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CONTRIBUTION OF THE LEGAL SERVICE*

To:	**To the proceedings of the Own Resources group meeting of 1 February 2012.**
Subject:	**Lawfulness of the new legal architecture proposed by the Commission for the own resources system for the EU**

During the Own Resources Working Party meeting of 1 February 2012, the Presidency and a number of delegations invited the representative of the Legal service to comment on the lawfulness of the legal architecture proposed by the Commission with a view to reorganising the own resources system of the EU, paying particular attention to the case of the tax-based own resources. At the request of the Presidency, this note takes up in writing the main points of the position expressed during that meeting.

* **This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public.**

1. By way of introduction, it was made clear that the subject of the legal opinion was not the legitimacy, or otherwise, of the Commission proposal from a taxation point of view. It was not for the Legal service to express an opinion on how appropriate it is to recast and reorganise the own resources (OR) system of the European Union, including the introduction of a new, and the overhaul of an existing, tax-based own resource. No substantial discussion of such policy issues has been carried out as yet, other than general presentations at Council and European Council level. In such circumstances, legal analysis was bound to be an *'as if'* exercise: it could only take as a working assumption that the two taxes[1], as the Commission proposed them, will be set EU-wide, and, on that basis, address the legality of the new architecture presented by the Commission from the EU own resources point of view.

2. It would be noted, in this respect, that the legal architecture proposed by the Commission[2] is not entirely new, but proceeds from a logic of reordering the EU own resources system. The proposed reorganisation takes the form of a pyramid scheme, laid out in four layers:

   - At the top, the Own resources decision (ORD), based on Article 311, third paragraph, of the Treaty on functioning of the European Union (TFEU), remains as the overarching legal instrument, - but is now devoid of technical elements found in previous ORDs – such as the definition of the GNI for own resources purposes, and the recalculation of own resources ceilings in case of significant changes in the GNI. Provisions that are not included in the decision are meant to constitute implementation measures.

[1] Those are: the new Financial Transactions Tax, as proposed in doc. 14942/11, and the so-called new VAT, based on existing VAT harmonisation legislation, but reorganised as proposed in doc. 16846/11.

[2] For a comprehensive view, see documents 16846/11, 16847/11, 16848/11, 16844/11 and 16845/11.

- At the second layer is the implementation of the OR decision, on the basis of new provision in the Treaty (311 last paragraph TFEU). Implementing acts for Own Resources decisions are not a new feature; past Council practice has been to foresee them in, and adopt them on the basis of, an authorisation contained in the ORD itself[3]. They are currently exemplified by Regulation 1150/2000[4].

  What is different in the new Commission proposal is (i) the legal basis, now provided by Article 311 (4) TFEU and (ii) the content, which, alongside a number of implementing rules already found in Regulation 1150/2000 (e.g. adjustment of the annual budgetary balance, implementation for carry-overs, provisions concerning control and supervision), now purports to contain the technical elements of the previous OR decisions indicated above, as well as a procedure for the definition of the tax rates and the rates of call applicable to the own resources established in the decision - including, critically, those based on the VAT and the FTT. The determination of the precise rate of call for both is to be carried out within a range limited by ceilings established in the ORD itself.

  The Commission bases such policy option on preparatory work carried out in the framework of the 2002-2003 European Convention, which concluded that the system of OR should, in the future, comprise two legal bases – one for creating the OR and setting a ceiling to them, and a different, lighter one, for the practical procedures[5].

[3] See Article 8(2) of the Own Resources decision currently in force (Council Decision of 7 June 2007, 2007/436/EU, Euratom, OJ L 163, 23.6.2007, p.17).

[4] OJ L 130 of 31.5.2000, last modified by Regulation 105/2009 (OJ L 36, 5.2.2009)

[5] See the "Final report of the discussion circle on own resources", doc. CONV 730/03 CERCLE III 7, pp. 4-5.

- A third layer is dedicated to particular aspects of implementation as regards the Member States, setting out rules on how the OR are to be made available to the Commission, as well as measures to be applied in order to meet cash requirements. There are few new provisions here, as most of the corresponding arrangements are already found in Regulation 1150/2000, with provisions being added concerning the management of Traditional Own Resources (TORs) and the GNI-based one. **DELETED**

- The last layer foresees some more traditional implementing acts, entrusted to the Commission on the basis of Article 291 TFUE.

3. To sum up, the comprehensive Commission proposal consists of one basic instrument and three levels of implementation – two by the legislator, based on specific provisions in the TFEU, and one by the Commission, presumably framed by comitology procedures.

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