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OPINION OF THE LEGAL SERVICE[1]

Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme - Examination of the proposed legal basis

I. INTRODUCTION

1. The Commission presented on 26 November 2015 a proposal for a Regulation amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme (hereinafter, "the proposal")[2]. The proposal is intended to amend the Regulation establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain

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[2] COM(2015) 586 final, doc. 14649/15.

investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund[3] (hereinafter, "the SRM Regulation"), with the aim of putting in place a common system for depositor protection, the European Deposit Insurances Scheme (hereinafter, "the EDIS"). The EDIS represents the third pillar of the Banking Union and is to be established in three successive stages: a reinsurance scheme for participating national Deposit Guarantee Schemes (hereinafter: "the DGSs") in a first period of three years; a co-insurance scheme for participating national DGSs in a second period of four years ; and full insurance for participating national DGSs in the steady state.

2. The proposal is founded on two pillars: the Single Resolution and Deposit Insurance Board (hereinafter, "the Board") that will be in charge of applying the deposit guarantee framework in the participating Member States, and the European Deposit Insurance Fund (hereinafter, "the DIF"). The DIF will be managed by the Board in all stages jointly with participating DGSs (or, where a DGS does not administer itself, by the national designated authority responsible to administer the respective participating DGS) and would provide the necessary financing for the mandatory functions that DGSs have under the DGS Directive[4]: pay-out to depositors or participation in a resolution function[5]. The DIF would be fed by ex-ante and

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3 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 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 Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 30.7.2014, p. 1.

4 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, OJ L 173, 12.6.2014, p. 149.

5 In the re-insurance phase, EDIS may provide limited funding and cover a limited share of the loss of a participating DGS that encounters a pay-out event or has been requested to contribute to resolution. During the co-insurance phase, EDIS provides funding for a percentage of the participating DGSs liquidity need arising from a payout event or a request to contribute to resolution. It also covers the same percentage of the loss the participating DGS ultimately incurs from these events. The share would be 20% in the first year of the co-insurance phase and increases each subsequent year by 20 percentage points, reaching 80% in the last year of co-insurance. During the last (full insurance) phase, EDIS will provide full funding of the liquidity need and covers all losses arising from a payout event or a request to contribute to resolution.

ex-post contributions to be paid by the entities covered by the proposal. It would also be able to borrow, under certain conditions, from all other deposit guarantee schemes recognised in non-participating Member States or to contract borrowings or other forms of support from other third parties.

3. Since it would become a part of the SRM Regulation, the proposal would only apply to the DGSs and entities therein defined that are established in participating Member States, i.e., the euro area Member States and those that have established a close cooperation arrangement with the Single Supervision Mechanism (hereinafter, the "SSM") under the Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (hereinafter, the "SSM Regulation")[6].

4. The Ad-hoc Working Party on the Strengthening of the Banking Union requested during its meeting of 20 January 2016 the opinion of the Council Legal Service on the question whether Article 114 of the Treaty on the Functioning of the European Union (TFEU) is the suitable legal basis for adopting the proposed Regulation.

II. LEGAL BACKGROUND

A) THE RELEVANT PROVISIONS OF THE EU TREATIES

5. Article 114(1) TFEU reads as follows: "*Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market*".

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6 Council Regulation No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L, 29.10.2013, p. 63.

6. Article 311 TFEU (on the Union's own resources) reads as follows:

"*The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.*

Without prejudice to other revenue, the budget shall be financed wholly from own resources.

The Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own resources or abolish an existing category. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements(...)".

7. The system of own resources of the Union to which Article 311 TFEU refers has been specified in Council Decision on the system of the European Communities' own resources (hereinafter, "the Own Resources Decision"), adopted in accordance with the procedure referred to in the third subparagraph of Article 311 TFEU[7]. According to Article 1 of the Own Resources Decision, "*The Communities shall be allocated own resources in accordance with the rules laid down in the following Articles in order to ensure (...) the financing of the general budget of the European Union*".

[7] OJ L 163, 23.6.2007, p. 17.

B) THE RELEVANT LEGAL FRAMEWORK RELATING TO THE BANKING UNION

8. As was the case already for the establishment of the SRM, the proposal has to be read against the background of a number of important legal acts recently adopted, concerning the establishment of the internal market in financial services, in particular the "*Single Rule Book*"[8] and the establishment of the Banking Union.

9. It is recalled that, in 2013, the Union legislature has agreed on the establishment of a SSM, conferring upon the European Central Bank (ECB), acting jointly with the national competent authorities, powers of supervision on the credit institutions established in the Member States whose currency is the euro and in the other Member States that decide to establish a close cooperation arrangement with the ECB for supervision purposes, which constitutes the first pillar of the Banking Union[9].

10. The second pillar of the Banking Union was created in July 2014, with the adoption of the SRM Regulation[10].

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8 The term Single Rulebook was coined in 2009 by the European Council in order to refer to the aim of a unified regulatory framework for the EU financial sector that would complete the single market in financial services and ensure uniform application of Basel III in all Member States (see point 20 of the presidency conclusions of 18/19 June 2009, Council doc. nº 11225/2/09). Currently, it consists of the Deposit Guarantee Scheme Directive, the Bank Recovery and Resolution Directive (Directive 2014/59/UE of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms), the Capital Requirements Directive **(**Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms) and the Capital Requirements Regulation **(**Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms) corresponding binding technical standards and guidelines developed by the European Supervisory Authority on their basis. In the future, other instruments could be added to this list such as the Bank Structural Reform Regulation (currently under negotiation) or new Union acts aiming at implementing Basel III by introducing uniform Total Loss Absorbing Capacity requirements.

9 See footnote 6.

10 See footnote 3.

11. It is also recalled that, in April 2014, the Union legislature has adopted Directive 2014/49 on deposit guarantee schemes (the DGSD)[11] which builds upon the previous Directive of 1994 and improves the protection of deposits by in particular, further harmonising the pay-outs procedure and by providing more unified funding requirements for the deposit guarantee schemes. The EDIS proposal builds on this Directive in order to further develop the Banking Union.

12. Lastly, in June 2015, the Five Presidents Report on Completing Europe's Economic and Monetary Union proposed to complete the Banking Union by establishing the EDIS[12].

III. LEGAL ANALYSIS

13. The question that the Council Legal Service has been asked to answer is whether Article 114 TFEU is a suitable legal basis for the adoption of this Regulation. This question is twofold: (i) whether Article 114 TFEU is the suitable legal basis for establishing the EDIS (understood as a centralised decision making procedure and as a set of uniform rules concerning the target level, the application of risk factors to the calculation of contributions, the repayment periods or the use of the fund) and (ii) whether it is suitable for establishing the DIF.

14. Bearing in mind the past experience with the SRM, the Council Legal Service will in addition consider if, and under which conditions, it would be feasible to have recourse to the intergovernmental method to regulate some of the provisions that are currently part of the proposal.

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11 See footnote 4.

12 http://www.consilium.europa.eu/en/press/press-releases/2015/06/22-tusk-5-presidents-report-economic-monetary-union/

A) THE SCOPE OF ARTICLE 114 TFEU

15. In its opinion n° 13524/13 relating to the SRM proposal[13], the Council Legal Service has extensively presented the well settled case-law of the Court concerning the scope of Article 114 TFEU. Reference therefore is made to points 18 to 27 of that opinion.

16. It is also recalled that in the *Short-selling* judgment[14], subsequent to the issuance of the opinion referred to in the previous paragraph, the Court has confirmed its settled case-law on the scope of Article 114 TFEU, and has in particular recalled that "*a legislative act adopted on that legal basis must, first, comprise measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States and, second, have as its object the establishment and functioning of the internal market*"[15]; that the legislature enjoys, "*depending on the general context and the specific circumstances of the matter to be harmonised, discretion as regards the most appropriate method of harmonisation for achieving the desired result, especially in fields with complex technical features*"[16] and "*may deem it necessary to provide for the establishment of an EU body responsible for contributing to the implementation of a process of harmonisation*"[17]. Lastly, the Court held that Article 114 TFEU may be used as a legal basis "*only where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market*"[18].

13 Opinion of 11 September 2013.
14 Case C-270/12, United Kingdom / *Parliament and Council*, EU:C:2014:18.
15 Paragraph 100 of the judgment.
16 Paragraph 102 of the judgment.
17 Paragraph 104 of the judgment.
18 Paragraph 113 of the judgment.

B) IS ARTICLE 114 AN ADEQUATE LEGAL BASIS TO ESTABLISH THE EDIS?

17. As was already done for the SRM, the present opinion will examine, in the light of the case-law of the Court, whether the EDIS can be adopted on the basis of Article 114 TFEU.

18. The establishment of a centralised power of decision forms part of the on-going process of harmonisation in the field of depositor protection operated by the DGSD and by the uniform provisions on depositor protection that the proposal would incorporate. The powers conferred upon the Board cannot be detached from the set of uniform harmonising rules on depositor protection provided for in the proposal that it is called to apply.

19. Both elements, the central power of decision and the further uniform rules on depositor protection, respond to the objective of harmonisation which underlies the proposal.

i) EDIS as centralised power of decision

20. First, the centralised power of decision aims at ensuring the uniform application relating to depositor protection, which is *"essential for the completion of the internal market in financial services",* bearing in mind the high degree of interconnection of the banking systems in the Union (see recital (7) of the preamble to the proposal). On the other hand, as recalled by recital (10) of the preamble to the proposal, under the current DGSD, national DGSs retain certain options and discretions, including with respect to certain essential elements like target levels, risk factors to be applied when assessing credit institutions' contributions, repayment periods or the use of funds. As underlined by the Commission in point 3.1 of its explanatory memorandum, "*the differences in funding levels and size of the existing 38 DGSs in the EU may negatively affect depositors' confidence and could impair the functioning of the internal market*".

21. It results that the establishment of EDIS is thus intended to avoid disparities between national rules that may obstruct the establishment of the internal market in the field of financial services. As the Court has already stated, Article 114 TFEU may be used as a legal basis where there are disparities or potential disparities between national rules "*which are such as to obstruct the fundamental freedoms or to create distortions of competition*"[19]. This seems to be the current situation under the DGSD[20].

22. The Council Legal Service has indicated, as regards the SRM, that the very adoption of decisions and actions centrally by the SRB could be regarded in itself as a harmonising measure in the sense of Article 114 TFEU.[21] Since, in the EDIS context, the Board would also adopt, at central level, decisions and therefore provide a framework for the establishment and subsequent implementation of uniform rules on deposit guarantees arrangements, this proposal will also contribute to the harmonisation process in the field of financial services. Concerning more specifically the first phase, the reinsurance stage, where the harmonisation of the decision making process is less intense than in the subsequent stages, the Council Legal Service notes that the EDIS will provide a certain liquidity support to DGSs, and therefore those DGSs will not have to use, as first resort, the national alternative funding means which, by nature, vary from one Member State to another. It would also, in all stages, cover losses of participating DGSs. This means that the protection given to depositors will be reinforced following the adoption of the EDIS proposal, starting with its first phase.

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19 Case C-434/02 Arnold André, EU:C:2004:800, paragraph 34; Case C-210/03, *Swedish Match*, EU/C/2004/802, paragraph 33; and Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others*, EU: C:2005:449, paragraph 32; Case C-66/04. *United Kingdom v Parliament and Council* ("*Smoke flavourings*"), EU:C:2005:743, paragraph 41.

20 See also the Five Presidents' report (point 3.1, page 11): " *As the current set-up with national deposit guarantee schemes remains vulnerable to large local shocks (in particular when the sovereign and the national banking sector are perceived to be in a fragile situation), common deposit insurance would increase the resilience against future crises. A common scheme is also more likely to be fiscally neutral over time than national deposit guarantee schemes because risks are spread more widely and because private contributions are raised over a much larger pool of financial institutions*."

21 Opinion of 11 September 2013.

23. The centralised power of decision aims at achieving two objectives that are strongly related to the improvement of the functioning of the internal market: ensuring financial stability[22] and guaranteeing a better depositors protection. The preservation of the financial stability is, as acknowledged by Article 3(1) of the ESRB Regulation[23], contributing to the smooth functioning of the internal market.

ii) The adoption of uniform harmonising rules on depositor protection

24. As recalled by the Court, the creation of centralised powers of decision of the Union on the basis of Article 114 TFEU is contingent upon the previous adoption of the essential elements of the harmonising measure - the material law - to be implemented by the central body[24]. In this sense, the corpus of uniform rules on depositor protection laid down in the proposal becomes especially relevant: those uniform rules are in particular contained in Articles 74b (target level), 74c (ex-ante contributions), 74d (ex-post contributions) and Article 77a (use of the DIF).

25. Firstly, as regards the target level, it is beyond doubt that Article 74b of the proposal (which fixes precise target levels for each phase of the EDIS, based on the sum of the minimum target levels fixed by the DGSD) goes further in the harmonisation process than Article 10 of the DGSD, that allowed Member States to have different target levels.

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22 According to recitals (6) and (8) of the preamble to the proposal, the EDIS, like the SRM, is related to the objective of guaranteeing financial stability in the banking sector.

23 Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, OJ L 331, 15.12.2010, p. 1.

24 See case "*Smoke flavourings*", C-436/03, *Parliament v. Council*, EU:C:2006:277, paragraphs 47 and 48.

26. Secondly, the calculation of contributions in the proposal also contains a higher level of harmonisation than Article 13 of the DGSD. Indeed, Article 13(2) allowed DGSs to use their own risk based methods for determining and calculating the risk-contributions of their members and, at the European level, EBA could only issue guidelines to specify such methods for calculation. Under the EDIS proposal, on the one hand, Article 74c and 74d introduce a central European level of decision by conferring to the Board responsibilities relating to contributions: in the reinsurance and the co-insurance period, the Board will determine for each participating DGS the total amount of ex-ante contributions that it may claim from the affiliated institutions (the spreading of that amount to the affiliated institutions being left for the DGS, as "*executive arm*" of the Board), after the reinsurance period, the Board itself will calculate both ex-ante and ex-post contributions for each credit institution affiliated to a participating DGS. On the other hand, according to Articles 74 c(5) and 74b (5), the Commission will adopt delegated acts (which will become by nature, according to Article 290 TFEU, an integral part of the legislative framework) specifying methods and criteria relating to the calculation of contributions, including a calculation formula, specific indicators, risk classes for members, thresholds for risk weights assigned to specific risk classes, or, for ex-post contributions, the annual limits and the circumstances and conditions under which payment of ex-post contributions by an entity may be deferred.

27. Thirdly, the use of the DIF is precisely defined in Article 77a in a uniform manner applicable to all participating Member States.

28. As in the case of the SRM, those uniform rules constitute the first stage of a process of harmonisation to be completed through their subsequent centralised application. While there is indeed a difference in the degree of intensity of the harmonisation in comparison with the SRM (that went further in harmonising the national options left open by the BRRD), this difference does not preclude the use of Article 114 TFEU for the establishment of the EDIS.

As recalled by the case law referred to above (paragraph 24 of this opinion) what matters from the perspective of the legal basis is that the act in question contains the essential elements for harmonisation , the degree of intensity of that harmonisation being a matter of political choice and discretion of the legislature and, ultimately, of proportionality. In the present case, the Council Legal Service is of the view that, as it results from points 18 and following above, there is a genuine contribution to the harmonisation process which justifies the use of Article 114 as legal basis.

iii) EDIS as part of the harmonisation process in banking supervision and resolution

29. Like the SRM, the EDIS proposal is not just an integral part of a harmonisation process in the field of depositor protection. In a broader context, it is related to EU rules harmonising prudential supervision and resolution[25]. The proposal is made on the assumption that supervision and resolution can only be effective and meaningful if an adequate insurance scheme, corresponding to the developments in the field of supervision, is created (see recital (12) of the proposal). The same rationale underlies the DGSD, where the EU legislator has stated that "*deposit protection is an essential element in the completion of the internal market and an indispensable complement to the system of supervision of credit institutions on account of the solidarity it creates among all the institutions in a given financial market in the event of the failure of any of them*" (see recital (37) of the DGSD). Moreover, in certain circumstances, the exercise of the powers by the Board contributes to the resolution action that EDIS may be called to fund[26].

[25] This is also emphasised in the Five Presidents' report (point 2.2, page 11): *" a single banking system is the mirror image of a single money. As the vast majority of money is bank deposits, money can only be truly single if confidence in the safety of bank deposits is the same irrespective of the Member State in which a bank operates. This requires single bank supervision, single bank resolution and single deposit insurance*."

[26] See article 79.

30. It is however recalled that it is not the role of the Council Legal Service to assess the accuracy of those assumptions underlying the proposal that the EDIS is an indispensable element for the functioning of a fully fledged banking union. This is a matter for political and financial judgment that belongs to the power of appraisal of the EU legislature, which in this respect holds a margin of discretion in accordance with the case-law of the Court. According to the Court, this discretion "*requires that the Community institutions which have adopted the act in question must be able to show before the Court that in adopting the act they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate*.[27]." Therefore, in the absence of an impact assessment provided by the Commission, the Union legislature must be able to demonstrate that it has exercised its discretion on the basis of sufficiently relevant plausible factors and circumstances.

31. Lastly, the monitoring powers of the Board relating to the pay-out procedure should increase the efficiency and uniformity of deposit insurance actions in the participating Member States by the simple fact of the centralisation.

32. On the basis of all the above elements, the Council Legal Service is of the opinion that Article 114 TFEU is a suitable legal basis for the establishment of the EDIS, as it was for the creation of the SRM.

C) IS ARTICLE 114 TFEU AN ADEQUATE LEGAL BASIS TO ESTABLISH THE DIF?

33. The examination of this question should deal with two sub-questions: 1) whether Article 114 TFEU is a suitable legal basis for the creation of the Fund; 2) whether Article 114 TFEU is a suitable legal basis to raise contributions from the institutions covered by the proposal.

34. The Fund constitutes the second pillar of the proposal. Its main objectives, features and functioning mirror, to a large extent, those of the DGSs. Under the DGSD, however, DGSs are not at all mutualised in a single mechanism but remain operational within the borders of each of the Member States.

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[27] Case C-343/09 *Afton Chemical* , EU:C:2010:419, paragraph 34.

i) Creation of the DIF

35. In its opinion n° 13524/13, the Council Legal Service has already taken the view in the context of the SRM proposal that Article 114 TFEU was a suitable legal basis for the establishment of the Single Resolution Fund, which features are very similar to those of the DIF.

36. Firstly, as is the case for the SRM, the centralised use of the DIF introduced by the EDIS proposal contributes to the further harmonisation process in the field of financial services. Indeed, on the one hand, according to Art 79 of the SRM Regulation, DGSs may be called currently to contribute to the financing of resolution actions. On the other hand, it is recalled that, when the Single Resolution Board decides, in accordance with Article 18 of the SRM Regulation, that the conditions for resolution are not met, the entity concerned is wound up under normal insolvency proceedings. In such a situation, DGSs may be called to intervene at national level, in accordance with the national law transposing the DGSD. By conferring on the Board, centrally, the power to decide on the use of the DIF for the mandatory functions that DGSs have under the DGS Directive (which are the pay-outs and the financing of the resolution actions), the proposal completes the harmonisation initiated by the DGSD and ensures the same level of deposit insurance across the Banking Union[28]. Also, as acknowledged by the Commission in its explanatory memorandum, "*the circumstances under which a national DGS may be used are already not any longer under national control*", following the entry into force of both the BRRD and the SRM Regulation, which contain provisions relating to the intervention of DGSs in resolution; *"[h]ence, establishing a common system also for deposit insurance is a logical next step in completing the Banking Union, and better aligns liability and control.*"[29]

[28] As emphasised by Recital (23) of the proposal, different systems of national funding "*would not provide for the homogenous deposit insurance across the Banking Union*".

[29] See point 3.2 of the Explanatory Memorandum.

37. Secondly, the proposal also justifies the creation of the DIF by the need to have a uniform high level of protection for all depositors in a harmonised framework throughout the Union and avoiding the creation of obstacles for the exercise of fundamental freedoms or the distortion of competition in the internal market due to different levels of protection at national level[30].

38. As for the SRM, it is not the role of the Council Legal Service to assess the accuracy of the premise underlying the proposal that the Fund is an indispensable element for the EDIS to be fully effective as well as to guarantee financial stability. This is a matter for political and financial judgment that belongs to the power of appraisal of the EU legislature, which in this respect holds a margin of discretion in accordance with the case-law of the Court. As recalled in point 30 of the present opinion, in the absence of an impact assessment provided by the Commission, the Union legislature must be able to demonstrate that it has exercised its discretion on the basis of sufficiently relevant plausible factors and circumstances.

39. Thirdly, while the DGSs remain in place, they act as integral part and as the "*executive arms*" of the Board, in the sense that they calculate, in the first phase of the EDIS, the individual ex-ante contributions on the basis of the total amount determined by the Board and they invoice, on behalf of the Board, in all phases, the contributions of each institution[31]. In this sense, the provisions of the Fund would have the effect of altering the actual or potential normative content of national laws and regulations[32].

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30 See Recital (23) of the Proposal as well as point 3.1. of the explanatory memorandum accompanying the proposal.

31 See Article 74c(2).

32 See in this sense case C-436/03, *Parliament v. Council*, EU:C:2006:277, paragraphs 39 and following. See, along the same lines, opinion of the Council Legal Service of 16 March 2012 concerning the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, doc. nº 7139/12.

40. Fourthly, it must be recalled that the Court has upheld the use of Article 114 TFEU for the adoption of measures comparable to the imposition of ex ante and ex post contributions, thus directly applicable to private entities and entailing an intervention in their commercial practices, such as the establishment of maximum EU wide roaming prices, when it appeared likely that national equivalent measures would be adopted and applied in a divergent way[33].

41. The above elements of the proposal would in conclusion allow recourse to Article 114 TFEU as the legal basis for establishing the Fund.

ii) The adoption of rules relating to contributions

42. It is recalled that the Council Legal Service has already taken in the past the view that the imposition of similar type of contributions can be done under Article 114 TFEU[34]. It is also recalled that in its opinion n°15901/10[35], the Council Legal Service arrived at the conclusion that the establishment of contributions on the basis of the DGSD could not be deemed to be a fiscal measure, but contributions akin to premium payments in exchange for a service, namely the coverage of certain risks deriving from the banking activity. They constitute levies necessary for the implementation of a regime specific to the banking sector and are hence an intrinsic part of its internal logic and functioning.

33 See case C-58/08, *Vodafone and others*, EU:C:2010:321, paragraphs 45 and 46.
34 See opinions of 13 March 2013, doc. nº 7441/13, and of 11 September 2013, doc. nº 13524/13.
35 Opinion of 5 November 2010, point 12.

43. It is also recalled that the funding of the EDIS may under no circumstance engage the budgetary liability of the Member States[36]. Article 114 TFEU cannot be used to compel directly or indirectly Member States to make further contributions to the budget of the Union or of any of its bodies beyond the system of own resources of the Union, as laid down in Article 311 TFEU and the Own Resources decision[37]. As in the case of the SRM, the EDIF will not be financed by the budget of the Union or by the budgets of Member States. It relies on a system of private financing by credit institutions.

44. Moreover, the proposal renders applicable Article 6(6) of the SRM Regulation to the EDIS, which prevents the Board from taking decisions within EDIS that require Member States to provide extraordinary public support or that impinge on their budgetary sovereignty and fiscal responsibilities. It also excludes the responsibility of the budget of the participating Member States (see Article 74a and, more specifically in respect of alternative funding means, Article 74g(3) of the proposal). Lastly, the very complex voting arrangements laid down by the proposal, which mirror the voting arrangements of the current SRM Regulation relating to resolution, provide for sufficient safeguards of the budgetary sovereignty of Member States. Article 52 of the Proposal, while not precluding that a Member State may be outvoted, introduces a system where the simple majority of its participating Members is doubled by a weighting of the contributions represented by those Member States. The cumulative effect of all those provisions is that the budgetary sovereignty of Member States is adequately preserved.

45. To conclude, Article 114 TFEU is therefore a suitable legal basis to raise contributions from the institutions covered by the proposal.

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36 See *mutatis mutandis* paragraphs 59 to 67 of opinion 13524/13.

37 Council Decision on the system of the European Communities' own resources, OJ L 163, 23.6.2007, p 17. It is recalled that a new decision was adopted in 2014, but it is not yet in force: OJ L 168, 7.6.2014, p. 105.

D) FEASIBILITY AND CONDITIONS FOR RECOURSE TO THE INTERGOVERNMENTAL METHOD

46. The primacy of EU law should not be - and in the recent past has not been - interpreted as meaning that EU shared competences should always be exercised by preference to national competences, in particular when recourse to the EU way would lead, in certain Member States, to major constitutional difficulties or risks that can be avoided without compromising common action.

47. The fact that Article 114 TFEU provides a legal basis for the proposal does not mean that Member States cannot refrain from using it for part of the proposal and decide to proceed through an agreement of international public law concerning certain parts that are the object of the proposal. This requires, as a precondition, that the EDIS Regulation leaves certain competences un-harmonised, and therefore within the remit of Member States.

48. It is recalled in this context that Article 114 TFEU belongs to the internal market area of competences and that according to Article 4(2) TFEU, the Union shares its competence with Member States in this area. It is also recalled that, in accordance with Protocol (No 25) on the exercise of shared competence, "*[w]ith reference to Article 2(2) of the Treaty on the Functioning of the European Union on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.*". Pursuant to Article 2(2) TFEU, if the Union has not exercised its competence, Member States "*may legislate and adopt legally binding acts in that area*". They may exercise such a competence individually or with other Member States, through intergovernmental instruments.

49. In other words, as long as the subject matter of the possible agreement has not been harmonised, nothing prevents Member States from putting in place a system where they collectively implement at national level, pursuant to uniform conditions and criteria, elements that remain within their sphere of competence. Recourse to the intergovernmental method is therefore legally possible. This is a situation different from the one that would arise if

Member States turned down already existing provisions of EU law, primary or secondary, establishing Union rules for action on a given subject matter and circumvented them through an international agreement, illegally substituting different substantial or procedural provisions and violating the autonomy of EU law. Such need not be the case here.

50. However, the Court has already judged that when concluding an agreement *inter se*, Member States may not disregard their duty to comply with European Union law when exercising their competences in that area[38]. There are, therefore, certain conditions to be fulfilled by such an agreement stemming from the nature of the Union legal order.

51. First of all, the autonomy and primacy of the Union legal order has to be fully respected: both the Treaties and the secondary law adopted on their basis form an independent source of law and cannot, because of the special and original nature of the Union law, be overridden by domestic legal provisions however framed.[39] The autonomy and primacy of Union law also limits the capacity of Member States to enter into international between themselves[40]. In particular, agreements inter se have to respect the division of competences between the Union and its Member States, which means that they cannot be concluded in areas where the former has exclusive competence within the meaning of Article 3 TFEU, nor in respect of areas where the Union has exercised its competence[41].

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38 Judgments of 15 January 2002, *Gottardo,* C-55/00, EU:C:2002:16, paragraph 32, and of 17 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraph 69.

39 Judgment of the Court of 15 July 1964, *Flaminio Costa v E.N.E.L.*, 6/64, EU:C:1964:66, page 594 or judgment of the Court of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49. To this end see also Declaration (No. 17) to the Treaty of Lisbon concerning primacy.

40 Judgment of the Court of 17 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraphs 129-145 regarding the primacy of Article 125 TFEU vis-à-vis the Treaty establishing the European stability mechanism (ESM-Treaty).

41 See Article 2 (1) and Article 3 TFEU. Judgment of the Court 31 March 1971, *AETR*, 22/70, EU:C:1971:32, paragraphs 15-19; Opinion of the Court of 26 April 1977, *Laying-up fund for inland waterway vessels*, 1/76, EU:C:1977:63, paragraph 4; Judgment of the Court of 14 July 1976, *Cornelis Kramer*, Joined Cases 3, 4 and 6/76, EU:C:1976:114, paragraph 20; Opinion of the Court of 19 March 1993, *International Labour Organisation*, 2/91,EU:C:1993:106, paragraph 7; the *Pringle* judgment quoted footnote 40, paragraphs 93-107.

52. Secondly, such an agreement shall not encroach on the power of the institutions, nor the procedures for those institutions to decide, as provided for in the Treaties[42].

53. Thirdly, when concluding agreements *inter se*, Member States are bound by the principle of sincere cooperation and shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives[43]. This entails that the intergovernmental agreement in question is supplementary to the law of the Union[44] and the Contracting Parties are subject in their quality of Member States, to special duties of action and abstention, notably the engagement to incorporate the agreement in due time into the framework of the EU Treaties[45].

54. It is recalled however that, in the end, it would be for the Court of Justice of the European Union to ensure that in the interpretation and application of the Treaties the Union law is observed[46].

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42 See the *Pringle* judgment quoted footnote 40, paragraphs 113, 116 and 162.

43 Article 4 (3) TEU.

44 On complementarity of intergovernmental agreements with EU law, see the reasoning of the Court in respect of the ESM in case Pringle, cit. above at footnote 38, in paragraph 58. Analogously, an intergovernmental agreement such as the Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial matters, the Brussels Convention, has been regarded by the European Court of Justice as intrinsically linked to the achievement of Union policies, in particular the establishment of the internal market (see case C-398/92, Mund & Fester, ECLI:EU:C:1994:52, paragraphs 11 and 12).

45 Judgments of the Court of 5 May 1981, *Commission v United Kingdom*, 804/79, EU:C:1981:93 paragraph 28; 15 January 1986, *Hurd v Jones*, 44/84, EU:C:1986:2, paragraph 38; 2 June 2005, *Commission v Luxembourg*, C-266/03, EU:C:2005:341, paragraph 59; 14 July 2005, *Commission v Germany*, EU:C:2005:462, paragraph 65; 20 April 2010, *Commission v Sweden*, C-246/07, EU:C:2010:203, paragraph 74.

46 Article 19 (1) TEU. See also Opinion of the Court of 14 December 1991, *European Free Trade Association*, 1/91, EU:C:1991:490, paragraphs 13-29.

55. In order to ensure conformity with these principles and rules, recent international agreements concluded between Member States contain clauses regarding the primacy of Union law and the compatibility of the international agreement with Union law[47], clauses regarding consistent interpretation[48] and the principle of sincere cooperation[49], clauses involving directly institutions and bodies of the Union[50], in particular conferring on the Court of Justice of the Union the jurisdiction for judging any disputes between the Contracting Parties relating to the agreement[51]. Lastly, certain clauses ensure that international agreements do no encroach upon the competences of Union to act in certain fields which are part of the shared competences of the Union and of its Member States[52].

IV. CONCLUSIONS

56. Article 114 TFEU is a suitable legal basis for the establishment of the EDIS and of the DIF.

57. However, under certain conditions and with adequate safeguards, Member States may have recourse to the intergovernmental method in respect of parts of the proposal that the EU legislature decides not to regulate.

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47 Article 2 (2) 1st sentence of the Treaty on Stability, Coordination and Governance (TSCG), Article 2 (2) 1st sentence of the Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund (Transfer-Agreement).

48 Article 2 (3) of the Transfer-Agreement.

49 Article 2 (1) TSCG, Article 2 (1) Transfer-Agreement.

50 Article 13 of the ESM Treaty; Articles 3, 5, 6, 7 and 8 of the TSCG; Articles 7, 10 and 15 of the Transfer-Agreement. On the admissibility of such an involvement of EU-institutions see Judgments of the Court of 30 June 1993, *Bangladesh*, Joined cases C-181/91 and C-248/91, EU:C:1994:76; 2 March 1994, *Lomé*, C-316/91, EU:C:1994:76; 17 November 2012, *Pringle*, C-370/12, EU:C:2012:756.

51 Article 37 ESM-Treaty, Article 8 of the TSCG and Article 14 of the Transfer-Agreement. This is permissible pursuant to Article 273 TFEU.

52 Article 2 (2) 2nd sentence of the TSCG, Article 2 (2) 2nd sentence of the Transfer-Agreement.