



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 18 July 2012

12498/13

LIMITE

**PESC 913
RELEX 680
INST 419
JUR 378**

"I/A" ITEM NOTE

From : General Secretariat of the Council
To : COREPER/Council

Subject : Draft Council position concerning the conclusion by the EU of Memoranda of Understanding, Joint Statements and other texts containing policy commitments, with third countries and international organisations

1. At its meetings on 26 and 29 November 2012, the Foreign Relations Counsellors Working Party (RELEX) noted that there seems to be an increasing tendency of the Commission to sign with third countries and international organisations instruments which are not intended to be legally binding but which contain policy commitments by the EU, such as Memoranda of Understanding (MoUs), Joint Statements, Joint Declarations and other such texts, without involving the Council. At the request by RELEX, the Council Legal Service provided a written contribution on the correct procedure to be followed for the conclusion with third countries and international organisations of such instruments (doc. 5707/13).
2. On 8 May 2013, the Presidency tabled in RELEX a draft Council position concerning the conclusion by the EU of Memoranda of Understanding, Joint Statements and other texts containing policy commitments, with third countries and international organisations. RELEX discussed the draft in its meetings on 8 May, 18, 20 and 26 June, and 15 and 18 July 2013.

On 18 July 2013 an agreement on the draft Council position, as set out in the Annex, was reached between delegations. The Commission reserved its position on the content of that text.

3. In light of the foregoing, COREPER is invited to:

- confirm the agreement on the draft Council position;
 - recommend to the Council to adopt the draft Council position on the arrangements to be followed for the conclusion by the EU of Memoranda of Understanding, Joint Statements and other texts containing policy commitments, with third countries and international organisations, as set out in the Annex.
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Council position on the arrangements to be followed for the conclusion by the EU of Memoranda of Understanding, Joint Statements and other texts containing policy commitments, with third countries and international organisations

1. The Council notes that in a number of recent cases the Commission has purportedly concluded on behalf of the EU, without involving the Council, Memoranda of Understanding (MoUs), Joint Statements, Joint Declarations and other such instruments with third countries and international organisations, which are not intended to be legally binding but which contain policy commitments by the EU.¹ The Council considers that the conclusion of such instruments should follow the principles and procedures set out below, in accordance with the institutional balance established by the EU Treaties.
2. These procedures would only apply to MoUs or other such instruments in which policy commitments are undertaken by the EU, and not to instruments merely containing administrative arrangements for practical cooperation between an EU institution or body with a third country or organisation. In the latter case, the EU institution or body may conclude such an instrument itself, by virtue of the principle of administrative autonomy in Article 335 TFEU, it being understood that the instrument would be concluded by the institution or body solely on its own behalf, and not on behalf of the EU.
3. Equally, if the text of an instrument to be agreed between the EU and a third country or international organisation contains legally binding commitments and would therefore constitute an international agreement, the procedure laid down in Article 218 TFEU for the negotiation, signature and conclusion of international agreements would apply.

¹ For example, the Joint Statement on Space Technology Cooperation with China in October 2012, which was the subject of a written contribution of the Legal Service (doc. 15809/12), and the MoU on the establishment of a Strategic Partnership between the EU and the International Fund for Agricultural Development in November 2012.

4. It will be necessary to verify in each case whether the subject-matter of an MoU or other such instrument comes within the scope of the EU's powers as laid down in the Treaties, and to decide whether an MoU or other such instrument should be concluded. Since the functioning of the EU is subject to the principle of conferral of powers (Articles 4 (1) and 5 (1)-(2) TEU), the EU institutions cannot subscribe, even in instruments of a non-binding nature, to policy positions which fall outside the EU's fields of activity. Consequently, if the instrument concerns certain matters which come within the scope of the EU's fields of activity and other matters which remain with the Member States, then it will have to be concluded by the EU and the Member States together.
5. Since there are no specific Treaty provisions concerning the procedure for the conclusion by the EU of MoUs and other such instruments, this question has to be determined in light of the distribution of powers and the institutional balance established by the Treaties. In accordance with Article 13 (2) TEU, the powers assigned to each institution must be exercised by that institution without interfering with the powers of other institutions.
6. According to Article 16 (1) TEU, the Council *"shall carry out policy-making and coordinating functions as laid down in the Treaties"*, whilst according to Article 17 (1) TEU the Commission *"shall ensure the Union's external representation"* (with the exception of the CFSP and other cases provided for in the Treaties). Since the establishment of the Union's position on policy questions dealt with in MoUs or other such instruments forms part of the Council's policy-making functions as mentioned in Article 16 (1) TEU, it is for the Council alone to determine the content of the EU's position and to authorise the Commission to negotiate and sign such instruments. It will then be for the Commission to represent that Union position (except with regard to the CFSP and other cases provided for in the Treaties), but this does not entitle the Commission to determine the content of the position.

7. Moreover, independently of the content of such an instrument, the mere fact of deciding to conclude it with a given third country or organisation is also a matter which falls within the competence of the Council, even if the Council has previously, in another context, established the Union's policy in that area. Consequently, the Commission may only sign or agree an MoU or other such instrument containing policy commitments by the EU, if it has previously obtained the necessary approval by the Council.
8. With regard to the procedure which should be followed in order to ensure respect for the institutional balance concerning policy commitments, the duty of sincere cooperation in Article 4 (3) TEU requires that the institutions of the Union, in full mutual respect, must assist each other in carrying out the tasks which derive from the Treaties. Consequently, the Commission should assist the Council to carry out its policy-making function and provide the Council or its preparatory bodies with the necessary input for establishing the EU's policy position.
9. The EU's position will then have to be endorsed in the Council, for example through a 'I/A' item procedure. The Council's authorisation for an MoU or other such instrument which contains policy commitments by the EU is necessary in two separate stages: first, in order for the Commission to enter into negotiations with the third country or organisation on the content of the instrument; and second, in order to obtain the Council's approval for the signature of the instrument in its final version.
10. The Council requests the Commission to follow in future the above principles and procedures for the negotiation and conclusion of MoUs and other such instruments containing policy commitments on behalf of the EU. The Council will review the implementation of these arrangements after six months.