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*Committee on Legal Affairs  
The Chair*

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27.6.2023

Mr Cristian-Silviu Buşoi  
Chair  
Committee on Industry, Research and Energy  
BRUSSELS

Subject: Opinion on the legal basis of the Proposal for a regulation of the European Parliament and of the Council establishing a framework of measures for strengthening Europe's semiconductor ecosystem (Chips Act) (COM(2022)0046 – C9-0039/2022 – 2022/0032(COD))

Dear Mr Chair,

By letter 5 May 2023<sup>1</sup>, the Chair of the Committee on Industry, Research and Energy requested the Committee on Legal Affairs, pursuant to Rule 40(2) of the Rules of Procedure, to provide an opinion on the appropriateness of the amended legal basis of the proposal for a Regulation of the European Parliament and of the Council establishing a framework of measures for strengthening Europe's semiconductor ecosystem (Chips Act) (2022/0032(COD))<sup>2</sup> (hereinafter “the proposed Regulation”).

JURI considered the above question at its meeting of 27 June 2023.

## **I - Background**

The Committee on Industry, Research and Energy (ITRE) was in inter-institutional negotiations on the proposed Regulation which aims to secure the Union's supply of chips by boosting production and innovation, and setting up emergency measures against shortages.

The Commission proposal was based on Articles 173(3), 182(1), 183 and 114 of the Treaty on the functioning of the European Union (TFEU). In its report, adopted on 24 January 2023, the ITRE Committee did not amend the legal basis proposed by the Commission.

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<sup>1</sup> D(2023)16808

<sup>2</sup> COM(2022) 46 of 8.2.2022.

In its General approach, the Council deleted the legal basis – Articles 182(1) and 183 TFEU – related to research in respect of pillar I (Chapter II – Chips for Europe Initiative). The Council argued that this change reflects the main purpose of the Regulation, i.e. to accelerate the semiconductor production of the Union’s industry, reinforce sovereignty in the semiconductor supply chain, boost industrial capacities, facilitate the development of innovative start-ups and SMEs, and encourage new investments in innovation and technological development. In Council’s opinion, Articles 182(1) and 183 TFEU (‘Research and technological development and space’) were only secondary to the main objective.

During inter-institutional negotiations, the deletion of the legal basis related to research 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 ITRE Committee requested an opinion on the appropriateness of the deletion of Articles 182(1) and 183 TFEU as a secondary legal basis for the proposed Regulation.

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

Title XVII of Part three TFEU, on “Industry” reads (emphasis added):

### *Article 173 (ex Article 157 TEC)*

1. *The Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union's industry exist.*

*For that purpose, in accordance with a system of open and competitive markets, their action shall be aimed at:*

- speeding up the adjustment of industry to structural changes,*
- encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings,*
- encouraging an environment favourable to cooperation between undertakings,*
- fostering better exploitation of the industrial potential of policies of innovation, research and technological development.*

2. *The Member States shall consult each other in liaison with the Commission and, where necessary, shall coordinate their action. The Commission may take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.*

3. *The Union shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of the Treaties. The*

***European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, may decide on specific measures in support of action taken in the Member States to achieve the objectives set out in paragraph 1, excluding any harmonisation of the laws and regulations of the Member States.***

***This Title shall not provide a basis for the introduction by the Union of any measure which could lead to a distortion of competition or contains tax provisions or provisions relating to the rights and interests of employed persons.***

Title XIX of Part three TFEU, on “Research and technological development and space” reads, inter alia, (emphasis added):

*Article 182  
(ex Article 166 TEC)*

- 1. A multiannual framework programme, setting out all the activities of the Union, shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee.***

***The framework programme shall:***

- establish the scientific and technological objectives to be achieved by the activities provided for in Article 180 and fix the relevant priorities,***
  - indicate the broad lines of such activities,***
  - fix the maximum overall amount and the detailed rules for Union financial participation in the framework programme and the respective shares in each of the activities provided for.***
- 2. The framework programme shall be adapted or supplemented as the situation changes.***
  - 3. The framework programme shall be implemented through specific programmes developed within each activity. Each specific programme shall define the detailed rules for implementing it, fix its duration and provide for the means deemed necessary. The sum of the amounts deemed necessary, fixed in the specific programmes, may not exceed the overall maximum amount fixed for the framework programme and each activity.***
  - 4. The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, shall adopt the specific programmes.***
  - 5. As a complement to the activities planned in the multiannual framework programme, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the measures necessary for the implementation of the European research area.***

*Article 183  
(ex Article 167 TEC)*

***For the implementation of the multiannual framework programme the Union shall:***

- determine the rules for the participation of undertakings, research centres and universities,***
- lay down the rules governing the dissemination of research results.***

Chapter 3 of Title VII of Part three TFEU, on “Approximation of laws” reads, inter alia, (emphasis added):

*Article 114  
(ex Article 95 TEC)*

- 1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.***
- 2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.*
- 3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.*
- 4. If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.*
- 5. Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.*
- 6. The Commission shall, within six months of the notifications as referred to in paragraphs*

*4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.*

*In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.*

*When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.*

- 7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.*
- 8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.*
- 9. By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union if it considers that another Member State is making improper use of the powers provided for in this Article.*
- 10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure.*

### **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>.

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<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.

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 Regulation**

As explained in the explanatory statement to the proposed Regulation, semiconductor chips are central to the digital economy. They make digital products work and they are key to the technologies of the future. In other words, there is no “digital” without chips. Against this premise and in the context of the recent health crisis and the ongoing armed conflict in Europe’s neighbourhood, Europe has witnessed disruptions in the supply of chips causing shortages across multiple economic sectors and potentially serious societal consequences. Many European sectors, including automotive, energy, communication and health as well as strategic sectors such as defence, security, and space are under threat by such supply disruptions. At the same time, fake chips start appearing on the market, compromising the security of electronic devices and systems.

This has revealed structural vulnerabilities in the value chains as well as European dependency on supply from a limited number of companies and geographies, and its vulnerability to third country export restrictions and other disruptions in the present geopolitical context. This dependency is exacerbated by the extremely high barriers to entry and capital intensity of the sector.

European players invest mainly in research and development but not enough in translating its results into industrial benefits. Europe is home to world-leading research and technology organisations. However, many results of European research and development are industrially deployed outside the Union.

The proposed Regulation aims at reaching the strategic objective of increasing the resilience of Europe’s semiconductor ecosystem while at the same time structuring a European approach to this issue and increasing its global market share in the sector, which should contribute to strengthening the internal market. The proposed Regulation is intended to cover the whole value chain from design to manufacturing capacities.

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<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.



In order to achieve these objectives, the proposed Regulation is built on three pillars:

Pillar 1: setting up the Chips for Europe Initiative to support technology capacity building and large-scale innovation across the Union to enable the development and deployment of cutting-edge and next generation semiconductor and quantum technologies that will strengthen the Union's capabilities and competences in advanced design, systems integration and component production. More specifically, the Chips for Europe Initiative includes five operational objectives related to: the development of pilot lines, to test and experiment innovative process technology and design concepts; the development of a design platform, to facilitate access to design resources; support to quantum chips; the set-up of competence centres and the strengthening of skills, to increase access and talent across the Union; and a Chips Fund, to support start-ups and the scaling-up of SMEs.

Pillar 2: creating a framework to ensure security of supply by attracting increased investment and production capacity in semiconductor manufacturing as well as in packaging and advanced testing and assembly through first-of-a-kind integrated production facilities and Union open foundries.

Pillar 3: establishing a mechanism for coordinating surveillance and crisis response between Member States and the Commission to strengthen collaboration with and between Member States, monitor the supply of semiconductors, estimate demand, anticipate shortages, trigger the activation of a crisis phase and deploy a dedicated toolbox.

## **V – Analysis**

It should first be noted that the request of ITRE Committee does not concern the appropriateness of Article 173(3) (industry) nor Article 114 TFEU (approximation of laws/internal market) as the legal basis for the proposed Regulation. The question at hand is rather whether the additional Articles 182(1) and 183 TFEU (research and technological development and space) are also appropriate legal bases for the proposed Regulation and is the focus of this analysis.

It is useful first to recall that in accordance with the established case law of the Court of Justice, it is only exceptionally that an act may be founded on various corresponding legal bases if it is established that the act simultaneously pursues a number of objectives which are inextricably linked, without one being secondary and indirect in relation to the other. It should thus be examined whether the aim and the purpose pursued by the proposed Regulation that would necessitate the addition of Articles 182(1) and 183 TFEU as the legal bases is inextricably linked and is not subordinate with the rest of the objectives based on Articles 173(3) and Article 114 TFEU.

In the first bullet point on the legal basis under point 2 of the explanatory statement to the proposed Regulation the Commission explains that it *“pursues two separate specific objectives, which form essential parts of its general objective to establish a coherent framework for strengthening the Union’s semiconductor ecosystem.”* It goes on saying that the *“first specific objective of the Regulation, underlying pillar 1, is creating large innovation capacities and the adequate technological capabilities in the semiconductor industry to accelerate and adjust to*

*innovation” and that “underlying pillars 2 and 3, the Regulation aims to increase the Union’s resilience and security of supply in the field of semiconductor technologies by supporting and coordinating investment in advanced semiconductor manufacturing (pillar 2) and enabling coordinated monitoring and crisis response (pillar 3).*

Following this outline of the general and specific objectives through the pillar structure of the proposed Regulation, the Commission explains that “[t]he appropriate legal bases for the first objective are Articles 173(3), 182(1) and 183 of the Treaty on the Functioning of the European Union (TFEU)” whereas it considered that the appropriate legal basis for the second objective, underlying pillars 2 and 3, is Article 114 TFEU.

The focus of this analysis here is therefore on the first specific objective underlying pillar 1 for which the Commission seems to also have had recourse to Article 182(1) and 183 TFEU, the appropriateness of which is questioned.

The Commission explains rather in detail why Article 173(3) TFEU is the appropriate legal basis. It recalls that the European Parliament and the Council “*may decide on specific measures in support of actions taken in the Member States to secure the conditions necessary for the competitiveness and innovation capacity of the Union and ensure the adjustment of the industry to structural changes due to fast innovation cycles. This legal basis, with regard to most activities undertaken under the Chips for Europe Initiative, is appropriate given that pillar 1 of [the proposed] Regulation aims to accelerate the semiconductor production of the Union’s industry, reinforce sovereignty in the semiconductor supply chain, boost industrial capacities, facilitate the development of innovative start-ups and SMEs, and encourage new investments in innovation and technological development”.*

However, when it comes to the choice of Articles 182(1) and 183 TFEU, the Commission merely states in the explanatory statement that “[i]n view of the broad nature of the Initiative, it is also based on the TFEU Title ‘Research and technological development and space’ (Articles 182(1) and 183)”. The same observation can be made when turning to the actual recitals and articles of the proposed Regulation as agreed during the interinstitutional negotiations, that is that the agreed text does not put forward the objective of research any more than the explanatory statement to the proposed Regulation. In fact, the only reference to Articles 182(1) and 183 TFEU can be found in the explanatory memorandum. Although the agreed text makes references to ‘research’ (see, for example recitals 10, 11, 12, 15 and Article 4 etc.) it manifestly does not imply that the research policy would be more than an incidental objective of the proposed Regulation intrinsically linked with the industry objectives or that it would genuinely pursue an independent research policy objective.

It should therefore be concluded that, in accordance with the settled case law, the research-related activities mentioned in the proposed Regulation as agreed during the interinstitutional negotiations are merely incidental and subordinate to one of the main aims, that of strengthening the Union semiconductor industry.

Consequently, it is appropriate to delete Articles 182(1) and 183 TFEU as the legal bases of the proposed Regulation.

## **VI – Conclusion and recommendation**



At its meeting of 27 June 2023 the Committee on Legal Affairs accordingly decided, by 16 votes in favour, 0 against and 0 abstentions<sup>8</sup>, to recommend to the Committee on Industry, Research and Energy that deletion of Articles 182(1) and 183 TFEU as the legal bases for the proposed Regulation appears to be appropriate.

Yours sincerely,

Adrián Vázquez Lázara

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<sup>8</sup> The following were present for the final vote: Adrián Vázquez Lázara (Chair), Sergey Lagodinsky (Vice-Chair), Marion Walsmann (Vice-Chair), Lara Wolters (Vice-Chair), Raffaele Stancanelli (Vice-Chair), François Alfonsi (for Marie Toussaint pursuant to Rule 209(7)), Isabel Carvalhais (for Maria Manuel Leitão Marques pursuant to Rule 209(7)), Ilana Cicurel, Angel Dzhambazki, Pierre Karleskind, Gilles Lebreton, Karen Melchior, Luděk Niedermayer (for Jiří Pospíšil pursuant to Rule 209(7)), Emil Radev, René Repasi, Javier Zarzalejos.