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# Note for the attention of Mr Richard CORBETT, MEP

(c/o Secretariat of the Committee on Constitutional Affairs)

Re: Draft report on the General revision of Parliament's Rules of procedure ('Corbett-Report') - Introduction of a prohibition for Members of the European Parliament concerning side activities during the parliamentary mandate - Scope of Article 232 TFEU

### I. Background

- 1. During the meeting of the AFCO shadow rapporteurs with the rapporteur Mr Richard CORBETT on 20 October 2016 in the context of the political discussion on the Corbett-Report, the Legal Service was requested by Mr CORBETT in his capacity as rapporteur, in accordance with Article 1(1) seventh indent of the Decision of the Bureau of 28 January 2004 on the consultation of the Legal Service, to provide him with a legal assessment of certain amendments which were tabled with regard to his report.
- 2. Indeed, some of the amendments tabled in AFCO aim at incorporating into the Code of Conduct for Members, with respect to financial interests and conflict of interests (hereinafter "Code of Conduct"), substantial changes which are already proposed by the so-called 'Giegold-Report' (draft report on transparency, accountability and integrity in the EU institutions)<sup>1</sup>. More specifically, the Legal Service was asked to examine the compatibility of those amendments with the applicable primary law which foresee the introduction of a prohibition, for Members of the European Parliament, to exercise professional side activities outside Parliament.

<sup>&</sup>lt;sup>1</sup> 2015/2041(INI).

- 3. In this respect, two categories of amendments can be distinguished. Firstly, some of the amendments concern an unconditional prohibition of side activities of MEPs. Secondly, several amendments aim at banning those side activities which risk entailing, for the MEP concerned, a conflict of interest in the context of the exercise of its parliamentary mandate.
- 4. The Legal Service will address both categories of amendments together, as they raise similar legal concerns. In this regard, the question will be addressed whether provisions banning MEPs from having professional activities outside of Parliament is in conformity with the relevant legal framework under primary law. More specifically, it has to be examined whether such prohibitions may be introduced by means of an amendment of the Code of Conduct on the basis of Article 232 TFEU.

## II. Legal assessment

## 1. Preliminary remarks

- 5. The Code of Conduct constitutes a part of Parliament's Rules of Procedure. It is therefore a legal instrument with the same legal value and nature as the Rules of Procedure. The Rules of Procedure constitute a *sui generis* legal instrument which is adopted unilaterally by the European Parliament by a special majority.
- 6. The relevant legal basis under primary law for the adoption of the Rules of Procedure is Article 232 TFEU which reads as follows:
  - "The European Parliament shall adopt its Rules of Procedure, acting by a majority of its Members. [...]"
- 7. Any amendment of the Rules of Procedure, including any amendment of the Code of Conduct by means of the amendments under consideration, must comply with this legal base and may not go beyond its scope. Moreover, it follows from established case law<sup>2</sup> that any legal act adopted on the basis of Art. 232 TFEU would have to respect primary law and the general principles of law, in particular the rule of law in the form of the principle of proportionality.
- 8. These strict legal requirements are underpinned by the fact that any prohibition of activities interferes with the Charter of fundamental rights of the European Union ('the EU-Charter'), as the freedom of MEPs to choose an occupation and the right to engage in work (Article 15 of the EU Charter) as well as their freedom to conduct a business (Article 16 of the EU Charter) would be limited. Although such limitation of fundamental rights is legally not *per se* excluded, as confirmed by Article 52(1) of the EU-Charter, it has to be underlined that any limitation of fundamental rights may only be foreseen by means of the correct legal instruments and only on the basis of the appropriate legal basis as foreseen under the Treaties.

See judgment in France v Parliament, Joined Cases 358/85 and 51/86, EU:C:1988:431, judgment in Luxembourg v Parliament, Joined Cases C-213/88 and C-39/89, EU:C:1991:449 and judgment in "Les Verts" v Parliament, Case 294/83, EU:C:1986:166.

- 2. The scope of Article 232 TFEU and the prohibition of professional side activities of Members
- 9. On the basis of Article 232 TFEU, Parliament has the power to adopt its Rules of Procedure. According to the relevant case law, this means that the Parliament has the power to determine its own internal organization and is authorised to take "appropriate measures to ensure the due functioning and conduct of its proceedings".
- 10. Article 232 TFEU thus concerns what is usually referred to in the national constitutional systems<sup>4</sup> as parliamentary autonomy to determine Parliament's internal procedures. It is indeed through its Rules of Procedure that Parliament exercises its self-organisation powers.
- 11. Against this background, Parliament may adopt, on the basis of Article 232 TFEU, all appropriate measures necessary for its proper functioning which may also regulate, inasmuch as strictly necessary for the proper functioning of the Institution, the exercise of the free mandate of Members. The free exercise of the mandate is indeed protected by Article 6 of the 1976 Act on direct elections (hereinafter 'the 1976 Act'), by Article 8 of the Protocol on Privileges and Immunities (PPI) as well as under Article 2(1) of the Statute for Members.
- 12. As regards the determination of the scope of Article 232 TFEU, Parliament's obligations of transparency also have to be taken into consideration. In this respect, Article 1(2) TEU establishes the principle that decisions in the European Union are taken as openly as possible. Moreover, Article 15(2) TFEU underlines that in particular the legislative process has to be transparent and open to the public.
- 13. It is therefore possible to conclude that the power of Parliament to organise its internal functioning also comprises the power to adopt rules ensuring transparency of the legislative procedure in Parliament including the conditions under which Members cast their votes. Therefore, Article 232 TFEU may be considered as constituting a sufficient legal base for the adoption of rules governing the declaration of interests of Members, in particular their financial interests.
- 14. As a consequence, Parliament was legally in a position to adopt its current Code of Conduct on the basis of Article 232 TFEU, which follows the philosophy of ensuring transparency in respect of possible conflicts of interest by imposing transparency obligations upon Members. Indeed, the current Code of Conduct contains, except for its Article 2(b), general principles to which the behaviour of a Member shall be submitted and obligations of declaration of conflicts of interests and, in particular, of financial interests without, however, establishing any prohibitions except for the said Article 2(b).
- 15. Against this background, it is not excluded legally to even extend the existing transparency obligations inasmuch as such extension would not amount to a prohibition or other restriction which goes beyond the scope of Article 232 TFEU

See judgment in Luxembourg v Parliament, Case 230/81, EU:C:1983:32, paragraph 38.

See, as an example, Art. 40(1) of the German Basic Law and Art. 72 of the Spanish Constitution.

- and/or amounts to a measure which is no longer proportionate with regard to the exercise of the free mandate by the Members.
- 16. As regards the only legal prohibition contained in the current Code of Conduct, which is enshrined in its Article 2(b) and which provided for a prohibition to "solicit, accept or receive any direct or indirect financial benefit or other reward in exchange for influencing, or voting on, legislation, motions for a resolution, written declarations or questions tabled in Parliament or any of its committees", and which imposes the obligation upon MEPs to "consciously seek to avoid any situation which might imply bribery or corruption", this prohibition may likewise be justified by a need to ensure the proper functioning and conduct of Parliament's proceedings. Indeed, such prohibition merely bans activities which, under international law or under national law of the Member States, are already considered as criminal offences.
- 17. The legal situation would be different, though, when it comes to restrictions amounting to *de facto* incompatibilities such as the prohibition of professional sideactivities of Members as foreseen by the amendments under consideration. Such restrictions would no longer be covered by Parliament's self-organisation powers, as enshrined in Article 232 TFEU. Moreover, they would interfere with other (conflicting) provisions under primary law which also determine the limits of the scope of Article 232 TFEU.
- 18. In this respect, firstly, the Legal Service holds the view that such restrictions can per se not be considered as "appropriate measures ensuring the due functioning and conduct of Parliament's proceedings", as required by the relevant case law<sup>5</sup>. Indeed, such prohibitions already fail to comply with the principle of proportionality, as they are not strictly necessary for the "due functioning and conduct of Parliament's proceedings".
- 19. Secondly, such restrictions would not be in line with the Act of 1976. This Act enumerates, under its Article 7(1), occupations and functions considered incompatible with the office of Member of the European Parliament. According to its paragraph 3, only Member States may extend the rules at national level relating to such incompatibilities.
- 20. Measures relating to such incompatibilities or *de facto* incompatibilities, as proposed by the amendments under consideration, would however go beyond the scope of Article 232 TFEU, as they would interfere unduly with the provisions of the Act of 1976 and circumvent its specific procedural requirements.
- 21. As a consequence, for this very reason the Code of Conduct cannot totally ban professional (side) activities of Members exercised in parallel with the mandate. This conclusion concerns both the unconditional prohibition of side activities of MEPs as well as those side activities which risk entailing, for the MEP concerned, a conflict of interest in the context of the exercise of its parliamentary mandate. From the understanding of the Legal Service, such prohibition would go beyond the scope of Article 232 TFEU.

See, for example, judgment in Luxembourg v Parliament, Case 230/81, EU:C:1983:32.

- 22. Thirdly, the proposed general prohibition of professional side activities of Members would also not be in line with the peculiar unilateral legal nature of the RoP which limits the scope of Article 232 TFEU inasmuch as the RoP cannot constitute a valid legal instrument for the imposition of obligations on third parties. On the same basis, they may not impose obligations upon Members in their private capacity.
- 23. Indeed, as regards the proposals for a general prohibition of side activities of Members irrespective of the risk of a possible conflict of interests, these amendments would affect Members in their private capacity, as any professional activity outside the parliamentary mandate would be prohibited. As a consequence, for this sole reason any general limitations of side-activities of MEPs not showing any specific link with the exercise of their mandate would go beyond the scope of Article 232 TFEU and may thus not be adopted on the basis of this legal base.
- 24. Finally, the Legal Service also holds the view that the proposed prohibition of professional side activities of Members to the extent that the prohibition of those side activities risks entailing, for the MEP concerned, a conflict of interest in the context of the exercise of its parliamentary mandate might not be in line with Article 223(3) TFEU governing the adoption of "the regulations and general conditions governing the performance of the duties of its Members."
- 25. This legal basis concerning the Statute for Members refers particularly to the regulations and general conditions governing the performance of the duties of the MEPs and thus to the very essence of the exercise of the parliamentary mandate. Parliament's self-organisation powers under Article 232 TFEU therefore lack any power to lay down rules governing this subject-matter.
- 26. The proposed prohibitions, however, relate exactly to this very essence of the exercise of the parliamentary mandate, as they aim at protecting its exercise from any possible undue influence stemming from other professional interests of the Member concerned.
- 27. The Legal Service therefore concludes that the proposed prohibition of side activities entailing a possible conflict of interest for the Member concerned might go beyond the scope of Article 232 TFEU also for this reason, as it could interfere unduly with Article 223(3) TFEU.
- 28. In this respect, however, it has to be emphasised that the Legal Service is not taking a position on the legality of such prohibition if contained in the Statute for Members, an issue that would require further analysis. The Legal Service simply underlines that such prohibition could not rest on the legal basis provided for the Rules of Procedure in Article 232 TFEU.

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#### III. Conclusion

- 29. On the basis of the foregoing, the Legal Service comes to the conclusion that a ban of professional (side) activities of Members would go beyond the scope of Article 232 TFEU. Such measures can thus neither be incorporated into Parliament's Rules of Procedure nor into the Code of Conduct. In this regard, the Legal Service does not take a position on whether the adoption of such measures would require an amendment of the Statute for Members, pursuant to Article 223(3) TFEU, and/or of the Act of 1976, in accordance with Article 223(1) TFEU.
- 30. This conclusion is without prejudice to Parliament's right to extend on the basis of Article 232 TFEU, if considered appropriate, transparency requirements currently laid down in the Code of Conduct with regard to the financial interest of Members.

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