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OPINION OF THE LEGAL SERVICE¹

Subject: Proposal for a Regulation of the European Parliament and of the Council on the establishment of a European Investment Stabilisation Function

- choice of legal basis
- restriction of the group of Member States entitled to receive financial assistance
- financing in accordance with an intergovernmental instrument

I. INTRODUCTION

1. On 1 June 2018, the Commission presented a proposal for a regulation of the European Parliament and of the Council on the establishment of a European Investment Stabilisation Function (the "Proposal"²).

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² Doc. 9615/18.

2. The Proposal is, together with the proposal for a Regulation on the establishment of the Reform Support Programme³, a follow-up to the Commission Communication of 6 December 2017 on new budgetary instruments for a stable euro area within the Union framework, which is a part of a package of initiatives to deepen Economic and Monetary Union.
3. The Proposal is based on Article 175(3) TFEU. It foresees the provision of financial assistance in the form of loans and interest rate subsidies for public investments to a Member State that is experiencing a large asymmetric shock. The instrument would apply only to Member States whose currency is the euro and those that participate in the Exchange Rate Mechanism (“ERM II”). It is meant to be supplemented by an intergovernmental agreement on the transfer of funds that would be used to finance the interest rate due by the recipients of assistance.
4. At the meeting of the Eurogroup Working Group - Alternates of 14 September 2018 and of the Financial Counsellors of 25 September 2018, the Council Legal Service was asked to present its views on the suitability of the legal basis proposed by the Commission for the adoption the Proposal as well as on the restriction of the group of Member States entitled to receive financial assistance under the Proposal. This opinion confirms and further develops the views provided orally by the Council Legal Service in those meetings.
5. In addition, this opinion will also address a specific question raised in respect of the foreseen financing of the EISF interest rate subsidy in accordance with an intergovernmental instrument.
6. The proposal for a Regulation on the establishment of the Reform Support Programme is the object of another opinion by the Council Legal Service, still to be issued. Both the present opinion and the one on the Reform Support Programme have to be read jointly as both proposals share common elements of examination.

³ Doc. 9606/18.

II. LEGAL BACKGROUND

i) Relevant Treaty provisions

7. Article 3 TEU identifies the aims of the European Union. According to the third subparagraph of paragraph 3 of that provision, “[The Union] shall promote economic, social and territorial cohesion, and solidarity among Member States”.

8. Economic, social and territorial cohesion forms the object of Title XVIII of Part III of the TFEU. Article 174(1) TFEU reads as follows:

"In order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion.

In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions. (...)"

9. Article 175 TFEU provides as follows:

"Member States shall conduct their economic policies and shall coordinate them in such a way as, in addition, to attain the objectives set out in Article 174.

(...)

If specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure (...)."

10. Article 120 TFEU, which forms part of Title VIII TFEU (“Economic and Monetary Policy”), Chapter 1 (“Economic policy”), reads as follows: *“Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 TFEU (...).”*

ii) General description of the Proposal

11. The Proposal establishes a European Investment Stabilisation Function („EISF“) which is to provide financial assistance for public investments to a Member State which is experiencing a large asymmetric shock (the „EISF support“).
12. According to the preamble, the consequences of the unprecedented financial crisis and economic downturn have hit certain Member States more severely than others in view of the differences in the rebalancing tools that were available to those whose currency was the euro (recitals 4 and 5). The financial crisis has resulted in pro-cyclical patterns for fiscal policies that have been detrimental to the quality of public finance and in particular for public investment. Such shortcomings have in turn contributed to widespread differences in macro-economic performances between Member States, imperilling cohesion. Consequently, additional instruments are necessary in order to support Member States to stabilize their economy by preserving public investments in the event of large asymmetric shocks (recitals 6 to 8).
13. A Member State is considered to experience a large asymmetric shock if its unemployment rate has deteriorated in accordance with parameters and thresholds provided by the Proposal (Article 4 and recitals 13 and 14 thereof).
14. According to Article 1(3), the EISF support is only available for Member States whose currency is the euro (“euro Member States”) and other Member States that participate in the exchange rate mechanism referred to in Article 140(1) TFEU (“ERM II Member States”).
15. A Member State is eligible to receive EISF support subject to strict conditionality, i.e. if it complies with decisions and recommendations that have been adopted under the Union’s preventive and corrective arms of the Stability and Growth Pact (Article 3(1) of the Proposal).

16. The EISF support is to be provided in the form of loans („EISF loan“). Whilst the beneficiary Member State is held to pay back the principal of the loan, the interest part („EISF interest rate subsidy“) is, in principle, subsidised (Article 1(2) of the Proposal, see below at paragraph 20). The amount of the loan assistance to be provided is determined in accordance with a pre-established formula specified in Article 8 of the Proposal, relating to parameters such as the increase in unemployment of the requesting Member State, the average total public investment in the EU and the GDP of the EU and of the Member State concerned. The outstanding amount of loans is limited to EUR 30 billion in principal (Article 7 of the Proposal).
17. As regards the EISF loan, the beneficiary Member State is obliged, in any given year in which it receives such loan, to invest an amount corresponding to at least the amount of the EISF loan in eligible public investment (Article 5(1)(a) of the Proposal), eligible public investment being defined in Article 2(3) of the Proposal on the basis of elements provided for, in particular, in the Structural and Cohesion funds.
18. In addition to an obligation to invest into defined cohesion policy objectives, the beneficiary Member State is obliged to maintain, in principle, the same level of its public investment as the average level in the five previous years (Article 5(1)(b) of the Proposal).
19. A corrective mechanism is foreseen if the conditions are not respected (Article 5(3) of the Proposal). In such a case, the Commission is obliged to request early repayment of the EISF loan (either partial or in the entirety) and the Member State concerned loses the entitlement to receive any interest rate subsidy.

20. While the EISF loan is to be provided as back-to-back operations that are guaranteed by the Union budget (Article 12 of the Proposal), the EISF interest rate subsidy is to be provided from the Stabilisation Support Fund (“SSF”) that is to be established by the EISF Regulation (Article 17 of the Proposal). The revenues of the SSF consist of contributions from Member States, to be provided as external assigned revenue in accordance with an intergovernmental agreement (“IGA”) to be concluded between the euro area and ERM II Member States⁴. The IGA will determine the calculation and the transfer of their financial contributions to the SSF (Article 2(1) of the Proposal). A Member State is eligible to receive such subsidy only if it complies with its obligations under the IGA (Article 3(2) of the Proposal).

III. LEGAL ANALYSIS

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

- a) Is Article 175(3) TFEU an appropriate legal basis for the adoption of the Proposal?
- b) Is it possible to restrict the group of Member States that are entitled to receive the EISF support under the Proposal to euro area and ERM II Member States?
- c) Is it possible to provide for the financing of the EISF interest rate through an intergovernmental instrument?

⁴ Other sources of revenue being returns on invested resources of the SSF and repayment of interest rate subsidies where the beneficiary Member State does not comply with the conditions for supported public investment under Article 5 of the Proposal.

A. Appropriateness of the legal basis of the Proposal

22. The first question to elucidate is the appropriateness of the legal basis proposed for the adoption of the Proposal, i.e., Article 175(3) TFEU, which in order to attain the objectives of economic, social and territorial cohesion, provides for specific actions if proven necessary outside the Union Structural Funds⁵.
23. According to well-established established case law of the Court of Justice of the EU ("the Court"), the choice of the legal basis for a Union measure must rest on objective factors which are amenable to judicial review, in particular the aim and content of that measure⁶.

a) Preliminary remarks

24. The Proposal has been submitted in the framework of the Commission initiative concerning the deepening of the Economic and Monetary Union. In this context, certain doubts have been expressed as to whether the Proposal constitutes an instrument of coordination of economic policies among the Member States, rather than an instrument of cohesion policy.
25. Under this scenario, it is useful to make some preliminary remarks on the relationship between cohesion policy and economic policy. To that end, the literal and systemic interpretation of the Treaties is of particular importance.

⁵ It is observed that other instruments that have been adopted on the basis of Article 175(3) TFEU include the European Union Solidarity Fund (Regulation (EC) No 2012/2002 establishing the European Union Solidarity Fund), the European Globalisation Adjustment Fund (Regulation (EU) No 1309/2013 on the European Globalisation Adjustment Fund), the Structural Reform Support Programme (Regulation (EU) 2017/825 on the establishment of the Structural Reform Support Programme for the period 2017 – 2020), the European Fund for Strategic Investment (Regulation (EU) 2015/1017 on the European Fund for Strategic Investment, the European Investment Advisory Hub and the European Investment Project Portal, the "EFSI") and Regulation (EC) 1968/2006 concerning Community financial contributions to the International Fund for Ireland (and successor regulations).

⁶ See, for instance, judgments in C-43/12, *Commission v Parliament and Council*, EU:C:2014:298, paragraph 29 and case-law cited; C-137/12, *Commission v Council*, EU:C:2013:675, paragraph 52 and case-law cited; C-130/10, *Parliament v Council*, EU:C:2012:472, paragraph 42; C-411/06, *Commission v Parliament and Council*, EU:C:2009:518, paragraph 45 and case-law cited.

26. It follows from Article 3(3) TEU that "*The Union ... shall promote economic, social and territorial cohesion, and solidarity among Member States.*" That objective is further specified in Articles 174 *et seq.* TFEU. Article 175 TFEU specifically provides that "[t]he formulation and implementation of the Union's policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 174 and shall contribute to their achievement." Consequently, cohesion objectives, i.e. the objective of attaining an overall harmonious development of the Union and to develop and pursue Union actions leading to the strengthening of its economic, social and territorial cohesion, is an overarching objective of the Treaties that feeds into other Union policies.
27. This means that cohesion policy informs other Union policies, including, most relevantly for the present purpose, economic policy. Indeed, according Article 175(1) TFEU, Member States are obliged to conduct their economic policies and coordinate them in such a way as, in addition, to attain the cohesion objectives. It follows that, under the Treaties, these two policies are complementary.
28. Nevertheless, the relationship between the cohesion and economic policies is in one sense only. The Treaties provide for an obligation to orient Member States' economic policies towards the objectives of cohesion. However, cohesion cannot be used as an instrument to achieve the Union aims in other policy areas, such as economic policy. The Court has confirmed this by stating that cohesion policy is "*administered in accordance with the [Union] regulatory framework and the content of which does not extend beyond the scope of the Union policy on economic and social cohesion.*"⁷
29. It follows, that while economic policy is contributory to the one on cohesion, the latter cannot be used with the preponderant aim to enhance the economic coordination between Member States.

⁷ See case C-166/07, European Parliament v. Council, International Fund for Ireland ("IFI"), EU:C:2009:499, paragraph 46.

30. The above entails the following consequences in the relationship between cohesion and economic policies of the Union: first, cohesion instruments cannot contain autonomous measures and procedures of economic coordination independent and separated from those laid down under the relevant provisions on economic policy under the Treaties and secondary legislation (such as the procedure of multilateral surveillance - Article 121(6) TFEU or the procedure to compel Member States to abide by their budgetary obligations - Article 126 TFEU). Otherwise, the instrument in question would extend beyond the field of cohesion by establishing a realm of economic coordination that is severed from the relevant economic policy instruments that the Treaties provide for. However, cohesion measures may, under certain conditions, contain measures of macro-economic conditionality provided they ensue and are consistent with the results of economic coordination undertaken in accordance with the relevant powers and procedures.
31. Second, cohesion policy cannot be used with the preponderant aim of ensuring the stability of the euro area - the latter understood as the conditions, including the Member States' creditworthiness, solvability and access to markets, necessary for the optimal and proper functioning of the single currency - which is an objective that is at the core of economic policy⁸.
32. Third, cohesion policy cannot be used to support the achievement of objectives for which economic policy lays down specific instruments of financial assistance. This is the case of Articles 122(2) TFEU (where the Council may decide to grant financial assistance to a Member State which is in difficulties or seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control) and 143 TFEU (that allows for granting mutual assistance - including financial - where a non euro area Member State is in difficulties or is seriously threatened with difficulties as regards its balance of payments).
33. If the examination under the above paragraphs clarifies the relationship between cohesion and economic policies, it is necessary to examine the specific contours of cohesion policy.

⁸ See Case C-370/12, *Pringle*, EU:C:2012:756, paragraph 56.

34. Neither the Treaties nor relevant case law provide a precise definition of economic, social and territorial cohesion, to the objectives of which, as laid down in Article 174 TFEU, is Article 175(3) TFEU subordinated. The scope of Article 174 TFEU is not limited to specific sectors and is defined functionally - on the basis of its objectives - , rather than organically⁹. In this sense, the Court has stated that the Treaty provisions on cohesion policy are of a programmatic nature¹⁰.
35. The notion of cohesion policy is particularly broad and inclusive¹¹ and, given its programmatic nature, leaves a large margin of discretion to the legislator as to how the cohesion aims should be achieved. Furthermore, Article 175(3) TFEU does not set out the form which "specific actions" it provides for can take¹². It can encompass a great number of economic measures that may have a positive impact on the social and economic situation of a given region or territory and, ultimately, of the Union as a whole through increasing economic, social and territorial convergence and homogeneity as well as economic, social and territorial development and progress¹³.
36. Finally, cohesion policy is addressed to bring about economic, social and territorial convergence and homogeneity among all the Member States of the Union - and not among a subgroup of them -, even if in concrete terms its application may be limited to some of those Member States or their regions which qualify for the specific instrument of cohesion policy in view of their particular convergence needs.
37. It is in this light that the appropriateness of Article 175(3) TFEU as the legal basis of the Proposal is to be assessed.

⁹ See also the Council Legal Service opinion in doc. 14745/16, paragraph 19.

¹⁰ Case C-149/96, Portuguese Republic v Council of the European Union, EU:C:1999:574, paragraph 86.

¹¹ See Advocate General Bot in C-166/07, *IFI*, referred to above, paragraph 90. See also Council Legal Service opinion referred to in footnote 9 above.

¹² Case C-166/07, *IFI*, referred to above, paragraph 45.

¹³ Case C-166/07, *IFI*, referred to above, paragraphs 52 and 53.

b) Examination of the aim and content of the Proposal

38. The Proposal contains some elements of context that explain its economic and financial rationale. The financial crisis has been detrimental to the quality of public finances and in particular for public investment. This is said to have led to large asymmetric shocks, most notably increases in national unemployment rates above long-term averages (see recitals (6), (7) and (13) of the preamble to the Proposal).
39. The aim of the Proposal is to address these vulnerabilities by creating an instrument of stabilisation that provides financing for preserving public investments in the event of large asymmetric shocks, thus contributing to guaranteeing the cohesion that those shocks may imperil (see recitals (8) and (18) of the preamble to the Proposal).
40. This is further confirmed by the explanatory memorandum accompanying the Proposal, according to which the EISF contributes to economic and social cohesion by strengthening the resilience of Union interdependent economies and preventing the risk of negative spill-over effects¹⁴. It is intended to be a complementary tool which helps beneficiary Member States preserving eligible growth-friendly public investment in case of macroeconomic instability, and helps easing the economic adjustment and returning it to sustainable path, rather than deepening and lengthening the recession which would negatively impact economic and social cohesion.

¹⁴ See pages 1 and 2 of the explanatory memorandum.

41. On the other hand, the Proposal's objective to ensure cohesion is clearly distinct from the objective of safeguarding the stability of the euro area. Even though the cohesion aims may have indirect positive repercussions on the stability of the euro area¹⁵, both objectives remain separated. The aim of the proposal is not to create the conditions for the optimal and proper functioning of the euro, thus its stability; it is addressed to assist Member States especially affected by asymmetric shocks (i.e. those totally or partially deprived of their exchange rate sovereignty, as will be further explained below at paragraphs 5249 and following) so that their public investment capacity is restored or preserved. Neither the activation of the EISF (Article 4 of the proposal) nor its maintenance and termination (Article 5 of the proposal) depend of a threat to the stability of the euro area - as is the case for activating existing or proposed mechanisms for guaranteeing the stability of the euro, such as the European Stability Mechanism and the European Monetary Fund - but of economic and social circumstances of structural value susceptible of placing Member States in a situation of dis-convergence.¹⁶
42. Finally, the EISF does not pursue the objectives of the specific financing instruments laid down under the economic policy referred to above at paragraph 32. On the one hand, the fact that the EISF is to be permanent makes it unsuitable to be based on Article 122(2) TFEU¹⁷; likewise, Article 143 TFEU, a legal basis aimed at non-euro area Member States to address problems in their balance of payments, is clearly unfitted for the objectives pursued by the EISF.

¹⁵ See in this sense recital 2 of the Proposal.

¹⁶ See page 5 of the EISF Proposal.

¹⁷ See Case C-370/12, *Pringle*, referred to above, paragraph 65, where the Court conceives the instrument under Article 122(2) TFEU as a temporary exceptional one.

43. Concerning the content of the Proposal, the EISF financial support, whether in the form of the EISF loan or the EISF interest rate subsidy, is to be used exclusively for the purpose of cohesion policy-driven public investment (either those defined in the future common provision regulation for the cohesion policy, or social investment into education and training, see Article 5(1)(a) of the Proposal). The beneficiary Member State is obliged, in any given year in which it receives an EISF loan, to invest at least an amount of the EISF loan into such cohesion policy-driven public investment and, moreover, to maintain the long-term level of its public investment (see Article 5(1)(b) of the Proposal). The continuation of the support is linked to the maintenance of the level of public investment required and, more importantly, the maintenance of public investment in programmes supported by the Union under the Structural funds (Article 5(2) of the proposal).
44. The cohesion-policy content of the Proposal is also underpinned by the structure of the formula that determines the size of the EISF loan for the beneficiary Member State, by taking into account the maximum level of eligible public investment in the Member State concerned and the severity of the asymmetric shock that the EISF support is meant to cushion (see Article 8 of the Proposal).
45. Finally, Article 20 of the Proposal provides an obligation for the Member States to take the necessary action to achieve and maintain public investment management systems and practices of high quality and foresees, in Annex I, the methodology for assessing the quality of such systems and practices by the Commission.
46. Moreover, the Proposal does not contain autonomous measures or procedures of economic coordination, separated from, or overlapping with, those laid down under the relevant economic policy powers laid down in the Treaties and secondary legislation. Although the eligibility of a Member State to receive EISF support is conditional upon compliance of measures of economic policy, the latter are decided in accordance with the applicable procedures under the Treaties, notably, the ones under Articles 121 and 126 TFEU (see Article 3(1) of the Proposal).

47. Such eligibility rules thus consist of macro-economic conditionality in respect of which the Council Legal Service has already concluded that it can be envisaged in relation to funding to be provided by Structural Funds, as excessive budgetary expenditure in relation to financial assistance may undermine the efficiency of the Union policies¹⁸. It is worth observing that macro-economic conditions have been established in the Common Provisions Regulation¹⁹.
48. It follows that, in view of the analysis of its aim and the content, the Proposal forms part of the specific actions which, when they prove necessary outside the Structural funds in order to realise the objectives referred to in Article 174 TFEU, may be adopted in accordance with Article 175(3) TFEU.

B. Restriction of the Member States that are entitled to receive EISF support to a specific group of Member States

49. According to Article 1(3) of the Proposal, the EISF support would only be available for euro area Member States and for ERM II Member States.
50. The question to elucidate is whether measures adopted on the basis of Article 175(3) TFEU may be limited in their application to a group of certain Member States only.

¹⁸ See Council Legal Service opinion 12944/12, in particular paragraphs 14 to 24. In the light of the criteria set out in that opinion, it might be necessary to adjust recital 15 of the Proposal in order to emphasise the link between the conditions and the effectiveness of the EISF financial assistance.

¹⁹ See Article 23 of the Common Provisions Regulation.

51. As a matter of principle, Union law applies uniformly to all Union Member States (see Article 52 TEU)²⁰. Member States may not enjoy derogations, except where expressly provided for in primary law or when, otherwise, derogations in question are temporary and objectively justified. A different situation from derogations for individual Member States is the one where the Union act only applies to a group of Member States on the basis of specific attributes that distinguish them in an objective and characterized manner²¹. Moreover, those specific attributes must be relevant for the objectives of the Proposal and the area of competence to which that Proposal belongs.
52. The application of the Proposal to Member States whose currency is the euro and the ERM II Member States is not the consequence of a derogation. It rather stems from a limitation of its scope by reason of certain attributes which are specific to the said Member States (see Article 1(3) of the Proposal). It is then necessary to ascertain whether those attributes are objective and sufficiently characterized and whether they are relevant for the objectives of the Proposal, and of cohesion policy.
53. Euro area Member States are deprived of their monetary sovereignty, through their own monetary policy or exchange rate instruments. Likewise, ERM II members are expected to observe normal fluctuation margins provided by the exchange rate mechanism of the European Monetary System, thus being deprived to a large extent of the capacity to devalue their national currencies against the euro.
54. The loss of control over monetary and exchange rate policy place these Member States in a special position: when facing large asymmetric shocks they cannot rely on traditional adjustment mechanisms such as devaluing their currency; they have to rely on instruments such as fiscal policy and structural reforms and the single monetary policy that, according to the Proposal, have proven insufficient to absorb the said large asymmetric shocks (see recitals 4 and 5 of the preamble, as well as page 2 of the explanatory memorandum).

²⁰ On the uniform application of Union law in all Member States, see joined cases 205 to 215/82, *Deutsche Milchkontor GmbH and Others v. Federal Republic of Germany*, EU:C:1983:233, paragraph 17; Case 182/84, *Criminal proceedings against Miro BV*, EU:C:1985:470, paragraph 14.

²¹ See also Council Legal Service opinion 13524/13 concerning so-called Single Resolution Mechanism Regulation, in particular 70 to 75.

55. The special position of euro area Member States and of ERM II Member States, consisting on the limited means to face large asymmetric shocks (notably their monetary policy and exchange rate instruments), may have negative consequences in terms of the level of public investments which may in turn affect their overall convergence and cohesion within the Union as a whole (see recitals 6, 8 and 18 of the Proposal).
56. It is actually from this point of view that the specific attributes of euro area and ERM II Member States are relevant for the objectives of cohesion policy as well as those of the Proposal: to restore an adequate level of public investment in Member States that do not have at their disposal all the mechanisms for gaining back competitiveness and may be thus potentially affected, in a distinct manner, by large asymmetric shocks.
57. The Council Legal Service will not examine the merits of the economic reasoning that underlies the limited application of the envisaged Regulation to euro area and ERM II Member States, as described above. Suffices to say that the overall economic rationale of the Proposal constitutes a plausible element of justification to allow the legislator to exercise the large margin of discretion that it holds in this area of Union competence.

C. Financing of the EISF interest rate subsidies in accordance with an intergovernmental instrument

58. While the SSF would be established by the Proposal, the revenues that would feed into the SSF would consist of the contributions from the Member States to be made in accordance with an IGA. A question has arisen as to whether the Member States that are, under the Proposal, entitled to receive the EISF support, would be obliged to become parties to such IGA.

59. Whilst, as a matter of principle, Member States are entitled to conclude an agreement among themselves in an area of their competence, they may not disregard their duty to comply with Union law. Consequently, it would in principle be possible that the commitment of the Member States to provide additional contributions to the Union beyond its system of own resources is set out in an intergovernmental instrument that the Member States concerned would conclude among themselves²².
60. However, the conditions enunciated by the Court for agreements concluded among Member States to be compatible with EU law, most prominently in *Pringle*²³, would have to be respected. More particularly, the intergovernmental instrument must respect the principles of autonomy and of primacy of the Union legal order, by most notably including consistency clauses²⁴ and mechanisms that anchor the intergovernmental action to Union law (such as the attribution of certain tasks of management and jurisdiction to EU institutions). Finally, the intergovernmental agreement must not encroach on the competences of the Union or of its institutions²⁵. When negotiating, concluding and implementing an intergovernmental agreement, the Member States have to comply with the principle of sincere cooperation set out in Article 4(3) TEU²⁶.

²² It is recalled that, similarly, the Single Resolution Fund that is established by the Single Resolution Mechanism Regulation (Regulation (EU) No. 806/2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund, the "SRMR") is filled on the basis of transfer of funds collected by the Member States from their credit institutions laid down in an intergovernmental agreement ("Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund"). In the same vein, the Facility for Refugees in Turkey is partially financed by contributions of the Member States in accordance with the Common Understanding.

²³ Referred to in footnote 8 above.

²⁴ See paragraphs 68 and 69, 109 and 121 of the *Pringle* judgment.

²⁵ See also Council Legal Service opinion 7862/16 on EDIS, in particular paragraphs 50 to 55.

²⁶ See paragraphs 148 et seq. of the *Pringle* judgment.

61. Whether a Member State becomes a contracting party to such IGA is entirely a matter of each Member State discretion. Indeed, Union law may not impose an obligation on a Member State to conclude an intergovernmental instrument²⁷. Article 175(3) TFEU on which the Proposal is based may not be used to compel, directly or indirectly, Member States to make further contributions to the Union beyond the system of Own Resources of the Union, as laid down in Article 311 TFEU and the Own Resources Decision²⁸. In the system as proposed by the Commission, the obligation for the Member States to transfer the contributions to the Union would be born in the IGA, and not in Union law, meaning that the enforceability instruments of the Union for compelling Member States to comply with their obligations under the said IGA would in principle not be available. As foreseen in the Proposal, should an euro area Member State or an ERM II Member State decide not to conclude such IGA, it could remain eligible for the purpose of receiving an EISF loan but would be ineligible for receiving the EISF interest rate subsidy²⁹.

IV. CONCLUSION

62. The Council Legal Service is of the opinion that:

1. Article 175(3) TFEU is the appropriate legal basis for the adoption of the Proposal.
2. The restriction of the group of Member States that are entitled to receive EISF support to euro area and ERM II Member States only is objectively justified and relevant to the objectives of the EISF.
3. It is at the discretion of each euro area or ERM II Member State to become or not a contracting party to the IGA.

²⁷ In this respect, the reference to "*all Member States*" in the definition of IGA proposed in Article 2(1) of the EISF Proposal is misleading.

²⁸ Council Decision (EU, Euratom) No 2014/335 of 26 May 2014 on the system of own resources of the European Union.

²⁹ See Article 3(2) of the EISF Proposal. That provision should, in the first place and in addition to compliance with the Member State obligations under the IGA, include a condition that the relevant Member State is a contracting party to such IGA. Similarly, recitals 27 and 28 would need to be adjusted accordingly.