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## OPINION OF THE LEGAL SERVICE<sup>1</sup>

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From: Legal Service  
To: Working Party on General Affairs

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Subject: Commission Proposal for an Inter-Institutional Agreement on a Mandatory Transparency Register - Legal analysis

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**DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (08.02.2017)**

### I. INTRODUCTION

1. On 28 September 2016 the Commission published a proposal for an 'Interinstitutional Agreement on a Mandatory Transparency Register' (the proposed IIA).<sup>2</sup> The proposal is aimed at replacing the existing transparency register for lobbyists which was set up in 2011 and revised in 2014 by the European Parliament and the Commission as a voluntary scheme based on a system of incentives and disincentives.<sup>3</sup> The Council was invited to join the IIA both in 2011 and in 2014 but did not take a final position on the issue.<sup>4</sup>

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<sup>1</sup> 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.

<sup>2</sup> ST 12882/16.

<sup>3</sup> 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, OJ (2014) L 277, pp. 11–24.

<sup>4</sup> The General Affairs Group discussed the possibility of joining the existing IIA on an optional transparency register in several occasions in recent and notably in its meetings of 3 and 17 October 2014. The Council Legal Service provided its opinion on this matter on 24 October 2014 (ST 14704/14).

2. The Commission presented its new proposal at the meeting of the Working Party on General Affairs (GAG) on 30 September 2016. The GAG started its examination of the Commission proposal and at its meeting on 14 October 2016 asked the Council Legal Service to give its opinion on the compatibility of the Commission proposal with the Treaties.
3. This opinion responds to the GAG request. It focuses on the legal issues surrounding the Commission's choice of legal basis for its proposal and those related to the inclusion of organs of the Member States in the register's scope of application. The opinion does not deal with legal issues raised by more specific aspects of the proposal, such as the definition of 'interest representatives', the activities exempted by the regime of the register, or the system of sanctions associated with the enforcement of the obligations for lobbyists as set out in the Code of Conduct. These issues could be addressed in a separate opinion if required.

## **II. BACKGROUND INFORMATION**

4. The Commission proposal aims at a more effective regulation of the practice of lobbying at EU level and notably at the establishment of a framework for a transparent and ethical interaction between interest representatives and the three EU institutions participating in the IIA (Article 1). This objective is to be achieved by the establishment of a 'mandatory' transparency register which would replace the current voluntary scheme.
5. The 'mandatory' character of the scheme derives from the fact that interest representatives who intend to interact in a privileged way with Union institutions beyond the core of rights derived from the Treaties (see point 34 below) are required to register (and therefore to comply with a number of transparency requirements - Annex II) and to subscribe to the rules and ethical principles set out in a Code of Conduct (Annex III).
6. The mechanism put in place by the IIA generally applies to "*activities which promote certain interests by interacting with any of the three signatory institutions, their members or officials, with the objective of influencing the formulation or implementation of policy or legislation, or the decision-making process within these institutions*" (Article 3(1)), with the exception of the cases defined in paragraph 2 or in Article 4.

7. More specifically, Article 5 identifies, for each of the three institutions, the types of interaction for which prior registration is required. In relation to the Council, the Commission proposal includes the following interactions: meetings between interest representatives and the Ambassador of the current or forthcoming Presidency of the Council of the EU, as well as their deputies in COREPER, the Council's Secretary-General and Directors-General; and the sending of automatic notices about the Council's activities to interest representatives (Article 5(1)). The provision further allows each participating institution to identify other types of interaction which will be subject to prior registration.
8. The proposal introduces clarifications as to the entities that are excluded from the scope of the transparency register, thus addressing some of the concerns raised by the current regime (Article 4). In particular, local and regional authorities as well as their representative associations are exempt from registration, as are the public authorities of the Member States at national level, including their permanent representations and embassies. By virtue of the same Article, political parties, churches and religious associations as well as philosophical and non-confessional organisations provided for in Article 17 TFEU are exempt from registration, with some exceptions. The same applies to public authorities of third countries and intergovernmental organisations.
9. In addition to regulating interactions of lobbyists with the three institutions participating in the IIA, the proposal envisages the possibility that other EU institutions, bodies, offices and agencies may join the register on a voluntary basis, by notifying their wish to make registration mandatory for certain interactions (Article 12). More notably, the proposal envisages that Member States may also join the scheme, by notifying their intention to make prior registration a requirement for certain interactions with their permanent representations to the EU (Article 13).

10. Articles 6 and 7 of the proposal define the conditions that interest representatives must meet to be entered into the register. Article 6 sets out the transparency requirements for the interest representatives seeking registration and further refers to Annex II, which details the information that applicants must provide and agree to make public. Article 7 provides that by joining the transparency register, interest representatives agree to abide by the rules and principles set out in the Code of Conduct (Annex III). The proposal also provides that failure to comply with the Code of Conduct may be subject to investigations leading to the adoption of measures such as temporary suspension or removal from the register (Annex IV).
11. The proposal envisages the establishment of a Management Board for the register composed of the Secretaries-General of the participating institutions and charged with overseeing the implementation of the IIA and taking certain relevant decisions for the functioning of the register, including decisions on requests for review submitted by registrants against whom measures have been adopted (Article 8). The day-to-day management of the register is entrusted to a Secretariat, which is a "*joint operational structure*" made up of staff seconded by the participating institutions (Article 9). A separate agreement will set out more detailed arrangements regarding the contributions to the administrative and financial resources of the Secretariat (Article 11(3)).
12. Article 14 provides that the IIA is binding upon the signatory institutions and shall replace the existing IIA in force between the European Parliament and the Commission. It further includes various transitional provisions and a review clause.

**III. LEGAL ANALYSIS**

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