

European Deposit Guarantee Scheme

Does the EU have the power to legislate?

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- ▶ The proposed EDIS Regulation cannot be based on the internal market competence (Art. 114 TFEU).
- ▶ The flexibility clause (Art. 352 TFEU) can only be used as a basis where its overall effect is to strengthen investor confidence within the eurozone. This cannot be predicted with any reliability.
- ▶ In any case, the flexibility clause requires unanimity in the Council; thus every Member State has a right of veto.

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1 Key elements of the European Deposit Insurance Scheme (EDIS)

On 24 November 2015, the EU Commission published a proposal for a regulation to establish a European Deposit Insurance Scheme (EDIS).¹

The proposed EDIS Regulation will initially apply to the eurozone. In the future, it will also apply to Member States who will join the common banking supervision by the ECB. The main component is the creation of a joint Deposit Insurance Fund to provide pay-outs to depositors and contributions to resolution, into which all eurozone banks will pay directly. As from 2024, bank deposits up to € 100,000 per investor per bank will be fully covered by way of EDIS. In the transition period, the joint Deposit Insurance Fund will supplement the national deposit guarantee schemes. The Member States can keep their national deposit guarantee schemes - which are required under the Deposit Guarantee Directive² – alongside the joint Deposit Insurance Fund.

The Single Resolution Board (SRB), which until now has had exclusive responsibility for bank resolution, will in future additionally administer the joint Deposit Insurance Fund.

The EU Commission bases its proposal on the EU internal market competence under Art. 114 of the Treaty on the Functioning of the EU (TFEU). The choice of legal basis is controversial. Section 1 below will therefore examine whether the internal market competence can be used as the legal basis for the proposed EDIS Regulation. An alternative legal basis may be offered by the flexibility clause under Art. 352 TFEU. Whether this is possible will be looked at in Section 2.

The decision on the applicable legal basis is of great importance for the legislative process. Measures based on the internal market competence are subject to the ordinary legislative procedure in which the European Parliament (EP) and the Council rank equally in the decision-making process.³ In the Council, a qualified majority is sufficient for the decision.⁴ Legislation based on the flexibility clause, on the other hand, must be passed unanimously by the Council, and the EP can either accept or reject it but cannot call for amendments.⁵

From the German perspective, a further difference exists in that with legislation based on the flexibility clause - by contrast with measures aimed at improving the internal market - the German representatives in the Council must reject a measure where no law has first come into force to transfer sovereign law under Art. 23 (1) Basic Law (GG).⁶

2 Internal market competence (Art. 114 TFEU)

The internal market competence allows the adoption of EU measures for the purpose of achieving the internal market unless otherwise specified in the Treaties.⁷ The EP and the Council can adopt "measures for the approximation of the laws, regulations and administrative provisions of the Member States which have as their object the establishment and functioning of the internal market".⁸

¹ Proposal COM(2015) 586 of 24 November 2015 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.

² Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (recast), OJ L 173 of 12 June 2014, p. 149.

³ Art. 114 (1) in conjunction with Art. 289 (1) and Art. 294 TFEU.

⁴ Art. 16 (3) TEU.

⁵ Art. 352 (1) TFEU.

⁶ § 8 Responsibility for Integration Act

⁷ Art. 114 (1) TFEU.

⁸ Art. 114 (1), sentence 2 TFEU.

2.1 Approximation of laws and administrative provisions

In order to be able to base the EDIS Regulation on the internal market competence, the Regulation must firstly serve the approximation of laws and administrative provisions of the Member States.

According to the EU Commission, the establishment of EDIS is "essential in achieving the objective of a harmonised deposit guarantee framework".⁹ In addition, "the European Deposit Insurance Scheme should facilitate [...] the harmonisation process in the field of financial services".¹⁰

The harmonisation of laws means that national laws are brought into line with a standard prescribed by Union law.¹¹ The European Court of Justice (ECJ) allows the EU legislator to scope for discretion when choosing the "method of harmonisation", "especially in fields with complex technical features".¹² The EU legislator should thus be able to use various regulatory instruments.¹³ One of these regulatory instruments may be "the establishment of an EU body responsible for contributing to the implementation of a process of harmonisation".¹⁴ By approving the transfer of decision-making powers to the EU Securities and Markets Authority (ESMA), the ECJ, in its Judgment on the Short Selling Regulation, confirmed the internal market competence as an organisational provision.¹⁵

Although, like ESMA, the SRB, which under the proposed EDIS Regulation will also be responsible for compensating investors, is an EU agency,¹⁶ the framework for transferring decision-making powers to the SRB is different to that applicable to ESMA in the aforementioned ECJ Judgment. The judgement was passed in a situation where national authorities in several Member States had already taken measures to restrict or ban certain types of short selling.¹⁷ As the EU lacked "a specific common regulatory framework", these measures were divergent.¹⁸ The effect of the planned EDIS Regulation, on the other hand, on the - in some cases still divergent - national provisions for the implementation of the Deposit Guarantee Directive¹⁹, will not be mandatory but simply aims to supplement them because, despite the creation of the joint Deposit Insurance Fund, national deposit insurance funds can remain in place unchanged even after 2024.

Thus there is much to suggest that the planned EDIS Regulation does not in fact contribute to the harmonisation of national laws and administrative provisions.

2.2 Improvement of the internal market

If we, nevertheless, take the EU Commission's view that the proposed EDIS Regulation contributes to a harmonisation of national law and administrative provisions, it still has to have as its object the establishment and functioning of the internal market.

⁹ Recital 11 Proposal COM(2015)586.

¹⁰ Ibid.

¹¹ Kahl, in: Calliess/Ruffert, EUV/AEUV, Kommentar, 4th Edn. 2011, Verlag C.H. Beck, München, Art. 114, para. 13.

¹² ECJ, C-270/12 of 22 January 2014, ECLI:EU:C:2014:18, United Kingdom/EP and Council, para. 102; ECJ, C-270/04 of 2 May 2006, ECLI:EU:C:2006:279, United Kingdom/EP and Council, para. 43.

¹³ Saurer, Die Errichtung von Europäischen Agenturen auf Grundlage der Binnenmarktharmonisierungskompetenz des Art. 114 AEUV – Zum Urteil des EuGH über die Europäische Wertpapier- und Marktaufsichtsbehörde (ESMA) vom 22. Januar 2014 (Case C-270/12), Die Öffentliche Verwaltung 2014, p. 549 (553).

¹⁴ ECJ, C-270/12 of 22 January 2014, ECLI:EU:C:2014:18, United Kingdom/EP and Council, para. 104.

¹⁵ Saurer, Die Errichtung von Europäischen Agenturen auf Grundlage der Binnenmarktharmonisierungskompetenz des Art. 114 AEUV – Zum Urteil des EuGH über die Europäische Wertpapier- und Marktaufsichtsbehörde (ESMA) vom 22. Januar 2014 (Case C-270/12), Die Öffentliche Verwaltung 2014, p. 549 (553).

¹⁶ Art. 42(1) Regulation (EU) No. 806/2014 of the European Parliament and 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 Bank Resolution Fund and amending Regulation (EU) No 1093/2010.

¹⁷ ECJ, C-270/12 of 22 January 2014, ECLI:EU:C:2014:18, United Kingdom/EP and Council, para. 109.

¹⁸ Ibid.

¹⁹ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (recast).

The internal market comprises an area with no internal frontiers in which basic freedoms are guaranteed and competition is protected from distortion.^{20,21} EU measures on the basis of the internal market competence must serve the achievement of the internal market, i.e. its improvement.²² They should remove "appreciable" obstacles to the assertion of basic freedoms and distortions of competition, i.e. interference with the internal market which carries a certain weight.²³ The choice of legal basis must depend on "objective, judicially verifiable circumstances which include the aim and content of the legal measure".²⁴ In deciding whether the aim of the legal measure is to improve the internal market, firstly the intention of the legislator must be considered and secondly it must be determined objectively whether the legal measure is suitable for achieving the internal market.²⁵

As the scope of the proposed EDIS Regulation is limited to the EU Member States participating in the Banking Union - i.e. currently the eurozone - the impact will be examined separately for the eurozone and the whole of the EU.

2.2.1 Improvement of the internal market within the eurozone

The EU legislator must firstly endeavour, with the help of the proposed EDIS Regulation, to improve the internal market, at least within the eurozone.

According to the Regulation's Recitals, the "absence of a homogenous level of depositor protection can distort competition and create an effective barrier for the freedoms of establishment and free provision of services by credit institutions within the internal market."²⁶ The Commission also bases its proposal on the fact that EDIS would "remove obstacles to the exercise of fundamental freedoms avoiding significant distortion of competition, at least in those Member States which share the supervision and resolution of credit institutions and the protection of depositors at the European level".²⁷ The aim is therefore the improvement of the internal market, at least within the eurozone.

Such a geographically limited improvement of the internal market is seen by some as sufficient for the application of the internal market competence²⁸ because the aim of the internal market is also helped by reducing the number of relevant legal systems.²⁹

If we accept this view, it is still necessary to determine whether the proposed EDIS Regulation also objectively constitutes an improvement of the internal market within the eurozone.

This is contradicted by the fact that national deposit guarantee schemes may be continued on a voluntary basis after 2024 alongside the joint Deposit Insurance Fund. There is therefore a risk that, in some eurozone countries, the national deposit guarantee funds - together with the burden of paying contributions borne by the banks - will continue to exist without change whilst in other

²⁰ Art. 26 (2) TFEU.

²¹ Protocol No. 27.

²² Leible/Schröder, in: Streinz, EUV/AEUV, 2nd Edn. 2012, Verlag C.H. Beck, München, Art. 114 AEUV, para. 50, Kahl, in: Calliess/Ruffert, EUV/AEUV, Kommentar, 4th Edn. 2011, Verlag C.H. Beck, München, Art. 114, para. 24.

²³ Leible/Schröder, in: Streinz, EUV/AEUV, 2nd Edn. 2012, Verlag C.H. Beck, München, Art. 114 AEUV, para. 41.

²⁴ Leible/Schröder, in: Streinz, EUV/AEUV, 2nd Edn. 2012, Verlag C.H. Beck, München, Art. 114 AEUV, para. 51.

²⁵ Ibid.

²⁶ Proposal COM(2015) 586, Recital 7.

²⁷ Proposal COM(2015) 586, Explanatory Memorandum p. 4 et seq.

²⁸ Repasi, Gutachten zur rechtlichen Machbarkeit eines "Single Resolution Mechanism" (SRM), <http://www.sven-giegold.de/wp-content/uploads/2013/07/Gutachten-zur-rechtlichen-Machbarkeit.pdf>, last accessed on 15 March 2016, p. 2 et seq.; Herrmann/Rosenfeldt, Europarechtliche Grundlagen und Grenzen der Errichtung eines einheitlichen Bankenabwicklungsmechanismus (SRM), http://www.gruene-bundestag.de/fileadmin/media/gruenebundestag_de/themen_az/eur_opaeische_union/PDF/SRM-Gutachten_final.pdf, last accessed on 15 March 2016, p. 11 et seq.

²⁹ Repasi, Gutachten zur rechtlichen Machbarkeit eines "Single Resolution Mechanism" (SRM), <http://www.sven-giegold.de/wp-content/uploads/2013/07/Gutachten-zur-rechtlichen-Machbarkeit.pdf>, last accessed on 15 March 2016, p. 2 et seq.

eurozone countries, the financial means of the national deposit guarantee funds will be reimbursed to the banks. Thus the divergences may even increase.

Secondly, many national divergences in deposit guarantee schemes arise from the options granted to Member States under the Deposit Guarantee Schemes Directive. This is also clarified by the EU Commission in Recital 10 of the Regulation: "Despite the further harmonisation introduced by the Directive 2014/49/EU (Deposit Guarantee Schemes Directive), national deposit guarantee schemes retain certain options and discretions."³⁰ This applies inter alia to target funding levels, risk factors relevant to the assessment of contributions, repayment periods and the use of funds.³¹ Here we are talking, for instance, about the temporary increase of the coverage level to over € 100,000 per depositor per bank, e.g. due to the sale of privately used residential property, or about so-called alternative measures for securing banks.^{32,33} These options remain in place irrespective of the proposed EDIS Regulation. In its Communication to accompany the proposal for a Regulation³⁴, the EU Commission finds, however, that harmonisation of the national deposit guarantee schemes must take place "in parallel with ongoing work to establish EDIS".³⁵

Thus there are still differences between the Member States in the arrangement of deposit guarantee schemes. Harmonising them does not currently form part of the EDIS Regulation.

Consequently, it is highly questionable whether the EDIS Regulation objectively removes "appreciable" distortions of competition or obstacles to basic freedoms in the eurozone. Thus, even if one considers a geographically limited improvement of the internal market to be sufficient for asserting the EU's internal market competence, it is still doubtful whether the internal market competence can be used as a legal basis for the EDIS Regulation.

2.2.2 Improvement of the internal market within the whole EU

In our view, a geographically limited improvement to the internal market is not sufficient for the internal market competence because the internal market fundamentally covers the territory of all the Member States.³⁶ Exceptions such as the so-called enhanced cooperation³⁷ of at least nine Member States as ultima ratio or temporary exceptions³⁸ are exclusively provided for under the Treaties.³⁹

Whilst the proposed EDIS Regulation is bringing in the joint Deposit Insurance Fund for the eurozone, the Member States outside the eurozone are left only with national funds.

It is not possible to give a general statement on whether a joint Deposit Insurance Fund for the eurozone will increase or in fact reduce the confidence of eurozone investors in the security of their bank deposits and it probably depends crucially on the respective credibility of the existing national deposit guarantee scheme.

³⁰ Proposal COM(2015) 586, Recital 10.

³¹ Ibid.

³² Art. 6 (2) and Art. 11 (3) of Directive 2014/49/EU.

³³ In Germany, recognised bank-related insurance schemes under Section 49 Deposit Insurance Act may bring in "measures to avoid threats to survival".

³⁴ Communication COM(2015) 587 from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions "Towards the completion of the Banking Union" of 24 November 2015.

³⁵ Communication COM(2015) 587, p. 11.

³⁶ Art. 52 TEU in conjunction with Art. 355 TFEU.

³⁷ Art. 20 TEU and Art. 326 et seq. TFEU.

³⁸ Art. 27 TFEU

³⁹ Dissenting view: Herrmann/Rosenfeldt, *Europarechtliche Grundlagen und Grenzen der Errichtung eines einheitlichen Bankenabwicklungsmechanismus (SRM)*, http://www.gruene-bundestag.de/fileadmin/media/gruenebundestag_de/themen_az/europaeische_union/PDF/SRM-Gutachten_final.pdf, last accessed on 15 March 2016, p. 11 et seq.

Assuming that the confidence of eurozone investors increases as a result of the joint Deposit Insurance Fund, then this will be disadvantageous for banks in non-eurozone countries. Assuming the opposite case, then this will be disadvantageous for banks inside the eurozone. In either case, however, competition in the internal market will be distorted because EDIS is likely to effect the confidence of eurozone and non-eurozone investors differently.

In addition, there is another impending distortion of competition in the internal market between banks in Member States outside the eurozone and banks in Member States inside the eurozone that continue to maintain national deposit insurance funds in addition to the joint Deposit Insurance Fund. The latter are subject to the risk of having to bear multiple contributions whilst banks in Member States outside the eurozone only have one contribution.

This issue is of particular importance for institutional protection schemes - such as the deposit guarantee funds for the savings banks (*Sparkassen*) and cooperative banks (*Genossenschaftsbanken*) in Germany. In addition to compensating depositors and contributing to resolutions, these systems can also take measures to avoid bank insolvencies if Member States have exercised their option in the Deposit Guarantee Schemes Directive. Funds from the proposed joint Deposit Insurance Fund, however, can only be used for compensating depositors and for contributing to resolutions.⁴⁰ Institutional protection schemes can therefore only be financed inside the eurozone by way of national deposit guarantee funds. Thus the proposed EDIS Regulation creates additional differences between Member States inside and outside the eurozone.

Although Member States outside the eurozone can decide to participate in ECB supervision and thus in the Banking Union, the participation of all Member States is not foreseeable even in the long term.

Consequently, the proposed EDIS Regulation does not result in an improvement, but in fact splits the internal market into eurozone and non-eurozone.

2.3 Focus of the proposed EDIS Regulation

Thirdly, the proposed EDIS Regulation can only be based on the internal market competence where the improvement of the internal market is the main objective of the EU legislator. Where a legislative act pursues two objectives, one of which is the main objective and the other is of secondary importance, the legal basis required for the main objective must be used.⁴¹ Thus, in order to comply with the Principle of Conferral despite the extent of the concept of the internal market, achieving the internal market must constitute the focus of the legislative act.⁴²

Deposit guarantee schemes aim to secure investor confidence in order to prevent bank runs and thus maintain financial stability. Although a harmonisation e.g. of target funding levels and the level of cover, may improve the single market, this is not the focus of the EDIS Regulation. In fact, it is mainly concerned with the introduction of the joint Deposit Insurance Fund whose aim is to increase the credibility of the deposit guarantee scheme by increasing the funding volume and thus boost financial stability. It therefore appears doubtful that the improvement of the internal market is its main objective. This is a further reason why the proposed EDIS Regulation cannot be based on the internal market competence.

⁴⁰ Art. 41p and 41q Proposal COM(2015) 586.

⁴¹ Leible/Schröder, in: Streinz, EUV/AEUV, 2nd Edn. 2012, Verlag C.H. Beck, München, Art. 114 AEUV, para. 129; Herrnfeld, in: Schwarze, EU-Kommentar, 3rd Edn. 2012, Nomos Verlagsgesellschaft, Baden-Baden, Art. 114 AEUV, para. 23.

⁴² Leible/Schröder, in: Streinz, EUV/AEUV, 2nd Edn. 2012, Verlag C.H. Beck, München, Art. 114 AEUV, para. 47; Herrnfeld, in: Schwarze, EU-Kommentar, 3rd Edn. 2012, Nomos Verlagsgesellschaft, Baden-Baden, Art. 114 AEUV, para. 23.

2.4 Interim conclusion

We take the view that the proposed EDIS Regulation cannot be based on the internal market competence. Firstly, over the whole of the EU, it splits rather than improves the internal market. Secondly, it does not even improve the internal market within the eurozone. Thirdly, the main objective of the EDIS Regulation is to strengthen financial stability rather than improve the internal market.

3 Flexibility clause (Art. 352 TFEU)

Since the internal market competence is not a suitable basis of the proposed EDIS Regulation, we will now examine whether the flexibility clause (Art. 352 TFEU) could be applicable.

The flexibility clause allows the adoption of suitable EU legislation "if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers".⁴³

3.1 Attaining an objective set out in the Treaties

The flexibility clause can therefore only be used "to attain one of the objectives set out in the Treaties".⁴⁴ The aims of the Treaties are principally set out in Art. 3 TEU.⁴⁵

With regard to the proposed EDIS Regulation, two aims are of relevance: establishing an internal market⁴⁶ and establishing an Economic and Monetary Union⁴⁷. The objective of establishing an internal market cannot be used as a basis for applying the flexibility clause because, as we have seen, the proposed EDIS Regulation does not improve the internal market. That leaves the aim of establishing an Economic and Monetary Union (Art. 3 (4) TEU) which is, in fact, where the proposed EDIS Regulation is intended to take effect: The EU Commission published the EDIS proposal in light of the Five Presidents' Report⁴⁸ and the follow-up Communication from the EU Commission on the completion of Economic and Monetary Union (EMU).⁴⁹ According to the EU Commission, completion of the Banking Union is "an indispensable step towards a full and deep EMU"⁵⁰. The European deposit insurance scheme forms the third pillar of this Banking Union alongside banking supervision by the SSM and bank resolution by the SRM.⁵¹ In the view of the EU Commission and the five Presidents "a unified and fully integrated financial system is key [...] for general confidence in the euro area banking system".⁵² This confidence in the banking system is essential for maintaining the financial stability which "underpins the economic and monetary policy of the Union"⁵³ and thus also for effective monetary policy transmission in the EMU.

In order to base the proposed EDIS Regulation on the flexibility clause, the Regulation must serve the objective of establishing Economic and Monetary Union (Art. 3 (4)).

⁴³ Art. 352 (1), sentence 1 TFEU.

⁴⁴ Art. 352 (1), sentence 1 TFEU.

⁴⁵ Rossi, in: Calliess/Ruffert, EUV/AEUV, Kommentar, 4th Edn. 2011, Verlag C.H. Beck, München, Art. 352, para. 30.

⁴⁶ Art. 3 (3) TEU.

⁴⁷ Art. 3 (4) TEU.

⁴⁸ Report of 22 June 2015: Completing Europe's Economic and Monetary Union, submitted by Jean-Claude Juncker, President of the European Commission in close cooperation with Donald Tusk, President of the European Council; Jeroen Dijsselbloem, President of the Eurogroup; Mario Draghi, President of the European Central Bank and Martin Schulz, President of the European Parliament.

⁴⁹ Communication COM(2015) 600 of 21 October 2015: Steps towards Completing Economic and Monetary Union

⁵⁰ Proposal COM(2015) 586, p. 55.

⁵¹ Proposal COM(2015) 586, p. 55 et seq.

⁵² Proposal COM(2015) 586, p. 55.

⁵³ Proposal COM(2015) 586, p. 4.

Two questions arise in this regard:

Firstly, it is unclear how Declaration No. 41 to the Treaty of Lisbon should be interpreted.⁵⁴ The Declaration expressly states that Art. 352 (1) TFEU can be used for the objectives referred to in Art. 3 (2) and (3) TEU.⁵⁵ On the other hand, Art. 352 expressly cannot be used exclusively to pursue the objectives under to Art. 3 (1) TEU⁵⁶. Economic and Monetary Union as an objective is contained in Art. 3 (4) TEU. Thus it is not referred to at all in Declaration No. 41. In fact, one could argue that the first sentence of Declaration No. 41 excludes its application to Economic and Monetary Union. However, the second sentence of Declaration No. 41 only expressly excludes the objectives under Art. 3 (1) TEU. Thus, the question of how to interpret the fact that Declaration No. 41 remains silent on this is open to debate.

It is sometimes argued that the objective of Art. 3 (4) TEU constitutes "a particularly suitable link to the flexibility clause due to its degree of concreteness".⁵⁷

If we adopt this view, we must then decide whether a joint Deposit Insurance Fund does actually serve the establishment of the Economic and Monetary Union.

According to the EU Commission, financial stability "underpins the economic and monetary policy of the Union"⁵⁸ because the more stable the financial system, the more effective the monetary policy measures of the European Central Bank. According to the German Bundesbank, a "stable financial system fulfils its key economic functions at all times and without difficulty. These functions are, in particular, the efficient allocation of funds and risks and the provision of an effective and secure financial infrastructure".⁵⁹ The ECB defines financial stability as a condition in which the financial system – intermediaries, markets and market infrastructures – can withstand shocks without major disruption in financial intermediation and in the general supply of financial services.⁶⁰

Deposit guarantee schemes aim to protect financial stability by giving depositors confidence in the security of their deposits and ensuring that they do not withdraw their money from the banks (bank run) in times of uncertainty.

The decisive factor is therefore whether the proposed EDIS Regulation increases or weakens investor confidence. This could differ from one Member State to another. An increase in investor confidence is likely in those Member States where there is currently a lack of confidence in the national deposit guarantee fund. The proposed EDIS Regulation could reduce the risk of a bank run in these Member States. However, in Member States with a credible national deposit guarantee fund, the proposed EDIS Regulation could weaken investor confidence. This would be the case where there is prevailing fear among investors that the funds in the Deposit Insurance Fund will be used principally to compensate investors in other Member States and, in the event of problems in their own Member State, the Deposit Insurance fund will no longer have sufficient funds available. Thus financial or reputational risks could jump from one Member State to other Member States. It is

⁵⁴ Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon on 13 December 2007, OJ C 115 of 9 May 2008, p. 335 et seq.

⁵⁵ These objectives include for example the area of freedom, security and justice without internal frontiers, the internal market, economic, social and territorial cohesion and solidarity among Member States, as well as foreign policy objectives

⁵⁶ which are peace, EU values and the protection of EU citizens.

⁵⁷ Rossi, in: Calliess/Ruffert, EUV/AEUV, Kommentar, 4th Edn. 2011, Verlag C.H. Beck, München, Art. 352, para. 33.

⁵⁸ Proposal COM(2015) 586, Explanatory Memorandum p. 4.

⁵⁹ https://www.bundesbank.de/Navigation/DE/Aufgaben/Finanz_und_Waehrungssystem/Stabilitaet/Begriffe/begriffe_und_definitionen.html, last accessed on 15 March 2016.

⁶⁰ <https://www.ecb.europa.eu/ecb/tasks/stability/html/index.en.html>: "The ECB defines financial stability as a condition in which the financial system – intermediaries, markets and market infrastructures – can withstand shocks without major disruption in financial intermediation and in the general supply of financial services". Last accessed on 15 March 2016.

not possible to predict which of these two factors is the more likely and whether the proposed EDIS Regulation will have the overall outcome of weakening or strengthening investor confidence.

The assessment is further hindered by the fact that ultimately, investor "confidence" in the security of their deposits is the measure of all things. Psychological or even irrational factors can play a decisive role in building or destroying this confidence. Only one thing is certain: investor confidence is an important element in financial stability which provides the foundations for economic and monetary policy in the EU.

3.2 Interim conclusion

The proposed EDIS Regulation may - irrespective of how Declaration No. 41 is to be interpreted - be based on the flexibility clause if the overall result of the EDIS Regulation is to strengthen investor confidence within the eurozone. This cannot be predicted with any reliability.

4 Conclusion

The proposed EDIS Regulation cannot be based on the internal market competence (Art. 114 TFEU). The flexibility clause (Art. 352 TFEU) can only be used as a basis where its overall effect is to strengthen investor confidence within the eurozone. This cannot be predicted with any reliability. In any case, the flexibility clause requires unanimity in the Council; thus every Member State has a right of veto.

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