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

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To: Working Party on General Affairs

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Subject: Draft arrangement between the European Parliament, the Council and the High Representative on the forwarding to and handling by the European Parliament of classified information in the area of CFSP

- Legal basis

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#### **DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (13.05.2024)**

1. At the meeting of the Working Party on General Affairs on 9 November 2018, the Legal Service was invited to give its opinion on the legal basis and the voting rule for the above-mentioned arrangement. This contribution summarizes and develops the intervention of the representative of the Legal Service.
2. Article 295 TFEU provides that "*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*".

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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.

3. The arrangement in question will be concluded by the European Parliament, the Council and the High Representative, but without the Commission which has no role in the area of the Common Foreign and Security Policy. Thus, the question arises whether the presence of the High Representative and the absence of the Commission as a signatory renders it impossible to rely on Article 295 TFEU as a legal basis.
4. In its opinion of 10 February 2017 (document 5151/17, points 21 and 22), the Legal Service has clarified the content and limits of the Article 295 TFEU in the following terms.

"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.<sup>2</sup> This indication is also confirmed by an argument of systemic nature. Article 295 TFEU is part of the second chapter of Part Six of the TFEU 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 therefore appears clear that the drafters of the Treaties did not consider Article 295 TFEU to be an autonomous material legal basis for the regulation of policy areas but rather a means to regulate institutional cooperation as such.

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<sup>2</sup> Opinion of the Legal Service of 4 July 2012, ST 12225/12, point 6.

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.<sup>3</sup>

5. **DELETED**

6. **DELETED**

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<sup>3</sup> 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.

7. **DELETED**

8. **DELETED**

9. The Legal Service was also asked to clarify the legally correct method to repeal the Inter-institutional agreement of 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy.

10. For the reasons set out in points 5 to 7 above, this IIA should be repealed by an inter-institutional agreement between the same parties on the basis of Article 295 TFEU.

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