



Brussels, 23 January 2020  
(OR. en)

5483/20

LIMITE

JUR 36  
ECOFIN 29  
UEM 12  
REGIO 6  
CADREFIN 9  
CODEC 40

---

---

**Interinstitutional File:  
2018/0213(COD)**

---

---

## **OPINION OF THE LEGAL SERVICE<sup>1</sup>**

---

From: Legal Service  
To: Financial Counsellors

---

Subject: Proposal for a Regulation of the European Parliament and of the Council on the establishment of the Reform Support Programme

- BICC - compatibility of the proposed allocation method with the cohesion legal basis (article 175, 3rd paragraph, TFEU)

---

### **I. INTRODUCTION**

1. On 31 May 2018, the Commission presented a proposal for a regulation of the European Parliament and of the Council on the establishment of the Reform Support Programme (the "RSP Proposal"<sup>2</sup>).

---

<sup>1</sup> 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.

<sup>2</sup> Doc. 9606/18.

2. The proposal is, together with the proposal on a European Investment Stabilisation Function (the "EISF" Proposal)<sup>3</sup>, 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. Its main instruments, the Reform Delivery Tool and Convergence Facility aim respectively at providing financial incentives for the implementation of non-investment related structural reforms by the Member States and at supporting reforms relevant for preparation for membership in the euro area.
4. Following political debates at the Euro Summit and at the Eurogroup,<sup>4</sup> the need was identified to create a budgetary instrument for convergence and competitiveness (BICC) specifically dedicated, in light of their special economic challenges, to the members of the euro area and those Member States that participate in the exchange rate mechanism (ERM II). The political debate also identified the need for a convergence and reform instrument (CRI) dedicated to the non-euro area Member States.
5. On 13 December 2019, the Presidency submitted a text of the RSP proposal where amendments for the incorporation of the two instruments referred to above - the BICC and the CRI - were made. The legal basis of the proposal is the third subparagraph of Article 175 TFEU, as initially proposed by the Commission. This opinion is based on the wording of the proposal as reflected in the last available presidency document.<sup>5</sup>

---

<sup>3</sup> Doc. 9615/18.

<sup>4</sup> See Euro Summit Statement of 14 December 2018, the Eurogroup Term Sheets of 14 June 2019 and 9 October 2019 and the 9 October 2019 Letter of the President of the Eurogroup to the President of the European Council.

<sup>5</sup> WK 14252/2019 of 13 December 2019.

6. At the meeting of the Financial Counsellors on 28 November 2019, the Council Legal Service was asked to present its views on whether the criteria for the allocation of financial contributions to the Member State participating in the BICC are compatible with the third subparagraph of Article 175 TFEU as legal basis for the instrument. This written opinion confirms and further develops the opinion provided orally by the Council Legal Service in that meeting. It complements the written opinions that the Council Legal Service has already provided in relation to the original RSP proposal and to the EISF proposal, hereinafter referred to, respectively, as the RSP opinion<sup>6</sup> and the EISF opinion.<sup>7</sup>

## 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. The first subparagraph of Article 174 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. (...)"*

---

<sup>6</sup> Doc. 6582/19, the “RSP opinion”.

<sup>7</sup> Doc. 5347/19, the “EISF opinion”.

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 (...)."*

**ii) *The allocation of financial contributions under the BICC***

10. According to the proposal, the BICC is available to Member States whose currency is the euro and also to those Member States whose currency is not the euro, but which participate in the ERM II with a view to joining the single currency, hereinafter referred to as "the participating Member States".
11. The objective of BICC is to promote the Union's economic, social and territorial cohesion by contributing to enhance the convergence and competitiveness of the euro area Member States, notably by improving their resilience and adjustment capacity and, as a consequence, improving the functioning of the economic and monetary union (Article 4). In order to do so, the BICC aims at providing participating Member States with financial support with a view to achieving reforms and investment as set out in the reform and investment packages that Member States wishing to receive support shall submit to the Commission (Article 5(2)(a) of the proposal).

12. Each participating Member State is entitled to a maximum financial contribution, i.e., a possible maximum amount available for each of them under each stage and call organised under the Programme. The maximum financial contribution is allocated according to two fundamental criteria: the population of the beneficiary Member State as a share of the total euro area population and the inverse of the ratio of the per capita Gross Domestic Product (GDP) of the beneficiary Member State to the average GDP per capita of the euro area (see Article 7f and Annex -I of the proposal). A useful clarification of the meaning and effects of these criteria was made by the Commission services in a non-paper distributed to the Euro Group Working Group - Alternates on 16 October 2019.
13. In addition, the methodology proposed corrects the effect of the application of the two main criteria identified in paragraph 11 by setting a "floor" level for the maximum financial contribution that is allocated to each participating Member State, through a formula that would work as follows: the Gross National Income (GNI) share of the beneficiary Member State over the total GNI of the euro area is applied over the total BICC financial envelope (GNI share). If the amount resulting from applying the population and GDP inverse criteria were lower than the 70% of the GNI share, the maximum financial contribution of the beneficiary Member State would be corrected upwards that 70% ("70% GNI floor", see Annex -I of the proposal).
14. Finally, the proposal sets out two further parameters for allocation that relate to the specific economic situation of the participating Member States and the quality of the proposed packages of investment and reforms. The first additional parameter foresees that Member States bear a co-financing of the reform and investment packages of 25% of the amount of their estimated total costs. However, a mechanism is put in place to halve the co-financing rate in case the Member State concerned were to suffer a severe economic downturn (see Article 7l of the proposal). The second parameter foresees that the maximum financial contribution allocates the 80% of the funds, with the remaining 20% to be used as an additional contribution (top-up) to support those reform and investment packages that have been assessed as particularly ambitious as measured against the strategic orientations for reform and investment priorities for the euro area.

15. The actual allocation of financial contributions to participating Member States takes place in stages and calls according to Article 7g. In the first stage, lasting 24 months, half of the 80% of the funds available under the BICC is to be made available to participating Member States which may submit proposals for packages of investments and reforms. If successful, participating Member States could receive up to their maximum allocation foreseen. In the second stage, lasting another 24 months, the other half of the funds available plus the unused amount from the first stage is made available to the participating Member States. In a third stage lasting until the end of the Programme, any unused amounts from the first two stages are to be allocated on the basis of a system of periodic calls organised by the Commission.
16. The amount of the actual financial contributions provided to the participating Member States under the BICC is based on the estimated total costs of the package of investments and reform proposed by the Member State concerned (Article 7k(2)) and is paid in one instalment, upon assessment by the Commission that the relevant milestones and targets have been completed (Article 7n).

### **III. LEGAL ANALYSIS**

17. This opinion will focus exclusively on the question whether the proposed allocation method of BICC is compatible with the legal basis of the proposal, i.e., the third subparagraph of Article 175 TFEU.
18. According to well-established case law of the Court of Justice ("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 measure<sup>8</sup>, i.e. here the relevant allocation criteria.

---

<sup>8</sup> 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.

19. On the basis of that case law, the question to be elucidated is whether the allocation parameters laid down in the proposal, described in paragraphs 10 to 16 above, are relevant for achieving the objectives of cohesion as laid down in Article 174 TFEU, i.e., strengthening the economic, social and territorial cohesion of the Union, objectives which the proposal itself declares to pursue (Articles 4 and 5 thereof).
20. At the outset, two remarks should be made. First, as the cohesion policy is formulated by the Treaties in broad and programmatic terms, the EU legislator has a large margin of discretion as to how those aims should be achieved, including the establishment of the allocation criteria of the particular cohesion instrument.<sup>9</sup> Second, the question under consideration has to be assessed by examining the overall cohesion effects of the different allocation criteria taken as a whole, i.e. on the basis of their global interplay and final outcome, and not by examining each of those criteria in an individual or isolated manner.
21. As described above, the proposed criteria for allocation are i) the fundamental ones based on population and inverse GDP; ii) a subsidiary one, also referred to as the "70% floor" based on GNI; iii) criteria based on the specific economic situation of the Member State concerned; and iv) criteria based on the quality of the projects of reform and investment submitted by the participating Member State. This opinion will in turn examine the cohesion relevance of each of these criteria as well as their overall cohesion effects.

---

<sup>9</sup> See points 26 to 36 of the EISF opinion, and in particular points 34, 35 and 36 thereof. See also case C-166/07, *European Parliament v. Council, International Fund for Ireland ("IFP")*, EU:C:2009:499, paragraphs 45, 52 and 53.

***i) Population and inverse GDP***

22. The Council Legal Service has already had the occasion to stress in its RSP opinion that population may constitute a possible parameter for the distribution of cohesion funds and is therefore compatible with the third subparagraph of Article 175 TFEU as a legal basis. However, that criterion does not provide any additional element in support of the cohesion purpose of the proposal, since it is neutral as regards the aim of reducing disparities between the levels of development of the least favoured regions (second subparagraph of Article 174 TFEU). It should therefore be accompanied by other factors linked to the relative degree of prosperity of Member States.<sup>10</sup>
23. This is actually the case of the proposed inverse of the ratio between the per capita GDP of each participating Member States and the euro area per capita GDP, which is a strong indicator of the relative degree of prosperity of Member States and has the effect of allocating greater resources to the less prosperous Member States in absolute terms, thus clearly in line with the cohesion purpose of the proposal.

***ii) The "70% floor" for allocation based on GNI***

24. The two fundamental criteria under i) above are supplemented by the additional 70% GNI floor as described in paragraph 13 above, which sets a minimum level for the maximum financial contribution allocated to participating Member States.
25. Some delegations have argued notably in the Council and in its preparatory bodies that a guarantee for minimum financing based on the relevant Member State's share of GNI - GNI being a key parameter for determining Member States' contributions to the EU budget under the own resources system - would incorporate a refunding or "*juste retour*" logic aimed at ensuring the participating Member States a return of what they contribute to the EU general budget. According to these delegations, this refunding logic would put at jeopardy the cohesion objectives of the instrument.

---

<sup>10</sup> Point 33 of the RSP opinion.



26. The Council Legal Service is of the opinion that the impact of this supplementary "floor" criterion on the overall allocation methodology of the BICC is not such as to put into question its cohesion result. This criterion is not a primary allocation parameter but a subsidiary one which intervenes as a "floor" or lower threshold ensuring a minimum allocation for participating Member States only if the application of the primary criteria - namely the population and the inverse per capita GDP - were to result into a contribution below the 70% threshold. It is also recalled that this criterion does not apply to the totality of the funds available under the BICC, but to 80% of those funds, the remaining 20% being available to react to country-specific economic challenges (see in this respect paragraph 30 below).
27. Moreover, the "floor" criterion - based on GNI - can be reconciled with the cohesion purposes of the proposal, bearing in mind the very specific nature of this cohesion instrument which aims at bringing convergence and competitiveness within the euro area through the implementation of reforms and investments. Actually, in an area so economically integrated as the one of the monetary union, the implementation of eligible reforms and investments by bigger economies (i.e., those with the higher share of GNIs) may have a more significant impact in bringing about the overall convergence and competitiveness of the euro area as a whole<sup>11</sup>. Therefore, the "floor" criterion should not be regarded as a mechanism of budgetary compensation to participating Member States, but as one inserted in the overall cohesion logic of the BICC<sup>12</sup>.

---

<sup>11</sup> It is advised that recitals justifying recourse to a GNI based parameter in the sense explained in this opinion are incorporated in the preamble of the proposal in the course of the discussions. In particular, these recitals could show that the very specific nature of the BICC - dedicated to the convergence and competitiveness within the euro area through the implementation of reforms and investments - make it different from classical cohesion instruments, thus explaining recourse to a shared GNI-based criterion in this particular case.

<sup>12</sup> In that respect, it is recalled that the financing of the general budget of the Union is regulated in the Own Resources Decision based on Article 311 TFEU. It is not possible to integrate, in an act of secondary law founded on another legal basis, compensation mechanisms in respect of the financing of the Union budget or of specific programmes or actions.

*iii) Criteria related to the specific economic situation of the participating Member States*

28. The two further parameters foreseen in the proposal for allocation that relate to the specific economic situation of the participating Member States should also be added to the assessment of the compatibility of the cohesion legal basis.
29. On the one hand, the proposal lays down rules on co-financing which would allow, in case of severe economic downturn, to halve the ratio of national co-financing of 25% (see article 71 thereof). While the modulation of the co-financing does not increase *per se* the global amounts allocated to each Member State, it allows to modify the financial burden that a Member State has to bear in order to benefit from the funding, thus increasing the capacity of those that are in difficult economic situations to absorb the BICC funding. By adapting the use of BICC funds to the economic cycle of the Member State concerned, the proposal takes into account the special convergence needs of Member States in severe difficulties, which can clearly be regarded as a cohesion relevant approach.
30. On the other hand, the proposal lays down that 20% of the total financial envelope for BICC may be used to react to country specific challenges by supporting packages of reforms and investments that are especially ambitious. The same reasoning developed in paragraph 29 above in relation to the modulation of the co-financing for Member States suffering from severe economic downturns can be made here: by incorporating in the formula for allocation the economic challenges of the participating Member States, the proposal addresses their specific convergence needs, which is clearly in line with the cohesion legal basis.

*iv) Criteria based on the quality of the reform and investment projects*

31. The actual application of all the parameters for allocation under i), ii) and iii) above result in setting a maximum available amount for each participating Member State. However, this means neither that this maximum amount is reserved for each participating Member State and needs to be reached, nor that the participating Member States have a vested entitlement to receive the totality of it:<sup>13</sup> access to funding is quality-related, i.e., it depends on the eligibility of reforms and investments presented by the participating Member States, in accordance with Articles 7i and 7j of the proposal; moreover, participating Member States may enjoy an actual level of funding that goes beyond the envisaged maximum amounts since at the final stage possible unused amounts are re-allocated among all participating Member States, rather than being de-committed.
32. As a result, the procedure for the allocation (and re-allocation) of funds is designed to incentivise an efficient use of funds for the pursuit of the specific objectives of BICC, i.e. to implement reforms and investments that are capable of bringing about convergence and competitiveness. It aims at encouraging Member States to submit quality and ambitious packages of investment and reforms measures against parameters that are cohesion relevant.
33. The Council Legal Service is therefore of the opinion that the combined application of all the allocation criteria laid down in the proposal leads to an overall redistribution of funds available under the BICC in line with its specific convergence and competitiveness objectives and, ultimately, compatible with the cohesion objectives laid down in the Treaties<sup>14</sup>. In addition, the selection of those criteria fall within the large margin of discretion available to the EU legislator in the field of cohesion.

---

<sup>13</sup> The allocation rules under BICC establish a mechanism which is intermediary between a system of "national envelopes" whereby specific amounts are a priori reserved for each Member States, and a system of competitive bidding, whereby Member States compete for all funds on the basis of the relevance and quality of their projects.

<sup>14</sup> The overall redistributive effect of the proposed mechanism is illustrated by a non paper containing a simulation table prepared by the Commission services and distributed to the members of the Euro Group Working Group Alternates on 16 October 2019.

#### IV. CONCLUSION

34. The criteria for the allocation of financial contributions to the participating Member States laid down in the proposal to establish a BICC are compatible with the cohesion legal basis of the instrument as provided for in the third subparagraph of Article 175 TFEU.
-