COUNCIL OF
THE EUROPEAN UNION

Brussels, 11 September 2013

13524/13

LIMITE

JUR 458
ECOFIN 787
UEM 314

OPINION OF THE LEGAL SERVICE (*)

Subject: 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

- Examination of the proposed legal basis

I. INTRODUCTION

1. The Commission presented on 10 July 2013 a proposal for a Regulation 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 of the European Parliament and of the Council (hereinafter, "the proposal")[1]. The proposal is strongly linked to the Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010 (hereinafter, "the BRRD proposal")[2].

(*) **This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.**

1 COM(2013) 520 final.

2 At the moment of drafting this opinion, the BRRD proposal is still under discussion between the co-legislators. See text of the general approach of the Council in Council doc. nº 11148/1/13 REV 1.

2. The BRRD proposal intends to establish a minimum level of harmonisation concerning the national laws and regulations on resolution of credit institutions. The proposal, however, envisages to create a centralised system of decision for resolution, endowed with the adequate financing means.

3. The proposal is founded on two pillars. First, a Single Resolution Mechanism (hereinafter, "the SRM") that will be in charge of applying a set of uniform rules on resolution defined by the proposal itself. Said set of uniform rules constitutes the material law to be applied by the SRM. Powers of resolution are conferred upon the Commission and the Board, that would be a newly created EU body with full legal personality. National competent and resolution authorities would be in charge of executing certain resolution actions adopted by the Commission and by the Board.

4. The second pillar of the proposal is the Single Resolution Fund (hereinafter, "the Fund"), that would provide the necessary financing to resolution action pursuant to a number of pre-defined criteria. The Fund would be fed by ex ante and 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 resolution arrangements within non-participating Member States or to contract borrowings or other forms of support from financial institutions or other third parties.

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

[3] At the moment of drafting this opinion the SSM proposal has not yet been adopted. See final compromise text in Council doc. nº 9044/13.

6. The Ad hoc Working Party on the Single Resolution Mechanism requested during its meeting of 19 July 2013 the opinion of the Council Legal Service on two questions: i) 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) whether the delegation of powers to the Board envisaged in the proposal is compatible with the EU Treaties and the general principles of EU law, as interpreted by the so-called "*Meroni*" case law of the Court of Justice of the European Union (the Court)[4].

7. The present opinion will concentrate exclusively on the first of the above referred questions. A separate opinion dealing with the second question will be subsequently presented in due course.

II. LEGAL BACKGROUND

A) THE RELEVANT PROVISIONS OF THE EU TREATIES

8. 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*".

9. 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.

[4] See cases 9/56, *Meroni*, [1957 and 1958] ECR 133, 98/80, *Romano* [1981], ECR 1241, and *Alliance for Natural Health*, joined cases C-154/04 and C-155/04, ECR [2005] P. I-06451

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(...)".

10. 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 transcribed above[5]. 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*".

B) THE RELEVANT LEGAL FRAMEWORK IN THE FIELD OF FINANCIAL SERVICES

11. 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.

12. First, in June 2009, the European Council called for the establishment of a "European single rule book applicable to all financial institutions in the Single Market"[6]. The Union has thus established a single set of harmonised prudential rules which banks throughout the EU must respect, through 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 and amending Regulation (EU) No 648/2012 (hereinafter, "the CRR")[7] and 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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (hereinafter, "the CRD IV")[8].

---

5 OJ L 163, 23.6.2007, p 17.
6 See point 20 of the presidency conclusions of 18/19 June 2009, Council doc. nº 11225/2/09.
7 OJ L 176, 27.6.2013, p. 1
8 OJ L 176, 27.6.2013, p. 17.

13. Second, the Union has set up the so called European Supervisory Authorities (hereinafter, "the ESAs") to which a number of tasks on micro-prudential supervision are allocated. They are the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA)[9]. As a general rule, the ESAs do not replace the respective national competent authorities in the exercise of their supervisory functions. The setting up of the ESAs was accompanied by the establishment of the European Systemic Risk Board, the "ESRB", to which some functions of macro-prudential supervision have been allocated[10].

14. Third, the Union legislator has recently 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.

---

9 Regulation (EU) No 1093/2010 of the European Parliament and of the Council, of 24 November 2010, establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12); Regulation (EU) No 1094/2010 of the European Parliament and of the Council, of 24 November 2010, of 24 November 2010, establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48); Directive 2010/78/EU of the European Parliament and of the Council, of 24 November 2010, amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) (OJ L 331, 15.12.2010, p. 120).

10 Regulation (EU) No 1092/2010 of the European Parliament and of the Council 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).

15. The above legislative elements, together with the proposal under the examination and the BRRD proposal have been conceived as tools of the so-called "integrated financial framework" that would permit an adequate functioning of the banking sector within the Union, providing financial stability, whilst ensuring a proper establishment of the internal market in the field of financial services[11].

III. LEGAL ANALYSIS

16. The present legal analysis will address in turn the following three questions:

a) Is Article 114 TFEU a suitable legal basis to establish the SRM?

b) Is Article 114 TFEU a suitable legal basis to establish the Fund?

c) May the measures envisaged under the proposal be applied only to entities established in a limited number of Member States?

A) IS ARTICLE 114 TFEU A SUITABLE LEGAL BASIS TO ESTABLISH THE SRM?

17. The crucial question that must be elucidated is whether Article 114 TFEU, which is devised to adopt "*measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States (…)*" can be a suitable legal basis for the establishment of the SRM, namely a centralised decision instrument of the Union that will apply a set of uniform rules on bank resolution.

[11] See Commission Communication "*A blueprint for a deep and genuine economic and monetary union Launching a European Debate*" COM (2012) 777 final/2, at section 3.1.2. See also, report of the four presidents "*Towards a genuine economic and monetary union*" and European Council Conclusions of 12/13 December 2012, at paragraph 11, Council No. 205/12.

1. The scope of Article 114 TFEU

18. Pursuant to the well settled case-law of the Court the choice of legal basis for a Union measure must rest on objective factors which are amenable to judicial review, including, in particular, the aim and content of the measure[12].

19. As regards the scope of the legislative powers laid down in Article 114 TFEU it must be observed that, as the Court has consistently held, that provision is 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[13]. The Court has also stated that measures under Article 114(1) TFEU must genuinely have that object, actually contributing to the elimination of obstacles to the fundamental freedoms or of establishment or to the removal of distortions to competition[14]. Moreover, the Court has repeatedly set out that 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*"[15].

---

12 See, inter alia, case C-300/89 *Commission* v *Council (Titanium dioxide)* [1991] ECR I-2867, paragraph 10; Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 25; Joined Cases C-164/97 and C-165/97 *Parliament* v *Council* [1999] ECR I-1139, paragraph 12; Case C-269/97 *Commission* v *Council* [2000] ECR I-2257, paragraph 43; Case C-336/00 *Huber* [2002] ECR I-7699, paragraph 30; Case C-338/01 *Commission* v *Council* [2004] ECR I-0000, paragraph 54; Case C-110/03 *Belgium* v *Commission* [2005] ECR I-0000, paragraph 78; and Case C-347/03 *Regione autonoma Friuli-Venezia Giulia* [2005] ECR I-0000, paragraph 72.

13 See case C-491/01 *British American Tobacco (Investments)and Imperial Tobacco* [2002] ECR I-11453, paragraph 60, and Case C-217/04 *United Kingdom* v *Parliament and Council* [2006] ECR I-3771, at paragraph 42.

14 *British American Tobacco*, cited in footnote 13, paragraph 60.

15 Case C-434/02 Arnold André [2004] ECR I-11825, paragraph 34; Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 33; and Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-0000, paragraph 32; Case C-66/04. *United Kingdom v Parliament and Council* ("*Smoke flavourings*"), [2005],ECR I-10553, paragraph 41.

20. According to the Court, Article 114 TFEU does not confer upon the Union legislature a general power to regulate the internal market[16]. Therefore, legislation based on Article 114 TFEU must not merely seek to regulate the internal market in ways that are seen desirable by the legislator. In addition, the use of that legal basis is not justified where the measure to be adopted has only the "incidental effect" of harmonising the market conditions within the Union.

21. Next, pursuant to the Court's case law, by the expression "measures for the approximation" in Article 114(1) TFEU, the authors of the Treaties have granted the Union legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the harmonisation technique most appropriate for achieving the desired result, in particular in fields that are characterised by complex technical features[17].

22. In that regard, the Court has expressly stated that nothing in the wording of Article 114 TFEU implies that the addressees of measures adopted on its basis can only be the Member States[18]. Actually, the approximation to which Article 114 TFEU refers can also take place through measures whose effect is to displace or to prevent the adoption of national law that is likely to diverge from them. In fact, Article 114 TFEU does not restrict its use to the adoption of directives, but allows approximation to take place through acts that are directly applicable, such as regulations[19]. Regulations, with their effect of making the law uniform and directly applicable, can be regarded as the most intensive form of approximation. Regulations, like directives, may bring about the adaptation or the substitution of potentially divergent laws of Member States[20].

---

16 See *British American Tobacco*, cited in footnote 13, at paragraph 60;

17 See, case "*Smoke flavourings*", cited in footnote 15, at paragraph 45.

18 Case C-217/04, *United Kingdom v. Parliament and Council*, "*ENISA*" [2006] ECR I-3789, paragraph 44.

19 And this, as a difference to other Treaty legal basis concerning the achievement of the internal market that confine their use to the adoption of directives (such as Articles 53 - freedom of establishment - and 60 - free provision of services - TFEU).

20 See in this sense, opinion of advocate general Kokott in case "*Smoke flavourings*" cited in footnote 15, at paragraphs 29 and 31.

23. The Court has thus accepted in a number of cases the use of Article 114 TFEU for the adoption of measures that are not directly and immediately addressed to the approximation of laws of Member States by means of their transposition.

24. First, in the "*Vodafone*" case, the Court has considered valid the use of Article 114 TFEU for the establishment of measures directly addressed to market operators, consisting in Union wide roaming caps, in a situation where a previous process of harmonisation addressed to the Member States themselves proved to be inefficient in avoiding the divergences between national laws [21].

25. Second, in the "*Smoke flavourings*" case, the Court has accepted the use of Article 114 TFEU for the establishment of a Union centralised process of decision whose application - by the Commission - would bring about the approximation of the laws of Member States[22].

26. Third, in the "*ENISA*" case, the Court has upheld the use of Article 114 TFEU for the creation of a Union body (an agency), in so far as the objectives and tasks of the body in question are closely linked to the subject matter of existing harmonising legislation, and are "likely to facilitate" the application of the harmonising legislation by supporting and providing a framework for its implementation[23].

27. The Court has nonetheless ruled out the use of Article 114 TFEU for the adoption of new legal forms (*in casu*, the European Cooperative Society) which have effect *alongside* the laws of the Member States without thus altering their normative content[24].

---

21 Case C-58/08, *Vodafone and others*, [2010] ECR I-5026.
22 Case "*Smoke flavourings*" cited in footnote 15.
23 Case *ENISA*, cited in footnote 18, at paragraphs 44 and following.
24 Case C-436/03, *Parliament v. Council*, [2006] ECR I-03733, paragraphs 40 and following .

2. The use of Article 114 TFEU to establish the SRM

28. The present opinion will now examine, in the light of the case-law previously examined, whether the SRM, that consists of a centralised decision procedure of resolution and of a set of uniform rules concerning the resolution of entities falling within the scope of the proposal, can be adopted on the basis of Article 114 TFEU.

29. The proposal introduces a centralised decision procedure, where the Commission holds a number of powers for resolution; it also comprises the Board, an agency-like body endowed with legal personality, to which further powers of resolution are attributed; it finally establishes the procedural modalities pursuant to which resolution powers will be exercised.

30. The Council Legal Service has reached the conclusion that the centralised decision procedure described in the proposal cannot be regarded as an isolated regulatory measure with autonomous purposes, but is conceived as an element contributing to an on-going harmonisation process in the field of financial services, without which its establishment would have no sense.

31. First, the establishment of a centralised power of decision forms part of the on-going process of harmonisation in the field of resolution to be operated by the BRRD proposal and by the uniform provisions on resolution that the proposal would incorporate. The powers conferred upon the Commission and the Board cannot be detached from the set of uniform harmonising rules on resolution provided for in the proposal that they are called to apply, rules which mirror, to a large extent, those to be agreed under the BRRD proposal.

32. Both elements, the central power of decision and the uniform rules on resolution, respond to the objective of uniform application which underlies the proposal.

33. On one side, the centralised power of decision aims at ensuring the uniform application of resolution rules, 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). It seeks to avoid the fragmentation of the internal market concerning credit institutions (see recital (5) of the preamble to the proposal). On the other side, as recalled by recital (13) of the preamble to the proposal, the establishment of uniform rules (a single rulebook) on resolution is fundamental in order to avoid disparities between national rules that may obstruct the establishment of the internal market in the field of financial services.

34. The aim of uniformity is strongly related to the objective of guaranteeing financial stability in the banking sector, which is regarded by the proposal as a premise for the proper functioning of highly integrated financial markets. The need to preserve financial stability is so a principle on which the proposal is based (see article 6(2)(a) thereof) and, more particularly, an objective that has to be pursued by resolution action (see articles 12(2) and 13(2) of the proposal).

35. By way of analogy to the "*smoke flavourings*" case-law (see above paragraph 25), it may be stated that the adoption of resolution decisions by Union central bodies - the Commission and the Board - would bring about the approximation effect sought for resolution rules, by avoiding their potential divergent application by Member States, that could compromise the achievement of the internal market in this particular field. The very adoption of resolution decisions and actions by the SRM could therefore be regarded itself as a harmonising measure in the sense of Article 114 TFEU.

36. However, as recalled by the Court itself, 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[25]. In this sense, the corpus of uniform rules on resolution laid down in the proposal becomes especially relevant. It consists of self-standing provisions on resolution included in the proposal itself, that mirror the corresponding ones under the BRRD proposal, and simple cross references to provisions of the BRRD proposal that could in principle be directly applicable by the Commission and the Board due to their clear, precise and unconditional nature[26]. Uniform rules constitute the first stage of a process of harmonisation to be completed through their subsequent centralised application. Both elements are two consecutive steps of the same harmonisation effort that go hand by hand. Uniform rules on resolution are the necessary material substratum that serves the proposal's aim to achieve the highest degree of uniform application, so that disparities in the internal market are eliminated[27].

---

25 See case "*Smoke flavourings*", cited in footnote 15, at paragraphs 47 and 48.

26 For an account of the relationship between the provisions of the BRRD proposal and the provisions of the proposal, see Commission Services Note « Interaction between SRM and BRRD », included in Working Document No 3 of the Ad Hoc Working Party on the Single Resolution Mechanism.

27 If the mechanism under discussion were to follow the model agreed under the SSM (where the ECB may apply EU law as implemented into the legal orders of Member States,(see Article 4(3) of the SSM proposal) thus relying on the domestic laws transposing the BRRD Directive into national law, this would jeopardise such a goal of uniformity, compromising the use of Article 114 TFEU as the legal basis of the proposal. Indeed, the BRRD proposal contains minimum harmonisation rules for which transposition Member States hold an important degree of discretion that might lead to diverse standards.

37. Second, the SRM is not just an integral part of a harmonisation process in the field of resolution. In a broader context, it is related to EU rules harmonising prudential supervision. This is especially the case of the so-called EU-wide single rule book on prudential requirements, composed of the CRR and CRD IV. In fact, in some instances, the exercise of resolution powers by the Board depends on compliance with prudential conditions laid down in the CRR and CRD IV, whose provisions operate thus as a yardstick for resolution purposes[28]. In other situations, the exercise of powers by the Board is addressed to guarantee the prudential requirements laid down in both the CRR and CRD IV[29].

38. The SRM is also linked to the powers and functions of the SSM to which the application of Union prudential supervision rules, such as the referred CRR and CRD IV, will be entrusted. The European Council - on which the EU Treaties confer the power to provide with the necessary impetus for the development of the Union and to define the general political directions and priorities thereof (see Article 15(1) TEU) - has stated that "*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*"[30]. This relationship is reflected in the proposal. To a large degree, actions by the ECB, in its quality of single supervisor and resolution actions by the SRM are intertwined and mutually dependent: the Board is subject to some obligations of information onto the ECB[31]; the ECB is subject to some obligations of information towards the Board[32]; the ECB may trigger the resolution procedure laid down in Article 16; both the Board and the ECB are subject to a general obligation of cooperation[33]; the ECB will appoint a member of the Board[34].

---

28 See articles 9(5) and(6), 11(1) and (4) and 24(1)a) of the proposal.

29 See articles 10(3)b) and c) and 24(13) of the proposal.

30 See European Council conclusions of 12/13 December 2012, referred to in footnote 11

31 See articles 8 (consultation concerning the assessment of resolvability) and 10 (consultation concerning the minimum requirement of own funds) of the proposal.

32 See articles 11(1) and (4) (concerning the information of supervision measures adopted by the ECB, in the framework of early intervention) and 32 (provision of information by the ECB to the Board for the exercise of its supervisory powers) of the proposal.

33 See article 27 of the proposal.

34 See Article 39 of the proposal

On the other hand, the SSM proposal recognises that the establishment of the SSM is the basis for next steps towards the banking union, of which the SRM is part (see recitals (11) and (12) of the SSM proposal). It equally establishes a duty of close cooperation between the ECB and the resolution authorities[35], and includes provisions ensuring adequate coordination at the level of supervision and resolution in cases where the ECB envisages to withdraw an authorisation to a credit institution.[36]

39. Lastly, the SRM is connected to the EBA a Union body which has been conceived as contributing to the harmonisation process in the banking sector[37]. The Board is held to inform EBA on some of its actions[38]; both of them are subject to a general obligation of cooperation[39]; the Board is deemed a competent authority in the sense of the rules establishing the EBA[40].

40. The above shows that supervision and resolution action are two complementary aspects of the internal market in the field of banking. The proposal assumes that supervision can only be effective and meaningful if an adequate resolution system, commensurate to the developments in the field of supervision, is created[41]. The SRM is thus instrumental to a wider process of harmonisation. Its tasks and objectives are closely linked to the EU framework on prudential supervision whose effective harmonisation it is supposed to propitiate, in the sense of the "*ENISA*" case-law to which reference has been made above (see paragraph 26).

---

35 See Article 3(4) of the SSM proposal.
36 See Article 14(5) and (6).
37 See recital (17) of Regulation (EU) 1093/2010 establishing a European Supervisory Authority (European Banking Authority).
38 See articles 9(7) (information on simplified obligations and waivers) and 10(8) (information on minimum requirement of own funds) of the proposal.
39 See recital (49) of the preamble and article 27(5) of the proposal.
40 See article 84 of the proposal.
41 See, in particular, recitals (8) and (9) of the preamble to the proposal.

41. Finally, the Council Legal Service notes that the decision whether the level of harmonisation desired should be achieved through the means of a "traditional" harmonisation method- i.e., Directive type rules addressed to Member States, as contained in the BRRD proposal – or, alternatively, through a centralised decision procedure - as in the proposal - is a matter that belongs to the power of political assessment of the Union legislator: as stated by the Court, the Union legislator enjoys of a discretion as regards the harmonisation method most appropriate for achieving the desired result, in particular in complex fields as the one concerning resolution (see above paragraph 21 of the opinion).

Moreover, as clarified by the Court in the "*Vodafone*" case, the Union legislator is free to complement and support a particular harmonisation measure (*in casu*, the BRRD proposal) with another one, based on a different conceptual approach - i.e, a centralised process of decision - when it considers that the first one is not sufficient to achieve the level of harmonisation desired[42].

42. On the basis of all the above elements, the Council Legal Service considers that Article 114 TFEU may be the legal basis for the establishment of the SRM as long as such a mechanism responds to a genuine need of uniform application of the rules on resolution that could not be otherwise achieved. The Union legislator enjoys a margin of discretion to make such a determination.

B) WHETHER ARTICLE 114 IS AN ADEQUATE LEGAL BASIS TO ESTABLISH THE FUND

43. 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 the financing of the Fund constitutes own resources of the Union in the sense of Article 311 TFEU.

[42] See case *Vodafone*, cited at footnote 21, at paragraph 42.

1. Whether Article 114 TFEU is a suitable legal basis for the creation of the Fund

44. The Fund constitutes the second pillar of the proposal. Its main objectives, features and functioning mirror, to a large extent, those of the "European system of financial arrangements" under the BRRD proposal, whereby national laws and regulations on financial arrangements concerning resolution would be approximated. Under the BRRD proposal, however, resolution financial arrangements are not mutualised in a single mechanism but remain operational within the borders of each of the Member States.

45. The Council Legal Service has already considered in the context of the BRRD proposal that the harmonisation of the "European system of financial arrangements" may be made on the basis of Article 114 TFEU[43]. In particular, in the view of the Council Legal Service, levies payable by credit institutions – whether they have an *ex ante* or *ex post* character – are made in consideration of a service, similar to an insurance which could be provided to them in case of resolution. From this point of view, the said contributions may not be regarded as taxes but rather as insurance premiums paid for a service, with the result that Article 114 TFEU is a suitable legal basis for them being harmonised under the BRRD proposal (*in lieu* of Article 115 TFEU, i.e., the legal basis for harmonising direct taxes).

46. Bearing in mind the above preliminary considerations, the question that must be elucidated is, again, whether the Union legislator can use Article 114 TFEU for establishing a centralised mechanism of finance for resolution, instead of the harmonisation of a plurality of financial resolution arrangements that would stay at Member States' level (as in the BRRD proposal). In other terms, it is necessary to determine whether the Fund constitutes an autonomous regulatory measure isolated from, or only incidentally related to, an ongoing process of harmonisation (in which case Article 114 TFEU would not be a suitable legal basis) or if it forms a necessary part of a harmonisation out of which it would be rendered meaningless or ineffective.

43 See opinion of the Council Legal Service of 13 March 2013, doc. nº 7441/13.

47. The case-law referred to in paragraphs 18 to 27 of the opinion is also relevant for the examination of this question, for which the following elements need to be underlined.

48. First, the Fund is designed by the proposal as a necessary part of the SRM. A centralised system of resolution would not be workable if it were not backed by a single funding system. Different systems of national funding would distort the application of uniform bank resolution rules in the internal market (see recital (11) to the preamble of the proposal). The Fund would not pursue independent financing objectives going beyond resolution action under the proposal. It is designed as instrumental to the execution of resolution action. It would serve the sole purposes of the efficient implementation of resolution tools and powers and in accordance with their objectives (see recital (58) to the preamble of the proposal and article 64(2) thereof).

49. Second, the proposal also justifies the creation of the Fund by the fact that in integrated financial markets any financial support to resolve a bank enhances the financial stability and the health of other banks not only in the Member State concerned but also in other Member States (see recital (11) of the preamble of the proposal)[44]. As referred to previously (see paragraph 34 of the opinion), financial stability of the financial sector is conceived under the proposal as a premise for the effective functioning of integrated markets in this field.

50. 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 SRM 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 (see paragraph 21 of the opinion).

[44] See also point 4.3.1. of the explanatory memorandum accompanying the proposal.

51. Third, the Fund would not be a new legal form or a mechanism that would take place *alongside* equivalent national instruments. As set out in Article 85 of the proposal, the Fund is to operate in place of national financial resolution arrangements of the – participating – Member States and as such it could be regarded as aiming at preventing the emergence of obstacles to the internal market resulting from heterogeneous development of national laws in the matter. 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[45].

52. Fourth, 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[46].

53. The above elements of the proposal would permit to justify recourse to Article 114 TFEU as the legal basis for establishing the Fund.

54. A fundamental remark, which is relevant for the consideration of the present question, as well as for the examination of the first one (concerning the use of Article 114 TFEU for establishing the SRM), must nonetheless be made. The funding of resolution may under no circumstance engage the budgetary liability of the Member States. 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 and the own resources decision.

---

45 See in this sense case C-436/03 (*European Cooperative Society*), cited at footnote 24, at 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.

46 See case *Vodafone*, cited at footnote 21, at points 45 and 46.

Actually, the system of own resources of the Union assumes the budgetary sovereignty of Member States: under Article 311 TFEU, the own resources decision is to be adopted by unanimity of the Council and enters into force subject to the previous approval by the Member States in accordance with their respective constitutional requirements (that normally involve the consent of national legislatures as the institutions holding budgetary powers)[47]. Moreover, under the Treaties, Member States are preponderantly responsible for their budgetary policies. The competence of the Union in respect of the budgetary policy of Member States is limited to providing the arrangements for coordination among Member States to take place (see Articles 2(3) and 5(1) TFEU).

55. The proposal appears to assume the above criteria. As will be examined below in this opinion, the Fund will not be financed by the budget of the Union or by the budgets of Member States. It lies on a system of private financing by credit institutions. The proposal states that no decision of the Board shall require Member States to provide extraordinary public support (Article 6(4) thereof). It also excludes the responsibility of the budget of the participating Member States in respect of alternative funding means (Article 69(3) of the proposal). Furthermore, one of the objectives of resolution is to protect public funds by minimising reliance on extraordinary financial support (see Article 12(2)c) of the proposal).

[47] Analogously, the Council Legal Service stated orally during the Council (Ecofin) of 9 May 2010 that a Regulation based on Article 122(2) TFEU - Regulation 407/2010 establishing a European financial stabilisation mechanism (the EFSM), OJ L 118, 15.05.2010, p.1 - could not engage the budgetary responsibility of Member States. The Commission proposal included however a provision that aimed at permitting the EFSM to grant assistance above the Union budget ceiling (see Art. 3 of the Commission proposal). Loans or credits above the ceiling would have been guaranteed directly by the euro area Member States. This provision disappeared from the text finally adopted, that states instead that "*The outstanding amount of loans or credit lines to be granted to Member States under this Regulation shall be limited to the margin available under the own resources ceiling for payment appropriations*" (article 2(2) of Regulation 407/2010).

56. However, in spite of these provisions, the proposal does not contain a robust system to guarantee the budgetary sovereignty of Member States, notably throughout the transitional period during which the target funding level has to be achieved. Purportedly, during this period, the Fund will not have the necessary means to face conveniently resolution decisions and recourse to extraordinary means of funding might be needed (see article 65 of the proposal).

57. Article 51(3) of the proposal sets out that "*Until the target funding level referred to in Article 65 is reached, a member appointed by a Member State shall be able to require once a further deliberation of the Board where a decision under discussion impinges on the fiscal responsibilities of that Member State*". Nonetheless, this provision does not constitute a sufficient safeguard of the budgetary sovereignty of Member States. It merely introduces an obligation of method (to continue deliberating) but does not ensure the effective capacity of a Member State to avoid the adoption by the Board of decisions encroaching upon its budgetary powers. Indeed, in accordance with the voting rules laid down under Article 51 of the proposal, any Member State may be outvoted at any moment, as decisions by the executive sessions of the Board are adopted by simple majority of its participating Members.

58. In view of the above considerations, the Council Legal Service is of the view that the use of Article 114 TFEU as legal basis of the proposal would be contingent upon the introduction of an adequate system to safeguard the budgetary sovereignty of Member States.

2. Whether the financing of the Fund constitutes an own resource of the Union in the sense of Article 311 TFEU

59. A different issue is whether the financing of the Fund constitutes an own resource of the Union. Should this be the case, the establishment of the Fund by the envisaged Regulation would require, in addition, an amendment of the own resources decision in accordance with the procedure laid down in the third subparagraph of Article 311 TFEU.

60. The EU Treaties do not contain a definition of what is to be understood by "own resources of the Union". The second subparagraph of Article 311 TFEU states that "*Without prejudice to other revenue, the budget shall be financed wholly from own resources*". Article 1 of the own resources decision sets out that "*The Communities shall be allocated own resources (...) in order to ensure (...) the financing of the general budget of the European Union*" (emphasis added). The Court has stated that the own resources to which Article 311 TFEU refers concern only revenue which is intended to finance the Union's general budget, to the exclusion of contributions that arise in a particular sector and that are allocated to the financing of that sector alone. It is the Court's view that the introduction by secondary legislation of new levies applicable to private operators, intrinsic to and necessary for the functioning of a particular sector or market, does not require the amendment of the system of own resources of the Community[48].

61. The financing of the budget of the Fund is self-supporting (see Article 57 of the proposal), i.e., no subsidy is allocated to it from the general budget of the Union[49]. This is not unprecedented. Some regulatory agencies of the Union, such as the Office for the Harmonisation of the Internal Market (Alicante) have a system of autonomous financing through fees paid by users of the system[50].

62. The financing of the Fund will thus take place by means of *ex ante* and *ex post* contributions (Articles 62, 66 and 67 of the proposal) paid by credit institutions. In addition the Fund will be able to borrow, under certain conditions, from all other resolution arrangements within non-participating Member States or to contract borrowings or other forms of support from financial institutions or other third parties (see articles 68 and 69 of the proposal).

---

48 See case C-265/87, *Schräder*, [1989] p. 02237, paragraphs 7 and following. See also case 108/81, *Amylum v. Council*, ECR [1982] p. 03107, paragraphs 32 and 33.

49 See Article 208 of Regulation 966/2012 on the financial rules applicable to the general budget of the Union (the financial Regulation). OJ L 298, 26.10.2012, p. 1.

50 See Article 139 of Council Regulation 207/2009 on the Community trade mark (OJ L 78, 24.3.2009, p. 1).

63. *Ex ante* and *ex post* contributions are not integrated in the general budget of the Union. They are allocated to part II of the budget of the Fund, which is separated from the Union's general budget (see Articles 55 and 57 of the proposal). From this formal point of view the said contributions do not consist of own resources. However, a formal criterion based on the place where revenues are placed - in the general budget of the Union or in a separate budget - would not suffice to determine whether they are or they are not own resources of the Union. Otherwise, the Union legislator could easily circumvent the application of the own resources provisions by establishing separate autonomous budgets. A material examination of whether, in substance, the said contributions are inherent and circumscribed to the functioning of a particular sector should also be made.

64. As clarified previously, contributions should be seen as 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. Contributions are so calculated in a way such as to permit the Fund to achieve a target level or critical mass calculated in relation to the covered deposits in the banking system (see recital (60) of the preamble to the proposal and article 65 thereof). Said contributions are strictly earmarked to the aim of covering risks and providing stability to the financial system, and not to finance the policies of the Union in a general manner.

65. On the basis of the above, contributions should not be assimilated to own resources of the Union, in the sense of article 311 TFEU. They rather consist of levies integrated in a separated budget paid by the industry for whose benefit the system is established.

66. The same reasoning could be applied to the borrowing transactions or other forms of assistance that the Fund is empowered to seek in order to supplement contributions by credit institutions (Articles 68 and 69 of the proposal). Regardless of their origin, whether public[51] or private - from the markets -, they would be solely allocated to the Fund and their use would respond to the very internal logic and objectives of resolution actions. In particular, under Article 69(3) of the proposal, expenses incurred by alternative funding means - like borrowing in the markets – could not be borne by the general budget of the Union[52].

67. The fact that the Fund is managed and owned by a Union public body - the Board - or the fact that it would be endowed with very important resources in terms of volume (55 billion euros), does not change the conclusion that the financing of the Fund would not constitute own resources of the Union.

C) WHETHER THE MEASURES ENVISAGED UNDER THE PROPOSAL MAY BE APPLIED ONLY TO ENTITIES ESTABLISHED IN A LIMITED NUMBER OF MEMBER STATES

68. Under Article 2 of the proposal, its provisions will apply to entities referred to in letters (a) to (c) thereof established in the participating Member States. Article 4 of the proposal defines participating Member States as those whose currency is the euro and those whose currency is not the euro but which have established a close cooperation with the SSM in accordance with Article 7 of the SSM proposal. The scope of application of the proposal is therefore tied to the one of the SSM proposal.

---

51 The Fund could have recourse to borrowings or other forms of support by Member States, acting individually or collectively through instruments such as the European Stability Mechanism (ESM), as long as the latter remain free to grant any such funding in accordance with their constitutional requirements. As explained above (see paragraphs 54 to 56 of the opinion), an act based on Article 114 TFEU could not be used to bind, directly or indirectly, the budgets of Member States.

52 The proposal does however not clarify the way in which borrowing transactions by the Fund will be guaranteed.

69. The SSM proposal is founded on Article 127(6) TFEU that permits the Council to confer upon the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings. It creates the SSM, the system of financial supervision composed by the ECB and national competent authorities of participating Member States, which are the Member States whose currency is the euro and those that have established a close cooperation in accordance with Article 7 of the SSM proposal [53]. Article 4(1) of the SSM proposal specifies the supervisory tasks for which the SSM shall be responsible in relation to credit institutions established in the participating Member States. Such tasks shall be executed by the two branches of the SSM, i.e., the ECB and the national competent authorities, in accordance with criteria defined by Article 6(4) of the SSM proposal.

70. The question that must be ascertained is whether measures adopted on the basis of Article 114 TFEU may have their application limited to entities established in certain Member States only.

71. As a matter of principle, EU law applies uniformly to all the 28 Member States (see Article 52 TEU) [54]. Member States may not enjoy derogations, except where expressly provided for in primary law [55] or when, otherwise, derogations are temporary and based on objective reasons.

---

[53] See Article 2(1) of the SSM proposal. By virtue of the EU Treaties, supervisory acts adopted by the ECB under Article 127(6) TFEU are only binding for Member States whose currency is the euro. See the first indent of Article 132(1) together with Article 139(2) e) TFEU. See also Articles 25.2, 34.1 and 42.1 of Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank.

[54] On the uniform application of EU law in all Member States see joined Cases 205 to 215/82, Deutsche Milchkontor GmbH and Others v Federal Republic of Germany, ECR 1983, p. 2633, paragraph 17; Case 182/84, Criminal proceedings against Miro BV, ECR 1985, p. 3731, paragraph 14.

[55] See for instance, Articles 22(1) and (2) TFEU, on right to vote, 27(2) TFEU for the internal market, 139 TFEU for the monetary union, 92 TFEU on transport, or 192(5) TFEU on environment.

72. More specifically, measures adopted on the basis of Article 114 TFEU, aimed at attaining one of the fundamental objectives of the Treaties, namely the abolition of obstacles to the internal market, do not admit derogations for one or more Member States. Article 114(4) to (7) TFEU lays down however the procedure under which a Member State may be authorised to maintain or to introduce national measures derogating from a harmonisation measure. The application of this procedure is subject to exhaustive conditions and to a strict control by the Commission, responding thus to the logic of the integrity and single character of the internal market.

73. A different situation from the derogations for individual Member States referred in the previous paragraph is the one where a Union act does only apply, in concrete terms, to a class of market operators based on specific attributes that distinguish them in an objective and characterised manner. In such a situation there is no derogation within the meaning of the above paragraphs.

74. The proposal does not contain derogations in respect of individual Member States. The circumstance of being established in a participating Member State, as the criterion to apply the proposal to the relevant entities, does not consist of a territorial derogation for some of the Member States. Such a criterion reflects, rather, a specific attribute peculiar to the entities falling within its scope of application, namely the fact of being subject to the SSM, that distinguishes them in an objective and characterised manner from the rest of credit institutions.

75. As shown previously (see above paragraphs 36 to 39 of the opinion), the SRM must be placed within the wider context of Union supervision rules of which the SSM is a corollary. Supervision and resolution are two complementary aspects of the establishment of the internal market for financial services, whose centralised application can be regarded as mutually dependant. This opinion has already described the important level of integration between the supervision tasks attributed to the SSM and resolution action (see above paragraph 38). Bearing in mind such a level of imbrication, the establishment of a centralised system of supervision, operated under Article 127(6) TFEU, would be actually relevant for the process of harmonisation of resolution operated under Article 114 TFEU. The fact of being subject to the SSM can therefore be regarded as a specific attribute that places the entities falling within the scope of application of the proposal in an objectively and characterised distinct position for resolution purposes.

76. The above criteria are not however sufficiently reflected in the proposal. Recitals (9) and (10) to the preamble of the proposal justify its differentiated application on circumstances of mere financial or political opportunity, such as the need to correct the competitive disadvantage in which credit institutions subject to the SSM would be placed if a parallel central system of resolution were not created, or the convenience that the sharing of resolution responsibilities between the national and Union levels should be aligned to the sharing of supervision of responsibilities between those levels. However legitimate these reasons may be, they are not sufficient to show that entities falling within its scope of application are in an objectively differentiated position. The drafting of the proposal and of its preamble should be then clarified to reflect that, due to the imbrication between supervision and resolution, entities subject to the SSM are in an objectively different situation for resolution purposes.

77. In any event, the application of the proposal to operators established in a limited number of Member States should not lead to a segmentation of the internal market. In the view of the Council Legal Service, the proposal contains sufficient elements that guarantee the integrity of the internal market.

78. On the one hand, Article 6(1) of the proposal enounces the principle of non discrimination against entities, deposit holders investors or other creditors on grounds of their nationality or place of business. Moreover, the material law on resolution to be applied by the SRM will be homogeneous to the one applicable by the national resolution authorities of the non participating Member States, to be harmonised through the BRRD proposal (see in this sense recital (18) to the preamble of the proposal) [56]. In this sense, it is fundamental that the effective date of application of the proposal, as referred to in Article 88 thereof, is fully aligned with the date where the national laws and regulations implementing the BRRD proposal become effectively applicable (see in this sense Article 115 of the BRRD proposal concerning transposition). Otherwise, a set of resolution rules would be applicable to entities located in the participating Member States whereas the rest of entities, established in the non participating Member States - would still be subject to national regimes not yet effectively harmonised. The alignment referred to should be made in an ultimate stage of the discussion of both proposals when some certainty exists as to their dates of entry into force. Finally, the fact remains that the application of the proposed Regulation to entities established in non participating Member States is not excluded, to the extent that the Council adopts a decision establishing that said Member States fulfil the necessary conditions for the adoption of the euro[57] or, otherwise in the absence of such a decision, where the Member State in question enters into close cooperation with the SSM.

[56] The Council Legal Service will separately examine the legal feasibility of applying the same State aid rules of the Union to resolution decisions under the proposal and to resolution decisions adopted by the national resolution authorities.

[57] See Article 140 TFEU. The decision abrogating the derogation of Member States whose currency is not the euro foreseen under Article 140 TFEU does not apply however to the United Kingdom and Denmark that enjoy, respectively, of an "opt-out" and an exemption to the obligation to adopt the euro as currency, by virtue of Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland) and Protocol (No. 16) on Denmark.

IV. CONCLUSIONS

79. Article 114 TFEU may be a suitable legal basis for the establishment of the SRM as long as such a mechanism responds to a genuine need of uniform application of the rules on resolution that could not be achieved through other methods of harmonisation.

80. Article 114 TFEU may be a suitable legal basis for the establishment of the Fund provided that i) said establishment is deemed to be indispensable for the efficient operations of the SRM and ii) an adequate mechanism to safeguard the budgetary sovereignty of Member States is introduced.

81. The financing of the Fund under the proposal does not constitute own resources of the Union, in the sense of article 311 TFEU.

82. The limitation of the scope of application of the proposal to credit institutions located in the participating Member States is objectively justified by their specific attribute of being subject to the SSM, subject to the insertion of an adequate motivation in the proposal.