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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  
Subject: Draft Agreement establishing an interinstitutional ethics body

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## **I. INTRODUCTION**

1. On 8 June 2023, the Commission adopted a communication and a proposal for an Agreement establishing an interinstitutional ethics body (hereafter “the Body”), accompanied by an explanatory memorandum and a financial statement<sup>2</sup>. The proposal tabled by the Commission is drafted as an Agreement to be concluded between all institutions mentioned in Article 13(1) TEU and the two advisory bodies mentioned in Article 13(4) TEU, i.e. the Economic and Social Committee and the Committee of the Regions<sup>3</sup>. Upon its request, the European Investment Bank could also become a Party to the Agreement once it enters into force<sup>4</sup>. Union bodies, offices and agencies, other than the Parties to the Agreement, may voluntarily apply the entire set of current and future common standards developed by the Body to the rules applicable to the office-holders, other than their staff members, who hold a function similar to the ones falling under the scope of the draft Agreement<sup>5</sup>.
2. Following a request by the Working Party on General Affairs, this opinion gives an assessment of the main legal questions raised by the draft Agreement. It is not an exhaustive legal analysis.

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<sup>2</sup> Document 10411/23 (‘Communication’) + ADD1 (‘the draft Agreement’), ADD2 and ADD3.

<sup>3</sup> Article 1(1) of the draft Agreement.

<sup>4</sup> Article 1(2) of the draft Agreement.

<sup>5</sup> Article 19(1) of the draft Agreement.

## II. LEGAL ANALYSIS

### A. Legal basis

3. The Commission does not cite a specific article of the Treaty as legal basis for the draft Agreement. It considers that an agreement based on the institutions' institutional autonomy is the appropriate approach, as it allows the participation of all Union institutions and the two advisory bodies<sup>6</sup>.
4. It is recalled that in a recent contribution relating to the draft Arrangement between the European Parliament, the Council and the High Representative of the Union for Foreign Affairs and Security Policy (HR) concerning access by the European Parliament to classified information held by the Council and the European External Action Service in the area of CFSP<sup>7</sup>, the Council Legal Service (CLS) did not exclude the possibility of concluding an interinstitutional agreement (IIA) under Article 295 TFEU with other parties than those mentioned in that provision: "*... [a]rticle 295 TFEU is an expression of the obligation of the institutions to practice mutual sincere cooperation, as laid down in Article 13(2) TEU. Although the HR is not mentioned among the Union's institutions listed in Article 13(1) TEU, the obligation of mutual sincere cooperation arguably extends by analogy also to the HR where a Treaty provision imposes on the HR duties of consultation and information of the European Parliament.*"

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<sup>6</sup> See in this sense para 3.4 of the Communication.

<sup>7</sup> Document 13641/21.

5. Following this line of reasoning, it would appear that in view of its content, i.e. the establishment of a joint interinstitutional ethics body for the members of the institutions and the bodies and of the procedural provisions necessary for its operation, and its nature, which is clearly intended to be legally binding, the draft Agreement should be qualified as an IIA under Article 295 TFEU.
6. It is also recalled that – despite the title given to it by the Commission – the text submitted by the Commission is not a proposal within the meaning of Article 283 TFEU, as Article 295 TFEU does not foresee that the three institutions act on a proposal from one of them, but on an equal footing. Therefore, in accordance with Article 16(3) TEU combined with Article 238(2) TFEU, the applicable voting rule within the Council for the approval of an IIA is reinforced qualified majority, which requires the votes in favour of 72 % of the Council members (i.e. 20 in a Union of 27), representing Member States comprising at least 65 % of the population of the Union. The same reinforced qualified majority voting also applies to any amendments which the Council may wish to make to the text of the draft Agreement.

## B. Scope

7. Article 1 of the draft Agreement establishes the subject-matter and the scope of the draft Agreement. The Agreement is proposed to apply to the members of the institutions and bodies that are Parties to the Agreement, as defined in Article 2(1) of the draft Agreement. In accordance with Article 7 of the draft Agreement, the Body is to develop standards for the conduct of the office-holders referred to in Article 2 of the draft Agreement, which the Parties commit to implement in their internal rules on the conduct of their members<sup>8</sup>.
  - a) *As regards the Council*
8. As regards the Council, the office-holders covered by the draft agreement would be “*the representatives at ministerial level of the Member State holding the Presidency of the Council*”<sup>9</sup>. It should be examined whether this approach is in conformity with the Treaties.
9. The Legal Service has consistently held that 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, cannot alter or encroach upon their institutional prerogatives, and more generally cannot modify the institutional balance established by the Treaties.<sup>10</sup>

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<sup>8</sup> Article 7(7) of the draft Agreement.

<sup>9</sup> Article 2(1)(c) of the draft Agreement.

<sup>10</sup> See the opinion of the Legal Service of 10 February 2017 on the IIA on a Mandatory Transparency Register (ST 5151/1/17 REV 1). Along the same lines see also the opinion of the Legal Service of 20 July 2015, ST 11096/15, para 11, and the opinion of the Legal Service of 4 July 2012, ST 12225/12, para 11.

10. In this respect, Article 16(2) TEU provides that “the Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.” This provision must be read in the light of Article 4(2) TEU, which provides that the Union shall respect Member States’ national identities inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government, and Article 5(2) TEU, which provides that “under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.”
11. The establishment of rules on common minimum standards for the ethical conduct of the representatives of Member States within the Council would thus require a legal basis in the Treaties; however such a legal basis does not exist.
12. Indeed, the work of the representatives of the Member States is governed by national legislation, and there is no legal basis in the Treaties allowing the Council to establish a set of common rules or to harmonize the national law of the Member States to create standards for ethical behaviour of representatives of the governments of the Member States acting as members of the Council, or within the Council.

13. Establishing a common ethical framework for representatives of the governments of the Member States would also clearly go beyond the Council's internal organisation. Moreover, such rules would be legally binding on the representatives of the governments of the Member States, and their respect would be subject to control by the Court of Justice of the European Union. This risks creating conflicts with the obligations of Member States' representatives under their respective national laws.
14. It follows that there is no legal basis which would allow the Council to elaborate and adopt internal rules on the conduct of its members going beyond the organisation of its proceedings as discussed in para 16 below. Hence, the Council may not confer any such competence on an interinstitutional body or commit to implement the standards developed by this body in its internal rules, as this would alter the distribution of competences between the Member States and the Union institutions as laid down in the Treaties.
15. The above analysis also applies to the representatives of the Member State holding the Presidency of the Council.

16. As the Legal Service pointed out in its opinion on the IIA on a mandatory transparency register,<sup>11</sup> the Presidency as such is an office provided for by the Treaties. The modalities of the exercise thereof are defined by a decision of the European Council pursuant to Article 236(b) TFEU and in accordance with Article 16(9) TEU<sup>12</sup> and detailed by the Council in execution of the European Council Decision<sup>13</sup> and in the Council's Rules of Procedure.<sup>14</sup>
17. However, the Presidency as an office must not be confused with the persons exercising it. The representatives at ministerial level of a Member State remain members of the government of that Member State while holding the Presidency of the Council. While by virtue of its power of internal organisation the Council can regulate certain aspects related to the office of the Presidency, as it has done in its Rules of Procedure, it cannot impose standards for the conduct of the office-holders, which remain a matter of national competence.

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<sup>11</sup> Opinion of the Legal Service of 10 February 2017 on the IIA on a Mandatory Transparency Register (ST 5151/1/17 REV 1) – see in particular paragraphs 48 to 58.

<sup>12</sup> European Council Decision 2009/881/EU of 1 December 2009 on the exercise of the Presidency of the Council, OJ L 315 of 2.12.2009, p. 50.

<sup>13</sup> Council Decision 2009/908/EU 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, OJ L 322 of 9.12.2009, p. 28.

<sup>14</sup> See notably Article 1 (General provisions, notice and venue of meetings), Article 2 (Configurations of the Council and programming), Article 3 (Agenda), Article 11 (Voting arrangements and quorum), Article 12 (Ordinary written procedure and silence procedure), Article 15 (Signing of acts), Article 19 (Coreper, committees and working parties), Article 20 (The Presidency and the smooth conduct of discussions) and Article 26 (Representation before the European Parliament).

18. It follows that it is legally impossible for the Council to confer on the Body foreseen in the draft Agreement the task of developing standards for the conduct of representatives at ministerial level of the Member State holding the Presidency, which the Council would commit to implement in its internal rules.
19. As regards representatives of Member States at ministerial level, it should be borne in mind that pursuant to the principle of sincere cooperation laid down in Article 4(3) TEU, *"the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."* More specifically, *"the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."*
20. In the present context, Article 13(1) TEU provides that the European Union *"shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions"*. It follows that the Union institutions and bodies, when carrying out their tasks, must have confidence that the conduct of their members is irreproachable, regardless of their particular status. To this end, Member States should aim to ensure in their legislation that their representatives acting within the Council are subject to rules of ethical behaviour which are equivalent to those applicable in the institutions, to the extent that this is compatible with their function of representing their government and the interests of their Member State.

21. Against this background, the solution found for the Transparency register was to delete the reference to the Council Presidency in the IIA on the Transparency Register. Instead, each Member State committed individually, by a national declaration, to comply with the standards of transparency set out in the said IIA.
22. A similar solution could also be envisaged in the present case, i.e. to delete para (c) in Article 2(1) of the draft Agreement, while considering individual statements by the Member States affirming that when they hold the Presidency of the Council, their representatives at ministerial level will comply with national rules of ethical behaviour which are equivalent to those applicable to the members of the institutions covered by the draft Agreement.
23. The above analysis does not apply to the Presidency of the Foreign Affairs Council, a role which the Treaties confer on the High Representative<sup>15</sup>, who is not a representative at ministerial level of any Member State. When exercising the functions of High Representative and of President of the Foreign Affairs Council, he/she does not act as a member of the Commission<sup>16</sup> and is therefore not covered by Article 2(1)(d) of the draft Agreement.

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<sup>15</sup> Article 18(3) TEU.

<sup>16</sup> It should be noted in this context that in case a motion of censure of the Commission is carried by the European Parliament, the High Representative shall resign from the duties that he/she carries out in the Commission but remains in office as President of the Foreign Affairs Council and as High Representative, unless his/her mandate is ended by the European Council under the procedure foreseen by Article 18(1) TEU. See also Article 18(4) TEU on the limits of the application of Commission procedures to the High Representative.

24. For the reasons outlined in para 20 above, and despite the legal impediment to including the representatives at ministerial level of the Member State holding the Presidency within the scope of the Agreement, the Council should thus be a Party to the Agreement, within the meaning of Article 1 of the draft Agreement, with a view to ensuring that the HR, in his functions as High Representative and President of the Foreign Affairs Council, is included in the scope of the Agreement. To this effect, a reference to the High Representative not only in his/her function as member of the Commission, but also in his/her function as High Representative and as President of the Foreign Affairs Council, should be added in the list of the “*members of the parties*” laid down in Article 2 of the draft Agreement.
25. Furthermore, the Council is an institution that directly appoints members of other institutions and of the advisory bodies of the Union and plays an important role in the appointment procedures for the members of other institutions. Hence, for this reason too, the Council has an interest in being represented in the Body and thus being able to participate in the elaboration of standards the respect of which it would need to ensure when appointing members of other institutions and advisory bodies.

b) As regards the European Council

26. If the approach outlined in para 5 is followed, the European Council would, for the first time, become a Party to an IIA under Article 295 TFEU should it choose to do so. In light of paragraphs 4 and 20 above, this does not pose any legal problems and indeed would be appropriate with a view to ensuring that the President of the European Council is included in the scope of the Agreement.
27. According to the definition set out in Article 2(1)(b) of the draft Agreement, for the purpose of the Agreement the term “*members of the parties*” means, in relation to the European Council, “*the President of the European Council*”. It follows that the Body would only develop standards for the conduct of the President of the European Council, which the European Council would commit to implement in its internal rules<sup>17</sup>, but not for the Heads of State or Government of the Member States.
28. In this respect, it should be pointed out that, unlike the representatives at ministerial level of the Member State holding the Presidency, the President of the European Council is elected for a term of two and a half years, renewable once<sup>18</sup>, and does not hold a national office.<sup>19</sup> It follows that the legal problems outlined above with regard to the inclusion in scope of the representatives of the Member State holding the Presidency of the Council do not arise for the President of the European Council.

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<sup>17</sup> Article 7(1) and (7) of the draft Agreement.

<sup>18</sup> Article 15(5) TEU.

<sup>19</sup> Article 15(6) TEU.

29. Last but not least, while the members of the European Council are not - and should not be - listed in Article 2(1) of the draft Agreement<sup>20</sup>, beyond ensuring the inclusion of the President of the European Council within the scope of the draft Agreement, the European Council has also an interest in being a party to the agreement given its role in the appointments of members of other institutions.

### **C. Composition and secretariat of the Body**

30. According to Article 3(2) of the draft Agreement, the representative of the Parties to the Agreement in the Body shall, in principle, *“be at the level of a Vice-President or at an equivalent level”*. This provision is obviously not adapted to the nature and structure of the European Council and of the Council. However, as indicated in part 3.1 of the explanatory memorandum, *“it is however necessary to take into consideration the specificities linked to the role of each institution. This is why the proposed Agreement foresees that flexibility is given to every Party to appoint a representative other than a Vice-President, where no such function exists within the Party, or such a choice would be inappropriate”*.
31. Pursuant to Article 5(1), (2) and (5) of the draft Agreement, five independent experts are to be appointed for a term of three years (renewable once) by common agreement of the Parties *“in consideration of their competence, experience, independence and professional qualities”*, *“following a procedure to be established by the Commission”* to assist the Body and to participate in its proceedings as observers. Considering the impact of the work of those experts on all Parties, it would be preferable to set out the procedure for their appointment in the Agreement itself and not to leave this entirely to the discretion of one of the Parties to the Agreement.

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<sup>20</sup> Pursuant to Article 15(2) TEU, the European Council consists of the Heads of State or Government of the Member States. Hence, the reasoning developed in paras 9-14 above in respect of the members of the Council applies *mutatis mutandis* also to the members of the European Council.

32. It is to be noted that the independent experts are to be administratively attached to the Commission. This is not in itself problematic, as such an administrative situation should not affect their independence, as is the case for OLAF, which is formally a Directorate-General of the Commission, while acting independently from it.

### C. Tasks of the Body

33. According to Article 6(1) of the draft Agreement, the Body is supposed to promote a culture of ethics and transparency amongst the parties, “*in particular by developing minimum standards [...] and by fostering the exchange of best practices*”. The Body’s tasks, as listed in Article 6(2) of the draft Agreement, are to develop and update standards for the conduct of the members of the Parties, to hold exchanges of views on the basis of assessments made by the Parties, to promote cooperation among the Parties, including exchanges with other organisations whose work is relevant for the setting of standards, and to issue an annual report.
34. Article 7(2) of the draft Agreement lists the matters that should be covered by the common standards to be agreed by the Body by consensus<sup>21</sup>, in particular interests and assets to be declared by members of the Parties, external activities, acceptance of gifts, hospitality, and travel offered by third parties, acceptance of awards, decorations or honours, activities after the end of their terms of office, and measures complementing the IIA on a mandatory transparency register. Pursuant to Article 7(3) of the draft Agreement, the Body shall also develop common minimum standards on general procedures of the Parties to ensure and monitor compliance with their internal rules in the areas referred to in paragraph 2 and publicity requirements of the information gathered in these areas.

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<sup>21</sup> Article 7(5) of the draft Agreement.

35. There appears to be a contradiction between Article 6(3) of the draft Agreement, according to which the functioning of the Body shall not impinge on the competences of the Parties or affect their respective powers of internal organisation, and Article 7(7) of the draft Agreement, pursuant to which the Parties commit to implement the minimum standards in their internal rules on the conduct of their members. Indeed, although the Commission affirms in its communication that the adoption of ethical rules will remain within the responsibility of each institution or body, in full respect of their autonomy and independence, the minimum standards would nevertheless become legally binding for the institutions through their commitment to implement them in their internal rules.
36. This is not in line with the respect of the autonomy and independence of each institution, given that once standards have been agreed in the Body, an institution cannot change them without the agreement of all other institutions. In order to preserve the autonomy of each institution, the reference in Article 7(7) of the draft Agreement to the Parties' commitment to implement the standards in their internal rules should thus be deleted.

### **III. CONCLUSIONS**

37. On the basis of the above, the following conclusions can be made :

- a) There is no legal obstacle to the Council and the European Council becoming Parties to the Agreement.
  - b) Representatives of Member States, including when holding the Presidency of the Council, cannot be included in the scope of the Agreement.
  - c) There are no legal obstacles to the inclusion of the President of the European Council in the scope of the Agreement.
  - d) There are no legal obstacles to the inclusion of the High Representative, in that capacity and in his/her capacity as President of the Foreign Affairs Council, in the scope of the Agreement.
  - e) The tasks of the Body should be clarified with a view to ensuring that the institutional autonomy and the independence of the institutions are fully respected.
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