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

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To:	Delegations
Subject:	Proposal for a Regulation of the European Parliament and of the Council on the establishment of the Reform Support Programme <ul style="list-style-type: none"><li>• "choice of legal basis"</li><li>• "restricted geographical scope of application"</li></ul>

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### **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>). The proposal is, together with the proposal on a European Investment Stabilisation Function<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.

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<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.

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

2. The proposal for a Regulation on the establishment of a European Investment Stabilisation Function (hereinafter, the EISF proposal) has been the object of an opinion of the Council Legal Service of 15 January 2019, with which the present one is to be read jointly<sup>4</sup>. Reference will be made to the relevant paragraphs of that opinion whenever pertinent.
3. The RSP Proposal encompasses three different instruments: a Reform Delivery Tool, a Technical Support Instrument and a Convergence Facility. The Commission has proposed Article 175(3) and 197(2) TFUE as the legal bases for the proposal. Notably, the Reform Delivery Tool and the Convergence Facility are budgetary actions aimed 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. They are based on Article 175(3) TFEU, which is a cohesion policy legal basis and empowers the Union to take those specific actions that may prove necessary beyond the Funds to strengthen economic, social and territorial cohesion.
4. The Convergence Facility has also a technical support component, which aims at supporting the efforts of national authorities in improving their administrative capacity to design, develop and implement the reforms covered by the Facility. Finally, capacity building is the purpose of the third instrument covered by the proposal, the Technical Support Instrument, which aims at providing technical support to Member states authorities in their efforts to design, develop and implement structural reforms. The proposal is therefore also based on Article 197(2) TFEU, which provides the legal basis for the Union to support administrative capacity in the member States.
5. At the meetings of the Economic Policy Committee on 13 September 2018 and of the Financial Counsellors on 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 of the Proposal. This opinion confirms and further develops the opinion provided orally by the Council Legal Service in those meetings.

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<sup>4</sup> See document 5347/19.

## II. LEGAL BACKGROUND

### *i) Relevant Treaty provisions*

6. The Treaty provisions relevant for the analysis in the present opinion have been identified in paragraphs 7 to 10 of the opinion of the Council Legal Service on the EISF proposal, to which reference is therefore made.

### *ii) General description of the proposal*

7. The proposal envisages to establish a Reform Support Programme ("the Programme", see Article 1 thereof). The Programme is made up of the three instruments identified above, the Reform Delivery Tool, the Convergence Facility and the Technical Support Instrument.
8. Pursuant to article 4 of the proposal, the general objectives of the Programme are twofold: the objective to contributing to improving the performance of the national economies thereby promoting resilient economic and social structures in the Member States (this is the case of the reform delivery tool and of the convergence facility for euro-area membership preparation); and the objective to contribute to strengthening the administrative capacity of the Member States (this is the case of the technical support instrument and of the convergence facility).

9. Pursuant to Article 5(2) of the proposal the following are the specific objectives of the Programme:

"(a) *as regards the reform delivery tool, the Programme shall provide Member States with financial incentives with a view to achieving the milestones and targets of the structural reforms as set out in the reform commitments entered into by Member States with the Commission (...);*

(c) *as regards the convergence facility for euro-area membership preparation the Programme shall:*

*(i) provide financial incentives to eligible Member States to help them achieve the milestones and targets of reforms that are relevant for preparation for euro-area participation, as set out in the reform commitments entered into by Member States with the Commission;*

*(ii) support the efforts of national authorities of eligible Member States in improving their administrative capacity to design, develop and implement reforms relevant for preparation for euro-area participation (...)"*.

10. Article 6 of the Proposal further defines its scope and clarifies that "*the general and the specific objectives (...) shall refer to policy areas related to cohesion, competitiveness, productivity, research and innovation, smart, sustainable and inclusive growth, jobs and investment*" and in particular to one or more of a set of 6 wide policy areas, specifically defined in letters (a) to (f).

### The Reform Delivery Tool

11. Chapter II of the proposal is devoted to the Reform Delivery Tool. Reforms eligible for funding under the tool are those that "*aim at addressing challenges identified in the context of the European Semester*" (Article 8 of the proposal). The maximum financial contribution is based on population of each Member State i.e., the more the population the higher funding (see Article 9 and annex 1 of the proposal). The allocation will be made on the basis of a proposal for reform commitments presented by the Member State concerned that will set out a number of elements including both the link with the European Semester and the expected economic impact of the reforms (Article 11(3) of the proposal).
12. When assessing the proposal, the Commission shall take into account a number of criteria, including whether the reforms are expected to address the challenges identified in the context of the European Semester and the effect on the performance and the resilience of the Member State concerned (Article 11(7) of the proposal, further specified in Annex II). In view of that assessment the Commission shall decide whether the reform commitments are "*major*" or "*significant*" or whether they are otherwise not eligible for funding (Article 12(2) of the proposal).
13. The Commission is granted the power to adopt a decision setting out the reform commitments to be implemented by the Member State, including the milestones, targets, detailed arrangements and timetable and the financial contribution (Article 12 of the proposal). The Commission also monitors whether commitments have been satisfactorily implemented, failing which the payment of all or part of the financial contribution shall be suspended (Article 15(4) of the proposal). Reform commitments are otherwise linked to the overall framework of economic governance of the Union: they are expected to address challenges identified in the European Semester (Article 11(1), 11(3)(a) and 11(7)(a)(i)); they are to be presented together with the national reform programme of the Member State concerned (Article 11(2) of the proposal); the reporting by the Member State is to be made in the

European Semester (Article 14 of the proposal). Finally, the Economic Policy Committee - an advisory body which exercises its functions in relation to the economic policy of the Union - may provide its opinion on the proposal for reform commitments of the Member State (Article 11(9) of the proposal).

14. The financial contribution shall be paid in one instalment once the Member State has satisfactorily implemented all the milestones and targets identified in its proposal (Article 12(3)). Article 15(1) further clarifies that the "*financial contribution provided to a Member State under the reform delivery tool shall take the form of financing not linked to cost*". Article 16 sets out the obligation of the Member State who received a financial contribution with respect to a reform commitment to repay it in case the conditions that allowed such payments have changed significantly.

#### The Convergence Facility

15. The Convergence Facility instrument is set out in Chapter IV of the proposal whose section 1 deals with the financial support component of the instrument. Article 25 makes clear that the "*structural reforms eligible for financing under the convergence facility shall be reforms that help eligible Member States in their preparation to join the euro area. Those reforms shall be aimed at addressing challenges identified in the context of the European Semester of economic policy coordination*".
16. The relevant provisions relating to the Reform Delivery Tool apply to the financial component of the Convergence Facility. Additionally, Article 27(2) clarifies that the proposal for reform commitments submitted by a Member State shall "*refer to the formal letter from the government of the Member State concerned to the Commission stating its clear commitment to join the euro area within a reasonable and defined timeframe and presenting a credible time-bound roadmap, after consultation with the Commission, for implementing concrete measures to prepare for successful participation in the euro area, including steps to ensure full alignment of its national legislation with the requirements under Union law (including the Banking Union)*".

17. In its assessment on the proposed reform commitments and its decision whether to grant a financial contribution, the Commission shall also refer to the said formal letter (Article 28).

### **III. LEGAL ANALYSIS**

18. 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, as far as the Reform Delivery Tool is concerned?
  - b) Is Article 175(3) TFEU an appropriate legal basis for the adoption of the Proposal, as far as the Convergence Facility is concerned?
  - c) Is it possible to limit the geographical application of the Convergence Facility to a restricted group of Member States?

#### **A. Appropriateness of Article 175(3) TFEU as legal basis of the Reform Delivery Tool**

##### ***a) Preliminary remarks***

19. The first question to elucidate is the appropriateness of Article 175(3) TFEU as the legal basis proposed for the adoption of the Reform Delivery Tool.
20. According to the well-established case law of the Court of Justice of the EU, 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>5</sup>

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<sup>5</sup> See Judgments of the Court of 11 June 1991 in Case C-300/89, *Commission v Council (Titanium dioxide)*, EU:C:1991:244, paragraph 10; of 17 March 1993 in Case C-155/91, *Commission v Council*, EU:C:1993:98, paragraph 7; of 4 April 2000 in Case C-269/97, *Commission v Council*, EU:C:2000:183, paragraph 43; of 29 April 2004 in Case C-338/01, *Commission v Council*, EU:C:2004:253, paragraph 54; of 26 January 2006 in Case C-533/03, *Commission v Council*, EU:C:2006:64, paragraph 43; of 6 November 2008 in Case C-155/07, *Commission v Council*, EU:C:2008:605, paragraph 34; of 22 October 2013 in Case C-137/12, *Commission v Council*, EU:C:2013:675, paragraph 52.

21. The preliminary remarks on the scope of cohesion policy to which Article 175(3) TFEU belongs, as well as on the relationship between that policy and economic policy made in the Council Legal Service opinion on the EISF proposal are also relevant for the present analysis. Reference is therefore made to paragraphs 24 to 37 of that opinion.

***b) Examination of the aim and content of the Reform Delivery Tool***

22. The proposal sets out the relationship between the implementation of the structural reforms and the ultimate aim of achieving economic and social cohesion as laid down in Article 174 TFEU.
23. When providing the overall context of the proposal, recitals (1) and (2) thereof clarify the fact that the coordination of economic policies, which is a matter of common concern, is to be done in such a way as to contribute to the objectives of territorial and social cohesion. The European Semester of economic policy coordination is the framework which identifies national reform priorities and monitor their implementation (recital (3)). Recital (4) sets out that the implementation of structural reforms identified in the Semester has as its consequence the resilience of domestic economies which can also contribute to the objective of strengthening economic and social cohesion.
24. The proposal further acknowledges that the degree of implementation of structural reforms in the Member States is still not sufficient and uneven (recital (6)). The proposal aims therefore at providing incentives to implement reforms in all policy areas, in response to challenges identified in the European Semester (recital (8)). According to Article 4(a), the general objective of the proposal is to contribute to addressing national reform challenges of a structural nature aimed at improving the performance of national economies and at promoting resilient economic and social structures, thereby contributing to cohesion, competitiveness, productivity, growth and employment (Article 4(a) of the proposal).



25. It results from the above that the proposal has an intermediate objective, which is to provide incentives to the structural reforms identified in the framework of the European Semester, and an ultimate one, which is to bring about social, economic and territorial cohesion through the implementation of those reforms.
26. The presumption that there is a link between reforms and cohesion aims follows an economic rationale whereby the former would lead to the latter. The Council Legal Service will not examine the merits of this presumption. Suffices to say that it constitutes a plausible economic reasoning in order to establish the proposal's general objectives, bearing in mind the large margin of discretion that the Council holds in this area of Union competence. A different issue is whether the particular reforms that may be the object of funding under the Reform Delivery Tool are *in concreto* cohesion relevant. This is a question that pertains to the examination of the content of the proposal (see point 30 below).
27. Thus the next question to elucidate is whether the declared aims of the proposal are properly translated into its content, so that the reform delivery tool constitutes a genuine instrument of cohesion, or whether its content rather consists of a mechanism of coordination of the economic policies of Member States.
28. The scope of the proposal as referred to in Article 6 thereof refers to "*policy areas related to cohesion, competitiveness, productivity, research and innovation, smart, sustainable, and inclusive growth, jobs and investments (...)*". In principle, therefore, the funding under the proposal - reform delivery tool component - is earmarked for policies which are identified as cohesion.
29. However, a number of other elements pertaining to the content of the proposal deserve special attention: first the eligibility of reforms as well as the assessment and allocation criteria for funding; second, the governance and decision making of the tool.

*i) Eligibility and assessment of reforms and allocation criteria for funding*

30. Eligible reforms, as well as assessment and allocation criteria for funding have been described in paragraphs 1011 and 12 above. However, the criteria referred to in those paragraphs lack a number of elements necessary to establish a link between the reform delivery tool and the objectives of cohesion.
31. First, the fact that a reform commitment responds to challenges identified in the European Semester does not suffice to establish a link with cohesion, since not all of the actions required under the Semester framework are susceptible of having a direct cohesion impact. In that regard, it shall be noted that only one out of the five assessment criteria set out in Article 11(7) of the proposal appears as a relevant indicator for cohesion<sup>6</sup> and that it does not play a preponderant role in the assessment or in the determination of the financial contribution<sup>7</sup>.
32. The proposal should thus, as a minimum, incorporate some further criteria which make clear that the eligible reform commitments are conducive to cohesion and convergence. In other words, the fact that a reform leads to reinforcing cohesion should be a condition for the activation of funding. Hence, when deciding on the eligibility of the reform commitments, and assessing their relevance, the Commission should justify in what manner the said commitments contribute to cohesion.<sup>8</sup> This should be reflected both in Articles 8 and 11(7) of the proposal and, as necessary, in Annex II.

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<sup>6</sup> See letter (a)(iii) of Article 11(7), according to which Commission shall assess whether the reform commitments “are expected to strengthen the performance and resilience of the economy of the Member State concerned”.

<sup>7</sup> The guidelines for the determination of the financial contribution set out in point 4 of Annex II consider all the assessment criteria defined in Article 11(7) as equally relevant for the sake of the Commission assessment.

<sup>8</sup> As per the Commission's proposal the criteria for assessment of Article 11(7) are not to be examined commutatively.

33. Second, the allocation of funding is at present based on the criterion of population. Population may constitute a possible parameter for the distribution of cohesion funds and is therefore compatible with Article 175(3) 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 (Article 174(2) TFEU). In order to establish the cohesion dimension of the proposal, the Council could consider, for example, the introduction of parameters linked to the relative degree of prosperity of Member States (for instance, GDP related) as a factor by which to modulate the allocation of funds.

*ii) Decision making and governance*

34. As recalled in the opinion of the Council Legal Service of 15 January 2019 on the EISF "*cohesion instruments cannot contain autonomous measures and procedures of economic coordination independent and separated from those laid down under the relevant provisions of economic policy under the Treaties and secondary legislation*". Moreover "*cohesion cannot be used with the preponderant aim to enhance the economic coordination between Member States*".

35. Decision making and governance under the Reform Delivery Tool have been described in paragraph 13 above. As described therein, reform delivery tool commitments are imbricated in the European Semester, since the reforms eligible for funding "address challenges" identified in the Semester. At the same time, the proposal establishes a different procedure for determining the content of those commitments with a much higher degree of granularity (notably by operationalising the commitments in the form of clear targets and timeline) as well as for assessing compliance with them. It also gives those commitments a different and binding legal form. The Commission holds a large power of discretion when taking its decisions, without any sequential link with the content and results of economic policy coordination.

36. Therefore, under the proposal's institutional design, the Commission would be empowered through a legally binding act to determine the content and assess the implementation of commitments which are also the object of decisions of economic coordination, typically adopted by the Council through recommendations. This may lead to situations whereby decisions by the Commission under the Reform Delivery Tool overlap with the process of economic policy coordination conducted within the framework of the European Semester. In so doing, the Reform Delivery Tool would constitute an autonomous procedure of economic coordination independent and separated from the Stability and Growth Pact.
37. This conclusion is not affected by the fact that the proposed instrument is of a voluntary nature and that it is left to the choice of each Member State whether to submit requests for financial contributions and undertake the relevant reform commitments: that voluntary nature of the instrument is deprived of any relevance in relation to the scope and institutional set-up of economic and cohesion policies as laid down in the Treaties.
38. In view of the above, a number of guarantees should be introduced in the proposal so that the reform delivery tool does not constitute an instrument of economic surveillance detached from the existing procedures of economic coordination, as is the case in the current text.
39. The proposal should make clear that both the decision on reform commitments and the subsequent assessment of compliance by the Commission follow and are consistent with the corresponding content and the assessment of implementation under the Stability and Growth Pact. There should be a relationship of coherence between the content and decision making of the reform delivery tool and the content and the results of economic coordination, notably in the European Semester. These guarantees of consistency would prevent an autonomous determination of the content and assessment of compliance of measures which, albeit being a benchmark for cohesion policy, may be otherwise subject to procedures of economic policy.
40. In the course of the discussions on the proposal, the question has been raised whether recourse may be had to a second legal basis relating to the Union competence in the domain of economic coordination, notably Article 121 TFEU.

41. Without it being necessary to discuss the feasibility of such a possibility, it shall be stressed that, even if that legal basis were to be added, the proposal would still require a number of adaptations. The conclusions reached above on eligibility and on assessment and allocation criteria would remain applicable since the addition of an economic policy legal basis would not eliminate the need to satisfy an objective link with cohesion. In addition, adaptations of an institutional nature would be required so that its governance set up would respond to the one of economic coordination which is to take place "*within the Council*" as laid down in Article 121(1) TFEU.

**B. Appropriateness of Article 175(3) TFEU as legal basis of the Convergence Facility**

42. Examination of whether the third subparagraph of Article 175 TFEU is a suitable legal basis for the convergence facility should also be based on the aim and the content of that measure.

43. As to the aim of the convergence facility, recital (5) of the proposal sets out that a "*high degree of sustainable convergence is particularly important for Member States, whose currency is not the euro, in their process of preparation to join the euro area*". More specifically, Article 5(2)c) of the proposal lays down that the aim of the facility is to "*provide financial incentives to eligible Member States to help them achieve the milestones and targets of reforms that are relevant for preparation for euro-area participation (...)*".

44. The Council Legal Service has stated in its opinion of 15 January 2019 on the EIFS that "*cohesion policy is addressed to bring about (...) convergence and homogeneity among all Member States of the Union - and not among a subgroup of them (...)*" and that "*cohesion policy cannot be used with the preponderant aim of ensuring the stability of the euro area*".

45. The relevant question is whether an instrument which aims at preparing Member States for their euro-area participation can be regarded as conducive to the cohesion objectives of the Union taken as a whole, or whether it is an instrument that rather aims at preserving the stability of the euro area.

46. Under the Treaties "*The Union shall establish an economic and monetary union whose currency is the euro*" (Article 3(4) TEU). Therefore the introduction of the euro is not only a right of Member States but also, and primarily, an obligation as long as the conditions for such an introduction, including the criteria of convergence, are fulfilled. Economic and monetary policy being a common policy of the EU, convergence efforts within that policy cannot be regarded as detached from the overall cohesion objectives of the Union because, ultimately, all Member States (with the exceptions laid down in primary law) are called to have the euro as their currency (see recital (5) and Article 4(a) of the proposal). A mechanism such as the convergence facility, that helps the progressive introduction of the euro through funding the implementation of reforms in non euro-area Member States may therefore serve the overall cohesion of the Union as it would contribute to spreading the convergence conditions of the euro area to the rest of the Union.
47. The consequential link between national reforms, the introduction of the euro and the ultimate aim of cohesion follows an economic rationale where the latter element, cohesion, is the result of the two former ones. As stated above in relation to the reform delivery tool, the Council Legal Service will not examine the merits of the economic reasoning underlying this link. Suffices it to say that it constitutes a plausible economic assumption in order to establish the general objectives of the convergence facility bearing in mind the large margin of discretion that the Council holds in this area of Union competence.
48. On the other hand, the facility's cohesion objective is clearly distinct from the one of safeguarding the stability of the euro area. Even though those reforms may have indirect positive repercussions on the stability of the euro area, both cohesion and euro area stability objectives remain separated. The aim of the facility is not to create the conditions for the optimal and proper functioning of the euro, thus its stability; it is addressed to underpin the economic resilience of Member States in their preparedness for future membership of the euro-area, as explained above.

49. Thus, as in the case of the Reform Delivery Tool, the following question to elucidate is whether the declared aims of the proposal are properly translated into its content, so that the Convergence Facility constitutes a genuine instrument of cohesion.
50. Concerning the content of the convergence facility, Article 24(2) of the proposal provides that the provisions relating to the Reform Delivery Tool also apply to the financial support component of the Convergence Facility. Thus the arguments already developed in section A as to the compatibility of the objectives and features of the Reform Delivery Tool with cohesion policy are also relevant here, especially the remarks made in relation to the scope, eligible reforms, assessment and allocation of funding and the governance and decision making and the adaptations of the proposal suggested in that regard.
51. Article 25 to 29 of the Proposal introduce, in addition, specific rules in relation to the financial support component of the Convergence Facility. These provisions should be specifically examined.
52. Pursuant to the proposal, a Commission decision shall set out the reform commitments to be implemented by the eligible Member State which are important for the participation in the euro area and the financial contribution. That Commission's decision shall also refer to the "formal letter" from the government of the Member State concerned to the Commission where it states its clear commitment to join the euro area and presents concrete measures to prepare for successful participation in the euro area, including the Banking Union (see Article 28(1) of the proposal).

53. It is far from clear what is the “formal letter” to which that provision refers nor its function or legal status. The procedure and criteria for adopting the euro (laid down in Article 140 TFEU and Protocol (No 13) on the convergence criteria) do not make reference to such an instrument. However, the juxtaposition of that letter with the decision of the Commission approving the reform commitments of the non euro-area Member State concerned, the content of the decision being built by reference to the "formal letter", may have as effect to render the latter, a unilateral statement of an informal character by a Member State, into a formal step in the process leading to the adoption of the euro. This may lead to a situation whereby decisions by the Commission under the Convergence Facility would de facto overlap with and supplement the procedure and criteria for adopting the euro, for which Article 140 TFEU and Protocol (No 13) constitute the relevant and exclusive legal framework<sup>9</sup>.
54. In view of the above, it is advised that the Commission decision under Article 28 of the proposal shall only take note of - or not to mention at all - the "formal letter" of the Member State stating its clear commitment to join the euro area. The proposal should also make clear that compliance with the reform commitments identified in the Commission’s decision cannot constitute a condition for the further adoption of the euro of the Member State concerned. The procedure and the criteria for abrogating the derogation of that Member State are exhaustively laid down in Article 140 TFEU and Protocol (No 13). An instrument of secondary law founded on a cohesion legal basis cannot supplement or modify that framework, without altering the competences foreseen in the Treaties.

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<sup>9</sup> It is noted that in the framework of the procedure to become part of the exchange rate mechanism (ERM II), i.e., one of the conditions for the introduction of the euro stemming from Article 140 TFEU, a practice has been developed pursuant to which euro area members, the ECB and the minister and central bank governors of non euro area Member States that participate in the ERM II take a decision on the participation in that mechanism of a non-euro area Member State which has so requested. That decision is typically accompanied with conditions associated to the participation in ERM II that may relate to sound fiscal and structural policies. More lately, in the case of Bulgaria, the triggering of the ERM II participation has been preceded by a letter of intent of that country where it announced a number of reform commitments with a view to its future adoption of the euro (see Eurogroup statement of 12 July 2018 on Bulgaria's path towards ERM II participation). As can be seen, the proposal for reform commitments under the convergence facility has an analogous content to the one of the ERM II participation decision and letter of intent.



55. Finally, it shall be noted that, unlike in the case of the Reform Delivery Tool, the guidelines for the determination of the financial contribution under the convergence facility give a certain prominence to the only assessment criterion which is relevant for cohesion (see point 5.2 of Annex II). This feature goes in the sense of establishing a genuine instrument of cohesion but should be better reflected and developed in the text of the Regulation, notably in line with the conclusions already reached in relation to the eligibility and allocation criteria, as well as governance of the Reform Delivery Tool.

### **C. Restriction of Convergence Facility support to a specific group of Member States**

56. According to Article 2(6) of the Proposal, the Member States eligible for support under the Convergence Facility would only be those Member States whose currency is not the euro and who have taken demonstrable steps towards adopting the euro (i.e., through the "formal letter" to which reference has been made previously).

57. The question arises therefore 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.

58. As a matter of principle, Union law applies uniformly to all Union Member States (see Article 52 TEU)<sup>10</sup>. 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 a situation where the Union act only applies to a group of Member States on the basis of specific circumstances that distinguish them in an objective and characterized manner<sup>11</sup>. Moreover, those specific circumstances must be relevant for the objectives of the Proposal and the area of competence to which that Proposal belongs.

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<sup>10</sup> 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*, ECLI:EU:C:1983:233, paragraph 17; Case 182/84, *Criminal proceedings against Miro BV*, ECLI:EU:C:1985:470, paragraph 14.

<sup>11</sup> See also Council Legal Service opinion 13524/13 concerning so-called Single Resolution Mechanism Regulation, in particular 70 to 75.

59. The application of the Proposal to Member States that have taken demonstrable steps towards adopting the euro is not the consequence of a derogation. It rather stems from a limitation of its scope by reason of certain circumstances which are specific to the said Member States (see Article 1(3) of the Proposal). It is then necessary to ascertain whether those circumstances are objective and sufficiently characterized and whether they are relevant for the objectives of the Proposal, and of cohesion policy.
60. The Member State which is not yet part of the monetary union but assumes a clear commitment to undertake those reforms is clearly placed in a special position. To start with, its commitment responds to the Treaty obligation to introduce the euro and is instrumental for achieving the Union objective to establish a monetary union. Pursuant to the principle of sincere cooperation laid down in Article 4(3) TEU, the Union is not only required to acknowledge but legally requested to assist Member States when carrying out the obligations stemming from the Treaties.
61. Second, the implementation of reforms that foster the conditions for a sustainable participation in the monetary Union entails specific costs and burdens that go beyond those ordinarily required in the framework of the coordination of economic policies under the Treaties. In that regard, the position of the Member States which have taken demonstrable steps towards adopting the single currency in a give time-frame is objectively different both from the one of the Member States who are yet to take that engagement (and therefore have not started the process of meeting the convergence criteria for participation in the monetary union) and the one of the euro-zone members (who have already attained the required convergence).
62. The possibility to limit the proposed instrument to the Member States that have taken demonstrable steps towards the euro also requires that their specific position is relevant for the objectives pursued by the cohesion policy as a whole.

63. As clarified previously when examining the aim and content of the Convergence Facility (see section B of this opinion), the Facility may serve the ultimate purpose of overall cohesion of the Union as it contributes to spreading the convergence conditions of the euro area to the rest of the Union, provided that the necessary adjustments are adopted so that a genuine and direct link with economic, social and territorial cohesion is objectively established.

#### **IV. CONCLUSION**

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

1. article 175(3) TFEU is the appropriate legal basis for the adoption of the reform delivery tool and convergence facility component of the Proposal, subject to a number of adaptations of provisions relating to i) the eligibility of reforms, ii) the assessment and allocation criteria for funding, iii) the governance and decision making, so that they constitute a genuine instrument of cohesion;
2. subject to the adaptations referred to in the paragraph above, the limitation of the scope of application of the Convergence Facility instrument under the Proposal to Member States who have taken demonstrable steps towards adopting the euro is objectively justified and relevant to the objectives of cohesion.

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