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REPORT

From: Working Party on General Affairs
To: COREPER (Part 2)
Subject: Draft interinstitutional agreement between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the Common Foreign and Security Policy
- Outstanding issues

I. INTRODUCTION

1. At its meeting on 16 December 2011, the Working Party on General Affairs heard a report from the Presidency on the latest negotiation session on the above interinstitutional agreement between the European Parliament and the Council, which took place in Strasbourg on 14 December 2011. The Working Party noted that the meeting with the European Parliament had been conducted in a constructive and businesslike atmosphere, with the European Parliament showing movement on some important issues for the Council.
2. The version of the draft IIA as it stands following that meeting is set out in Annex I. Annex II contains three draft declarations agreed in the context of the negotiations.

II. AREAS OF AGREEMENT

3. The Working Party noted the provisional agreement between the negotiators on a number of important outstanding issues which had been settled in line with the Presidency's negotiating mandate:
- (a) a limitative list of matters covered by the IIA (Article 1);
 - (b) equivalence of basic principles and minimum standards for the protection of classified information (Recitals 11 and 12, Article 3(2), Article 8(2) and (3) and statement (a));
 - (c) extension of the scope of the IIA to information classified TRES SECRET UE/EU TOP SECRET (Article 2(a) and others);
 - (d) security clearance requirement for MEPs, where the Council secured the preservation of the principle at all levels while allowing an exception for access to the level CONFIDENTIEL UE/EU CONFIDENTIAL under certain conditions (Article 4(2));
 - (e) determining MEPs to whom access to classified information may be granted (Article 5(4));
 - (f) penal sanctions in the case of loss or compromise of classified information (Article 7(4));
 - (g) a joint statement on the review of the level of classification of Council documents before transmission to the Parliament and procedures for downgrading and declassifying Council documents transmitted to the Parliament (statement (b)).

III. OUTSTANDING ISSUE

4. As expected, the most difficult issues related to the exclusion of CFSP matters and the question of the review of the 2002 IIA on CSDP.

5. The European Parliament is ready to accept the Council's position that the Common Foreign and Security Policy be excluded from the scope of the IIA (see title and Article 1), provided that three conditions are met:
 - "(a) it should be clearly said in Art. 1 (and possibly also in the title of the agreement) that this is without prejudice to both Art. 218.6 TFUE and Art. 218.10 TFUE (as for agreements relating exclusively to the CFSP, the provisions of 218.10 also apply), as these cases will be covered by the new agreement;*
 - (b) a specific additional article should be added at the end of the agreement describing the current transitional provisions applied to CFSP information (either ad hoc decisions or use of the 2002 agreement); a declaration or a recital will not be acceptable for Parliament;*
 - (c) recital 7 paraphrasing the political declaration of VP/HR Ashton should be complemented by a political declaration that the review of the 2002 IIA should be done in 2012."*

6. The Presidency indicated to the European Parliament that what was already on the table was at the limits of his mandate, and that he had no mandate to accept any commitment on reviewing the 2002 IIA, nor on putting a provision in the body of the IIA describing the current practice with regard to access by the European Parliament to documents in the area of CFSP. He emphasised that the approach suggested by the Parliament was likely to be problematic for the Council both from a legal point of view (since it would mean including in the IIA operational provisions on matters which fall outside its scope), and from a political point of view (since the High Representative has committed to reviewing the 2002 IIA, and it would be preferable to gain experience in implementing the new IIA before considering any review of the 2002 IIA).

IV. WAY FORWARD

7. The Working Party on General Affairs noted that most of the difficult issues have been addressed in a manner consistent with the negotiating mandate, including on the two major questions of the exclusion of matters in the area of the CFSP and the inclusion of a limitative list in Article 1.
8. The Presidency considers that the three requests set out by the Parliament (see point 5 above) could be addressed as follows:
 - (a) on Article 218(10) TFEU, by adding language at the end of Recital 4, as follows: "(...) all stages of the procedure; this provision also applies to agreements relating to the Common Foreign and Security Policy."
 - (b) on transitional provisions, maintaining Recital 6 as proposed by the Presidency. The request from the Parliament for an article to be inserted on this matter cannot be accepted for legal reasons, since it would mean including in the IIA operational provisions on matters which fall outside its scope;
 - (c) on the review of the 2002 IIA, by proposing a draft joint statement to the European Parliament along the lines set out in Annex III which could commit to beginning the review in 2012 without imposing a deadline for its completion.
9. While a large number of delegations have expressed support for this general approach on a personal basis, they reserved their position pending further internal consultation.
10. COREPER is invited to examine this approach in order to give guidance on the Presidency's response to the European Parliament.

Draft

INTERINSTITUTIONAL AGREEMENT

of ...

between the European Parliament and the Council

concerning the forwarding to and handling by the European Parliament of
classified information held by the Council on matters other than those in the area of
the Common Foreign and Security Policy

THE EUROPEAN PARLIAMENT AND THE COUNCIL,

Whereas:

- (1) Article 14(1) of the Treaty on European Union (TEU) provides that the European Parliament shall, jointly with the Council, exercise legislative and budgetary functions and that it shall exercise functions of political control and consultation as laid down in the Treaties.
- (2) Article 13(2) TEU provides that each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them and that the institutions shall practice mutual sincere cooperation. Article 295 of the Treaty on the functioning of the European Union (TFEU) provides that they shall make arrangements for their cooperation and that to that end they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature.
- (3) The Treaties and, as appropriate, other relevant provisions provide that either in the context of a special legislative procedure or under other decision-making procedures, the Council shall consult or obtain the consent of the European Parliament before adopting a legal act. They also provide that, in certain cases, the European Parliament shall be informed about the progress or the results of a given procedure or be involved in the evaluation or the scrutiny of certain EU agencies.

- (4) In particular, Article 218(6) TFEU provides that, except where an international agreement relates exclusively to the common foreign and security policy, the Council shall adopt the decision concluding international agreements after obtaining the consent of or consulting the European Parliament. It also provides in its paragraph 10 that the European Parliament shall be immediately and fully informed at all stages of the procedure.
- (5) In cases where implementation of the Treaties and, as appropriate, other relevant provisions, would require access by the European Parliament to classified information held by the Council, appropriate arrangements governing such access should be drawn up between the European Parliament and the Council.
- (6) Where the Council decides to grant the European Parliament access to classified information held by the Council in the area of the Common Foreign and Security Policy, it either takes *ad hoc* decisions to that effect, or it uses the Interinstitutional 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 policy¹ (hereinafter the "Interinstitutional Agreement of 20 November 2002"), as appropriate.
- (7) The Declaration by the High Representative on political accountability², made when Council Decision (2010/427/EU) establishing the organisation and functioning of the European External Action Service³ was adopted, states that the High Representative will review and where necessary propose to adjust the existing provisions on access for Members of the European Parliament to classified documents and information in the field of security and defence policy (i.e. the Interinstitutional Agreement of 20 November 2002).

¹ OJ C 298, 30.11.2002, p. 1.

² OJ C 210, 3.8.2010, p. 1.

³ OJ L 201, 3.8.2010, p. 30

- (8) It is important that the European Parliament be associated with the principles, standards and rules for protecting classified information which are necessary in order to protect the interests of the European Union and of the Member States. Moreover, the European Parliament will be in a position to provide classified information to the Council.
- (9) The Bureau of the European Parliament adopted on 6 June 2011 a Decision concerning the rules governing the treatment of confidential information by the European Parliament¹ (hereinafter the "European Parliament's security rules").
- (10) The Council adopted on 31 March 2011 a Decision on the security rules for protecting EU classified information² (hereinafter the "Council's security rules").
- (11) The security rules of EU institutions, bodies, agencies or offices should constitute together a comprehensive and coherent general framework within the European Union for protecting classified information and ensure equivalence of basic principles and minimum standards. The basic principles and minimum standards laid down in the European Parliament's and in the Council's security rules should accordingly be equivalent.
- (12) The level of protection afforded to classified information under the European Parliament's security rules should be equivalent to that afforded to classified information under the Council's security rules.
- (13) The relevant services of the European Parliament Secretariat and of the General Secretariat of the Council will cooperate closely to ensure that equivalent levels of protection are applied to classified information in both institutions.

¹ OJ C 190, 30.6.2011, p. 2.

² Council Decision 2011/292/EU, OJ L 141, 27.5.2011, p. 17.

- (14) This Agreement is without prejudice to: existing and future rules on access to documents adopted in accordance with Article 15(3) TFEU; rules on the protection of personal data adopted in accordance with Article 16(2) TFEU; rules on the European Parliament's right of inquiry adopted in accordance with Article 226, third subparagraph, TFEU; and relevant provisions relating to the European Anti-Fraud Office (OLAF),

HAVE CONCLUDED THIS INTERINSTITUTIONAL AGREEMENT:

Article 1
Purpose and scope

This Agreement sets out arrangements governing the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the Common Foreign and Security Policy which is relevant for the European Parliament to exercise its powers and functions. It concerns all such matters, namely:

- (a) proposals subject to a special legislative procedure or to another decision-making procedure under which the European Parliament is to be consulted or required to give its consent; or
- (b) international agreements on which the European Parliament is to be consulted or is required to give its consent pursuant to Article 218(6) TFEU; or
- (c) negotiating directives for agreements referred to in subparagraph (b); or
- (d) activities, evaluation reports or other documents on which the European Parliament is to be informed; or
- (e) documents on the activities of those EU agencies in the evaluation or scrutiny of which the European Parliament is to be involved.

Article 2

Definition of "classified information"

For the purposes of this Agreement, "classified information" shall mean any or all of the following:

- (a) "EU classified information" (EUCI) as defined in the European Parliament's security rules and in the Council's security rules and bearing one of the following security classification markings:
- RESTREINT UE/EU RESTRICTED;
 - CONFIDENTIEL UE/EU CONFIDENTIAL;
 - SECRET UE/EU SECRET;
 - TRES SECRET UE/EU TOP SECRET;
- (b) classified information provided to the Council by Member States and bearing a national classification marking equivalent to one of those used for EUCI as set out in subparagraph (a);
- (c) classified information provided to the European Union by third States or international organisations which bears a classification marking equivalent to one of those used for EUCI as set out in subparagraph (a), as provided for in the relevant security of information agreements or administrative arrangements.

Article 3
Protection of classified information

1. The European Parliament shall protect, in accordance with its security rules and with this Agreement, any classified information provided to it by the Council.
2. As equivalence is to be maintained between the basic principles and minimum standards for protecting classified information laid down by the European Parliament and by the Council in their respective security rules, the European Parliament shall ensure that the security measures in place in its premises afford a level of protection to classified information equivalent to that afforded to such information on Council premises. The relevant services of the European Parliament and the Council shall cooperate closely to that effect.
3. The European Parliament shall take the appropriate measures to ensure that classified information provided to it by the Council shall not:
 - (a) be used for purposes other than those for which access was provided;
 - (b) be disclosed to persons other than those to whom access has been granted in accordance with Articles 4 and 5, nor be made public;
 - (c) be released to other EU institutions, offices, bodies or agencies, or to Member States, third States or international organisations without the prior written consent of the Council.
4. The Council may grant the European Parliament access to classified information which originates in other EU institutions, offices, bodies or agencies, or in Member States, third States or international organisations only with the prior written consent of the originator.

Article 4
Personnel security

1. Access to classified information shall be granted to Members of the European Parliament in accordance with Article 5(4).
2. Where the information concerned is classified at the level CONFIDENTIEL EU/EU CONFIDENTIAL, SECRET UE/EU SECRET or TRES SECRET UE/EU TOP SECRET, or its equivalent, access may be granted only to Members of the European Parliament authorised by the President:
 - who have been security-cleared in accordance with the European Parliament's security rules; or
 - who are duly authorised by virtue of their functions in accordance with national laws and regulations.

Notwithstanding the previous subparagraph, where the information concerned is classified at the level CONFIDENTIEL EU/EU CONFIDENTIAL, or its equivalent, access may also be granted to Members of the European Parliament determined in accordance with Article 5(4) who have signed a solemn declaration of non-disclosure in accordance with the European Parliament's security rules. The Council shall be informed of the names of the Members granted access under this subparagraph.

3. Before being granted access to classified information, Members of the European Parliament shall be briefed on and acknowledge their responsibilities to protect such information in accordance with the European Parliament's security rules, and on the means of ensuring such protection.

4. Access to classified information shall be granted only to European Parliament officials and those employees of the European Parliament working for political groups:
- (a) who have been designated in advance as having a need-to-know by the relevant parliamentary body/office-holder determined in accordance with Article 5(4);
 - (b) who, where the information is classified at the level CONFIDENTIEL UE/EU CONFIDENTIAL or above, or its equivalent, have been security-cleared to the appropriate level; and
 - (c) who have been briefed and received written instructions on their responsibilities for protecting such information as well as on the means of ensuring such protection, and have signed a declaration acknowledging receipt of those instructions and undertaking to comply with them in accordance with the European Parliament's security rules.

Article 5

Procedure for accessing classified information

1. Where it is under a legal obligation to do so pursuant to the Treaties or to legal acts adopted on the basis of the Treaties, the Council shall provide classified information referred to in Article 1 to the European Parliament. The parliamentary bodies or office-holders referred to in paragraph 3 may also present a written request for such information.
2. In other cases, the Council may provide classified information referred to in Article 1 to the European Parliament either at its own initiative or on written request from one of the parliamentary bodies or office-holders referred to in paragraph 3.
3. The following parliamentary bodies or office-holders may present written requests to the Council:
 - the President;
 - the Conference of Presidents or the Bureau;
 - the Chair of the Committee concerned;
 - the rapporteur(s) concerned.

Requests from other Members of the European Parliament shall be made via one of the parliamentary bodies or office-holders referred to above.

The Council shall respond to such requests without delay.

4. Where the Council is under a legal obligation to, or has decided to grant the European Parliament access to classified information, it shall determine in writing, before this information is forwarded, together with the relevant body or office-holder(s) as listed in paragraph 3:

(a) that such access may be granted to one or more of the following:

- the President;
- the Conference of Presidents and/or the Bureau;
- the Chair of the Committee(s) concerned;
- the rapporteur(s) concerned;
- all Members of the Committee(s) concerned.

(b) and any specific handling arrangements for protecting such information.

Article 6

Registration, storage, consultation and discussion of classified information in the European Parliament

1. Classified information provided by the Council to the European Parliament:
 - (a) where it is classified at the level CONFIDENTIEL UE/EU CONFIDENTIAL or above, or its equivalent, shall be registered for security purposes to record its life-cycle and ensure its traceability at all times;
 - (b) shall be stored in a secure area which meets the minimum standards of physical security laid down in the Council's and the European Parliament's security rules, which shall be equivalent;
 - (c) may be consulted by the relevant European Parliament Members, officials and those employees of the European Parliament working for political groups referred to in Articles 4(4) and 5(4) only in a secure reading room within the European Parliament's premises. In this case, the following conditions shall apply:
 - the information shall not be copied by any means, such as photocopying or photographing;
 - no notes shall be taken;
 - no electronic communication devices may be taken into the room.

2. Classified information may only be handled on communication and information systems which have been duly accredited or approved in accordance with standards equivalent to those laid down in the Council's security rules.
3. Classified information provided orally to recipients in the European Parliament shall be subject to the equivalent level of protection as that afforded to classified information in written form.
4. Notwithstanding paragraph 1(c), information classified up to the level of CONFIDENTIEL UE/EU CONFIDENTIAL or equivalent provided by the Council to the European Parliament may be discussed at meetings held *in camera* and attended only by European Parliament Members and those officials and other employees of the European Parliament working for political groups who have been granted access to the information in accordance with Articles 4(4) and 5(4). The following conditions shall apply:
 - documents shall be distributed at the beginning of the meeting and collected again at the end;
 - documents shall not be copied by any means, such as photocopying or photographing;
 - no notes shall be taken;
 - no electronic communication devices may be taken into the room;
 - the minutes of the meeting shall make no mention of the discussion of the item containing classified information.
5. Where meetings are necessary to discuss information classified SECRET UE/EU SECRET or above, specific arrangements shall be agreed on a case-by-case basis between the European Parliament and the Council.

Article 7

Breach of security, loss or compromise of classified information

1. In the case of a proven or suspected loss or compromise of classified information provided by the Council, the Secretary-General of the European Parliament shall immediately inform the Secretary-General of the Council. The Secretary-General of the European Parliament shall conduct an investigation and shall inform the Secretary-General of the Council of the results of the investigation and of measures taken to prevent a recurrence. Where a Member of the European Parliament is concerned, the President of the European Parliament shall act together with the Secretary-General.
2. Any Member of the European Parliament who is responsible for a breach of the provisions laid down in the European Parliament's security rules or in this Agreement may be liable to the penalties set out in Rules 9(2) and 152-154 of the European Parliament's Rules of Procedure.
3. Any European Parliament official or other employee of the European Parliament working for a political group who is responsible for a breach of the provisions laid down in the European Parliament's security rules or in this Agreement may be liable to the penalties set out in the Staff Regulations or the Conditions of Employment of Other Servants of the European Union.
4. Persons responsible for losing or compromising classified information may be liable to disciplinary and/or legal action in accordance with the applicable laws, rules and regulations.

Article 8
Final provisions

1. The European Parliament and the Council, each for its own part, shall take all necessary measures to ensure implementation of this Agreement. They shall cooperate to that effect, in particular by organising visits to monitor implementation of the security-technical aspects of this Agreement.
2. The relevant services of the European Parliament and the Council shall consult each other before either institution modifies its respective security rules, in order to ensure that equivalence of basic principles and minimum standards for protecting classified information is maintained.
3. Classified information shall be provided to the European Parliament under this Agreement once the Council, together with the European Parliament, has determined that equivalence has been achieved between the basic principles and minimum standards for protecting classified information in the European Parliament's and in the Council's security rules, on the one hand, and between the level of protection afforded to classified information in the European Parliament's premises and in the Council's premises, on the other.
4. This Agreement may be reviewed at the request of either institution in the light of experience in implementing it.

Done in ... on ...

For the European Parliament
The President

For the Council
The President

STATEMENTS TO BE APPROVED ALONG WITH THE AGREEMENT

(a) Draft Statement by the European Parliament and the Council on Article 8(3)

The European Parliament and the Council will cooperate so that the determination referred to in Article 8(3) can be made by the entry into force of the Interinstitutional Agreement on the forwarding to and handling by the European Parliament of classified information held by the Council, expected in Spring 2012.

(b) Draft Statement by the European Parliament and the Council on classification of documents

The European Parliament and the Council recall that underclassification or overclassification of documents undermines the credibility of security rules.

The Council will continue to ensure that the correct level of classification is applied to information originating within the Council in accordance with its security rules. The Council will review the level of classification of any document before forwarding it to the European Parliament, in particular to verify whether such level of classification is still appropriate.

The European Parliament will protect any classified information provided to it in a manner commensurate with its level of classification. In the event of it requesting whether a classified document provided by the Council may be downgraded or declassified, such downgrading or declassification may only occur with the prior written consent of the Council.

(c) Draft Council Statement on unclassified Council documents

The Council confirms that the Interinstitutional Agreement between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the Common Foreign and Security Policy does not apply to unclassified documents internal to the Council (i.e. those marked LIMITE).

Draft**Statement by the European Parliament and the Council on access to classified information in the area of the Common Foreign and Security Policy**

Recalling the Declaration by the High Representative on political accountability published in OJ C 210 of 3 October 2010, the European Parliament and the Council consider that a review of the Interinstitutional Agreement (IIA) of 20 November 2002 should begin in the course of 2012. This review will be undertaken respecting the specific role of the European Parliament in the area of the CFSP, taking account of experience gained in implementing the IIA of 20 November 2002 and the new IIA on the forwarding to and handling by the European Parliament of classified information on matters other than those in the area of the Common Foreign and Security Policy.

Pending completion of this review, where the Council decides to grant the European Parliament access to classified information held by the Council in the area of the Common Foreign and Security Policy, it proceeds as described in recital (6) of the new IIA referred to above and in accordance with paragraph 2 of the Declaration by the High Representative referred to above.
