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CONTRIBUTION OF THE LEGAL SERVICE¹

To: Eurogroup in inclusive format

Subject: Budgetary instrument for convergence and competitiveness: examination of the legal status, relationship and effects of the enabling clause and the intergovernmental agreement.

I. INTRODUCTION

1. The term sheet on the Budgetary Instrument for convergence and competitiveness (BICC), as endorsed by the Eurogroup (inclusive format) on 9 October 2019, contains, amongst others, the following text regarding the financing of the instrument.

“Discussions on an IGA, whose legal status will be explained in an annex to the summing up letter by the Council Legal Service, will continue at the level of the EWG. The EWG should submit a report covering the need, the content, modalities and the size of an IGA in due time to allow for a final decision in the context of the MFF.

An enabling clause to be included in the Regulation based on Art 175”

¹ 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.

2. In the course of the meeting of the Eurogroup (inclusive format) of 9 October 2019, the Council Legal Service (CLS) was invited to clarify the legal status, the relationship and the effects of the enabling clause as well as of the Intergovernmental Agreement (IGA) to which reference is made in the term sheet. The Council Legal Service was further requested by the President of the Eurogroup to reflect its oral intervention in writing (as also recalled in the term sheet). This contribution follows up on that request.

II. LEGAL ANALYSIS

3. The purpose of the enabling clause that is to be introduced in the envisaged BICC Regulation is to authorise additional contributions by Member States to the budget of the Union and earmark them to finance expenditure arising from the BICC. Such additional contributions would be provided as external assigned revenue, as an exception to the budgetary principle of universality under Article 20 of the Financial Regulation, according to which all revenues finance indistinctly all items of expenditure. That exception should therefore be formulated by way of derogation to the principle of universality, a possibility which is open to the discretion of the EU legislator, as shown by the existing categories of external and internal assigned revenue referred to in Article 21 of the Financial Regulation itself.

4. However, the EU Treaties or an act of EU secondary law (as the BICC Regulation) cannot legally oblige Member States to conclude the IGA referred to in the term sheet, or compel them to contribute to the budget of the Union beyond the framework of their financial obligations as defined by the own resources system. Therefore, the enabling clause cannot be the basis for the negotiation, signature and conclusion of an IGA where Member States would legally commit to pool and to allocate external revenues to the BICC. The Member States, as subject of international public law, are free to decide to negotiate, sign and conclude the IGA².
5. Member States' consent to be bound by the provisions of the IGA depends therefore on their national constitutional requirements³.

² See opinion of the Council Legal Service (document 5347/19) on the proposal on the European Investment Stabilisation Function where the Council Legal Service concluded that “*Union Law may not impose an obligation on a Member State to conclude an [IGA]*”. That opinion also underlined that “*Article 175(3) TFEU (...) may not be used to compel, directly or indirectly, Member State to make further contributions to the Union beyond the system of Own Resource Decision.*” (para.61).

³ Even if, in the past, intergovernmental treaties in the field of the Economic and Monetary Union (such as the ESM Treaty, the Treaty on Stability, Convergence and Competitiveness, or the IGA on the transfer of contributions to the Single Resolution Fund) have been concluded by all euro area Member States, this fact is a consequence of a wish to maintain political coherence, rather than of a legal obligation that would stem from the EU Treaties or secondary law.