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OPINION OF THE LEGAL COUNSEL

Subject: Draft Decision of the Heads of State or Government, meeting within the European Council, on the association agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part
- Form, legal nature, effects and conformity with the association agreement

1. The text of a draft Decision of the Heads of State or Government, meeting within the European Council, on the association agreement with Ukraine has been produced in order to address concerns of the Dutch people as presented by the Dutch Prime Minister following the referendum on 6 April 2016. The purpose of this opinion is to clarify questions concerning the form, the legal nature and the legal effects of the above mentioned draft Decision of the Heads of State or Government, as well as its conformity with the agreement.
2. With regard to its form, the text is drafted as a "*Decision of the Heads of State or Government, meeting within the European Council*". It is therefore a Decision of the Member States of the European Union, of an intergovernmental nature, not a decision of the European Council as an institution of the European Union under Article 15 TEU, within the meaning of the fourth paragraph of Article 288 TFEU. The addition of the phrase "*meeting within the European Council*" aims only at clarifying that the Heads of State or Government took the opportunity of their participation in a meeting of the European Council, of which they are all members, to adopt their decision.

Previous practice shows that the Heads of State or Government have in several cases had recourse to decisions adopted in the same form in order, for instance, to clarify their intentions, to interpret certain provisions or to decide on the seats of EU institutions and bodies.¹

3. With regard to its legal nature and effects, the draft Decision of the Heads of State or Government should, in the present case as well as in previous instances, be regarded - although it does not require the accomplishment of the formalities generally needed for self-standing agreements - as an instrument of international law, by which the EU Member States agree on how they understand and will apply, within their competences, certain provisions of an act by which they are otherwise all bound. Some of the previous comparable decisions were aimed at clarifying certain issues and interpreting certain provisions of the EU Treaties, others - such as those concerning the seats - were aimed at applying provisions of the EU Treaties.
4. The existence of such instruments, and the fact that they belong to the EU *acquis* at large, is acknowledged notably by the accession acts which provide expressly that new EU Member States are in the same situation as the previous Member States in respect of instruments concerning the Union adopted by common agreement of the Member States.² Both under international law and EU law, the denomination of a particular instrument, whether it is called "decision", "agreement", "resolution" or else, is not sufficient to ascertain its legal effects, the decisive elements being the content of the instrument and the will of its authors. In the present case, both the title of the instrument (decision) and its content use language that shows the will of the Member States to be legally bound by it as concerns the way they understand the association agreement and the way they will apply it.

¹ See, for instance, decisions of the Heads of State or Government, meeting within the European Council, taken in December 1992 and in June 2009 to address certain problems raised by the Government of a Member State following a referendum in that State or decisions taken by common agreement of the representatives of the Member States, including at the level of Heads of State or Government, in December 1992, October 1993 and December 2003 on the location of the seats of a number of EU institutions and bodies, in the context of Article 341 TFEU.

² See for instance Article 3(3) of the Accession Act of Croatia to the EU. Likewise the draft Constitutional Treaty, in its legal continuity article, mentioned, as components of the *acquis*, "*decisions and agreements arrived at by Representatives of the Governments of the Member States meeting within the Council*" (Article IV-438(3)).

5. The present draft only differs from the above-mentioned previous instances insofar as it is intended to be agreed by the EU Member States only, and therefore not by all parties to the association agreement to which the Decision makes reference. It is in particular clear that, unless Ukraine declares that it accepts the Decision, its provisions cannot constitute an interpretative instrument binding on Ukraine by virtue of Article 31(2)(b) of the Vienna Convention on the Law of Treaties.
6. However, it is among the prerogatives of the Heads of State or Government to give their consent, on behalf of EU Member States that are parties to the association agreement, to a common understanding of how they will apply certain provisions of this agreement and to give binding force, among themselves, to this understanding. Naturally, this implies that the Decision should contain no element that changes the content of the rights and obligations contained in the agreement. Neither should it constitute or contain a reservation in the meaning of Articles 19 to 23 of the Vienna Convention on the Law of Treaties, if only because this would oblige the Member States to submit the adoption of the Decision to constitutional procedures foreseen for the conclusion of treaties, and thus reopen those that have been completed.
7. But, as indicated below, the draft Decision neither amends the contents of the agreement nor constitutes a reservation to it. It has nevertheless legal force in order to exclude, as among the Member States of the EU, certain interpretations that could be given to the language of the agreement and certain forms of action that could be considered on its basis. In case the EU Court of Justice would have to interpret the provisions of the association agreement in the future, the draft Decision could also be used in its reasoning to assess the intentions of the EU Member States as to the scope of the commitments undertaken when becoming parties.

8. With regard to its conformity with the association agreement, an analysis of the six paragraphs (A to F) of the draft Decision show that they do not contradict any of the provisions of the association agreement. These paragraphs set out the common understanding of the Heads of State or Government of the EU Member States in a way which, in the light of the object and purpose of the agreement, is compatible with the meaning of the terms thereof and with their context.³

9. Nothing in the association agreement aims at conferring on Ukraine the status of a candidate country, nor at providing collective security guarantees, nor at giving Ukrainians rights which would run against the right of EU Member States, recognised by Article 75(5) TFEU, to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, nor at requiring additional financial support to Ukraine by EU Member States.

10. Therefore, the paragraphs forming the substance of the draft Decision are in conformity with the association agreement, including those which recall the importance and the monitoring of the fulfilment of their obligation by the parties in accordance with Article 478 of the agreement. There would therefore be no obstacle for the Court of Justice to have recourse to these paragraphs were it called upon to interpret the relevant provisions of the agreement.

³ Article 31 of the 1969 Vienna Convention on the Law of the Treaties requires that a treaty be "*interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".