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CONTRIBUTION OF THE LEGAL SERVICE¹

Subject: Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation
- Council participation

I. INTRODUCTION

1. At its meetings on 3 and 17 October 2014, the General Affairs Group (GAG) discussed the Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation², and in particular the question whether it would be appropriate for the Council to become a party to this Agreement (hereinafter, 'the Agreement' or 'the IIA'). Following oral interventions of the representative of the Legal Service on this question, the Group requested a contribution in writing. This contribution responds to that request.

¹ 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. The Council reserves all its rights in law as regards any unauthorised publication.

² OJ L277 of 19.9.2014, p. 11.

II. BACKGROUND

2. The Transparency register for the registration of lobbyists was set up in 2011 by the European Parliament and the Commission by means of an inter-institutional agreement³. This inter-institutional agreement was revised by the two institutions concerned and replaced by the Agreement referred to in point 1.
3. The Agreement covers "*all activities, other than those referred to in paragraphs 10 to 12, carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions, irrespective of where they are undertaken and of the channel or medium of communication used, for example via outsourcing, media, contracts with professional intermediaries, think tanks, platforms, forums, campaigns and grassroots initiatives*" (point 7 of the Agreement).⁴
4. In particular, "those activities include:
 - contacting Members and their assistants, officials or other staff of the EU institutions;
 - preparing, circulating and communicating letters, information material or discussion papers and position papers;
 - organising events, meetings, promotional activities, conferences or social events, invitations to which have been sent to Members and their assistants, officials or other staff of the EU institutions; and
 - voluntary contributions and participation in formal consultations or hearings on envisaged EU legislative or other legal acts and other open consultations" (point 7 of the Agreement).

³ OJ L191 of 22.7.2011, p. 29.

⁴ Emphasis added.

5. Two specific provisions concern the position of Member States. On the one hand, pursuant to point 15, *"the register does not apply to Member States' government services, third countries' governments, international intergovernmental organisations and their diplomatic missions"*. On the other hand, pursuant to point 19, *"the activities to be taken into account for assessing eligibility to register are those aimed (directly or indirectly) at all EU institutions, agencies and bodies, and their Members and their assistants, officials and other staff. Such activities do not include activities directed at Member States, in particular those directed at their permanent representations to the European Union."*
6. All organisations and self-employed individuals, irrespective of their legal status, engaged in activities, whether ongoing or under preparation, covered by the register are expected to register (point 8).
7. By registering, the organisations and individuals concerned agree that the information which they provide for inclusion in the register shall be in the public domain (point 21 of the Agreement). This information concerns general and basic information on inter alia the organisation, the persons legally responsible, its members and goals, but also specific information on the main legislative proposals or policies targeted by the activities of the registrant, its link with EU institutions (e.g. membership of high-level groups or consultative committees) and financial figures (See Annex II to the Agreement).
8. By registering, the organisations and individuals concerned also agree to act in compliance with the code of conduct set out in Annex III to the Agreement and to be subject to any measures to be applied in the event of non-compliance.

9. In return, and in order to encourage registration, the parties to the Agreement shall offer incentives in the framework of their administrative authority. For instance, permanent access passes to the Parliament's premises will only be issued to individuals representing or working for registered organisations. Listed as further possible incentives that may be offered by the European Parliament are the authorisation to organise or co-host events on the Parliament's premises, a facilitated transmission of information and participation as speakers in committee hearings, or patronage by the Parliament.
10. As regards the Commission, the following possible incentives are listed: measures with regard to the transmission of information to registrants when launching public consultations, measures with regard to expert groups and other advisory bodies, specific mailing lists and patronage by the Commission.
11. The Secretaries-General of the European Parliament and of the Commission shall be responsible for supervision of the system and for all key operational aspects, and shall by common accord take the measures necessary to implement the agreement (point 22). A joint operational structure, designated as the Joint Transparency Register Secretariat and made up of a group of officials from the concerned institutions, shall implement the system (point 24).
12. The European Parliament and the Commission have regularly called upon the Council to join the Transparency register, and a series of letters on the topic have been exchanged among the institutions. Point 35 of the revised Agreement includes an explicit invitation to both the European Council and the Council: "*The European Council and the Council are invited to join the register*".

III. LEGAL ANALYSIS

a) Preliminary remarks

13. What follows is a legal analysis of possible implications for the Council based on the text of the inter-institutional agreement as it currently stands. This is without prejudice to the fact that, were the Council to decide to 'join the Transparency Register' (the terms of point 35 of the Agreement) it would have to become a party to the IIA, which necessarily means that the parties to the Agreement engage in trilateral negotiations and agree on a new text.
14. The analysis which follows is also without prejudice to any future views which the Legal Service may take on the establishment of a mandatory register for lobbyists. If and when the Commission submits a proposal to that effect to the European Parliament and the Council, as announced by Commission President-elect Juncker and First Vice-President Commissioner-designate Timmermans, further legal analysis will be required.
15. This contribution only addresses the position of the Council and not that of the European Council, which is a separate institution.

b) The position of the Council, its members and its General Secretariat

16. It has emerged from discussions in the GAG that delegations agree that sufficient guarantees about the exclusion of all activities directed at Member States must be in place in order for them to consider the Council's participation in the Register. This requirement has been stressed before, for instance in the Council's reply to a letter from Mr Wieland and Mr Šefčovič of 19 December 2012, in which the Council underlined that "*any potential future agreement between the three Institutions would need to (...) clearly exclude activities directed at Member States, including their diplomatic missions and national governments, since these form part of the national decision making process*".⁵

⁵ ST 11502/13.

17. The Council's concern has been taken into account by the European Parliament and the Commission, who have agreed to include a clause in their revised Agreement which excludes activities directed at Member States, in particular those directed at their permanent representations to the European Union, from the scope of the register (point 19). This clause serves the apparent aim of facilitating the Council's participation in the register. In their letter of 25 June 2014 to the Chairman of the General Affairs Council, Mr Wieland and Mr Šefčovič repeat their invitation to the Council to *"once again [...] consider formally joining the Transparency Register"* and underline that *"[i]t is evident from the provisions laid down in the IIA that the Council's possible participation in the Transparency Register would not affect its institutional autonomy, nor that of its constituent members"*.⁶
18. The exclusion as drafted in point 19 of the Agreement is formulated as an exception. If the Council decided to become a party to the IIA with the current point 19, and if the interpretation of this point were submitted to the Court or to the Ombudsman, it would therefore be interpreted restrictively. The meaning that would be given to the exception would be determined in the light of the principles underpinning the IIA as well as the fact that the Council decided to become a party to the IIA, a legal step that ought to have an 'effet utile'. It is not excluded that it would be seen as not excluding Member States' activities when they act as members of the Council or as the Presidency of the Council.
19. However, it appears from discussions in the GAG that the exception is understood as covering all activities of Member States, including when they act as members of the Council or as Presidency of the Council. The Legal Service also understands delegations' wish, with which the Commission appears to agree, to see the text in case of a trilateral negotiation further clarified so as to make sure that the exclusion covers all Member States activities as suggested above. Therefore, the Legal Service will continue this analysis on the basis of the presumption that the Council makes its participation dependent on such a full exclusion of activities directed at Member States.

⁶ ST 11764/14.

20. A full exclusion of activities directed at Member States, including when they act as members of the Council or as the Presidency, raises the fundamental question of the ‘effet utile’ of a possible Council participation. Becoming a party to the IIA is a legal step. If the Council takes that step, one would expect it to do so because it considers that becoming a party will contribute to the objectives and principles underlying the IIA, which are to improve transparency as regards activities which aim at influencing the formulation or implementation of policy and the decision-making processes of the EU institutions.
21. However, without covering activities directed at its members, it is difficult to see how the participation by the Council would contribute to the IIA's objectives and principles. There is no policy-making or decision-making taking place within the Council if it is not done by its members. Therefore, if activities directed at Member States, including when they act as members of the Council are excluded, the Council's decision-making would not be covered by the IIA and its participation in the register would be devoid of purpose.
22. The equivalent would be true for a participation by the European Parliament under the condition that activities directed at MEPs and their assistants are excluded. In that case, the Parliament's participation would also be devoid of purpose because the decision-making to be influenced would remain outside of the scope of the Register.
23. If the Council nonetheless decides that it should become a party to the IIA, its decision will give rise to questions as to what the ‘effet utile’ of the Council's participation is. It is recalled that providing answers to this question is not a prerogative of the parties to the IIA; answers on this matter may one day be sought from the Court of Justice.

24. The only possible conclusion in that case would be that the Council signs up to the IIA in the understanding that it would cover activities directed at its General Secretariat (GSC). However, this position ignores the fact that the GSC's role is to assist, advise and help coordinate the Council's decision-making, in independence and impartiality without a political agenda of its own. GSC officials are not involved in the kind of activities interest groups typically wish to influence. This is the reason why the GSC does not engage in stakeholder consultations. As far as the Council is concerned, this befalls on the Member States.⁷
25. No entity other than the Council itself, composed of one member per Member State at ministerial level, who may commit the government of the Member State in question and cast its vote (Article 16(2) TEU), is engaged in any decision-making. This is the reason why to date the GSC has only rarely been contacted by interest groups and why officials can usually limit themselves in their replies to pointing out the GSC's role to make them understand that in order to influence decision-making they should be targeting the decision-makers, that is MEPs and members of the Council in case of the ordinary legislative procedure.
26. The foregoing is an important guarantee of the independence and impartiality of the GSC's work and would be put at risk by a Council participation in the IIA under the terms discussed, that is without covering any activity directed at Member States. This would notably be the case because a participation under these terms would give rise to a false impression that officials working for the GSC are the persons to be targeted with lobbying activities and because the GSC may come under pressure to show that the Council's participation does not constitute an empty shell but has real consequences. This may make it harder for the GSC to resist contacts with interest groups in the future.

⁷ See judgment of the Court of Justice of 8 July 2010 in Case C-343/09 Afton Chemical Limited v Secretary of State for Transport, paragraphs 38 - 40, in which the Court recognised that "the Council is not necessarily in possession of scientific documents used by the Member States at meetings".

27. Another important point which would have to be addressed concerns the question of incentives. Both the Parliament and the Commission have indicated, in point 30 of the Agreement, which type of incentives they may offer to registered organisations and individuals in return for their sharing of information on their interests and their adherence to the code of conduct. These include, as regards the Parliament, the facilitation of access to its premises (including through permanent access badges), the possibility for registrant to organise events in the Parliament, a facilitated transmission of information, including through specific mailing lists etc. Similar incentives, though not regarding access to its premises, are listed for the Commission.
28. The Council would have to consider which incentives it would be willing to offer to registered organisations and individuals. Incentives of the kind listed by the Parliament and the Commission do not appear reconcilable with the Council's working rules and practices. However, not offering any incentives at all would only raise further questions as regards the real purpose of the Council's participation.
29. Taking into account the foregoing, one could argue that it would suffice to address the specific role of the GSC in the IIA. This has been a request which the Council has in the past addressed to the European Parliament and the Commission⁸, and it was repeated by several delegations during discussions in the GAG. However, while such wording could be appropriate in an IIA which covers the decision-making of the Council by including the activities of its members, in an IIA which excludes these activities it would only serve the purpose of pointing out that the Council's participation is devoid of purpose.

⁸ Ibid.

30. As indicated above, the situation would be different in case of a mandatory register, in which the Council would arguably not have to offer any incentives, but rather use the sanctions foreseen for cases of non-compliance by interest groups with the conditions laid down in the future text.

IV. CONCLUSION

31. The Legal Service is of the view that signing up to the Agreement on behalf of the Council would lead to legal risks and political confusion. Rather than insisting on sufficient guarantees as regards the exclusion of all activities directed at Member States, including Permanent Representations, their activities as members of the Council and as Presidency of the Council and as to the role of the GSC, it would therefore be advisable to explain to the other institutions why the Council considers that its participation in the current Register is not appropriate, referring thereby to the specificity of the institution.
32. Alternatively, if the Council does wish to become a party to the Agreement in order to show its commitment to transparency and to send a strong signal to stakeholders that the three institutions are working together on this matter, it should consider to have at least those activities of the Member States which relate to their work as members of the Council covered by the Agreement.
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