

DRAFT TREATY ESTABLISHING THE EUROPEAN STABILITY MECHANISM (ESM)

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 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
THE REPUBLIC OF FINLAND**

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

COMMITTED TO ensuring the financial stability of the euro area;

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

WHEREAS

(1) The European Council agreed on 17 December 2010 on the need for euro area Member States to establish a permanent stability mechanism. This European Stability Mechanism will assume the tasks currently fulfilled by the European Financial Stability Facility ("EFSF") and the European Financial Stabilisation Mechanism ("EFSM") in providing where needed financial assistance to euro area Member States after June 2013.

(2) On 25 March 2011, the European Council has adopted a decision adding to Article 136 of the Treaty on the Functioning of the European Union the following paragraph: "*The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality*".

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

(4) If indispensable to safeguard the financial stability of the euro area as a whole, access to ESM financial assistance will be provided on the basis of strict policy conditionality under a macro-economic adjustment programme and a rigorous analysis of public-debt sustainability. The initial maximum lending volume of the ESM after the complete run down of the EFSF is set at EUR500bn.

(5) All euro-area Member States will become ESM Members. As a consequence of joining the euro area, a Member State of the European Union (the "EU") should become a member of the ESM with full rights and obligations, in line with those of the contracting parties.

(6) The ESM will cooperate very closely with the International Monetary Fund ("IMF") in providing financial assistance. In all circumstances, active participation of the IMF will be sought, both on technical and financial level. A Member State requesting financial assistance from the ESM is expected to address a similar request to the IMF.

(7) Non euro area Member States participating on an ad hoc basis alongside the ESM in a financial assistance operation for euro-area Member States will be invited to participate, as observers, in the ESM meetings when this financial assistance and its monitoring will be

discussed. They will have access to all information in a timely manner and be properly consulted.

(8) On xx 2011, the representatives of the governments of the Member States of the Union, authorised the contracting parties of this Treaty to request the European Commission and the European Central Bank ("ECB") to perform the tasks provided for in this Treaty.

[(9) An adequate and proportionate form of private-sector involvement will be sought on a case by case basis where financial assistance is received by an ESM Member, in line with IMF practice. The nature and extent of this involvement will depend on the outcome of a debt sustainability analysis and take due account of the risk of contagion and potential spill over effects on other Member States and third countries. On the basis of this analysis and depending on whether a macro-economic adjustment program can realistically restore the public debt to a sustainable path, the beneficiary Member State may be required to take initiatives ranging from encouraging the main private investors to maintain their exposure to engaging in active negotiations in good faith with its creditors to secure their direct involvement in restoring debt sustainability] [alternative to Article 12 (2)]

[(10) In its statement of 28 November 2010, the Eurogroup stated that standardized and identical Collective Action Clauses ("CACs") will be included, in such a way as to preserve market liquidity, in the terms and conditions of all new euro area government bonds starting in June 2013. Moreover, the Term Sheet on the ESM, as endorsed by the European Council on 25 March 2011, stated that the detailed legal arrangements for including CACs in euro area government securities will be finalised by the end of 2011.] [alternative to Article 12 (3)]

[(11) Like the IMF, the ESM will provide financial assistance to a Member when its regular access to market finance is impaired. Reflecting this, Heads of State and government have stated that the ESM will enjoy preferred creditor status in a similar fashion to IMF, while accepting preferred creditor status of IMF over ESM. The euro area Member States will support equivalent creditor status of the ESM and that of other Member States lending bilaterally alongside the ESM] .

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

(13) Post-programme surveillance will be carried out by the European Commission and by the Council of the European Union within the framework laid down under Articles 121 and 136 TFEU.

HAVE AGREED as follows:

CHAPTER 1. COMMON PROVISIONS

Article 1
Establishment and Members

1. By this Treaty, the contracting parties establish among themselves an international financial institution, called "European Stability Mechanism" (hereinafter the "ESM").
2. The contracting parties are the members of the ESM (hereinafter the "ESM Members").

Article 2
New members

1. Membership in the ESM shall be open to the other Member States of the European Union as from the entry into force of the decision of the Council of the European Union taken in accordance with Article 140(2) of the Treaty on the Functioning of the European Union (hereinafter the "TFEU") to abrogate their derogation from participating in the euro.
2. New ESM Members shall be admitted on equal terms and conditions as existing ESM Members, in accordance with Article 39.
3. A new Member State acceding to the ESM after its establishment shall receive shares in the ESM in exchange for its capital contribution, calculated in accordance with the contribution key described in Article 11.

Article 3
Purpose

The purpose of the ESM shall be to mobilise funding and provide financial assistance, under strict economic policy conditionality, 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. For this purpose 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.

CHAPTER 2. GOVERNANCE OF THE ESM

Article 4
Structures and voting rules

1. The ESM shall have a Board of Governors, a Board of Directors, a Managing Director, and dedicated staff as may be considered necessary.
2. The decisions of the Board of Governors and the Board of Directors shall be taken by mutual agreement, qualified majority or simple majority as specified in this Treaty. In respect of all decisions, a quorum of 2/3 of the members with voting rights representing at least 2/3 of the voting rights must be present.

3. The adoption of a decision by mutual agreement requires the unanimity of the members participating in the vote. Abstentions do not prevent the adoption of a decision by mutual agreement.
4. The adoption of a decision by qualified majority requires eighty per cent (80%) of the votes cast.
5. The adoption of a decision by simple majority requires a majority of the votes cast.
6. The voting rights of each ESM Member, as exercised by its appointee or representative on the Board of Governors or Board of Directors, shall be equal to the number of shares allocated to it in the authorized capital stock of the ESM as set out in Annex 2 to this Treaty.
7. If any ESM Member fails to pay any part of the amount due in respect of its obligations in relation to paid-in shares or calls of capital under Articles 8 to 10 of this Treaty, or in relation to the reimbursement of the financial assistance under Article 14 or 15 of this Treaty, such ESM Member shall be unable, for so long as such failure continues, to exercise any of its voting rights. The voting thresholds shall be recalculated accordingly.

Article 5
Board of Governors

1. Each ESM Member shall appoint a Governor and an alternate Governor, revocable at any time. The Governor shall be a member of the government who has responsibility for finance. The alternate Governor shall have full power to act on behalf of the Governor when he or she is not present.
2. The Member of the European Commission in charge of economic and monetary affairs and the President of the European Central Bank (hereinafter the "ECB"), as well as the President of the Eurogroup, as referred to in protocol N° 14 to the EU Treaties (if he or she is not a Governor) may participate in the meetings of the Board of Governors as observers.
3. Representatives of non-euro area Member States participating on an ad hoc basis alongside the ESM in a financial assistance operation for a euro-area Member State shall also be invited to participate, as observers, in the meetings of the Board of Governors when this financial assistance and its monitoring will be discussed.
4. Other persons, including representatives of institutions or organisations, such as the IMF, may be invited by the Board of Governors to attend meetings as observers on an *ad hoc* basis.
5. The Board of Governors shall either appoint the President of the Eurogroup as the ESM Chairperson or elect a Chairperson and a Vice-Chairperson from among its members for a term of two years. The Chairperson and the Vice-Chairperson may be re-elected. A new election shall be organised without delay if the incumbent no longer holds the function needed for being designated Governor.
6. The Board of Governors shall take the following decisions by mutual agreement:

- (a) The decision to issue new shares on other terms than at par, in accordance with Article 8(2);
- (b) The capital calls, in accordance with Article 9(1);
- (c) The changes in authorized capital and adaptation of the maximum lending volume of the ESM, in accordance with Article 10(1);
- (d) The decision to take into account a possible update of the key for the subscription of the ECB capital, in accordance with Article 11 (3) and the changes to be made to Annex 1 in accordance with Article 11 (5);
- (e) The granting of financial assistance by the ESM, including the policy conditionality as stated in the Memorandum of Understanding ("MoU"), the financial terms and conditions, and the choice of instruments, in accordance with Articles 12 to 15;
- (f) The mandate to be given to the European Commission to negotiate, in liaison with the ECB, the economic policy conditions attached to each financial assistance, in accordance with Article 13(3);
- (g) The changes in the pricing structure and pricing policy for financial assistance, in accordance with Article 14(4);
- (h) The changes to the list of financial assistance instruments that may be used by the ESM, in accordance with Article 16;
- (i) The modalities of the transfer of EFSF support to the ESM, in accordance with Article 35;
- (j) The decision to approve the application for membership of the ESM by new Members, referred to in Article 39
- (k) The adaptations to be made to this Treaty as a direct consequence of the accession of new Members, including changes to be made to the distribution of capital among ESM Members and the calculation of such a distribution as a direct consequence of the accession of a new Member to the ESM, in accordance with Article 39;
- (l) The delegation to the Board of Directors of tasks listed in the present Article.

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

- (a) The detailed technical terms of accession of a new member to the ESM, in accordance with Article 39;
- (b) The election of the Chairperson and Vice-Chairperson of the Board of Governors, in accordance with paragraph 2 of this Article;
- (c) The by-laws of the ESM and the rules of procedure applicable to the Board of Governors and Board of Directors (including the right to establish committees and subsidiary bodies), in accordance with paragraph 9;

- (d) The determination of the list of activities incompatible with the duties of a Director or an alternate Director, in accordance with Article 6 (8);
- (e) The appointment of the Managing Director, in accordance with Article 7;
- (f) The establishment of other funds, in accordance with Article 20;
- (g) The decisions on the actions to be taken for recovering a debt of an ESM Member, in accordance with Article 21(2) and (3);
- (h) The approval of the annual accounts of the ESM, in accordance with Article 23 (1); and
- (i) The appointment of the members of the Internal Auditing Board, in accordance with Article 24;
- (j) The approval of the external auditors, in accordance with Article 25;
- (k) The decision to waive the immunity of a Governor, alternate Governor, Director, alternate Director or member of the staff, in accordance with Article 30; and
- (l) The taxation regime applicable to the ESM staff, in accordance with Article 31(5);
- (m) The decision on a dispute, in accordance with Article 32(2);
- (n) Any other necessary decision not explicitly provided for by this Treaty.

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

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

Article 6 ***Board of Directors***

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

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

3. Representatives of non-euro area Member States participating on an ad hoc basis alongside the ESM in a financial assistance operation for a euro-area Member State shall be invited to participate, as observers, in the meetings of the Board of Directors when this financial assistance and its monitoring will be discussed.

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

5. The Board of Directors shall take decisions by qualified majority, unless otherwise stated in this Treaty. Decisions delegated by the Board of Governors shall be adopted in accordance with the relevant voting rules set in Article 5 (6) and (7).

6. Without prejudice to the powers of the Board of Governors as set out in Article 5, the Board of Directors shall ensure that the ESM is run in accordance with this Treaty and the by-laws of the ESM adopted by the Board of Governors. It shall take decisions as provided for in this Treaty or which are delegated to it by the Board of Governors.

7. Any vacancy in the Board of Directors shall be immediately filled in accordance with paragraph (1).

8. The Board of Governors shall lay down what activities are incompatible with the duties of a Director or an alternate Director, the by-laws of the ESM and rules of procedure of the Board of Directors.

Article 7 *Managing Director*

1. The Managing Director shall be appointed by the Board of Governors from among candidates having the nationality of an ESM Member, a relevant international experience and a high competence in economic and financial matters. Whilst holding office, the Managing Director may not be a Governor or Director or an alternate of either.

2. The term of office of the Managing Director shall be five years. He or she may be re-appointed once. He or she shall, however, cease to hold office when the Board of Governors so decides.

3. The Managing Director shall chair the meetings of the Board of Directors and shall participate in the meetings of the Board of Governors.

4. The Managing Director shall be chief of the staff of the ESM. He or she shall be responsible for the organization, appointment and dismissal of the staff in accordance with staff rules to be adopted by the Board of Directors.

5. The Managing Director shall be the legal representative of the ESM and shall conduct, under the direction of the Board of Directors, the current business of the ESM.

CHAPTER 3. CAPITAL OF THE ESM

Article 8

Authorized capital stock

1. The authorized capital stock shall be EUR seven hundred billion (700,000,000,000). It shall be divided into seven (7) million shares, having a nominal value of EUR hundred thousand (100 000) each, which shall be available for subscription according to the initial contribution key defined in Article 11 and calculated in Annex 1.
2. The capital stock shall be divided into paid-in shares and callable shares. The initial total aggregate nominal value of paid-in shares shall be EUR eighty billion (80,000,000,000). Shares of stock initially subscribed shall be issued at par. Other shares shall be issued at par, unless the Board of Governors decides to issue them in special circumstances on other terms.
3. Shares of stock shall not be encumbered or pledged in any manner whatsoever and they shall not be transferable, with the exception of transfers for the purposes of implementing adjustments of the contribution key defined in Article 11 to the extent necessary to ensure that the distribution of shares corresponds to the adjusted key.
4. The ESM Members hereby unconditionally and irrevocably undertake to provide their contribution to the authorized capital stock, in accordance with their contribution key in Annex 1. They shall meet all capital calls on a timely basis in accordance with the terms set out in this Treaty.
5. The liability of each ESM Members shall be limited, in all circumstances, to its portion of the authorized capital at its issue price. No ESM Member shall be liable, by reason of its membership, for obligations of the ESM. The obligations of ESM Members to contribute to capital in accordance with this Treaty are not affected if such ESM Member becomes eligible for or is receiving financial assistance from ESM.

Article 9 Capital calls

1. The Board of Governors may call in authorized unpaid capital at any time and set an appropriate period of time for its payment by the ESM Members.
2. The Board of Directors may call in authorized unpaid capital by simple majority decision to restore the level of paid-in capital if the amount of the latter is reduced by the absorption of losses below the level established in Article 8(2), as may be amended by the Board of Governors following the procedure foreseen in Article 10, and set an appropriate period of time for its payment by the ESM Members.
3. The Managing Director shall call authorized unpaid capital in a timely manner if needed to avoid the ESM being in default of any scheduled or other payment obligation due to creditors of ESM. He or she shall inform the Board of Directors and the Board of Governors of any such call. When a potential shortfall in ESM funds is detected, the Managing Director shall make such capital call(s) as soon as possible with a view to ensuring that the ESM shall have sufficient funds to meet payments due to creditors in full on their due date. ESM Members hereby irrevocably and unconditionally undertake to pay on demand any capital call made on them by the Managing Director pursuant to this paragraph, such demand to be paid within seven (7) days of receipt of such demand.

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

Article 10
Changes in authorized capital

1. The Board of Governors shall review regularly and at least every five years the maximum lending volume and the adequacy of the authorized capital stock of the ESM. It may decide to change the authorized capital and amend Article 8 and Annex 2 accordingly. This decision shall enter into force after the ESM Members have notified the Depository of the completion of their applicable national procedures. The new shares shall be allocated to the ESM Members according to the contribution key defined in Article 11 and in Annex 1.

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

3. Upon a new Member State becoming an ESM Member, the ESM's authorized capital stock shall be automatically increased by multiplying the respective amounts then prevailing by the ratio, within the expanded contribution key defined in Article 11, between the weighting of the entering ESM Member and the weighting of the existing ESM Members.

Article 11
Contribution key

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

2. The initial contribution key for the subscription of the ESM authorized capital stock is specified in Annex 1 to this Treaty.

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

- when there is a change in the authorized capital stock, as specified in Article 10 (1)
- upon a new Member State becoming an ESM Member and the ESM's authorized capital stock automatically increasing as specified in Article 10(3);
- when the twelve (12) year temporary correction applicable to an ESM Member established in accordance with Article 37 ends.

The Board of Governors may decide to take into account possible updates to the key for the subscription of the ECB capital mentioned in paragraph 1.

4. When the contribution key for the subscription of the ESM authorized capital stock is adjusted, the ESM Members shall transfer among themselves capital stock to the extent necessary to ensure that the distribution of capital stock corresponds to the adjusted key.

5. Annex 1 shall be amended upon decision by the Board of Governors upon any adjustment contemplated by this Article.

6. The Board of Directors shall take all other measures necessary for the application of this Article.

CHAPTER 4. OPERATIONS OF THE ESM

Article 12 Principles

[1.] If indispensable to safeguard the financial stability of the euro area as a whole, the ESM may provide financial assistance to ESM Members, subject to strict conditionality under a macro-economic adjustment programme, commensurate with the severity of the economic and financial imbalances experienced by that ESM Member.

[2. An adequate and proportionate form of private-sector involvement shall be sought on a case by case basis where financial assistance is received by an ESM Member, in line with IMF practice. The nature and the extent of this involvement shall depend on the outcome of a debt sustainability analysis and shall take due account of the risk of contagion and potential spill over effects on other Member States and third countries. If, on the basis of this analysis, it is concluded that a macro-economic adjustment program can realistically restore the public debt to a sustainable path, the beneficiary Member State shall take initiatives aimed at encouraging the main private investors to maintain their exposure. Where it is concluded that a macro-economic adjustment program cannot realistically restore the public debt to a sustainable path, the beneficiary Member State shall be required to engage in active negotiations in good faith with its creditors to secure their direct involvement in restoring debt sustainability.. In the latter case, the granting of financial assistance will be contingent on the Member State having a credible plan for restoring debt sustainability and demonstrating sufficient commitment to ensure adequate and proportionate private-sector involvement. Progress in the implementation of the plan will be monitored under the programme and will be taken into account in the decisions on disbursements.] [Alternative to recital 9]

[3. Collective action clauses shall be included in all new euro-area government securities, with maturity above one year, from July 2013, in a standardized manner which ensures that their legal impact is identical in all euro-area jurisdictions.] [Alternative to recital 10]

Article 13 Procedure for granting financial assistance

1. An ESM Member may address a request for a financial assistance to the Chairperson of the Board of Governors. On receipt of such a request, the Chairperson of the Board of Governors shall task the European Commission, in liaison with the ECB, to:

- (a) Assess the existence of a risk to the financial stability of the euro area as a whole;
- (b) Undertake - wherever possible, together with the IMF - a rigorous analysis of the debt sustainability of the ESM Member concerned;
- (c) Assess the actual financing needs of the ESM Member concerned and the nature of the private sector involvement required, in accordance with Article 12.

2. On the basis of the assessment referred to in paragraph 1, the Board of Governors may decide to grant, in principle, financial assistance to the ESM Member concerned.

3. If a decision to grant, in principle, financial assistance is adopted, the Board of Governors shall task the European Commission to negotiate with the ESM Member concerned – wherever possible, together with the IMF and in liaison with the ECB – a memorandum of understanding (hereinafter the “MoU”) detailing the economic policy conditions, contained in a macro-economic adjustment programme and attached to the financial assistance. In parallel, the Managing Director of the ESM shall prepare a proposal for financial assistance, including the terms and financial conditions and the choice of instruments, to be adopted by the Board of Governors.

The MoU shall be fully consistent with the measures of economic policy coordination foreseen in the TFEU, including any act of secondary legislation as well as any opinion, warning, recommendation or decision addressed to the ESM Member concerned.

4. The European Commission shall sign the MoU on behalf of the ESM, subject to prior respect of the conditions established in paragraph (3) and approval by the Board of Governors.

5. The Board of Directors shall approve the financial assistance agreement detailing the technical aspects of the financial assistance to be provided and the disbursement of the first tranche of the assistance.

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

7. The European Commission – wherever possible, together with the IMF, and in liaison with the ECB – shall be entrusted with monitoring the compliance with the economic policy conditions attached to the financial assistance. On the basis of the report of the European Commission, the Board of Directors shall decide, by mutual agreement, on the disbursement of the tranches of the financial assistance subsequent to the first tranche.

8. The Board of Directors shall adopt the detailed guidelines which shall apply to the disbursements of financial assistance.

Article 14
ESM stability support (ESS)

1. The Board of Governors may decide to grant a short term or medium term stability support in the form of a loan to an ESM Member as financial assistance, in accordance with Article 12.
2. The technical terms and conditions of each loan shall be specified in a financial assistance agreement, to be signed by the Managing Director.
3. The ESS pricing shall cover ESM funding cost plus an additional margin determined by the Board of Governors. The pricing structure is detailed in the pricing policy in Annex 3. The pricing policy shall be reviewed regularly by the Board of Governors.
4. The Board of Governors may decide to change the pricing structure and pricing policy and amend Annex 3 accordingly.

Article 15
Primary market support facility (PMSF)

1. The Board of Governors may decide, as an exception, to arrange for the purchase of bonds of an ESM Member on the primary market, in accordance with Article 12 [and with the objective of maximising cost efficiency of the financial assistance].
2. The technical terms and conditions under which the bond purchase is conducted shall be specified in the financial assistance agreement, to be signed by the Managing Director.
3. The Board of Directors shall adopt the detailed guidelines on the modalities for implementing the PMSF.

Article 16
Review of the list of financial assistance instruments

The Board of Governors may review the list of financial assistance instruments provided for in Articles 14 and 15 and decide to make changes to it.

Article 17
Borrowing operations

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

CHAPTER 5. FINANCIAL MANAGEMENT OF THE ESM

Article 18 ***Investment policy***

The Managing Director shall implement a prudent investment policy of the ESM, so to ensure the highest creditworthiness of ESM, in accordance with guidelines to be adopted, and reviewed regularly, by the Board of Directors. The ESM shall be entitled to use part of the return on its investment portfolio to cover its operating and administrative costs.

Article 19 ***Dividend policy***

1. As long as the ESM has not provided a financial assistance to one of its Members, the proceeds from the investment of the ESM paid-in capital shall be returned to the ESM Members according to their respective shares, after deductions for operational costs, provided that the targeted effective lending capacity is fully available.
2. The Board of Directors may decide, by simple majority, to distribute a dividend to the ESM Members if the amount of paid-in capital and the reserve fund exceeds the level required to maintain the lending capacity of the ESM and proceeds from the investment are not required to avoid a payment shortfall to the creditors. Dividends are distributed *pro rata* to the shares.
3. The Managing Director shall implement the dividend policy of the ESM, in accordance with guidelines to be adopted by the Board of Directors.

Article 20 ***Reserve and other funds***

1. The Board of Governors shall establish a reserve fund and, where appropriate, other funds.
2. Without prejudice to Article 19, the net income generated by the ESM operations and the proceeds of the financial sanctions received from the ESM Members [under the multilateral surveillance procedure, the excessive deficit procedure and the macro-economic imbalances procedure established under the TFEU] shall be put aside in a reserve fund.
3. The resources of the reserve fund shall be invested in accordance with guidelines to be adopted by the Board of Directors.
4. The Board of Directors shall adopt such rules as may be required for the establishment, administration and use of other funds.

Article 21 ***Coverage of losses***

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

- (a) First, against the reserve fund;
- (b) Second, against the paid-in capital; and
- (c) Last, against an appropriate amount of the authorized unpaid capital, which shall be called in accordance with Article 9(3).

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

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

Article 22

Budget

The Board of Directors shall approve the ESM budget annually.

Article 23

Annual accounts

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

Article 24

Internal Auditing Board

- 1. The Internal Auditing Board (hereinafter the 'IAB') shall consist of three members appointed by the Board of Governors for their competence in auditing and financial matters.
- 2. The Members of the IAB shall be independent. They shall not seek nor take instructions from the ESM governing bodies, the ESM Members or any other public or private body.
- 3. The IAB shall inspect the ESM accounts and verify that the operational accounts and balance sheet are in order. It shall have full access to any document of the ESM needed for the implementation of its tasks.
- 4. The IAB shall send an annual report to the Board of Governors in which it ascertains that:
 - (a) The balance sheet and operational accounts are in accordance with the books;

(b) The balance sheet and operational accounts give an accurate and true picture of the financial position of the ESM in respect of its assets and liabilities, the results of its operations and its cash flow for the financial year under review.

5. The ESM shall be operated according to principles of sound financial and risk management.

Article 25
External auditing

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

CHAPTER 6. GENERAL PROVISIONS OF THE ESM

Article 26
Location

1. The ESM shall have its seat and principal office in Luxembourg.

2. The ESM may establish a liaison office in Brussels.

Article 27
Legal status of the ESM, immunities and privileges

1. To enable the ESM to fulfil its purpose, the status, immunities and privileges set out in this Article shall be accorded to the ESM in the territory of each ESM Member. The ESM shall endeavour to obtain recognition of its status, immunities and privileges in other territories in which it performs functions or holds assets.

2. The ESM shall have full legal personality; it shall have full legal capacity:

(a) To acquire and dispose of immovable and movable property;

(b) To contract;

(c) To institute legal proceedings and

(d) To enter into a headquarter agreement and/or protocols as necessary for ensuring that its status, privileges and immunities are recognised and given effect.

3. The ESM, its property, funding and assets, wherever located and by whomsoever held shall enjoy immunity from every form of judicial process except to the extent that the ESM expressly waives its immunity for the purpose of any proceedings or by the terms of any contract, including the documentation of the funding instruments.

4. The property, funding and assets of the ESM shall, wherever located and by whomsoever held, be immune from search, requisition, confiscation, expropriation or any other form of seizure, taking or foreclosure by executive, judicial, administrative or legislative action.

5. The archives of the ESM and in general, all documents belonging to it or held by it, shall be inviolable.

6. The premises of the ESM shall be inviolable.

7. The official communications of the ESM shall be accorded by each ESM Member and by each state which has recognised the status, privileges and immunities of the ESM the same treatment as it accords to the official communications of a state which is an ESM Member.

8. To the extent necessary to carry out the activities provided for in this Treaty all property, funding and assets of the ESM shall be free from restrictions, regulations, controls and moratoria of any nature.

9. The ESM shall be exempted from any requirement to be authorised or licensed as a credit institution, investment services provider or other authorised licensed or regulated entity under the laws of each ESM Member.

Article 28
Staff of the ESM

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

Article 29
Professional secrecy

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

Article 30
Immunities of persons

1. Governors, alternate Governors, Directors, alternate Directors, the Managing Director and staff members shall be immune from legal process with respect to acts performed by them in their official capacity and shall enjoy inviolability in respect of their official papers and documents except when and to the extent that the Board of Governors expressly waives this immunity.

2. The immunities conferred under this Article are granted in the interest of the ESM. The Board of Governors may waive to such extent and upon such conditions as it determines any of the immunities conferred under this Article. The Managing Director may waive any such immunity in respect of any member of the staff of the ESM (other than himself or herself, a

Governor, an alternate Governor, a Director, an alternate Director in respect of which any waiver needs to be approved by the Board of Governors).

3. Each ESM Member shall promptly take the action necessary for the purposes of giving effect to this Article in the terms of its own law and shall inform the ESM accordingly.

Article 31
Exemption from taxation

1. Within the scope of its official activities, the ESM, its assets, income, property and its operations and transactions authorised by this Treaty shall be exempt from all direct taxes.

2. The ESM Members shall take the appropriate measures to remit or refund the amount of indirect taxes or sales taxes included in the price of movable or immovable property where the ESM makes, for its official use, substantial purchases the price of which includes taxes of this kind.

3. No exemption shall be granted in respect of taxes and dues which amount merely to charges for public utility services.

4. Goods imported by the ESM and necessary for the exercise of its official activities shall be exempt from all import duties and taxes and from all import prohibitions and restrictions.

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

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

(i) which discriminates against such obligation or security solely because of its origin; or

(ii) if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the ESM.

Article 32
Interpretation of the Treaty and dispute settlement

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

2. If a dispute arises between an ESM Member and the ESM or between ESM Members in connection with the interpretation and application of this Treaty, including disputes about the compatibility of the decisions adopted by the ESM with this Treaty, the Board of Governors shall decide on this dispute. The votes of the member of the Board of Governors of the ESM Member(s) concerned are suspended for this decision and the voting threshold needed for the adoption of the decision is recalculated accordingly.

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

Article 33
International co-operation

The ESM shall be entitled for the furtherance of its purposes to co-operate within the terms of this Treaty with the IMF, any non-euro area Member State which is providing financial assistance on an *ad hoc* basis or any international organisation or entity having specialised responsibilities in related fields.

CHAPTER 7. TRANSITORY ARRANGEMENTS

Article 34
Transitional arrangements between EFSF and ESM

During the transitory phase spanning the period from June 2013 until the complete run-down of EFSF, the consolidated ESM and EFSF lending shall not exceed EUR 500 billion (500,000,000,000), without prejudice to the regular review of the adequacy of the maximum lending volume in accordance with Article 10. The board of Directors shall adopt detailed guidelines on the calculation of the forward commitment capacity to ensure that the consolidated lending ceiling shall not be breached.

Article 35
Transfer of EFSF supports

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

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

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

Article 36
Payment of the initial capital

1. Without prejudice to paragraph 2, payment of paid-in shares of the amount initially subscribed by each ESM Member shall be made in five annual instalments of twenty (20) per cent each of the total amount. The first instalment shall be paid by each ESM Member within fifteen (15) days after the date of entry into force of this Treaty, but not earlier than 2 January 2013. The remaining four (4) instalments shall each be payable at the first, second, third and fourth anniversary of the payment date of the first instalment.

2. During the five year period of capital payment by instalments, ESM Members shall provide, in a timely manner prior to the issuance date, appropriate instruments in order to maintain a minimum fifteen (15) per cent ratio between paid-in capital and the outstanding amount of ESM issuances.

Article 37
Temporary correction of the contribution key

1. At inception, the ESM Members shall subscribe the authorized capital on the basis of the initial contribution key as specified in Annex 1 to this Treaty. The temporary correction included in this initial contribution key shall apply for a period of twelve (12) years after the date of adoption of the euro by the ESM Member concerned.

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

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

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

The percentages shall be rounded up or down to the nearest multiple of 0.0001 percentage points. The statistical terms will be those published by Eurostat.

3. This temporary correction shall apply for a period of twelve (12) years after the date of adoption of the euro by the ESM Member concerned.

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

Article 38
First appointments

1. Each ESM Member shall designate its Governor within the two weeks following the entry into force of this Treaty.
2. The Board of Governors shall appoint the Managing Director and each Governor shall appoint a Director and an alternate Director within the two months following the entry into force of this Treaty.

CHAPTER 8. FINAL PROVISIONS

Article 39
Accession

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

Article 40
Annexes

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

1. The initial contribution key of the ESM;
2. The initial subscriptions to the authorized capital stock; and
3. The pricing policy.

Article 41
Signature and deposit

1. This Treaty deposited with the Council of the European Union (hereinafter 'the Depositary') shall remain open until XXX 2011 for signature to the States whose names are set forth in Annex 2 to this Agreement.
2. The Depositary shall communicate certified copies of this Treaty to all the signatories.

Article 42
Ratification, approval, or acceptance

1. This Treaty shall be subject to ratification, approval or acceptance by the signatories. Instruments of ratification, approval or acceptance shall be deposited with the Depositary no later than 31 December 2012.
2. The Depositary shall notify the other signatories of each deposit and the date thereof.

Article 43
Entry into force

1. This Treaty shall enter into force on the first day of the second month following the date when instruments of ratification, acceptance or approval have been deposited by signatories whose initial subscriptions represent no less than 95% of the total subscriptions set forth in Annex 2. Where appropriate, the list of ESM Members shall be adjusted; the key in Annex 1 shall then be recalculated and the total authorised capital stock in Article 8(1) and Annex 2 and the total initial aggregated value of paid-in shares in Article 8(2) shall be reduced accordingly.
2. Subject to Article 41(1), for each signatory which thereafter deposits its instrument of ratification, acceptance or approval, this Treaty shall enter into force on the 20th day after the date of deposit.
3. For each State which accedes to this Treaty in accordance with Article 39 this Treaty shall enter into force on the 20th day after the deposit of its instrument of accession.

Done at Brussels on the XX in the year two thousand and eleven in a single original, whose English, French, German, Greek, Finnish, Gaelic, Swedish, Estonian, Italian, Maltese, Dutch, Portuguese, Slovak, Slovene and Spanish texts are equally authentic, which shall be deposited in the archives of the Depositary which shall transmit a duly certified copy to each of the other prospective members whose names are set forth in Annexes 1 and 2.

For the euro-area Member States,

Kingdom of Belgium

Represented by:

Date:

XX June 2011

Federal Republic of Germany

Represented by:

Date:

XX June 2011

Republic of Estonia

Represented by:

Name:

Title:

Date: XX June 2011

Ireland

Represented by:

Date:

XX June 2011

Hellenic Republic

Represented by:

Date:

XX June 2011

Kingdom of Spain

Represented by:

Date:

XX June 2011

French Republic

Represented by:

Date:

XX June 2011

Italian Republic

Represented by:

Date:
XX June 2011

Republic of Cyprus
Represented by:

Date:
XX June 2011

Grand Duchy of Luxembourg
Represented by:

Date:
XX June 2011

Republic of Malta
Represented by:

Date:
XX June 2011

Kingdom of the Netherlands
Represented by:

Date:
XX June 2011

Republic of Austria
Represented by:

Minister of Finance

Date:
XX June 2011

Portuguese Republic
Represented by:

Date:
XX June 2011

Republic of Slovenia
Represented by:

Date:
XX June 2011

Slovak Republic
Represented by:

Date:
XX June 2011

Republic of Finland
Represented by:

Date:
XX June 2011

Annex 1. Contribution Key of the ESM.

Country	ESM key (%)
Kingdom of Belgium	3,4771
Federal Republic of Germany	27,1464
Republic of Estonia	0,1860
Ireland	1,5922
Hellenic Republic	2,8167
Kingdom of Spain	11,9037
French Republic	20,3859
Italian Republic	17,9137
Republic of Cyprus	0,1962
Grand Duchy of Luxembourg	0,2504
Republic of Malta	0,0731
Kingdom of the Netherlands	5,7170
Republic of Austria	2,7834
Portuguese Republic	2,5092
Republic of Slovenia	0,4276
Slovak Republic	0,8240
Republic of Finland	1,7974
Total	100.0

Annex 2 . Subscriptions to the authorized capital stock

Country	Number of shares	Capital subscription (EUR)
Kingdom of Belgium	243.397	24.339.700.000
Federal Republic of Germany	1.900.248	190.024.800.000
Republic of Estonia	13.020	1.302.000.000
Ireland	111.454	11.145.400.000
Hellenic Republic	197.169	19.716.900.000
Kingdom of Spain	833.259	83.325.900.000
French Republic	1.427.013	142.701.300.000
Italian Republic	1.253.959	125.395.900.000
Republic of Cyprus	13.734	1.373.400.000
Grand Duchy of Luxembourg	17.528	1.752.800.000
Republic of Malta	5.117	511.700.000
Kingdom of the Netherlands	400.190	40.019.000.000
Republic of Austria	194.838	19.483.800.000
Portuguese Republic	175.644	17.564.400.000
Republic of Slovenia	29.932	2.993.200.000
Slovak Republic	57.680	5.768.000.000
Republic of Finland	125.818	12.581.800.000
Total	7.000.000	700.000.000.000

Annex 3. Pricing policy

The ESS pricing structure is the following:

- 1) ESM funding cost
- 2) A charge of 200 bps applied on the entire loan
- 3) A surcharge of 100 bps for loan amounts outstanding after 3 years

For fixed rate loans with maturities above 3 years, the margin will be a weighted average of the charge of 200 bps for the first 3 years and 200 bps plus 100 bps for the following years.