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OPINION OF THE LEGAL SERVICE¹

From: Legal Service
To: Working Party on General Affairs
Subject: Commission Proposal for an Inter-Institutional Agreement on a Mandatory Transparency Register - Legal analysis

I. INTRODUCTION

1. On 28 September 2016 the Commission published a proposal for an 'Interinstitutional Agreement on a Mandatory Transparency Register' (the proposed IIA).² 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.³ The Council was invited to join the IIA both in 2011 and in 2014 but did not take a final position on the issue.⁴

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 ST 12882/16.

³ 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.

⁴ 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

13. The current Commission proposal raises two fundamental issues in relation to its legal feasibility: (i) whether Article 295 TFEU can validly be used to put in place a mandatory scheme such as the one proposed by the Commission and (ii) whether the proposal to apply the proposed scheme to interactions between interest representatives and certain organs of the Member States, whether on a voluntary basis or not, is compatible with the Treaties. Each aspect will be addressed in turn. It should be noted that the use of the word 'mandatory' in this context may create confusion since the proposal only lays down a series of conditions which interest representatives must fulfil if they wish to obtain privileged access to the three signatory institutions, over and above the rights derived from the Treaties (see point 34 below).

A) The choice of Article 295 TFEU as legal basis for the proposal

14. The Commission proposes to establish a mandatory register for interest representatives by means of an Interinstitutional Agreement concluded on the basis of Article 295 TFEU. In accordance with that provision:

"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".

15. Until the introduction of Article 295 TFEU by the Treaty of Lisbon, the Treaties did not contain an explicit legal basis for the conclusion of interinstitutional agreements. The practice of interinstitutional agreements was however already well established before the introduction of a specific Treaty provision.⁵ Since the 1970s, when the first IIAs were adopted in the budgetary field,⁶ EU institutions have been concluding agreements to regulate the form of their cooperation in a great variety of areas, often anticipating solutions which were later formalised in the Treaties or secondary legislation.
16. Pre-Lisbon IIAs were concluded as atypical acts with various denominations and different legal effects.⁷ Lacking an explicit legal basis for their conclusion, they were based on the principle of sincere cooperation between the institutions on their power of internal organisation.

⁵ Even before the introduction of Article 295 TFEU, reference to the conclusion of interinstitutional agreements could be found in secondary legislation. In this context, see for example Article 9(7) and recital 9 of Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ (2001) L145/43 and Article 2(2) of the Staff Regulations as laid down by Regulation 259/68, OJ (1968) L56,p.1 and as last amended by OJ (2014) L 129, pp. 12–18. The first general reference to interinstitutional agreements can be found in the Treaty of Nice, whose Declaration No 3 on the duty of sincere cooperation aimed at identifying the limits of the recourse to IIA: "*the Conference recalls that the duty of sincere cooperation which derives from Article 10 of the Treaty establishing the European Community and governs relations between the Member States and the Community institutions also governs relations between the Community institutions themselves. In relations between those institutions, when it proves necessary, in the context of that duty of sincere cooperation, to facilitate the application of the provisions of the Treaty establishing the European Community, the European Parliament, the Council and the Commission may conclude interinstitutional agreements. Such agreements may not amend or supplement the provisions of the Treaty and may be concluded only with the agreement of these three institutions.*"

⁶ See for instance: Collaboration entre le Conseil et l'Assemblée dans le cadre de la procédure budgétaire, JO (1971) C124/62; Council document R/788/72 of 18 April 1972; Joint Declaration of the European Parliament, the Council and the Commission of 4 March 1975 concerning the institution of a conciliation procedure between the Parliament and the Council, applicable to acts with significant financial implications, OJ (1975) C 89/1.

⁷ See for instance Exchange of letters between the European Parliament, the Council and the Commission of the European Communities (right of petition), OJ (1989) C120/90; Code of Conduct concerning public access to Council and Commission documents, OJ (1993) L340/41; Modus Vivendi of 20 December 1994 between the European Parliament, the Council and the Commission concerning the implementing measures for acts adopted in accordance with the procedure laid down in Article 189b of the EC Treaty, OJ (1995) C293/1, corr. OJ (1996) C102/1.

17. The introduction of an explicit legal basis for the conclusion of IIAs has codified the existing practice and at the same time has clearly set out the rules that must be respected by the institutions when having recourse to interinstitutional agreements.
18. In negative terms, the provision clarifies - if need be - that interinstitutional agreements must be concluded in compliance with the Treaties. As the Legal Service has already had occasion to point out in relation to the proposal for the conclusion of a framework agreement between the European Parliament and the Commission,⁸ IIAs must comply with primary law and cannot alter or supplement the institutional set-up provided for by the Treaties. This means that IIAs cannot grant institutions powers which are not conferred on them, alter or encroach upon their institutional prerogatives or more generally modify the institutional balance established by the Treaties.⁹
19. Moreover, the institutions cannot have recourse to an IIA in order to regulate a subject matter for which the Treaties have conferred legislative powers to the institutions by providing an explicit material legal basis. Were they allowed to do so, they would be able to circumvent the guarantees and the balance of powers that underpin the procedural rules associated with the relevant legal basis.¹⁰ The conclusion of an IIA cannot therefore be used as an alternative to the recourse to a material legal basis, provided for by the Treaties.

⁸ Opinion of the Legal Service of 30 August 2010, ST 12964/10.

⁹ *Ibidem*, point 5. Along the same line see also Opinion of the Legal Service of 20 July 2015, ST 11096/15, point 11. See also Opinion of the Legal Service of 4 July 2012, ST 12225/12, point 11.

¹⁰ Opinion of the Legal Service of 6 April 2005, ST 7861/05, point 5.

20. In that regard it should be stressed that Article 298 TFEU does not appear to be an appropriate material basis to regulate the subject matter covered by the Commission proposal. As a matter of fact both the wording and the legislative history of Article 298 TFEU show that the provision aims at providing a legal basis for the adoption of provisions governing the administrative action of the Institutions, including, if need may be, the codification of existing administrative EU law. On the contrary, the provision cannot be extended to regulate the legislative activities of the Union¹¹ or the conduct of the members of the Institutions that do not belong to the administration, as is notably the case for the members of the Commission or of the EP.
21. In positive terms, Article 295 TFEU clarifies that IIAs can be concluded by the institutions to make arrangements for their cooperation. The wording of the provision, and notably the use of the term 'arrangements', points to the fact that IIAs are instruments for regulating the modalities of cooperation and not for the regulation of substantive policy areas. As the Legal Service has already had occasion to stress, IIAs are about process, not substance.¹² This indication is also confirmed by an argument of systemic nature. Article 295 is part of the second chapter of Part Six of the Treaty on the Functioning of the European Union on "legal acts of the Union, adoption procedures and other provisions", notably in a section devoted to the "procedures for the adoption of acts". It appears therefore clear that the drafters of the Treaties did not consider Article 295 to be an autonomous material legal basis for the regulation of policy areas but rather a means to regulate institutional cooperation as such.

¹¹ On the difference between legislative and administrative activity see the Opinion of the Legal Service of 11 August 2015, ST 11440/15 on the scope of the Ombudsman's mandate and the notion of maladministration.

¹² Opinion of the Legal Service of 4 July 2012, ST 12225/12, point 6.

22. A first important consequence of the above is that IIAs can only be used to regulate matters that pertain to inter-institutional cooperation. Thus under Article 295 TFEU, IIAs can be concluded to define the principles, the methodology and the form of a coordinated exercise by the Institutions of their respective prerogatives. On the contrary, IIAs cannot be used to directly exercise those prerogatives and regulate the substance of the matter at stake. Moreover, while IIAs can define the modalities of inter-institutional cooperation, including through binding commitments, the way these commitments are implemented internally remains a matter to be left to each participating Institution.¹³
23. Secondly, IIAs bind only the participating institutions and cannot create obligations for third parties, irrespective of whether they are other institutions, Member States or individuals. The practice confirms this conclusion. No obligations can be imposed on Member States by means of an IIA; they can only be called upon in a non-committing manner.¹⁴ In cases where IIAs have regulated matters affecting individual positions, they have been concluded in the form of a joint decision of the participating institutions,¹⁵ or have been followed by the adoption, by each institution, of identical decisions.¹⁶

¹³ Along the same lines, see Opinion of the Legal Service of 20 July 2015, ST 11096/15, point 14, in which it is made clear that IIAs should make reference to the institutions only, not to who does what in any one of them, since this should remain a matter to be decided internally and not through an agreement with other institutions.

¹⁴ See for instance the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ (2016) L 123, pp. 1–14, which in paragraphs 43 and 44 uses the wording "[t]he three institutions call upon the Member States...".

¹⁵ See for instance the Decision of the European Parliament, the Council and the Commission of 6 March 1995 on the detailed provisions governing the exercise of the European Parliament's right of inquiry, OJ (1995) L113/2.

¹⁶ As provided, for example, by the Code of Conduct concerning public access to Council and Commission documents, OJ (1993) L340/41 and paragraph 2 of the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF), OJ (1999) L136/15.

24. To some extent, the Commission proposal seems to take into consideration the specific legal constraints associated with the recourse to Article 295. Thus, recital 8 of the proposal provides that "*the operation of this register shall not impinge on the competences of any of the three institutions or affect their respective internal organisational powers*".
25. Moreover, the proposal confers to the Secretary-Generals of the three participating Institutions, acting by consensus within the Management Board, the authority to take a number of relevant decisions concerning the establishment and functioning of the Register (Article 8(2)). These notably include the approval of "*guidelines for registrants*" relating to the main features of the Register, the decision on requests for review of individual decisions adopting measures in case of breach of the Code of Conduct and the overseeing of the overall implementation of the agreement.
26. Finally, a number of provisions of the proposed IIA make clear that certain of its effects will be linked to the adoption of additional acts by the three institutions, which commit themselves to adopting such acts, individually or jointly. Thus, according to Article 5(2), the institutions "*shall take the necessary internal measures to give effect to the types of conditionality*" provided for in the same Article. Article 7 provides that the institutions shall adopt "*the necessary internal measures*" to apply any measures imposed on interest representatives in the event of violation of the Code of Conduct. Finally, and more significantly, Article 10 of the proposal further provides that the three institutions shall establish the Secretariat of the register and its Management Board "*by means of a separate Decision, commonly adopted by the three institutions before the entry into force of the Agreement*".
27. The Council Legal Service is, however, also of the view that these provisions are not sufficient to render the proposal fully compatible with the chosen legal basis.

28. The Legal Service considers that the Institutions may agree by means of an IIA on the main features of such a mechanism regulating their interaction with lobbyists. These can include the scope of the activities covered by the scheme and of the entities exempt from registration, as well as the conditions and the procedures for the inclusion of lobbyists in the common register. As part of the arrangement for their cooperation the Institutions can also agree on the establishment of common organs for the management of the Register.
29. However, the IIA cannot provide the normative basis on the ground of which the principle of conditionality is agreed or the relationship between each of the Institutions and the interest representatives is directly regulated. Such a basis can only be provided by the exercise of the power of internal organisation which is proper to each of the Institutions.
30. Nor can it be argued that the institutions could decide to exercise their power of internal organisation by concluding an IIA. Such an argument disregards the fact that the Treaties provide for different voting rules in the Council for the two situations and this difference reflects a balance among members that cannot be altered by the institutions.
31. As a consequence, the Legal Service is of the view that, after having agreed on the features and on the modalities of functioning of the Register, the Institutions still have to decide in their own capacity of self-organisation to be bound by the product issued from this commonly agreed methodology. In addition they must also set up for themselves the envisaged mechanism for their relations with interest representatives. More specifically, it will be up to such decisions to define which types of interaction in each institution must be made conditional upon registration, the specific rules of transparency and ethical behaviour to which interest representatives will be subject and to provide internal authority to the list of interest representatives included in the Register.

32. In practice, this can be done by the adoption of separate decisions by each of the Institutions. However, nothing prevents that such decisions could be pre-defined according to an agreed common wording. Moreover, the internal acceptance of the list of interest representatives can be achieved by the conferral to the Secretariat of the Register to take decisions on individual applications. In that regard, however, it will be necessary to attribute to the Board of Directors composed by the Secretary Generals of the three Institutions deciding by consensus the power to decide on requests for review submitted by interest representatives whose request to be entered in the Register has been rejected.¹⁷
33. Finally, the respective role of the IIA and of the separate institutional decisions should be reflected in the wording of the IIA. The Commission's proposal is drafted as directly establishing the regulatory framework for the interest representatives (and therefore addressed to them) rather than as setting out modalities of cooperation; it should be revised accordingly.
34. As regards the positions of individuals, it follows from the considerations above that the IIA could not alter the rights expressly conferred by the Treaties to the individuals in relation to the functioning of the EU institutions as resulting from the Treaties, and notably from Article 10(3) and 11(1), (2), (3) TUE and 15(1) TFUE as well as Article 41(4) of the Charter of Fundamental Rights, which notably provides the right to write to the Institutions and receive an answer.

¹⁷ Article 8 of the proposal confers to the Board of Directors only the power to decide on requests for review of decisions taking measures in case of breach of the code of conduct.

35. In that regard, it must be stressed at the outset that the Commission proposal imposes an obligation on interest representatives if they wish to have access to certain intensive forms of interaction, since their inclusion in the register and their acceptance of transparency requirements and of the ethics rules set out in the Code of Conduct are a condition for engaging in the selected interactions. However, the entry into the Register does not confer any substantive rights to interest representatives since Institutions retain the faculty to decide whether to engage or not in interactions with registered lobbyists.
36. Thus, each of the institutions acts within its powers if it determines in principle that certain forms of interaction are not absolute and may be conditional. Starting from there, to coordinate such conditions may be done through an IIA without affecting the rights of individuals.
37. At the same time, the IIA aims at establishing a procedural framework for the handling of registration requests and the management of registered entities, including the power to carry out investigations and to adopt administrative 'measures' to draw the consequences of possible violations of the Code of Conduct, for example by means of temporary exclusions from types of interactions or removal from the Register (Annex IV). This framework is to be managed by a specific "joint operational structure", the Secretariat, that is *inter alia* empowered to take the relevant individual decisions. It is therefore clear that individuals will be vested with a number of procedural rights in relation to their inclusion in the register and that the decisions taken will produce legal effects upon them. It is also clear that individuals will be entitled to apply to the General Court for the annulment of the decisions negatively affecting them.

38. It results from the reasons set out above that the IIA is an appropriate basis to establish the Joint Secretariat and Management Board which constitutes modalities of cooperation. However, to empower the Secretariat to take decisions on applications and impose administrative measures on individuals would be beyond the remit of this legal basis. In order to do that, separate decisions of each institution are required, adopted on the grounds of their respective power of internal organisation. The solution identified by the Commission in Article 10, namely the adoption of a single separate decision, commonly adopted by the three institutions to establish the Joint Secretariat and Management Board, is therefore unnecessary for this purpose.
39. Finally, as regards the position of other EU entities, the Commission proposal allows those of them that wish to do so, to use the framework established by the IIA, subject to the notification of the type of interactions that they wish to make conditional upon registration and to a proportionate contribution to the costs of the functioning of the Secretariat (Article 12). The proposal also makes clear that use of the register does not confer the status of party to the IIA upon the third parties. In light of these elements, the Legal Service considers that the nature of the third parties' involvement remains merely voluntary and that their legal position is not directly affected by the agreement. The optional mechanism envisaged by the Commission is therefore as such compatible with the recourse to Article 295 TFEU as long as the third parties concerned are only Institutions and other bodies established by Union law.
40. In conclusion, the Legal Service considers that institutions can validly conclude an IIA on the basis of Article 295 TFEU in order to agree on operating principles of a mechanism of conditionality for the interaction with lobbyists as well as on the main features of such mechanism, including the scope of the register (Articles 2, 3 and 4). The institutions can also agree on the conditions for the inclusion of lobbyists in the register (Articles 6 and 7) and on the organisation and management of the register by joint organs (Articles 8, 9 and 11), provided, however, that the decision to be bound by such a mechanism, as well as the rules of substance and the implementation of those provisions, are then left to the adoption of separate decisions to be adopted by each of the Institutions concerned (points 31,32 and 38).

B) The inclusion of interaction with certain organs of the Member States

41. Among the interactions which are to be made conditional upon registration, the Commission proposes to include "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 the COREPER" (Article 5(1)). The proposal also provides for the possibility for Member States to notify their intention to take advantage of the register and notify its Secretariat that they wish to make certain types of interaction between interest representatives and their permanent representations to the EU conditional upon registration (Article 13).
42. Both proposals raise the issue of whether it is possible under EU law to regulate the interactions between interest representatives and certain organs of the Member States. In particular, it is necessary to establish whether the power of internal organisation of the Council can have a bearing on the way in which Member States organise their representation within the institution.
43. The reply to this question cannot be but negative. Under Article 16(2) TEU the Council consists of a representative of each Member State at ministerial level who may commit the government of the Member State in question. Article 16(7) provides that a Committee of Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council. Both provisions are to be read in light of Article 4 TEU according to which the Union shall respect Member States' national identities inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government (Article 4(2)).

44. It therefore results from the Treaty that the issue of who should represent a Member State in the Council is a matter for each Member State to decide, in accordance with its political and constitutional structures. Equally it is for each Member State to determine how such a representation should be organised¹⁸ and notably how the national position should be defined, and which procedures and contributions should be taken into account.
45. As a consequence, the regulation, if any, of the interaction between Permanent Representations of Member States and interest representatives is a matter that falls within the exclusive competence of the Member States and must be regulated by national law. There is currently no legal basis in the Treaties to regulate the matter.
46. This legal basis cannot in particular be found in Article 295 TFEU which, as it has been pointed out in section A) and notably in points 22, 23 and 39 of the present opinion, can only be used to put in place arrangements for the cooperation of the three main EU Institutions. It is possible to offer to other bodies or entities established by Union law to join such cooperation, as long as they are not parties to the IIA. But Article 295 TFEU does not constitute a valid legal basis to regulate situations which are external to them. It follows from these considerations that the IIA is not an instrument such as to establish a mechanism for those Member States which would like to join on a voluntary basis.
47. In this respect, it is to be noted that the national law of each Member State has rules on access to government officials. Therefore, introducing EU rules on this subject, be they voluntary, would encroach upon national competences and would moreover bear the risk of creating a conflict of law. Of course it remains possible for Member States to amend their national law and introduce a scheme which mirrors the one proposed by the Commission. But this should remain a matter reserved for national law and not an issue of implementation or transposition of EU law, be it voluntary.

¹⁸ See for instance the contribution of the Legal Service of 31 May 2013, ST 10384/13, point 5, in relation to the rules on the distribution of documents.

48. Some additional considerations must be addressed in relation to the proposal to include "*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 the COREPER*" (Article 5(1))" among the interactions which are to be conditional upon registration.
49. To start with, the rationale behind the Commission proposal is not entirely clear. If the idea is to regulate interactions with the Presidency of the Council, then it is difficult to understand why the provision only refers to the most relevant preparatory body of the Council (with the exception, however, of the Special Committee on Agriculture, which has a specific role in preparing the AGRI formation of the Council)¹⁹ but excludes, on the one hand, the higher political decision-makers, namely the ministries exercising the Presidency of the various Council formations and, on the other hand, the delegates of the Member States who preside over the other Council preparatory bodies.
50. The proposal also overlooks the variety and complexity of the office of the Presidency. Article 1 of Decision 2009/881/EU adopted by the European Council to implement Article 16(9) TEU provides that the Presidency is held "*by pre-established groups of three Member States for a period of 18 months*" (Article 1(1) of the Decision). If each member of the group in turn chairs the Council configurations and preparatory bodies for a six-month period, it remains nonetheless clear that the other members concur in the exercise of the Presidency, by assisting the Chair "*in all its responsibilities*". What is more, the members of the group "*may decide alternative arrangements among themselves*" (Article 1(2)). However, the Commission proposal merely includes the current or forthcoming Presidency (the latter not necessarily always being part of the Presidency trio).

¹⁹ Established by Article 5 (4) of the Decision of the representatives of the Governments of the Member States meeting within the Council on the acceleration of the pace of achievement of the objects of the Treaty (60/912/EEC), OJ (1960) 58/1217.

51. The proposal also fails to consider that in a number of instances the Presidency is not subject to the principle of rotation but follows a different logic. The most evident example of this is, of course, the Presidency of the Foreign Affairs Council which the Treaties confer on the High Representative of the Union for Foreign Affairs and Security Policy (Article 18(3) TEU). Consequently, the preparatory bodies of the Foreign Affairs Council other than the COREPER are also fixed and chaired by a representative of the High Representative (albeit with some notable exceptions).²⁰ It is worth stressing that when exercising the Council Presidency, the High Representative does not act as a Member of the Commission and cannot therefore be covered by the Commission proposal to make the meetings between interest representatives and members of the Commission and their Cabinet members (Article 5 of the proposal - first indent of the section relating to the European Commission) conditional upon registration. The same applies to the Directors-General of the EEAS whom the High Representative may appoint to chair a Council preparatory body.

²⁰ See in particular Article 4 and Annex II of the Council Decision of 1 December 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council and on the chairmanship of preparatory bodies of the Council (2009/908/EU).

52. In other instances, the Presidency of Council preparatory bodies is entrusted to an elected Chair, for example in the case of certain bodies provided for by the Treaties or established by Council Decision, such as the EU Military Committee and the military working group supporting its activities,²¹ the Economic and Financial Committee provided for by Article 134 TFEU,²² the Employment Committee provided for by Article 150 TFEU,²³ the Social Protection Committee (Article 160 TFEU),²⁴ the Economic Policy Committee²⁵ and the Financial Services Committee.²⁶ Finally, by way of exception, the Chair of a Council body may be appointed by the Secretary-General of the Council.²⁷ In the light of this situation, the choice of the Commission to limit its proposal to only one of the many organisational forms that the Council Presidency can assume does not appear coherent with the objective pursued.

²¹ See Article 3 of Council Decision (2001/79/CFSP) of 22 January 2001, which provides that the Chairman shall be appointed by the Council on the recommendation of the Committee for a period of three years unless decided otherwise.

²² See Article 6 of the Annex to Council Decision 2012/245/EU of 26 April 2012, which provides that the Committee elects a President by a majority of its members for a renewable two-year-term.

²³ See Article 4(1) of Council Decision (EU) 2015/772 of 11 May 2015, which provides that the Committee shall elect its Chairperson from among the members appointed by the Member States for a once renewable term of two years.

²⁴ See Article 4(1) of Council Decision (EU) 2015/773 of 11 May 2015, which provides that the Committee shall elect its Chairperson from among the members appointed by the Member States for a once renewable term of two years.

²⁵ See Article 6(1) of the Annex to Council Decision 2000/604/EC of 29 September 2000, which provides that the Committee shall elect from among its members, by a majority of its members, a president for a non-renewable period of two years.

²⁶ See point 3 of Council Decision 2003/165/EC of 18 February 2003, which provides the Committee shall have a Chair which it shall appoint from among the representatives of the Member States and who shall serve for two years, the first Chair being appointed by the Economic and Financial Committee.

²⁷ See Annex III of Council Decision 2009/908/EU of 1 December 2009.

53. More crucially, the considerations expressed above in points 43 to 47 also remain relevant in reference to the organ of the Member States exercising the Presidency. Of course, the Presidency as such is an office provided for by the Treaties and the modalities of its exercise are defined by a decision of the European Council according to Article 236(1)(b) TFEU²⁸ and then detailed by the Council in execution of the European Council Decision²⁹ and in exercise of its power of internal organisation.³⁰
54. However, the Presidency as an office must not be confused with the organ exercising it. In case of the rotating and elected Presidencies, this organ remains in principle an organ of the Member States. The Presidency is a Union office entrusted to a Member State that exercises it, however, in accordance with its own internal political and administrative structures.

²⁸ See European Council Decision 2009/881/EU on the exercise of the Presidency of the Council, referred to in point 50.

²⁹ Article 4 of European Council Decision 2009/881/EU empowers the Council to adopt a decision establishing the measures for its implementation. In exercise of this power the Council adopted Decision 2009/908/EU mentioned above in footnote 20.

³⁰ The responsibilities and the powers of the Presidency are defined in some detail in the Council Rules of Procedure. See notably Article 20 devoted to the role of the Presidency. See also Article 1 (notice and venue of meetings), Article 2 (configurations of the Council and programming), Article 3 (Agenda), Article 11 (voting arrangements), Article 12 (written and silence procedure), Article 15 (signing of acts), Article 19 (Coreper, committees and working parties), Article 26 (Representation before the European Parliament).

55. For the reasons set out in points 43 to 47, the power of internal organisation of the Council can regulate the office of the Presidency but not the way in which Member States exercise it. Thus, the modalities and conditions for the appointment of the officials that will exercise the Presidency,³¹ the personal status of those officials (most of them being diplomats, thus also covered by specific international law rules), as well as the rules governing the decision-making process that leads to the adoption of the positions to be assumed in the exercise of the Presidency, remain a matter for the Member State in question to decide. Similarly, the activities and initiatives that a Member State holding the Presidency may take beyond its official responsibilities are imputable to the Member State alone, as its organs are not subject to control by the Council. These activities and initiatives are subject to judicial control before national Courts and not before the Court of Justice of the EU. Were the Commission's proposal to be followed the result may be that the Court of Justice of the EU would have jurisdiction on alleged misconducts of the Ambassadors chairing the COREPER pursuant to article 258, 259 or 263 TFUE, depending on whether it is considered as an organ of the Council or of the Member State concerned.
56. These findings are in line with regular Council practice. In a 2005 case concerning a complaint to the Ombudsman by a citizen who had expressed concern that the Presidency of the time had sought sponsorship from private companies, the Council took the view that "*the organisation of the Presidency, including the seeking of sponsorship for elements of a Presidency, is, in principle, a matter for the Member State authorities concerned. It is not a matter falling within the power of decision of the Council*".³² Thus the Council could not be considered responsible for the decision of a government holding the Presidency to avail itself of a sponsorship, nor was it in a position to address the merits of the matter.³³

³¹ It is interesting to note that Council Decision 2009/908/EU defines in Annex II the conditions and modalities for the appointment of the fixed Chairs for the preparatory bodies of the Foreign Affairs Council (see above point 51 and footnote 20) but does not provide any rule on the appointment of elected Chairs or rotating Presidencies.

³² See point 5 of the Council's reply to the Ombudsman in case 2172/2005/MHZ of 18 November 2005, SN 3659/05. The decision of the Ombudsman in this case can be found in ST 8771/06.

³³ See points 5 and 10 of the Council's reply to the Ombudsman in case 2172/2005/MHZ doc. ST 13382/05

57. In another 2005 Ombudsman case concerning the number of languages chosen for the website of the Presidency in office, the Council stressed that the Treaty rules on the Presidency "*obviously do not imply that the Member State [holding the Presidency] becomes part of the Council any more than any other Member State. It merely implies that, as far as the EC Treaty is concerned, that Member State (as such, not as member of the Council) is charged with the chairing of Council meetings and the activities that this entails*". The Council went on to clarify that as in the case of cultural events organised by the Member State holding the Presidency, "*the websites run by the Member State ... are set up, financed and managed under the responsibility of the Member State as such. They are neither financed by the Council nor managed by it*". It finally concluded that "*the websites are not maintained by 'the Presidency' but, in the terms of Article 203 EC, by the Member State holding the Presidency*".^{34 35}

³⁴ See the reply to the Ombudsman's proposal of a 'friendly solution' to complaint 1487/2005/GG, ST 13951/05.

³⁵ In both cases the Ombudsman did not share the view of the Council, and closed the inquiries with findings of maladministration. The Ombudsman followed a functionalist approach and considered that "*when a Member State holds the Presidency that means that this Member State has, for a limited period of time, the office of presiding over the Council. In this sense, however, the Presidency is clearly part of the Council.(...).* The Ombudsman considers that, *being functionally part of the Council, the Presidency ought to be subject to the same obligations as the latter, unless there are specific reasons why these obligations should not be applied to the Presidency. It is obvious that this conclusion only applies to the extent that the Member State concerned is acting in its capacity as President of the Council*" (see points 2.9, 2.10 and 2.11 of the Ombudsman Draft Recommendation in case 1487/2005/GG, doc. ST 7662/06, page 14). The Council Legal Service considers that a functional argument cannot be brought to the point of extending the competence of the Union as defined by the Treaties and submitting the internal functioning of Member States to the power of internal organisation of the Council.

58. In the view of the Council Legal Service, the Commission's proposal to make meetings with the Ambassador of the current or forthcoming Presidency as well as their deputies in COREPER conditional upon registration amounts to an attempt to regulate the way in which organs of the Member States are organised and formulate their positions. However, as it has been shown, this is a matter that falls within the competence of the Member States only and which cannot, for that reason, be regulated by means of an IIA concluded by the Council.³⁶ In that regard it should be further stressed that the status of the Head of Permanent Missions to international organisations remain regulated by the principles enshrined in the 1975 Vienna Convention on the Representation of States in their relations with International Organisations which are largely deemed to reflect norms of international customary law. This Convention in particular reflects rules of more general scope, such as the 1961 Vienna Convention on diplomatic relations, which in turn recognises in its preamble that its purpose is "to ensure the efficient performance of the functions of diplomatic missions as representing States". It follows that the Permanent Representative or the Deputy Permanent Representative are representing their national State before the European Union and can only be governed by their national law in their relations with interest representatives.

³⁶ The opposite conclusion of course applies in relation to those cases in which the Presidency is not exercised by an organ of the Member State but rather by organs of the institutions, such as certain permanent Chairs of Council preparatory bodies. However the Commission proposal does not include these situations.

IV. CONCLUSION

59. The Council Legal Service is of the opinion that the institutions can validly conclude an IIA on the basis of Article 295 TFEU in order to agree on the operating principles of a mechanism of conditionality for interaction with interest representatives as well as on the main features of such mechanism, including the definition of lobbyist (Articles 2, 3 and 4). The institutions can also agree on the conditions for the inclusion of lobbyists in the register (Articles 6 and 7) and on the organisation and management of the register by joint organs (Articles 8, 9 and 11), provided, however, that the decision to be bound by such a mechanism as well as the rules of substance and the implementation of those provisions are then left to the adoption of separate decisions to be adopted by each of the Institutions concerned.
60. Conversely, the regulation of interactions between interest representatives and organs of the Member States exercising the Presidency of the Council or of its preparatory bodies falls within the exclusive competence of the Member States. The same conclusion applies to the regulation of interactions between interest representatives and the Ambassador of the current or forthcoming Presidency as well as their deputies in COREPER.
61. An IIA cannot legally provide for the voluntary participation of Member States in the mechanism of conditionality for interactions of interest representatives with the EU Institutions.
