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OPINION OF THE LEGAL SERVICE[1]

Subject:	Proposals on Next Generation EU – Compatibility of the package with the Union's principles of budgetary balance and discipline under Article 310 TFEU – Compatibility of the package with the integrity of the system of own resources (Article 311 TFEU) – Suitability of Article 122 TFEU as legal basis for the Recovery Instrument proposal – Compatibility of the package with Article 125(1) TFEU (no bail-out clause).

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I. INTRODUCTION

1. On 28 May 2020, the Commission presented a package of proposals entitled "Next Generation EU" (hereinafter referred to as the "NGEU"). The proposals aim at addressing the recovery needs of the EU and its Member States as a consequence of the COVID-19 crisis. The NGEU consists of a temporary reinforcement of the overall Multiannual Financial Framework (MFF) of the Union, endowed with a global amount of EUR 750 billion. That amount would be financed through the Union borrowing on the markets. The proceeds of such borrowing would be used for expenditure in an amount of EUR 500 billion and for loans in an amount of EUR 250 billion.

2. The package consists of three kinds of proposals: i) those introducing new instruments (most notably the EU Recovery Instrument and the Recovery and Resilience Facility), ii) those amending a number of proposals presented in the 2018 MFF context (most notably the amended proposal for the Own Resources Decision) and iii) those amending current legislation (the Fund for European Aid to the Most Deprived (FEAD), the Union Civil Protection Mechanism, the European Fund for Sustainable Development (EFSD), Humanitarian Aid and the current MFF Regulation).

3. The construction of the NGEU is based on three pillars:

   – first, the amended proposal for the Own Resources Decision (hereinafter the "ORD proposal")[2], which provides for an exceptional and temporary increase of the own resources ceiling of 0,6% of EU GNI. The own resources ceiling is increased for the sole purpose of covering all liabilities of the Union resulting from the borrowing (Article 3c of the ORD proposal). The proposal envisages to empower the Commission to borrow funds on capital markets, on behalf of the Union, and provides for the overall volume of Union's liability and the essential features of its repayment (Article 3b(3));

[2] Commission amended proposal for a Council Decision on the system of Own Resources of the European Union (COM (2020) 445 final), document ST 8140/20 INIT.

– second, the proposal for the EU Recovery Instrument (hereinafter the "Recovery Instrument")[3], based on Article 122 TFEU, which identifies recovery measures (Article 2 of the Recovery Instrument), allocates the borrowed funds to various Union programmes to that effect (Article 3) and qualifies the part of the borrowing dedicated to expenditure (EUR 500 billion) as external assigned revenue for the purposes of Article 21(5) of the Financial Regulation (Article 4(1) of the Recovery Instrument);

– third, the different Union programmes to which the resources are allocated, which lay down the rules for their implementation, including programming, eligibility and allocation criteria.

4. In the course of the meetings of a number of preparatory groups of the Council (MFF Ad Hoc Working Party, Financial Counsellors and the Structural Measures Working Party) as well as of COREPER, the following questions concerning the legality of the NGEU have been raised:

   A. Whether the NGEU is compatible with the principles of budgetary balance and discipline (Article 310 TFEU), and with the integrity of the own resources system (Article 311 TFEU).

   B. Whether the legal basis chosen for the Recovery Instrument, namely Article 122 TFEU, is appropriate.

   C. Whether the NGEU is compatible with Article 125(1) TFEU (no bail-out clause)

5. The Council Legal Service will examine the above questions in turn. For the sake of a proper structure of the analysis, the questions will be divided into sub-questions, as appropriate. As the questions related to the overall legal construction of the NGEU are of a horizontal nature, the Council Legal Service may, as necessary, examine other issues of a more technical caracter specific to each of the proposals when these will be discussed in the relevant preparatory bodies.

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[3] Commission proposal for a Council Regulation establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 pandemic (COM (2020) 441 final), document ST 8141/20 INIT.

6. Bearing in mind the length and complexity of each of the questions examined, the Council Legal Service will treat each of them with their own legal backgrounds and analysis, and will provide intermediate conclusions at the end of each of the analyses as they relate to each question. All such conclusions will then be grouped at the end of the opinion in a general conclusion.

II. FINDINGS OF THE COUNCIL LEGAL SERVICE

A. WHETHER THE NGEU IS COMPATIBLE WITH THE PRINCIPLES OF BUDGETARY BALANCE AND DISCIPLINE (ARTICLE 310 TFEU), AND WITH THE INTEGRITY OF THE OWN RESOURCES SYSTEM (ARTICLE 311 TFEU)

1. Preliminary remarks

7. The budgetary construction of the NGEU and its financing is unprecedented and raises novel and delicate legal issues of a budgetary nature.

8. For the purpose of the legal assessment of the budgetary construction of the NGEU, the following are the main features of relevance:

   – the NGEU draws on an unprecedented high amount of financing raised from borrowing on the markets;

   – such borrowing will be contracted by the Commission on behalf of the Union on the basis of an empowerment contained in the ORD proposal;

   – the majority of the proceeds from such borrowing will constitute external assigned revenue for the Union budget;

– those proceeds will be assigned through a Regulation based on Article 122 TFEU, the Recovery Instrument, to various spending programmes and will be used primarily for expenditure, i.e. for non-repayable forms of support[4], whereas a proportionately smaller share of the proceeds from the borrowing will be used for providing loans to Member States.

9. The most novel element is the use of borrowing to finance budget spending ("borrowing for spending") and the accompanying budgetary construction. The legal construction should be assessed, in particular, against Articles 310 and 311 TFEU.

10. This section will be divided in four parts.

The first part will be devoted to assessing whether "borrowing for spending" as proposed complies with the principles of budgetary balance and budgetary discipline (part 2 below). The second part will assess whether the extensive use of external assigned revenue as proposed is compatible with the integrity of the system of own resources of the Union and with other fundamental budgetary principles (part 3 below). The third part will focus on the legal basis for the spending of the borrowed funds, the interaction between the ORD proposal based on Article 311 TFEU and the Recovery Instrument based on Article 122 TFEU, as well as their respective roles in the construction (part 4 below). Finally, the fourth part will examine whether the ORD proposal could entail joint and several liabilities of the Member States (part 5 below).

2. Is "borrowing for spending" compatible with the Union's principles of budgetary balance and budgetary discipline under Article 310 TFEU?

a) Legal framework

11. The principles of budgetary balance and of budgetary discipline are both, in the EU Treaties, of constitutional importance.

[4] For the purposes of this opinion, financing provided to provision budgetary guarantees is treated as expenditure. Whereas budgetary guarantees constitute repayable forms of support, the provisioning made to cover for losses in cases of calls on the guarantee is effectively paid in and therefore constitutes expenditure for the Union budget.

12. The principle of budgetary balance is laid down in the third subparagraph of Article 310(1) TFEU which reads as follows:

"*The revenue and expenditure shown in the budget shall be in balance.*" (emphasis added)

13. Whereas Article 310(1) TFEU relates to the annual budgetary balance, the multi-annual budgetary discipline is addressed in Article 310(4) TFEU:

"*With a view to maintaining budgetary discipline, the Union shall not adopt any act which is likely to have appreciable implications for the budget without providing an assurance that the expenditure arising from such an act is capable of being financed within the limit of the Union's own resources and in compliance with the multiannual financial framework referred to in Article 312.*" (emphasis added)

14. It is also relevant to mention Article 323 TFEU which provides that "*The European Parliament, the Council and the Commission shall ensure that the financial means are made available to allow the Union to fulfil its legal obligations in respect of third parties*" (emphasis added).

15. Finally, Article 17(1) of the Financial Regulation ("FR")[5] repeats the principle of budgetary balance: "*Revenue and payment appropriations shall be in balance.*", and Article 17(2) FR, which is a corollary of that principle, reads as follows: "*The Union* (…) *shall not raise loans within the framework of the budget"* (emphasis added).

b) Legal analysis

16. As explained above, the construction proposed by the Commission to address recovery needs following the exceptional situation which has arisen as a consequence of the COVID-19 pandemic entails that Union expenditure would be financed by future income.

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[5] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1).

17. The proposal consists in allowing the Union to borrow on capital markets up to EUR 750 billion (2018 prices), with EUR 500 billion foreseen for Union expenditure ("borrowing for spending") and EUR 250 billion for loans (Article 3b(1) of the ORD proposal). The Commission would be empowered to issue debt on behalf of the Union to be paid back as it reaches maturity.

18. Those proceeds from borrowing which will be used for spending through Union programmes would be channelled to those programmes as external assigned revenue (so-called "other revenue" as referred to in Article 311, second paragraph, TFEU) for the purposes of Article 21(5) FR, whereas the repayment of the corresponding debt as it reaches maturity would be covered by the Union's own resources. The repayment would be guaranteed via a ring-fenced compartment provided for in the ORD proposal (Article 3c thereof). That compartment would consist in a dedicated, extraordinary and temporary increase of the ceilings for own resources by 0.6 % of EU GNI which may only be used for covering all liabilities of the Union resulting from the borrowing undertaken to finance recovery following the COVID-19 crisis.

19. The novel construction under which the Union would issue debt to finance non-repayable forms of expenditure raises a question of compliance with the principle of budgetary balance enshrined in Article 310 TFEU, which requires that "*the revenue and expenditure shown in the budget* [to] *be in balance.*"

20. That principle is directly linked to the Union's system of own resources, under which Member States allocate own resources to the Union to ensure the financing of the Union's annual budget (see Article 1 of the current Own Resources Decision ("current ORD"[6])). The total amount of resources for a given year is defined by reference to the amount needed to cover the total of budgetary expenditure. The GNI-based contribution works as the balancing resource which fills the gap between the total of all other revenue[7] and the expenditure authorised under the annual budgetary procedure (see Article 2(1)(c) of the current Own Resources Decision).

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6 Council Decision (EU, Euratom) No 2014/335 of 26 May 2014 on the system of own resources of the European Union (OJ L 168, 7.6.2014, p.105).

7 I.e. revenue from other own resources and from so-called "other revenue".

The principle of budgetary balance is a strict one, and any surplus or deficit resulting at the end of the year must be carried over into the next year so as to ensure that the final outcome of each year is balanced[8]. The budget technical nature of this principle and its link to own resources is confirmed by the relevant case law[9].

21. Whereas borrowing with a view to on-lending the proceeds (so-called "back-to-back lending") has become a relatively established practice, borrowing with a view to financing Union expenditure in the same way as a State would do, i.e. borrowing to finance current or operating expenses, has not been considered to be compatible with the principle of budgetary balance[10]. This was clarified by the Commission in 2015 in replies to parliamentary questions: "(…) *as regards the obligation to balance the EU budget, the consistent interpretation over time of* [Article 310 TFEU] *is that the EU budget cannot be balanced by issuing public debt"*[11].

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8 See Article 7 of the current ORD and Article 18 FR. In accordance with Article 18 FR: "*The balance from each financial year shall be entered in the budget for the following financial year as revenue in the event of a surplus or as a payment appropriation in the event of a deficit*".

9 Judgment of 31 March 1992, *Council v. European Parliament*, C-284/90, EU:C:1992:154, paragraphs 29 and 31.

10 However, in 1984, Member States agreed on the basis of an intergovernmental political agreement to provide reimbursable advances to finance a gap in the budget. Such advances to finance a budget deficit in reality amounted to loans provided by Member States to the Union.

11 See Questions E-001662/2015 and E-005201/2015 inquiring about the possibility for the Union to issue public debt to finance the Investment Plan. The Commissioner answered as follows: "*The Treaty establishes the principle of a balanced budget for the EU. Filling a gap between revenue and expenditure by issuing public debt is therefore not possible. The Investment Plan can therefore not serve to finance EU budget expenditure by issuing public debt."*. When asked to further explain the issue, the Commissioner added: "*Indeed, Article 310 TFEU does not prohibit issuing EU public debt. This is the case, for instance, to raise the funds needed for the financial assistance to Member States or third countries through back-to-back loans. These borrowing and lending operations are neutral from the budgetary point of view as no disbursement is requested and the new liability is fully matched by an asset; if a delay or a default by a borrower has to be compensated by the EU budget, this is done drawing on the own resources of the Union. However, as regards the obligation to balance the EU budget, the consistent interpretation over time of such Article is that the EU budget cannot be balanced by issuing public debt."* (emphasis added)

22. The Union is prohibited from adopting a budget in deficit and, by extension, the Union is not allowed to run an operating deficit[12].

23. However, the Treaty only requires the (annual) budget to be in balance. It does not, contrary to Article 17(2) FR[13], explicitly prohibit (or allow[14]) financing by means of loans. Actually, and as mentioned above, neither Article 310 TFEU nor Article 17(2) FR have prevented the Union from having recourse to loans insofar as they constitute a neutral operation which is not such as to upset the budgetary balance and insofar as sufficient guarantees are provided to face the arising liabilities. The following cases are worth mentioning:

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12 See also recital 10 in the 2002 version of the Financial Regulation according to which "*The principle of equilibrium constitutes a basic budgetary rule. In this connection, it should be emphasised that recourse to loans is not compatible with the system of Community own resources. However, the principle of equilibrium is not such as to hinder the borrowing and lending operations guaranteed by the general budget of the Union.*" (Council Regulation No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, 16.9.2002, p. 1)).

13 The previous wording of Article 17(2) FR was more direct in forbidding the EU to raise loans: Article 14(2) of the 2002 Financial Regulation provided in a straightforward way that "(…) *the Community* (…) *may not raise loans*", while the current wording of Article 17(2) introduced in 2012 provides that "*the Union* (…) *may not raise loans within the framework of the budget*" (emphasis added) which encapsulates the practice of the off-budget operations which are thus regarded as not being "*within the framework of the budget*".

14 By contrast, while the TFEU itself is silent about borrowing and loans, the Euratom Treaty expressly allows the Community to have recourse to loans, but only "*for the financing of research or investment*" (Article 172(4) Euratom Treaty). The Coal and Steel Treaty also allowed the Community to borrow funds but only in order to grant loans (Article 51 ECSC).

(a) Back-to-back lending where a basic act authorises the Commission to contract loans on behalf of the Union with a view to on-lending to Member States or third countries (financial assistance)[15], such as the EFSM[16], the Balance of Payments Facility[17], Macro-Financial Assistance[18] and, more recently, the SURE instrument[19]. In such cases, loans give rise to so-called contingent liabilities[20], i.e. liabilities which will only materialise in case of default on the loan.

(b) Under Article 266(6) FR, building acquisition projects may be financed through a loan subject to approval by the European Parliament and the Council. Although of a much smaller financial impact, the example is interesting as it is a case of financing expenditure for the acquisition of an asset (not to lend on the money) by having recourse to a loan. Contrary to the back-to-back lending situation, the liability of the Union is not just contingent but certain.

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15 The possibility of granting financial assistance is now directly regulated in the FR, Title X, which will apply as from the post-2020 MFF, see in particular Article 220 thereof.

16 Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ L 118, 12.5.2010, p. 1).

17 Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments (OJ L 53, 23.2.2002, p. 1).

18 Adopted in accordance with Article 212 TFEU (see, by way of example, Decision (EU) 2020/33 of the European Parliament and of the Council of 15 January 2020 providing further macro-financial assistance to the Hashemite Kingdom of Jordan (OJ L 14, 17.1.2020, p. 1)).

19 Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak (OJ L 159, 20.5.2020, p. 1).

20 Article 2(15) FR defines "contingent liability as follows": "*Contingent liability" means a potential financial obligation that could be incurred depending on the outcome of a future event.*"

24. In both cases referred to above, the loans or the borrowing constitute a neutral, off-budget operation. In the case of back-to-back lending, the proceeds from the borrowing is not recorded as budgetary revenue and expenditure arising from on-lending is not recorded as expenditure, as the two fully counter-balance each other. In the case of building acquisitions, the amount of the loan or borrowing is not recorded in the budget as revenue and the full amount of the building price is not recorded as expenditure, as the debt is counterbalanced by the value of the building.

25. It follows that in both cases above, the debt resulting from the borrowing is counterbalanced by an asset, which justifies its off-budget treatment, namely the claim against the recipient of financial assistance or, in the case of a building acquisition project, the value of the building[21]. The annual budget only contains lines to accommodate, respectively, defaults (in the case of back-to-back lending) and annual instalments on the loan (in the case of building acquisition) but those are fully matched by budget revenue as the Union has to honour its liabilities.

26. The off-budget treatment of the abovementioned borrowing operations means that the budgetary balance is not affected.

27. Back-to-back loans are not the only case where the Union carries out operations which may give rise to substantial liabilities. The Union may also provide budgetary guarantees[22]. Such guarantees may generate a contingent liability which may exceed the financial assets provided to cover the Union's liability (so-called provisioning, see Article 210(2) FR).

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21 When the provision on borrowing to acquire buildings was introduced in 2012, the Commission made the following statement: "The *Commission underlines that using loans for the acquisition of buildings is not contrary to the principle of equilibrium according to Article 17 of the Financial Regulation. The borrowing of the funds constitutes an off-budget operation: the amount of the loan is not recorded in the budget as revenue and the full amount of the building price is not recorded as expenditure. Only the annual instalments to be paid to the bank are included as expenditure matched by the annual administrative budget (revenue). From an accounting point of view, the loan does not finance the budget expenditures, but the acquisition of an asset. The loan (debt) is compensated by the value of the building (asset). Therefore, loans for the acquisition of buildings do not create a deficit.*"

22 Article 2(9) FR contains the following definition: "*Budgetary guarantee" means a legal commitment of the Union to support a programme of actions by taking on the budget a financial obligation that can be called upon should a specified event materialise during the implementation of the programme, and that remains valid for the duration of the maturity of the commitments made under the supported programme.*"

Budgetary guarantees are an instrument for the implementation of the budget and hence for financing Union policies (see Article 62(2) FR). They are repayable forms of assistance and the liability of the Union is therefore counterbalanced by a claim against the final recipients whose operations benefit from the guarantee.

28. It follows from the above that those parts of the Recovery Instrument involving back-to-back lending would not raise novel legal issues, because the debt resulting from the borrowing constitute neutral, off-budget operations which do not bring into question the compliance with the principle of budgetary balance[23].

29. The use of proceeds from borrowing to finance operational expenditure entails some significant differences from the cases of borrowing referred to above, most notably the fact that it would not give rise to contingent liabilities but to actual expenditure that the Union would be bound to pay in order to reimburse the debt. On the basis of the cases referred to above (back-to-back lending, acquisition of buildings, guarantees), it needs to be clarified whether "borrowing for spending" under the NGEU is organised in such a way that i) the budgetary balance is not affected and ii) the liability (debt) arising from the borrowing is budgetarily neutral, i.e. it is duly counter-balanced by an asset.

i) Whether "borrowing for spending" under the NGEU affects the budgetary balance

30. "Borrowing for spending" involves two steps: first, the Union borrows the money on the markets and channels the proceeds to the relevant spending programmes as external assigned revenue; second, the Union pays back the money by using own resources allocated to the Union as the borrowing reaches maturity.

[23] It is noted that back-to-back lending under the NGEU does not entail financial assistance to Member States of the same type as the EFSM.

31. It is the first step, under which the proceeds from the borrowing is used for spending, which requires further assessment. The second step, the repayment, will be fully integrated into the system of own resources and be based on conventional budgetary mechanisms. The repayment will thus be programmed under the MFF ceilings and financed with own resources allocated up-front under the compartment referred to in paragraph 18 above.

32. As to the first step, the question is whether the budgetary balance is distorted when the proceeds from the borrowing (revenue) are used for spending, whereas the corresponding liability (the debt) is not budgeted as expenditure.

33. In that respect it is recalled that Article 310 TFEU requires that the revenue and expenditure "*shown in the budget*" shall be in balance and Article 17(2) FR prohibits loans "*within the framework of the budget*" (emphasis added). Given that, under the Recovery Instrument, the money would be channelled to the various programmes as external assigned revenue, as foreseen in Article 4(1) of the Recovery Instrument, the equilibrium of the revenue and expenditure shown in the budget will not be affected.

34. This is so because amounts corresponding to external assigned revenue are not provided in the budget and are not decided upon under the annual budget procedure. In accordance with Article 7(2)(e) FR, external assigned revenues do constitute authorised spending ("appropriations") but they do not form part of the appropriations "provided" in the budget, within the meaning of Article 7(2)(a) FR. They are intended to be additional in nature and come on top of the voted appropriations[24]. The budget contains a structure for accommodating assigned revenue but this does not entail putting amounts on the relevant budget lines[25]. From a purely budgetary technique perspective, external assigned revenue by its very nature cannot jeopardize the budgetary balance.

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[24] In accordance with Article 22 FR, assigned revenue automatically generates commitment and payment appropriations in corresponding amounts.

[25] In the statement of revenue, there is a budget line with a p.m. entry to receive the revenue, and the estimated amount figures in the remarks, but the amount does not feature on the lines of the voted budget. On the expenditure side, the budget remarks indicate which budget lines may receive appropriations corresponding to assigned revenue.

35. This situation may legitimately be qualified as comparable to the off-budget nature of back-to-back lending operations. It is therefore in line with the practice developed for many years as regards borrowed money, which has been regarded as compatible with the wording of Article 17(2) FR in its version since 2012 which prohibits the Union from raising loans "*within the framework of the budget*".

36. On the basis of the above, it must be concluded that recourse to borrowing to finance Union expenditure through Union programmes by means of external assigned revenue does not affect the revenue and expenditure shown in the budget and, therefore, does not jeopardise the budgetary balance.

37. However, as will be explained further below in part 3, recourse to external assigned revenue is subject to clear constraints and cannot be unlimited. More specifically, "borrowing for spending" cannot become a permanent feature of the budgetary landscape, a ban which is provided for in Article 3a of the ORD proposal.

ii) Whether "borrowing for spending" under the NGEU is budgetarily neutral, i.e. duly counterbalanced by an asset

38. The analysis cannot be limited to verifying whether the principle of budgetary balance is observed from a purely budgetary technique point of view, as examined in point i) above. An analysis limited to a purely literal reading of the third subparagraph of Article 310(1) TFEU - which requires that revenue and expenditure shown in the annual budget is in balance, but does not apply to off-budget operations - would make it easy to circumvent the principle of budgetary balance by creating multiple borrowing programmes that would provide funding through external assigned revenue. That would be contrary to the more fundamental principle that underpins the principle of budgetary balance, i.e. that the Union cannot run an operating deficit (see paragraphs 21 and 22 above).

39. Consequently, in addition to verifying the respect of the principle of the budgetary balance, it is also necessary to show that "borrowing for spending" under the NGEU is budgetarily neutral, i.e. that it is duly counterbalanced by an asset.

Budget neutrality is intrinsically linked to Article 310(4) TFEU which encapsulates the principle of budgetary discipline by preventing the Union from adopting any act which is likely to have appreciable implications for the budget without "*providing an assurance that the expenditure arising from such an act is capable of being financed within the limit of the Union's own resources*" (emphasis added)[26]. That provision aims at ensuring that the Union does not undertake any financial obligations which it will not be able to honour. It aims at ensuring multi-annual financial discipline[27].

Article 310(4) TFEU is also a corollary of the principle of budgetary balance as it ensures the proper correspondence of revenues and expenditure over time. Budgetary neutrality is fundamental for the good functioning of the Union budgetary system, which relies solely upon the resources allocated to it under the Own Resources Decision adopted on the basis of Article 311 TFEU.

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[26] See also recital 13f to the ORD proposal: "*The repayment of funds borrowed in order to provide non-repayable support, repayable support through financial instruments or provisioning for budgetary guarantees, as well as the interest due, should be funded by the Union budget. The borrowed funds which are granted as loans to Member States should be repaid by the sums received from beneficiary Member States. The necessary resources need to be allocated and made available to the Union for it to be able to cover all of its financial obligations and contingent liabilities resulting from the exceptional and temporary empowerment to borrow in any given year and under any circumstances in compliance with Article 310(4) TFEU and Article 323 TFEU*." (emphasis added)

[27] The fact that that the claim will most likely not be activated (as in the case of contingent liabilities in back-to-back lending operations) or will certainly be called (as in the case of commitments for the "borrowing for spending") bears no pertinence for examining the budget neutral effect of the claim.

40. Borrowing by the Union would be budgetarily neutral if the resulting debt is matched by a claim allowing the Union to cover the principal, interests and costs associated with that borrowing and where sufficient assets are dedicated for that purpose[28]. That claim would constitute the "*assurance*" for the financing of expenditure to which Article 310(4) TFEU refers and would be essential to guarantee the future annual repayments of the debt, and hence to ensure the budgetary balance throughout the repayment period (as explained previously, repayments are to be integrated in conventional budgetary mechanisms)[29].

41. It is in the light of the above that it should be assessed whether the construction proposed under the NGEU sufficiently ensures the budget neutrality of the "borrowing for spending" operations.

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28 In that respect it should also be noted that the multi-annual nature of Union programmes regularly involves situations where the Union takes on a liability by means of a legally binding commitment, without such commitment being counterbalanced by any other asset than the assurance that ensuing obligations can be covered within the ceiling for own resources. This is the case, for example, for large-scale projects such as ITER and GALILEO which also stretch well beyond one MFF period. In the field of cohesion, it is equally the case that the full legal commitment for the whole MFF period is undertaken up-front upon the notification by the Commission to a Member State that it has adopted a programme, see Article 76 of Regulation (EU) No 1303/2013 (OJ L 347, 20.12.2013, p. 320). Moreover, the "*reste à liquider*" (RAL) concept is the very product of budget commitments undertaken which will give rise to subsequent payment claims.

29 The link between the availability of own resources and the budgetary balance has also been confirmed by the Court, see judgment of 15 November 2005, *Commission v Kingdom of Denmark*, C-392/02, EU:C2005:683, paragraph 54.

42. The construction proposed by the Commission, which is anchored in the ORD proposal, comprises the following important elements:

– it introduces a dedicated and temporary increase[30] of the own resources ceilings solely for the purpose of catering for the liabilities arising from the operations under the NGEU (Article 3c of the ORD proposal)[31];

– it incorporates the maximum amount of borrowing and the further modalities for repayment (Article 3b);

– it comprises a cash management provision to ensure the timely availability of cash resources in case the authorised appropriations in the budget are not sufficient for the Union to comply with its obligations under the borrowing to finance the NGEU (Article 6(4));

– the Recovery Instrument specifies that the commitment appropriations corresponding to the external assigned revenue are generated as of the entry into force of the ORD (Article 4(3) of the Recovery Instrument).

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30 Based on information from the Commission, the dedicated increase of 0.6 % of the GNI of all Member States is more than sufficient to cover the liabilities (principal, interests and associated costs) over the repayment period stipulated in the second subparagraph of Article 3b(2) of the ORD proposal (i.e. 1 January 2028 to 31 December 2058).

31 Article 3c provides: "*The amounts established in Article 3(1) and (2), respectively, shall be temporarily increased by 0,6 percentage points for the sole purpose of covering all liabilities of the Union resulting from its borrowing referred to in Article 3b until all these liabilities have ceased to exist, and at the latest until 31 December 2058. Those increased amounts shall not be used for paying any other liabilities of the Union*" (emphasis added).

43. The combined effect of the abovementioned provisions in the ORD proposal, and in particular the dedicated compartment combined with the indication of the maximum amount of borrowing, constitutes a claim against the Member States which, once the ORD has entered into force in accordance with the third paragraph of Article 311 TFEU (and unless it is amended or repealed), becomes an irrevocable, definitive and enforceable guarantee of payment that is given upfront by the Member States. In that respect, it is recalled that the ORD, contrary to the MFF Regulation, is not adopted for a limited period of time[32].

44. The Council Legal Service considers that the novel and important provisions in the ORD proposal referred to above provide a credible and solid asset, thereby ensuring the budget neutrality of the operation and providing ample "*assurance*" that the Union expenditures under the NGEU are capable of being financed, as required under Article 310(4) TFEU. The measures set out in Article 6(4) of the ORD proposal further contribute to safeguarding the capacity of the Union to honour its legal obligations in a timely manner as required by Article 323 TFEU[33].

45. The fact that the full amount of borrowing is stipulated in the ORD proposal also ensures that the asset consisting of the commitments of the Member States fully counter-balances the debt, even if the maximum annual amount corresponding to the increase in the ceilings is not in itself sufficient to cater for the full debt. This is comparable to cases of back-to-back lending, where the asset, i.e. the full claim against the Member State or third country to which financial assistance is provided, also arises from the outset, but the repayments are made progressively in accordance with the underlying loan agreement.

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[32] While it is true that an Own Resources Decision is traditionally replaced for each consecutive MFF, this is not a requirement that stems from primary law. Given that such a decision is adopted by unanimity and subject to the approval by all Member States in accordance with their respective constitutional requirements, the revocation of the commitments made by all Member States in the ORD is not in the hands of one or even a majority of Member States. It would require the agreement of all Member States.

[33] The content and scope of Article 6(4) will be assessed separately further below (see part 4 of section A).

c) ***Intermediate conclusions***

46. In the light of the above, the following intermediate conclusions can be made:

- The Treaties allow the Union legislator to establish a mechanism such as the one proposed in the NGEU, provided that it incorporates a number of safeguards aimed at preserving its budget neutrality and, ultimately, at respecting the principle of budgetary balance:

  – borrowed amounts are channelled to spending programmes by means of external assigned revenue which by its nature is additional and does not affect the revenue and expenditure shown in the annual budget and therefore, from a budgetary technique point of view, does not generate an imbalance in the annual budget;

  – the repayment of the Union's debt is guaranteed within the ceilings of own resources, by a dedicated compartment which may only serve that purpose and by additional provisions under which the Member States commit to make available resources up to the maximum amount of borrowing stipulated in the ORD proposal, the combined effect of which will constitute an irrevocable, definitive and enforceable guarantee of payment.

47. It is, however, still necessary to examine whether the substantial amount of external assigned revenue that is proposed under the NGEU is in line with the rules governing the system of own resources of the Union, in particular its integrity, and with the basic budgetary principles of unity and universality.

3. Is the extensive use of external assigned revenue in compliance with the integrity of the system of own resources of the Union and with basic budgetary principles?

a) ***Legal framework***

48. The system of own resources of the Union, and its integrity, as well as the principle of budget unity are both, in the EU Treaties, of constitutional importance.

49. The first paragraph of Article 311 TFEU on own resources provides:

"*The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.*"

The second paragraph of Article 311 TFEU provides:

"*Without prejudice to other revenue, the budget shall be financed wholly from own resources*" (emphasis added).

50. The principle of unity is enshrined in the first subparagraph of Article 310(1) TFEU:

"*All items of revenue and expenditure of the Union shall be included in estimates to be drawn up for each financial year and shall be shown in the budget*" (emphasis added).

This is repeated in Article 8(1) FR:

"*All revenue and expenditure shall be booked to a budget line.*"

51. The principle of universality, also referred to as the principle of non-assignment, is defined in the FR and means that all revenue shall finance all expenditure without distinction. Article 20 FR defines the scope of that principle as follows[34]:

"*Without prejudice to Article 21, total revenue shall cover total payment appropriations. Without prejudice to Article 27, all revenue and expenditure shall be entered in the budget in full without any adjustment against each other*" (emphasis added).

52. As an exception to the principle of universality, Article 21 FR sets out a catalogue of internal and external assigned revenues. In particular, Article 21(5) FR stipulates that:

"*A basic act may assign the revenue for which it provides to specific items of expenditure. Unless otherwise specified in the basic act, such revenue shall constitute internal assigned revenue.*"

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[34] The principle of universality is also enshrined in Article 6 of the current ORD as regards own resources: "*The revenue referred to in Article 2 [own resources] shall be used without distinction to finance all expenditure entered in the Union's annual budget.*"

b) Legal analysis

53. The NGEU is proposed to be financed with EUR 500 billion (2018 prices) of external assigned revenue, corresponding to the amounts foreseen for "borrowing for spending". The external assigned revenue constitutes so-called "other revenue" as mentioned in the second paragraph of Article 311 TFEU and not an own resource. Under the proposed construction, the amounts are assigned and allocated through the Recovery Instrument, which is based on Article 122 TFEU[35].

54. Such a substantial amount of external assigned revenue is unprecedented both in absolute and in relative terms[36]. It would be equal to almost half the size of the amount proposed for the next "baseline" MFF (2021-2027) and would be rolled out during a shorter period of time[37].

55. This part will analyse the proposed use of external assigned revenue in the light of the system of own resources of the Union, governed by Article 311 TFEU, and in particular its integrity, and of the basic budgetary principles of unity and universality.

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35 Article 4(1) Recovery Instrument qualifies a part of the total financing as external assigned revenue: "*For the purposes of Article 21(5) of* [the Financial Regulation]*, EUR 433 200 000 000 in 2018 prices of the funds referred to in Article 3(1) shall constitute external assigned revenue to the Union programmes referred to in point (a) of Article 3(2) of this Regulation and EUR 66 800 000 000 in 2018 prices of those funds shall constitute external assigned revenue to the Union programmes referred to in Article 3(2)(c) of this Regulation."*

36 By way of comparison, according to Working Document V accompanying the draft budget for 2020, the total amount of commitment appropriations stemming from assigned revenue (internal and external) amounted to 16 437,4 million in 2018 (and 19 174, 8 million in payment appropriations). Main sources of external assigned revenue comprised contributions from EFTA, candidate and third countries to Union programmes and activities and Member States' contributions to the Facility for Refugees in Turkey, see COM (2019) 400.

37 In accordance with Article 4(4) of the Recovery Instrument: "*Legal commitments giving rise to expenditure for support as referred to in Article 3(2)(a), and where appropriate in point (i) of Article 3(2)(c), shall be entered into by the Commission or by its executive agencies by 31 December 2024. Legal commitments in an amount of at least 60 percent of the amount referred to in Article 3(2)(a) shall be entered into by 31 December 2022.*"Article 4(5) to (7) of the Recovery Instrument contains similar deadlines for loans and budgetary guarantees, adapted to their specific features, and Article 4(8) specifies that the deadlines do not apply to technical and administrative assistance.

56. As already indicated in section A, part 2, of this opinion concerning the budgetary balance, the debt arising from borrowing will be repaid by own resources and the repayments will be integrated into the MFF and will fully adhere to the regular budgetary mechanisms. This analysis will therefore not deal with repayments which do not raise the same questions as external assigned revenues.

57. As mentioned above, assigned revenue is not an own resource but forms part of so-called "other revenue" that accrues to the Union[38]. The second paragraph of Article 311 TFEU expressly recognises that the Union budget may be financed also from "*other revenue*": "*Without prejudice to other revenue, the budget shall be financed wholly from own resources.*" (emphasis added). The integration into the ORD proposal of the provisions about the specific compartment and the borrowing on the markets is legally possible even if the proceeds from borrowing are not qualified as an own resource[39].

However, the term "*wholly*" used in Article 311 TFEU also reflects that the primary source of financing of the Union budget is to come from own resources and not from other revenue. This preponderance given to own resources is due to the strong guarantees, rooted in national budgetary sovereignty, which accompany the Own Resources Decision on the basis of which Member States allocate own resources to the Union budget in a definitive manner. The reliance on own resources as the primary source of financing of the budget is also a corollary of the requirement for sufficiency of means of the Union to attain the objectives and carry through the policies of the Union as set out in the first paragraph of Article 311 TFEU, and ultimately for the Union's financial autonomy.

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38 For a further description of other revenue, see Commission fiches 10 and 47 in documents WK 7294/2018 INIT and WK 10842/2018 INIT. Fiche 47 states the following: "*Other revenue sources are not established through the Own Resources Decision. They can in principle be created by a wide range of legislation and be anchored in different Treaty legal bases. They can thus be founded on secondary law subject to a variety of decision procedures. The generation of revenue is not the primary objective of such legislation, but a side effect or corollary. Other revenue can be either registered as general revenue (i.e. fungible with the Gross National Income-based Own Resource) or it can be assigned.*"

39 To integrate the proceeds of borrowing as a new category of own resources in the system of own resources of the Union would moreover be legally problematic, as the proceeds in reality constitute a liability which needs to be repaid and, therefore, are not a genuine resource which can be allocated to the Union in a final and definitive manner, as genuine own resources can.

Any construction involving other revenue, therefore, needs to fully preserve the integrity of the own resources system of the Union.

58. As an exception to the principle of universality, Article 21 FR provides that revenue may be assigned to specific items of expenditure[40]. In particular, under Article 21(5) FR, a basic act may "*assign the revenue for which it provides to specific items of expenditure*". This is also the construction proposed for the NGEU.

59. However, whereas assigned revenue is permitted under the FR and, therefore, forms part of the budgetary system, it also follows from the above that it is in the very nature of external assigned revenue to serve to reinforce specific expenditure provided in the budget. Such assigned revenue is therefore additional or complementary to the appropriations provided for in the budget and cannot become a generalised means for financing Union needs that would circumvent and replace the usual budgetary procedures. Due to its additional nature and the way it is generated, assigned revenue is not voted on by the budgetary authority under the annual budgetary procedure[41] and is not counted against the ceilings[42] of the MFF[43].

60. Assigned revenue therefore also detracts from the principle of unity which implies that all revenue and expenditure shall be recorded in one single document, namely the budget. That principle aims at preserving the prerogatives of the European Parliament and the Council in their capacity as budgetary authority under Articles 14(1) and 16(1) TEU, with responsibility for adopting the annual budget under the procedure set out in Article 314 TFEU.

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40 Article 21(1) foresees that: "*External assigned revenue and internal assigned revenue shall be used to finance specific items of expenditure.*"

41 In the case of Article 21(5) FR, the assigned revenue is provided under a basic act, within the meaning of Article 310(3) TFEU and as defined in Article 2(4) FR, and automatically generates commitment and payment appropriations (Article 22(2) FR).

42 This is also confirmed in recital 8 to the current MFF Regulation: "*The MFF should not take account of budget items financed by assigned revenue* (…)." See Council Regulation (EU, Euratom) No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020 (OJ L 347, 20.12.2013, p. 884).

43 The technical aspects of external assigned revenue and how it would work under the NGEU are also described in Commission fiche No 69, see document WK 6112/2020 INIT.

61. The Treaty-based principle of unity and the principle of universality form part of the basic budgetary principles listed in Title II of the FR. Their fundamental role and special status is also reflected in Article 3(2) FR which provides that they may not be derogated from under other legislative acts.

62. It follows from all of the above that recourse to external assigned revenue is subject to important restrictions which aim, in particular, at preserving the inter-institutional balance by protecting the prerogatives, including the budgetary ones, of the European Parliament and the Council. External assigned revenue must, therefore, remain additional or complementary in nature in order to avoid deconstructing the system of own resources and the regular budgetary mechanisms, in circumvention of the applicable procedures.

63. The proposed volume of external assigned revenue for the NGEU is unprecedented and substantial. However, the determination of whether the mechanism remains within the acceptable boundaries cannot be based on quantity alone, but must also take into account qualitative elements, including the specific economic circumstances and context in which such mechanism comes up and the safeguards put in place. Such safeguards must include guarantees which sufficiently circumscribe the construction to ensure that it cannot become a permanent mechanism or constitute a shift of paradigm in the EU budget processes and methods which would put at jeopardy the system of own resources as established by the Treaties.

64. The NGEU is prompted by the exceptional situation which has arisen as a consequence of the COVID-19 pandemic and the ensuing urgent need to support a swift recovery. It is, therefore, by no means a typical spending programme. Rather, it is proposed as an exceptional, temporary and one-off instrument to help economic recovery in a spirit of solidarity[44]. Solidarity is a core principle underlying the Treaties. The preamble to the TEU confirms the desire of the Member States to "*deepen the solidarity between their peoples, while respecting their history, their culture and their traditions*"(6th recital). Moreover, solidarity is listed, in Article 2 TEU, among the values on which the Union is founded.

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[44] The spirit of solidarity is an element expressly mentioned in Article 122(1) TFEU (such wording was added in 2009 by the Lisbon Treaty) which is the legal basis of the Recovery Instrument. It therefore forms part of the specific construction of the NGEU.

65. In that respect it is recalled that, in accordance with the first paragraph of Article 311 TFEU, the Union is to "*provide itself with the means necessary to attain its objectives.*" In the same vein, Article 3(6) TEU provides that the "*Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties"*. Finally, Article 323 TFEU provides that "*The European Parliament, the Council and the Commission shall ensure that the financial means are made available to allow the Union to fulfil its legal obligations in respect of third parties.*"

66. In order to respond to the exceptional situation, it is thus also required that financial means are available which are commensurate in volume to the challenge that the Union and its Member States face. It is for the Union legislator to decide, under the applicable procedures, what is considered appropriate and commensurate to the specific situation. In making such a decision, the legislator enjoys a wide margin of discretion, provided the safeguards described in paragraphs 67 to 69 below - which in essence aim at safeguarding the integrity of the system of own resources as well as the principles of unity and universality applicable to the Union budget - are respected.

67. The Council Legal Service considers that a mechanism such as the one proposed, the purpose of which is to provide for an exceptional, temporary and one-off contribution to support recovery through targeted spending, which comes on top of budget resources to be provided under the next MFF, is consistent with the additional and complementary nature of assigned revenue. The substantial amount of external assigned revenue may, therefore, exceptionally be considered justified insofar as it is strictly circumscribed to cover measures linked to the COVID-19 pandemic[45] and limited, in size and duration, to what is necessary to that end.

[45] A detailed assessment of whether the measures proposed to be financed fall within the scope of Article 122 TFEU and the specific objective of supporting recovery as a consequence of the COVID-19 pandemic, is provided in section B below.

68. In the view of the Council Legal Service, the construction of the NGEU adequately incorporates the above safeguards:

– under the ORD proposal, the use of borrowing on capital markets for the financing of operational expenditure of the Union is as a matter of principle excluded (Article 3a and recital 13h). However, by way of derogation, such a construction is exceptionally authorised "*for the sole purpose of addressing the consequences of the COVID-19 crisis*" (Article 3b(1) of the ORD proposal, emphasis added);

– the financial construction relies on a proposal based on Article 122 TFEU, a legal basis that presupposes exceptional situations, and provides for measures of a targeted and temporary character (see Articles 2 and 4(4) to (7) of the Recovery Instrument).

69. The Council Legal Service also considers that - in the light of the substantial amount of external assigned revenues involved and the fact that, as explained above, external assigned revenues are not a part of the annual budgetary procedure the legal soundness of the mechanism proposed under the NGEU could be further strengthened by establishing arrangements for inter-institutional cooperation which would guarantee an involvement of both the European Parliament and the Council, as the two arms of the budgetary authority[46], in a manner which would be consistent with, and respect the specific nature of, assigned revenue[47]. This should not amount to establishing a kind of parallel budgetary procedure.

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46 In its communication "The EU powering the Recovery Plan for Europe", the Commission invites the European Parliament and the Council to "*review on an annual basis expenditures financed with external assigned revenues under Next Generation EU.*" See page 2 of the Communication (COM (2020) 442 final), document ST 8137/20 INIT.

47 In that respect it is recalled that the annual budget already contains a structure to accommodate external assigned revenue, in particular by means of indications in the budget remarks, as explained in footnote 25. The Commission is already proposing to enhance transparency by including information about the expected amount of annual legal commitments, see Statement of estimates of the European Commission for the financial year 2021 (SEC(2020) 250).

c) ***Intermediate conclusions***

70. In the light of the above, the following conclusions can be made:

- it is for the Union legislator to determine which financial means are necessary to adequately attain the objective pursued by the NGEU for which determination it holds a margin of discretion which includes the possibility of having recourse to borrowing, the proceeds of which constitute external assigned revenue. That margin of discretion is however limited by the need to respect the integrity of the system of own resources of the Union;

- in view of the substantial amount that the external assigned revenue envisaged under the NGEU would represent, adequate safeguards should be provided with a view to protecting the integrity of the own resources system of the Union and of the budgetary system. The exceptional character of the situation the NGEU intends to address and its one-off nature and limited duration, as duly reflected in the relevant proposals, do constitute such adequate safeguards;

- with a view to reinforcing the consistent of the external assigned revenue with the system of own resources and the budgetary mechanisms, the introduction of additional and specific arrangements aimed at ensuring an appropriate involvement of the European Parliament and the Council in the annual process is advised.

4. Is Article 311 TFEU an appropriate legal basis for establishing elements related to the NGEU, in particular those linked to the borrowing of funds?

71. As already mentioned above, the ORD proposal contains novel elements pertaining to the borrowing under the NGEU.

This part assesses whether Article 311 TFEU is the appropriate legal basis for those elements and, in particular, for the empowerment of the Commission to contract borrowing on capital markets. As will be shown below, this issue is also of relevance for defining the specific role which is given in the general construction to the Recovery Instrument (which is based on Article 122 TFEU).

a) Legal framework

72. The legal basis under consideration is the third paragraph of Article 311 TFEU:

"*The Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own resources or abolish an existing category. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements."* (emphasis added)

73. The Own Resources Decision is complemented by implementing measures for the own resources system, insofar as this is provided for in the Own Resources Decision (see the fourth paragraph of Article 311 TFEU[48]), and by an act determining the methods and procedure for making own resources available to the Union, a so-called "Making Available Regulation"[49], adopted on the basis of Article 322(2) TFEU which provides:

"*The Council, acting on a proposal from the Commission and after consulting the European Parliament and the Court of Auditors, shall determine the methods and procedure whereby the budget revenue provided under the arrangements relating to the Union's own resources shall be made available to the Commission, and determine the measures to be applied, if need be, to meet cash requirements*". (emphasis added)

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[48] "*The Council, acting by means of regulations in accordance with a special legislative procedure, shall lay down implementing measures for the Union's own resources system in so far as this is provided for in the decision adopted on the basis of the third paragraph [ORD]. The Council shall act after obtaining the consent of the European Parliament.*"

[49] The current Making Available Regulation is Council Regulation (EU, Euratom) No. 609/2014 of 26 May 2014 on the methods and procedure for making available the traditional, VAT and GNI-based own resources and on the measures to meet cash requirements (OJ L 168, 7.6.2014, p. 39).

b) Legal analysis

i) Preliminary remarks

74. According to well-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 measure[50].

75. Moreover, the case law has established that if an act has a twofold purpose or component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on the Treaty provision corresponding to the main purpose or the main component of the act. Exceptionally, where a measure has several contemporaneous objectives or components which are indissociably linked with each other without one being secondary and indirect in respect of the others, the measure must be based on the various legal bases. Recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other[51].

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50 See judgment of 11 June 1991, *Commission v Council* ("*Titanium dioxide*"), C-300/89, EU:C:1991:244, paragraph 10; judgment of 5 May 2015, *Spain v Council*, C-147/13, EU:C:2015:299, paragraph 68 and the case law cited.

51 See judgments *Commission v Council* ("Titanium dioxide"), cited above, paragraphs 17 to 21; *Spain v Council,* cited above, paragraph 59; judgment of 11 September 2003, *Commission v Council,* C-211/01, EU:C:2003:452, paragraph 39; judgment of 19 September 2002, *Huber,* C-336/00, EU:C:2002:509, paragraph 31; judgment of 29 April 2004, *Commission v Council,* C-338/01, EU:C:2004:253, paragraphs 55 *et seq.;* judgment of 8 September 2009, *Commission v Parliament and Council*, C-411/06, EU:C:2009:518, paragraphs 46 and 47; judgment of 6 November 2008, *Parliament v Council,* C-155/07, EU:C:2008:605, paragraphs 36 *et seq.*

76. The case law also underlines that the procedures involved in the different legal bases are the result of the choice made by the authors of Treaties[52]. In particular, the Court has pointed out that: "*The rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves.*"[53]. The choice of legal basis thus cannot be guided by criteria of pure political convenience linked to the specific procedure it entails (for instance in view of the use of the unanimity voting rule instead of the qualified majority voting rule) or be motivated by the type of national procedure a given legal basis would entail.

77. Two additional preliminary remarks should be made concerning the scope of the third paragraph of Article 311 TFEU.

– First, the scope of the Own Resources Decision needs to regulate measures linked to revenue. This clearly stems from the wording of the third paragraph of Article 311 TFEU which refers to "*provisions relating to the system of own resources of the Union*" (emphasis added).

– Second, the third paragraph of Article 311 TFEU empowers the Council to adopt a decision on the *"the system of own resources of the Union"*. The establishment or abolishment of categories of own resources, as referred to further in that provision, may be adopted "*in the context*" of the provisions relating to the system of own resources. Hence, the power of the Council under the third paragraph of Article 311 TFEU is not limited to establishing or abolishing categories of own resources, but encompasses the power to adopt any provision related to the system of own resources, which is a wider notion. This is already the case in respect of the provisions of the current ORD which go beyond the pure establishment of categories of own resources by dealing for instance with issues such as rebates, surplus and the principle of universality.

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52 See judgment of 19 July 2012, *European Parliament v Council*, C-130/10, EU:C:2012:472, paragraphs 80 to 82.

53 See judgment of 23 February 1988, *United Kingdom of Great Britain and Northern Ireland v Council*, C-68/86, EU:C:1988:85, paragraph 38.

78. The above has an immediate consequence in relation to the question whether the ORD proposal may contain provisions related to the future repayment of borrowing under the NGEU. First of all it is not necessary that the proceeds from borrowing are established as a new category of own resource for it to be possible to include such provisions in the ORD proposal. Second, the establishment of the proceeds from borrowing as a new category of own resources would be legally problematic, as those proceeds are revenues which are not final and definitive, but engender a liability for the Union. Their legal nature is thus different from the notion of own resources, which are due to the Union in a final and definitive manner and which do not create a liability for the Union[54].

79. The question is, therefore, whether, in spite of the proceeds from borrowing not being a category of own resource, measures laid down in the ORD proposal that concern their future repayment fall within the notion of "*system of own resources of the Union",* as referred to in the third paragraph of Article 311 TFEU. That question must be addressed bearing in mind the aim and content of those measures.

ii) Content and aim of measures on repayment of borrowing laid down in the ORD proposal

80. As regards the content of those provisions, the ORD proposal lays the foundation for the borrowing operations under the NGEU in the following manner:

– it establishes the principle that the Union may not borrow on the markets for the financing of operational expenditure (see Article 3a of the ORD proposal);

– by way of derogation from that principle, it exceptionally empowers the Commission to borrow funds in the amount of EUR 750 billion on capital markets on behalf of the Union "*for the sole purpose of addressing the consequences of the COVID19 crisis*", and determines the distribution between loans and expenditure respectively (see Article 3b(1), points (a) and (b));

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54 See also footnote 39 above. In accordance with well-established case law, the obligation for Member States to make available own resources to the Union is founded directly on the own resources framework and does not require any additional act, see judgment of 21 June 2007, *Republic of Finland v Commission*, C-163/06 P, EU:C:2007:371, paragraphs 30-32 and 35.

– it establishes an ear-marked compartment by means of an extraordinary and temporary increase of the own resources ceilings to cover liabilities arising from the borrowing (see Article 3c);

– it sets out further modalities for the repayment of the borrowing, in particular the repayment period (see Articles 3b(2) and 3c) and a ceiling on the maximum annual repayments (see Article 3b(2)[55]), and empowers the Commission to establish the necessary arrangements for the borrowing operations (see Article 3b(3));

– finally, it includes a provision on cash resources which refers to the applicable provisions under the Making Available Regulation (see Article 6(4)).

81. The aim of the proposed provisions and the specific context are detailed in the explanatory memorandum accompanying the ORD proposal and are further defined in the recitals.

82. In particular, the explanatory memorandum refers to Articles 310(4) and 323 TFEU[56] and indicates that "[i]*n order to ensure compliance with those provisions in any given year and under any circumstances, it is necessary that Member States allocate to the Union the resources needed to cover the financial obligations and contingent liabilities stemming from this exceptional and temporary empowerment to borrow funds*."

83. Recital 13d specifies that the inclusion in the ORD proposal of the empowerment for the Commission to borrow funds on the markets is closely related to the increase of the own resources ceiling and "*ultimately to the functioning of the system of own resources of the Union*". Moreover, it specifies that the unprecedented nature of the operation calls for "*certainty*" about the overall volume of Union's liability and the essential features of repayment and the pursuit of a single borrowing strategy.

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55 The Commission has clarified that the 7.5 % cap on annual repayments only applies to the amounts due for borrowing used to finance expenditure, hence excluding the loan component. This needs to be better reflected in the second subparagraph of Article 3b(2) which currently refers back to the provision indicating the full amount of EUR 750 billion.

56 Cited in paragraph 14 above.

84. In the same vein, recital 13f further explains the rationale for including the elements in the ORD proposal as follows: "*The repayment of funds borrowed* (…) *should be funded by the Union budget. The borrowed funds which are granted as loans to Member States should be repaid by the sums received from beneficiary Member States. The necessary resources need to be allocated and made available to the Union for it to be able to cover all of its financial obligations and contingent liabilities resulting from the exceptional and temporary empowerment to borrow in any given year and under any circumstances in compliance with Article 310(4) TFEU and Article 323 TFEU*."

85. In the light of the above, it is possible to conclude that the aim of the targeted amendments to the ORD proposal is to ensure - at any given moment in time - the Union's ability to repay the debt resulting from the exceptionally high amount of borrowing, including the contingent liabilities arising from the loan component. In other words, the aim of the provisions concerning the borrowing and their repayment is linked to the creation in the ORD proposal of the necessary space for repayments, and ultimately to the proper functioning of the own resources compartment dedicated to this end. The need for strong guarantees to that effect has been highlighted above as a necessary safeguard to ensure the legal soundness of the proposed construction of the NGEU.

86. It must now be examined whether the content of the provisions dealing with borrowing and their future repayment duly translates those aims.

87. This is the case in respect of the temporary increase of the own resources ceiling as the key provision to guarantee the capacity of the Union to repay, but also for the essential features for repayment and borrowing strategy which form an integral part of the increase of the ceiling. Those modalities reflect the conditions under which Member States agree to make available the necessary own resources. Provisions governing the extent to which Member States agree to make funds available for the specific borrowing operations and the conditions attached thereto, therefore, fall squarely within the scope of Article 311 TFEU as "*provisions relating to the system of own resources of the Union.*" Those elements are, moreover, directly linked to the principle of budgetary discipline as enshrined in Article 310(4) TFEU, under which "*assurance*" shall be provided that expenditure can be financed within the limits of the Union's own resources.

88. Whereas the indication of the final use of borrowing (i.e. for the sole purpose of addressing the consequences of the COVID-19 crisis, Article 3b(1)) and the general prohibition from issuing borrowing to finance ordinary operational expenditure (Article 3a) are not directly relevant for the Union's capacity to repay and may appear more expenditure-related, they contribute to defining the ultimate limits and conditions for making available the financing and may, therefore, be considered as ancillary to the general set-up, in the meaning of the case law referred to in paragraph 75 above that recognises the possibility of including components which are incidental in nature to those under the "primary" legal basis.

89. Two provisions of the ORD proposal, however, deserve a closer assessment, namely the empowerment of the Commission to borrow funds on the markets (Article 3b(1)(a)) and the cash management measures (Article 6(4)).

Inclusion of the empowerment to borrow funds in the ORD proposal

90. The ORD proposal, in Article 3b(1)(a), empowers the Commission to borrow funds on capital markets on behalf of the Union.

91. The inclusion of that provision in the ORD constitutes a departure from previous practice under which the provisions empowering the Commission to borrow funds on the markets have been inserted in the legal acts based on the policy legal basis, the latter constituting the required "*legally binding Union act providing a legal basis for* [the Union's] *action*" within the meaning of Article 310(3) TFEU[57]. This is known as a "basic act" in budget terminology (see Article 2(4)FR).

[57] See for instance the various instruments set up over time to assist Member States experiencing difficulties with the balance of payments. Article 122 TFEU has also already been used on past occasions to provide various types of assistance to Member States in case of events leading to severe difficulties as regards their economic situation: this is notably the case of the EFSM Regulation (referred to in footnote 16 above), based on Article 122(2)), the Emergency Support Instrument Regulation (Council Regulation (EU) 2016/369 on the provisions of emergency support within the Union), recently activated for measures linked to the COVID-19 crisis, based on Article 122(1), and the SURE Instrument (referred to in footnote 19 above), based on Articles 122(1) and (2) TFEU.

92. In the present case, it would therefore have been legally feasible and consistent with the FR to include the empowerment for the Commission to borrow funds on capital markets in the Recovery Instrument which is based on Article 122 TFEU.

93. However, practice alone is not enough to found the legality of an act[58] and, by implication, cannot be taken as an expression of what is legally required.

94. It is, therefore, necessary to examine whether the inclusion of the empowerment in the ORD proposal may be considered as belonging to the "*system of own resources of the Union*" as laid down in the third paragraph of Article 311 TFEU or can be inserted as an ancillary element thereof.

95. Recital 13d of the ORD proposal, referred to in paragraph 83 above, justifies the inclusion of the empowerment for the Commission in the ORD proposal by stating that it is closely related to the establishment of the new compartment and, ultimately, to the functioning of the system of own resources. The empowerment is, therefore, conceived as closely linked to the dedicated increase of the own resources ceiling and, eventually, to the Union's capacity to repay its debt. In that respect, it has to be recognised that "borrowing for spending" - due to the fact that it generates debt which needs to be covered from future own resources - involves a strong revenue element. It is that circumstance, combined with the substantial amount concerned and the need to ensure the Union's capacity to repay the debt, which justifies the dedicated compartment in the ORD proposal, a feature which is not common to any of the existing borrowing operations.

96. On the other hand, whereas the dedicated compartment as well as the specific repayment modalities and the maximum amount are all directly linked to the conditions under which the Member States commit to repay the debt arising from the borrowing, the same cannot be said as regards the empowerment. The empowerment is rather an element linked to a specific action and the ensuing expenditure. It could therefore be considered as quite foreign to the "*system of own resources*" within the meaning of Article 311 TFEU.

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58 See judgment of 6 May 2008, *European Parliament v Council*, C-133/06, EU:C:2008:257, paragraph 60.

97. However, the case law referred to in paragraph 75 above recognises the possibility of including in a legal instrument components which are incidental in nature to the main component of the instrument and its "primary" legal basis. This pre-supposes that such components are secondary and indirect in relation to the preponderant one.

98. In the present case, the empowerment to borrow may legitimately be considered as constituting an incidental component of the ORD proposal because, without directly forming a part of the system of own resources, such an empowerment is a logical and necessary part of the specific, and novel, construction foreseen for the financing of the NGEU[59].

It should be clarified that in the proposed architecture, whereas the ORD proposal contains the empowerment for the Commission to borrow on the markets, it is the Recovery Instrument to be adopted under Article 122 TFEU, which would constitute the legal basis for the Union's action within the meaning of Article 310(3) TFEU, defining its scope as well as the implementation period. It would therefore constitute the "*basic act*" for the implementation of the expenditure. This would entail some adaptations to the Recovery Instrument proposal based on Article 122 TFEU to make it consistent with the FR. These adaptations derive from the fact that, whilst Article 21(5) FR foresees that a basic act may assign the revenue for which it provides to specific items of expenditure (as external revenue), the Recovery Instrument proposal does not itself provide for the revenue[60].

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[59] Such conclusion, which is based on the specificities of the NGEU, cannot be directly transposed to future "ordinary" borrowing operations.

[60] The Council Legal Service therefore cannot agree with the assessment contained in the Commission Q and A published on its internet site with regard to the legal construction of the NGEU: "*The Own Resources Decision is an act establishing the revenue of the Union, the own resources. How can it constitute legal basis for expenditure (repayment of the borrowing)? Article 310(3) TFEU provides that the "implementation of expenditure shown in the budget shall require the prior adoption of a legally binding Union act providing a legal basis for its action and for the implementation of the corresponding expenditure in accordance with the [financial] regulation". The Own Resources Decision is a "legally binding Union act" as defined by Article 2(4) of the Financial Regulation. As long as it can validly authorise the borrowing and its repayment (see previous question), the necessary consequence is that it will constitute a basic act for the expenditure intrinsically linked to the borrowing, i.e. the instalments of the borrowing. Therefore, this aspect belongs to the 'system of own resources of the Union' [Article 311(3) TFEU].*" The document can be accessed via the following link: https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1024.

Given the very technical nature of these implications, the Council Legal Service suggests to address them during discussions in the relevant preparatory body.

Inclusion of cash management measures in the ORD proposal (Article 6(4))[61]

99. Article 6(4) of the ORD proposal comprises measures to ensure the availability of cash to honour the liabilities of the Union arising from the borrowing in the context of the NGEU.

Whereas such measures are revenue-related and, therefore, belong to the notion of a "*system of own resources*", the question is whether such provision may be introduced in the ORD proposal, or whether it should rather be inserted in the Making Available Regulation, for which, however, no amendment proposal has been tabled[62].

100. The Making Available Regulation is based on Article 322(2) TFEU which explicitly refers to "*measures to be applied, if need be, to meet cash requirements*". As Article 6(4) of the ORD proposal is a measure aimed at meeting cash requirements, there is no doubt as to the possibility of including such a provision in the Making Available Regulation, as also illustrated by the reference, in Article 6(4) of the ORD proposal, to the Making Available Regulation which already contains provisions on cash management measures in its Article 14.

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61 The content of Article 6(4) and whether it may entail joint and several liabilities is examined below in part 5.

62 Cited in paragraph 73 and footnote 49 above. The Commission has tabled a separate Regulation governing the making available of the proposed new own resources, and a proposal for the amendment of Regulation (EEC, Euratom) No 1553/89 on the definitive uniform arrangements for the collection of own resources accruing from value added tax, which proposals are both based on Article 322(2) TFEU.

101. However, the question is whether this finding in itself excludes the possibility of including Article 6(4) in the ORD proposal. The Council Legal Service has already issued an opinion which explains the specific features of the own resources framework which consist of several layers, with the Own Resources Decision at the top of the pyramid. The Own Resources Decision includes the provisions which are considered most essential to the functioning of the own resources framework, and the legislator has a wide margin of discretion as to essential elements to be included in the Own Resources Decision, provided that this does not lead to emptying the other acts forming part of the own resources framework of their useful effect[63].

102. It is therefore open to the legislator to consider that Article 6(4), in the light of the magnitude of the borrowing and its consequences in terms of repayment, belongs in the ORD proposal rather than in the Making Available Regulation, as long as consistency is sought with Article 14 of the Making Available Regulation which already, at least partially, covers the legal situation purported to be regulated by Article 6(4) of the ORD proposal. Such inclusion in the ORD proposal would also be justified by the direct link to the other elements on repayment. Finally, both the current ORD and the Commission's 2018 ORD proposal already contain a limited number of provisions on the making available of own resources.

c) Intermediate conclusions

103. In the light of the above, the Council Legal Service is of the view that:

- Article 311 TFEU is an appropriate legal basis for the new elements introduced in the ORD proposal to cater for the repayment of borrowing foreseen under the NGEU;

[63] Opinion of the Council Legal Service in doc. 6198/12, paragraph 10: "*it will be recalled, on the other hand, that the legislator has a wide discretionary margin in order to determine what is an essential element to include in the ORD, and is therefore not bound to follow the proposed legal architecture in all its particular detail. However, while in theory all provisions, essential as well as non-essential, could be included in the ORD, account must also be taken of the useful effect of the provisions of 311(4) and 322 (2) TFUE, - insofar those two legal bases indicate an intention of the Contracting Parties, confirmed by Treaty preparatory works, to have a number of issues decided by the legislator, but with different procedural requirements than those of the Own Resources decision.*"

- the empowerment of the Commission to borrow funds on capital markets may be considered ancillary to those other provisions of the ORD proposal;

- it is open to the Union legislator to consider that Article 6(4) of the ORD proposal is an essential element of the system of own resources which should be included in the ORD proposal rather than in the Making Available Regulation.

5. Whether, as currently drafted, Article 6(4) of the ORD proposal, which lays down the rules applying in the case of a default on a loan or an insufficiency of budget appropriations, by reference to the Making Available Regulation, could entail joint and several liabilities for Member States

a) Legal framework

104. Under Article 6(4) of the ORD proposal, where authorised appropriations entered in the budget would not be sufficient for the Union to comply with its obligations resulting from the borrowing referred to in Article 3b, the Member States would be obliged to make the resources necessary for that purpose available to the Commission "*in accordance with regulations adopted under Article 322(2) TFEU, as applicable at that time, under the same conditions as those applying in the event of default on a loan contracted"* by the Union.

That wording in Article 6(4) of the ORD proposal must be understood as referring to Article 14 of the current Making Available Regulation, in particular its paragraphs (3) and (4).

105. Article 14 of the Making Available Regulation forms a part of Chapter IV "*Management of Cash Resources*" and reads as follows:

"*1. The Commission shall draw on the sums credited to the accounts referred to in Article 9(1) to the extent necessary to cover its cash resource requirements arising out of the implementation of the budget.*

2. If the cash resource requirements are in excess of the assets of the accounts, the Commission may draw in excess of the total of these assets subject to the availability of appropriations in the budget and within the limit of the own resources entered in the budget. In this event, it shall inform the Member States in advance of any foreseeable excess requirements.

3. In the sole case of default under a loan contracted or guaranteed pursuant to regulations and decisions adopted by the Council, or by the European Parliament and the Council, in circumstances in which the Commission cannot activate other measures provided for by the financial arrangements applying to these loans in time to ensure compliance with the Union's legal obligations to the lenders, paragraphs 2 and 4 may provisionally be applied, irrespective of the conditions in paragraph 2, in order to service the Union's debts.

4. Subject to the second subparagraph, the difference between the overall assets and the cash resource requirements shall be divided among the Member States, as far as possible, in proportion to the estimated budget revenue from each of them.
The Commission, when covering its cash resource requirements, shall aim to reduce the impact of the obligations on Member States to credit amounts of negative interest pursuant to the third subparagraph of Article 9(1) by drawing with priority on the sums credited to the accounts concerned."

106. As a result of the reference to Article 14 of the Making Available Regulation, in the event the Union would not be able honour its obligations vis-à-vis its creditors from the borrowing referred to in Article 3b of the ORD proposal, the Commission would be able to require each Member State to make available cash resources that are necessary to cover the requirements consisting of the need to repay the relevant principal, interest or costs. The needs would be divided among the Member States - as far as possible - on a *pro rata* basis. Such cash measures are provisional only and can never lead to calling cash beyond the ceilings for own resources.

b) Legal analysis

107. In the course of the discussions on the ORD proposal, questions have been raised as to whether, by referring to Article 14 of the Making Available Regulation, Article 6(4) of the ORD proposal would open the way to a "mutualisation of debt" through the own resources system, namely whether it would lead to a system of joint and several responsibility of Member States in relation to debt issued for the purposes of the NGEU, under which each Member State could be obliged to provide missing cash resources irrespective of the proportion of its liabilities to the Union as compared to those of the other Member States.

108. It should be emphasised that under the system of own resources of the Union, the financial liability of each Member State is individual and not joint and several. The system of own resources is based on the full respect of the budgetary sovereignty of the Member States. This is the reason why the Authors of the Treaties have provided that, in accordance with the third paragraph of Article 311 TFEU, the Own Resources Decision may only enter into force once it has been approved by each Member State in accordance with its national constitutional requirements. While Member States are bound to assume the financial liability they have accepted when approving the Own Resources Decision, additional financial obligations going beyond provisional measures may only be imposed upon them provided that the Own Resources Decision has first been amended accordingly.

    Consequently, the system of own resources of the Union is, as a matter of principle, based on the system of proportionality in which the contributions of each Member States are determined *pro rata,* by a reference to contribution rates which are set out in the Own Resources Decision itself (in particular the so-called GNI-based contributions) and where the Member States´ contributions are foreseeable and certain and cannot be modified unless the Own Resources Decision is modified.

109. Article 14(3) and (4) of the Making Available Regulation thus does not entail a mutualisation of debt but rather establishes a system of provisional compensation among Member States, in which each Member State remains ultimately liable to transfer the amounts due by virtue of the application of the Own Resources Decision. Article 14(3) and (4) of the Making Available Regulation lays down a last resort mechanism to be applied in case of default on a loan of the Union when "*the Commission cannot activate other measures provided for by the financial arrangements applying to these loans in time to ensure compliance with the Union's legal obligations to the lenders"*. The emphasis is on the timely payment of the Union's debt, as the budgeting of additional amounts needed, which at any rate has to be undertaken, may risk leading to late payment by the Union. The obligation of the Member States to provide, provisionally, the missing cash resource requirements is based on the system of proportionality (*pro rata*).

Although Article 14(3) of the Making Available Regulation would theoretically permit that, where such proportionate allocation is not possible, the division of the liability among the Member States may exceptionally lead to some Member States providing a higher contribution than that calculated on a *pro rata* basis, this cannot be regarded as a joint and several assumption of liabilities, as in any event the provision of missing cash resources would apply on a provisional basis only, as off-budget operations[64].

110. However, Article 14(3) and (4) of the Making Available Regulation has been conceived to repair shortages of cash resources in cases of loans, where i) amounts involved have so far been much more modest than the borrowing envisaged under the NGEU, and ii) the loans in question only give rise to a contingent liability.

By contrast, the NGEU is a very different construction: it entails much larger amounts where the liability of Member States is bound to arise in relation to a situation of the "borrowing for spending".

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[64] The cash operations would subsequently have to be regularised in the Union annual budget (typically by means of an amending budget). It is also understood that the Commission will undertake measures to recover the debt from the defaulting debtor and such recovered amounts will be budgeted as revenue for the budget.

111. In the light of comments made during the discussions so far of the ORD proposal, the fact that the NGEU is such a different construction and the magnitude of the amounts involved could indicate that the application of Article 14 of the Making Available Regulation to the case at hand under the NGEU may be inadequate. This is in particular due to the "borrowing for spending" component, especially as regards the exceptional situations where compensation under that provision could lead to a provisional redistribution of amounts on a different than *pro rata* basis, and which in the NGEU could involve requesting very large sum of missing cash resources from a limited amount of Member States[65].

112. In addition, the general reference from Article 6(4) of the ORD proposal to the provisions on the management of cash resources under the Making Available Regulation and the dynamic nature of this reference, i.e. reference to provisions in their version as applicable at the relevant moment and thus subject to any future amendment and legislative evolution[66], is difficult to reconcile with the idea of stability and predictability which underlies the establishment of a specific compartment in the ORD proposal to respond the issuance of debt with very long term maturities.

113. In order to take into account the above concerns, it is advised that the ORD proposal itself contains appropriate wording that is specific to the management of cash resources related to the NGEU. The ORD proposal could clearly establish the principle of the *pro rata* division of missing cash resources as well as the principle that each Member State´s ultimate liability to transfer resources to the Union is in any event limited by the amount that the Member State has committed to transfer to the Union. The Council Legal Service stands ready to suggest adequate wording to address these issues.

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65 At the same time, it should be noted that an insufficiency of resources under the "borrowing for lending" component is likely to be quite exceptional, as the repayments are fully foreseeable and programmable due to the fact that the Union takes on a certain (as compared to only contingent) liability. The Commission has referred to the case of provisional twelfths which may not ensure the amount of appropriations needed.

66 It is recalled that the Making Available Regulation can be modified by the Council acting by qualified majority.

*c) **Intermediate conclusions***

114. In the light of the above the following conclusions are made:

- the system of own resources of the Union is, as a matter of principle, based on a system of proportionality in which the contributions of each Member States are determined *pro rata,* by a reference to contribution rates which are set out in the Own Resources Decision itself (in particular the so-called GNI-based contributions) and where the Member States´ contributions are foreseeable and certain and cannot be modified unless the Own Resources Decision is modified.

- although Article 14(3) and (4) of the Making Available Regulation, to which application Article 6(4) of the ORD proposal makes a reference, does not entail a mutualisation of debt but constitutes a system of provisional compensation among Member States in case of a default under a loan contracted by the Union, those provisions are conceived for situations different from the envisaged "borrowing for spending" under the NGEU and the particular magnitude and specific nature of the latter's operations. In order to address these specificities and the concerns expressed by delegations, it is advised that the text of the ORD proposal be modified to insert wording that is specific to the management of cash resources related to the NGEU.

B. WHETHER THE LEGAL BASIS CHOSEN FOR THE RECOVERY INSTRUMENT (ARTICLE 122 TFEU) IS APPROPRIATE

1. Preliminary remarks

115. The Recovery Instrument[67] allocates the proceeds raised through the borrowing on the markets under the new Commission´s empowerment set out in the ORD proposal to a number of recovery measures for which it defines the scope (Articles 2 and 3 of the Recovery Instrument).

[67] Commission proposal for a Council Regulation establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 pandemic (COM (2020) 441 final), document ST 8141/20 INIT.

116. The Recovery Instrument also provides for the forms that the support shall take (non-repayable support, loans and provisioning for guarantees, Article 3(2)) and sets out specific rules for the budgetary implementation of the Instrument, including the designation of the proceeds of borrowing as external assigned revenue (Article 4(1)).

However, the Recovery Instrument does not lay down the recovery measures as such but rather provides that they shall be carried out under specific programmes which the Recovery Instrument finances (Article 2(2)). Thus the final objectives of the Recovery Instrument are pursued via the implementation of autonomous spending programmes and according to their specific features and rules, as established in the relevant Union acts.

2. Legal framework

117. Article 122 TFEU reads as follows,

"*1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may 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, notably in the area of energy.*

2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken."

3. Legal analysis

118. According to the well-established case law of the Court referred to in paragraph 74 above, the choice of the legal basis for a Union act must rest on objective factors which are amenable to judicial review, in particular the aim and content of that act.

119. The Recovery Instrument does not specify whether its legal basis is paragraph 1 or 2 of Article 122 TFEU, or whether the two paragraphs constitute the legal basis of the proposal at the same time.

It is noted that Article 122(2) TFEU provides that the Council may grant under certain conditions Union financial assistance to Member States. However, the Recovery Instrument does not grant financial assistance to Member States. It lays down general arrangements for the use of the proceeds of the Union´s borrowing in a number of Union programmes.

The Council Legal Service is therefore of the view that the Recovery Instrument is based on paragraph 1 of Article 122 TFEU and not on paragraph 2. The wording used in paragraph 2, where it refers to the difficulties or the exceptional occurrences which may justify its use, helps however giving an indication on the sorts of exceptional circumstances that Article 122 as a whole is designed to address.

120. Article 122(1) TFEU empowers the Council to adopt the "*measures appropriate to the economic situation*" in a "*spirit of solidarity*", without specifying which are the situations which qualify for recourse to that provision or the particular form, nature and content of the measures that may be adopted on its basis. Article 122(1) TFEU simply refers "*in particular*" to severe difficulties in the supply of certain products, notably in the area of energy, but does not specify exhaustively either the kind of situations which may give rise to that provision or to the specific measures that the Council is empowered to adopt.

121. Having regard to its wide wording, the Council has a wide margin of discretion when acting on the basis of Article 122(1) TFEU. That degree of discretion must, however, be exercised bearing in mind the following parameters:

– First, recourse to Article 122(1) TFEU presupposes the existence of a situation of urgency or of exceptionality[68] leading to severe difficulties[69] in the economic situation of the Member States which cannot be addressed by means of the ordinary Union measures. The "*appropriate*" measures to which Article 122(1) TFEU refers must be commensurate to the gravity of the situation. Moreover, as confirmed by the case law, measures adopted under Article 122(1) TFEU must be temporary[70]. It cannot be used for the purpose of regulating a matter on a permanent basis or to replace the ordinary financing of EU policies, since this would encroach on the relevant substantive legal bases provided for in the Treaties. The introductory words "*without prejudice to any other procedures provided for in the Treaties*" underscore the exceptional and temporary nature of measures under Article 122(1) TFEU, as recourse to that provision may not undermine or circumvent the use of other legal basis laid down in the Treaties for use in "normal times".

– Second, Article 122(1) TFEU belongs to Chapter 1 of Title VIII TFEU, which deals with economic policy. Measures under Article 122(1) TFEU must therefore be economic in nature.

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68 The wording of Article 122(1) does not mention expressly the condition of urgency as is the case for Article 122(2). However, the two paragraphs need to be read jointly and on the basis of the specific purpose of Article 122 in the system of the Treaties: both contextual and systemic methods of interpretation point therefore at an "emergency rationale" that applies to the whole Article.

69 Art. 122(1) TFEU refers to "*severe difficulties in the supply of certain products*". While the reference is merely illustrative and not meant to limit the types of difficulties that can be addressed by the Article, the provision does set a threshold of relevance ("*severe difficulties*") that needs to be reached to justify the adoption of measures under this legal basis and leaves thus a margin of discretion to the Council when adopting the measures. It is noted that the notion of "*severe difficulties*" is also used to define the condition for the recourse to financial assistance under paragraph 2 of Article 122.

70 These conditions have been identified by the Court for the use of Article 103 of the EEC Treaty which is the predecessor of Article 122 TFEU. See judgment in *Balkan Import,* cited above, paragraphs 13 to 17.

122. It has to be examined now whether, in view of the above criteria, the aim and content of the Recovery Instrument fit within Article 122(1) TFEU. This examination must be complemented by a subsequent one: since the objectives of the Recovery Instrument are pursued via the implementation of autonomous spending programmes, it has also to be assessed whether the essential characteristics of those programmes duly translate the requirements that the measures adopted under Article 122 TFEU should respect.

a) Examination of the Recovery Instrument

i) The aims of the Recovery Instrument

123. Article 1 of the Recovery Instrument lays down that the objective of the instrument is "*to support the recovery in the aftermath of the COVID-19 pandemic*". Recitals 1 and 2 of the preamble to the Recovery Instrument identify the COVID-19 pandemic as the source of an exceptional economic situation. In order to face this exceptional situation, recital 4 sets out the objectives of the Recovery Instrument, i.e. to put in place an exceptional programme of economic and social support, in a spirit of solidarity between Member States, and in particular for those who have been particularly hard hit, as well as to boost an exceptional and coordinated programme of economic and social support. Recital 6 further underscores that support under the Recovery Instrument should only be made available in order to address the consequences of the COVID-19 pandemic or the immediate funding needs to avoid a re-emergence of the pandemic.

124. The objectives of the proposal, as described above, duly correspond to those of Article 122(1) TFEU, namely to address in a spirit of solidarity exceptional situations, in particular if severe difficulties arise.

ii) The content of the Recovery Instrument

125. The next question to address is whether the declared aims of the Recovery Instrument are properly translated in its content. As clarified above, such a content must consist of measures which are exceptional, temporary and economic in nature.

The exceptional character of the measures

126. The exceptionality of the measures entails first an examination of whether they are linked to the situation caused by the COVID-19 pandemic. In other words, the requirement of exceptionality involves that the scope of the Recovery Instrument must be limited to measures designed to address the consequences of the COVID-19 pandemic.

127. Article 2 of the proposal, on the scope of the Recovery Instrument, provides that it shall support the recovery within the Union in the aftermath of the COVID-19 pandemic, for which it provides "*in particular*" a number of measures to tackle its adverse consequences (Article 2(1), points (a) to (i), as well as the second subparagraph of Article 2(1) of the proposal):

a) measures aiming at reacting to the immediate impact of the crisis on employment, health sectors, economic operators (measures under points (a), (c), (d) and (i))[71];

b) measures supporting the relaunch of Member States´ economies, notably by supporting reforms and investments and the objective of just transition to climate-neutral economy (measures under point (b) and (h))[72];

c) measures which reinforce the preparedness of the Union to face future health crises (points (e), (f) and (g))[73];

d) measures providing support to third countries affected by the COVID-19 crisis (second subparagraph of Article 2(1))[74].

128. The Council Legal Service considers that, the first category of measures referred to in point a) above is clearly connected to the COVID-19 pandemic.

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71 To be implemented via REACT EU, the Solvency Support Instrument and the Strategic Investment Facility.

72 To be implemented via Recovery and Resilience Facility and additional resources for the Just Transition Fund.

73 To be implemented via EU4Health and additional resources for Horizon 2020 and RescEU.

74 To be implemented via additional resources for Humanitarian Aid and NDICI.

129. The second category of measures (point b) is justified in the proposal by the fact that the COVID-19 crisis is having a different impact on the national economies and is amplifying pre-existing differences in the fiscal capacity of the Member States to support their recovery: without a unified approach to the recovery, this would set national economies on a divergence path that would ultimately endanger the single market as well as social an territorial cohesion of the Union (recitals 3 and 4).

Although it is not for the Council Legal Service to assess the merits of the economic reasoning underlying the second category of measures, it is reasonable to conclude, bearing in mind the wide margin of discretion the Council enjoys under Article 122 TFEU, that support aimed at kick-starting the economies of Member States which have been severely affected by the lock-down to slow the circulation of the virus through helping structural reforms and investments that aim at restoring the economic soundness of Member States especially affected by the COVID-19 crisis, does belong to the overall rationale of exceptionality of Article 122 TFEU.

130. Two kinds of measures - those related to preparedness to future crisis (point c of paragraph 128) as well as those providing support to third countries (point d) - also deserve special consideration.

131. Concerning the inclusion in the scope of the Recovery Instrument of measures aimed at strengthening the preparedness to future crises (points (e) to (g) of Article 2(1)) it must be clarified that, in principle, Article 122(1) TFEU provides for "reactive" actions in the sense that it allows to respond to existing difficulties but does not support preventive action to avoid future hypothetical crisis, for which other legal bases (and ordinary form of financing) are available.

132. At the same time, however, the COVID-19 pandemic is still in progress and it is not possible to predict at this moment its future evolution (e.g. possible other waves). If not addressed, the difficulties experienced at the beginning of the crisis in certain areas (e.g. insufficient autonomy of the Union supply chains; insufficient preparedness of health sector in dealing with infectious diseases; lack of medical supplies, medicaments, research, etc.) could further undermine the economic situation in case of resurgence of the pandemic. Therefore, it is possible to consider that measures for preparedness are appropriate to tackle situation resulting from the COVID-19 crisis, provided, however, that the preparedness measures are clearly related to the difficulties faced during the crisis.

133. The inclusion among the measures supported by the Recovery Instrument of forms of support to third countries raises also concerns (second subparagraph of Article 2(1)). According to the proposal, this direct support would be justified in the light of the importance of economic relations with third countries and of the benefits that the support would bring to the Union by strengthening trade and economic relations which have suffered from the crisis (recital 7). This objective is reflected in the content of Article 2(1), second subparagraph of the proposal, according to which "*the Instrument shall also provide crisis support to partner countries in order to restore and enhance their trade an economic relations with the Union and strengthen their resilience*".

134. In that regard it shall be stressed that the competence set out in Article 122(1) TFEU is based on the particular spirit of solidarity which exists between Member States[75] and which justifies taking exceptional action when Member States experience situations of severe economic difficulties. The position of third countries in that regard is fundamentally different.

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[75] The General Court has clarified that "*the spirit of solidarity between Member States that must inform the adoption by the Council of measures appropriate to the economic situation, within the meaning of Article 122(1) TFEU, indicates that such measures must be founded on assistance between the Member States*", judgment of 30 September 2015, *Anagnostakis v Commission*,T-450/12, EU:T:2015:739, paragraph 42. This finding has been confirmed by the Court of Justice in appeal, judgment of 12 September 2017, C-589/15 P, EU:C:2017:663, paragraph 71.

Thus, while the difficulties that a Member State experiences due to the interdependence it might have with the economies of third countries are relevant for triggering Article 122 TFEU[76], they cannot justify the provision of direct assistance to third countries for measures aimed at supporting their resilience to the extent that those measures have no direct consequences on Member States economies. This qualification should be reflected in the provision and the justification should be further elaborated or the scope should be reduced to those third countries of particular relevance.

135. The exceptionality of the measures requires also an assessment of their appropriateness for the economic situation they intend to address. In this sense, Article 3 of the proposal lays down the overall financing of the Recovery Instrument (EUR 750 billion) as well as the apportionment of that amount into non-repayable support, loans and guarantees, including the allocation to individual programmes. During the discussions in Coreper and relevant preparatory bodies, various delegations have raised the issue of the necessity and the proportionality of the overall volume and specific allocations of resources.

136. As clarified earlier, the Council enjoys a wide margin of discretion when deciding about the content of the measures under Article 122(1) TFEU. In this particular case, that margin of discretion may be exercised in the light of the detailed assessment of the recovery needs resulting from the COVID-19 crisis which the Commission has presented in support of the NGEU[77]. On this basis, the figures proposed by the Commission do not appear disproportionate in relation to the unprecedented character of the crisis and to the extraordinary size of its consequences as laid down in the referred Commission assessment. It is also recalled that the figures proposed correspond to maximum possible amounts and that the actual spending will depend on the submission of successful applications for support under the specific EU programmes, which guarantee that resources will be used only if the relevant eligibility criteria are met.

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[76] The first applications of Article 122 TFEU in fact concerned situations of difficulties that Member States were experiencing in their balance of payments due to the exposure of international trade or external shocks in the supply of products, notably oil.

[77] See Commission Staff Working Document: "Identifying Europe´s recovery needs", document ST 8136/20 ADD 1 REV1.

The temporary character of the measures

137. As clarified previously in this opinion, measures adopted under Article 122(1) TFEU must be temporary. They cannot become a permanent action of the EU.

138. While not subject to an explicit sunset clause[78], a number of features of the Recovery Instrument allow to conclude that it has a temporary character, in particular:

– the one-off nature of the budgetary construction resulting from the designation of the resources mobilized in the form of non-repayable support as external assigned revenues (Article 4(1) of the Recovery Instrument);

– the rules on budgetary implementation of the Recovery Instrument set out a system of deadlines for concluding legal commitments related to the resources mobilized under the Recovery Instrument. These deadlines circumscribe in time the availability of the support and the eligibility of the measures;

[78] Sunset clauses limiting the effects of the measures in time can be found in other instruments adopted on the basis of Article 122 (most recently, for instance, in the SURE Instrument referred above in footnote 18). The inclusion of such a clause is, however, not necessary to qualify the temporary character of the instrument, provided that its limited duration clearly results from its overall design.

– the deadlines extend over a period of 4 years, with a significant part of the resources - 60% of the amounts available in form of non-repayable support - to be subject to a legal commitment already within 2 years (Article 4(4) to (7)). Such a timeline does not appear unreasonable in light of the magnitude of the volumes of resources at stakes, the level of ambition of the objectives of the Recovery Instrument and the fact that the COVID-19 pandemic is still ongoing. Moreover, such timeline is comparable to the timeline of other instruments already adopted on the basis of Article 122 TFEU which are of a far lesser magnitude and ambition[79].

The economic character of the measures

139. Finally, measures adopted under Article 122(1) TFEU must be of economic nature, which may include setting up spending programmes (as in the case of ESI), a back-to-back lending facility based on a guarantee scheme (SURE) or even a mere regulatory framework addressing an economic situation. The Recovery Instrument takes a form which is different, since it mobilizes resources collected on the basis of the Commission´s empowerment to borrow on the markets and allocates the borrowed funds to a number of measures which are to be implemented on the basis of Union´s programmes. The Instrument is clearly economic in nature since it finances a comprehensive set of measures for economic recovery (recital 4) which are addressed to tackle the economic consequences of the pandemic through measures which are related with the economic dimension of the crisis (Article 2(1)).

[79] For example, the economic adjustment programme for Portugal adopted on the basis of the EFSM Regulation, referred above in footnote 15, had a timeline of 3 years for a overall financial assistance of 26 billions. The conclusion about the temporary nature of the measures under the Recovery Instrument proposal is not put in question by the fact that the payments of the committed amounts and the implementation of the financed activities (as well the reimbursement of maturities under the ORD proposal) extend over a much longer period, since this different timing follow the different logic of the implementation of the measures.

b) ***Examination of the sectorial acts receiving the funds***

i) Preliminary remarks

140. To the extent that the measures identified in the Recovery Instrument will be implemented via specific Union´s programmes, it is necessary to ensure that under the rules of such programmes the resources provided via the Recovery Instrument are used in conformity with the extraordinary and temporary character of the support under Article 122 TFEU, as described above[80]. This, in particular, entails to verify whether the support is aimed at addressing the needs resulting from the COVID-19 crisis as reflected in the rules of the relevant programme regarding allocation of funds, eligibility of operations, assessment criteria and temporal limitation of the support. A positive reply is necessary to guarantee the legality of the spending of the resources mobilised by the Recovery Instrument.

141. The Council Legal Service is of the view that, overall, the sectorial programmes, as laid down in the different proposals, properly translate the requirements stemming from Article 122(1) TFEU. For the sake of brevity, the examination below will only focus on those instruments that deserve special attention or in relation to which questions have been raised by delegations. The Council Legal Service may later on examine specific aspects of each proposal when specifically discussed in the relevant preparatory bodies.

[80] In the framework of the Article 122 Instrument, the Council cannot determine the rules for the separate spending programmes which are adopted under the relevant substantial legal basis in the Treaty, generally requiring the ordinary legislative procedure. However, respecting the conditions set out for using Article 122 TFEU are a condition for the legality of the spending.

ii) Proposal establishing the Recovery and Resilience Facility

142. The Recovery and Resilience Facility (the "RRF"[81]) aims at supporting reforms and investments to address structural weaknesses of the economies of the Member States and strengthen their resilience, in a context where the COVID-19 crisis seriously affects their capacity to invest and risks putting them on a path of economic divergence (recitals 4 to 6 of the RRF proposal). This aim is then translated in the general and specific objectives of the programme (Article 4), in the eligibility criteria for the support to be provided to Member States on the basis of a recovery and resilience plan (Article 14) and in the criteria for assessing those plans (Article 16). These provisions give a particular prominence to the achievement of the national reform priorities challenges identified in the framework of the European Semester and to support the green and digital transitions.

143. The aim and content of the RRF fall therefore within the scope of the Recovery Instrument as described above, and in particular in the category of measures identified under point (b) of Article 2(1) of the Recovery Instrument. In particular, the focus of the RRF on structural reforms and long term objectives like the green and digital transitions responds to the logic identified in paragraph 129 above and offers a plausible link between the economic situation created by the crisis and its effect on the capacity of recovery of the Member States and hence the justification of support. A different issue is whether the criteria proposed to allocate the maximum financial contributions to Member States also corresponds to the rationale of Article 122 TFEU. The methodology of allocation proposed by Commission in Annex I of the RRF proposal is based on the following:

– the population of the beneficiary Member State as a share of the total EU population in 2019;

– the inverse of the ratio of the per capita Gross Domestic Product (GDP) of the beneficiary Member State over the average GDP per capita of the EU in 2019;

[81] Commission proposal for a Regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility (COM(2020) 408 final), document ST 8403/20 INIT.

– the average unemployment rate in years 2015 to 2019 in the beneficiary Member State over the average unemployment rate for the whole EU in the same period;

– caps for the second and third criterion so to avoid excessive concentration of resources.

144. The criteria proposed by the Commission are indicators of the difference in prosperity among the Member States and of their underpinning economic weaknesses. By allocating greater resources to Member States which are less prosperous and which have to tackle higher structural unemployment, the methodology targets resources to the Member States which are more in need of investment and economic reforms.

145. Various delegations have raised issues as to the relevance of the reference period for the calculation of the maximum financial contributions. In particular, the question has been asked whether data referred to 2019 - that is prior the COVID-19 outbreak - are relevant in light of the aim of the programme, which is to support the post-crisis recovery.

146. In that regard, the Commission has stressed that the Member States with proven pre-existing economic weaknesses are those most exposed to the crisis and to the risk of divergence. They are the ones whose capacity of recovery was already reduced and are now presumed to be most affected. Moreover, the pandemic being recent and still ongoing, economic data relating to its impact is partial and does not necessarily reflect the final overall impact in terms of recovery needs.

147. It is not for the Council Legal Service to enter into the merits of the economic reasoning that underlies the methodology for allocation. Suffices it to say that such a presumption does not appear manifestly unreasonable and, therefore, does not undermine the rationale for support under the Recovery Instrument, even if it only provides an indirect assessment of the impact of the crisis.

In order to strengthen the emergency rationale of the spending, the Council could consider complementing the envisaged methodology - which refers to parameters previous to the pandemic - with other parameters or criteria linked to the actual or estimated impact of the crisis on the prosperity of the Member States or with a mechanism of modulation of the allocation taking into account the evolution over time of the pandemic and its economic impact.

iii) Proposal for a Just Transition Fund

148. The Just Transition Fund (the "JTF"[82]) is a cohesion instrument proposed by the Commission before the COVID-19 crisis and aimed at addressing the socio-economic challenges of the transition towards a climate neutral economy. The Commission is now proposing to significantly increase the JTF with additional resources mobilised by the Recovery Instrument via an amended JTF proposal.

149. Having regard to its aim and scope, the JTF falls under the general concept of the Commission's communication[83] and makes the two respective concepts of transition and recovery coexist in one legal instrument. In particular, the JTF is covered by the scope of Article 2(1)(h) of the Recovery Instrument whereby the support under the Recovery Instrument is meant to warrant that a just transition to a climate-neutral economy will not be undermined by the COVID-19 crisis. Likewise, the social dimension of the JTF may be considered as corresponding to the scope of the Recovery Instrument insofar as the latter is meant to restore employment and create jobs.

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82 Commission amended proposal for a Regulation of the European Parliament and of the Council establishing the Just Transition Fund (COM(2020) 460 final, document ST 8386/20 INIT.

83 According to the Commission´s communication "*solidarity, cohesion and convergence must drive Europe's recovery*" (COM 2020 456; p.1), document ST 8136/20 INIT.

150. Yet, the additional resources are allocated to Member States in accordance with the methodology set out in the original JTF proposal. This methodology aims at allocating resources in light of the Member States´ relative capacity to make investments to cope with the transition towards climate neutrality on the basis of a number of criteria. However, these criteria refer to the situation before the pandemics[84], whose relevance to assess the impact of the COVID-19 pandemics on the referred capacity of Member States is not clear.

151. It follows, that even though the mobilisation of additional resources is based on the assumption that the COVID-19 crisis has adversely affected the capacity to tackle the transition challenge, this assumption is not translated in relevant parameters able to capture the additional needs resulting from the crisis for regions, economic sectors and Member States so as to enable a targeted and efficient financing of the transition, in particular, in the first period following the COVID-19 pandemic. These parameters should be adapted so that the allocation of funds is sufficiently linked to the needs stemming from the COVID-19 crisis.

iv) EU4Health, Horizon 2020 and RescEU proposals

152. In the Commission proposal, the Recovery Instrument will provide additional support for various programmes which have a permanent character and broader objectives than handling the consequences of the pandemic. This is the case of EU4Health[85], Horizon 2020[86], RescEU[87], which support a number of actions in the area of health cooperation, research and innovation and civil protection.

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84 These criteria include parameters on the scale of the transition challenge at regional level (through the corresponding industrial CO2 emissions), on the scale of social challenges in the light of potential job losses in industry, coal and lignite mining and the production of peat and oil shale. The method also takes into account Member States' level of economic development and related investment capacity as detected by economic indicators relating to the period 2015-2017. See Annex I to the JTF proposal.

85 Commission Proposal for a Regulation of the European Parliament and of the Council on the establishment of a Programme for the Union's action in the field of health - for the period 2021-2027 and repealing Regulation (EU) No 282/2014 (COM (2020) 405 final), document ST 8595/20 INIT.

86 Commission Proposal for a Omnibus Regulation amending sectoral regulations of Horizon Europe, NDICI, CAP, EAGF and EAFRD (COM (2020) 459 final), document ST 8555/20 INIT.

87 Commission Proposal for a Decision amending Decision 1313/2013/EU on a Union Civil Protection Mechanism (COM (2020) 220 final), document ST 8330/20 INIT.

153. As clarified above, such a form of support to preparedness measures is compatible with the Article 122(1) TFEU rationale only to the extent that a sufficient link can be established between the measures that are financed and the current pandemic. In order to guarantee the regularity of the spending, this link needs to be translated in appropriate provisions so as to avoid that the additional resources are directed at measures unrelated to the current ongoing crisis, as it would be the case of civil protection measures concerning disasters of a different nature than a pandemic, or research programmes and health measures unrelated with the pandemics or its effects.

4. Intermediate conclusions

154. In the light of the above, the following conclusions can be made:

- bearing in mind the exceptional and temporary character of the measures that it provides for, Article 122 TFEU is the correct legal basis for the proposed Recovery Instrument;
- Article 122 TFEU does not allow for the provision of direct assistance to third countries, in respect of measures aimed at supporting their resilience, to the extent that those measures have no direct consequences on Member States economies. The relevant proposals should be adapted in this regard;
- the sectorial programmes recipient of borrowed funds under the NGEU properly translate, in general, the requirements stemming from Article 122 TFEU of being exceptional and temporary in nature. However, the criteria under the JTF for allocation of the NGEU funds, as well as the scope of the EU4Health, Horizon 2020 and RescEU proposals are defined in a too broad manner; they should be further defined so as to be sufficiently linked to the economic impact of the COVID-19 pandemic.

C. WHETHER THE NGEU IS COMPATIBLE WITH ARTICLE 125(1) TFEU (NO BAIL-OUT CLAUSE)

1. Legal framework

155. Article 125(1) TFEU reads as follows:

> "*The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.*" (emphasis added)

2. Legal analysis

156. The question has been raised whether the legal construction under the NGEU is compatible with Article 125(1) TFEU, the so-called "no bail-out" clause.

157. This question can be examined from two different angles. The first one relates to whether Member States' contributions owed through the system of own resources in order to reimburse the Union´s debt to the markets entail those Member States assuming in a joint and several manner the commitments from the other Member States to the Union´s own resources. The second one relates to whether funding through the NGEU would amount to the Union being liable for the commitments of Member States.

158. First, as clarified above (paragraphs 108 and 109), the ORD proposal is based on a system of *pro rata* liabilities, i.e. on the principle that each Member State remains solely responsible for its share of the commitments that it has assumed to the Union for the future repayment of debt issued under the NGEU. This is in line with the system of own resources of the Union under which the financial liability of each Member States is *pro rata*, individual, and not joint and several. Therefore, Member States' liabilities under the ORD proposal do not entail assuming the commitments of other Member States in the meaning of Article 125(1) TFEU.

159. Second, in relation to the compatibility of funding through the NGEU with the "no bail-out" clause, it is observed that in the *Pringle* case[88], which dealt with the compatibility of the ESM Treaty with Article 125(1) TFEU, the Court concluded that the aim of that provision is to ensure that the Member States follow a sound budgetary policy, more specifically, that they remain subject to the logic of the markets when they enter into debt, since that ought to prompt them to maintain budgetary discipline[89]. It is recalled that the financial assistance granted to the Member States under the ESM Treaty was aimed at replacing the markets to which the Member State concerned was unable to accede due to its financial and budgetary situation. Therefore, the need not to diminish the Member States´ incentive to conduct a sound budgetary policy was the *raison d´être* for the strict conditionality that was attached to the stability support provided by the ESM to the Member States[90]. It is that conditionality that permitted the ESM assistance to be considered as compatible with Article 125(1) TFEU.

160. Accordingly, the scope of application of Article 125(1) TFEU does not cover forms of financing which, differently from the assistance under the ESM Treaty, are not intended to assume the liability of Member States before or *in lieu* of the markets.

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88 See judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756.

89 See judgment *Pringle*, cited above, paragraph 135. See, for further reference, Council Legal Service opinion in doc. 7197/20.

90 See judgment *Pringle*, cited above, paragraph 143.

161. From that point of view, the NGEU would be fundamentally different from the assistance under the ESM Treaty. The NGEU would involve a large spending programme intended to kick-start the economy as a reaction to the severe economic shock induced by the COVID-19 pandemic. As opposed to the legal and factual situation analysed in the *Pringle* case, the NGEU, and the Union programmes through which the borrowed funds are to be channelled, do not consist in providing financial assistance to the Member States that would be replacing the markets. The NGEU is not a mechanism for assuming the liability of Member States before or *in lieu* of the markets, in the meaning of Article 125(1) TFEU as interpreted by the Court in the *Pringle* case.

162. The NGEU would consist in a number of instruments of Union expenditure through programmes, both existing and new, aiming at achieving the objectives of different Union policies (most notably those of cohesion). In view of its construction, the NGEU thus neither results in the Union assuming commitments of Member States as means of treasury financing, nor aims at replacing or supplementing Member States´ financing on the markets by Union financing.

163. Moreover, it is recalled that all legal bases that are included in the Treaties are by nature compatible with each other. There is no hierarchy between them. All of them must be applied harmoniously in accordance with the methods of interpretation followed by the Court of Justice. The objectives pursued by the different policies of the Union on the basis of primary law are therefore presumed compatible with Article 125(1) TFEU. In particular, funding in pursuance of EU policies, most notably cohesion, are by essence compatible with Article 125(1) TFEU.

164. The NGEU, therefore, falls outside the scope of application of Article 125(1) TFEU.

3. Intermediate conclusions

165. In the light of the above, the following conclusion can be made:

- The general construction of the NGEU, and more specifically the ORD proposal as well as its funding structure, is compatible with Article 125(1) TFEU.

III. GENERAL CONCLUSIONS

166. In the light of the above, the Council Legal Service concludes as follows:

Whether the NGEU is compatible with the Union's principles of budgetary balance and discipline, (Article 310 TFEU), and with the integrity of the own resources system (Article 311 TFEU)

167. The Treaties allow the Union legislator to establish a mechanism such as the one proposed in the NGEU, provided that it incorporates a number of safeguards aimed at preserving its budget neutrality and, ultimately, at respecting the principle of budgetary balance:

– borrowed amounts are channelled to spending programmes by means of external assigned revenue which by its nature is additional and does not affect the revenue and expenditure shown in the annual budget and, therefore, from a budgetary technique point of view, does not generate an imbalance in the annual budget;

– the repayment of the Union's debt is guaranteed within the ceilings of own resources, by a dedicated compartment which may only serve that purpose and by additional provisions under which the Member States commit to make available resources up to the maximum amount of borrowing stipulated in the ORD proposal, the combined effect of which will constitute an irrevocable, definitive and enforceable guarantee of payment.

168. It is for the Union legislator to determine which financial means are necessary to adequately attain the objective pursued by the NGEU for which determination it holds a margin of discretion which includes the possibility to have recourse to borrowing, the proceeds of which constitute external assigned revenue. That margin of discretion is however limited by the need to respect the integrity of the system of own resources of the Union;

169. In view of the substantial amount that the external assigned revenue envisaged under the NGEU would represent, adequate safeguards should be provided with a view to protecting the integrity of the own resources system of the Union and of the budgetary system. The exceptional character of the situation the NGEU intends to address and its one-off nature and limited duration, as duly reflected in the relevant proposals, do constitute such adequate safeguards.

170. With a view to reinforcing the consistency of the external assigned revenue with the system of own resources and the budgetary mechanisms, the introduction of additional and specific arrangements aimed at ensuring an appropriate involvement of the European Parliament and the Council in the annual process is advised.

171. Article 311 TFEU is an appropriate legal basis for the new elements introduced in the ORD proposal to cater for the repayment of borrowing foreseen under the NGEU. The empowerment of the Commission to borrow funds on capital markets may be considered ancillary to those other provisions of the ORD proposal. It is open to the Union legislator to consider that Article 6(4) of the ORD proposal is an essential element of the system of own resources which should be inserted in the ORD proposal rather than in the Making Available Regulation.

172. The system of own resources of the Union is, as a matter of principle, based on a system of proportionality in which the contributions of each Member States are determined *pro rata,* by a reference to contribution rates which are set out in the Own Resources Decision itself (in particular the so-called GNI-based contributions) and in which the Member States' contributions are foreseeable and certain and cannot be modified unless the Own Resources Decision is modified.

    Given the particular magnitude and specific nature of the envisaged "borrowing for spending" as well as the concerns expressed by delegations, it is advised that the text of Article 6(4) of the ORD proposal be modified to insert wording that is specific to the management of cash resources related to the NGEU.

Whether the legal basis chosen for the Recovery Instrument (Article 122 TFEU) is appropriate

173. Bearing in mind the exceptional and temporary character of the measures that it provides for, Article 122 TFEU is the correct legal basis for the proposed Recovery Instrument.

174. Article 122 TFEU does not allow for the provision of direct assistance to third countries, in respect of measures aimed at supporting their resilience, to the extent that those measures have no direct consequences on Member States economies. The relevant proposals should be adapted in this regard;

175. The sectorial programmes recipient of borrowed funds under the NGEU properly translate, in general, the requirements stemming from Article 122 TFEU of being exceptional and temporary in nature. However, the criteria under the JTF for allocation of the NGEU funds, as well as the scope of the EU4Health, Horizon 2020 and RescEU proposals are defined in a too broad manner; they should be further defined so as to be sufficiently linked to the economic impact of the COVID-19 pandemic.

Whether the NGEU is compatible with Article 125(1) TFEU (no bail-out clause)

176. The general construction of the NGEU, and more specifically the ORD proposal as well as its funding structure, is compatible with Article 125(1) TFEU.