Lithuanian Presidency of the Council of the European Union 2013

ECONOMIC AND FINANCIAL AFFAIRS COUNCIL
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ROOM DOCUMENT No. 1
SUBJECT: SRM TORs
FROM: Presidency

SRM: TERMS OF REFERENCE (DRAFT)

I. Governance of the SRM; role of EU institutions

1. The new Agency created by the SRM Regulation, the Board, plays the central role at the European level in all phases relating to resolution.

2. Under the conditions set out in Section II of those TORs, it is the Board (where the Commission shall sit as observer) which takes the decisions on resolutions and EU institutions will only exercise an ex post control of those decisions. This ex post control may take the form either of an objection or of directives addressed to the Board to modify in a certain manner its decisions.

3. For decisions relating to the triggering of resolution (Article 16), the Commission plays a central role, because it examines, from a *Meroni* perspective, whether the decisions of the Board are acceptable or not. Where the Commission does not react within a given time, the decisions of the Board will enter into force automatically. Where the Commission disagrees with the decisions of the Board and it considers either that those decisions should be objected or that they should be modified, the decision should be put in the hands of the Council, composed of the 28 Member States' representatives. Appropriate voting arrangements should be established between the Member States so that non-participating Member States express their vote in conformity with the prevailing majority among the participating Member-States.

4. The Council, on proposal from the Commission, would intervene only to object to the decisions of the Board or to require amendments of those decisions.

5. Where the Council does not decide within the given time, the decision taken by the Board will enter into force automatically. Any Council decision shall be taken by simple majority.

6. This decision making process at the European level would ensure both the fact that the Board remains the key decision maker, and therefore the Single Resolution Authority of the participating Member States, and that an appropriate involvement of the Union institutions is preserved in order to respect the *Meroni* doctrine.

7. Where public aid is present, the Board, the Single Resolution Fund and any participating Member States' authorities financing fully or partly the resolution, shall act in conformity with the decision on that public aid taken by the Commission in accordance with the state aid framework.

II. Decision-making in the Board

i) Executive Session of the Board

OPTION A:

8. The voting modalities in executive session: the number of votes of the home Member States is equal to the number of the host Member States and the number of votes for the permanent Members of the Board is also equal (=1/3 each).
9. The executive board will have the Executive Director and four officials appointed by the Council to participate in voting, one vote for each member, which together shall count as 1/3 of all votes in all cases.

OPTION B: points 8 and 9 as above plus the sentence: Any decision has to be supported by the majority of the permanent members of the executive session (the director and the 4 appointed members)

OPTION C: on para's 8 and 9: 5th Presidency compromise (14710/13).

10. The executive session of the Board shall take decisions by simple majority of votes.
11. In case of a tie the Executive Director shall have a casting vote.

ii) Plenary session of the Board

12. As a general rule, save for the decisions referred to hereunder, Plenary Session shall take decisions by simple majority of votes, each member having one vote.

13. The plenary session to take decisions to request funds when there is a need to use more than [20 %] of the available financial means at the time of the decision granting liquidity support and for the recapitalization decisions (i.e. there should be no threshold for recapitalisation decisions, or other decisions involving a material repayment risk).

14. On these matters (point 13), the plenary shall decide by 2/3 majority. The votes of the members shall be weighted in accordance with the ECB capital key.

15. Commission and ECB shall participate as observers in both sessions of the SRB.

III. Scope of the SRM

16. The scope of SRM should be in line with that of the SSM, covering all banks.
17. Board should give general rules / general instructions for all banks in participating Member States.
18. Board should be responsible for planning and resolution phases of directly supervised banks, as well as cross-border banks in the participating Member States (i.e. banks that have a subsidiary in at least in one other participating Member State).
19. National resolution authorities should be responsible for the planning and resolution phase for other indirectly supervised banks. However, where the resolution of these banks implies the use of the SRF, the responsibility for the resolution phase shall rest with the SRB. In any event, a participating Member State may entrust the responsibility for planning and resolution phases to the Board for the entirety of those other indirectly supervised banks ("opt-in" possibility).

20. NRAs shall co-operate with SRB under appropriate arrangements to ensure effective application and implementation of resolution within the SRM. The SRB shall issue general instructions to the NRAs of the participating Member States to that effect.

OPTION A:

21. The principles of bank contributions should be as precise as possible, including proportionality [incl. for smaller banks] at level 1 legislation. Council implementing act should fix the precise contribution key.

OPTION B:

21. Article 66 to be deleted from the last Presidency compromise.

IV. Set up of the SRF

The SRF (interaction of the SRM Regulation / Intergovernmental agreement)

The intended interaction of the SRM Regulation and Inter-governmental agreement is illustrated by the following table:

SRM Regulation	**Inter-Governmental agreement**
Establishment of the SRM and of the Board	
Establishment of the fund	
Decision making mechanism (incl. use of funds)	
Key principles on determination of national bank levies (Article 66)	
Bail-in rules	Rules explicitly setting the bail in provision applicable to the use of the SRF
	Compensation clause for non participating MS in case of non contractual liability involving SRM.
	Consistency clause
	Transfer of national funds to the SRF.
	Mutualisation of national compartments
	General provisions
	Review clause

22. A Single Resolution Fund (SRF) will be established by the SRM Regulation.

23. The SRF will be comprised of compartments, corresponding to each participating Member State.

24. The Regulation should establish a number of elements that link the functioning of the SRF to the logic and integrity of the internal market and ensure the coherence between the intergovernmental and Union level.

25. In case the financial means available in the SRF are not sufficient to cover the losses, costs or other expenses incurred by their use in the a specific resolution action, the Fund shall require the NRAs to raise extraordinary ex post contributions from institutions authorized in the territory of the participating Member States.

26. The Board will be in charge of the decisions, addressed to NRAs, as appropriate, on the use of the granted SRF means.

27. Until the fund reaches the target funding level but until no later than 10 years, each compartment of the fund shall be earmarked to be used in relation to the resolution of an institution and entities which are established in the participating Member States to which the national compartment corresponds. The earmarking will be progressively phased out during a period of 10 years.

The Board, in its plenary session, under the rules explained above, shall use the **national compartments as follows**:

a) first, the available financial means of the national compartments of the Member State in which the entity under resolution is established to cover the following percentage of resolution costs:

- First year- 100%;
- Second year - 90%;

[....]

- Tenth year - 10%.

The Board, in its plenary session, under the voting rules explained above:

(b) may use the available financial means of **the other national compartments** of all other Member States to cover the costs not covered by the available financial means under point (a) above, up to the following limits of the available financial means:

- First year- 10%;
- Second year - 20%;

[....]

- Tenth year - 100%.

As form year 11 the subdivision of national compartments shall cease.

28. The SRF shall be filled in by the levies raised at national level, in accordance with the detailed rules established in the BRRD and in the SRM Regulation.

29. The inter-governmental agreement shall provide for the legal bases to enable transfer to the SRF and mutualisation of contributions raised at national level.

30. The inter-governmental agreement shall also provide for:

i) General Provisions

- Membership: the participating Member States.

- Consistency clause: objectives and actions shall fully respect those laid down under BRRD for resolution financing arrangements.

ii) Contributions to the Fund. Compartments

- Contributions shall be payable at national level and transferred to the SRF.

- Contributions by the industry shall be allocated to the compartment of the participating Member State where the relevant entity is located.

iii) Other provisions

- rules explicitly setting the bail in provision applicable to the use of the SRF.

- Interpretation and dispute settlement: 273 TFEU for disputes among Member States (ECJ jurisdiction).

- Non contractual liability (compensation to non participating Member States).

- Accession of new Members.

- Ratification and Entry into force (super-qualified majority of signatories; in time for SRM to be operational by the set deadlines).

V. Consistency and timing of Bail-in under SRM and BRRD

31. SRM planning function should start from the 1 January 2015
32. SRM resolution function and BRRD bail-in regime should start 1 January 2016

VI. Other arrangements

33. Participating Member States should enter into an agreement, under which they shall reimburse promptly and with interest each non-participating Member State for the amount that state has paid in own resources in respect of any application of the Union budget for the purposes of meeting any costs and liabilities, including non-contractual liabilities, in relation to this Regulation, on a pro rata basis.

34. To protect the functioning of the internal market and to secure equality of treatment, the EBA's tasks and powers shall apply to the same extent to all authorities performing tasks of a similar kind or which have similar effects. This is essential in order to ensure a level playing field for all financial institutions established in the Union.

35. In line with international standards, there will be rigorous standards of accountability. The European Court of Auditors will be invited to produce a public report on each resolution undertaken under the SRM. The European Parliament and Council may invite the Court of Auditors to report on other matters relating to the operation of the SRM.