providing credit lines to the SRF. As such, the revised ESMT foresees their participation, as observers, in relevant meetings where such financial assistance is discussed and evaluated. They would also be entitled to receive the relevant information, to be provided in accordance with procedures to be agreed.

## 5.3 Early warning system

The ESMT requires the ESM to establish an early warning system to ensure full and timely repayment under the backstop facility (Article 18A(7)). The Treaty already foresaw such mechanism for other lending instruments in ESM toolkit. It is expected that the current procedures - which require, namely, the ESM to accompany the Commission in its missions to Member States having received financial assistance - will have to be adjusted.

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<sup>19</sup> The detailed financial terms and conditions of the credit line will be set out in a backstop facility agreement between the ESM and the SRB, approved by the Board of Directors of ESM and signed by the Managing Director.

<sup>20</sup> In case the condition of *permanence of the legal framework* is not complied with the Treaty foresees that continuation of the backstop facility and its use will require a comprehensive review (the text is silent as to whom is to conduct such assessment) and a decision by the Board of Governors.

<sup>21</sup> Additional conditions are set in the ESMT namely, a suspension of the procedure for further reassessment after being used twice and the set-up of a separate buffer to cover the risks arising from the disbursement.



## Annex: Changes introduced in the [draft revised text of the ESMT \(June 2019\)](#)

On 14 June 2019, the Eurogroup broadly agreed the [DRAFT revised text](#) of the *Treaty establishing the European Stability Mechanism*, together with the new [Annexes](#) III (on the Precautionary Conditional Credit Line) and IV (on the backstop facility to the SRF).

The following text presents the draft revised Treaty with new text (**in bold red**) and/or deletions (~~strikethrough~~).

### TREATY

#### ESTABLISHING THE EUROPEAN STABILITY MECHANISM

BETWEEN THE KINGDOM OF BELGIUM, THE FEDERAL REPUBLIC OF GERMANY, THE REPUBLIC OF ESTONIA, IRELAND, THE HELLENIC REPUBLIC, THE KINGDOM OF SPAIN, THE FRENCH REPUBLIC, THE ITALIAN REPUBLIC, THE REPUBLIC OF CYPRUS, THE REPUBLIC OF LATVIA, THE REPUBLIC OF LITHUANIA, THE GRAND DUCHY OF LUXEMBOURG, MALTA, THE KINGDOM OF THE NETHERLANDS, THE REPUBLIC OF AUSTRIA, THE PORTUGUESE REPUBLIC, THE REPUBLIC OF SLOVENIA, THE SLOVAK REPUBLIC AND THE REPUBLIC OF FINLAND

THE CONTRACTING PARTIES, the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland (the "euro area Member States" or "ESM Members");

COMMITTED TO ensuring the financial stability of the euro area;

RECALLING the Conclusions of the European Council adopted on 25 March 2011 on the establishment of a European stability mechanism;

WHEREAS:

The European Council agreed on 17 December 2010 on the need for euro area Member States to establish a permanent stability mechanism. This European Stability Mechanism ("ESM") will assume the tasks currently fulfilled by the European Financial Stability Facility ("EFSF") and the European Financial Stabilisation Mechanism ("EFSM") in providing, where needed, financial assistance to euro area Member States.

(1) On 25 March 2011, the European Council adopted Decision 2011/199/EU amending Article 136 of the Treaty on the Functioning of the European Union ("**TFEU**") with regard to a stability mechanism for Member States whose currency is the euro<sup>22</sup> adding the following paragraph to Article 136: "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

(2) With a view to increasing the effectiveness of the financial assistance and to prevent the risk of financial contagion, the Heads of State or Government of the Member States whose currency is the euro agreed on 21 July 2011 to "increase [the] flexibility [of the ESM] linked to appropriate conditionality".

(3) Strict observance of the European Union **legal** framework, the integrated **framework for fiscal and** macro-economic surveillance, in particular the Stability and Growth Pact, the macroeconomic imbalances framework and the economic governance rules of the European Union, should remain the first line of defence against confidence crises affecting the stability of the euro area.

(4) On 9 December 2011 the Heads of State or Government of the Member States whose currency is the euro agreed to move towards a stronger economic union including a new fiscal compact and strengthened economic policy coordination to be implemented through an international agreement, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union ("TSCG"). The TSCG will help develop a closer coordination within the euro area with a view to ensuring a lasting, sound and robust management of public finances and thus addresses

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<sup>22</sup> OJ L 91, 6.4.2011, p. 1

one of the main sources of financial instability. This Treaty and the TSCG are complementary in fostering fiscal responsibility and solidarity within the economic and monetary union. It is acknowledged and agreed that the granting of financial assistance in the framework of new programmes under the ESM will be conditional, as of 1 March 2013, on the ratification of the TSCG by the ESM Member concerned and, upon expiration of the transposition period referred to in Article 3(2) TSCG on compliance with the requirements of that article.

**(5A) At the Euro Summit of 29 June 2018 in inclusive format, the Heads of State or Government of the Member States whose currency is the euro stated that the ESM will provide the common backstop to the Single Resolution Fund ("SRF") and be strengthened on the basis of the elements set out in the letter of the President of the Euro Group dated 25 June 2018. At the Euro Summit of 14 December 2018 in inclusive format, the Heads of State or Government of the Member States whose currency is the euro endorsed the terms of reference of said common backstop to be provided by the ESM, as well as a term sheet on the reform of the ESM. The term sheet on the reform of the ESM foresees that at the latest by the end of the transitional period, the common backstop to the SRF will be established. The term sheet on the reform of the ESM also foresees that the effectiveness of precautionary financial assistance instruments will be enhanced for ESM Members with sound economic fundamentals, which could be affected by an adverse shock beyond their control. In line with the joint position on future cooperation between the European Commission and the ESM as annexed to the term sheet on the reform of the ESM regarding the eligibility assessment under the precautionary credit line, depending on the precise scope of the eligibility criteria, the European Commission and the ESM will assume their respective roles in line with EU law, the ESM Treaty and ESM guidelines. The term sheet on the reform of the ESM also foresees that an additional margin will be applied in case an ESM Member having been granted ESM precautionary financial assistance fails to comply with the conditionality attached to it after having drawn funds, unless such non-compliance is due to events beyond the control of the government. The term sheet on the reform of the ESM furthermore highlights that conditionality remains an underlying principle of the ESM Treaty and all ESM instruments, but the exact terms need to be adapted to each instrument.**

**(5B) The joint position on future cooperation between the ESM and the European Commission sets out the agreement on new modalities of cooperation within and outside financial assistance programmes. The European Commission and the ESM share common objectives and will exercise specific tasks related to crisis management for the euro area on the basis of European Union law and the ESM Treaty. Therefore, the two institutions will work closely together on ESM crisis management measures with an efficient governance in pursuit of financial stability by complementing expertise. The European Commission ensures consistency with European Union law, in particular with the economic policy coordination framework. The ESM performs its analysis and assessment from the perspective of a lender. The joint position on future cooperation will be fully incorporated in a memorandum of cooperation, as set out in Article 13(8), when the amendments to this Treaty enter into force.**

(6) Given the strong interrelation within the euro area, severe risks to the financial stability of Member States whose currency is the euro may put at risk the financial stability of the euro area as a whole. The ESM may therefore provide stability support on the basis of a strict conditionality, appropriate to the financial assistance instrument chosen if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. The initial maximum lending volume of the ESM is set at EUR 500 000 million, including the outstanding EFSF stability support. The adequacy of the consolidated ESM and EFSF maximum lending volume will, however, be reassessed prior to the entry into force of this Treaty. If appropriate, it will be increased by the Board of Governors of the ESM, in accordance with Article 10, upon entry into force of this Treaty.

**(7) All euro area Member States will become ESM Members. As a consequence of joining the euro area, a Member State of the European Union should become an ESM Member with full rights and obligations, in line with those of the Contracting Parties. ESM Members acknowledge the current dialogue between the Managing Director and the European Parliament.**

(8) The ESM will cooperate very closely with the International Monetary Fund ("IMF") in providing stability support. The active participation of the IMF will be sought, both at technical and financial level. A euro area Member State requesting financial assistance from the ESM is expected to address, whenever **possible-appropriate**, a similar request to the IMF.

(9) Member States of the European Union whose currency is not the euro ("non euro area Member States") participating on an ad hoc basis alongside the ESM in a stability support operation for euro area Member States will be invited to participate, as observers, in the ESM meetings when this stability support and its monitoring will be discussed. They will have access to all information in a timely manner and be properly consulted.

**(9A) Member States of the European Union whose currency is not the euro and which have established a close cooperation with the European Central Bank (“ECB”) in accordance with Council Regulation (EU) No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (“SSM Regulation”) are expected to provide parallel credit lines for the SRF alongside the ESM. They will participate in the common backstop on equivalent terms. Representatives of those Member States (“Participating Member States”) will be invited to attend meetings of the Board of Governors and Board of Directors as observers in which matters regarding the common backstop will be discussed and should have the same access to information. Appropriate arrangements for sharing of information and timely coordination between the ESM and Participating Member States should be established. Representatives of the Single Resolution Board (“SRB”) may be invited as observers on an ad hoc basis to attend meetings of the Board of Governors and the Board of Directors in which backstop financing will be discussed.**

(10) On 20 June 2011, the representatives of the Governments of the Member States of the European Union authorised the Contracting Parties of this Treaty to request the European Commission and the ~~European Central Bank (“ECB”)~~ to perform the tasks provided for in this Treaty. **It is acknowledged that the duties conferred within this Treaty on the European Commission and the ECB do not entail any powers to make decisions of their own and that the tasks executed by those two institutions on the basis of this Treaty solely commit the ESM.**

(11) In its statement of 28 November 2010, the Euro Group stated that standardised and identical Collective Action Clauses (“CACs”) will be included, in such a way as to preserve market liquidity, in the terms and conditions of all new euro area government bonds. As requested by the European Council on 25 March 2011, the detailed legal arrangements for including CACs in euro area government securities were finalised by the Economic and Financial Committee. **Following introduction of these CACs as of 1 January 2013, ESM Members commit to introduce CACs providing for single-limb aggregated voting (“single-limb CACs”) by 2022. The detailed legal modalities will be agreed within the Economic and Financial Committee, taking into account national constitutional requirements, so that single-limb CACs will be implemented by all ESM Members in new euro area government securities in a way which ensures that their legal impact is identical.**

~~(12) In accordance with IMF practice, in exceptional cases an adequate and proportionate form of private sector involvement~~ **Upon request by an ESM Member and where appropriate, the ESM may facilitate the dialogue between that ESM Member and its private investors on a voluntary, informal, non-binding, temporary, and confidential basis.**

**(12A) The ESM should provide stability support only to ESM Members whose debt is considered sustainable and whose repayment capacity to the ESM is confirmed. The assessment of debt sustainability and repayment capacity will be carried out on a transparent and predictable basis, while allowing for sufficient margin of judgment. Such assessments will be carried out by the European Commission in liaison with the ECB, and the ESM and wherever appropriate and possible together with the IMF in line with this Treaty, European Union law and the memorandum of cooperation entered into pursuant to Article 13(8). In case the collaboration does not yield a common view, the European Commission will make the overall assessment of the sustainability of public debt, while the ESM will assess the capacity of the ESM Member concerned to repay the ESM.**

**(12B) In exceptional cases an adequate and proportionate form of private sector involvement, in accordance with IMF practice,** shall be considered in cases where stability support is provided accompanied by conditionality in the form of a macro-economic adjustment programme.

**(13) Like the IMF, the ESM will provide stability support to an ESM Member when its regular access to market financing is impaired or is at risk of being impaired. Reflecting this, Heads of State or Government have stated that the ESM loans will enjoy preferred creditor status in a similar fashion to those of the IMF, while accepting preferred creditor status of the IMF over the ESM. This status will be effective as of the date of entry into force of this Treaty. In the event of ESM financial assistance in the form of ESM loans following a European financial assistance programme existing at the time of the signature of this Treaty, the ESM will enjoy the same seniority as all other loans and obligations of the beneficiary ESM Member, with the exception of the IMF loans. Backstop loans to the SRB by the ESM are to enjoy preferred creditor status in a similar fashion to other ESM loans.**

**(14) The euro area Member States will support equivalent creditor status of the ESM and that of other States lending bilaterally in coordination with the ESM, including in relation to backstop loans to the SRB.**

(15) ESM lending conditions for Member States subject to a macroeconomic adjustment programme, including those referred to in Article 40 of this Treaty, shall cover the financing and operating costs of the ESM and should be

consistent with the lending conditions of the Financial Assistance Facility Agreements signed between the EFSF, Ireland and the Central Bank of Ireland on the one hand and the EFSF, the Portuguese Republic and Banco de Portugal on the other.

**(15A) Article 2(3) TFEU sets out that the Member States of the European Union shall coordinate their economic policies within arrangements determined by the TFEU. In accordance with Articles 5(1) TFEU and 121 TFEU the Member States of the European Union shall coordinate their economic policies within the Council of the European Union. Accordingly, the ESM should not serve the purpose of economic policies coordination among ESM Members for which European Union law provide the necessary arrangements. The ESM respects the powers conferred by European Union law on the Union institutions and bodies.**

**(15B) ESM Members recognise that swift and efficient decision-making under the backstop facility and coordination with Participating Member States participating alongside the ESM in backstop financing for the SRF is critical to ensure the effectiveness of the common backstop and of resolutions financed therewith, as reflected by the terms of reference of the common backstop endorsed by the Heads of State or Government of the Member States whose currency is the euro at the Euro Summit of 14 December 2018 in inclusive format. The terms of reference foresee criteria for disbursements under the backstop facility including inter alia the principles of last resort and fiscal neutrality over the medium term, full compliance with Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 ("SRM Regulation") and with the Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012 ("BRRD"), and permanence of the legal framework. The terms of reference also foresee a decision by the ESM on the use of the backstop, as a rule, within 12 hours as of the request by the SRB extendable by the Managing Director to 24 hours in exceptional cases, especially in the case of a particularly complex resolution operation, while respecting national constitutional requirements.**

**(16) The independence of the Managing Director and staff of the ESM is recognised by this Treaty. It should be exercised in a manner such that, where relevant and as provided for in this Treaty, consistency is preserved with European Union law, whose application is overseen by the European Commission.**

~~(16)~~ (17) Disputes concerning the interpretation and application of this Treaty arising between the Contracting Parties or between the Contracting Parties and the ESM should be submitted to the jurisdiction of the Court of Justice of the European Union, in accordance with Article 273 of the Treaty on the Functioning of the European Union ("TFEU").

~~(17)~~ **(18) The ESM will establish appropriate warning systems with the aim of ensuring that it receives any repayments due under stability support or the backstop facility in a timely manner.** Post-programme surveillance will be carried out by the European Commission in liaison with the ECB, and by the Council of the European Union within the framework laid down ~~in~~ **pursuant to** Articles 121 and 136 TFEU,

HAVE AGREED AS FOLLOWS:

## CHAPTER 1

### MEMBERSHIP AND PURPOSE

#### ARTICLE 1

##### Establishment and members

1. By this Treaty, the Contracting Parties establish among themselves an international financial institution, to be named the "European Stability Mechanism" ("ESM").
2. The Contracting Parties are ESM Members.

#### ARTICLE 2

##### New members

1. Membership in the ESM shall be open to the other Member States of the European Union as from the entry into force of the decision of the Council of the European Union taken in accordance with Article 140(2) TFEU to abrogate their derogation from adopting the euro.
2. New ESM Members shall be admitted on the same terms and conditions as existing ESM Members, in accordance with Article 44.
3. A new member acceding to the ESM after its establishment shall receive shares in the ESM in exchange for its capital contribution, calculated in accordance with the contribution key provided for in Article 11.

#### ARTICLE 3

##### Purposes

1. The purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. ~~For this purpose~~ **Where relevant in order to internally prepare and enable it to appropriately and in a timely manner pursue the tasks conferred on it by this Treaty, the ESM may follow and assess the macroeconomic and financial situation of its Members including the sustainability of their public debt and carry out analysis of relevant information and data. To this end, the Managing Director shall collaborate with the European Commission and the ECB to ensure full consistency with the framework for economic policy coordination provided for in the TFEU.**
2. **The ESM may provide the backstop facility to the SRB for the SRF to support the application of the resolution tools and exercise of resolution powers of the SRB as enshrined in European Union law.**
3. **For these purposes**, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties.
4. **Without prejudice to paragraph 1, the conditionality applied shall be appropriate to the financial assistance instrument chosen, as laid down in this Treaty.**

#### CHAPTER 2

#### GOVERNANCE

#### ARTICLE 4

##### Structure and voting rules

1. The ESM shall have a Board of Governors and a Board of Directors, as well as a Managing Director and other dedicated staff as may be considered necessary.
2. The decisions of the Board of Governors and the Board of Directors shall be taken by mutual agreement, qualified majority or simple majority as specified in this Treaty. In respect of all decisions, a quorum of 2/3 of the members with voting rights representing at least 2/3 of the voting rights must be present.
3. The adoption of a decision by mutual agreement requires the unanimity of the members participating in the vote. Abstentions do not prevent the adoption of a decision by mutual agreement.
4. By way of derogation from paragraph 3, an emergency voting procedure shall be used where the **European Commission** and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance, as defined in Articles 13 to 18, would threaten the economic and financial sustainability of the euro area. The adoption of a decision by mutual agreement by the Board of Governors referred to in points (f) and (g) of Article 5(6) and the Board of Directors under that emergency procedure requires a qualified majority of 85% of the votes cast. Where the emergency procedure referred to in the first subparagraph is used, a transfer from the reserve fund and/or the paid-in capital to an emergency reserve fund is made in order to constitute a dedicated buffer to cover the risks arising from the financial support granted under that emergency procedure. The Board of Governors may decide to cancel the emergency reserve fund and transfer its content back to the reserve fund and/or paid-in capital.
5. The adoption of a decision by qualified majority requires 80 % of the votes cast.
6. The adoption of a decision by simple majority requires a majority of the votes cast.



7. The voting rights of each ESM Member, as exercised by its appointee or by the latter's representative on the Board of Governors or Board of Directors, shall be equal to the number of shares allocated to it in the authorised capital stock of the ESM as set out in Annex II.

8. If any ESM Member fails to pay any part of the amount due in respect of its obligations in relation to paid-in shares or calls of capital under Articles 8, 9 and 10, or in relation to the reimbursement of the financial assistance under Article 16 or 17, such ESM Member shall be unable, for so long as such failure continues, to exercise any of its voting rights. The voting thresholds shall be recalculated accordingly.

## ARTICLE 5

### Board of Governors

1. Each ESM Member shall appoint a Governor and an alternate Governor. Such appointments are revocable at any time. The Governor shall be a member of the government of that ESM Member who has responsibility for finance. The alternate Governor shall have full power to act on behalf of the Governor when the latter is not present.

2. The Board of Governors shall decide either to be chaired by the President of the Euro Group, as referred to in Protocol (No 14) on the Euro Group annexed to the Treaty on the European Union and to the TFEU or to elect a Chairperson and a Vice-Chairperson from among its members for a term of two years. The Chairperson and the Vice-Chairperson may be re-elected. A new election shall be organised without delay if the incumbent no longer holds the function needed for being designated Governor.

3. The Member of the European Commission in charge of economic and monetary affairs and the President of the ECB, as well as the President of the Euro Group (if he or she is not the Chairperson or a Governor) may participate in the meetings of the Board of Governors as observers.

4. Representatives of non-euro area Member States participating on an *ad hoc* basis alongside the ESM in a stability support operation for a euro area Member State shall also be invited to participate, as observers, in the meetings of the Board of Governors when this stability support and its monitoring will be discussed. **Representatives of Participating Member States participating alongside the ESM in backstop financing for the SRF shall also be invited to participate, as observers, in the meetings of the Board of Governors when matters regarding the common backstop will be discussed.**

5. Other persons, including representatives of institutions or organisations, such as the IMF, may be invited by the Board of Governors to attend meetings as observers on an *ad hoc* basis.

6. The Board of Governors shall take the following decisions by mutual agreement:

(a) to cancel the emergency reserve fund and transfer its content back to the reserve fund and/or paid-in capital, in accordance with Article 4(4), **to cancel the suspension of the application of Article 18A(6) first subparagraph, to change the voting majority required for an adoption of a decision on loans and respective disbursements under the backstop facility under the emergency voting procedure and set the circumstances in which a review is to take place in the future, in accordance with Article 18A(6) third subparagraph;**

(b) to issue new shares on terms other than at par, in accordance with Article 8(2);

(c) to make the capital calls, in accordance with Article 9(1);

(d) to change the authorised capital stock and adapt the maximum lending volume of the ESM, in accordance with Article 10(1);

(e) to take into account a possible update of the key for the subscription of the ECB capital, in accordance with Article 11(3), and the changes to be made to Annex I in accordance with Article 11(6);

(f) to provide stability support by the ESM, including the economic policy conditionality as stated in the memorandum of understanding referred to in Article 13(3) **or as referred to in Article 14(2), to change the eligibility criteria for precautionary financial assistance set out in Annex III in accordance with Article 14(1)**, and to establish the choice of instruments and the financial terms and conditions, in accordance with Articles 12 to 18;

(g) to ~~give a mandate~~ **entrust i) the Managing Director and ii) the European Commission to negotiate**, in liaison with the ECB, **together to negotiate** the economic policy conditionality attached to each financial assistance, in accordance with Article 13(3);

**(g bis) to grant a backstop facility, in accordance with the first subparagraph of Article 18A(1), to change the criteria for the approval of loans and disbursements under the backstop facility set out in Annex IV in**

**accordance with the second subparagraph of Article 18A(1), to determine any of the elements set out in the third subparagraph of Article 18A(1), and to decide on the termination or continuation of such backstop facility in accordance with Article 18A(1) and (8);**

- (h) to change the pricing policy and pricing guideline for financial assistance **or the backstop facility for the SRF**, in accordance with Article 20;
- (i) to change the list of financial assistance instruments that may be used by the ESM, in accordance with Article 19;
- (j) to establish the modalities of the transfer of EFSF support to the ESM, in accordance with Article 40;
- (k) to approve the application for membership of the ESM by new members, referred to in Article 44;
- (l) to make adaptations to this Treaty as a direct consequence of the accession of new members, including changes to be made to the distribution of capital among ESM Members and the calculation of such a distribution as a direct consequence of the accession of a new member to the ESM, in accordance with Article 44; and
- (m) to delegate to the Board of Directors the tasks listed in this Article.

7. The Board of Governors shall take the following decisions by qualified majority:

- (a) to set out the detailed technical terms of accession of a new member to the ESM, in accordance with Article 44;
- (b) whether to be chaired by the President of the Euro Group or to elect, by qualified majority, the Chairperson and Vice-Chairperson of the Board of Governors, in accordance with paragraph 2;
- (c) to set out by-laws of the ESM and the rules of procedure applicable to the Board of Governors and Board of Directors (including the right to establish committees and subsidiary bodies), in accordance with paragraph 9;
- (d) to determine the list of activities incompatible with the duties of a Director or an alternate Director, in accordance with Article 6(8);
- (e) to appoint and to end the term of office of the Managing Director, in accordance with Article 7;
- (f) to establish other funds, in accordance with Article 24;
- (g) on the actions to be taken for recovering a debt from an ESM Member, in accordance with Article 25(2) and (3);
- (h) to approve the annual accounts of the ESM, in accordance with Article 27(1);
- (i) to appoint the members of the Board of Auditors, in accordance with Article 30(1);
- (j) to approve the external auditors, in accordance with Article 29;
- (k) to waive the immunity of the Chairperson of the Board of Governors, a Governor, alternate Governor, Director, alternate Director or the Managing Director, in accordance with Article 35(2);
- (l) to determine the taxation regime applicable to the ESM staff, in accordance with Article 36(5);
- (m) on a dispute, in accordance with Article 37(2); and
- (n) any other necessary decision not explicitly provided for by this Treaty.

8. The Chairperson shall convene and preside over the meetings of the Board of Governors. The Vice-Chairperson shall preside over these meetings when the Chairperson is unable to participate.

9. The Board of Governors shall adopt their rules of procedure and the by-laws of the ESM.

## ARTICLE 6

### Board of Directors

1. Each Governor shall appoint one Director and one alternate Director from among people of high competence in economic and financial matters. Such appointments shall be revocable at any time. The alternate Directors shall have full power to act on behalf of the Director when the latter is not present.

2. The Member of the European Commission in charge of economic and monetary affairs and the President of the ECB may appoint one observer each.

3. Representatives of non-euro area Member States participating on an *ad hoc* basis alongside the ESM in a financial assistance operation for a euro area Member State shall also be invited to participate, as observers, in the meetings of the Board of Directors when this financial assistance and its monitoring will be discussed. **Representatives of Participating Member States participating alongside the ESM in backstop financing for the SRF shall also be invited to participate, as observers, in the meetings of the Board of Directors when matters regarding the common backstop will be discussed.**
4. Other persons, including representatives of institutions or organisations, may be invited by the Board of ~~Governors~~ **Directors** to attend meetings as observers on an ad hoc basis.
5. The Board of Directors shall take decisions by qualified majority, unless otherwise stated in this Treaty. Decisions to be taken on the basis of powers delegated by the Board of Governors shall be adopted in accordance with the relevant voting rules set in Article 5(6) and (7).
6. Without prejudice to the powers of the Board of Governors as set out in Article 5, the Board of Directors shall ensure that the ESM is run in accordance with this Treaty and the by-laws of the ESM adopted by the Board of Governors. It shall take decisions as provided for in this Treaty or which are delegated to it by the Board of Governors.
7. Any vacancy in the Board of Directors shall be immediately filled in accordance with paragraph 1.
8. The Board of Governors shall lay down what activities are incompatible with the duties of a Director or an alternate Director, the by-laws of the ESM and rules of procedure of the Board of Directors.

## ARTICLE 7

## Managing Director

1. The Managing Director shall be appointed by the Board of Governors from among candidates having the nationality of an ESM Member, relevant international experience and a high level of competence in economic and financial matters. Whilst holding office, the Managing Director may not be a Governor or Director or an alternate of either.
2. The term of office of the Managing Director shall be five years. He or she may be re-appointed once. The Managing Director shall, however, cease to hold office when the Board of Governors so decides.
3. The Managing Director shall chair the meetings of the Board of Directors and shall participate in the meetings of the Board of Governors.
4. The Managing Director shall be chief of the staff of the ESM. He or she shall be responsible for organising, appointing and dismissing staff in accordance with staff rules to be adopted by the Board of Directors. **The Managing Director and the staff of the ESM shall be responsible only to the ESM and shall be completely independent in the performance of their duties.**
5. The Managing Director shall be the legal representative of the ESM and shall conduct, under the direction of the Board of Directors, the current business of the ESM.

## CHAPTER 3

## CAPITAL

## ARTICLE 8

## Authorised capital stock

1. The authorised capital stock shall be EUR 704 798.7 million. It shall be divided into seven million forty-seven thousand nine hundred and eighty-seven shares, having a nominal value of EUR 100 000 each, which shall be available for subscription according to the initial contribution key provided for in Article 11 and calculated in Annex I.
2. The authorised capital stock shall be divided into paid-in shares and callable shares. The initial total aggregate nominal value of paid-in shares shall be EUR 80 548.4 million. Shares of authorised capital stock initially subscribed shall be issued at par. Other shares shall be issued at par, unless the Board of Governors decides to issue them in special circumstances on other terms.
3. Shares of authorised capital stock shall not be encumbered or pledged in any manner whatsoever and they shall not be transferable, with the exception of transfers for the purposes of implementing adjustments of the contribution

key provided for in Article 11 to the extent necessary to ensure that the distribution of shares corresponds to the adjusted key.

4. ESM Members hereby irrevocably and unconditionally undertake to provide their contribution to the authorised capital stock, in accordance with their contribution key in Annex I. They shall meet all capital calls on a timely basis in accordance with the terms set out in this Treaty.

5. The liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price. No ESM Member shall be liable, by reason of its membership, for obligations of the ESM. The obligations of ESM Members to contribute to the authorised capital stock in accordance with this Treaty are not affected if any such ESM Member becomes eligible for, or is receiving, financial assistance from the ESM.

#### ARTICLE 9

##### Capital calls

1. The Board of Governors may call in authorised unpaid capital at any time and set an appropriate period of time for its payment by the ESM Members.

2. The Board of Directors may call in authorised unpaid capital by simple majority decision to restore the level of paid-in capital if the amount of the latter is reduced by the absorption of losses below the level established in Article 8(2), as may be amended by the Board of Governors following the procedure provided for in Article 10, and set an appropriate period of time for its payment by the ESM Members.

3. The Managing Director shall call authorised unpaid capital in a timely manner if needed to avoid the ESM being in default of any scheduled or other payment obligation due to ESM creditors. The Managing Director shall inform the Board of Directors and the Board of Governors of any such call. When a potential shortfall in ESM funds is detected, the Managing Director shall make such capital call(s) as soon as possible with a view to ensuring that the ESM shall have sufficient funds to meet payments due to creditors in full on their due date. ESM Members hereby irrevocably and unconditionally undertake to pay on demand any capital call made on them by the Managing Director pursuant to this paragraph, such demand to be paid within seven days of receipt.

4. The Board of Directors shall adopt the detailed terms and conditions which shall apply to calls on capital pursuant to this Article.

#### ARTICLE 10

##### Changes in authorised capital stock

1. The Board of Governors shall review regularly and at least every five years the maximum lending volume and the adequacy of the authorised capital stock of the ESM. It may decide to change the authorised capital stock and amend Article 8 and Annex II accordingly. Such decision shall enter into force after the ESM Members have notified the Depositary of the completion of their applicable national procedures. The new shares shall be allocated to the ESM Members according to the contribution key provided for in Article 11 and in Annex I.

2. The Board of Directors shall adopt the detailed terms and conditions which shall apply to all or any capital changes made under paragraph 1.

3. Upon a Member State of the European Union becoming a new ESM Member, the authorised capital stock of the ESM shall be automatically increased by multiplying the respective amounts then prevailing by the ratio, within the adjusted contribution key provided for in Article 11, between the weighting of the new ESM Member and the weighting of the existing ESM Members.

#### ARTICLE 11

##### Contribution key

1. The contribution key for subscribing to ESM authorised capital stock shall, subject to paragraphs 2 and 3, be based on the key for subscription, by the national central banks of ESM Members, of the ECB's capital pursuant to Article 29 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (the "ESCB Statute") annexed to the Treaty on European Union and to the TFEU.

2. The contribution key for the subscription of the ESM authorised capital stock is specified in Annex I.

3. The contribution key for the subscription of the ESM authorised capital stock shall be adjusted when:

- (a) a Member State of the European Union becomes a new ESM Member and the ESM's authorised capital stock automatically increases, as specified in Article 10(3); or
- (b) the twelve year temporary correction applicable to an ESM Member established in accordance with Article 42 ends.
4. The Board of Governors may decide to take into account possible updates to the key for the subscription of the ECB's capital referred to in paragraph 1 when the contribution key is adjusted in accordance with paragraph 3 or when there is a change in the authorised capital stock, as specified in Article 10(1).
5. When the contribution key for the subscription of the ESM authorised capital stock is adjusted, the ESM Members shall transfer among themselves authorised capital stock to the extent necessary to ensure that the distribution of authorised capital stock corresponds to the adjusted key.
6. Annex I shall be amended upon decision by the Board of Governors upon any adjustment referred to in this Article.
7. The Board of Directors shall take all other measures necessary for the application of this Article.

CHAPTER 4  
OPERATIONS  
ARTICLE 12  
Principles

1. If indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions.

**2. The ESM may provide the backstop facility for the SRF, without prejudice to European Union law and the competences of European Union institutions and bodies. Loans under the backstop facility shall only be granted as a last resort and to the extent that it is fiscally neutral in the medium term.**

~~2.3.~~ Without prejudice to Article 19, ESM stability support may be granted through the instruments provided for in Articles 14 to 18.

~~3.4.~~ Collective action clauses shall be included, as of 1 January 2013, in all new euro area government securities, with maturity above one year, in a way which ensures that their legal impact is identical. **Single-limb aggregated voting shall apply to all new euro area government securities, with maturity above one year, issued on or after 1 January 2022.**

**5. When exercising the tasks conferred on it in this Treaty, the European Commission will ensure that financial assistance operations provided by the ESM under this Treaty are, where relevant, consistent with European Union law, in particular with the measures of economic policy coordination provided for in the TFEU.**

ARTICLE 13

Procedure for granting stability support

1. An ESM Member may address a request for stability support to the Chairperson of the Board of Governors. Such a request shall indicate the financial assistance instrument(s) to be considered. On receipt of such a request, **both i) the Chairperson of the Board of Governors shall entrust Managing Director and ii) the European Commission; in liaison with the ECB, with shall be entrusted by the Chairperson of the Board of Governors to together discharge** the following tasks:

- (a) to assess the existence of a risk to the financial stability of the euro area as a whole or of its Member States, unless the ECB has already submitted an analysis under Article 18(2);
- (b) to assess whether public debt is sustainable **and whether stability support can be repaid. This assessment shall be conducted in a transparent and predictable manner while allowing for sufficient margin of judgment.** Wherever appropriate and possible, such an assessment is expected to be conducted together with the IMF;
- (c) to assess the actual or potential financing needs of the ESM Member concerned.



2. On the basis of the request of the ESM Member and the assessments referred to in paragraph 1, **a proposal by the Managing Director based on these assessments and, where applicable, the positive assessments referred to in Article 14(1) and (2),** the Board of Governors may decide to grant, in principle, stability support to the ESM Member concerned in the form of a financial assistance facility.

3. If a decision pursuant to paragraph 2 is adopted **other than with respect to a precautionary conditioned credit line,** the Board of Governors shall **entrust i) the Managing Director and ii) the European Commission** – in liaison with the ECB, **together** and, wherever possible, **also** together with the IMF–, with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (an "MoU") detailing the conditionality attached to the financial assistance facility. The content of the MoU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen. ~~In parallel, the~~ **The** Managing Director of the ESM shall prepare a proposal for a financial assistance facility agreement, including the financial terms and conditions and the choice of instruments, to be adopted by the Board of Governors.

The MoU shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned.

4. ~~The European Commission MoU shall sign the MoU~~ **be signed** on behalf of the ESM **by the European Commission and the Managing Director,** subject to prior compliance with the conditions set out in paragraph 3 and approval by the Board of Governors.

5. The Board of Directors shall approve the financial assistance facility agreement detailing the financial aspects of the stability support to be granted and, where applicable, the disbursement of the first tranche of the assistance.

6. The ESM shall establish an appropriate warning system to ensure that it receives any repayments due by the ESM Member under the stability support in a timely manner.

7. ~~The~~ **Both i) the Managing Director and ii) the** European Commission – in liaison with the ECB, **together** and, wherever possible, **also** together with the IMF–, shall be entrusted with monitoring compliance with the conditionality attached to the financial assistance facility.

**8. Subject to prior approval by the Board of Directors by mutual agreement, the ESM may enter into a memorandum of cooperation with the European Commission detailing the cooperation between the Managing Director and the European Commission in carrying out the tasks entrusted to them pursuant to paragraphs 1, 3 and 7, and referred to in Article 3(1).**

## ARTICLE 14

### ESM precautionary financial assistance

**1. ESM precautionary financial assistance instruments provide support to ESM Members with sound economic fundamentals which could be affected by an adverse shock beyond their control.** The Board of Governors may decide to grant precautionary financial assistance **to an ESM Member whose government debt is sustainable** in the form of a precautionary conditioned credit line or in the form of an enhanced conditions credit line in accordance with Article 12(1), **subject to the fulfilment of eligibility criteria to be applied for each type of such assistance as provided for in Annex III.**

~~2. The conditionality attached~~ **Board of Governors may decide to change the eligibility criteria for ESM precautionary financial assistance and amend Annex III accordingly. Such amendment shall enter into force after the ESM Members have notified the Depository of the completion of their applicable national procedures.**

**2. The conditionality attached to a precautionary conditioned credit line shall consist of continuous respect of the eligibility criteria provided for in Annex III to which the ESM Member concerned shall commit in its signed request pursuant to Article 13(1) highlighting its main policy intentions ("Letter of Intent"). On receipt of such a Letter of Intent, the Chairperson of the Board of Governors shall entrust the European Commission with the task to assess whether the policy intentions included in the Letter of Intent are fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned. By way of derogation from Article 13(3) and Article 13(4), no MoU shall be negotiated.**

**3. The conditionality attached to an enhanced conditions credit line shall be detailed in the MoU, in accordance with Article 13(3) and be coherent with the eligibility criteria provided for in Annex III.**

~~3.4.~~ The financial terms and conditions of the ESM precautionary financial assistance shall be specified in a precautionary financial assistance facility agreement, to be signed by the Managing Director.

~~4.5.~~ The Board of Directors shall adopt the detailed guidelines on the modalities for implementing the ESM precautionary financial assistance.

~~5.6.~~ The Board of Directors shall ~~decide by mutual agreement on a proposal from the Managing Director and after having received a report from the European Commission in accordance with Article 13(7), whether the credit line should be maintained.~~ **regularly consider, at least every six months or 6.** After the ESM Member has drawn funds for the first time (via a loan or a primary market purchase), ~~the Board of Directors~~ **a report in accordance with Article 13(7). For a precautionary conditioned credit line, the report shall** ~~decide by mutual agreement on a proposal from the managing Director and based on~~ **verify continuous respect of the eligibility criteria as referred to in paragraph 2, whereas for** an assessment conducted by the European Commission in liaison with the ECB whether the ~~enhanced conditions credit line~~ **the report shall verify compliance with the policy conditions detailed in the MoU. In case the report concludes that the ESM Member** continues to be adequate or whether another form of financial assistance is needed. **respect the eligibility criteria for the precautionary conditioned credit line or comply with the conditionality attached to the enhanced conditions credit line, the credit line shall be maintained unless the Managing Director or any Director requests a decision of the Board of Directors by mutual agreement whether the credit line should be maintained.**

**7. If the report pursuant to paragraph 6 concludes that the ESM Member does no longer respect the eligibility criteria for the precautionary conditioned credit line or comply with the conditionality attached to the enhanced conditions credit line, access to the credit line shall be discontinued, unless the Board of Directors decides by mutual agreement to maintain the credit line. If the ESM Member has drawn funds before, an additional margin shall apply in line with the pricing guideline to be adopted by the Board of Governors pursuant to Article 20(2), unless the Board of Directors assesses on the basis of the report that non-compliance is due to events beyond the control of the ESM Member. If the credit line is not maintained, another form of financial assistance may be requested and granted in accordance with the applicable rules under this Treaty.**

#### ARTICLE 15

Financial assistance for the re-capitalisation of financial institutions of an ESM Member

1. The Board of Governors may decide to grant financial assistance through loans to an ESM Member for the specific purpose of re-capitalising the financial institutions of that ESM Member.

2. The conditionality attached to financial assistance for the re-capitalisation of an ESM Member's financial institutions shall be detailed in the MoU, in accordance with Article 13(3).

3. Without prejudice to Articles 107 and 108 TFEU, the financial terms and conditions of financial assistance for the re-capitalisation of an ESM Member's financial institutions shall be specified in a financial assistance facility agreement, to be signed by the Managing Director.

4. The Board of Directors shall adopt the detailed guidelines on the modalities for implementing financial assistance for the re-capitalisation of an ESM Member's financial institutions.

Where applicable, the Board of Directors shall decide by mutual agreement, on a proposal from the Managing Director and after having received a report from the **Managing Director and the** European Commission in accordance with Article 13(7), the disbursement of the tranches of the financial assistance subsequent to the first tranche.

#### ARTICLE 16

##### ESM loans

1. The Board of Governors may decide to grant financial assistance in the form of a loan to an ESM Member, in accordance with Article 12.

2. The conditionality attached to the ESM loans shall be contained in a macro-economic adjustment programme detailed in the MoU, in accordance with Article 13(3).

3. The financial terms and conditions of each ESM loan shall be specified in a financial assistance facility agreement, to be signed by the Managing Director.

4. The Board of Directors shall adopt the detailed guidelines on the modalities for implementing ESM loans.
5. The Board of Directors shall decide by mutual agreement, on a proposal from the Managing Director and after having received a report from **the Managing Director and** the European Commission in accordance with Article 13(7), the disbursement of the tranches of the financial assistance subsequent to the first tranche.

#### ARTICLE 17

##### Primary market support facility

1. The Board of Governors may decide to arrange for the purchase of bonds of an ESM Member on the primary market, in accordance with Article 12 and with the objective of maximising the cost efficiency of the financial assistance.
2. The conditionality attached to the primary market support facility shall be detailed in the MoU, in accordance with Article 13(3).
3. The financial terms and conditions under which the bond purchase is conducted shall be specified in a financial assistance facility agreement, to be signed by the Managing Director.
4. The Board of Directors shall adopt the detailed guidelines on the modalities for implementing the primary market support facility.

The Board of Directors shall decide by mutual agreement, on a proposal from the Managing Director and after having received a report from the **Managing Director and the** European Commission in accordance with Article 13(7), the disbursement of financial assistance to a beneficiary Member State through operations on the primary market.

#### ARTICLE 18

##### Secondary market support facility

1. The Board of Governors may decide to arrange for operations on the secondary market in relation to the bonds of an ESM Member in accordance with Article 12(1).
2. Decisions on interventions on the secondary market to address contagion shall be taken on the basis of an analysis of the ECB recognising the existence of exceptional financial market circumstances and risks to financial stability.
3. The conditionality attached to the secondary market support facility shall be detailed in the MoU, in accordance with Article 13(3).
4. The financial terms and conditions under which the secondary market operations are to be conducted shall be specified in a financial assistance facility agreement, to be signed by the Managing Director.
5. The Board of Directors shall adopt the detailed guidelines on the modalities for implementing the secondary market support facility.
6. The Board of Directors shall decide by mutual agreement, on a proposal from the Managing Director, to initiate operations on the secondary market.

#### **ARTICLE 18A**

##### **Backstop facility**

- 1. On the basis of a request for a backstop facility by the SRB and of a proposal by the Managing Director, the Board of Governors may decide to grant a backstop facility to the SRB covering all possible uses of the SRF as enshrined in European Union law, subject to adequate safeguards.**

**The criteria for the approval of loans and disbursements under the backstop facility are provided for in Annex IV. The Board of Governors may decide to change the criteria for approval of loans and disbursements and amend Annex IV accordingly. Such amendment shall enter into force after the ESM Members have notified the Depositary of the completion of their applicable national procedures.**

**The Board of Governors shall determine the key financial terms and conditions of the backstop facility, the nominal cap and any adjustments to it, provisions on the procedure on the verification of compliance with the condition of permanence of the legal framework for bank resolution and on the consequences for the backstop facility and its use as well as the conditions upon which the Board of Governors may decide to terminate the**

**backstop facility and the conditions and time limits upon which the Board of Governors may decide to continue the backstop facility pursuant to paragraph 8.**

- 2. The backstop facility shall take the form of a revolving credit line under which loans can be provided.**
- 3. The detailed financial terms and conditions of the backstop facility shall be specified in a backstop facility agreement with the SRB, to be approved by the Board of Directors by mutual agreement and signed by the Managing Director.**
- 4. The Board of Directors shall adopt and regularly review the detailed guidelines on the modalities for implementing the backstop facility, including on procedures ensuring swift adoption of decisions pursuant to paragraph 5.**
- 5. On the basis of a request for a loan by the SRB, containing all relevant information while respecting confidentiality requirements of European Union law, a proposal from the Managing Director and an assessment of the SRB's repayment capacity and, where relevant, the assessments by the European Commission and the ECB pursuant to paragraph 6, the Board of Directors shall decide by mutual agreement, guided by the criteria provided for in Annex IV, on loans and respective disbursements under the backstop facility. The Board of Directors may decide by mutual agreement to delegate to the Managing Director the task provided for in this paragraph for a specified period of time and amount, in line with the rules specified in guidelines adopted by the Board of Directors.**
- 6. By way of derogation from Article 4(3), an emergency voting procedure shall be used where the European Commission and the ECB conclude in separate assessments that a failure to urgently adopt a decision by the Board of Directors on loans and respective disbursements under the backstop facility pursuant to paragraph 5 sentence 1 would threaten the economic and financial sustainability of the euro area. The adoption of such a decision by mutual agreement under that emergency procedure requires a qualified majority of 85% of the votes cast. This paragraph does not apply, if and for as long as any procedures are ongoing concerning the permanence of the legal framework for bank resolution pursuant to paragraph 8 and related provisions of the guidelines to be adopted by the Board of Directors.**

Where the emergency procedure referred to in the first subparagraph is used, a transfer to an emergency reserve fund is made in order to constitute a dedicated buffer to cover the risks arising from the loans and respective disbursements approved under that emergency procedure. The Board of Directors may decide by mutual agreement to cancel the emergency reserve fund and transfer its content back to the reserve fund and/or paid-in capital.

After two instances of the use of this emergency voting procedure, the application of the first subparagraph shall be suspended until the Board of Governors decides to cancel such suspension. The Board of Governors, when deciding to cancel such suspension, shall review the voting majority required for an adoption of a decision under said procedure, set the circumstances in which a review is to take place in the future, and may decide to amend this paragraph accordingly, without lowering the voting threshold. Such amendment shall enter into force after the ESM Members have notified the Depository of the completion of their applicable national procedures.

- 7. The ESM shall establish an appropriate warning system to ensure timely receipt of repayments due under the backstop facility.**
- 8. The backstop facility and its use under this Article shall be contingent upon compliance with the condition of permanence of the legal framework for bank resolution. Where the condition of the permanence of the legal framework for bank resolution is not complied with, a comprehensive review will be initiated and a decision by the Board of Governors shall be required to continue the backstop facility. Further provisions on the procedure on the verification of compliance with the condition of permanence of the legal framework for bank resolution and on the consequences for the backstop facility and its use shall be determined by the Board of Governors pursuant to paragraph 1.**
- 9. For the purpose of paragraph 8, the permanence of the legal framework for bank resolution shall consist of:**
  - (a) the permanence, as defined in Article 9(1) of the Intergovernmental Agreement of 21 May 2014 on the transfer and mutualisation of contributions to the Single Resolution Fund ("IGA"), of the rules defined in Article 9(1) IGA; and**

**(b) the permanence of the principles and rules relating to the bail-in tool and to the framework on the minimum requirement for own funds and eligible liabilities laid down in BRRD, the SRM Regulation and Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, to the extent that these principles and rules are relevant for preserving the financial means of the SRF.**

**10. In implementing this Article, the ESM shall cooperate closely with Participating Member States participating alongside the ESM in backstop financing for the SRF.**

#### ARTICLE 19

Review of **and amendments to** the list of financial assistance instruments

The Board of Governors may review the list of financial assistance instruments provided for in Articles 14 to 18 and decide to make changes to it.

#### ARTICLE 20

Pricing policy

1. When granting stability support **or backstop financing for the SRF**, the ESM shall aim to fully cover its financing and operating costs and shall include an appropriate margin.
2. For all financial assistance instruments **and backstop financing for the SRF**, pricing shall be detailed in a pricing guideline, which shall be adopted by the Board of Governors.
3. The pricing policy may be reviewed by the Board of Governors.

#### ARTICLE 21

Borrowing operations

1. The ESM shall be empowered to borrow on the capital markets from banks, financial institutions or other persons or institutions for the performance of its purposes.
2. The modalities of the borrowing operations shall be determined by the Managing Director, in accordance with detailed guidelines to be adopted by the Board of Directors.
3. The ESM shall use appropriate risk management tools, which shall be reviewed regularly by the Board of Directors.

### CHAPTER 5

#### FINANCIAL MANAGEMENT

#### ARTICLE 22

Investment policy

1. The Managing Director shall implement a prudent investment policy for the ESM, so as to ensure its highest creditworthiness, in accordance with guidelines to be adopted and reviewed regularly by the Board of Directors. The ESM shall be entitled to use part of the return on its investment portfolio to cover its operating and administrative costs.
2. The operations of the ESM shall comply with the principles of sound financial and risk management.

#### ARTICLE 23

Dividend policy

1. The Board of Directors may decide, by simple majority, to distribute a dividend to the ESM Members where the amount of paid-in capital and the reserve fund exceed the level required for the ESM to maintain its lending capacity and where proceeds from the investment are not required to avoid a payment shortfall to creditors. Dividends are distributed *pro rata* to the contributions to the paid-in capital, taking into account the possible acceleration referred to in Article 41(3).



2. As long as the ESM has not provided financial assistance to one of its members, the proceeds from the investment of the ESM paid-in capital shall be returned to the ESM Members according to their respective contributions to the paid-in capital, after deductions for operational costs, provided that the targeted effective lending capacity is fully available.

3. The Managing Director shall implement the dividend policy for the ESM in accordance with guidelines to be adopted by the Board of Directors.

#### ARTICLE 24

##### Reserve and other funds

1. The Board of Governors shall establish a reserve fund and, where appropriate, other funds.

2. Without prejudice to Article 23, the net income generated by the ESM operations and the proceeds of the financial sanctions received from the ESM Members under the multilateral surveillance procedure, the excessive deficit procedure and the macro-economic imbalances procedure established under the TFEU shall be put aside in a reserve fund.

3. The resources of the reserve fund shall be invested in accordance with guidelines to be adopted by the Board of Directors.

4. The Board of Directors shall adopt such rules as may be required for the establishment, administration and use of other funds.

#### ARTICLE 25

##### Coverage of losses

1. Losses arising in the ESM operations shall be charged:

(a) firstly, against the reserve fund;

(b) secondly, against the paid-in capital; and

(c) lastly, against an appropriate amount of the authorised unpaid capital, which shall be called in accordance with Article 9(3).

2. If an ESM Member fails to meet the required payment under a capital call made pursuant to Article 9(2) or (3), a revised increased capital call shall be made to all ESM Members with a view to ensuring that the ESM receives the total amount of paid-in capital needed. The Board of Governors shall decide an appropriate course of action for ensuring that the ESM Member concerned settles its debt to the ESM within a reasonable period of time. The Board of Governors shall be entitled to require the payment of default interest on the overdue amount.

3. When an ESM Member settles its debt to the ESM, as referred to in paragraph 2, the excess capital shall be returned to the other ESM Members in accordance with rules to be adopted by the Board of Governors.

#### ARTICLE 26

##### Budget

The Board of Directors shall approve the ESM budget annually.

#### ARTICLE 27

##### Annual accounts

1. The Board of Governors shall approve the annual accounts of the ESM.

2. The ESM shall publish an annual report containing an audited statement of its accounts and shall circulate to ESM Members a quarterly summary statement of its financial position and a profit and loss statement showing the results of its operations.

#### ARTICLE 28

##### Internal Audit

An internal audit function shall be established according to international standards.

#### ARTICLE 29

#### External audit

The accounts of the ESM shall be audited by independent external auditors approved by the Board of Governors and responsible for certifying the annual financial statements. The external auditors shall have full power to examine all books and accounts of the ESM and obtain full information about its transactions.

#### ARTICLE 30

##### Board of Auditors

1. The Board of Auditors shall consist of five members appointed by the Board of Governors for their competence in auditing and financial matters and shall include two members from the supreme audit institutions of the ESM Members - with a rotation between the latter - and one from the European Court of Auditors.
2. The members of the Board of Auditors shall be independent. They shall neither seek nor take instructions from the ESM governing bodies, the ESM Members or any other public or private body.
3. The Board of Auditors shall draw up independent audits. It shall inspect the ESM accounts and verify that the operational accounts and balance sheet are in order. It shall have full access to any document of the ESM needed for the implementation of its tasks.
4. The Board of Auditors may inform the Board of Directors at any time of its findings. It shall, on an annual basis, draw up a report to be submitted to the Board of Governors.
5. The Board of Governors shall make the annual report accessible to the national parliaments and supreme audit institutions of the ESM Members, and to the European Court of Auditors **and to the European Parliament.**
6. Any matter relating to this Article shall be detailed in the by-laws of the ESM.

#### CHAPTER 6

##### GENERAL PROVISIONS

#### ARTICLE 31

##### Location

1. The ESM shall have its seat and principal office in Luxembourg.
2. The ESM may establish a liaison office in Brussels.

#### ARTICLE 32

##### Legal status, privileges and immunities

1. To enable the ESM to fulfil its purpose, the legal status and the privileges and immunities set out in this Article shall be accorded to the ESM in the territory of each ESM Member. The ESM shall endeavour to obtain recognition of its legal status and of its privileges and immunities in other territories in which it performs functions or holds assets.
2. The ESM shall have full legal personality; it shall have full legal capacity to:
  - (a) acquire and dispose of movable and immovable property;
  - (b) contract;
  - (c) be a party to legal proceedings; and
  - (d) enter into a headquarter agreement and/or protocols as necessary for ensuring that its legal status and its privileges and immunities are recognised and enforced.
3. The ESM, its property, funding and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that the ESM expressly waives its immunity for the purpose of any proceedings or by the terms of any contract, including the documentation of the funding instruments.
4. The property, funding and assets of the ESM shall, wherever located and by whomsoever held, be immune from search, requisition, confiscation, expropriation or any other form of seizure, taking or foreclosure by executive, judicial, administrative or legislative action.
5. The archives of the ESM and all documents belonging to the ESM or held by it, shall

be inviolable.

6. The premises of the ESM shall be inviolable.
7. The official communications of the ESM shall be accorded by each ESM Member and by each state which has recognised the legal status and the privileges and immunities of the ESM, the same treatment as it accords to the official communications of an ESM Member.
8. To the extent necessary to carry out the activities provided for in this Treaty, all property, funding and assets of the ESM shall be free from restrictions, regulations, controls and moratoria of any nature.
9. The ESM shall be exempted from any requirement to be authorised or licensed as a credit institution, investment services provider or other authorised licensed or regulated entity under the laws of each ESM Member.

#### ARTICLE 33

##### Staff of the ESM

The Board of Directors shall lay down the conditions of employment of the Managing Director and other staff of the ESM.

#### ARTICLE 34

##### Professional secrecy

The Members or former Members of the Board of Governors and of the Board of Directors and any other persons who work or have worked for or in connection with the ESM shall not disclose information that is subject to professional secrecy. They shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy.

#### ARTICLE 35

##### Immunities of persons

1. In the interest of the ESM, the Chairperson of the Board of Governors, Governors, alternate Governors, Directors, alternate Directors, as well as the Managing Director and other staff members shall be immune from legal proceedings with respect to acts performed by them in their official capacity and shall enjoy inviolability in respect of their official papers and documents.
2. The Board of Governors may waive to such extent and upon such conditions as it determines any of the immunities conferred under this Article in respect of the Chairperson of the Board of Governors, a Governor, an alternate Governor, a Director, an alternate Director or the Managing Director.
3. The Managing Director may waive any such immunity in respect of any member of the staff of the ESM other than himself or herself.
4. Each ESM Member shall promptly take the action necessary for the purposes of giving effect to this Article in the terms of its own law and shall inform the ESM accordingly.

#### ARTICLE 36

##### Exemption from taxation

1. Within the scope of its official activities, the ESM, its assets, income, property and its operations and transactions authorised by this Treaty shall be exempt from all direct taxes.
2. The ESM Members shall, wherever possible, take the appropriate measures to remit or refund the amount of indirect taxes or sales taxes included in the price of movable or immovable property where the ESM makes, for its official use, substantial purchases, the price of which includes taxes of this kind.
3. No exemption shall be granted in respect of taxes and dues which amount merely to charges for public utility services.
4. Goods imported by the ESM and necessary for the exercise of its official activities shall be exempt from all import duties and taxes and from all import prohibitions and restrictions.

5. Staff of the ESM shall be subject to an internal tax for the benefit of the ESM on salaries and emoluments paid by the ESM, subject to rules to be adopted by the Board of Governors. From the date on which this tax is applied, such salaries and emoluments shall be exempt from national income tax.

6. No taxation of any kind shall be levied on any obligation or security issued by the ESM including any interest or dividend thereon by whomsoever held:

(a) which discriminates against such obligation or security solely because of its origin; or if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the ESM.

#### ARTICLE 37

##### Interpretation and dispute settlement

1. Any question of interpretation or application of the provisions of this Treaty and the by-laws of the ESM arising between any ESM Member and the ESM, or between ESM Members, shall be submitted to the Board of Directors for its decision.

2. The Board of Governors shall decide on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of this Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with this Treaty. The votes of the member(s) of the Board of Governors of the ESM Member(s) concerned shall be suspended when the Board of Governors votes on such decision and the voting threshold needed for the adoption of that decision shall be recalculated accordingly.

3. If an ESM Member contests the decision referred to in paragraph 2, the dispute shall be submitted to the Court of Justice of the European Union. The judgement of the Court of Justice of the European Union shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgment within a period to be decided by said Court.

**4. Any dispute between ESM Members concerning the compliance with the condition of the permanence of the legal framework for bank resolution laid down in Article 18A may be directly submitted to the Court of Justice of the European Union in line with the procedure to be determined by the Board of Governors pursuant to Article 18A(1) and (8). The judgment of the Court of Justice of the European Union shall be binding on the parties to the procedure; the ESM shall act in conformity with such judgment.**

#### ARTICLE 38

##### International cooperation

The ESM shall be entitled, for the furtherance of its purposes, to cooperate, within the terms of this Treaty, with the IMF, any State which provides financial assistance to an ESM Member on an *ad hoc* basis, **any Member State of the European Union** and any international organisation or entity having specialised responsibilities in related fields.

#### CHAPTER 7

##### TRANSITIONAL ARRANGEMENTS

#### ARTICLE 39

##### Relation with EFSF lending

During the transitional phase spanning the period from the entry into force of this Treaty until the complete run-down of the EFSF, the consolidated ESM and EFSF lending shall not exceed EUR 500 000 million, without prejudice to the regular review of the adequacy of the maximum lending volume in accordance with Article 10. The Board of Directors shall adopt detailed guidelines on the calculation of the forward commitment capacity to ensure that the consolidated lending ceiling is not breached.

#### ARTICLE 40

##### Transfer of EFSF supports

1. By way of derogation from Article 13, the Board of Governors may decide that the EFSF commitments to provide financial assistance to an ESM Member under its agreement with that member shall be assumed by the ESM as far as such commitments relate to undisbursed and unfunded parts of loan facilities.

2. The ESM may, if authorised by its Board of Governors, acquire the rights and assume the obligations of the EFSF, in particular in respect of all or part of its outstanding rights and obligations under, and related to, its existing loan facilities.

3. The Board of Governors shall adopt the detailed modalities necessary to give effect to the transfer of the obligations from the EFSF to the ESM, as referred to in paragraph 1 and any transfer of rights and obligations as described in paragraph 2.

#### ARTICLE 41

##### Payment of the initial capital

1. Without prejudice to paragraph 2, payment of paid-in shares of the amount initially subscribed by each ESM Member shall be made in five annual instalments of 20 % each of the total amount. The first instalment shall be paid by each ESM Member within fifteen days of the date of entry into force of this Treaty. The remaining four instalments shall each be payable on the first, second, third and fourth anniversary of the payment date of the first instalment.

2. During the five-year period of capital payment by instalments, ESM Members shall accelerate the payment of paid-in shares, in a timely manner prior to the issuance date, in order to maintain a minimum 15 % ratio between paid-in capital and the outstanding amount of ESM issuances and guarantee a minimum combined lending capacity of the ESM and of the EFSF of EUR 500 000 million.

3. An ESM Member may decide to accelerate the payment of its share of paid-in capital.

#### ARTICLE 42

##### Temporary correction of the contribution key

1. At inception, the ESM Members shall subscribe the authorised capital stock on the basis of the initial contribution key as specified in Annex I. The temporary correction included in this initial contribution key shall apply for a period of twelve years after the date of adoption of the euro by the ESM Member concerned.

2. If a new ESM Member's gross domestic product (GDP) per capita at market prices in euro in the year immediately preceding its accession to the ESM is less than 75 % of the European Union average GDP per capita at market prices, then its contribution key for subscribing to ESM authorised capital stock, determined in accordance with Article 10, shall benefit from a temporary correction and equal the sum of:

(a) 25 % of the percentage share in the ECB capital of the national central bank of that ESM Member, determined in accordance with Article 29 of the ESCB Statute; and

(b) 75 % of that ESM Member's percentage share in the gross national income (GNI) at market prices in euro of the euro area in the year immediately preceding its accession to the ESM.

The percentages referred to in points (a) and (b) shall be rounded up or down to the nearest multiple of 0,0001 percentage points. The statistical terms shall be those published by Eurostat.

3. The temporary correction referred to in paragraph 2 shall apply for a period of twelve years from the date of adoption of the euro by the ESM Member concerned.

4. As a result of the temporary correction of the key, the relevant proportion of shares allocated to an ESM Member pursuant to paragraph 2 shall be reallocated amongst the ESM Members not benefiting from a temporary correction on the basis of their shareholding in the ECB, determined in accordance with Article 29 of the ESCB Statute, subsisting immediately prior to the issue of shares to the acceding ESM Member.

#### ARTICLE 43

##### First appointments

1. Each ESM Member shall designate its Governor and alternate Governor within the two weeks of the entry into force of this Treaty.

2. The Board of Governors shall appoint the Managing Director and each Governor shall appoint a Director and an alternate Director within the two months of the entry into force of this Treaty.

#### CHAPTER 8

##### FINAL PROVISIONS

#### ARTICLE 44



#### Accession

This Treaty shall be open for accession by other Member States of the European Union in accordance with Article 2 upon application for membership that any such Member State of the European Union shall file with the ESM after the adoption by the Council of the European Union of the decision to abrogate its derogation from adopting the euro in accordance with Article 140(2) TFEU. The Board of Governors shall approve the application for accession of the new ESM Member and the detailed technical terms related thereto, as well as the adaptations to be made to this Treaty as a direct consequence of the accession. Following the approval of the application for membership by the Board of Governors, new ESM Members shall accede upon the deposit of the instruments of accession with the Depositary, who shall notify other ESM Members thereof.

#### ARTICLE 45

##### Annexes

The following Annexes to this Treaty shall constitute an integral part thereof:

- 1) Annex I: Contribution key of the ESM;
- 2) Annex II: Subscriptions to the authorised capital stock;
- 3) Annex III: Eligibility criteria for ESM precautionary financial assistance; and**
- 4) Annex IV: Criteria for the approval of loans and disbursements under the backstop facility.**

#### ARTICLE 46

##### Deposit

This Treaty shall be deposited with the General Secretariat of the Council of the European Union ("the Depositary"), which shall communicate certified copies to all the signatories.

#### ARTICLE 47

##### Ratification, approval or acceptance

1. This Treaty shall be subject to ratification, approval or acceptance by the signatories. Instruments of ratification, approval or acceptance shall be deposited with the Depositary.
2. The Depositary shall notify the other signatories of each deposit and the date thereof.

#### ARTICLE 48

##### Entry into force

1. This Treaty shall enter into force on the date when instruments of ratification, approval or acceptance have been deposited by signatories whose initial subscriptions represent no less than 90% of the total subscriptions set forth in Annex II. Where appropriate, the list of ESM Members shall be adjusted; the key in Annex I shall then be recalculated and the total authorised capital stock in Article 8(1) and Annex II and the initial total aggregated nominal value of paid-in shares in Article 8(2) shall be reduced accordingly.
2. For each signatory which thereafter deposits its instrument of ratification, approval or acceptance, this Treaty shall enter into force on the day following the date of deposit.
3. For each State which accedes to this Treaty in accordance with Article 44, this Treaty shall enter into force on the twentieth day following the deposit of its instrument of accession.

Done at Brussels on the second day of February in the year two thousand and twelve in a single original, whose Dutch, English, Estonian, Finnish, French, German, Greek, Irish, Italian, Maltese, Portuguese, Slovak, Slovenian, Spanish and Swedish texts are equally authentic, which shall be deposited in the archives of the Depositary which shall transmit a duly certified copy to each of the Contracting Parties.

Upon accession of the Republic of Latvia, the Latvian text shall be equally authentic, which shall be deposited in the archives of the Depositary which shall transmit a duly certified copy to each of the Contracting Parties.

Upon accession of the Republic of Lithuania, the Lithuanian text shall be equally authentic, which shall be deposited in the archives of the Depositary which shall transmit a duly certified copy to each of the Contracting Parties.

**ANNEX I**

Effective as of 19 February 2019, upon the end of the temporary correction applicable to the Republic of Slovenia

**Contribution Key of the ESM**

<i><b>ESM Member</b></i>	<i><b>ESM key (%)</b></i>
<i>Kingdom of Belgium</i>	<i>3.4519</i>
<i>Federal Republic of Germany</i>	<i>26.9496</i>
<i>Republic of Estonia</i>	<i>0.1847</i>
<i>Ireland</i>	<i>1.5806</i>
<i>Hellenic Republic</i>	<i>2.7962</i>
<i>Kingdom of Spain</i>	<i>11.8174</i>
<i>French Republic</i>	<i>20.2381</i>
<i>Italian Republic</i>	<i>17.7839</i>
<i>Republic of Cyprus</i>	<i>0.1948</i>
<i>Republic of Latvia</i>	<i>0.2746</i>
<i>Republic of Lithuania</i>	<i>0.4063</i>
<i>Grand Duchy of Luxembourg</i>	<i>0.2486</i>
<i>Malta</i>	<i>0.0726</i>
<i>Kingdom of the Netherlands</i>	<i>5.6756</i>
<i>Republic of Austria</i>	<i>2.7632</i>
<i>Portuguese Republic</i>	<i>2.4910</i>
<i>Republic of Slovenia</i>	<i>0.4679</i>
<i>Slovak Republic</i>	<i>0.8184</i>
<i>Republic of Finland</i>	<i>1.7844</i>
<b>Total</b>	<b>100.0</b>

The above figures are rounded to four decimals.

**ANNEX II**

Effective as of 19 February 2019, upon the end of the temporary correction applicable to the Republic of Slovenia

Subscriptions to the authorised capital stock

<b><i>ESM Member</i></b>	<b><i>Number of shares</i></b>	<b><i>Capital subscription (EUR)</i></b>
<i>Kingdom of Belgium</i>	243,285	24 328 500 000
<i>Federal Republic of Germany</i>	1,899,406	189 940 600 000
<i>Republic of Estonia</i>	13,020	1 302 000 000
<i>Ireland</i>	111,404	11 140 400 000
<i>Hellenic Republic</i>	197,078	19 707 800 000
<i>Kingdom of Spain</i>	832,888	83 288 800 000
<i>French Republic</i>	1,426,383	142 638 300 000
<i>Italian Republic</i>	1,253,406	125 340 600 000
<i>Republic of Cyprus</i>	13,733	1 373 300 000
<i>Republic of Latvia</i>	19,353	1 935 300 000
<i>Republic of Lithuania</i>	28,634	2 863 400 000
<i>Grand Duchy of Luxembourg</i>	17,521	1 752 100 000
<i>Malta</i>	5,117	511 700 000
<i>Kingdom of the Netherlands</i>	400,015	40 001 500 000
<i>Republic of Austria</i>	194,753	19 475 300 000
<i>Portuguese Republic</i>	175,566	17 556 600 000
<i>Republic of Slovenia</i>	32,977	3 297 700 000
<i>Slovak Republic</i>	57,680	5 768 000 000
<i>Republic of Finland</i>	125,768	12 576 800 000
<b><i>Total</i></b>	<b>7 047 987</b>	<b>704 798 700 000</b>

## ANNEX III

### Eligibility criteria for ESM precautionary financial assistance

The criteria below represent the eligibility criteria for ESM precautionary financial assistance and have been determined having regard to:

(A) the Euro Summit Statement of 14 December 2018 which endorsed the term sheet on the reform of the ESM, specifying that ex-ante eligibility criteria assessing sound economic and financial performance will be clarified, and that the enhanced conditions credit line (ECCL) instrument will continue to be available as foreseen in the current ESM guideline; and

(B) the joint position on future cooperation between the European Commission and the ESM, as annexed to the term sheet on the reform of the ESM, as well as to the roles and competences of institutions as foreseen in the European Union legal framework.

Furthermore considering that the procedure for granting ESM precautionary financial assistance follows Articles 13 and 14 of this Treaty, and that according to Article 14(1) of this Treaty, the Board of Governors may decide to grant precautionary financial assistance to an ESM Member whose government debt is sustainable, and that the Board of Directors shall adopt the detailed guidelines on the modalities for implementing ESM precautionary financial assistance accordance with Article 14(5) of the Treaty,

#### 1. Eligibility criteria for granting a precautionary conditioned credit line (PCCL):

Access to a PCCL shall be based on eligibility criteria and limited to ESM Members where the economic and financial situation is fundamentally strong and whose government debt is sustainable. As a rule, ESM Members need to meet quantitative benchmarks and comply with qualitative conditions related to EU surveillance. An assessment shall be made on whether a potential beneficiary ESM Member qualifies for a PCCL on the basis of the following criteria:

(a) Respect of the quantitative fiscal benchmarks. The ESM Member shall not be under excessive deficit procedure and needs to meet the three following benchmarks in the two years preceding the request for precautionary financial assistance:

i. a general government deficit not exceeding 3 percent of GDP,

ii. a general government structural budget balance at or above the country specific minimum benchmark<sup>1</sup>,

iii. a debt benchmark consisting of a general government debt to GDP ratio below 60 percent or a reduction in the differential with respect to 60 % over the previous two years at an average rate of one twentieth per year;

(b) Absence of excessive imbalances. The ESM Member should not be identified as experiencing excessive imbalances under EU surveillance;

(c) A track record of access to international capital markets, where relevant, on reasonable terms;

(d) A sustainable external position; and

(e) Absence of severe financial sector vulnerabilities putting at risk the ESM Member's financial stability.

#### 2. Eligibility criteria for granting an Enhanced Conditions Credit Line (ECCL):

Access to an ECCL shall be open to ESM Members that are not eligible to the PCCL because of non-compliance with some eligibility criteria but whose general economic and financial situation remains strong and whose government debt is sustainable.

<sup>1</sup> The minimum benchmark is the level of the structural balance providing a safety margin against the 3% Treaty threshold under normal cyclical conditions. It is mainly used as one of three inputs into the calculation of the minimum MTO.

## ANNEX IV

### Criteria for approval of loans and disbursements under the backstop facility

The criteria below represent the criteria for the approval of loans and disbursements under the backstop facility and have been determined having regard to:

(A) the terms of reference of the common backstop to the SRF endorsed at the Euro Summit of 14 December 2018; (B) Recital 15B of this Treaty recalling that terms of reference of the common backstop to the SRF endorsed at the Euro Summit of 14 December 2018 foresee criteria for disbursements under the backstop facility including inter alia the principles of last resort and fiscal neutrality over the medium term, full compliance with Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (“SRM Regulation”) and with Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012 (“BRRD”), and permanence of the legal framework; (C) Article 12(2) of this Treaty specifying that loans under the backstop facility shall only be granted as a last resort and to the extent that it is fiscally neutral in the medium term; (D) Article 18A(8) of this Treaty specifying that the backstop facility and its use shall be contingent upon compliance with the condition of permanence of the legal framework for bank resolution and that further provisions on the procedure on the verification of compliance with this condition and on the consequences for the backstop facility and its use shall be determined by the Board of Governors pursuant to Article 18A(1); (E) Article 18(5) of this Treaty specifying that the Board of Directors shall decide by mutual agreement, guided by the criteria provided for in this Annex, on loans and respective disbursements under the backstop facility; and considering that the procedure for granting and implementing the backstop facility follows Article 18A of this Treaty and that the Board of Directors shall adopt detailed guidelines on the modalities for implementing the backstop facility in accordance with Article 18(4) of this Treaty,

Criteria for the approval of loans and disbursements under the backstop facility:

1. Recourse to the backstop facility is of last resort. Therefore:

- a) the financial means of the SRF available to be used in accordance with Article 76 of the SRM Regulation that are not already committed to resolution actions are depleted, including the situation where there are financial means available in the SRF, but those are insufficient for the resolution case at hand,
- b) ex-post contributions are not sufficient or not immediately available, and
- c) the SRB is not able to borrow on terms and conditions considered acceptable by the SRB in accordance with Articles 73 and 74 of the SRM Regulation;

2. The principle of fiscal neutrality over the medium term is respected. The repayment capacity of the SRB is sufficient to fully repay the loans granted under the backstop facility over the medium term;

3. The requested funds are available to the ESM. In case of cash disbursements, the ESM has obtained the funds on terms acceptable to the ESM or, in case of non-cash disbursements, the notes are legally created and held in custody of the applicable security depository;

4. All the parties to the Intergovernmental Agreement of 21 May 2014 on the transfer and mutualisation of contributions to the Single Resolution Fund (“IGA”), in the territories of which the relevant resolution action takes place, have complied with their obligations to transfer contributions received from the institutions authorised in their territory to the SRF;

5. There is no ongoing event of default on borrowings of the SRB from the ESM or from any other creditor, or, the SRB has presented a remedy plan in respect of any such ongoing event of default which is satisfactory to the Board of Directors;

6. The condition of permanence of the legal framework on bank resolution as defined in Article 18A(9) of the Treaty is complied with, as determined by the Board of Governors pursuant to Article 18A(1); and

7. The dedicated resolution scheme is fully compliant with European Union law and has entered into force in accordance with European Union law.