



DRAFT BOARD OF GOVERNORS RESOLUTION FOR THE NOMINAL CAP AND THE PROVISIONS
ON THE PROCEDURE FOR THE VERIFICATION OF COMPLIANCE WITH THE CONDITION OF THE
PERMANENCE OF THE LEGAL FRAMEWORK FOR BANK RESOLUTION

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AGREED DRAFT

Draft resolution for the nominal cap and the provisions on the procedure for the verification of compliance with the condition of the permanence of the legal framework for bank resolution

THE BOARD OF GOVERNORS,

Having regard to the purpose of the ESM, pursuant to Article 3(2) of the ESM Treaty, to provide the backstop facility to the Single Resolution Board (“SRB”) for the Single Resolution Fund (“SRF”) to support the application of the resolution tools and exercise of resolution powers of the SRB as enshrined in European Union law,

Having regard to the terms of reference of the common backstop to the Single Resolution Fund endorsed by the Euro Summit of 14 December 2018 (the “Terms of Reference”),

Having regard to Article 18a(1) of the ESM Treaty, specifying that the Board of Governors shall determine the key financial terms and conditions of the backstop facility, the nominal cap and any adjustments to it,

Having regard to Article 18a(8) of the ESM 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 the condition of permanence of the legal framework and on the consequences for the backstop facility and its use shall be determined by the Board of Governors,

Having regard to Article 37(4) of the ESM Treaty, specifying that 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(8) of the ESM Treaty 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,

Recalling that the procedure for granting and implementing the backstop facility follows Article 18a of the ESM Treaty and the detailed guidelines on the modalities for implementing the backstop facility to be adopted by the Board of Directors in accordance with Article 18a(4) of the ESM Treaty,

DETERMINES, pursuant to Article 18a(1) and (8) of the ESM Treaty, the following:

1. Nominal cap

The nominal cap in respect of the backstop facility is set at €68 billion. The nominal cap will limit the amount available for the backstop facility, so that its maximum amount is at all times equal to or lower than the nominal cap. The Board of Governors may, by mutual agreement, adjust the nominal cap initially set. The Board of Governors will review the appropriateness of the nominal cap initially set according to this paragraph well in time before the end of the transitional period.

2. Verification of compliance with the condition of permanence of the legal framework

a) Procedural provisions

(1) Where an ESM Member considers that the condition of permanence of the legal framework for bank resolution set out in Article 18a(9) lit. (a) of the ESM Treaty is not complied with and the relevant change of such legal framework has been

adopted against the will of such ESM Member, the ESM Member may exercise, as a Contracting Party to the Intergovernmental Agreement of 21 May 2014 on the transfer and mutualisation of contributions to the Single Resolution Fund (“IGA”), its rights under public international law regarding a fundamental change of circumstances, in accordance with Article 9(2) IGA, by notifying the other Contracting Parties to the IGA of its claim. Such notification shall be made in writing within two months from the entry into force of the relevant change of the legal framework for bank resolution. The ESM Member shall also inform the ESM and the SRB of such notification and of the date when such notification has been made to all Contracting Parties to the IGA as well as of any circumstances relevant for the consequences for the backstop facility and its use described below.

(2) Where an ESM Member considers that the condition of permanence of the legal framework is not complied with as the principles and rules defined in Article 18a(9) lit. (b) of the ESM Treaty have been repealed, or otherwise amended against the will of such ESM Member in a manner which is not equivalent or that does not lead, at least, to the same and not less stringent result than that deriving from those principles and rules as in force as of 27 June 2019, the ESM Member may notify the other ESM Members of such claim. The notification shall be made in writing within two months from the entry into force of the relevant change of the legal framework for bank resolution. The ESM Member shall also inform the ESM and the SRB of such notification and of the date when such notification has been made to all ESM Members as well as of any circumstances relevant for the consequences for the backstop facility and its use described below. Any other ESM Member may, within one month from the date when such notification has been made to all other ESM Members, request the Court of Justice of the European Union pursuant to Article 37(4) of the ESM Treaty to verify the compliance with the condition of the permanence of legal framework set out in Article 18a(9) lit. (b) of the ESM Treaty.

(3) Where an ESM Member exercises its rights both under paragraphs 1 and 2 above, it shall do so in a single notification. In that case, any request to the Court of Justice of the European Union by an ESM Member pursuant to Article 9(2) IGA and Article 37(4) of the ESM Treaty shall be made in one single application. The application shall also specify that the Court of Justice of the European Union is requested to verify the compliance with the condition of the permanence of legal framework separately for (i) rules defined in Article 18a(9)(a) of the ESM Treaty and for (ii) principles and rules defined in Article 18a(9)(b) of the ESM Treaty, respectively. Neither the exercise of the rights under paragraph 2, nor a judgment of the Court of Justice of the EU delivered in this respect shall affect performance or execution of obligations under the IGA.

b) Consequences for the backstop facility

In accordance with Article 18a(8) of the ESM Treaty, a comprehensive review of the backstop facility will be initiated in the following events (each of them a 'Fundamental Change Event'):

- i. no request has been submitted to the Court of Justice of the European Union pursuant to Article 9(2) of the IGA and/or Article 37(4) of the ESM Treaty within one month from the date when the notification under lit. a) above has been made to all other ESM Members / Contracting Parties to the IGA, as applicable; or,
 - ii. any such request which has been submitted in the time limits prescribed under lit. a) above has been withdrawn, or otherwise discontinued;
- or
- iii. the Court of Justice of the European Union has concluded, on the basis of a request submitted to it pursuant to Article 9(2) IGA and/or Article 37(4) of the ESM Treaty, that there has been a fundamental change of circumstances in the meaning of Article 9(2) IGA and/or the condition of the permanence of the legal framework for bank resolution defined in Article 18a(9) lit. b) of the ESM Treaty is not complied with.

Following a Fundamental Change Event, a meeting of the Board of Governors shall be convened or a written procedure initiated to decide following a comprehensive review on whether the backstop facility shall be continued. If the Board of Governors does not decide following a comprehensive review by mutual agreement to continue the backstop facility on the same or on amended terms within 90 calendar days after any Fundamental Change Event, the backstop facility shall be terminated. The Board of Governors may decide by mutual agreement to extend said time limit before its expiration. The Managing Director shall notify the SRB thereof in accordance with the backstop facility agreement. A copy of such notification shall be sent to the European Commission and the European Central Bank.

c) Consequences for the use of the backstop facility

For the purposes of the approval of loans and disbursements pursuant to Article 18a(5) of the ESM Treaty, point (f) of paragraph 2 of Annex IV to the ESM Treaty shall be considered satisfied, unless

- i. a Fundamental Change Event has occurred; or
- ii. within one month from the date when a notification has been made to all other Contracting Parties to the IGA pursuant to Article 9(2) IGA, a Contracting Party to the IGA has submitted a request to the Court of Justice of the European Union in accordance with Article 9(2) IGA, however, it has not requested a suspension, within the meaning of Article 278 TFEU, of the operation of the measure which is the object of the dispute under Article 9 IGA or, if it has requested such suspension, the request has been rejected.

Point (f) of paragraph 2 of Annex IV to the ESM Treaty shall also be considered satisfied, if, following any of the situations described in i. and ii. above, the Board of Governors has decided following a comprehensive review by mutual agreement to continue the backstop facility on the same or on amended terms.