

Treaty establishing the European Stability Mechanism (11 July 2011)

Caption: On 11 July 2011, a first Treaty establishing the European Stability Mechanism was signed in Brussels by the 17 Member States in the euro area. The deterioration of the financial situation in Greece meant that a new aid plan was required, involving the Member States in the euro area, the financial assistance instruments set up in 2010 (the European Financial Stabilisation Mechanism, including the European Financial Stability Facility (EFSF)) and private creditors. Given the risk of contagion, the decision was taken to review the financial assistance instruments, namely the EFSF and the recently approved European Stability Mechanism. The Treaty of 11 July 2011 did not enter into force; it was amended and served as the basis for another Treaty establishing the European Stability Mechanism, signed in Brussels on 2 March 2012.

Source: Eurozone Portal – The official gateway to the euro area – Treaty establishing the European Stability Mechanism. [ONLINE]. [Brussels]: Eurozone Portal. [01.11.2013]. 11.07.2011. T/ESM/en, 55 p.
http://www.eurozone.europa.eu/media/migrated/596858/treaty_establishing_the_esm.pdf.

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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, 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 reader will find below, for information purposes, the text of the Treaty establishing the European Stability Mechanism, which was signed by the euro area Member States in Brussels on 11th July 2011. The Treaty will enter into force when the requirements laid down in Article 43(1) thereof have been met.

THE CONTRACTING PARTIES, the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland (the "euro area Member States" or "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 adopted Decision 2011/199/EU amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro¹ adding the following paragraph to Article 136: "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 economic governance rules of the European Union, should remain the first line of defence against confidence crises affecting the stability of the euro area as a whole.

¹ OJ L 91, 6.4.2011, p. 1.

- (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 economic 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 EUR 500 000 million.
- (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 should become an ESM Member 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 at technical and financial level. A euro area Member State requesting financial assistance from the ESM is expected to address a similar request to the IMF.
- (7) Member States of the European Union whose currency is not the euro ("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 20 June 2011, the representatives of the Governments of the Member States of the European Union authorised the Contracting Parties of this Treaty to request the European Commission and the European Central Bank ("ECB") to perform the tasks provided for in this Treaty.
- (9) In its statement of 28 November 2010, the Euro Group stated that standardised 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 July 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.
- (10) Like the IMF, the ESM will provide financial assistance to an ESM Member when its regular access to market financing is impaired. Reflecting this, Heads of State or Government have stated that the ESM will enjoy preferred creditor status in a similar fashion to IMF, while accepting preferred creditor status of the IMF over the ESM. This status shall be effective as of 1 July 2013. In the unlikely event of ESM financial assistance following a European financial assistance programme existing at the time of the signature of this Treaty, ESM will enjoy the same seniority as all other loans and obligations of the beneficiary ESM Member, with the exception of the IMF loans.

- (11) The euro area Member States will support equivalent creditor status of the ESM and that of other Member States of the European Union 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 in Articles 121 and 136 TFEU,

HAVE AGREED AS FOLLOWS:

CHAPTER 1

MEMBERSHIP AND PURPOSE

ARTICLE 1

Establishment and members

1. By this Treaty, the Contracting Parties establish among themselves an international financial institution, to be named the "European Stability Mechanism" ("ESM").
2. The Contracting Parties are 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) TFEU to abrogate their derogation from adopting the euro.

2. New ESM Members shall be admitted on the same terms and conditions as existing ESM Members, in accordance with Article 39.

3. A new member 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 provided for 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

ARTICLE 4

Structure and voting rules

1. The ESM shall have a Board of Governors and a Board of Directors, as well as a Managing Director and other 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 $\frac{2}{3}$ of the members with voting rights representing at least $\frac{2}{3}$ 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 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 by the latter's representative on the Board of Governors or Board of Directors, shall be equal to the number of shares allocated to it in the authorised capital stock of the ESM as set out in Annex II.
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, 9 and 10, or in relation to the reimbursement of the financial assistance under Article 14 or 15, 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. Such appointments are revocable at any time. The Governor shall be a member of the government of that ESM Member who has responsibility for finance. The alternate Governor shall have full power to act on behalf of the Governor when the latter is not present.

2. The Board of Governors shall decide either to be chaired by the President of the Euro Group, as referred to in Protocol (No 14) on the Euro Group annexed to the Treaty on the European Union and to the TFEU or to 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.
3. The Member of the European Commission in charge of economic and monetary affairs and the President of the ECB, as well as the President of the Euro Group (if he or she is not the Chairperson or a Governor) may participate in the meetings of the Board of Governors as observers.
4. 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.
5. 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.
6. The Board of Governors shall take the following decisions by mutual agreement:
 - (a) to issue new shares on terms other than at par, in accordance with Article 8(2);

- (b) to make the capital calls, in accordance with Article 9(1);
- (c) to change the authorised capital stock and adapt the maximum lending volume of the ESM, in accordance with Article 10(1);
- (d) 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 I in accordance with Article 11(6);
- (e) to grant financial assistance by the ESM, including the economic policy conditionality as stated in the memorandum of understanding referred to in Article 13(3), and to establish the financial terms and conditions, and the choice of instruments, in accordance with Articles 12 to 15;
- (f) to give a mandate to the European Commission to negotiate, in liaison with the ECB, the economic policy conditionality attached to each financial assistance, in accordance with Article 13(3);
- (g) to change the pricing structure and pricing policy for financial assistance, in accordance with Article 14(4);
- (h) to change the list of financial assistance instruments that may be used by the ESM, in accordance with Article 16;

- (i) to establish the modalities of the transfer of EFSF support to the ESM, in accordance with Article 35;
 - (j) to approve the application for membership of the ESM by new members, referred to in Article 39;
 - (k) to make adaptations 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; and
 - (l) to delegate to the Board of Directors the tasks listed in this Article.
7. The Board of Governors shall take the following decisions by qualified majority:
- (a) to set out the detailed technical terms of accession of a new member to the ESM, in accordance with Article 39;
 - (b) whether to be chaired by the President of the Euro Group or to elect, by qualified majority, the Chairperson and Vice-Chairperson of the Board of Governors, in accordance with paragraph 2;

- (c) to set out 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) to determine the list of activities incompatible with the duties of a Director or an alternate Director, in accordance with Article 6(8);
- (e) to appoint and to end the term of office of the Managing Director, in accordance with Article 7;
- (f) to establish other funds, in accordance with Article 20;
- (g) on the actions to be taken for recovering a debt from an ESM Member, in accordance with Article 21(2) and (3);
- (h) to approve the annual accounts of the ESM, in accordance with Article 23(1);
- (i) to appoint the members of the Internal Auditing Board, in accordance with Article 24;

- (j) to approve the external auditors, in accordance with Article 25;
- (k) to waive the immunity of the Chairperson of the Board of Governors, a Governor, alternate Governor, Director, alternate Director or the Managing Director, in accordance with Article 30(2);
- (l) to determine the taxation regime applicable to the ESM staff, in accordance with Article 31(5);
- (m) on a dispute, in accordance with Article 32(2); and
- (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 their rules of procedure and the by-laws of the ESM.

ARTICLE 6

Board of Directors

1. Each Governor shall appoint one Director and one alternate Director from among people of high competence in economic and financial matters. Such appointments shall be revocable at any time. The alternate Directors shall have full power to act on behalf of the Director when the latter 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 also 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 to be taken on the basis of powers 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, relevant international experience and a high level of 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. The Managing Director 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 organising, appointing and dismissing 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

ARTICLE 8

Authorised capital stock

1. The authorised capital stock shall be EUR 700 000 million. It shall be divided into seven million shares, having a nominal value of EUR 100 000 each, which shall be available for subscription according to the initial contribution key provided for in Article 11 and calculated in Annex I.
2. The authorised 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 80 000 million. Shares of authorised capital 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 authorised capital 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 provided for in Article 11 to the extent necessary to ensure that the distribution of shares corresponds to the adjusted key.

4. ESM Members hereby irrevocably and unconditionally undertake to provide their contribution to the authorised capital stock, in accordance with their contribution key in Annex I. 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 Member shall be limited, in all circumstances, to its portion of the authorised capital stock 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 the authorised capital stock in accordance with this Treaty are not affected if any 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 authorised 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 authorised 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 provided for in Article 10, and set an appropriate period of time for its payment by the ESM Members.

3. The Managing Director shall call authorised unpaid capital in a timely manner if needed to avoid the ESM being in default of any scheduled or other payment obligation due to ESM creditors. The Managing Director 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 days of receipt.
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 authorised capital stock

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

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 Member State of the European Union becoming a new ESM Member, the authorised capital stock of the ESM shall be automatically increased by multiplying the respective amounts then prevailing by the ratio, within the adjusted contribution key provided for in Article 11, between the weighting of the new 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 paragraphs 2 and 3, be based on the key for subscription, by the national central banks of ESM Members, of the ECB's capital pursuant to Article 29 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (the "ESCB Statute") annexed to the Treaty on European Union and to the TFEU.

2. The contribution key for the subscription of the ESM authorised capital stock is specified in Annex I.

3. The contribution key for the subscription of the ESM authorised capital stock shall be adjusted when:
 - a) a Member State of the European Union becomes a new ESM Member and the ESM's authorised capital stock automatically increases, as specified in Article 10(3); or
 - b) the twelve year temporary correction applicable to an ESM Member established in accordance with Article 37 ends.
4. The Board of Governors may decide to take into account possible updates to the key for the subscription of the ECB's capital referred to in paragraph 1 when the contribution key is adjusted in accordance with paragraph 3 or when there is a change in the authorised capital stock, as specified in Article 10(1).
5. When the contribution key for the subscription of the ESM authorised capital stock is adjusted, the ESM Members shall transfer among themselves authorised capital stock to the extent necessary to ensure that the distribution of authorised capital stock corresponds to the adjusted key.
6. Annex I shall be amended upon decision by the Board of Governors upon any adjustment referred to in this Article.
7. The Board of Directors shall take all other measures necessary for the application of this Article.

CHAPTER 4

OPERATIONS

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 an ESM Member, subject to strict economic policy 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 of the European Union and third countries. If, on the basis of this analysis, it is concluded that a macro-economic adjustment programme can realistically restore public debt to a sustainable path, the beneficiary ESM Member shall take initiatives aimed at encouraging the main private investors to maintain their exposure. Where it is concluded that a macro-economic adjustment programme cannot realistically restore the public debt to a sustainable path, the beneficiary ESM Member shall be required to engage in active negotiations in good faith with its non-official creditors to secure their direct involvement in restoring debt sustainability. In the latter case, the granting of financial assistance will be contingent on the ESM Member 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.
3. Collective action clauses shall be included in all new euro area government securities, with maturity above one year, from July 2013, in a standardised manner which ensures that their legal impact is identical.

ARTICLE 13

Procedure for granting financial assistance

1. An ESM Member may address a request for financial assistance to the Chairperson of the Board of Governors. On receipt of such a request, the Chairperson of the Board of Governors shall entrust the European Commission, in liaison with the ECB, with the following tasks:
 - (a) to assess the existence of a risk to the financial stability of the euro area as a whole;
 - (b) to undertake - wherever possible, together with the IMF - a rigorous analysis of the debt sustainability of the ESM Member concerned;
 - (c) to 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).
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 pursuant to paragraph 2 is adopted, the Board of Governors shall entrust the European Commission with the task of negotiating with the ESM Member concerned – wherever possible together with the IMF, and in liaison with the ECB – a memorandum of understanding (the "MoU") detailing the economic policy conditionality, 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 agreement, including the financial terms and 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 provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned.

4. The European Commission shall sign the MoU on behalf of the ESM, subject to prior compliance with the conditions set out 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 conditionality 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

1. The Board of Governors may decide to grant 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 ESM stability support pricing shall cover ESM funding costs plus an additional margin determined by the Board of Governors. The pricing structure is detailed in the pricing policy in Annex III. 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 III accordingly.

ARTICLE 15

Primary market support facility

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 the 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 primary market support facility.

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 shall be 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

ARTICLE 18

Investment policy

The Managing Director shall implement a prudent investment policy for the ESM, so as to ensure its highest creditworthiness, 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 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 creditors. Dividends are distributed *pro rata* to the shares.
3. The Managing Director shall implement the dividend policy for 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) firstly, against the reserve fund;
 - (b) secondly, against the paid-in capital; and
 - (c) lastly, against an appropriate amount of the authorised 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 Article 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. The Board of Governors 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, as 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 (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 whether:
 - (a) the balance sheet and operational accounts are in accordance with the books; and
 - (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 operation of the ESM shall comply with the 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

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, privileges and immunities

1. To enable the ESM to fulfil its purpose, the legal status and the privileges and immunities 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 legal status and of its privileges and immunities 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 to:
 - (a) acquire and dispose of movable and immovable property;
 - (b) contract;
 - (c) be a party to legal proceedings; and
 - (d) enter into a headquarter agreement and/or protocols as necessary for ensuring that its legal status and its privileges and immunities are recognised and enforced.
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 all documents belonging to the ESM 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 legal status and the privileges and immunities of the ESM, the same treatment as it accords to the official communications of 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. In the interest of the ESM, the Chairperson of the Board of Governors, Governors, alternate Governors, Directors, alternate Directors, as well as the Managing Director and other staff members shall be immune from legal proceedings with respect to acts performed by them in their official capacity and shall enjoy inviolability in respect of their official papers and documents.

2. The Board of Governors may waive to such extent and upon such conditions as it determines any of the immunities conferred under this Article in respect of the Chairperson of the Board of Governors, a Governor, an alternate Governor, a Director, an alternate Director or the Managing Director.
3. The Managing Director may waive any such immunity in respect of any member of the staff of the ESM other than himself or herself.
4. 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, wherever possible, 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:
 - (a) which discriminates against such obligation or security solely because of its origin; or
 - (b) 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 and dispute settlement

1. Any question of interpretation or application of the provisions of this Treaty and the 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. The Board of Governors shall decide on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of this Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with this Treaty. The votes of the member(s) of the Board of Governors of the ESM Member(s) concerned shall be suspended when the Board of Governors votes on such decision and the voting threshold needed for the adoption of that decision shall be recalculated accordingly.

3. If an ESM Member contests the decision referred to in paragraph 2, the 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 shall take the necessary measures to comply with the judgment within a period to be decided by said Court.

ARTICLE 33

International cooperation

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

CHAPTER 7

TRANSITIONAL ARRANGEMENTS

ARTICLE 34

Relation with EFSF lending

During the transitional phase spanning the period from June 2013 until the complete run-down of the EFSF, the consolidated ESM and EFSF lending shall not exceed EUR 500 000 million, 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 is not breached.

ARTICLE 35

Transfer of EFSF supports

1. By way of derogation from 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 be assumed by the ESM as far as such commitments 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 and any transfer of rights and obligations as described in paragraph 2.

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 20 % each of the total amount. The first instalment shall be paid by each ESM Member within fifteen days of the date of entry into force of this Treaty, but not earlier than 2 January 2013. The remaining four instalments shall each be payable on 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 15 % 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 authorised capital stock on the basis of the initial contribution key as specified in Annex I. The temporary correction included in this initial contribution key shall apply for a period of twelve 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 GDP per capita at market prices, then its contribution key for subscribing to ESM authorised capital stock, determined in accordance with Article 10, shall benefit from a temporary correction and equal the sum of:
 - a) 25 % of the percentage share in the ECB capital of the national central bank of that ESM Member, determined in accordance with Article 29 of the ESCB Statute; and
 - b) 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.

The percentages referred to in points (a) and (b) 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. The temporary correction referred to in paragraph 2 shall apply for a period of twelve years from the date of adoption of the euro by the ESM Member concerned.

4. As a result of the temporary correction of the key, the relevant proportion of shares allocated to an ESM Member pursuant to paragraph 2 shall be reallocated amongst the ESM Members not benefiting from a temporary correction on the basis of their shareholding in the ECB, determined in accordance with Article 29 of the ESCB Statute, subsisting immediately prior to the issue of shares to the acceding ESM Member.

ARTICLE 38

First appointments

1. Each ESM Member shall designate its Governor and alternate Governor within the two weeks of 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 of 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 of the European Union will file with the ESM after the adoption by the Council of the European Union of the decision to abrogate its derogation from adopting the euro in accordance with Article 140(2) TFEU. The Board of Governors will approve the application for accession of the new ESM 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 for membership by the Board of Governors, new ESM Members will accede upon the deposit of the instruments of accession with the Depositary, who shall notify other ESM Members thereof.

ARTICLE 40

Annexes

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

- 1) Annex I: Contribution key of the ESM;
- 2) Annex II: Subscriptions to the authorised capital stock; and
- 3) Annex III: Pricing policy.

ARTICLE 41

Deposit

This Treaty shall be deposited with the General Secretariat of the Council of the European Union ("the Depositary"), which 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, approval or acceptance have been deposited by signatories whose initial subscriptions represent no less than 95 % of the total subscriptions set forth in Annex II. Where appropriate, the list of ESM Members shall be adjusted; the key in Annex I shall then be recalculated and the total authorised capital stock in Article 8(1) and Annex II and the initial total aggregated nominal value of paid-in shares in Article 8(2) shall be reduced accordingly.

2. For each signatory which thereafter deposits its instrument of ratification, approval or acceptance, this Treaty shall enter into force on the twentieth day following 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 twentieth day following the deposit of its instrument of accession.

Done at Brussels on the eleventh day of July in the year two thousand and eleven in a single original, whose Dutch, English, Estonian, Finnish, French, German, Greek, Irish, Italian, Maltese, Portuguese, Slovak, Slovenian, Spanish and Swedish 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 Contracting Parties.

ANNEX I

Contribution Key of the ESM

ESM Member	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
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 II

Subscriptions to the authorised capital stock

ESM Member	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
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 III

Pricing policy

The ESM stability support pricing structure is the following:

ESM funding cost, plus a margin consisting of:

- 1) A charge of 200 bps applied on the entire loan;
- 2) 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.
