

DRAFT GUIDELINE ON THE BACKSTOP FACILITY TO THE SRB FOR THE SRF

**DISCLAIMER:** this draft document is part of the ESM reform package agreed in principle at the Eurogroup meeting of 4 December 2019, subject to the conclusion of national procedures. It is made available for information purposes only. This document can be formally adopted by the relevant ESM decision-making body only after the entry into force of the ESM Treaty, as amended by the draft Amending Agreement.

AGREED DRAFT

## **European Stability Mechanism Guideline on the backstop facility to the SRB for the SRF**

### **Article 1 *Aim and scope*<sup>1</sup>**

1. The ESM may provide the backstop facility to the Single Resolution Board (the “SRB”) for the Single Resolution Fund (“SRF”) to support the application of the resolution tools and exercise of the SRB’s resolution powers under the Single Resolution Mechanism of the European Union (“EU”), 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 1093/2010 (“SRMR”).
2. Loans under the backstop facility may be granted to the SRB only as a last resort and to the extent it is fiscally neutral in the medium term for any of the purposes set forth in Article 76 of SRMR, including liquidity provision subject to adequate safeguards, where needed.
3. This guideline shall be applied in accordance with the interpretative declaration on the European Stability Mechanism of 27 September 2012, according to which, among others, Article 34 of the ESM Treaty does not prevent providing comprehensive information so that the Members of the Board of Directors are able to share the information received under this guideline with the national parliaments, as foreseen by national regulation.

---

<sup>1</sup> The political decision on the early introduction of the backstop will be taken in 2020 and be informed by the risk reduction assessment of the institutions and competent authorities as laid down in ToR of December 2018.

If agreed, this should be implemented in an effective manner. This would be achieved through limited changes to the Intergovernmental Agreement (IGA), which would bring forward the mutualisation of ex-post contributions to the Single Resolution Fund.

The first recourse requirement for the Member State in which the resolution action takes place (the concerned compartment) would be initially set at 30% of the maximum amount of ex post contributions and decrease progressively until the end of the transitional period; whereas the contribution of all compartments (concerned and non-concerned) would cover up to 70% of the maximum amount of ex post contributions pro-rata (up to the actual level of the SRF –not taking into account possible disbursements).

In case of an early introduction, this guideline will need to be updated accordingly.

**Article 2**  
***Granting of the backstop facility***

1. In accordance with Article 18a(1) of the ESM Treaty, the Board of Governors may decide by mutual agreement, on the basis of a request by the SRB and of a proposal by the Managing Director, to grant a backstop facility to the SRB for the SRF, in the form of a revolving credit line under which loans can be provided.
2. In accordance with Article 18a(1) of the ESM Treaty, the Board of Governors shall, by mutual agreement, determine the key financial terms and conditions of the backstop facility. The detailed financial terms and conditions of the backstop facility shall be specified in a backstop facility agreement between the ESM and the SRB, to be approved by the Board of Directors by mutual agreement and signed by the Managing Director.
3. The initial availability period of the backstop facility shall be ten years.

**Article 3**  
***Size of the backstop***

1. The Board of Governors shall, by mutual agreement, establish the nominal cap in respect of the backstop facility. The nominal cap will limit the amount for the backstop facility, so that its maximum amount (as per paragraph 2 below) is at all times equal to or lower than the nominal cap. The Board of Governors may, by mutual agreement, adjust the nominal cap, without prejudice to the procedure in Article 11(1) of the ESM Treaty on a review of the maximum lending volume.
2. The Board of Governors shall, by mutual agreement, establish the maximum amount when granting the backstop facility pursuant to Article 2. The outstanding amount under the backstop facility shall never exceed such maximum amount. The maximum amount is aligned with the euro area pro-rata share of ex-ante contributions to the target level of the SRF but is not higher than the established nominal cap.
3. The Board of Directors may upon delegation by the Board of Governors and by mutual agreement revise the maximum amount, upon notification by the SRB or as part of a review pursuant to Article 11, so as to align the maximum amount with the euro area share of the target level of the SRF up to the level of the nominal cap.

**Article 4**  
***Procedure for approval of loans under the credit line  
and disbursements***

1. The SRB may request a loan under the backstop facility to the Managing Director for financing a specific resolution case.

Such written request shall contain information listed in paragraph 1a to allow the Board of Directors to take informed decisions on loans and respective disbursements under

the backstop facility. The request shall also contain confirmation that, in the SRB's opinion, the dedicated resolution scheme to be adopted by the SRB is compliant with SRMR and with the BRRD, detail the suggested terms of the requested loan, confirm that the criteria in points (a) and (d) to (f) of paragraph 2 of Annex IV to the ESM Treaty for granting the loan are met.

- 1a. The SRB shall, for the purpose of paragraph 1, provide in such request the following information, which shall be treated in accordance with Article 10:
  - a) the identity of the institution, as long as the institution has provided its express and prior consent in accordance with Article 88(1) of the SRMR;
  - b) confirmation that the conditions for resolution are met, namely:
    - (i) information on the FOLTF assessment,
    - (ii) no reasonable prospect that any alternative private sector measure or supervisory action can prevent the failure of the institution having regard to timing and the relevant circumstances, including early intervention measures or the write-down or conversion of relevant capital instruments, and
    - (iii) the resolution action is necessary in the public interest;
  - c) A descriptive outline of the resolution strategy and tools as laid down in the relevant provisions in Article 22 and Article 24 to Article 27 of the SRMR, including the application of discretionary exclusions from bail-in;
  - d) use of other funding sources, uses of the SRF and the common backstop, including amounts and application to solvency or liquidity purposes;
  - e) the latest available information relating to balance sheet data supporting the information provided under points b), c) and d) in order to assess the consequences of the decision on the disbursement of the backstop facility and insofar that it is relevant to understand the repayment capacity assessment performed by the ESM and the SRB and to decide on the compliance with the fiscal neutrality criterion;
  - f) confirmation that:
    - (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 in 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 acceptable by the SRB in accordance with Articles 73 and 74 of the SRMR.

- 1b. After a duly completed request for a loan has been submitted by the SRB to the ESM, the SRB shall, upon request from the Managing Director acting on his own motion or on a motion of a member of the Board of Directors, promptly provide additional relevant explanations, unless its disclosure would interfere with the exercise of the SRB functions, in which case the SRB shall duly explain in writing the reasons for such refusal.

This shall be without prejudice to the swift decision-making foreseen under this guideline.

- 1c. The use of information provided under this guideline shall respect the tasks and powers conferred by European Union law on the Council, the Commission, the ECB and the SRB to decide on resolution, including the specific merits of each resolution action as laid down in the European Union Treaties and in the SRMR, and the procedure laid down in Article 18 thereof. In particular, information shared by the SRB with the Managing Director and the Board of Directors in the course of the procedure for the approval of loans and respective disbursements under the backstop facility shall be used for the purpose of ensuring the ESM functions as laid down in Article 18a and Annex IV to the ESM Treaty, most notably of determining the SRB capacity of servicing the loan within the relevant maturity.

Without prejudice to Article 46 SRMR, following the entry into force of the resolution scheme, the members of the SRB Board may be invited to voluntarily participate in a public or non-public hearing at national parliaments, including budget committees.

2. Without prejudice to a more specific agreement on prefunding between the SRB and the ESM, the SRB endeavours, on a best efforts basis and whenever possible, to provide the ESM with an anonymised pre-notification, particularly when: (i) the ECB formally consults the SRB on an assessment of whether an entity or a group is failing or likely to fail ("FOLTF") or the SRB informs the ECB of its intention to conduct a FOLTF assessment, and (ii) the SRB considers that recourse to the backstop facility is highly likely. Such notification would indicate, among other things, the estimated amount of funds required, including whether in cash or in kind, and a tentative timeline. Such notification would not disclose the name of the entity or group to be resolved nor any other confidential information that would enable the entity or group to be identified.
3. After having received a request pursuant to paragraphs 1 and 1a, and based on a joint assessment by the Managing Director and the SRB of the SRB's capacity to service the loan within the relevant maturity, the Managing Director shall submit to the Board of Directors a proposal for the approval of a loan and the disbursement thereof, provided that said request is complete and includes all information required pursuant to paragraphs 1, 1a and 3. The SRB and the Managing Director may provide separate assessments and conclusions including on the debt servicing schedule to the Board of Directors in case they have not agreed on a joint assessment of the repayment capacity of the SRB.

The Board of Directors will decide in light of the assessments presented and the conclusions provided on the satisfaction of the principle of fiscal neutrality over the medium term as enshrined in Article 12(1a) of the ESM Treaty and point (b) of paragraph 2 of Annex IV to the ESM Treaty. The proposal of the Managing Director shall include the debt servicing schedule as agreed with the SRB. In case there is no agreement between the Managing Director and the SRB on the debt servicing schedule (which shall include meeting a set of debt service cover ratios requirements under the agreed scenarios), the proposal will be based on the Managing Director's final assessment and conclusions. The Managing Director shall inform the Board of Directors ahead of its decision whether the requested funds are available to the ESM in accordance with point (c) of paragraph 2 of Annex IV to the ESM Treaty.

4. In accordance with Article 18a(5) of the ESM Treaty on the basis of a request for a loan by the SRB pursuant to paragraphs 1 and 1a and of a proposal pursuant to paragraph 3, the Board of Directors shall decide by mutual agreement on loans and respective disbursements under the backstop facility for a specific resolution case, guided by the criteria enshrined in Annex IV to the ESM Treaty. Such decisions should not be discriminatory (directly or indirectly) on grounds of nationality or place of business. Where the European Commission and ECB conclude in separate assessments that a failure to urgently adopt a decision on loans and respective disbursements under the backstop facility would threaten the economic and financial sustainability of the euro area, the Board of Directors shall decide, after having received these assessments, by qualified majority in accordance with and subject to Article 18a(6) of the ESM Treaty. Representatives of the European Commission and the ECB shall present the analysis underlying their conclusion at the relevant meeting of the Board of Directors.
5. The Board of Directors shall, as a rule, take a decision pursuant to paragraph 4 within 12 hours of the SRB's request pursuant to paragraphs 1 and 1a, subject to compliance with paragraphs 1 to 3.
6. In exceptional cases, especially in the case of a particularly complex resolution operation, the Managing Director may extend the time limit set pursuant to paragraph 5 by up to 12 additional hours, to up to 24 hours as from the SRB's request pursuant to paragraphs 1 and 1a.
7. The decision pursuant to paragraph 4 shall be conditional on the entry into force of the dedicated resolution scheme substantially in line with the relevant information presented to the Board of Directors at the time of the request submitted pursuant to paragraphs 1 and 1a above and with the relevant information provided thereafter pursuant to paragraph 1b. The SRB will confirm, in writing, the entry into force of the resolution scheme substantially in line with the information provided to the Board of Directors as soon as the resolution scheme has entered into force. For this purpose, the SRB will provide adequate supporting information to the ESM, which will also include the decision on the resolution scheme of the European Commission or, where relevant, the Council pursuant to Article 18(7) SRMR. Such confirmation by the SRB represents the second of the two elements referred to in paragraph 1 above in respect of point (g) of paragraph 2 of Annex IV to the ESM Treaty. The SRB will confirm, in writing, that points (a) and (d) to (f) of paragraph 2 of Annex IV to the ESM Treaty continue to be

satisfied, and that the information which the SRB provided in respect of point (b) of paragraph 2 of Annex IV to the ESM Treaty continues to be accurate and complete.

The Managing Director will report to the Board of Directors that it has received all the above confirmations from the SRB.

In case of substantial changes to the relevant information provided to the Board of Directors pursuant to paragraphs 1, 1a, 1b and 3 above, the Board of Directors shall take another decision whether or not to uphold its disbursement decision.

8. The Managing Director shall inform the Board of Directors that its decision became effective and execute the disbursement of the approved loan, provided that the SRB has provided the confirmations pursuant to paragraph 7 in relation to the continued satisfaction of the criteria established in Annex IV to the ESM Treaty (other than point (c) of paragraph 2 of such Annex).
9. The Managing Director shall disburse loans for liquidity purposes in tranches, if so specified in the decision under paragraph 4 above, and under the terms foreseen in such decision.

#### **Article 5**

#### ***Delegation to the Managing Director***

1. In line with Article 18a(5) of the ESM Treaty, the Board of Directors may, by mutual agreement, delegate its power to decide on loans and disbursements under the backstop facility pursuant to Article 4(4) to the Managing Director. The delegation decision by the Board of Directors shall specify a period of time, a maximum amount of the sum of all loans, and if appropriate further terms with which the Managing Director has to comply.
2. If the SRB requests a loan pursuant to Article 4(1) and the decision on such request falls within the delegated authority of the Managing Director pursuant to paragraph 1, the Managing Director shall approve the requested loan, provided that said request is complete and that the criteria defined in Annex IV to the ESM Treaty are satisfied. The Managing Director shall take such decision within the timeframe defined in Article 4(5) and (6). Following receipt of the confirmation from the SRB pursuant to Article 4(7), the Managing Director shall execute the disbursement, provided that the requested funds have been raised by the ESM and all other criteria under Annex IV to the ESM Treaty continue to be satisfied.
3. The Managing Director shall promptly inform the Board of Directors about any requests for loans received and decisions on loans taken pursuant to paragraph 2.
4. The Board of Directors shall retain full power to exercise authority over any matter delegated to the Managing Director under paragraph 1, without affecting the decisions already taken under the delegation.

**Article 6**  
***Maturity***

1. The Board of Directors or the Managing Director shall set the maturity of each loan on the occasion of approval of the loan and disbursement pursuant to Article 4(4) or Article 5(2), respectively. As a rule, the loans provided under the backstop facility shall have an initial maturity of 3 years.
2. The Board of Directors may by mutual agreement extend the maturity determined pursuant to paragraph 1 by a maximum of 2 years upon a request by the SRB including updated comprehensive information on projected inflows and outflows of the SRF.
3. By way of derogation from paragraph 1, the Board of Directors or the Managing Director, as the case may be, may decide by mutual agreement that the initial maturity may be 5 years in case of a threat to financial stability of the Banking Union, as assessed and confirmed by the SRB in the request for the loan under the backstop facility.

**Article 7**  
***Liquidity in resolution***

In case the ESM provides loans to the SRB for the purposes of liquidity support from the SRF, the following safeguards apply:

1. The ESM shall have the possibility to disburse a loan in tranches to the extent such tranching is compatible with the resolution scheme according to the SRB, as specified in Article 4(9) above. Prior to every subsequent tranche disbursement, the Board of Directors shall be informed about the size of the entity's actual financing needs in relation to the initial projections by the SRB. The disbursement of the tranches does not require additional or new loan requests and approvals and shall not be subject to additional conditions.
2. A step-up margin shall apply to a loan, in accordance with Section 4 (Other costs and fees) of the Pricing Guideline.
3. The initial maturity shall be 12 months unless the Board of Directors decides differently by mutual agreement. The SRB undertakes on a best-endeavour basis towards the ESM to repay the loan within a period of 6 months in line with the adopted resolution scheme. If the loan to SRB cannot be repaid within the initial maturity, the Board of Directors shall decide by mutual agreement whether to extend the initial maturity of the loan to the SRB by another 6 months each time based on the information provided by the SRB.

If the loan cannot be repaid by the SRB within 12 (or such other initial maturity as agreed) or 6 months, as applicable, the SRB shall justify it to the Board of Directors and inform about the SRB's assessment of the banks solvency position and the expected recovery of the liquidity support injected, and include an updated repayment capacity assessment pursuant to Article 8 of this guideline. In case there is no extension of the initial maturity, the Board of Directors shall decide on a remedy plan to be agreed with the SRB in accordance with Article 9 to ensure full repayment in line with Article 6.



4. In order to inform the Board of Directors about the state of play and recovery perspective of the liquidity support from the SRF to the resolved entity, the SRB shall report every three months on the loan provided for liquidity purposes, including the following items: (i) outstanding amounts including information on the entity's actual financial needs in relation to the initial projection by the SRB, (ii) any extension of maturity, and (iii) any other aspects with an impact on timely repayment including the exit strategy.
5. The SRB is expected to provide liquidity to banks on a fully collateralised basis where available and practical. The collateral policy is expected to be presented to the ESM by June 2020.

## **Article 8**

### ***Repayment capacity assessments***

1. To facilitate swift and efficient decisions on SRB requests for loans, the ESM shall follow developments of the available funds in the SRF and the repayment capacity of the SRB, based on information provided regularly by the SRB. Such information shall include information on uses of the SRF and significant changes in the available funds in the SRF, including information on payments due on alternative funding sources, etc.
2. The SRB and the ESM will jointly assess the repayment capacity of the SRB, including the recoupment capacity of the SRB from the banking sector, considering projection periods of three and five years, based on a common methodology, including all relevant macroeconomic elements, and a data set agreed by the SRB and the ESM. The SRB will provide to the ESM the necessary information regarding such assessments. The repayment capacity assessment will also take into account other inflows and outflows than those related to the recoupment capacity, in particular contingent liabilities related to material litigation that could impact the SRB's capacity to repay the ESM. The SRB will disclose such information to the best of its knowledge. In case the SRB and the ESM cannot agree on a joint assessment, the SRB and the ESM shall perform separate assessments.
3. As regards recoupment capacity forming part of the repayment capacity assessment, the anonymous supervisory data necessary for the calculation of the recoupment capacity from the banking sector will be held in a physical secure data room located at the SRB premises. The SRB and the ESM will run the calculations jointly solely in the physical data room, based on the common methodology. No bank-specific information or data will be retrieved from the physical data room. The output data will take the form of aggregated descriptive statistics that do not reveal any bank-specific information and do not allow a re-identification of individual banks by combining the descriptive statistics with each other or with other data sources.
4. Prior to any request for a loan pursuant to Article 4(1), the repayment capacity assessment calculation will be performed at the discretion of the SRB or the ESM and as a minimum once per year. In case of high likelihood of the use of the facility, the calculation schedule can be accelerated to be performed on a quarterly or, where needed, more frequent basis, without prejudice to the swift decision-making as

foreseen in this guideline. When a request for a loan or a request for an extension of the maturity is filed, an up to date repayment capacity analysis should be available. The calculation shall be based on the latest available information. If the SRB or the ESM become aware of material changes that could affect the last regular review of the repayment capacity, a new calculation will be performed.

### **Article 9** **Monitoring**

When loans are outstanding, the ESM shall monitor the repayment capacity of the SRB for the purposes of the ESM's Early Warning System established pursuant to Article 18a(7) of the ESM Treaty to ensure timely receipt of payments under the backstop facility. For this purpose, the repayment capacity assessment calculation will be performed on a quarterly basis, unless either the ESM or the SRB has reasonable grounds to request an update in addition to this schedule. If the Internal Risk Committee on the basis of the ESM's Early Warning System established pursuant to Article 18a(7) of the ESM Treaty reporting concludes that there might be doubt on timely repayment and that this could lead to a payment default to the ESM, the Managing Director will inform the Board of Directors and the observers in the Board of Directors immediately on a confidential basis. A remedy plan satisfactory to the ESM shall be discussed and agreed between the ESM and the SRB.

### **Article 10** **Confidentiality**

The treatment of confidential information exchanged between the ESM and SRB in accordance with Article 4 is subject to professional secrecy obligations in accordance with Article 34 of the ESM Treaty and European Union law and shall be subject to appropriate mechanisms for maintaining confidentiality.

### **Article 11** **Reviews**

1. The Board of Directors shall review this guideline, at least every three years after its entry into force to assess whether changes are required in light of its application or developments related to the Banking Union. On this occasion, the Board of Directors may also review the backstop facility and other documents related to the backstop facility approved by the Board of Directors or the Board of Governors and decide to or recommend to amend those, as the case may be.
2. In addition to regular reviews, the Board of Directors shall carry out comprehensive reviews every ten years after the approval of the backstop facility by the Board of Governors, following which the Board of Directors may in addition to the decisions referred to in paragraph 1 recommend to the Board of Governors to amend the criteria for the approval of loans and disbursements enshrined in Annex IV to the ESM Treaty or to terminate the backstop facility at the end of the respective availability period pursuant to Article 12.

3. In accordance with Article 18a(8) of the ESM Treaty comprehensive reviews shall also be carried out, where the condition of permanence of the legal framework on bank resolution is not complied with as determined in line with the provisions established by Board of Governors' Resolution No. [●] on [●]/[●]/20[●●] (SG/BoG:[●]/[●]/20[●●]).

## **Article 12**

### ***Termination***

1. The initial availability period of the backstop facility as set out in Article 2(3) will be ten years. This availability period will be extended automatically for further ten year periods, unless: (a) the SRB notifies the ESM, with a reasonable notice period determined in the backstop facility agreement, that it does not wish for the backstop facility to be renewed, or (b) based on the results of the review carried out pursuant to Article 11(2) of this guideline, the Board of Governors decides by mutual agreement that the backstop facility will not be extended and the ESM notifies the SRB thereof with a reasonable notice period determined in the backstop facility agreement. A copy of such notification shall be sent to the European Commission and the European Central Bank.
2. The backstop facility shall also be terminated in accordance with the Board of Governors' Resolution No. [●] on [●]/[●]/20[●●] (SG/BoG:[●]/[●]/20[●●]) where following a fundamental change event defined therein and the ensuing comprehensive review, the Board of Governors did not decide by mutual agreement to continue the backstop facility on the same or on amended terms. Within 90 calendar days as may be extended by the Board of Governors by mutual agreement after any Fundamental Change Event, the backstop facility shall be terminated.

## **Article 13**

### ***Cooperation with non-euro area Member States***

In implementing this guideline, the ESM shall cooperate closely with non-euro area Member States participating in the Single Supervisory Mechanism and in the Single Resolution Mechanism and providing parallel facilities to the SRB for the SRF. The details of the cooperation shall be set out in an agreement between the ESM and non-euro area Member States participating in the Single Supervisory Mechanism and in the Single Resolution Mechanism and providing parallel facilities to the SRB for the SRF.