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REPORT

From: Presidency

To: COREPER II and Council

Subject: Single Resolution Mechanism

Proposal for a Regulation of the European Parliament and of the Council 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 Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council [First reading]

= General approach

I. INTRODUCTION

1. The Council (ECOFIN) of 10 December 2013 examined the Presidency compromise text¹ and a report² relating to the above-mentioned Commission proposal (SRM Regulation). The meeting was adjourned till 18 December 2013, retaining the objective of reaching an agreement on the Council general approach before the end of the year in line with the deadline set by the European Council.

¹ Doc. 17410/13 EF 255 ECOFIN 1117 CODEC 2846.

² Doc. 17411/13 EF 256 ECOFIN 1118 CODEC 2847.

2. As a result of the ECOFIN debate on 10 December 2013, there is now an emerging consensus that the Council agreement on the SRM will have to consist of the following five constitutive parts, on which the latest Presidency proposals are as follows:
 - a) a general approach on the **SRM Regulation** (the 6th compromise text³);
 - b) a decision of the representatives of the euro area Member States meeting within the Council of the European Union on the inter-governmental agreement on the SRF (**Decision on IGA**); (Annex 1)
 - c) **terms of reference** of the inter-governmental agreement on the SRF (**TORs of the IGA**); (Annex 2)
 - d) statement of the participating Member States on the **SRM backstop** (Annex 3).
 - e) declaration of the representatives of the 28 Member States meeting within the Council on voting once Council is called upon to decide in accordance with Article 16 of the Regulation on the SRM (**the declaration on voting**) (Annex 4).
3. In preparation of the ECOFIN meeting of 18 December, the Ad Hoc Working Party on the Single Resolution Mechanism on 16 December (in its 10th meeting) has examined the main outstanding issues relating to the legislative text of the SRM Regulation, as well as the other texts referred to above that would constitute the Council agreement on SRM.
4. As a result of this examination, the Presidency singles out the following key outstanding issues where political decisions are required for further progress to be made.

³ Doc. ST 17742/13 EF 268 ECOFIN 1155 CODEC 2962, **as it now stands with the amendments after the AHWP of 16 December.**

II. KEY ISSUES

a) Governance of the SRB (triggering resolution (Article 16) and voting rules in SRB Plenary and Executive sessions (Articles 48 and 51)

5. The main constitutive elements of this issue have emerged as the main object of the debates:

- i) role of the EU institutions in the context of the SRM (Article 16);*
- ii) voting in the plenary and executive session of the SRB.*

There is an overall agreement that any final compromise should enable **efficient, effective and speedy resolution decisions**.

i) role of the EU institutions in the context of the SRM (Article 16)

6. The current wording of **Article 16** foresees that the SRB itself exercises the powers of a resolution authority: it can adopt a resolution scheme, which would place the entity into resolution, determine application of the resolution tools and determine the use of the SRF. The Commission sits as an observer in the SRB, and will only exercise an ex post control of those decisions. This ex post control may take the form either of an objection or of directives addressed to the SRB to modify its decisions in a certain manner. Where the Commission does not react within a given time, the decisions of the SRB will enter into force automatically.
7. Where the Commission disagrees with the decisions of the SRB and it considers either that those decisions should be objected or that they should be modified, the right to take a decision then rests with the Council. Since all voting within the Council on the issues set out in Article 16 of the SRM Regulation has to be done by all 28 Member States, the Presidency proposes to complement the agreement on the SRM by a declaration of the representatives of the 28 Member States meeting within the Council on voting once Council is called upon to decide in accordance with Article 16 of the Regulation on the SRM (Annex 4). The aim is to ensure that any decision is voted by the non-participating Member States in the same manner as the prevailing majority of the participating Member States.

8. Following the AHWP meeting of 16 December the Presidency has amended the draft declaration and the draft SRM Regulation text to reflect the simple majority decision required by the Council in the context of Article 16 of the SRM Regulation.
9. The Council, on proposal from the Commission, would intervene only to object to the decisions of the SRB or to require amendments of those decisions. This decision making process at the European level would ensure both that the SRB remains the key decision maker (and therefore the Single Resolution Authority of the participating Member States) and that an appropriate involvement of the Union institutions is preserved in order to respect the *Meroni* doctrine.
10. Where public aid is present, the SRB, the Single Resolution Fund and any participating Member States' authorities financing fully or partly the resolution, shall act in conformity with the decision on that public aid taken by the Commission in accordance with the state aid framework.
11. However, a number of delegations remain of the view that the Council should not be involved in the context of Article 16. The Council is seen as the less efficient alternative due to a number of legal, procedural and timing constraints, and these delegates would prefer the Commission to be the acting EU institution.
 - ii) *voting in the plenary and executive session of the SRB (Articles 48 and 51)*
12. In view of the compromise on the overall package, the Presidency proposes the following solution for the voting arrangements in the SRB:
 - In the **executive session** of the SRB, the voting regime would be as follows (Article 51): both for cross-border and non cross-border cases, the representatives of NRAs concerned, the SRB Executive Director and 4 members, appointed by the Council would reach decisions by a joint agreement (consensus) but, should they fail to do so, the Executive Director and the appointed members would have the right to take a decision by a simple majority of votes (one member - one vote, in all cases). This is unchanged to the 5th Presidency compromise (as set out in doc. 17410/13);

- in the **plenary session** of the SRB (Article 48), as a general rule: a simple majority of SRB plenary session members, each voting member has one vote. In case of a tie, the Executive Director has a casting vote.
 - where the resolution action requires the support of the Fund above the threshold of 20% or more of the financial means fully paid-in in the Fund at the time of the decision granting liquidity support, or if the Fund is used to recapitalise an institution or a group in certain cases: on these decisions the SRB in its **plenary session** would decide by majority of 2/3 of the SRB members. Each voting member shall have one vote. In case of a tie, the Executive Director shall have a casting vote.
13. While the Presidency is of the view that this compromise on the voting in the executive and plenary sessions of the SRB constitutes an equitable compromise, it notes, however, that the required majority support is not yet present.

b) interaction of the SRM Regulation and the IGA on the SRF (TORs of the IGA)

14. In the ECOFIN of 10 December there was a measure of support to the principle that the channeling of the funds to the SRF and their gradual mutualisation, as well as certain other components should be set out in an instrument of international public law to be ratified by all the participating Member States (IGA on the SRF), rather than in the SRM Regulation.
15. The IGA on the SRF should be negotiated and agreed by 1 March 2014 in the intergovernmental conference with a view to confirmation by the ministers when meeting in the margins of the 11 March 2014 ECOFIN. This should permit reaching a final political agreement with the European Parliament on the draft SRM Regulation by the end of this parliamentary term, the deadline set by the European Council.
16. Careful design of interaction of the SRM Regulation and of the future IGA is a very important issue, and, given the time constraints, it is impossible to reach an agreement on the full text of the IGA at this stage of negotiations.

17. Therefore the Presidency proposes TORs of the IGA, which would permit agreement on principles how the SRM Regulation and the IGA would interact (see the draft Decision on IGA (Annex 1) and of the draft TORs of IGA (Annex 2).
18. However, a number of delegations raise serious concerns on the split of SRM substance between the TORs of IGA, and the draft text of the SRM Regulation. The Presidency hopes to solve this issue in advance of the 18 December 2013 ECOFIN meeting.

c) backstop for SRM

19. At the ECOFIN of 10 December, the draft statement of the Council on the SRM backstop has been tabled, but has not been discussed (Annex 3). The work on this issue will continue in the Eurogroup Working Group (EWG) and the Eurogroup meetings of 17 December. The results of this preparatory work will be made known in time for the 18 December ECOFIN meeting.
20. In view of the deadlines set by the European Council and given that the trilogues with the European Parliament should start as soon as possible, the Presidency is of the view that Article 69 of the compromise now reflects the best available solution in terms of efficiency - it leaves open the possibility for the SRM to resort to a backstop, once it is in place.
21. However, a large number of delegations make their agreement on SRM conditional upon a satisfactory solution on the SRM backstop issue, seeking assurance that such backstop will definitely exist.

III. OTHER ISSUES

22. On the SRM Regulation, the Presidency has made adjustments that are now reflected in its sixth compromise text⁴, and now hopes that the Member States concerned will be able to lift their remaining reservations.
23. The Presidency in its latest compromise text made the bail-in tool mandatory in the Member States participating in the SRM from the date when the resolution function of the SRM becomes effective (scheduled for 1 January 2016). However, some delegations see this date only as a possible component of an overall agreement, given that the Council general approach on the BRRD foresaw mandatory application of the bail-in tool from 2018 only.
24. The SRM text should be aligned with the final text on the BRRD. The Presidency has attempted to align the SRM compromise with the Council general approach on the BRRD, however due to time constraints, any further alignment can in principle be done also during the trilogues on the SRM.
25. Some delegations have also raised a number of technical concerns, that do not block them from accepting the overall compromise on the principal elements of the SRM. The Presidency expects these issues could be addressed if necessary in the following stages of negotiations on this text.

⁴ Doc. ST 17742/13 EF 268 ECOFIN 1155 CODEC 2962.

IV. CONCLUSION

26. The Presidency invites delegations to lift their remaining reservations in order to enable the Presidency to start negotiations with the European Parliament in accordance with the mandate received, in view of reaching a timely agreement on the overall compromise text.
27. Against this background, **the Council** is invited to:
- a) finalise the agreement on the **general approach**, and
 - b) invite the Presidency to start negotiations with the European Parliament **on the SRM Regulation** as soon as possible on the basis of the general approach with a view to reaching an agreement at first reading.
28. **Representatives of the Member states participating in the SRM (euro area member States)** are invited to adopt:
- a) **a decision** of the representatives of the euro area Member States meeting within the Council of the European Union on the inter-governmental agreement on the SRF;
 - b) **terms of reference** of the inter-governmental agreement on the SRF;
 - c) **the statement on the SRM backstop**.
29. **Ministers meeting within the Council** are invited to agree:
- a) **a declaration** of the representatives of the 28 member States meeting within the Council on voting once Council is called upon to decide in accordance with Article 16 of the Regulation on the SRM.
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Draft Decision (inter-governmental Agreement)

Decision of the representatives of the euro area Member States meeting within the Council of the European Union

1. The representatives of the euro area Member States (the “participating Member States”) commit to establish among themselves an inter-governmental agreement (“the Agreement”) specifying the channelling of the funds to the SRF and gradual mutualisation, through an instrument of international public law to be ratified by all the participating Member States.
2. The Agreement shall be supplementary to the SRM Regulation. Both should set out the main content, elements as well as the functioning of the SRF, including rules explicitly setting the bail in provision applicable to the use of the SRF. The SRM Regulation shall also contain the references and provisions necessary for an efficient interaction between the SRM and the SRF.
3. Through the Agreement, in line with the Terms of Reference attached to this decision, the participating Member States commit to channel national funds to the national compartments of the SRF – the Agreement shall also provide arrangements for progressive reciprocal mutualisation of compartments during the transitional period.
4. The inter-governmental agreement will be in full consonance with the aim and objectives of the Union legislation on resolution, in particular the Regulation establishing the Single Resolution Mechanism.

5. Participating Member States shall endeavour to finalise their negotiations by 1 March 2014 so that the national procedures of ratification of the agreement on the Single Resolution Fund are duly completed in Reference attached to this decision.
6. Negotiations on the agreement on the Single Resolution Fund will take place in the framework of an intergovernmental conference whose particular meeting modalities and composition shall be further specified by the Secretary General of the Council of the European Union.
7. Non-euro area Member States that **consider [...]** to participate in the Single Supervisory Mechanism are invited to **take part in negotiations [...]** on the Single Resolution Fund **[...]. Other Non-euro area Member States may participate in those negotiations as observers.**

**TERMS OF REFERENCE CONCERNING THE INTERGOVERNMENTAL
AGREEMENT ON THE SINGLE RESOLUTION FUND**

(TORs of the IGA; AS DISTRIBUTED FOR THE AHWG OF 16 DECEMBER 2013)

These Terms of Reference contain an account of the fundamental elements that should be included in the Inter-governmental agreement (IGA) on the functioning of the Single Resolution Fund (the Fund). Where appropriate, specific references are made to the interaction between the IGA and the SRM Regulation, thus specifying which of the two instruments constitute the source of rights and obligations for the participating Member States. The IGA would enter into force when the instruments of ratification, approval or acceptance will be deposited by a sufficient number of signatories that are part of the SSM/SRM.

I. PROVISIONS CONCERNING THE FUNCTIONING OF THE FUND

1. By means of the IGA the participating Member States (the parties) will assume the following obligations:

A) to transfer the contributions that they raise at national level in accordance with the BRRD and SRM Regulation to the Fund.

B) to allocate, during a transitional period, the said contributions to different compartments corresponding to each participating Member State . The said compartments will be subject to a progressive merger so that they will cease to exist at the end of the transitional period.

A) The transfer of contributions

2. The BRRD and the SRM Regulation will set out the criteria to determine the fixing and calculation of any such - ex ante and ex post - contributions as well as the obligation of Member States to levy them at national level.
3. However the obligation to transfer the contributions raised at national level towards the fund will not derive from the law of the Union. Such obligation will be established by the IGA, that will lay down provisions whereby the parties agree to reciprocally transfer the contributions that they raise at national level to the Fund. The transfer of contributions will take place in accordance with the rules on the progressive merger of the national compartments of the Fund, as described in section B) below.
4. The entry into force of the IGA will be necessary for the Fund to be fed by national compartments based on contributions raised by the parties.
5. The IGA will establish that the SRB may dispose of the national compartments progressively transferred to the Fund according to the agreed rules in the IGA..

B) The compartments: progressive merger

6. The IGA will establish that contributions raised at national level will be attributed to different compartments, corresponding to each participating Member State, during a transitional period (i.e., a period elapsing at the moment when the fund reaches the target funding level determined in the SRM Regulation but not later than 10 years).
7. The IGA will establish that national compartments will be used in relation to the possible resolution of a bank which is established in the party to which the compartment corresponds. The size of each of the compartments should be determined in accordance to criteria to be further agreed in the IGA.

8. The IGA will establish that when a decision is made and the conditions are met to make use of the Fund in a specific resolution case, as a first step the costs are born by the compartments of the relevant home and host parties, in accordance with burden share criteria to be further agreed in the IGA. During the transitional period the use of the financial means in the compartments of the relevant home and host parties will decrease by 10% every year.
9. The IGA will establish that in case the financial means in a national compartment of a home and/or host Member State are not sufficient, as a second step recourse shall be had to the available financial means in all national compartments of the Fund, including to the same degree the remaining financial means in the national compartments of the directly involved home and host Member States. During the transitional phase, the use of available financial means of all national compartments of the Fund in this second step will increase 10% every year, ie total usage by consecutive resolution action shall not exceed the above mentioned thresholds within any given year.
10. The IGA will establish that in case the financial means available in the Fund are not sufficient to cover the costs of a particular resolution action, any further remaining financial means in the compartments of the directly involved home and host parties should be used. In case the remaining financial means in the compartments of the directly involved home and host parties are not sufficient, the National Resolution Authorities concerned will be required to raise extraordinary ex post contributions from institutions authorized in the territory of the parties concerned by the resolution case.

Year	<u>Step 1:</u> Use of paid in means in national compartment	<u>Step 2:</u> Use of the available paid in means in all compartments making up the SRF, including any remaining paid in means in the national compartment in question	<u>Step 3:</u> In case of any remaining costs
1	100%	10%	Use of remaining financial means in the directly involved national compartments + Possible extraordinary ex post levy on national banking sector in + Bridge financing from national backstop or ESM programme according to agreed procedures
2	90%	20%	
3	80%	30%	
4	70%	40%	
5	60%	50%	
6	50%	60%	
7	40%	70%	
8	30%	80%	
9	20%	90%	
10	10%	100%	
11	0%	100%	

11. The IGA will establish that national compartments will be merged into a single Fund at the end of the transitional period as described in para. 6.
12. Directly affected national banking sectors should replenish the resources in the corresponding national compartments within a given time period up to the average of all other compartments so as to be able to participate in and contribute to European risk-sharing.

13. The SRM Regulation will establish provisions conferring upon the SRB the power to use the Fund in accordance with the IGA rules on the progressive merge of the national compartments of and their use by the Fund. However, from a legal point of view, it is not the SRM Regulation that creates the parties' obligation to merge progressively their respective compartments. Such obligation and the conditions to use them stem from the IGA. Accordingly, the SRB may not use the Fund if the IGA has not previously entered into force.

II. GOVERNANCE

14. The IGA will not establish additional governing bodies for the Fund. Governance of the Fund, including decisions on its use and management (investments, borrowing and alternative borrowing), addressed to National Resolution Authorities as appropriate, will correspond to the SRB, in accordance with the powers and procedures laid down in the SRM Regulation.

III OTHER PROVISIONS

15. The IGA will establish that the use of the Fund on a mutual basis is contingent upon respect of the rules on decision-making and the general principles governing resolution set out in Article 13(1) (a) and (b) of the SRM Regulation and the specific rules and tools set out in subsequent Articles (including bail-in tool) which require that the shareholders and the institution under resolution bear first losses and the creditors of the institution under resolution bear losses after the shareholders in accordance with the order of priority of their claims - pursuant to the relevant provisions of the SRM Regulation.

16. Membership of the IGA shall be open to all Member States of the European Union that wish to be a Contracting Party. However, its provisions will be only binding on those Member States that are part of the Single Supervisory Mechanism (SSM) and the SRM, thus the euro area Member States plus any other non euro area Member State whose competent authority has established close cooperation with the ECB in accordance with Article 7 of Regulation 1024/2013 (the SSM Regulation).
17. The IGA shall enter into force on the date when the instruments of ratification, approval or acceptance have been deposited by at least a number of signatories that are part of the SSM/SRM, whose total compartments in the Fund represent a minimum critical mass to be further determined.
18. The IGA will include provisions permitting the accession to Member States that are not parties to the agreement at the moment it enters into force.
19. The IGA will include provisions ensuring consistency with the law of the Union, thus recognising the principles of primacy and of sincere cooperation. According to these provisions, the IGA i) will be applied and interpreted in conformity with the law of the Union, ii) will be applied insofar as it is compatible with the law of the Union; and iii) shall not encroach upon the competences of the Union in the field of the internal market.
20. The IGA will include provisions concerning the attribution of jurisdiction to the Court of Justice. Parties may bring before the Court of Justice, on the basis of Article 273 TFEU, any dispute among them concerning the interpretation or application of the IGA. In particular, any party that considers, on the basis of their own assessment or on the basis of information to be provided by the SRB, that another one has breached its obligations under the IGA, may bring the case before the Court of Justice. The judgment of the Court of Justice shall be binding on the parties to the proceedings, which shall take the necessary measures to comply with the judgment within a period to be decided by the Court of Justice. An adequate system for enforcing the judgments of the Court of Justice against parties that persistently breach their obligations under the IGA (including the impositions of sanctions) may be envisaged.

21. The IGA will include provisions according to which the parties will reimburse promptly and with interest each SRM non-participating Member State for the amount that State has paid in own resources corresponding to the use of the Union budget in cases of non-contractual liability that the Court of Justice may declare in respect of the exercise of powers by the institutions of the Union under the SRM Regulation. The distribution of costs among the parties shall be made pro rata in accordance with the size of their compartments in the Fund. The Commission will be tasked to coordinate any reimbursement action.

 22. The IGA will establish that within 10 years, at most, of its date of entry into force, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating its substance into the legal framework of the European Union.
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Draft statement of the participating Member States on the SRM backstop

(as distributed during the 10 December 2013 ECOFIN)

1. A Single Resolution Fund (SRF) shall be established in the context of the Banking Union to underpin the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM) in order to safeguard financial stability in the Banking Union as a whole or in one or more of its Member States concerned.
2. However, situations may arise when the fund is not sufficiently funded, especially in the initial period but also in the steady state. In order to ensure sufficient funding, the Eurogroup and Ecofin Ministers agreed for Member States participating in the SSM/SRM to put in place a system by which bridge financing would be available as a last resort and in full compliance with State aid rules.
3. In the build-up phase, bridge financing will initially be available from the respective national sources, or from the ESM on a case by case basis in line with agreed procedures. In particular, National guarantees for the national compartments, in the SRM transition phase, should be discussed and foreseen in particular if using ESM under agreed procedures (lender of last resort to eligible Member States).
4. A common backstop will be designed and developed during the transitional period. Such common backstop should be fully operational when single resolution fund is totally funded.
5. These arrangements will be operational by the time the SRF is established. They will be activated according to their agreed rules and be fiscally neutral over the medium term. This means that any loans from public sources shall be fully repaid, by means of ex-post levies on the banking sector (in all participating Member States), when necessary, so that taxpayers are not affected by the use of the mechanism.
6. The arrangements will ensure equivalent treatment across all Member States participating in the SSM/SRM, including Member States joining at a later stage, in terms of rights and obligations. They will respect a level playing field with non-participating Member States, take full advantage of synergies with existing frameworks, and safeguard the Internal Market.
7. The operational details for such a mechanism will be developed in the coming months.

**DECLARATION OF THE REPRESENTATIVES OF THE 28 MEMBER STATES
MEETING WITHIN THE COUNCIL**

While fully respecting the procedural requirements of the Treaties on which the EU is founded, the representatives of the Member States of the 28 Member States meeting within the Council agree on the following:

When the Council is called upon to decide in accordance with Article 16 of the Regulation on the Single Resolution Mechanism, the Members of the Council that are participating Member States will verify before an eventual vote is taken among themselves whether they intend to support, to amend or to reject the proposal presented by the Commission pursuant to that provision.

To this[...] effect[...], they will verify whether a [...] simple majority of them, calculated in accordance with Article 238([...]1) TFEU[...], exists in favour of the proposal.

The Members of the Council that are not participating Member States will exercise their right to vote in a manner such that they will not prevent the adoption of the decision by the Council in the sense previously agreed by the Members of the Council that are participating Member States.
