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CONTRIBUTION OF THE LEGAL SERVICE[1]

To:	Working Party on General Affairs
Subject:	Draft Arrangement between the European Parliament, the Council and the High Representative of the Union for Foreign Affairs and Security Policy concerning access by the European Parliament to classified information held by the Council and the European External Action Service in the area of the common foreign and security policy – Legal assessment of the changes to the Council's mandate proposed by the European Parliament

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I. INTRODUCTION

1. At its meeting on 17 April 2019, the Permanent Representatives Committee (Part 2) agreed to endorse the re-opening of negotiations on the draft Arrangement between the European Parliament (hereafter "EP"), the Council and the High Representative of the Union for Foreign Affairs and Security Policy (hereafter "HR") concerning access by the European Parliament to classified information held by the Council and the European External Action Service in the area of the common foreign and security policy (hereafter "CFSP"), on the

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basis of the mandate contained in the annexes to document 8513/19.[2] This mandate revised and updated an existing mandate approved by Coreper in 2012.[3]

2. On 9 July 2021, the Council received the EP's mandate, which takes the form of changes to the Council's mandate.[4]

3. At its meeting on 12 October 2021, the Working Party on General Affairs had a first exchange of views on the EP's mandate, and the representative of the Council Legal Service made an oral intervention setting out the Legal Service's preliminary analysis of the changes proposed. This contribution summarizes and further develops this analysis.

II. LEGAL ANALYSIS

A. Title and legally binding nature of the arrangement

4. The EP's amendments aim to change the title of the arrangement by replacing the term *"arrangement"* with the term *"interinstitutional agreement"*. This raises the question of the legal basis of the draft arrangement and its legally binding nature.

5. At the outset, it is useful to recall the wording of Article 295 TFEU:

"The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature".

6. This text could be read as meaning that, unlike arrangements, only interinstitutional agreements may be of a binding nature. However, the case-law and the reading of other Treaties provisions make it clear that such understanding is not correct.

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[2] This mandate consists of three parts : the text of the draft arrangement itself (Annex I), the text of a draft Interinstitutional Agreement between the European Parliament and the Council repealing the Interinstitutional Agreement of 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy (Annex II), which aims to repeal the said Interinstitutional Agreement of 20 November 2002, meant to be replaced by the new arrangement between the European Parliament, the Council and the HR, and guiding principles for that new arrangement on the forwarding to and handling by the European Parliament of EU classified information (hereafter "EUCI") in the area of CFSP (Annex III).

[3] Document 17773/12.

[4] See the third column of the annex to document WK 9288/2021.

7. Indeed, Article 295 TFEU, which was introduced by the Treaty of Lisbon, is not a substantially new provision, but codifies a long-standing practice of cooperation between the institutions in accordance with their duty of mutual sincere cooperation, which has resulted in arrangements and agreements with all kinds of denominations (e.g. joint declaration, joint statement or gentlemen's agreement), in particular in the area of the budget.

8. In this respect, the Court of Justice held already in a judgment of 3 July 1986[5] that *"the problems regarding the delimitation of non-compulsory expenditure in relation to compulsory expenditure are the subject of an inter-institutional conciliation procedure set up by the Joint Declaration of the European Parliament, the Council and the Commission of 30 June 1982, and are capable of being resolved in that context"*. In substance, the Court of Justice thus considered that this Joint Declaration has binding effect on the institutions.

9. Furthermore, it is settled case law that acts open to challenge, within the meaning of Article 263 TFEU, are any measures adopted by the institutions, whatever their form, which are intended to have binding legal effects[6].

10. Thus, in order to determine whether the present draft arrangement is of a binding nature, the Court of Justice would not look merely at its title, but examine whether it follows from its content that it is intended to have binding legal effects, i.e. whether the formulations used in the arrangement demonstrate the will of the concluding parties to be bound by that arrangement.

11. Against this background, while the Council may prefer in the negotiations the term *"arrangement"*, which may be one element underpinning its technical nature, what matters is whether the substantive provisions of the arrangement, in the light of the case-law cited above (points 8 and 9), create or not legal obligations on the concluding parties.

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5 Judgment of 3 July 1986, Council v European Parliament, Case 34/86, EU:C:1986:291, paragraph 50. See also judgment of 27 September 1988, Greece v Council, Case C-204/86, EU:C:1988:450, paragraph 16.

6 Judgment of 1 October 2009, Commission v Council, C-370/07, EU:C:2009:590, paragraph 42 and case-law cited.

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C. Procedural rules vs substantive rules

19. As the Legal Service has repeatedly recalled[9], Article 295 TFEU is a procedural provision. The use of the terms *"arrangements for their cooperation"* clarifies that the arrangements made or the institutional agreements concluded by the institutions in accordance with this article are instruments regulating the modalities of their cooperation. In the same vein, the second sentence of Article 295 TFEU, pursuant to which interinstitutional agreements must be concluded *"in compliance with the Treaties"*, indicates that Article 295 TFEU is not meant to be an autonomous substantive legal basis for the regulation of policy areas. In other words, the instruments foreseen by that provision are about process, not substance. This is also confirmed by an argument of systemic nature. Article 295 TFEU is part of the second chapter of Part Six of the TFEU on *"legal acts of the Union, adoption procedures and other provisions"* and appears in a section devoted to the *"procedures for the adoption of acts"*.

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[9] See in that sense the opinion of the Legal Service of 4 July 2012, document 12225/12, point 6), the opinion of 10 February 2017, document 5151/17, points 21 and 22, and the contribution of 28 November 2018, document 14876/18, point 4.