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

To:	Permanent Representatives Committee/Part 2
Subject:	Enlargement process: suggestion by the Commission that the Western Balkan countries would participate in Council meetings or Council work on matters of substantial importance to them

### I. INTRODUCTION AND FACTUAL BACKGROUND

1. On 6 February 2020, the European Commission issued its Communication on the new enlargement methodology with a view to enhancing the accession process (hereinafter, the Communication)<sup>2</sup>.

<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> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Enhancing the accession process - A credible EU perspective for the Western Balkans*, COM(2020) 57 final, Brussels, 5.2.2020.

2. Point II) b) (Reinvigorating the accession process - A stronger political steer) reads "*This should include creating new opportunities for high level political and policy dialogue with the countries, through regular EU-Western Balkans summits and intensified ministerial contacts, especially in areas where alignment is progressing well and key criteria are being met. Such increased engagement could lead to the countries participating as observers in key European Union meetings on matters of substantial importance to them.*" (emphasis added).

On 25 February 2020, the Commission presented the Communication to the General Affairs Council.

3. The Commission clarified that the above highlighted sentence means that, under the new enlargement methodology, candidate states could take part in the work of the Council. In response, the CLS explained the applicable legal framework governing the rules for participation of third parties in meetings of the Council.
4. Further to a request from Coreper on 26 February 2020, this contribution summarises the position regarding participation of third countries in the work of the Council including within the context of the enlargement process<sup>3</sup>.

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<sup>3</sup> See also CLS opinions 10962/18 of 9 July 2018, 9463/11 of 28 April 2011, 8332/00 of 8 May 2000, 7016/00 of 16 March 2000 and 7893/95 of 14 June 1995 as well as the Comments on the Council's Rules of Procedure, 2016, pp. 38-39.

## II. LEGAL FRAMEWORK

5. Article 16(2) TEU: "*The Council shall consist of a representative of each Member State at ministerial level.*"
6. Article 5(2) of the Council's Rules of Procedure (CRP): "*The Commission shall be invited to take part in meetings of the Council. The same applies to the European Central Bank in cases where it exercises its right of initiative. The Council may, however, decide to deliberate without the presence of the Commission or of the European Central Bank.*"
7. Article 6(1) CRP: "*Without prejudice to Articles 7, 8 and 9 and to provisions on public access to documents, the deliberations of the Council shall be covered by the obligation of professional secrecy, except in so far as the Council decides otherwise.*"

### III. LEGAL ANALYSIS

8. Participation in Council proceedings, in the sense of taking, shaping or influencing decisions, results from membership of the Council and is reserved to Council members only. The purpose of this rule, which applies both to meetings of the Council and of Council preparatory bodies, is to preserve the decision-making autonomy of the Council and, as a consequence, the autonomy of the EU's decision-making process, guaranteed by the Treaties. Even the mere presence of a third party in the meetings of the Council or of its preparatory bodies could undermine the Council's decision-making autonomy by influencing its decision-shaping and decision-making, either by altering the direction of deliberations between Council members or by inhibiting them from expressing their views freely<sup>4</sup>.
9. A distinction must be drawn between EU institutions and other third parties, including third countries. In this regard, some exceptions to the rule that only Council members may participate in Council meetings are made in relation to certain other EU institutions. These exceptions are expressly provided for in the Treaties themselves<sup>5</sup> or result implicitly from the role assigned by the Treaties to a Union institution<sup>6</sup>. These exceptions illustrate the qualitative difference between those EU institutions and other third parties which stems from the principle of institutional balance which is laid down in the Treaties and is characteristic of the institutional structure of the European Union. However, even in these cases, participation remains at the discretion of the Council (except where stipulated in the Treaties) and does not extend to participation in the decision-making process in the sense of participation in voting.

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<sup>4</sup> See CLS opinions 10962/18, points 27 to 29, 9463/11 points 2 to 4.

<sup>5</sup> For example, Article 284(2) TFEU provides "*The President of the European Central Bank shall be invited to participate in Council meetings when the Council is discussing matters relating to the objectives and tasks of the ECB*".

<sup>6</sup> The Commission, exercising the right of initiative assigned to it under the Treaty, submits to the Council proposals or other draft instruments, which it should be able to explain, defend or amend. This is reflected in Article 5(2) CRP which treats the Commission as a standing guest in Council meetings, unless otherwise decided by the Council.

10. A distinction must also be drawn between participation of the EU institutions in the specific cases referred to in paragraph 10 above and the occasional presence of third parties, such as representatives of other EU institutions, EU bodies or agencies, of third countries or other guests, who may be invited to attend certain meetings of the Council or its preparatory bodies on an *ad hoc* basis and for a specific item on the agenda. For instance, depending on the subject matter discussed and the appropriateness of such attendance, representatives of other EU institutions or of EU bodies or agencies may be occasionally invited to attend Council meetings<sup>7</sup>. In accordance with Article 6(1) CRP, the Council may authorise such occasional presence, by lifting the obligation of professional secrecy covering its deliberations. In doing so, it must however take appropriate measures to fully preserve the autonomy of its decision-making. This means that the invited third party must not participate in the deliberations of the Council. The meeting should therefore be organised in such a way as to preserve this autonomy.
11. In practice, this means that the invited third party should enter the meeting room for the specific item and leave after that. The third party may state its view or inform the Council concerning a subject at issue under a given agenda item. It may also exchange views with the members of the Council or answer their questions. It is not allowed to intervene or even be present when the Council deliberates, for instance, on the drafting of an act of the Council or during its adoption.

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<sup>7</sup> For instance, representatives of the Court of Justice or the Court of Auditors may be invited to attend Council meetings where issues relevant to these institutions are discussed. The Council may also occasionally invite EU bodies or agencies to attend in order to inform Council members on a given issue.

#### IV. THIRD COUNTRIES AND THE ENLARGEMENT CONTEXT

12. The above rules on the non-participation and non-attendance - save for the above mentioned exceptional invitation - of third parties to Council meetings apply to all third countries regardless of the closeness of their relations with the EU. In this regard, although Norway, Iceland and Liechtenstein, on the one hand, and the UK during the current transition period, on the other, apply a large part or all of the EU *acquis*, neither the EEA Agreement nor the Withdrawal Agreement provides that these third countries may participate in or attend the meetings of the Council or its preparatory bodies. The same is true as regards Turkey although it is in a customs union with the EU. In addition to respecting the decision-making autonomy of the Council, the purpose of this rule is to avoid upsetting the balance between the different models of cooperation with the EU's third country partners<sup>8</sup>.
13. In the context of enlargement, there is one exception for acceding States during the interim period, namely, the period from the signature of the Treaty of Accession and before its entry into force. Acceding States, by signing the Treaty of Accession, have accepted the Union *acquis* in its entirety. Provisions of the *acquis* adopted after the signature of the Treaty of Accession will be equally binding on the acceding States although they cannot legally participate in their adoption. In the interim period, therefore, it is the practice, reflected in a statement agreed by the relevant Accession Conference, that representatives of acceding States may participate in meetings of Council or its preparatory bodies as active observers, with a right to speak on matters related to evolution of the *acquis* or on items likely to have an impact after the entry into force of the Treaty of Accession.

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<sup>8</sup> The only and unique case where an association agreement provides that the associated states discuss draft future EU provisions together with the members of the Council in the Mixed Committee of the Agreement, are the Schengen Association Agreements between the EU and the four Schengen Associated States (Iceland, Liechtenstein, Norway and Switzerland) (see Article 3 of the relevant Agreements). This is due to the very integrated nature of the Schengen area without internal border controls to which the four Schengen States are fully associated in a dynamic fashion, with a "guillotine" system in case of non-acceptance by the Associated State of an EU instrument developing the *acquis*. These Agreements do not however allow the Associated States to participate in meetings of the Council of the EU.

The Dublin/Eurodac Association Agreements do not provide for such a system. Their decision-shaping system is similar to that of the EEA Agreement (i.e. it is for the Commission to consult and inform the four partners on draft EU acts; no meetings are foreseen with the members of the Council concerning draft EU acts).

For instance, in 2002, the Accession Conference agreed that "*as from signature of the Accession Treaty, the acceding countries will enjoy active observer status in the Council bodies, it being understood that the Council reserves the possibility of meeting without the participation of the acceding countries*"<sup>9</sup>.

## V. CONCLUSION

14. The principle of the autonomy of decision-making of the Council is fundamental to carrying out the policy-making and decision-making responsibilities conferred on it by the EU Treaties. In accordance with the applicable legal framework, third countries may not participate in the decision-making of the Council or its preparatory bodies; nor may they be allowed to have an impact or influence on such decision-making or shaping. That includes all third countries, including those that are engaged in the enlargement process up to the interim period. This is without prejudice to the possibility of their occasional presence in Council meetings, subject to specific procedural and substantive requirements as set out in this contribution.

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<sup>9</sup> See point 8 of 13569/02 of 13 November 2002 on details of the practical arrangements.