

European Stability Mechanism



## Procurement Review Procedure

May 2016 (consolidated version effective as of 3 May 2021)

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## 1 Purpose, Definitions

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1. The Procurement Review Procedure of the ESM (the “Procedure”) establishes, on the basis of Article 12 of the ESM Procurement Policy (the “Policy”), the rules applicable to the proceedings initiated by unsuccessful Candidates before the ESM Procurement Review Panel (the “PRP”) and the ESM Procurement Oversight Panel (the “POP”, collectively the “ESM Procurement Panels”).
2. Unless expressly stated otherwise, capitalised terms used in this Procedure have the same meaning as the capitalised terms defined in the Policy.

## 2 Status and Competence of the ESM Procurement Panels

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1. The ESM Procurement Panels are directly empowered by delegated authority from the Managing Director to render a decision in a procurement related dispute between an unsuccessful Candidate and the ESM (the “Case”).
2. The ESM Procurement Panels decide objectively and impartially in accordance with the Policy and this Procedure.
3. All members of staff of the ESM are obliged to cooperate with the ESM Procurement Panels and to provide any documents and information required under this Procedure and requested by the ESM Procurement Panels without undue delay in order to ensure an effective, efficient and rapid conclusion of the proceedings.
4. When resolving a Case, the ESM Procurement Panels interpret the Policy, including the ESM’s general principles of procurement set forth in Article 4.1 of the Policy, in the light of the specific nature of the ESM, its size and the particular environment in which it operates, in order to allow for the effective fulfilment of the ESM’s mandate as a crisis resolution mechanism.
5. The ESM Procurement Panels assess whether there has been a material breach of the Policy which adversely affects the Candidate or manifest error of assessment of fact or misuse of powers which could have impacted the outcome of the Procurement Procedure. In their assessment, the ESM Procurement Panels respect the ESM’s broad margin of assessment with regard to the factors to be taken into account for the purpose of awarding a Contract.
6. The ESM Procurement Panels do not have any specific powers beyond those conferred upon them by this Procedure. In particular, they do not have the authority to annul a Contract which was signed by the ESM and the successful Candidate.
7. The PRP is competent to render the decisions as specified in Article 5 of this Procedure in accordance with the rules provided for in Articles 3 and 4 of this Procedure. The decisions

taken by the PRP are final unless an appeal is admissible pursuant to Article 6 (1) of this Procedure (the “Appeal”).

8. The POP is competent to take the following decisions:
  - a) In accordance with Article 6 of this Procedure, the POP decides on an Appeal;
  - b) In accordance with Article 7 of this Procedure, the POP decides on a Request for Review referred to it by the PRP;
  - c) In accordance with Article 8 of this Procedure, the Managing Director may, at any time during the proceedings before the PRP, request the POP to step in and decide in lieu of the PRP.

The decisions taken by the POP are final and are not subject to further appeal.

### **3 Filing of a Request for Review**

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1. A Candidate may file, pursuant to Article 12 of the Policy, a Request for Review.
2. The Request for Review must be signed by a person authorised to represent the Candidate and submitted in a PDF format. The PDF file shall be attached to an email sent to the email address provided on the ESM’s website or, if available, by using the dedicated electronic form on the ESM’s website.
3. The Request for Review and all supporting documents must be in English.
4. The Candidate is responsible for providing evidence supporting its Request for Review and for ensuring that the evidence is accurate and sufficient to form a basis for the review. In particular, the Candidate must provide the following documents:
  - a) the application or proposal of the Candidate,
  - b) the ESM’s notification pursuant to Article 9.17 (1) of the Policy, and
  - c) the Candidate’s De-briefing Request and the ESM’s De-briefing Note pursuant to Article 9.17 (2) of the Policy.
5. The Request for Review must contain:
  - a) the full legal name of the Candidate and its contact details, including address and telephone number;
  - b) the full name of the person authorised to represent the Candidate and/or, if applicable, the name and contact details of any counsel assisting or representing the Candidate;

- c) the email address at which the Candidate accepts to receive any written communications in relation to the Request for Review;
  - d) a statement of the relevant facts;
  - e) the grounds on which the Candidate claims that the challenged Procurement Procedure was not conducted in accordance with the Policy and the arguments relied upon in support of those grounds; and
  - f) the remedy or remedies being sought.
6. The Request for Review may contain:
- a) a request to suspend the signing of the Contract pursuant to paragraph 9 below; and
  - b) an indication which information contained in the Request for Review shall be treated by the ESM as confidential.
7. The PRP may, but is not obliged to, request the Candidate to clarify or to provide additional information in support of its Request for Review.
8. A Request for Review is only admissible:
- a) if it has been filed in accordance with the provisions set forth in paragraphs 2, 3, 4 and 5 above;
  - b) if the Candidate has submitted a De-briefing Request in accordance with Article 9.17 (2) of the Policy, i.e. no later than four (4) Business Days ("Business Days", here and in the entire Procedure, having the same meaning as "business days" defined in the Policy) as of the receipt of the ESM's notification pursuant to Article 9.17 (1) of the Policy, and
  - c) if the Request for Review has been filed not later than fifteen (15) Business Days after the receipt of the ESM's notification pursuant to Article 9.17 (1) of the Policy.
9. A request to suspend the signing of the Contract by extending the Standstill Period provided for in Article 9.17 (1) of the Policy may be filed separately or as part of the Request for Review. Such a request must bring forward arguments allowing the PRP, in accordance with Article 5 (7) of this Procedure, to justify the adoption of such a measure and is only admissible if:
- a) it has been filed in accordance with the provisions set forth in paragraphs 2, 3 and 5 a) to d) above;
  - b) the Candidate has submitted a De-briefing Request in accordance with Article 9.17 (2) of the Policy, and

- c) it has been filed not later than four (4) Business Days before the expiry of the Standstill Period.

For the avoidance of doubt, if a request to suspend the signing of the Contract is filed separately and not as part of a Request for Review, a subsequent Request for Review must be filed in accordance with the requirements pursuant to paragraph 8 above.

- 10. In accordance with Article 12 (2) of the Policy, the filing of a Request for Review and/or a request to suspend the signing of the Contract do not have an automatic suspensive effect on the challenged Procurement Procedure. In particular, the ESM could always sign the Contract once the Standstill Period has expired and it was not previously extended by the PRP.

#### **4 Conduct of the Proceedings before the ESM Procurement Review Panel**

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- 1. The PRP will acknowledge the receipt of the Request for Review within two (2) Business Days after it has been filed and at the same time will provide the Request for Review to the ESM functions responsible for the challenged Procurement Procedure (the “Respondent”).
- 2. The PRP will obtain full access to the ESM’s electronic file on the challenged Procurement Procedure within two (2) Business Days after the Request for Review has been filed.
- 3. The PRP will submit to the Candidate and to the Respondent, not later than seven (7) Business Days after the Request for Review has been filed, copies of documents related to the alleged breach of the Policy and the Candidate’s participation in the challenged Procurement Procedure.

The Candidate may submit to the PRP additional observations strictly limited to the documents provided by the PRP under this paragraph 3 not later than five (5) Business Days after the receipt of these documents. The PRP shares the Candidate’s additional observations with the Respondent and the Candidate as soon as reasonably possible but not later than two (2) Business Days after having received the Candidate’s additional observations.

- 4. The Respondent will submit to the PRP their joint observations to the Request for Review not later than ten (10) Business Days after the PRP informed the Respondent that the Request for Review has been filed. The PRP reviews the joint observations and may redact or withhold information the release of which would affect other Candidates’ legitimate commercial interests, would hinder the application of the law, might prejudice fair competition between Economic Operators or would otherwise be contrary to the ESM’s or public interest. The PRP subsequently shares the Respondent’s joint observations with the Candidate and the Respondent as soon as reasonably possible but not later than two (2) Business Days after having received the Respondent’s joint observations.

5. The Candidate may submit to the PRP comments strictly limited to the Respondent's joint observations referred to under paragraph 4 above not later than four (4) Business Days after having received the Respondent's joint observations. The Respondent may submit to the PRP comments strictly limited to the Candidate's additional observations referred to under paragraph 3 above not later than four (4) Business Days after having received the Candidate's additional observations. The PRP shares the Candidate's comments and the Respondent's comments with the Candidate and the Respondent as soon as reasonably possible but not later than two (2) Business Days after having received the comments. Otherwise and unless required by the PRP, there will be no further exchange of documents.
6. The PRP may ask the Respondent and/or the Candidate for clarification, at any time. The Respondent and/or the Candidate shall provide their clarifications within the timelines specified by the PRP. The PRP shares any clarifications received with the Respondent and the Candidate as soon as reasonably possible but not later than two (2) Business Days after having received such clarifications.
7. If appropriate and justified by the particular circumstances pertaining to the Case, the PRP may decide, in its sole discretion and at any point during the proceedings, to hold an oral exchange on any questions the PRP may have to the Respondent and/or to the Candidate on the submitted documents and/or clarifications. Such exchange may take place in person at the ESM offices or remotely via teleconference. The PRP makes available the minutes of the oral exchange to the Candidate and to the Respondent.
8. The PRP assesses the documents, clarifications and supporting evidence submitted to it or presented before it, the Procurement Procedure to the extent it has been challenged, and any other relevant records in order to decide on the Case.
9. Before sharing any documents, clarifications and supporting evidence submitted to the PRP or presented before the PRP, the PRP may redact or withhold information the release of which would affect other Candidates' legitimate commercial interests, would hinder the application of the law, might prejudice fair competition between Economic Operators or would otherwise be contrary to the ESM's or public interest.
10. The PRP may at any time of the proceedings engage external expertise where necessary for the assessment of the Request for Review, the costs being borne by the ESM.
11. All written communication during the proceedings before the PRP shall be made by email, wherever appropriate in PDF format attached to an email, unless otherwise requested by the PRP.

## **5 Decisions by the ESM Procurement Review Panel**

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1. A Request for Review is founded in case of a material breach of the Policy adversely affecting the Candidate or manifest error of assessment of fact or misuse of powers which

could have impacted the outcome of the Procurement Procedure. Otherwise, it is deemed unfounded and will be rejected.

2. The PRP may reject a Request for Review at any time of the proceedings even before having received the Respondent's observations and/or the Candidate's additional observations, if the PRP concludes that the Request for Review is not admissible or it is manifestly unfounded.
3. To the extent the PRP concludes that the Request for Review is founded, the PRP may require the cancellation of the Procurement Procedure or parts thereof, provided that the Contract has not yet been signed.
4. If the Contract has been signed, the Candidate has claimed compensation and the PRP cannot conclude that the Request for Review is unfounded, the PRP refers the Request for Review to the POP. Simultaneously, the PRP hands over its file to the POP, accompanied by its report on the Case.
5. The PRP aims at a swift resolution of the Case and either decides upon the Request for Review or refers it to the POP pursuant to paragraph 4 above not later than 30 (thirty) Business Days after the receipt of the Request for Review, unless it considers that exceeding this period is justified by the particular circumstances pertaining to the Case.
6. The PRP notifies the Candidate and the Respondent as soon as reasonably possible of its reasoned decision on the Request for Review or the fact that the Request for Review has been referred to the POP.
7. If deemed appropriate, the PRP may, upon a request or on its own motion, require to suspend the signing of the Contract and thereby extend the Standstill Period, or adopt other measures of a temporary nature which may be valid until the PRP takes a decision pursuant to paragraphs 1 to 4 above. Such a decision must be justified, *prima facie*, in fact and in law and urgently required to avert a severe disadvantage for the Candidate due to the alleged breach of the Policy which prevails over the interest of the ESM and of the other Candidates to proceed with the challenged Procurement Procedure.

The PRP takes the decision to suspend the signing of the Contract and to extend the Standstill Period prior to its expiry. In this particular case, the PRP notifies the Candidate and the Respondent as soon as possible of any decision taken by it pursuant to this paragraph.

## 6 Appeal

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1. A Candidate may file an Appeal to the POP against a decision by the PRP to reject the Request for Review pursuant to Article 5 (1) or (2) of this Procedure. For the avoidance of doubt, a decision by the PRP pursuant to Article 5 (7) of this Procedure, cannot be challenged by filing an Appeal.

The following rules apply to the filing of an Appeal:

- a) The Appeal must specify the grounds on which the Candidate claims that the PRP's decision does not comply with the Policy or this Procedure, the arguments relied upon in support of those grounds and the remedies being sought;
  - b) The Appeal must be filed not later than five (5) Business Days after receipt of the notification of the PRP's decision;
  - c) Furthermore, the provisions relating to the filing of a Request for Review as specified in Article 3 (2), (3), (5) a), b), c), (6) b), (7) and (10) of this Procedure are applicable *mutatis mutandis* to the filing of an Appeal.
2. The provisions relating to the conduct of the proceedings before the PRP as specified in Article 4 (1) to (2) and (4) to (11) of this Procedure are applicable *mutatis mutandis* to the proceedings before the POP.

The PRP hands over its file, including its reasoned decision, to the POP, once an Appeal has been filed.

3. The POP either confirms the PRP decision which has been appealed or sets it aside in whole or in part and replaces it by its own decision. The provisions relating to the decisions by the PRP as specified in Article 5 (1) and (2) of this Procedure are applicable *mutatis mutandis* to the decisions rendered by the POP.
4. If the POP concludes that there is a sufficiently serious breach of the Policy adversely affecting the Candidate, the POP may require that the Candidate is compensated. Compensation is limited to the costs, to be proven to the satisfaction of the POP, incurred by the Candidate for participating in the Procurement Procedure, excluding costs incurred in relation to the proceedings before the ESM Procurement Panels (but including legal counsel fees) and excluding any indirect and consequential costs and expenses, in particular any loss of profit or revenue. The amount of the compensation may not exceed the lesser of five percent (5%) of the Contract Value established pursuant to Article 5.3 of the Policy or fifty thousand euro (EUR 50,000).
5. The POP renders its reasoned decision within thirty (30) Business Days as of the date when the Appeal has been filed, unless it considers that exceeding this period is justified by the particular circumstances pertaining to the Case.
6. The POP notifies the Candidate and the Respondent as soon as reasonably possible of its reasoned decision.

## **7 Request for Review Referred to the ESM Procurement Oversight Panel by the ESM Procurement Review Panel**

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1. The following provisions govern the procedure before the POP related to a Request for Review which the PRP has referred to it pursuant to Article 5 (4) of this Procedure.
2. The Candidate, following the notification by the PRP that its Request for Review has been referred to the POP, may submit, within five (5) Business Days, additional observations and supporting evidence strictly limited to support its claim for compensation. The POP shares such additional observations with the Respondent and the Candidate as soon as reasonably possible but not later than two (2) Business Days after having received the Candidate's observations. The Respondent can provide its position on the claim for compensation within five (5) Business Days after having received the Candidate's observations. The POP shares the Respondent's position with the Candidate and the Respondent as soon as reasonably possible but not later than two (2) Business Days after having received the Respondent's position. Otherwise and unless required by the POP, there will be no further exchange of observations.

The provisions relating to the conduct of the proceedings before the PRP as specified in Article 4 (6) to (11) of this Procedure are applicable *mutatis mutandis* to the proceedings before the POP.

3. The POP rejects the Request for Review referred to it by the PRP in the absence of a material breach of the Policy adversely affecting the Candidate and which could have impacted the outcome of the Procurement Procedure.
4. The POP may require that the Candidate is compensated if the conditions for awarding compensation set out in Article 6 (4) of this Procedure are met.
5. The POP renders its reasoned decision within thirty (30) Business Days as of the referral of the Request for Review, unless it considers that exceeding this period is justified by the particular circumstances pertaining to the Case.
6. The POP notifies the Candidate and the Respondent as soon as reasonably possible of its reasoned decision.

## **8 Subrogation by the ESM Procurement Oversight Panel**

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1. In the event that the POP, upon a request of the Managing Director, steps in and decides in lieu of the PRP, it takes over the proceedings as they stand and conducts the proceedings by applying the rules applicable to the PRP, however, including also the power to require the payment of compensation if and to the extent that the conditions for awarding compensation set out in Article 6 (4) of this Procedure are met. For the avoidance of doubt, a decision taken by the POP in lieu of the PRP pursuant to this paragraph is final and is not subject to further appeal.

2. The POP notifies the Candidate and the Respondent as soon as reasonably possible of its reasoned decision.

## **9 Publication of information on final reasoned decisions**

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1. The ESM Procurement Panels arrange as soon as reasonably possible for the publication of information on their final reasoned decisions on Requests for Review and Appeals, in accordance with paragraph 2 below, on the ESM's website.
2. The ESM Procurement Panels may redact or withhold information the release of which may affect legitimate commercial interests of Candidates, would hinder the application of the law, might prejudice fair competition between Economic Operators or would otherwise be contrary to the ESM's or the public interest.

## **10 Composition of the ESM Procurement Panels**

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1. The Managing Director designates the members of the ESM Procurement Panels and their alternates, in case the members are unavailable or have recused themselves from deciding on the Case due to conflict of interest. The ESM Procurement Panels are composed as follows:
  - a) the PRP is composed of the Head of Risk Management, the Head of Finance and Control, and the Head of Corporate Governance and Internal Policies;
  - b) the POP is composed of the Secretary General and two external experts with experience in public procurement matters: a reputable external lawyer and a procurement expert at senior level from a peer organisation. In case the procurement expert from a peer organisation is unavailable to decide on a Case, a second reputable external lawyer with experience in public procurement matters serves on the POP instead.
2. The members of the ESM Procurement Panels shall be independent and free from improper influence and fear of retaliation in the performance of their duties pursuant to this Procedure. Any member of the ESM Procurement Panels who has a conflict of interest in deciding on a particular Case shall promptly recuse themselves and be replaced by their alternate. The mere fact of being a member of staff of the ESM is not considered to constitute a conflict of interest.

## **11 Organisation of the ESM Procurement Panels**

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1. The ESM Procurement Panels take their decisions by simple majority.

2. The members of the ESM Procurement Panels are subject to a duty of confidentiality. The Procurement Panels take the necessary measures so as to ensure the confidentiality of any information the release of which may affect legitimate commercial interests of Candidates, may hinder the application of the law, may prejudice fair competition between Economic Operators or may otherwise be contrary to the ESM's or the public interest.
3. In their entire activities, the ESM Procurement Panels aim at a swift resolution of the Case, yet not at the expense of comprehensiveness or accuracy.

## **12 Calculation of Time Limits**

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1. For the purpose of calculation of time limits laid down in or pursuant to this Procedure, time shall run from 00.00 hours (CET) on the day following that on which the relevant event occurs.
2. Receipt of emails sent by the ESM Procurement Panels is deemed to occur on the day of their dispatch.

## **13 Costs**

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1. The proceedings pursuant to this Procedure are free of charge subject to paragraph 2 below. Without prejudice to Article 6 (4) above, the Candidate and the ESM bear their own costs, including for legal counsel, incurred throughout the proceedings.
2. If a Request for Review or an Appeal has caused the ESM to incur avoidable costs in relation to the proceedings before the ESM Procurement Panels, in particular where the action is manifestly an abuse of process, the concerned ESM Procurement Panel may require that the Candidate pays a contribution to these costs. However, the amount of such contribution may not exceed the lesser of five percent (5%) of the Contract Value established pursuant to Article 5.3 of the Policy or fifty thousand euro (EUR 50,000).

## **14 Candidate's Participation in Other Procurement Procedures**

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Without prejudice to Article 9.12 of the Policy, the proceedings pursuant to this Procedure have no impact on the Candidate's participation in other ongoing or future Procurement Procedures of the ESM.

## **15 Summary Report to the Board of Directors**

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On an annual basis, the ESM provides a summary report to the Board of Directors on the Cases resolved pursuant to this Procedure during the preceding calendar year.

## 16 Entry into Force, Transitional Provisions and Procedure Review

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1. This Procedure entered into force on 2 May 2016, was amended as of 2 January 2018, and on 3 May 2021.
2. Proceedings which have started before the entry into force of the amendment of 3 May 2021 will be completed in accordance with the version of the Procedure which was in force on the date the Request for Review has been filed.
3. The Managing Director may review and, where necessary, revise this Procedure from time to time, in particular, following a revision of the Policy.