

# **Legal opinion on the proposed IIA**

## **for a mandatory Transparency Register in the European Union**

### **INTRODUCTION**

This legal opinion discusses the legal implications deriving from the choice of an interinstitutional agreement (hereinafter, an IIA) to regulate interest representation activities in the European Union. In particular, it focuses on whether this instrument may validly allow the European Parliament to impose a set of requirements on its Members (in relation to their free and independent mandate), the political groups, the intergroups and other informal groupings of Members, and on the accredited parliamentary assistants (APAs).

This legal opinion is organised upon the following three sections:

- A. Legal status of IIAs
  - i. Typology of IIAs
  - ii. Legal effects of IIAs directly derived from Treaty provisions
  
- B. Ability of the proposed IIA to impose obligations on the European Parliament's internal actors
  - i. Members
  - ii. Political groups, intergroups and other informal groupings of Members
  - iii. Accredited parliamentary assistants (APAs)
  
- C. Compatibility of the proposed IIA with Articles 2 and 11 TEU

## A. Legal status of IIAs

1. The legal basis for the proposed IIA is Article 295 TFEU: “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**.”
2. While IIAs are indisputably "acts" of the EU institutions, being concluded by the EU institutions themselves, they do not fall under one of the categories of Union legal acts mentioned in Article 288 TFEU. They are not given any specific legal status anywhere else in the Treaty.<sup>1</sup> While the Court of Justice of the European Union has never addressed directly the question of the legal status of IIAs, several Advocate Generals did so in some opinions they delivered.<sup>2</sup>
3. As stated by Professor Jörg Monar, “the bonds and links which normally surround and regulate the two political branches of a constitutional system, i.e. the legislative and the executive, are largely non-existent”<sup>3</sup> in the EU’s institutional framework as foreseen in the Treaty. Similarly to what occurs at the national level, agreements between authorities allow the constitutional system to supplement itself where they are used to fill possible lacunae, inter alia by interpretation. In the Union system, IIAs play that “vital instrumental function”. Whilst they do not supplement the basic provisions of the Treaty, they certainly do serve to implement them.<sup>4</sup> Called upon to discuss the method and cooperation between the Parliament and the Council in establishing the budget of the Union, Advocate General La Pergola defined the IIAs as “the legal means (...), the procedure which puts into effect the relevant provisions of the Treaty.”<sup>5</sup> In other words, **the IIAs complement, where necessary, the provisions of the Treaty by giving full meaning to them.**
4. The effects and the status of IIAs are not the same for all IIAs.

### i. Typology of IIAs

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<sup>1</sup> Monar, Jörg, 'Interinstitutional Agreements: the Phenomenon and its New Dynamics after Maastricht', *CMLRev* 1994, 693-719, p.696.

<sup>2</sup> The exhaustive analysis of the case-law of the Court of Justice of the European Union (both the Court of Justice and the General Court) undertaken by the author of this legal opinion has not found any rulings engaging directly on the issue. Nevertheless, it identified opinions of several Advocate Generals doing so. In these cases, it must be noticed that the judgments of the Court that followed those opinions built upon the reasoning made by Advocate Generals and embraced their interpretation.

<sup>3</sup> Monar, *op.cit.*, p. 694.

<sup>4</sup> See the opinion of Advocate General La Pergola delivered on 14 November 1995 in the case *Council v Parliament*, C-41/95, EU:C:1995:382, paragraph 21.

<sup>5</sup> *Idem*, paragraph 16.

5. One must distinguish between two categories of IIAs:
  - (i) IIAs directly derived from Treaty provisions; and,
  - (ii) the other IIAs.<sup>6</sup>
  
6. While the former category must be regarded as legal acts derived from the Treaty and therefore as legally binding (see sub-section (ii.) below)<sup>7</sup>, the latter are a more complex category of acts. The other IIAs “fulfil some but not all of the necessary ingredients for establishing a binding legal obligation under the Treaties, thereby having a legal status somewhere “in between” a political undertaking and a plain legal obligation.”<sup>8</sup> They are generally considered as pieces of soft law. We can consider that their implicit legal basis lays down in Article 4 (3) TEU that “obliges national institutions and European institutions to cooperate loyally.”<sup>9</sup>
  
7. The question is therefore to determine to which category of IIAs the proposed text belongs to.
  
8. By giving meaning to several Treaty provisions for which the EU institutions must take all adequate measures to make of them a reality in the EU decision-making process, the proposed IIA belongs to the category of IIAs derived from Treaty provisions. These provisions are:
  - **Article 1 TEU:** “(...) an ever closer union (...) in which decisions are taken as openly as possible (...)”;
  - **Article 10 (3) TEU:** “Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly (...) as possible (...)”<sup>10</sup>;
  - **Article 11 (1-2) TEU:** “The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action (...) [and] shall maintain an open, transparent and regular dialogue with representative associations and civil society.”;
  - **Article 15 (1 and 3) TFEU:** “In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies

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<sup>6</sup> Monar, *op.cit.*, p. 697.

<sup>7</sup> *Idem.*

<sup>8</sup> *Idem.*, p.699.

<sup>9</sup> Maurer, Andreas, Kietz, Daniela, and Völkel, Christian, “Interinstitutional Agreements in the CFSP: Parliamentarization through the Back Door?”, *European Foreign Affairs Review* 10/2005, 175-195, p.177.

<sup>10</sup> According to the European Court of Justice, « the ability of EU citizens to **find out the considerations that underpin legislative action** is a precondition for the effective exercise of their democratic rights », see <<https://www.ombudsman.europa.eu/cases/decision.faces/en/69206/html.bookmark>> (last access 31.03.2017)

shall conduct their work as openly as possible. (...) [They] shall ensure that its proceedings are transparent (...)"

**The proposed IIA may therefore produce legally binding effects.**

9. We must now examine under what condition and how these effects may be felt in the EU legal order.

**ii. Legal effects of IIAs directly derived from Treaty provisions**

10. The legal status of IIAs of the first category “cannot give rise to doubts.”<sup>11</sup> If the Treaty provides “in a number of special cases for accords among the institutions (...) [then] all IIAs concluded by virtue of one of [these Treaty] provisions [such as Article 295 TFEU] must be regarded as legal acts derived from the (...) treaties and therefore as legally binding.”<sup>12</sup> These IIAs are therefore hard law. **They bind the institutions that are party thereto.**
11. As written by Advocate General Melchior Wathelet,<sup>13</sup> “[t]he practice of forming interinstitutional agreements gives specific expression to the complementarity between [the principles of institutional balance and sincere cooperation<sup>14</sup>].”<sup>15</sup> In areas where a same process is shared between the three political institutions, “an interinstitutional agreement is a means of establishing good practices, preventing disputes and, above all, preserving the institutional balance.”<sup>16</sup> In other words, these agreements are key to ensure the respect of the role of each institution and the principle of institutional balance.<sup>17</sup> As such, they provide a framework for coordination among institutions.

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<sup>11</sup> Monar, *op.cit.*, p. 697.

<sup>12</sup> *Idem.*

<sup>13</sup> See the opinion of Advocate General Wathelet delivered on 17 March 2015 in the case *European Commission v Council of the European Union*, C-425/13, EU:C:2015:174, paragraphs 79-81. See also, on this subject : Guerassimoff, Carine, *La coopération interinstitutionnelle dans l’Union européenne*, RAE, Paris, 1997, p. 472; Huiban, Odile, ‘Les accords interinstitutionnels dans l’Union européenne’, *Problèmes actuels du droit communautaire*, LGDJ, 1998, p. 93; Gautron, Jean-Claude, ‘Les accords interinstitutionnels dans l’ordre juridique communautaire’, *Les règles et principes non écrits en droit public*, LGDJ, 2000, p. 195; Godet, Romain, *Accords interinstitutionnels et équilibre institutionnel dans la Communauté européenne*, Université Panthéon-Sorbonne, Paris, 2001.

<sup>14</sup> See Tournepeiche, Anne-Marie, *Les accords interinstitutionnels dans l’Union européenne*, vol. 18, Bruylant, 2011, and Blumann, Claude, *Les accords interinstitutionnels*, JCl. Europe, vol. 1/193 (see also, by the same author, ‘Équilibre institutionnel et séparation des pouvoirs en droit communautaire’, *Clés pour le siècle*, Dalloz, 2000, p. 1639).

<sup>15</sup> See Blumann, Claude, and Dubouis, Louis, *Droit institutionnel de l’Union européenne*, 5th ed., LexisNexis, 2013, p. 199 (see also the section on the principle of institutional balance, p. 194 et seq.)

<sup>16</sup> *Idem.*

<sup>17</sup> See the opinion of Advocate General Wathelet delivered on 17 March 2015 in the case *European Commission v Council of the European Union*, C-425/13, EU:C:2015:174, paragraphs 82-90.

12. As a consequence, these IIAs have a specific legal status: they are not part of primary law, nor of secondary law, but are somewhere in between, as they come to complement primary law.<sup>18</sup> **They can – as a result – prime secondary law.**<sup>19</sup>
13. The institutions have nevertheless to clearly state their intention to give it a legally binding value.<sup>20</sup> If not clearly stated, the IIA would be considered as being merely a non-legally binding act, non-binding guidelines.
14. In the proposed IIA, that intention is stated in Article 14 (1). The proposed IIA would therefore be legally binding vis-à-vis the signatory institutions. The legally binding nature of such IIA is even more clear as, as already said, it echoes, complements and implements obligations of the institutions stemming from Treaty provisions such as Article 11 (1-2) TEU and Article 15 (1 and 3) TFEU.
15. Due to the *sui generis* legal status in the hierarchy of norms, these IIAs do not only bind the signatory institutions but may also produce legal effects **vis-à-vis third parties** that are institutions' internal actors.
16. Even if IIAs are not intended by the signatory institutions to be legally binding, Advocate Generals Sharpston and Geelhoed have considered that we could still expect of the institutions, who expressed a will in an IIA related to the legislative process (e.g. taken on the basis of Article 295 TFEU), even non-binding, to respect the IIA in the way how legislation is drafted.<sup>21</sup>

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<sup>18</sup> See e.g. Judgment of 19 March 1996 *Commission v Council*, C-25/94, EU:C:1996:114, paragraph 49: certain IIAs constitute the fulfilment of duties laid down in the treaties, such as the principle of sincere cooperation.

<sup>19</sup> See e.g. the opinion of Advocate General Sharpston delivered on 18 September 2008 in the case *Glencore Grain Rotterdam*, C-391/07, EU:C:2008:514, paragraphs 74-76. Analysing regulations, Advocate General Sharpston emphasizes the hierarchical relation between (certain) IIA and legislation by underlining that the legislation at stake does not fully respect the two first recitals (clear, simple and precise drafting of EU legislation in order to ensure legal certainty, in respect of the ECJ case-law) of an IIA (Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, OJ 1999 C 73, p. 1.). See also: Opinion of Advocate General Sharpston delivered on 10 April 2008 in the case *Heinrich*, C-345/06, EU:C:2008:212, paragraph 65; Opinion of Advocate General Geelhoed delivered on 5 April 2005 in the case *Alliance for Natural Health and Others*, Joined cases C-154/04 and C-155/04, EU:C:2005:199, paragraphs 68-72, 82 and 88.

<sup>20</sup> See, e.g., Opinion of Advocate General Tesauro delivered on 22 January 1998 in the case *United Kingdom v Commission*, C-106/96, EU:C:1998:17, paragraph 10 (footnote 11): “where it is clear from an interinstitutional agreement or joint declaration that the institutions concerned intended to enter into a binding commitment towards each other, this must be recognised, in the light of the principle of interinstitutional cooperation laid down in Article [13 (2) TEU], as giving rise to a legal obligation, failure to observe which is actionable in proceedings before the Court”

<sup>21</sup> See Judgment of 12 July 2005, *Alliance for Natural Health and Others*, Joined Cases C-154/04 and C-155/04, EU:C:2005:449, paragraph 92. See also e.g.: Opinion of Advocate General Sharpston delivered on 24 January 2013 in the case *VG Wort e.a.*, Joined Cases C-457/11 to C-460/11, EU:C:2013:34, paragraph 32; Opinion of Advocate General Geelhoed delivered on 14 October 2004 in the case *Peter Biegi Nahrungsmittel GmbH and Commonfood v Commission*, C-499/03 P, EU:C:2004:635, paragraphs 22-23.

17. Having determined the legal nature of the proposed IIA, we can now examine whether the commitments that would be undertaken through the proposed IIA by the European Parliament may validly be extended to its internal actors.

**B. Ability of the proposed IIA to impose obligations on European Parliament's internal actors**

18. Having already demonstrated the ability of the proposed IIA to produce legally binding effects for the signatory institutions and for the third parties that are their internal actors, the question here is whether IIA commitments may conflict with other EU rules governing these internal actors.
19. As demonstrated *supra*, IIAs deriving from Treaty provisions must be considered as legally binding acts insofar as the institutions intend to give them this status. This is the case of the proposed IIA. The proposed IIA has not as a result the value of primary law, nor that of secondary law, but the value of a *sui generis* act situating itself in between these two categories.
20. While it may prime over secondary law, no IIA can however amend or go against primary law.<sup>22</sup> The EU institutions cannot go beyond what the provisions of the Treaty entitle them to do.<sup>23</sup>
21. In the context of Article 295 TFEU, EU institutions are allowed to organize how the legislative process goes, how acts are made, drafted, codified,<sup>24</sup> etc. This provision gives a certain *autonomie constitutive* to the three institutions on how to organize their cooperation within the legislative procedures.
22. Article 5 of the proposed IIA introduces a conditionality principle upon which registration becomes a requirement in order for interest representatives to hold meetings with Members of the European Parliament (hereinafter, the Members), the Secretary-General, Directors-General and the Secretaries of the political groups. One must notice that only “certain types of interaction” – not all of them – are constrained by this provision.

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<sup>22</sup> Chamon, Merijn, “EU Agencies: Does the Meroni Doctrine Make Sense?”, *Maastricht J. Eur. & Comp. L.* 17/2010, 281-305, p.299.

<sup>23</sup> *Idem*, p.302.

<sup>24</sup> See, e.g., the interinstitutional agreement of 20 December 1994 on an accelerated working method for the official codification of legislative texts, *OJ* 1996 C 102, p. 2.

23. Following the terms of the request of this legal opinion, we examine the situation for (i) Members, (ii) political groups, intergroups and other informal meetings of Members, and (iii) accredited parliamentary assistants (APAs).

**i. Members**

24. The question here is whether the proposed IIA, by imposing requirements on certain type of interaction between Members and interest representatives, is compatible with the Members' free and independent mandate.

25. As identified by the European Parliament Legal Service, the Members' free and independent mandate is protected by Article 6 of the 1976 Act<sup>25</sup> concerning the election of the Members of the European Parliament by direct universal suffrage (hereinafter, the 1976 Act), Article 8 of the Protocol on Privileges and Immunities (hereinafter, the PPI) and Article 2 (1) of the Members' Statute.<sup>26</sup>

26. The 1976 Act and the PPI are both acts of primary law. Article 6 (1) of the 1976 Act reads "Members of the European Parliament shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate." Article 8 of the PPI provides that "Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties." As these acts belong to primary law, the proposed IIA must conform to their provisions.

27. While the requirements introduced by the proposed IIA appear *prima facie* compatible with the parliamentary immunity provided by Article 8 of the PPI, the European Parliament Legal Service has raised concerns in the past on the compatibility of a mandatory Transparency Register with Article 6 (1) of the 1976 Act and the Members' free and independent mandate.<sup>27</sup>

28. The proposed IIA relates to the very essence of the exercise of the Members' free and independent mandate as it aims at ensuring transparency of certain types of interaction Members hold with interest representatives along the legislative process.

29. A mandatory Transparency Register would bring the essential obligation for interest representatives to register. The question of respect of the Members' free and independent

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<sup>25</sup> Article 6 (1) to be more precise, as (2) refers to the PPI.

<sup>26</sup> See legal opinion SJ-0680-16, paragraph 11.

<sup>27</sup> See legal opinion SJ-0662-13.

mandate arises when this obligation leads to an explicit limitation on Members to meeting or having a contact with registered interest representatives.

30. As underlined by the European Parliament Legal Service, the free and independent mandate cannot, however, be conceived in absolute terms. The question is therefore whether such limitation is **proportionate**, and accordingly whether the requirements of the proposed IIA could or not fall under the “instructions” forbidden by Article 6 (1) of the 1976 Act.<sup>28</sup>
31. The principle of proportionality requires:
  - a. that measures adopted by EU institutions do not exceed the limits of what is suitable or appropriate in order to attain the legitimate objective pursued by the legislation in question (suitability test);
  - b. that where there is a choice between several appropriate measures, recourse must be had to the least onerous method (necessity test);
  - c. that the disadvantages caused must not be disproportionate to the aims pursued (*stricto sensu* proportionality).<sup>29</sup>
32. The proposed IIA laying down a framework for transparent and ethical interaction between interest representatives engaging in activities covered by this agreement and any of the three institutions aims at pursuing the legitimate objectives that are the Treaty-sanctioned goals of openness and transparency mentioned *supra* (pt 8).
33. When it comes to the suitability test, the question is whether the requirements of the proposed IIA do not exceed the limits of what is suitable or appropriate to attain the Treaty-sanctioned objectives of openness and transparency.
34. A mandatory Transparency Register would enhance the openness and transparency of the work of the EU institutions, its members and of the EU decision-making process itself. By obliging interest representatives to register, the advantages of the current voluntary system (i.e. to show what interests are being pursued at the European level, by whom and with what budgets) would be generalised and the most relevant data of all those seeking to influence the legislative procedure in the Union as interest representatives would be made publicly available.<sup>30</sup> Moreover, by obliging interest representatives to register and

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<sup>28</sup> See legal opinion SJ-0662-13, paragraph 32.

<sup>29</sup> See Judgment of 10 March 2005, *Tempelman and van Schaijk*, Joined cases C-96/03 & C-97/03, EU:C:2005:145, paragraph 48. See also: Judgment of 15 December 2005, *Greece v. Commission*, C-86/03, EU:C:2005:769, paragraph 96; Judgment of 12 January 2006, *Agrarproduktion Staebelow*, C-504/04, EU:C:2006:30, paragraph 37; Judgment of 11 September 2002, *Pfizer Animal Health v. Council*, T-13/99, EU:T:2002:209, paragraph 411; Judgment of 11 September 2002, *Alpharma v. Council*, T-70/99, EU:T:2002:210; Judgment of 8 June 2010, *The Queen v. Secretary of State for Bus., Enter. and Regulatory Reform*, C-58/08, EU:C:2010:321, paragraph 53.

<sup>30</sup> See legal opinion SJ-0662-13, paragraphs 34-35.



provide certain information, the requirements of the proposed IIA appears suitable and appropriate to attain the objectives of openness and transparency.

35. The European Parliament Legal Service argued in the past, on the basis of Article 6 (1) of the 1976 Act, that “[a]s a result of the freedom to speak and vote, Members must be able to get informed in the way they consider best for the exercise of their mandate. This freedom of information comprises the right to meet with whom the Members consider appropriate, so as to make up their minds before speaking and voting in the European Parliament.”<sup>31</sup>
36. The proposed mandatory Transparency Register, by increasing the level of information about interest representatives they meet and discuss with, would enhance – rather than limit – Members’ ability to inform themselves. Moreover, Members would remain entirely free to meet the interest representatives they consider appropriate as long as the latter fulfil the requirements imposed by the proposed IIA. Finally, one must once again observe that these requirements are required for certain types of interaction only.
37. Consequently, the requirements of the proposed IIA do not exceed the limits of what is suitable or appropriate to attain the Treaty-sanctioned goals of openness and transparency. They must be deemed suitable to achieve these legitimate objectives.
38. When it comes to the necessity test, the question is whether, in the presence of several appropriate measures, recourse is had to the least onerous one.
39. In this context, taking into account the legitimate objectives at stake (understood as the willingness to show what interests are being pursued at the European level, by whom and with what budgets), the mandatory Transparency Register appears to be the least restrictive measure to achieve the declared goals. As such it does not create excessive new requirements.
40. While a mandatory legislative footprint system inviting all the rapporteurs to state at the end of his or her report with whom they have had contacts could be *prima facie* perceived as a less restrictive means (as it would not prevent Members to meet with interest representatives, registered or not),<sup>32</sup> it would not be appropriate to achieve the objectives of openness and transparency.
41. Indeed, the obligations of openness and transparency stemming from the Treaty are not limited to a certain part of the legislative activity of the European Parliament that is the work of the rapporteurs. On the contrary, they intend to cover all institutions’ activities and, in the case of the European Parliament, the institution’s but also all its Members’ work. The necessary measure should therefore cover the work of all Members and the

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<sup>31</sup> See legal opinion SJ-0662-13, paragraph 30.

<sup>32</sup> See legal opinion SJ-0662-13, paragraphs 36-40.

interaction between each Member and interest representatives. Moreover, unlike a legislative footprint system, the Transparency Register allows the public to have direct access to essential data related to the interest representatives, rather than merely a mention of their name in a legislative footprint.

42. A mandatory Transparency Register appears therefore as the least restrictive measure to achieve the declared objectives.
43. As a result, the requirements imposed by the proposed IIA must be deemed proportionate with the aims they pursue and therefore compatible with the exercise of the Members' free and independent mandate. The requirements do not fall under the "instructions" forbidden by Article 6 (1) of the 1976 Act. **Such limitation respects both acts of primary law at stake that are the 1976 Act and the PPI.** Moreover, such requirements are compatible with Article 11 TEU, as we explain *infra* under section (C).
44. Concerning the compatibility of the proposed IIA with the Members' Statute,<sup>33</sup> it must be noted that the latter is a legislative act, an act belonging therefore to secondary law. The Members' Statute is adopted under Article 223 (2) TFEU. This legal basis refers particularly to the power of the European Parliament to lay down the regulations and general conditions governing the performance of the duties of the Members and thus to the very essence of the exercise of the parliamentary mandate.
45. Article 2 (1) of the Members' Statute provides that "Members shall be free and independent." A similar provision is included in Rule 2 of the Parliament's Rules of Procedure, stating that "Members shall exercise their mandate freely and independently, shall not be bound by any instructions and shall not receive a binding mandate."
46. **The proposed IIA operationalises rather than extending the existing transparency obligations stemming from the Treaty.** As such it does not affect the free and independent mandate of Members as it is defined in the Members' Statute. **The proposed IIA intends to develop and complement obligations of primary law (e.g. obligation of transparency) that already govern the Statute and its interpretation. These obligations of primary law already put limits on the freedom and the independence of the Members enshrined in Article 2 (1) of the Statute.** Additionally, as it has already been underlined, the proposed mandatory Transparency Register also aims at allowing Members to easily identify the identity of interest representatives they meet.<sup>34</sup>

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<sup>33</sup> Decision of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament (2005/684/EC, Euratom), *OJ L* 262 of 7.10.2005, p. 1–10

<sup>34</sup> This requirements was already considered by the European Parliament in, e.g., its resolution of 8 May 2008 on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions (2007/2115(INI)), pt 1. In the same resolution, the European Parliament considered "that its Members have a responsibility on their own part to ensure that they receive balanced

47. As the Members' Statute belongs to secondary law, the proposed IIA would prime the Statute due to its higher legal status. The question however may arise whether the proposed IIA may entail the amendment of the rules governing the Members' Statute.
48. It is submitted that insofar as the proposed IIA intends to develop and complement obligations of primary law (e.g. obligation of transparency) that already govern the Statute and its interpretation, its adoption would not require amendments to the Members' Statute. The interpretation of the Statute will still have to take into consideration these requirements stemming from primary law, and additionally the ones stemming from the proposed IIA. As it has however been demonstrated, **the interpretation of the Members' Statute (as it exists today) in regard to the proposed IIA would not compromise the substantive rights and obligations provided by the former.**
49. Independent of these, the Members' free and independent mandate remains unaffected: Members do still decide entirely independently to what extent they will take account of opinions originating from stakeholders' encounters.<sup>35</sup>

**ii. Political groups, intergroups or other informal groupings of Members (Rules of Procedure)**

50. An IIA co-signed by the European Parliament on the basis of Article 295 TFEU is an appropriate legal means to bind its political groups to follow the IIA provisions, as well as intergroups or other informal groupings of Members.
51. The European Parliament's Rules of Procedure is a *sui generis* legal instrument adopted unilaterally by the European Parliament. Given the legal status of the proposed IIA and being concluded by three institutions, it primes the Rules of Procedure. The proposed IIA will have to be taken into consideration by the Parliament while acting on the basis of Article 232 TFEU.

*Intergroups<sup>36</sup> and other informal groupings*

52. According to the Rule 34 (1) of the European Parliament's Rules of Procedure, "[i]ndividual Members may form Intergroups or other unofficial groupings of Members

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information" (pt 2), responsibility that the proposed mandatory Transparency Register could help them to fulfil.

<sup>35</sup> See, e.g. the European Parliament resolution of 8 May 2008 on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions (2007/2115(INI)), This maintains that Parliament must decide entirely independently to what extent it will take account of opinions originating from civil society (pt 4).

<sup>36</sup> One must notice that in the "Information to be provided by registrants" to the Register (Annex II to the proposed IIA), registrants would have to declare their "membership of, or participation in, European Parliament intergroups" (II, B, (b)).

states.” Since the conditions of Article 5 of the proposed IIA are imposed on Members as individuals, Article 5 remains applicable when Members meet in Intergroups or other informal groupings.

53. The conditions imposed by Article 5 of the proposed IIA can therefore cover Intergroups and informal groupings of Members without the need of any amendment to the rules of procedure.

#### *Political groups*

54. The existence and the regime of political groups are foreseen by Rules 32 et seq. of the European Parliament’s Rules of Procedure. As Rule 32 states that “Members may form themselves into groups according to their political affinities”, the same conclusion can be drawn than for Intergroups and other informal groupings of Members.
55. The proposed IIA would thus not require any amendment of the Rules of Procedure. Nevertheless, on the occasion of the next revision, we would suggest the adoption of the following amendment to Rule 115 (1) of the Rules of Procedure: “Parliament shall ensure that its activities are conducted with the utmost transparency, in accordance with the second paragraph of Article 1 of the Treaty on European Union, Article 15 of the Treaty on the Functioning of the European Union, Article 42 of the Charter of Fundamental Rights of the European Union **and in compliance with the rules governing the mandatory Transparency Register.**”

#### **iii. Accredited parliamentary assistants (APAs)**

56. An IIA signed by the Parliament with a provision that its staff meet only registered interest groups also bind accredited parliamentary assistants (APAs) in their contacts with interest representatives.<sup>37</sup>
57. APAs are subject to the same regime than the staff. Indeed, due to the “specific nature of the duties, functions and responsibilities of accredited parliamentary assistants, which are designed to allow them to provide direct assistance to Members of the European Parliament in the exercise of their functions as Members of the European Parliament, under their direction and authority”<sup>38</sup>, the Council decided to make the Staff Regulations also applicable to APAs.<sup>39</sup> Moreover, their contract is thereof concluded and administered

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<sup>37</sup> The European Parliament Legal Service arrived to the same conclusion in its legal opinion SJ-0662-13.

<sup>38</sup> Preamble of the Council Regulation No 160/2009 of 23 February 2009 amending the Conditions of Employment of Other Servants of the European Communities, *OJ L 55*, 27.2.2009, p. 1–8, points 6 and 10.

<sup>39</sup> Council Regulation (EC) No 160/2009 of 23 February 2009 amending the Conditions of Employment of Other Servants of the European Communities, *OJ L 55*, 27.2.2009, p. 1–8, adopted on the basis of Article 336 TFEU.

by the European Parliament directly, that can therefore add obligations to the regime of APAs.

58. Concerning the conformity of the proposed IIA with the Staff Regulations, the question is the same than regarding the conformity of the proposed IIA with the Members' Statute. As the Staff Regulations belong to secondary law, the proposed IIA would prime the Staff Regulations due to the IIA's legal status between primary and secondary law. Furthermore, including the APAs in the IIA increases the efficiency and the respect by APAs of the rules laid down in articles 11, 11A, 12, 17, 19 of the Staff Regulations. The specific nature of the duties of the APAs (such as closely assisting the Member they work for) justifies a fortiori their inclusion in the proposed IIA's regime.
59. While it has been demonstrated that the proposed IIA does not conflict with existing primary law defining the free and independent mandate of Members and secondary law, it remains to be examined whether the non-eligibility clause may be compatible with the following Treaty provisions: Articles 2 and 11 TEU.

### **C. Compatibility of the proposed IIA with Articles 2 and 11 TEU**

60. The remaining question has to do with the compatibility of the non-eligibility cause (Article 6 of the proposed IIA) with Articles 2 (EU values) and 11 (citizens and representative associations must have the opportunity to make known and publicly exchange their views in all areas of Union action) TEU.
61. As it has been demonstrated, the requirements introduced by the proposed IIA complement or operationalize Treaty provisions (e.g. obligations stemming from Articles 1, 10 (3), 11 (1-2) TEU and 15 (1 and 3) TFEU), rather than conflicting with them. This is equally true for EU values such as freedom, democracy, equality and the rule of law enshrined in Article 2 TEU.
62. This is all the more so for Article 6 of the proposed IIA which subjects the registration to the proof of the eligibility of the registrants in terms of carrying out activities covered by the proposed IIA (Article 6 (1)). To this effect, registrants need to provide the information detailed in Annex II of the proposed IIA, and to agree for that information to be in the public domain (Article 6 (2)). Rather than conflicting with Article 11 TEU, Article 6 of the proposed IIA provides full meaning to the latter.
63. Indeed, by concluding the proposed IIA, the institutions decide on the "appropriate means [to] give (...) representative associations the opportunity to make known and **publicly** exchange their view in all areas of Union action" (Article 11 (1) TEU).

64. In choosing a mandatory Transparency Register such as the one proposed in this IIA, institutions interpret “appropriate means” and “publicly” by taking into account and giving meaning to obligations of transparency stemming from Article 11 (2) TEU (“[t]he institutions shall maintain an **open, transparent** and regular dialogue with representative associations and civil society”) and the other Treaty provisions above-mentioned (pt 8).
65. Therefore, by requiring the registrants to provide the information listed in Annex II (general information, activities covered by the register, links with EU institutions and financial information related to the activities covered by the register) and agree to make them public, the proposed IIA does not exceed what is necessary to achieve the Treaty’s objectives in terms of transparency. It does not create excessive new requirements. Moreover, by foreseeing that the Secretariat shall provide “an online registration form and guidelines for registrants on the financial modalities to be declared” so as to ease the registration process (see Annex II *in fine*), and considering the developments made under section B (ii), the proposed IIA does respect the principle of proportionality enshrined in Article 5 (4) TEU.

## CONCLUSIONS

Given its legal status, the proposed IIA operationalises rather than extending the existing transparency obligations stemming from the Treaty and its requirements are proportionate to the aims pursued. As such it does not affect the free and independent mandate of Members as it is defined in the Members' Statute nor it conflicts with the prerogatives of other internal actors. The proposed IIA intends to develop and complement obligations of primary law, such as the duty of openness and transparency that already govern the Statute and its interpretation, without compromising the substantive rights and obligations provided by the former. These obligations of primary law already put limits on the freedom and the independence of the Members enshrined in Article 2 (1) of the Statute as well as that of other internal actors. Additionally, the proposed mandatory Transparency Register also allows Members to easily identify the identity of interest representatives they meet, thus enhancing the Member's ability to inform themselves.

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