

Non-paper

on the legal basis of the European Investment Stabilisation Function

Background

An informal assessment has been requested by the European Investment Stabilisation Function (EISF) co-rapporteurs as regards the points raised in the letter of Bernd Lucke MEP of 3.12.2018 (in annex), in which he calls into question the legal basis of the Commission's proposal COM (2018)387 and in which he requests individual replies to the six points he raises.

Preliminary observations on the scope of Union cohesion policy

In accordance with Article 3(3) TEU, one of the aims of the Union is to “*promote economic, social and territorial cohesion, and solidarity among Member States*”. That overarching objective is further specified in Title XVIII of Part III of the TFEU (Articles 174-178). According to the first sentence of Article 174 TFEU: “*In order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion.*” The Union shall “*in particular*” aim at reducing disparities between regions, which implies that cohesion policy objectives are not limited only to reducing disparities between regions.

The case-law of the Court of Justice supports the view that the notion of cohesion should be understood broadly. Notably, in the *International Fund for Ireland* case,¹ Advocate General Bot stated that the general wording of Article 158 EC (now Article 174 TFEU) “*permits a degree of flexibility as well as adaptability in the aims pursued by the Community legislature when it wishes to provide for common actions. Consequently, the priority areas of action change regularly in accordance with the economic and social needs which manifest themselves in various Member States.*”² He considers “*the policy of cohesion may be defined as a device for restoring a balance and for redistribution among the Member States*”, while it is “*also an expression of solidarity between them and their peoples.*”³

The Court itself then went on to confirm the broad nature of the Treaty Title on Economic, Social and Territorial Cohesion and of the third paragraph of Article 175 TFEU, stating that while that provision does not set out the form which the “*specific actions*” for which it provides can take, “*the Title provides adequate legal bases allowing for the adoption of means of action which are specific to the Community, administered in accordance with the Community regulatory framework and the content of which does not extend beyond the scope of the Community's policy on economic and social cohesion*”.⁴

In the case of *Portugal v Council*, meanwhile, the Court noted the programmatic nature of the provisions on cohesion, thus implying that the co-legislators enjoy a broad discretion in

¹ See case C-166/07, *European Parliament v. Council, International Fund for Ireland* (“IFI”), EU:C:2009:499.

² Point 81 of the AG's Opinion, EU:C:2009:213.

³ Point 85 of the AG's Opinion, *supra*.

⁴ Case C-166/07, *supra*, paragraph 46.

deciding how the objectives of cohesion policy should be achieved.⁵ This broad discretion is typical of policies, like cohesion, which are set out in the Treaties at a high level of generality.

Point 1

The first point raises the issue of whether a legislative proposal aimed at a subset of Member States (Eurozone + ERM II) can be considered to promote the “overall” harmonious development of the Union, as indicated in the first sentence of Article 174 TFEU.

It is submitted that the limitation of the benefits of a cohesion instrument to a subset of Member States is possible, provided it can be justified by reference to certain objective attributes which distinguish the eligible Member States and which are relevant for the purposes of the proposal. Disturbances affecting a single Member State or region can have implications for the overall economic and social cohesion of the Union as a whole.

In the aforementioned *International Fund for Ireland* case, for example, the fact that specific contributions were intended for a particular area of the Community did not exclude them from the scope of the third paragraph of Article 159 EC (now Article 175 TFEU). As the Advocate General affirmed, “*there is nothing in the wording of that article that rules out specific action for the benefit of one or more regions of the Community. In addition, if the Community’s economic and social cohesion policy is regarded as a device for restoring a balance in order to promote convergence between the regions of the Community, it is perfectly logical that the Community should selectively focus its action on regions which manifest certain economic and social imbalances.*”⁶

In the case of the EISF, the Commission’s proposal justifies the difference of treatment among Member States by reference to the fact that Euro area and ERM II Member States are deprived of monetary policy or exchange rate instruments to respond to an asymmetric shock. According to the proposal, experience shows the loss of control over monetary and exchange rate policy may have negative consequences for the level of public investments, which may in turn affect convergence and cohesion within the Union as a whole (see recitals 6, 8 and 18 of the proposal).

Bearing in mind the broad scope of the notion of cohesion and the discretion of the co-legislators in deciding how the objectives of cohesion policy should be achieved, it is submitted that this limitation to a subset of Member States is justified.

Concerning the argument that support for this subset of Member States could lead to increased *divergences* with the remaining Member States (non-Eurozone or ERM II), this instrument should be viewed in the context of a broader cohesion policy which also includes instruments supporting Member States in preparing for accession to the euro area (notably elements of the Reform Support Programme). As indicated above, the co-legislators enjoy a broad discretion in deciding how the objectives of cohesion policy should be achieved and in adopting measures tailored to the objective circumstances prevailing in different Member States and regions.

⁵ Case C-149/96, Portuguese Republic v Council of the European Union, EU:C:1999:574, paragraph 86.

⁶ Point 92 of the AG’s Opinion, *supra*.

Point 2

The second point raises doubts about whether the activation criteria focused on the unemployment rate laid down in Article 4(1)(a) and (b) of the proposal can be considered to relate to cohesion policy. It also notes that there is no comparative element across Member States in the activation criteria. Instead, it is suggested that these criteria show the proposal is concerned rather with macroeconomic stabilisation of the euro area.

The fact that the activation of EISF support is based on objective developments related to employment levels within an individual Member State, without reference to the situations in other Member States, does not remove the proposal from the scope of cohesion policy. Again, the co-legislators enjoy a broad discretion in deciding how the objectives of cohesion policy should be achieved.

It should also be noted that cohesion policy and economic policy are complementary. There is no contradiction in the view that a cohesion policy instrument may serve to support macroeconomic stabilisation in a given Member State, thus ensuring that cohesion is not imperilled through a reduction in public investments and negative spillovers resulting from a large asymmetric shock affecting that Member State (see Explanatory Memorandum, p. 3).

Point 3

The third point draws attention to the theoretical possibility that a Member State could be eligible for EISF assistance even if its unemployment rate is lower than the Union average. It is suggested this could increase divergences in the Union and this would be inconsistent with the objectives of cohesion policy. It is also suggested that the Member State with the lowest unemployment rate in the Union could even benefit. Again this is seen as evidence that the proposal pursues macroeconomic objectives rather than cohesion policy objectives.

It is submitted that it cannot be considered contrary to the objectives of cohesion policy to provide support to a Member State to maintain or restore its employment levels in the event of an asymmetric shock, especially when the impact of that shock can have negative spillover effects in other Member States.

As for the argument that EISF support to more developed economies could in fact *increase* divergences among Member States, it can be observed that cohesion policy aims at *upwards* convergence and not downwards convergence. It is a legitimate aim of cohesion policy to provide assistance to maintain or restore previous levels of development. Moreover, by allowing for early and rapid intervention to counter the asymmetric shock, the EISF support should serve to *prevent* the emergence of new disparities. Furthermore, the EISF financial support, whether in the form of the EISF interest rate subsidy or in the form of an EISF loan, would have to be used exclusively for the purpose of cohesion policy-driven public investment, and while doing so it should prevent unwanted downward convergence and potential spillovers.

Point 4

*The fourth point suggests that the ‘eligible public investments’ do not need to serve the objectives of cohesion policy and the possibilities for support to education and training could again lead to increased divergences within the Union. Again it is suggested the intention behind the proposal is purely macroeconomic and so the proposal is *ultra vires*.*

Eligible public investments are defined in Article 2, paragraph 3 of the proposal principally by reference to the definition in the Common Provisions Regulation, which is precisely an act of cohesion policy that defines and pursues cohesion policy objectives.

In relation to the possible aggravation of divergences in relation to education and training standards, the same considerations set out above in relation to employment levels under point 3, above, can be applied by analogy with regard to education and training.

Point 5

The fifth point suggests that even the wealthiest Member States could receive assistance under the EISF, even when they have no disadvantaged regions. This cannot be justified on a cohesion policy legal basis.

As indicated under point 3, above, it is a legitimate aim of cohesion policy to provide assistance to maintain or restore previous levels of development in a context of upwards convergence, and the activation of EISF support when a risk becomes apparent should increase economic resilience and prevent the emergence of negative spillovers, thus pursuing cohesion objectives.

Point 6

Finally, under the sixth point, it is suggested that the proposal cannot be based on the legal basis of Article 175, third paragraph, TFEU, notably since it cannot be considered a “specific action” which is “necessary” “outside the funds”, as required by the text of that article.

According to settled case-law, the choice of legal basis for a Union measure must be based on objective factors which are amenable to judicial review, in particular the aim and content of the measure.

In terms of its aim, it appears from the recitals and the explanatory memorandum accompanying the proposal that the aim of the EISF is to support macro-economic stabilisation and ensure that cohesion is not imperilled through a reduction in public investments in the event of a large asymmetric shock affecting a Member State of the Eurozone or ERM II (explanatory memorandum, p. 3). The instrument should therefore contribute to overall cohesion in the Union by strengthening the resilience of interdependent economies and preventing the risk of negative spillover effects (see Explanatory Memorandum, pp. 1-2).

In terms of its content, the instrument will provide support in the form of loans and interest rate subsidies to Member States of the Eurozone and ERM II to preserve public investments in the event of large asymmetric shocks. The support must be used to promote public investment which pursues cohesion policy objectives, as defined in the Common Provisions Regulation, or social investment in education and training. The continuation of support is linked to the maintenance of public investments in programmes supported by the Structural Funds.

In terms of its aim and content, it can be considered the proposal falls within the scope of the cohesion policy legal basis of Article 175 TFEU. Since the Structural Funds do not provide for a specific instrument to support public investment in the case of large asymmetric shocks, it is appropriate to base this specific action on Article 175, third paragraph, TFEU. The assessment of necessity and proportionality is, of its nature, a political one, but it can be recalled again that cohesion policy is set out in the Treaties at a high level of generality and the co-legislators

enjoy a broad discretion in deciding how the objectives of that policy should be pursued. There is nothing in the proposal to establish that the Commission has manifestly exceeded the limits of its discretion in this regard.

Conclusion

On the basis of this analysis, it should be concluded that Article 175, third paragraph, TFEU is the appropriate legal basis for the proposal for the EISF.

Annex: letter by Mr Bernd Lucke MEP of 3.12.2018