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**CONTRIBUTION OF THE LEGAL SERVICE**[1]

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| To: | Financial Counsellors |
| Subject: | Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulation (EU) 2021/1060 , Regulation (EU) 2021/2115, Directive 2003/87/EC and Decision (EU) 2015/1814<br>• Article 21(2) - Allocation key for the new revenue |

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## I. INTRODUCTION

1. On 18 May 2022, the Commission submitted a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2021/241[2] ("the proposal"[3]). The proposal is part of the overall REPowerEU initiative, addressed at introducing a set of measures to save energy, diversify supplies and accelerate Europe's clean energy transition. Because Recovery and Resilience Plans (RRP) are an adequate channel to implement these priorities, the proposal aims at enhancing the ability of the Recovery and Resilience Facility (RRF) to support reforms and investments dedicated to diversifying energy supplies, in particular fossil fuels, thereby strengthening the strategic autonomy of the Union. In particular, energy-related reforms and investments should be established through a dedicated 'REPowerEU chapter' of the Recovery and Resilience plans, for which specific financing arrangements (new revenues) are laid down in the proposal.

2. The Financial Counsellors Working Group has discussed on the method to allocate to Member States the new revenues specific to the REPowerEU chapter, namely whether that allocation should rely on the existing criteria under the current RRF Regulation, or whether it should incorporate ad hoc allocation criteria that respond better to the current energy and geopolitical challenges.

3. The Financial Counsellors Working Group sought the opinion of the Council Legal Service (CLS) on the legal feasibility of possible new allocation criteria. The CLS offered its views at the meetings of that Group that took place on 14 June, and 5 and 14 July 2022. The present contribution reflects and supplements the views already presented by the CLS.

[2] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (OJ L 57, 18.2.2021, p. 17).
[3] Document ST 9337/22.

## II. LEGAL FRAMEWORK

*i) The relevant provisions of NGEU legislation*

4. The RRF is part of the New Generation EU (NGEU) legislation. The functioning and operations of the RRF therefore fall within the rules under which the financing of NGEU was conceived and must comply with such rules. Those rules are for the essence laid down in the Own Resources Decision and in the European Recovery Instrument Regulation (EURI Regulation)[4].

5. In accordance with Article 5(1) of the Own Resources Decision:

"*For the sole purpose of addressing the consequences of the COVID-19 crisis through the Council Regulation establishing a European Union Recovery Instrument and the sectoral legislation referred to therein:*

*(a) the Commission shall be empowered to borrow funds on capital markets on behalf of the Union up to EUR 750 000 million in 2018 prices.* (…)" (emphasis added).

6. The EURI establishes an exceptional, temporary and coordinated programme of economic and social support for the recovery in the aftermath of the COVID-19 crisis, which shall only be made available for those purposes (see Article 1 and recital (6) of the EURI Regulation). EURI is founded on Article 122 TFEU which empowers the Council to decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products.

[4] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom (OJ L 424, 15.12.2020, p. 1) and Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis (OJ L 433I , 22.12.2020, p. 23).

7. EURI is composed of different programmes among which the RRF: in accordance with Article 6 RRF Regulation, its measures fall within those referred to in the EURI Regulation. RRF is an integral part of EURI and, therefore, recovery and resilience measures under RRF must be carried out to address the EURI's aims, namely to tackle the unprecedented impact of the COVID-19 crisis (see recital (19) RRF Regulation).

*ii) The relevant provisions of the proposal*

8. The proposal amends the general objectives of the RRF Regulation. In particular, it supplements the general RRF's objectives by adding the one to increase *"(...) the resilience of the Union energy system through a decrease of dependence on fossil fuels and diversification of energy supplies at Union level ('REPowerEU objectives')"* (Article 1 (1) of the proposal).

9. Recital (1) of the preamble to the proposal, states that "*In particular, it has become clearer than ever that the Union's energy security is indispensable for a successful, sustainable and inclusive recovery from the COVID-19 crisis, as it is also a major factor contributing to the resilience of the European economy*". Recital (2) underlines the direct links between the sustainable recovery from COVID-19, building the Union's resilience and the Union's energy security. Recital (3) sets out that the amendments are addressed at enhancing RRF's "*ability to support reforms and investments dedicated to diversifying energy supplies, in particular fossil fuels, thereby strengthening the strategic autonomy of the Union alongside an open economy*".

10. The proposal provides for new revenue of 20 billion euro as non-repayable support that will be financed from the auctioning of Emission Trading Scheme (ETS) allowances. It shall be made available as external assigned revenue and exclusively dedicated to finance the specific REPowerEU reforms and investments (see new Article 21a). Under the Commission's proposal, new revenue shall be allocated to Member States in accordance with the criteria as currently laid down in the RRF Regulation – in essence founded on the population, the inverse of GDP per capita and the relative unemployment rate of each Member State[5].

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[5] Article 11(1) RRF Regulation.

11. The proposal also requires that Recovery and Resilience Plans submitted to the Commission after the entry into force of that proposal contain a separate REPowerEU chapter, which shall outline reforms and investments, with their corresponding milestones and targets, aiming at contributing to REPowerEU objectives (see new Article 21c). Rules on the content, assessment and adoption of the plans, disbursements, protection of financial interests applicable to RRF are also applicable to the REPowerEU chapter[6].

## III. LEGAL ANALYSIS

### a) Preliminary remarks

12. The proposal makes of REPowerEU a chapter of the Recovery and Resilience Plans. Therefore, REPowerEU cannot be regarded as a standalone facility but as an integral part of the RRF. It responds to the very general and specific aims of RRF as laid down in Article 4 RRF Regulation. As clarified above in paragraph 11, REPowerEU is subject to the rules on content, assessment and adoption of the plans, disbursements, protection of financial interests already provided by the RRF Regulation.

13. It is in this framework that the question whether the new revenue (20 billion euro) could be allocated in accordance with criteria different to the ones currently laid down in the RRF Regulation – i.e. criteria that better respond to the energy objectives of REPowerEU - is to be examined. As already clarified orally by the CLS, it is feasible to incorporate new criteria as long they comply with two conditions:

    i) the allocation key should be cohesion related;

    ii) the allocation key should remain consistent with the RRF general objectives and system.

[6] See recitals (9) and (19) to the preamble of the proposal.

## b) Examination of the question of the compatibility of new criteria

### *i) The allocation key should be cohesion related*

14. The first condition stems from the legal basis of the RRF, which serves also as legal basis of the proposal, i.e. the cohesion legal basis set out in Article 175(3) TFEU. That provision empowers the EU legislator to adopt specific actions outside the Structural Funds that prove necessary to achieve the cohesion objectives set out in Article 174(1) TFEU. The RRF is therefore a cohesion instrument and this implies that the distribution of the 20 billion euros provided for in Article 21a(1) of the proposal must also be conducive to cohesion and convergence[7]. The current RRF allocation key, based on the population, the inverse of the GDP per capita and the relative unemployment rate of each Member State, respond to the requirements of Article 175(3) TFEU.

15. It is recalled that that some of the criteria under the current RRF Regulation are essential for the RRF to be considered as cohesion related and should therefore be kept, whichever the evolution of the current discussions on the proposal. This is in particular the case of the criterion based on the inverse of the GDP per capita, which allows taking account of the relative degree of prosperity of Member States and is of the utmost importance for achieving the cohesion's objective to reduce the disparities between the levels of development of the least favoured regions[8].

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[7] On the objective of cohesion, see the CLS opinion of 15 January 2019 regarding the European Investment Stabilisation Function, 5347/19, paragraphs 36 and 37.

[8] See in this sense, the CLS opinion of 19 February 2019, doc. 6582/19, at paragraph 33.

*ii) The allocation key should remain consistent with the RRF general objectives and system*

16. The second condition stems from the very nature of the proposal that envisages to make REPowerEU part of the RRF and is subject to the overall system, objectives, rules and procedures provided for in the RRF.

17. Indeed RePowerEU is anchored into the RRF system and must comply with RRF objectives. If adopted, there will be still one single RRF plan that enhances the REPowerEU chapter, one single Council implementing decision approving the evaluation of this plan, and disbursement decisions encapsulating the different financial contributions. RePowerEU actions can be regarded as fungible with the overall ones of the RRF. As a result, neither the new revenues nor the reforms and investments they would help to finance can be detached from the RRF general objective to mitigate the social and economic impact of the COVID-19 crisis.

18. It is recalled that RRF is one of the programmes for the implementation of EURI, an extraordinary and temporary instrument founded on Article 122 TFEU, whose resources are exclusively dedicated to tackle the adverse economic consequences of the COVID-19 crisis or the immediate funding needs to avoid its re-emergence. As stated by the CLS in its opinion of 24 June 2020 on the proposals on NGEU, all the programmes financed by EURI (among which RRF) must be used in conformity with the latter's extraordinary and temporary character, in turn linked to the specific needs resulting from COVID-19 crisis. The rules on allocation of funds of each programme should be then oriented towards that objective[9].

19. Respecting the COVID-19 rationale of RRF is thus fundamental for preserving the extraordinary and temporary character of NGEU, which must remain a one-off instrument dedicated to addressing the consequences of the COVID-19 crisis. Neither EURI nor any of its programmes, such as RRF/REPowerEU, can become a general facility for addressing whichever crisis afflicts the Union. Accordingly, allocation criteria under REPowerEU must remain loyal to the general objective of tackling the COVID-19 crisis, as clearly set out in Article 5(1) of the Own Resources Decision (see paragraph 5 above).

[9] See CLS opinion of 24 June 2020, doc. 9062/20, at paragraphs 140 and following.

20. The fact that the proposal envisages new revenue - 20 billion euros – financed from the auctioning of ETS allowances and exclusively dedicated for REPowerEU, distinct from the sources originally foreseen for NGEU, which are founded on the borrowings in the markets, cannot put into question this conclusion: the particular source on which the financing of EURI programmes are based is not a circumstance capable of altering the purposes for which it is designed.

*iii) Application of the two conditions to possible new allocation criteria*

21. Several alternatives have already been mentioned and discussed within the group of Financial Counsellors, most of which relate to the degree of fossil fuel dependence of each Member State, and none would raise legal concerns with regard to the two conditions examined in paragraphs 14 to 20 above[10]. It is not for the CLS to enter into the merits of the economic reasoning that underlies the methodology for allocation ultimately agreed by the Council, nor to provide with a precise methodology for allocation. The CLS will therefore limit itself to assess whether those alternatives are within the boundaries of the two conditions explained previously.

22. On the one hand, those alternatives appear to be cohesion relevant, in the sense that they would contribute to bring about convergence and reduce disparities among the different regions of the particular field of energy security and diversification. Moreover, they would supplement, and not replace, existing allocation criteria that are fundamental from a cohesion perspective, i.e. inverse GDP per capita. On the other hand, those additional allocation criteria do not appear to distort the COVID-19 related objectives under EURI/RRF, as the proposal itself shows how the pandemic crisis has been exacerbated by the subsequent energy challenges.[11]

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10 For instance, the allocation key presented by the French Presidency on 30 June which consists in replacing the unemployment data by an indicator based on the year-on-year price increase of investment goods; or an allocation key which would replace the unemployment variable by an indicator based on the importance of natural gas and oil in the energy mix; or a combination using for 50% the RRF allocation key and for 50% the ETS allocation key (as set by the Article 10 (2) of the ETS Directive and Commission Decision (EU) 2020/2166).

11 See recitals (1) and (2) of the proposal.

23. However, criteria for allocating the new REPowerEU revenues that would be directly linked to the consequences of the invasion of Ukraine by Russia, such as for example the relative degree of dependence on Russian fossil fuels or the degree of exposure to the consequences of the war, would raise serious legal concerns. Those circumstances seem difficult to be framed in the context of the COVID-19 crisis. The use of allocation criteria directly linked to the consequences of the invasion of Ukraine for distributing the REPowerEU moneys would make the RRF to drift apart the objectives where it is rooted and become a sort of general crisis management instrument, for which it was neither designed nor set up. This would not be compatible with the NGEU legislation with which it must, as a principle, comply.

## IV. CONCLUSION

24. In the light of the above, the Council Legal Service is of the opinion that:

a) RePowerEU is part of the RRF and should comply with the NGEU legislation, and it cannot become a self-standing instrument of management of the war in Ukraine and its economic consequences. This is why changing the allocation key provided for in Article 21a(2) of the proposal to a criterion directly linked to Russia's invasion of Ukraine would raise serious legal concerns as to its compatibility with the NGEU legislation.

b) Conversely, it is possible to modify the allocation key currently proposed to take into account the specific energy security objectives of REPowerEU, on the condition that any new allocation criteria support cohesion purposes and remain consistent with the RRF general objectives and system and the NGEU legislation.