



---

*Committee on Legal Affairs  
The Chair*

---

6.3.2023

Mr Dragoş Pişlaru  
Chair  
Committee on Employment and Social Affairs  
BRUSSELS

Mr Pascal Canfin  
Chair  
Committee on the Environment, Public Health and Food Safety  
BRUSSELS

Subject: Opinion on the legal basis of the Proposal for a Regulation of the European Parliament and of the Council establishing a Social Climate Fund (COM(2021)0568 – C9-0324/2021 – 2021/0206(COD))

Dear Chairs,

By letter of 21 December 2022<sup>1</sup> you asked the Committee on Legal Affairs (JURI) pursuant to Rule 40(2) of the Rules of Procedure, to provide an opinion on the appropriateness of the legal basis of the proposal for a Regulation of the European Parliament establishing a Social Climate Fund (2021/0206(COD)).

JURI considered the above question at its meeting of 28 February 2023.

## **I - Background**

The Committee on Employment and Social Affairs (EMPL) and the Committee on the Environment, Public Health and Food Safety (ENVI) were in inter-institutional negotiations on the proposed SCF Regulation. The general objective of the SCF is to contribute to the transition towards climate neutrality by addressing the social impacts of the inclusion of greenhouse gas emissions from buildings and road transport into the scope of Directive

---

<sup>1</sup> D(2022)42097.

2003/87/EC<sup>2</sup> on the emissions trading system.

The Commission proposal is based on Article 91(1), point (d), Article 192(1) and Article 194(1)(c) TFEU. In their joint report adopted on 18 May 2022 EMPL and ENVI committees did not amend the Commission's choice of legal basis. The mandate adopted in plenary on 22 June 2022 left those elements also unchanged. In its General Approach, the Council added Article 322(1) TFEU as the legal basis to cater for a derogation from Article 22(2) of title II of the Financial Regulation, arguing that it was required by the use of external assigned revenues for the SCF. During inter-institutional negotiations, the change of legal basis for the use of external assigned revenues has provisionally been agreed by the co-legislators. In view of the above and pursuant to Article 40(2) of the Rules of Procedure, the ENVI and EMPL committees jointly requested the JURI committee to provide an opinion on the appropriateness of adding Article 322(1) as a fourth legal basis for the proposed SCF Regulation.

## **II - The relevant Treaty Articles**

Title VI ("Transport") of Part Three of the Treaty on the Functioning of the European Union (hereinafter "TFEU") reads, inter alia, (emphasis added):

*Article 91*  
(*ex Article 71 TEC*)

**1. For the purpose of implementing Article 90, and taking into account the distinctive features of transport, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, lay down:**

*(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;*

*(b) the conditions under which non-resident carriers may operate transport services within a Member State;*

*(c) measures to improve transport safety;*

***(d) any other appropriate provisions.***

**2. When the measures referred to in paragraph 1 are adopted, account shall be taken of cases where their application might seriously affect the standard of living and level of employment in certain regions, and the operation of transport facilities.**

Title XX ("Environment") of Part Three TFEU reads, inter alia, (emphasis added):

*Article 192*

---

<sup>2</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC (OJ L 275 25.10.2003, p. 32).

*(ex Article 175 TEC)*

- 1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.**

*(...)*

Title XXI (“Energy”) of Part Three TFEU reads, inter alia, (emphasis added):

*Article 194*

- 1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:**

*(a) ensure the functioning of the energy market;*

*(b) ensure security of energy supply in the Union;*

***(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and***

*(d) promote the interconnection of energy networks.*

- 2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.*

*Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).*

*(...)*

Chapter 5 (“Common provisions”) of Title II of Part Six TFEU reads, inter alia, (emphasis added):

*Article 322*

*(ex Article 279 TEC)*

- 1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, shall adopt by means of regulations:**

***(a) the financial rules which determine in particular the procedure to be adopted for***

***establishing and implementing the budget and for presenting and auditing accounts;***

*(b) rules providing for checks on the responsibility of financial actors, in particular authorising officers and accounting officers.*

(...)

### **III – CJEU case law on the choice of legal basis**

The Court of Justice has traditionally viewed the question of the appropriate legal basis as an issue of constitutional significance, guaranteeing compliance with the principle of conferred powers (Article 5 of the Treaty on European Union) and determining the nature and scope of the Union's competence<sup>3</sup>.

According to well-established case law, the legal basis of a Union act does not depend on an institution's conviction as to the objective pursued, but must be determined according to objective criteria amenable to judicial review, including in particular the aim and the content of the measure<sup>4</sup>.

If examination of a measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component<sup>5</sup>. Only exceptionally, if it is established that the act simultaneously pursues a number of objectives, inextricably linked, without one being secondary and indirect in relation to the other, may such an act be founded on the various corresponding legal bases<sup>6</sup>. This would however only be possible if the procedures laid down for the respective legal bases are not incompatible with and do not undermine the right of the European Parliament<sup>7</sup>.

### **IV – Aim and content of the proposed SCF Regulation**

The proposed SCF Regulation is a part of a complementary and interconnected set of proposals forming the 2030 Climate and Energy 'Fit for 55' package to achieve the greenhouse gas emission reduction target. The main aim and purpose of the proposed SCF Regulation as submitted by the Commission and not changed in the core during interinstitutional negotiations is clear and undisputed: setting up a Social Climate Fund for the period from 2026 until 2032 to address the social impacts arising from the inclusion of the building and road transport sectors in the scope of Directive 2008/37/EC on the emissions trading system. On the one hand, the increase in the price for fossil fuels, due to carbon pricing also for those two sectors, is expected to have significant social and distributional

---

<sup>3</sup> *Opinion 2/00 ("Cartagena Protocol")*, ECLI:EU:C:2001:664, para 5.

<sup>4</sup> Case C-300/89, *Commission v Council ("Titanium dioxide")*, ECLI:EU:C:1991:244, paragraph 10.

<sup>5</sup> *Ibid.* paragraph 30 and Case C-137/12, *Commission v Council*, ECLI:EU:C:2013:675, paragraph 53 and case-law cited.

<sup>6</sup> Case C-300/89, paragraphs 13 and 17; Case C-42/97, *Parliament v Council*, ECLI:EU:C:1999:81, paragraph 38; *Opinion 2/00*, paragraph 23; Case C-94/03, *Commission v Council ("Rotterdam Convention")*, ECLI:EU:C:2006:2 and Case C-178/03, *Commission v Parliament and Council*, ECLI:EU:C:2006:4, paragraphs 36 and 43.

<sup>7</sup> Case C-300/89, paragraphs 17-25; Case C-268/94 *Portugal v Council*, ECLI:EU:C:1996:461.

impacts that may disproportionately affect vulnerable households, vulnerable micro-enterprises and vulnerable transport users who spend a larger part of their incomes on energy and transport and who, in certain regions, do not have access to alternative, affordable mobility and transport solutions. Also, such impacts on vulnerable groups differ between Member States, and price impacts are likely to be felt more strongly in Member States, regions and population with lower average income. On the other hand, as corollary to the fuel price increases through carbon pricing, the emissions trading generates revenues which can be used to alleviate the burden on the vulnerable groups. The financial envelope of the SCF would, in principle, correspond to 25% of the expected revenues to be accumulated from the auctioning of allowances within the emissions trading for buildings and road transport sectors.

The Commission based the proposed SCF Regulation on Article 91 (Title VI on “Transport”), Article 192(1) (Title XX on “Environment”) and Article 194(1)(c) (Title XXI on “Energy”) of Part Three TFEU. Like the main aim and purpose of the proposed SCF Regulation, those initial legal bases were neither disputed by Parliament in its mandate nor by the Council in its general approach. It seems thus unnecessary to go deeper into the aim and the content of the proposed SCF Regulation to ascertain the relevance of the initial legal bases. It should however be noted that there seems to be a clerical error in one of the referenced legal bases which will be briefly addressed under point V below.

In its general approach the Council nevertheless added a reference to Article 322(1) as another legal basis, arguing that that was necessary *“to cater for a derogation from Article 22(2) of title II of the Financial Regulation, required by the use of external assigned revenues for this Fund”*. This addition to the initial legal bases was provisionally agreed during the interinstitutional negotiations in December 2022.

Article 322(1) provides legal basis for (a) financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts, and (b) rules providing for checks on the responsibility of financial actors, in particular authorising officers and accounting officers.

As regards the financial rules, Regulation (EU) 2018/1046<sup>8</sup> on the financial rules applicable to the general budget of the Union (the “Financial Regulation”) applies, in principle, to the proposed SCF Regulation. However, in the course of interinstitutional negotiations several derogations from the Financial Regulation were either agreed upon or introduced in the provisionally agreed text. The question whether adding Article 322 TFEU as additional legal basis therefore arose. The content of the proposed SCF Regulation should therefore be looked at from that point of view.

From the start, the proposed SCF Regulation included a derogation from Article 116 of the Financial Regulation on the time limits for payments since, as explained in recital 26: *“payments should be made on the basis of a Commission decision authorising the disbursement to the Member State concerned”*; it was therefore *“necessary to derogate from Article 116(2) of [the Financial Regulation], so that the payment deadline can start running*

---

<sup>8</sup> 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).

*from the date of the communication from the Commission to the Member State concerned of that decision and not from the date on which a payment request is received*". That derogation is provided for in Article 19(5) of the proposed SCF Regulation.

During interinstitutional negotiations several other derogation from the Financial Regulation were included.

A further derogation from Article 116 of the Financial Regulation was included in Article 19(9) of the proposed SCF Regulation, providing that *"if in a given round of payment requests the revenue assigned to [the SCF] in accordance with Article 30d(3a) of Directive 2003/87/EC are not sufficient to cover the submitted payment requests, the Commission shall pay those Member State on a pro-rata basis determined as a share of the payment availabilities to the total approved payments."*

Another derogation from the Financial Regulation was included in Article 9(1a) of the proposed SCF Regulation: *"By way of derogation from Article 22(2) of [the Financial Regulation] [...], commitment appropriations covering the relevant maximum amount referred to in paragraph 1 shall be made available automatically at the beginning of each financial year, starting from 1 January 2026, up to the respectively applicable annual amounts referred to in [...]"* Article 22(2) of the Financial Regulation otherwise provides that the *"appropriations corresponding to assigned revenue shall be made available automatically, both as commitment appropriations and as payment appropriations, when the revenue has been received by the Union institution"*, save in three particular cases which do not apply to the SCF. The reasons for this derogation are explained in recital 23, namely *"[c]onsidering that the external assigned revenue will be made available following the auctioning of allowances pursuant to [...] Directive 2003/87/EC, it is necessary to provide for a derogation from Article 22(2) of the [Financial Regulation] to enable the Union to commit yearly the amounts necessary for the payments to Member States to be made in accordance with this Regulation for the accommodation of appropriations corresponding to assigned revenue."*

Yet another derogation from the Financial Regulation was included in Article 19(10) of the proposed SCF Regulation which derogates from Article 12(4)(c) of the Financial Regulation. That latter provision provides that appropriations are automatically carried over in respect of appropriations corresponding to external assigned revenue. Such appropriations are to be fully used by the time all the operations relating to the programme or action to which they are assigned have been carried out or they may be carried over and used for the succeeding programme or action.

The last derogation was included in Article 25a of the proposed SCF Regulation. That Article contains an amendment to Regulation (EU) 2021/1060<sup>9</sup> on common provisions for the implementation of the structural funds, inserting a new Article 26a, which provides, inter alia, that *"[b]y way of derogation from Article 14(3) of [the Financial Regulation], the time limit after which the Commission shall decommit the amounts in accordance with Article 105(1)*

---

<sup>9</sup> Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy (OJ L 231, 30.6.2021, p. 159).

*shall start from the year in which the corresponding budgetary commitments are made.”*

## **V – Analysis**

It should first be noted that the question addressed to the JURI committee is not whether those derogations from the Financial Regulation are necessary in the context of the proposed SCF Regulation. Rather, the question concerns the necessity of an additional legal basis to provide grounds for the derogations from the Financial Regulation.

Article 3(1) of the Financial Regulation on compliance of secondary legislation with that Regulation provides that “[p]rovisions concerning the implementation of the revenue and expenditure of the budget, and contained in a basic act, shall comply with the budgetary principles set out in Title II.” Paragraph 2 of that same Article provides that “[w]ithout prejudice to paragraph 1, any proposal or amendment to a proposal submitted to the legislative authority containing derogations from the provisions of [the Financial Regulation] other than those set out in Title II, or from delegated acts adopted pursuant to [the Financial Regulation], shall clearly indicate such derogations and shall state the specific reasons justifying them in the recitals and in the explanatory memorandum of such proposals or amendments.”

Regarding the two derogations from Article 116 of the Financial Regulation, it should be noted that Article 116 does not fall under Title II on budgetary principles but under Title IV on budget implementation. In accordance with Article 3(2) of the Financial Regulation, those two derogations are clearly indicated and the reasons for their inclusion in the proposed SCF Regulation is specified in the recitals.

The situation is different when it comes to the derogations from Articles 12(4)(c), 14(3) and 22(2) of the Financial Regulation. All three Articles fall under Title II of the Financial Regulation: Articles 12(4)(c) and 14(3) under Chapter 2 on the principle of annuality and Article 22(2) under Chapter 5 on the principle of universality. The only way to derogate from the budgetary principles in Title II of the Financial Regulation would be to establish a *lex specialis* based on primary law. Therefore, the addition of Article 322(1) among the legal bases for the proposed SCF Regulation seems indeed necessary.

However, the reference should be more precise than the one put forward in the letter from EMPL and ENVI committees. Namely, Article 322(1) empowers the legislators to adopt “(a) the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts”; and “(b) rules providing for checks on the responsibility of financial actors, in particular authorising officers and accounting officers”. The derogations in the proposed SCF Regulation clearly fall under point (a). Consequently, the correct legal basis would be Article 322(1)(a).

In terms of procedure, Article 322(1) TFEU provides for the consultation of the Court of Auditors as a procedural requirement. That condition seems to have been satisfied since the Court of Auditors did issue an opinion<sup>10</sup> on the proposed SCF Regulation.

Last but not least, although the legal basis initially chosen by the Commission were not disputed, it is worth noting that Article 194(1)(c) is not the appropriate choice. Although that

---

<sup>10</sup> [https://www.eca.europa.eu/Lists/ECADocuments/OP22\\_08/OP\\_Social-climate-fund\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/OP22_08/OP_Social-climate-fund_EN.pdf)

Article does provide that the Union policy on energy shall “*promote energy efficiency and energy saving and the development of new and renewable forms of energy*” the competence to adopt measures necessary to achieve the objectives set out in Article 194(1) is actually provided for in paragraph 2 of that Article. The reference to that Article as the legal basis should therefore be corrected to read “Article 194(2)”.

## **VI - Conclusion and recommendation**

At its meeting of 28 February 2023 the Committee on Legal Affairs accordingly decided, by 18 votes in favour, none against and no abstention<sup>11</sup>, to recommend to the Committee on Employment and Social Affairs and the Committee on the Environment, Public Health and Food Safety, firstly, that the addition of Article 322(1) TFEU as a legal basis for the proposed Regulation establishing a Social Climate Fund appears to be acceptable as long as it is made more precise and point (a) is added to that reference, and secondly, that the reference to Article 194(1)(c) TFEU is corrected to read “Article 194(2)” TFEU.

Yours sincerely,

Adrián Vázquez Lázara

---

<sup>11</sup> The following were present for the final vote: Adrián Vázquez Lázara (Chair), Sergey Lagodinsky (Vice-President), Marion Walsmann (Vice-Chair), Raffaele Stancanelli (Vice-Chair), Pascal Arimont, Gunnar Beck, Ilana Cicurel, Eider Gardiazabal (for Tiemo Wölken pursuant to Rule 209(7)), Andrzej Halicki, Gilles Lebreton, Maria-Manuel Leitão-Marques, Antonius Manders, Karen Melchior, Sabrina Pignedoli, Jiří Pospíšil, Nacho Sánchez Amor, Marie Toussaint, Axel Voss, Javier Zarzalejos.