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REPORT

From: Presidency

To: Council

Subject: **Single Resolution Mechanism [First reading]**

- Proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council
= *General approach*

I. INTRODUCTION

1. The above-mentioned Commission proposal has been transmitted to the Council on 10 July 2013. The main objective of this proposal is to set up one of the key elements of the Banking Union - a Single Resolution Mechanism (SRM) - consisting of the central decision-making body (Single Resolution Board (SRB)) and the Single Resolution Fund (SRF). This would enable in-depth restructuring of the banks with severe financial problems and ensure the sustainability of the financial markets of the Member States participating in the Single Supervisory Mechanism (SSM).

2. The European Council of June 2013¹ stated that "in the short run, the key priority is to complete the Banking Union in line with the European Council conclusions of December 2012² and March 2013³" and that "this is key to ensuring financial stability, reducing financial fragmentation and restoring normal lending to the economy". The European Council recalled that "it is imperative to break the vicious circle between banks and sovereigns" and that "a fully effective Single Supervision Mechanism (SSM) requires a Single Resolution Mechanism for banks covered by the SSM". The European Council also set an objective to reach agreement on the SRM proposal in the Council "by the end of the year so that it can be adopted before the end of the current parliamentary term". This commitment has been reiterated by October 2013 European Council.⁴ The relevant extracts of the European Council conclusions are set out in the Annex to this report.
3. The Committee on Economic and Monetary Affairs of the European Parliament is expected to adopt its report on 25 November 2013. The European Central Bank has issued its opinion on this legislative proposal on 7 November 2013⁵. The opinion of the European Economic and Social Committee was issued on 17 October 2013.⁶
4. Upon request of the Ad Hoc Working Party on the Single Resolution Mechanism⁷ (AHWP), the Council Legal Service has delivered two opinions: on the proposed legal basis⁸ and on delegation of powers to the SRB⁹. Council Legal Service opinion on the EBA role in relation to the Commission resolution powers is pending. Concerning the legal basis of the Commission proposal, the opinion of the Council Legal Service confirmed that Article 114 of the TFEU may be a suitable legal basis for the establishment of the SRM and of the SRF, subject to certain clarifications to be made in the text.

¹ Doc. EUCO 104/2/13 REV 2 CO EUR 9 CONCL 6, point 13.

² Doc. EUCO 205/12 CO EUR 19 CONCL 5, point 11.

³ Doc. EUCO 23/13 CO EUR 3 CONCL 2, point 13.

⁴ Doc. EUCO 169/13 CO EUR 13 CONCL 7, point 44.

⁵ Doc. 15863/13 STATIS 114 ECOFIN 987 UEM 377 CODEC 2478.

⁶ Doc. 15595/13 EF 209 ECOFIN 966 CODEC 2438.

⁷ Doc. 12020/13 LIMITE EF 142 ECOFIN 679.

⁸ Doc. 13524/13 JUR 458 ECOFIN 787 UEM 314 LIMITE.

⁹ Doc. 14547/13 JUR 523 EF 189 ECOFIN 867 CODEC2224 LIMITE.

5. The AHWP has met seven times in order to make progress on this file and discuss various options for a possible overall compromise. The Presidency has tabled three compromise proposals¹⁰. The outstanding issues have also been examined in the meeting of the Committee of Permanent Representatives (Coreper - Part 2) on 7 November 2013.
6. As a result of these debates, the Presidency notes that the third compromise text¹¹, to the extent possible, addresses the main concerns raised by the Member States, save for the open issues outlined further in this report.

II. KEY OPEN ISSUES

7. The debates confirmed that further political guidance is necessary on the key open issues set out below, in order to meet the deadline and the other objectives set by the European Council:
 - a) *Scope of the SRM (Article 2)*
8. The Commission proposed that the Regulation applies to the **entire banking sector of the Member States that participate in the SSM**: parent institutions that will be directly supervised by the ECB and all credit institutions established in the participating Member States. The institutional scope therefore is identical to that of the SSM (i.e. includes all (several thousand) banks in the participating Member States). A majority of delegations agree with this scope of the SRM, as set out in the Presidency compromise text.
9. However, some delegations maintain that the scope of the **SRM should be narrowed to cover only the entities which qualify as “significant”** according to the criteria listed in Article 6(4) of the SSM Regulation and **which will be directly supervised by the ECB** (less than 150 banks, as currently estimated).

¹⁰ Doc. 14056/13 EF 183 ECOFIN 830 CODEC 2123 REV 1; doc. 14754/13 EF 192 ECOFIN 890 CODEC 2265 and doc. 15503/13 EF 206 ECOFIN 956 CODEC 2408.

¹¹ Doc. 15503/13 EF 206 ECOFIN 956 CODEC 2408.

10. The debates have shown that the scope of the SRM is closely linked to the funding principles, and any narrowing of the proposed scope could give rise to review of the funding principles now reflected in the compromise text.
- b) *Financing arrangements of the SRM (Articles 56, 57, 62, 65, 67 to 69)*
11. The Commission proposed to establish a single fund (the SRF) to be used for financing resolution of banks and banking groups of the participating Member States. However some delegations are of the view that any resolution funding should be sourced in all cases from national funds in participating Member States. In case of a cross-border group, the relative contributions by each national resolution fund would be determined on the basis of the burden-sharing criteria established in the BRRD¹². Credit lines and mutual lending facilities among the national resolution funds of participating Member States could be envisaged. This system would imply the network of national resolution funds instead of the SRF.
12. Nevertheless, most of the delegations are of the view that SRM should comprise a single fund (financed from the contributions by all institutions covered by the SRM), which is one of the key elements of the Banking Union, together with centralised decision making on supervision and resolution.
13. In this respect it is recalled that the December 2012 European Council concluded that the SRM "should be based on contributions by the financial sector itself and include appropriate and effective backstop arrangements. This backstop should be fiscally neutral over the medium term, by ensuring that public assistance is recouped by means of *ex post* levies on the financial industry."¹³ Several delegations are of the view that agreement on the common backstop is a key element for credibility of the future SRM.

¹² Negotiations on the Commission proposal for a Directive establishing a framework for the recovery and resolution of credit institutions and investment firms are now in the trilogue stage.

¹³ Doc. EUCO 205/12 CO EUR 19 CONCL 5, point 11.

14. The Presidency observes that to address the issue of possible support (backstop) to the SRM, the preparatory work is on-going in the Economic and Financial Committee (EFC) and the Eurogroup Working Group (EWG), which are likely to continue working on this issue also in 2014. In view of the deadlines set by the European Council and given that the trilogues with the European Parliament should start as soon as possible, the Presidency is of the view that Article 69 of the compromise now reflects a feasible solution - it leaves open the possibility for the SRM to resort to a backstop, once it is in place. This solution leaves room for the EFC and the EWG to complete their work on the backstop issue.
- c) *Decision-making in the SRM (Article 16) and governance of the SRB (Articles 39, 46, 49, 51 and 52)*
15. Decision-making mechanism of the SRM has emerged as the main object of the debates. Given the legal requirements, a Union institution vested with executive powers (the Council or the Commission in this case) should be involved at least at the stage where a decision to trigger resolution is taken (Article 16). A large majority of the delegations have converged on the view that this task should be entrusted to the Commission. However, some delegations are still of the view that the Council should play a role, especially where key decisions have to be taken (either with active voting or a power to overrule, e.g., by way of reversed qualified majority).
16. The decision to trigger resolution will be prepared by the SRB, and it is thus of key importance how the SRB takes its decisions. There is an overall agreement that the voting modalities in the SRB should enable efficient, effective and speedy resolution decisions. Various options have been proposed, in particular:
- i) that decisions on the resolution scheme and actions should be taken in a specific composition of the SRB executive session, which would be composed of permanent officials and of the representatives of the national resolution authorities (NRAs) concerned, to whom votes would be attributed in accordance with the weighting rules set out in the SRM Regulation, permitting to reflect the balance between "home" and "host" NRAs;

- ii) that the SRB plenary session (all NRAs) role should be strengthened so that where NRAs concerned are not able to reach joint agreement (consensus), the SRB plenary session would have to decide by a simple majority (each member of the plenary session would have one vote).
 - 17. To achieve a compromise between positions of the delegations, the Presidency proposes the following solution: the representatives of NRAs concerned and the SRB executive session (**the Executive Director and members, appointed by the Council**) would reach decisions by a joint agreement (**consensus**) but, should they fail to do so, the **Executive Director and the appointed members would have the right to take a decision** by a simple majority of votes (one member - one vote, in all cases).
 - 18. To address the need to have **stronger voting rules for the decisions involving use of funds** the current Presidency compromise text foresees that the SRB plenary session would have the right to oppose the SRB executive session on certain decisions relating to the use of the SRF means.
 - 19. Some delegations are of the view that the role of the **SRB plenary session should be strengthened further** by providing that decisions where any SRF means are used would only be taken by the SRB plenary session (even possibly with weighted voting regime and qualified majority vote) and - where SRF would have to be complemented with borrowed means or ex post contributions to the SRF- the SRB plenary session would have even higher requirement for the qualified majority in favour.
- d) Advancing the bail-in date (Article 6(4), Articles 24 and 88)*
- 20. The SRM Regulation needs a robust **system to guarantee the budgetary sovereignty of Member States** at the same time respecting their constitutional arrangements, also throughout the transitional period during which the target funding level has to be reached. For that purpose, as well as in order to address one of the principal concerns of the Member States, the Presidency has introduced relevant modifications to Article 6(4) of the proposal, which now prohibits taking any decisions that would require a Member State to provide extraordinary public support without its approval under national budgetary procedures.

21. In addition, a group of delegations is of the view that yet another effective way to limit public sector involvement, and thus to ensure budgetary sovereignty of a Member State, is to make the **bail-in tool fully applicable to the Member States participating in the SRM from the date when SRM Regulation becomes effective** (now 1 January 2015).
 22. Alternatively, the SRM could be designed to become effective as from the date of mandatory application of the bail-in tool under BRRD (now 1 January 2018, under the Council general approach¹⁴).
- e) *Non contractual liability (Article 78)*
23. A number of Member States have raised issues with the arrangements for the **payment of costs and non-contractual liabilities** of the Commission and, where relevant, of the SRB when performing tasks under the SRM. By way of Article 340 of the TFEU, similar to other areas of the EU policies, (including those where not all EU Members States are participating), the liabilities of the Commission would be covered by the general EU budget. The Presidency observes that strong legal doubts have been raised about any departure from this principle. However, these delegations insist that general EU budget should be immune from any possible cases of non-contractual liability of the EU bodies or institutions taking decisions in the SRM context.
- f) *The seat (Article 44)*
24. The SRB will have to **actively and closely co-operate with Commission** services in effectively conducting resolution activities. Therefore the Commission proposed that the SRB has its seat in Brussels, Belgium. However, a group of delegations maintain a scrutiny reserve on the location of the seat of the SRB.

¹⁴ Doc. 11148/1/13 EF 132 ECOFIN 572 DRS 121 CODEC 1511 REV 1 + COR 1.

III. OTHER ISSUES

25. A number of other issues remain open, which, in the opinion of the Presidency, could be solved at the Ad Hoc Working Party / Committee of Permanent Representatives level, once the agreement has been reached on the key issues outlined in Part II of this report.
26. The delegations have signalled the following particular concerns:
 - i) A number of delegations consider that a potential **conflict of interest** is inherent in the Commission if it is granted discretionary powers in the SRM context, as now foreseen in the Presidency compromise: the Commission will have to strike the right balance between potentially conflicting objectives - a resolution objective of achieving financial stability and an objective to ensure that resolution measures, where they constitute State or SRF aid, are compatible with internal market. To address these concerns, the Presidency has proposed relevant safeguards, nevertheless, there are delegations that maintain a reserve on this solution.
 - ii) The original Commission proposal that has foreseen application of **state aid rules** to the use of SRF means "by analogy" had to be modified to ensure level playing field and legal certainty about how such approach could be implemented in practice. However, some delegations are still of the view that use of the SRB funds should be subject to ex post verification of compatibility with internal market, as it is the way to ensure that the SRM at all times guarantees efficient, effective and swift decision-making in the resolution process.
 - iii) Once the final political agreement on **the BRRD** is reached in the trilogues, the **SRM text should be aligned** with it. The Presidency has attempted to align the SRM compromise to the Council general approach on the BRRD, however it has become apparent that the ultimate solution for this issue needs to be further postponed until the political agreement on the BRRD is reached.

- iv) Some Member States have requested to maintain the **possibility for the SRM to lend the necessary resources to a deposit guarantee scheme**, in the event resources of that deposit guarantee scheme are not sufficient to cover the payments to be made to depositors, provided that all the conditions under Article 10 of Directive 94/19/EC are met. However, other delegations oppose this option, especially in the cases where such lending would not be related to bail-in activities. At the moment, the option originally foresee in Article 73(4) of the 2nd Presidency compromise is not included in the text.
- v) Some delegations seek **amendments to EBA Regulation**, so as to ensure that EBA can perform its tasks in relation to the Commission in the same way as for any other resolution authority - this pertains both to the process which the EBA follows when exercising its powers and the outcome of the exercise of those powers (which in some cases is binding). These delegations see this as an essential point in order to secure equality of treatment between resolution authorities and credit institutions located in different Member States and to ensure coherence in the exercise of the EBA's tasks and powers. However, questions have been raised whether such suggestion is relevant and possible to fulfil in the SRM context, from the legal and practical perspective.
- vi) A number of delegations have indicated, that the text of the SRM Regulation should specify further details relating to the **method of calculation of individual contributions to the SRF**, rather than completely leaving this aspect to be solved by the Commission delegated act (Article 66(3)). The key objective in this respect is to ensure adequate and well-balanced system of contributions to the Fund.
- vi) Some delegations have also raised **a number of technical concerns**, that the Presidency expects to address in the following stages of negotiations on this text, where the Presidency will act in accordance with the guidance and mandate it will receive from Member States.

IV. CONCLUSION

27. The Presidency invites delegations to lift, where possible, any reservations they might have on the issues outlined in this report, in view of reaching a timely agreement on the overall compromise text.
28. Against this background, the Council is invited to:
 - a) finalise the agreement on the general approach, or, should this be not possible,
 - b) resolve the outstanding key issues set out in Part II of this report and mandate the Ad Hoc Working Party on the Single Resolution Mechanism and the Committee of Permanent Representatives to
 - i) finalise the agreement on the issues set out in Part III of this report, and
 - ii) submit the text to the Council for formal approval of the general approach.

ANNEX

EXTRACTS FROM THE EUROPEAN COUNCIL CONCLUSIONS RELATING TO THE SRM

1. December 2012 European Council

"Roadmap for the completion of EMU

[...]

10. It is imperative to break the vicious circle between banks and sovereigns. [...]

[...]

11. In a context where bank supervision is effectively moved to a single supervisory mechanism, a single resolution mechanism will be required, with the necessary powers to ensure that any bank in participating Member States can be resolved with the appropriate tools. [...] The Commission will submit in the course of 2013 a proposal for a single resolution mechanism for Member States participating in the SSM, to be examined by the co-legislators as a matter of priority with the intention of adopting it during the current parliamentary cycle. It should safeguard financial stability and ensure an effective framework for resolving financial institutions while protecting taxpayers in the context of banking crises. The single resolution mechanism should be based on contributions by the financial sector itself and include appropriate and effective backstop arrangements. This backstop should be fiscally neutral over the medium term, by ensuring that public assistance is recouped by means of *ex post* levies on the financial industry."

2. March 2013 European Council

"Deepening EMU

[...]

13. The European Council recalls that it is imperative to break the vicious circle between banks and sovereigns. [...]. The Commission intends to submit by summer 2013 a legislative proposal on a Single Resolution Mechanism for countries participating in the SSM, to be examined as a matter of priority with the intention of adopting it during the current parliamentary cycle. It should ensure an effective framework for resolving financial institutions while protecting taxpayers in the context of banking crises, be based on contributions from the financial sector itself and include appropriate and effective backstop arrangements, in line with its conclusions of December 2012. The integrity of the Single Market will be fully respected and a level playing field will be ensured between Member States which take part in the SSM and those which do not."

3. June 2013 European Council

"III. COMPLETING THE ECONOMIC AND MONETARY UNION

[...]

13. In the short run, the key priority is to complete the Banking Union in line with the European Council conclusions of December 2012 and March 2013. This is key to ensuring financial stability, reducing financial fragmentation and restoring normal lending to the economy. The European Council recalled that it is imperative to break the vicious circle between banks and sovereigns and underlined the following points:

[...]

- (e) a fully effective SSM requires a Single Resolution Mechanism (SRM) for banks covered by the SSM. The European Council looks forward to the Commission's proposal establishing an SRM with a view to reaching agreement in the Council by the end of the year so that it can be adopted before the end of the current parliamentary term. [...]"

4. October 2013 European Council

"III. ECONOMIC AND MONETARY UNION

33. Following the December 2012 and June 2013 European Council meetings, the European Council has focused its discussion on banking and economic union but will return to all issues in December 2013. [...]

[...]

Banking Union

41. The European Council has been actively steering the process of establishing the Banking Union. [...]

[...]

43. [...] It also calls on the Eurogroup to finalise guidelines for European Stability Mechanism direct recapitalisation so that the European Stability Mechanism can have the possibility to recapitalise banks directly, following the establishment of the Single Supervisory Mechanism.

44. Completing the Banking Union is urgent and requires not only a Single Supervisory Mechanism but also a Single Resolution Mechanism. The European Council calls on the legislators to adopt the Bank Recovery and Resolution Directive and the Deposit Guarantee Directive by the end of the year. The European Council underlines the need to align the Single Resolution Mechanism and the Bank Recovery and Resolution Directive as finally adopted. It also underlines the commitment to reach a general approach by the Council on the Commission's proposal for a Single Resolution Mechanism by the end of the year in order to allow for its adoption before the end of the current legislative period."