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CONTRIBUTION OF THE LEGAL SERVICE^(*)

Subject: Procedure 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

I. Introduction

1. The Council Legal Service was requested by the Foreign Relations Counsellors Working Party (RELEX), at its meetings on 26 and 29 November 2012, to provide a written contribution on the correct procedure to be followed for the conclusion with third countries and international organisations of 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. The Working Party noted that there seems to be an increasing tendency of the Commission to sign such instruments on behalf of the EU with third countries and international organisations, without involving the Council.¹

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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 (see para. 5 below).

II. Preliminary considerations

2. First, it is to be noted that MoUs, Joint Statements, Joint Declarations and other such instruments are used in cases where the parties do not wish to create legally binding rights and obligations between themselves or vis-à-vis third parties. That said, it is well-established in both international and EU law that it is the content of an instrument concluded between subjects of international law, and not its title or form, which determines whether such instrument constitutes an international agreement.² The parties can always make their intention clear in this regard by specifying in an MoU or other such instrument that it is not intended to create legal rights and obligations.³ The substantive provisions of the instrument should also reflect such intention, in particular by avoiding expressions normally reserved for legal texts (e.g. the obligatory form "*shall*", etc.).

If the text of an instrument to be agreed between the EU and a third country or international organisation does contain legally binding commitments and would thus qualify as an international agreement, then the procedures laid down in Article 218 TFEU for the negotiation, signature and conclusion of international agreements by the EU would apply.

² With regard to international law, Article 2(1)(a) of the 1969 Vienna Convention of the Law of Treaties stipulates that "*treaty*' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". Equally, with regard to EU law, the EU Court has ruled that Article 218 TFEU (formerly Article 228 EC) "*uses the expression 'agreement' in a general sense to indicate any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation*" (Case C-327/91, *France v. Commission*, para. 27) (our underlinings).

³ In Case C-233/02, *France v. Commission*, concerning 'Guidelines on Regulatory Cooperation and Transparency' concluded by the Commission with the USA, the EU Court stated that "*the intention of the parties must in principle be the decisive criterion for the purpose of determining whether or not the Guidelines are binding*" (para. 42). The Court found that such intention was clearly expressed in the text of the Guidelines, in particular by a provision specifying that the purpose of the document was to establish guidelines which regulators of the US Government and the Commission services "*intend to apply on a voluntary basis*" (para. 43). Cf. the case of Maritime Delimitation and Territorial Questions between Qatar and Bahrain (1994), where the International Court of Justice (ICJ) stated that "*In order to ascertain whether an agreement of that kind has been concluded, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up*" (para. 23). The ICJ found that there was nothing in the material before it to indicate that the parties did not intend to conclude an international agreement, but added that "*nor could any such intention, even if shown to exist, prevail over the actual terms of the instrument in question*" (para. 29).

3. Secondly, it is always necessary to verify whether the subject-matter of an MoU or other such instrument to be concluded by the EU, regardless of the fact that it is not legally binding, comes within the scope of the EU's powers as laid down in the Treaties. 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, without exceeding their competences.⁴ Consequently, if the subject-matter of an MoU or other such instrument falls outside the EU's fields of activity, then the instrument cannot be concluded on behalf of the EU but only by the EU Member States. If the instrument concerns some 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.

4. Thirdly, if an MoU or other such instrument merely contains administrative arrangements for practical cooperation between an EU institution (e.g. the Commission) or body (e.g. the Council Secretariat) with a third country or organisation, then that EU institution or body may conclude such an instrument itself, by virtue of the principle of administrative autonomy as referred to in Article 335 TFEU.⁵ Naturally, in such case the MoU or other such instrument may only be concluded by the EU institution or body on its own behalf, and not on behalf of the EU.

⁴ See the Contribution of the Legal Service in doc. 15018/12, concerning the adoption by the Council of conclusions and other documents not provided for in the Treaties, para. 6.

⁵ Article 335 provides that "*the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation*" (our underlining).

III. Procedure for the conclusion by the EU of MoUs, Joint Statements and other such instruments containing policy commitments

5. Recent examples of non-legally binding MoUs and Joint Statements which go beyond administrative cooperation and contain policy commitments include, as already mentioned above (para. 1, footnote 2), the Joint Statement on Space Technology and Cooperation between the EU and China, signed by the Commission in October 2012, and the MoU concerning the establishment of a Strategic Partnership between the EU and the International Fund for Agricultural Development (IFAD), also signed by the Commission in November 2012.⁶

6. There are no specific Treaty provisions concerning the procedure for the conclusion by the EU of such MoUs and other instruments. This question therefore has to be considered in the light of the distribution of powers and the institutional balance established by the Treaties, as the Court of Justice stated in Case C-233/02 concerning 'Guidelines on Regulatory Cooperation and Transparency' concluded with the USA in 2002. The Court found that those Guidelines, whilst falling within the scope of the common commercial policy, were not legally binding, but it underlined that *"this judgment cannot be construed as upholding the Commission's argument that the fact that a measure such as the Guidelines is not binding is sufficient to confer on that institution the competence to adopt it. Determining the conditions under which such a measure may be adopted requires that the division of powers and the institutional balance established by the Treaty in the field of the common commercial policy be duly taken into account [...]"* (para. 40).

⁶ That MoU provides that the EU and IFAD *"intend to explore the EU membership in IFAD"*, and specifies in considerable detail (points A. 2 and A. 3) the objectives of the Strategic Partnership and the methods for achieving it, including through financial cooperation under a specific contribution agreement to be concluded (point D. 1).

7. On that basis, the procedure for concluding MoUs and other such documents by the EU should respect the following conditions, as indicated by the Legal Service in its above-mentioned Contribution concerning the Joint Statement on Space Technology Cooperation between the EU and China.⁷

a) *Respective powers of the Council and the Commission*

8. The principle of the distribution of powers is laid down in Article 13(2) TEU which provides that *"Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation."*

This provision reflects the principle of the institutional balance, as developed in the case-law of the ECJ, which ensures that the powers assigned to each institution are exercised by that institution without interfering with the powers of other institutions and without interference from other institutions, within the limits and conditions established in the Treaties.⁸

9. Article 16(1) TEU provides, *inter alia*, that the Council *"shall carry out policy-making and coordinating functions as laid down in the Treaties"*. Article 17(1) TEU provides, *inter alia*, that the Commission *"shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice [...] With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation."*

⁷ That Contribution also restated the same reasoning as set out in the Legal Service Opinion of 25 September 2012 on the submission by the Commission of an *amicus curiae* brief to the US Supreme Court (doc. 14205/12, paras. 15-30).

⁸ The Court stated in Case C-70/88, Parliament v. Council (admissibility) that *"Those prerogatives [of the institutions] are one of the elements of the institutional balance created by the Treaties. The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community.[...] Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions"* (paras. 21-22).

These paragraphs describe certain tasks to be performed by the Council and the Commission, respectively, in accordance with the provisions of the Treaties. However, they are not 'enabling clauses' which entitle either institution to act independently of those other provisions. The Council cannot exercise "*policy-making*" functions on the basis of Article 16(1) TEU alone, but only as laid down in other provisions of the Treaties. Similarly, the Commission cannot autonomously ensure the "*external representation*" of the Union on the basis of Article 17(1) TEU alone, without respecting the policy-making role of the Council concerning the negotiation and conclusion of instruments containing policy commitments on behalf of the Union.

10. The representation of the Union and the determination of the policy content of positions to be adopted on behalf of the Union are two separate functions. The determination of the Union's position regarding policy questions dealt with in MoUs or other such instruments forms part of the Council's policy-making functions as set out in Article 16(1) TEU, in conjunction with the relevant Treaty provisions empowering the Council to act in the field(s) of activity which are the subject of the MoU or other instrument in question.⁹ Therefore, it is for the Council alone to determine the content of the EU's position on the negotiation and signature of such instruments. Although it is for the Commission to represent that Union position (except with regard to the CFSP and other cases provided for in the Treaties), this does not entitle the Commission to determine its content.

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 something which in principle falls within the competence of the Council, even if the Council has previously, in another context, established the Union's policy in that area.

⁹ For example, Articles 172 and 189 TFEU (respectively satellite navigation systems in the context of trans-European networks, and space policy) in the case of the Joint Statement on Space Technology Cooperation with China, and Article 209 TFEU (development cooperation) in the case of the Strategic Partnership with IFAD.

11. 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.¹⁰

b) *Procedure to be followed by the Commission*

12. As already noted, there is no specific rule in the Treaties setting out the procedure according to which the Commission should act in order to ensure respect for the distribution of powers between the Council and the Commission with regard to policy commitments.

In this regard, the duty of sincere cooperation (Article 4(3) TEU) is a general principle which applies throughout the Treaties. According to that principle, the institutions of the Union, in full mutual respect, must assist each other in carrying out the tasks which derive from the Treaties.¹¹ 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.

The EU's position will then have to be endorsed in the Council, for example by means of an 'I/A' item note. Such endorsement would be necessary in at least two separate stages: first, in order for the Commission to enter into discussions with the third country or organisation on the envisaged 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 provisions of Article 335 TFEU do not permit a different conclusion, since this is not an instance which concerns "*matters relating to [... the] operation*" of the Commission alone, as referred to in Article 335 TFEU, in which the Commission enters into administrative arrangements by virtue of its administrative autonomy. Article 335 TFEU must in any case be interpreted with due regard to the provisions of the TEU on the distribution of powers.

¹¹ See the case-law of the Court concerning co-operation between the institutions (e.g. Case C-65/93, *Parliament v. Council*, paras. 23-28).