

Law of 21 July 2021 approving the Agreement amending the Treaty establishing the European Stability Mechanism, signed in Brussels on 27 January and 8 February 2021

(Mém. A 2021, No 565)

We Henri, Grand Duke of Luxembourg, Duke of Nassau,

Having heard our State Council;

With the consent of the Chamber of Deputies;

Having regard to the decision of the Chamber of Deputies of 14 July 2021 and that of the State Council of 16 July 2021 that a second vote is not required;

Ordered and order:

Article 1.

The Agreement amending the Treaty establishing the European Stability Mechanism, signed in Brussels on 27 January and 8 February 2021 is approved.

Article 2.

Debt securities created by the European Stability Mechanism which are subject to Luxembourg law do not need to be given to a third party at the time of their creation. They may be issued for no consideration. The securities and the debts they represent validly exist as soon as they are created. As long as the European Stability Mechanism possesses such a security, all rights attached to the security shall be suspended. The suspension shall end as soon as the security is transferred to a third party.

We instruct and order that this law be inserted in the Journal officiel du Grand-Duché de Luxembourg in order to be implemented and complied with by all the persons concerned.

AGREEMENT
AMENDING THE 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,
THE REPUBLIC OF 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

PREAMBLE

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, the Republic of 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 the "Signatories");

RECOGNISING the agreement to mobilise funding and to provide backstop financing for the purposes of the use of the Single Resolution Fund ("SRF"), owned by the Single Resolution Board ("SRB") established in accordance 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 1093/2010¹;

RECOGNISING the key contribution of the European Stability Mechanism ("ESM") in crisis management by providing timely and effectively stability support to euro area Member States;

HAVING AGREED on a comprehensive package to further strengthen the Economic and Monetary Union;

AIMING at a further development of the ESM to strengthen the resilience and crisis resolution capabilities of the euro area, while continuing to fully respect European Union law;

RECALLING that 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 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;

¹ OJ L 225, 30.7.2014, p. 1.

FURTHER RECALLING that 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 and a term sheet on the reform of the ESM, and that, at the Euro Summit of 21 June 2019 in inclusive format, the Heads of State or Government of the Member States whose currency is the euro took note of the broad agreement reached on the revision of the Treaty Establishing the European Stability Mechanism,

HAVE AGREED AS FOLLOWS:

ARTICLE 1

Amendments to the Treaty Establishing the European Stability Mechanism

The Treaty Establishing the European Stability Mechanism is amended as follows:

A. The preamble is amended as follows:

(1) Recital (4) is replaced by the following:

"(4) 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."

(2) The following recitals are inserted:

"(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 the law of the European Union, this Treaty and ESM guidelines. The term sheet on the reform of the ESM also foresees that an additional margin will be applied where 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 this 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 this 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."

(3) In recital (7), the following sentence is added:

"ESM Members acknowledge the current dialogue between the Managing Director and the European Parliament."

(4) In recital (8), the third sentence is replaced by the following:

"A euro area Member State requesting financial assistance from the ESM is expected to address, whenever appropriate, a similar request to the IMF."

(5) The following recital is inserted:

"(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* are expected to provide parallel credit lines for the SRF alongside the ESM. Those Member States will participate in the common backstop on equivalent terms ('Participating Member States'). Representatives of Participating Member States should 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. It should be possible to invite representatives of the Single Resolution Board ('SRB') 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."

(6) Recital (10) is replaced by the following:

"(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 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."

* OJ L 287, 29.10.2013, p. 63."

(7) In recital (11), the following sentences are added:

"Following the 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."

(8) The following recitals are inserted:

"(11a) 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.

(11b) 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). Where 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."

(9) Recital (12) is replaced by the following:

"(12) 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."

(10) In recital (13), the following sentence is added:

"Backstop loans to the SRB by the ESM are to enjoy preferred creditor status in a similar fashion to other ESM loans."

(11) Recital 14 is replaced by the following:

"(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."

(12) The following recitals are inserted:

"(15a) Article 2(3) of the Treaty on the Functioning of the European Union ('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 are to 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 provides 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* ('SRMR') 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. The terms of reference 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.

(13) Recital 16 is replaced by the following:

"(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."

(14) Recital 17 is replaced by the following:

"(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 TFEU.

(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 pursuant to Articles 121 and 136 TFEU,".

* OJ L 225, 30.7.2014, p. 1.

** OJ L 173, 12.6.2014, p. 190."

B. The Articles are amended as follows:

(15) Article 3 is replaced by the following:

"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. 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."

(16) In Article 4(4), the first sentence is replaced by the following:

"By way of derogation from paragraph 3 of this Article, 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."

(17) Article 5 is amended as follows:

(a) in paragraph 4, the following sentence is added:

"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.";

(b) paragraph 6 is amended as follows:

(i) point (a) is replaced by the following:

"(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 the first subparagraph of Article 18a(6), 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 the third subparagraph of Article 18a(6);";

(ii) point (f) is replaced by the following:

"(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), and to establish the choice of instruments and the financial terms and conditions, in accordance with Articles 12 to 18;";

(iii) the following point is inserted:

"(fa) to change the eligibility criteria for precautionary financial assistance set out in Annex III in accordance with Article 14(1);";

(iv) point (g) is replaced by the following:

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

(v) the following point is inserted:

"(ga) 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);";

(vi) point (h) is replaced by the following:

"(h) to change the pricing policy and pricing guideline for financial assistance or the backstop facility for the SRF, in accordance with Article 20;";

(vii) point (j) is replaced by the following:

"(j) to establish the modalities of the transfer of EFSF support to the ESM, including the creation of an additional tranche of authorised capital, in accordance with Article 40;".

(18) Article 6 is amended as follows:

(a) in paragraph 3, the following sentence is added:

"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.";

(b) paragraph 4 is replaced by the following:

"4. Other persons, including representatives of institutions or organisations, may be invited by the Board of Directors to attend meetings as observers on an ad hoc basis.".

- (19) In Article 7(4), the following sentence is added:
- "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."
- (20) Article 12 is amended as follows:
- (a) the following paragraph is inserted:
- "1a. 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.";
- (b) in paragraph 3, the following sentence is added:
- "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.";
- (c) the following paragraph is added:
- "4. 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."
- (21) Article 13 is amended as follows:
- (a) paragraph 1 is amended as follows:
- (i) the introductory wording is replaced by the following:
- "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 Managing Director and (ii) the European Commission in liaison with the ECB, shall be entrusted by the Chairperson of the Board of Governors to together discharge the following tasks:";
- (ii) point (b) is replaced by the following:
- "(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;"
- (b) paragraph 2 is replaced by the following:
- "2. On the basis of the request of the ESM Member and the assessments referred to in paragraph 1 of this Article, 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.";

(c) in paragraph 3, the first subparagraph is replaced by the following:

"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. The Managing Director 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.";

(d) paragraph 4 is replaced by the following:

"4. The MoU shall 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.";

(e) paragraph 7 is replaced by the following:

"7. 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.";

(f) the following paragraph is added:

"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 of this Article, and referred to in Article 3(1).".

(22) Article 14 is replaced by the following:

"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.

The 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 of assessing 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 (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.

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.

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

6. The Board of Directors shall regularly consider, at least every six months or after the ESM Member has drawn funds for the first time (via a loan or a primary market purchase), a report in accordance with Article 13(7). For a precautionary conditioned credit line, the report shall verify continuous respect of the eligibility criteria as referred to in paragraph 2 of this Article, whereas for an enhanced conditions credit line the report shall verify compliance with the policy conditions detailed in the MoU. Where the report concludes that the ESM Member continues to 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 of this Article concludes that the ESM Member no longer respects 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."

(23) In Article 15, paragraph 5 is replaced by the following:

"5. 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."

(24) In Article 16, paragraph 5 is replaced by the following:

"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."

(25) In Article 17, paragraph 5 is replaced by the following:

"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 financial assistance to a beneficiary Member State through operations on the primary market."

(26) The following article is inserted:

"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 the approval of loans and disbursements and amend Annex IV accordingly. Such amendment shall enter into force after the ESM Members have notified the Depository 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 for 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 the first sentence of paragraph 5 of this Article 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 of this Article and related provisions adopted by the Board of Governors.

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 and 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 Depositary 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 for 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 of this Article, 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, SRMR 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.

(27) In Article 19, the title is replaced by the following:

"Review of and amendments to the list of financial assistance instruments".

(28) In Article 20, paragraphs 1 and 2 are replaced by the following:

"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.".

(29) In Article 21, paragraph 1 is replaced by the following:

"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.".

(30) In Article 30, paragraph 5 is replaced by the following:

"5. The Board of Governors shall make the annual report accessible to the national parliaments and supreme audit institutions of the ESM Members, to the European Court of Auditors and to the European Parliament.".

(31) In Article 37, the following paragraph is added:

"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.".

(32) In Article 38 the sole paragraph is replaced by the following:

"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 responsibilities in related fields.".

* OJ L 176, 27.6.2013, p. 1."

(33) In Article 40, the following paragraph is added:

"4. Without prejudice to Articles 8 to 11 and 39, the Board of Governors may, in order to facilitate the transfer referred to in paragraph 2 of this Article, create an additional tranche of authorised capital, to be subscribed by some or all EFSF shareholders in proportion to the contribution key set out in Annex 2 to the EFSF Framework Agreement signed on 10 June 2010 (as amended). The additional tranche shall consist of callable capital, shall have no voting rights (even if such capital is called), and shall be subject to a maximum amount corresponding to the aggregate principal amount outstanding of the EFSF loan facilities transferred multiplied by a percentage no higher than 165 %. The Board of Governors shall determine the manner and circumstances of capital calls and payments under the additional tranche.

The transfer referred to in paragraph 2 shall not increase the sum of EFSF and ESM liabilities compared to a scenario where that transfer does not take place. The additional tranche shall support the transfer of the EFSF loans and shall be reduced in line with the repayment of said loans.

The decision by the Board of Governors under the first subparagraph shall enter into force after ESM Members have notified the Depository of the completion of their applicable national procedures."

(34) In Article 45, points 1 and 2 are replaced by the following:

- "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."

(35) The following text is added as Annex III:

"ANNEX III

Eligibility criteria for ESM precautionary financial assistance

1. 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 this Treaty.

2. 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 % of GDP;
 - (ii) a general government structural budget balance at or above the country specific minimum benchmark*;
 - (iii) a debt benchmark consisting of a 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;
- (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.

3. Eligibility criteria for granting an 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.

* The minimum benchmark is the level of the structural balance providing a safety margin against the 3 % TFEU threshold under normal cyclical conditions. It is mainly used as one of three inputs into the calculation of the minimum medium-term objective."

(36) The following text is added as Annex IV:

"ANNEX IV

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

1. 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 SRMR and with BRRD, and permanence of the legal framework;
 - (c) Article 12(1a) 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) of this Treaty;
 - (e) Article 18a(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 18a(4) of this Treaty.

2. Criteria for the approval of loans and disbursements under the backstop facility:
 - (a) Recourse to the backstop facility is of last resort. Therefore:
 - (i) the financial means of the SRF available to be used in accordance with Article 76 of the SRMR 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;
 - (ii) ex post contributions are not sufficient or not immediately available; and
 - (iii) 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 SRMR;
 - (b) 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;

- (c) The requested funds are available to the ESM. In the case of cash disbursements, the ESM has obtained the funds on terms acceptable to the ESM or, in the case of non-cash disbursements, the notes are legally created and held in custody of the applicable security depository;
- (d) All the parties to the 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;
- (e) 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;
- (f) The condition of permanence of the legal framework on bank resolution as defined in Article 18a(9) of this Treaty is complied with, as determined by the Board of Governors pursuant to Article 18a(1) and (8) of this Treaty; and
- (g) The dedicated resolution scheme is fully compliant with European Union law and has entered into force in accordance with European Union law."

ARTICLE 2

Deposit

This Amending Agreement shall be deposited with the General Secretariat of the Council of the European Union ("the Depository"), which shall communicate certified copies to all the Signatories.

ARTICLE 3

Consolidation

The Depository shall establish a consolidated version of the Treaty Establishing the European Stability Mechanism and communicate it to all the Signatories.

ARTICLE 4

Ratification, approval or acceptance

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

ARTICLE 5

Entry into force and accession

1. This Amending Agreement shall enter into force on the date when instruments of ratification, approval or acceptance have been deposited by all the Signatories.
2. Before its entry into force, this Amending Agreement shall be open for accession by Member States of the European Union acceding to the Treaty Establishing the European Stability Mechanism in accordance with Articles 2 and 44 thereof.

Articles 2 and 44 of the Treaty Establishing the European Stability Mechanism shall also apply to the accession to this Amending Agreement.

The acceding Member State shall be required to submit the application for accession to this Amending Agreement simultaneously with the application for accession to the Treaty Establishing the European Stability Mechanism. The approval of the application by the Board of Governors under Article 44 of the Treaty Establishing the European Stability Mechanism shall take effect upon simultaneous deposit of the instruments of accession to both the Treaty Establishing the European Stability Mechanism and this Amending Agreement.

Done in a single original, whose Dutch, English, Estonian, Finnish, French, German, Greek, Irish, Italian, Latvian, Lithuanian, Maltese, Portuguese, Slovak, Slovenian, Spanish and Swedish texts are equally authentic.