

# CODEX ALIMENTARIUS COMMISSION



Food and Agriculture  
Organization of the  
United Nations



World Health  
Organization

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Agenda Item 14.1

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## JOINT FAO/WHO FOOD STANDARDS PROGRAMME CODEX ALIMENTARIUS COMMISSION Forty-fifth Session

### PARTICIPATION OF THE EUROPEAN UNION AS ADVISER TO THE MEMBER FOR EUROPE IN THE EXECUTIVE COMMITTEE OF THE CODEX ALIMENTARIUS COMMISSION

(Prepared by the FAO and WHO Legal Offices)

#### Introduction

1. The participation of the European Union (EU), a Member Organization of FAO, as adviser to the Member for the region of Europe in the Executive Committee of the Codex Alimentarius Commission (CCEXEC) has been the subject of discussions over the past years.
2. At the 78th Session of CCEXEC in February 2020, the Member for North America “*drew the attention of CCEXEC78 to the presence of the European Union (EU) as advisor to the Member for Europe, requesting the Representative of the Legal Counsel of WHO to clarify whether this was in line with the formal declaration by the European Community (EC) at the 18th session of the Codex Committee on General Principles (CCGP)*”<sup>1</sup> in 2003. In response, the WHO legal representative, speaking on behalf of FAO and WHO Legal Offices, stated that “*the matter was complex and related to the accession of the EC to FAO and later to Codex and also related to the participation of advisors in the CCEXEC which had evolved*”. The legal representative further indicated that “[e]xtensive research would be needed to provide detailed advice on the question to CCEXEC79” and suggested that “*CCEXEC agree with the participation of a staff member of the EU as advisor to the Member for Europe at the current session on the understanding that this would not constitute a precedent that could influence further decisions on the matter*”.
3. At the 79th Session of CCEXEC in July 2020, the Member for North America reiterated the request for “*clarification regarding the participation of the European Union (EU) as advisor to the Member for Europe in [CCEXEC], following on former discussions at CCEXEC78*”, and noted the “*lack of document outlining the division of competence between the European Union and Member States, as required by the Codex Procedural Manual prior to any meeting in which a member organization may be entitled to participate*”. The FAO legal representative, speaking on behalf of FAO and WHO Legal Offices, stated that further to a preliminary review of the matter, it was determined that “*the rules do not provide any clear legal position on the participation of the EU as advisor to the Member for Europe in the Executive Committee*” and that “*considering the gap in the rules, the EC declaration of 2003 and the evolving practice, a decision regarding the participation of the EU as advisor to the Member for Europe in sessions of the CCEXEC lies with the Codex membership*”. In this regard, the FAO/WHO Legal Offices recommended that: “*(i) the issue (...) be addressed at the next physical meeting of the Commission; and, (ii) in view of the deliberations, the Legal Offices prepare a paper that will address the legal aspects of the issue, with a view to assisting the membership in taking a decision on the matter*”.<sup>2</sup>
4. In this context, the FAO/WHO Legal Offices submit this document, which provides an overview of the participation of Member Organizations in meetings of FAO Governing Bodies and meetings of the Codex Alimentarius Commission and its subsidiary bodies, as well as an outline of the relevant rules and practices that may assist the Membership’s discussions on the matter.

<sup>1</sup> REP/20/EXEC1, par. 4.

<sup>2</sup> REP20/EXEC2, par. 8.

## **Historical background**

### **(i) The right of the European Union to participate in joint subsidiary bodies of FAO**

5. Prior to the accession of the EU as Member Organization of FAO on 26 November 1991, the question of whether membership of FAO would entitle a Member Organization to participate in joint subsidiary bodies of FAO, such as the Codex Alimentarius Commission, had already been raised.
6. In particular, at the 99th Session of the Council in June 1991, the FAO Legal Counsel delivered an opinion on the matter, with the concurrence of the UN Legal Counsel, which reads as follows:

*“In my opinion membership by a Member Organization in FAO would entitle that Member Organization to participate in bodies operated jointly with other organizations such as the Codex Alimentarius, a joint FAO/WHO body, and the World Food Programme Committee on Food Aid Policies and Programmes (CFA), a joint subsidiary body of the UN and FAO. The basic documents establishing both of these joint bodies allow for membership by Member Nations, or Member States of one of the parent organizations. The effect of the proposed assimilation clause in the amendments to the FAO Constitution, however, would be to allow regional economic integration organizations that are members of FAO, as one of the parent organizations, also to be eligible for membership in such bodies. This would be consistent, in the case of the Codex Alimentarius, with its status as a joint Commission established under Article VI of the FAO Constitution. Following the general principle set down in the proposed amendments to Constitution, Member Organizations would not be eligible for election in their own right to such joint bodies, but would merely exercise the rights, of membership of their Member States that are elected, in accordance with the principle of the alternative exercise of membership rights. The issue of eligibility for election to the Codex Alimentarius does not of course arise, since membership in the Codex is open to all Member Nations (and hence Member Organizations) that are interested in international food standards and that have notified the Director-General of FAO or WHO of their desire to be considered as Members. However, I would point out that the exercise of rights of membership may involve changes in the Rules of Procedure and working methods of such joint bodies. Thus my opinion would be without prejudice to whatever procedural decisions may be required by the relevant intergovernmental bodies.”<sup>3</sup>*

### **(ii) The sui generis nature of the EU’s participation in FAO meetings**

7. As reflected in Articles II.8<sup>4</sup> and II.9<sup>5</sup> of the FAO Constitution, the membership of the EU in FAO is based on the principle of the alternative exercise of membership rights with its Member States that are Member Nations of FAO in the areas of their respective competences. The EU’s membership rights include the right to participate in matters within the EU’s competence in any meeting of FAO, including any meeting of the Council or other body in which any of the EU Member States are entitled to participate.
8. However, pursuant to Article II.9 of the FAO Constitution, there are exceptions to this rule. The EU is not eligible for election or designation to bodies of restrictive membership, referred to below, nor can it participate in voting for elective places. The EU does not attend Conference committees dealing with the internal work of the Conference, such as the Credentials Committee and the General Committee.<sup>6</sup> Further, the EU does not participate in bodies of restricted membership where representatives of Members are nominated based on their individual qualifications, i.e. the three Council committees dealing with institutional matters (the Programme Committee, the Finance

<sup>3</sup> <https://www.fao.org/3/t0482e/T0482E16.htm#16>

<sup>4</sup> **Article II.8** of the FAO Constitution: “A Member Organization shall exercise membership rights on an alternative basis with its Member States that are Member Nations of the Organization in the areas of their respective competences and in accordance with rules set down by the Conference”.

<sup>5</sup> **Article II.9** of the FAO Constitution: “Except as otherwise provided in this Article, a Member Organization shall have the right to participate in matters within its competence in any meeting of the Organization, including any meeting of the Council or other body, other than bodies of restricted membership referred to below, in which any of its Member States are entitled to participate. A Member Organization shall not be eligible for election or designation to any such body, nor shall it be eligible for election or designation to any body established jointly with other organizations. A Member Organization shall not have the right to participate in bodies of restricted membership specified in the rules adopted by the Conference”.

<sup>6</sup> **Rule XLIII.2** of the GROs: “Member Organizations shall not participate in the Credentials Committee or the General Committee or any other body of the Conference dealing with the internal working of the Conference as the Conference may decide”.

Committee and the Committee on Constitutional and Legal Matters).<sup>7</sup> Nonetheless, a practice has developed over the years where the EU may be present at these meetings as observer and articulate its position on matters within its competence through the delegation holding the rotating Presidency of the Council of the EU, subject to the rules of procedure of the body concerned. Also, as the EU does not contribute to the budget of the Organization<sup>8</sup>, it does not participate in any of the financial decision-making.<sup>9</sup>

9. As regards the EU's participation in the Council, the Committee on Constitutional and Legal Matters (CCLM) reviewed the matter at its 68th Session in 1993 and stressed that there was "*a distinct difference between the legal basis on which Member Nations on the one hand, and Member Organizations on the other hand, may be entitled to participate in meetings of the Council*". The CCLM considered that "*this difference in legal status*" reflected the "*sui generis nature of Member Organizations' rights to be present, participate and exercise membership rights in Council meetings*". The Council endorsed the CCLM's views at its 103rd session.<sup>10</sup> In practice, this is understood to mean that the EU is entitled to attend Council sessions even when the matter under discussion is not within the EU's exclusive competence, although it does not "participate" in the sense reflected in Article II.9 of the FAO Constitution.
10. Finally, the EU participates in meetings of other FAO Governing Bodies and their subsidiary bodies, such as the Committee on Fisheries (COFI), the Committee on Agriculture (COAG), the Committee on Commodity Problems (CCP), and the Committee on Forestry (COFO). The EU also participates in the sessions of the FAO Regional Conference for Europe and the Committee on World Food Security (CFS). As such, the EU contributes to discussions within those bodies.

**(iii) The EU's membership in Codex and its participation in Codex sessions**

11. In 2003, the EU became a member of the Codex Alimentarius Commission,<sup>11</sup> following the adoption by the Commission, at its 26th Session in July 2003, of amendments to the Codex Rules of Procedure allowing for the admission of regional economic integration organizations in the membership of the Commission.<sup>12</sup>
12. Rule II of the revised Codex Rules of Procedure mirrors the wording of Article II of the FAO Constitution, providing as follows:

*"1. A Member Organization shall exercise membership rights on an alternative basis with its Member States that are Members of the Commission in the areas of their respective competence.*

*2. A Member Organization shall have the right to participate in matters within its competence in any meetings of the Commission or its subsidiary bodies in which any of its Member States is entitled to participate. This is without prejudice to the possibility for the Member States to develop or support the position of the Member Organization in areas within its competence.*

<sup>7</sup> **Rule XLVI** of the GROs: "*Member Organizations shall not participate in the Programme Committee, the Finance Committee and the Committee on Constitutional and Legal Matters*".

<sup>8</sup> **Article XVIII (2)** of the FAO Constitution: "*Each Member Nation and Associate Member undertakes to contribute annually to the Organization its share of the budget, as apportioned by the Conference (...)*".

**Article XVIII (6)** of the FAO Constitution: "*A Member Organization shall not be required to contribute to the budget as specified in paragraph 2 of this Article, but shall pay to the Organization a sum to be determined by the Conference to cover administrative and other expenses arising out of its membership in the Organization. A Member Organization shall not vote on the budget*".

<sup>9</sup> **Article XVIII.5** of the FAO Constitution: "*Decisions on the level of the budget shall be taken by a two-thirds majority of the votes cast*".

<sup>10</sup> <https://www.fao.org/3/t0810e/T0810E06.htm#6.5>, paragraphs 237-242 refer, "*the Council noted the conclusion of the CCLM that there was thus a distinct difference between the legal basis on which Member Nations on the one hand, and Member Organizations on the other hand, may be entitled to participate in meetings of the Council. Member Nations may participate if they are elected to membership of the Council under the provisions of Article V. 1 of the Constitution. Member Organizations, on the other hand, were expressly declared ineligible for election to any body of restricted membership by the terms of Article 11.9. Their rights to participate in Council meetings derived then, not from Article V.1, but rather from Article II.9 (...)* It appeared that this difference in legal status was well reflected in the provisional seating arrangements presently in force, which clearly reflected the sui generis nature of Member Organizations' rights to be present, participate and exercise membership rights in Council meetings (...)"

<sup>11</sup> **Rule I (3)** of the Codex Rules of Procedure: "*Membership shall also comprise regional economic integration organizations members of either FAO or WHO that notify the Director-General of FAO or WHO of their desire to be considered Members of the Commission*".

<sup>12</sup> ALINORM 03/41, par. 19-24.

3. A Member Organization may exercise on matters within its competence, in any meetings of the Commission or any subsidiary body of the Commission in which it is entitled to participate in accordance with paragraph 2, a number of votes equal to the number of its Member States which are entitled to vote in such meetings and present at the time the vote is taken. Whenever a Member Organization exercises its right to vote, its Member States shall not exercise theirs, and conversely.

4. A Member Organization shall not be eligible for election or designation, nor to hold office in the Commission or any subsidiary body. A Member Organization shall not participate in voting for any elective places in the Commission and its subsidiary bodies.

[...]"

13. However, while Article II.9 of the FAO Constitution specifically provides that “a Member Organization shall have the right to participate in matters within its competence in any meeting of the Organization, including any meeting of the Council or other body” (emphasis added), Rule II (2) of the Codex Rules of Procedure only refers to the right of a Member Organization to “participate in matters within its competence in any meetings of the Commission or its subsidiary bodies in which any of its Member States is entitled to participate”, without any reference to the Executive Committee of the Codex Alimentarius Commission (CCEXEC). There appears to be a gap in the Codex Rules of Procedure, which do not appear to address the right of Member Organizations to participate in CCEXEC, bearing in mind that the definition of subsidiary bodies under Rule XI (1) does not seem to include the Executive Committee.<sup>13</sup>
14. It is noted that the participation of the EU in CCEXEC was the subject of lengthy discussions at the time of the review of the amendments to the Codex Rules of Procedure.
15. In particular, at its 17th Session in April 2002, the Codex Committee on General Principles (CCGP) discussed the issue of the membership of regional economic integration organizations in the Codex Alimentarius Commission and noted that “the question of [their] participation in the Executive Committee (...) was raised by several Delegations”. In this respect, the CCGP advised that it “was informed that the same principle of alternative exercise of membership rights would apply when the Member of the Executive Committee elected by the Commission was a member state of a Regional Economic Integration Organization”.<sup>14</sup> The Committee explained that: “[i]n this case, the Regional Economic Integration Organization would exercise the membership rights of the elected Member when matters before the Executive Committee were those in which the Regional Economic Integration Organization had competence. When the elected Member was not a Member of a Regional Economic Integration Organization, the question of alternative exercise of membership rights did not arise. However, the Committee considered “that it would be premature to submit the proposed draft amendments [to the Codex Rules of Procedure] to the Commission for adoption and agreed to consider the matter at its next session in the light of the advice to be provided by the FAO Committee on Constitutional and Legal Matters”.<sup>15</sup>
16. At its 74th Session in October 2002, the CCLM was requested to examine the specific questions discussed at CCGP17 during the review of the amendments to the Codex Rules of Procedure, including the issue of the participation of Member Organizations in CCEXEC. On that occasion, the CCLM questioned whether the “Executive Committee should be equated more with the committees of restricted membership of the Council of FAO (...) or bodies dealing with the internal working of the FAO Conference (...) or, instead, whether it should be equated more with the Council of FAO itself, which deals with both institutional and technical matters”.<sup>16</sup> The CCLM concluded that “it was essential to consider the functions and activities of the Executive Committee of the Codex Alimentarius Commission” and that, given that such an exercise “was not, in itself, an issue primarily of a legal nature”, it should be “carried out by the Codex Committee on General Principles and ultimately the Codex Alimentarius Commission.” Nonetheless, the CCLM considered that:

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<sup>13</sup> **Rule XI (1)** of the Codex Rules of Procedure: “The Commission may establish the following types of subsidiary bodies: (a) subsidiary bodies which it deems necessary for the accomplishment of its work in the finalization of draft standards; (b) subsidiary bodies in the form of: (i) Codex Committees for the preparation of draft standards for submission to the Commission, whether intended for worldwide use, for a given region or for a group of countries specifically enumerated by the Commission. (ii) Coordinating Committees for regions or groups of countries which shall exercise general coordination in the preparation of standards relating to such regions or groups of countries and such other functions as may be entrusted to them”.

<sup>14</sup> ALINORM 03/33, par. 114.

<sup>15</sup> ALINORM 03/33, par. 120.

<sup>16</sup> CL 123/16, par. 18.

*“in the event that it should be decided that the Executive Committee should be equated more with the FAO Council and, consequently, that the Member Organization should be able to participate in the Executive Committee, the Member Organization would exercise membership rights on an alternative basis with the Member elected from the relevant region. In the case of the European Community, in the event that the Member from Europe should be a State other than a Member of the European Community, the Community would not participate in the Executive Committee.”<sup>17</sup>*

17. Subsequently, at the 18th Session of the CCGP in April 2003, the membership in the Codex Alimentarius Commission of regional economic integration organizations was again discussed. The FAO Legal Representative, speaking on behalf of FAO and WHO Legal Offices, recalled that, at its 74th Session, the CCLM had noted that the *“question of participation of the Member Organization in the Executive Committee depended on the nature and functions of the latter and, as such, should be dealt with by the Codex Committee on General Principles and ultimately by the Commission”*. As reflected in the report of CCGP18, it is on that occasion that the Observer from the European Community (now EU) stated that:

*“[s]ince the previous discussions on this subject, new legislation had entered into force in the European Union that required the European Community to take into account the international food standards of Codex when introducing new or harmonizing existing food legislation. Also, in accordance with its obligations under the SPS and TBT Agreements concerning the participation of Members of the WTO in the international standards-setting bodies, the European Community that is a member of WTO was looking forward to meeting these obligations as a Member of the Codex Alimentarius Commission”*.<sup>18</sup>

18. The Observer from the European Community then submitted to the CCGP the following Declaration concerning its participation in the Executive Committee:

*Although the Committee on Constitutional and Legal Matters of the FAO considered that the participation of a Member Organization in the Executive Committee depended on the functions and activities of this Committee, the European Community declares formally that it gives up in every case the possibility of taking part in the proceeding of the Executive Committee when a Member State of the European Community is elected for the Region of Europe and that an agenda item would be of European Community competence. (emphasis added)<sup>19</sup>*

19. Following the Declaration, the CCGP did not address the question as to whether CCEXEC could be qualified as a committee of restricted membership, as was suggested by the CCLM at its 74th Session. It is also noted that the Codex Alimentarius Commission did not express any view on the 2003 Declaration from the European Community.
20. As concerns the substance of the Declaration, it would seem to address only those situations when (i) a Member State of the EU represents the region of Europe and (ii) the agenda item is a matter of EU competence.
21. As concerns the first point, the observer from the European Community in fact confirmed at CCGP18 that the matter referred to in the Declaration would not arise if a non-Member State of the European Union was elected to the Executive Committee.<sup>20</sup> This is in line with the considerations of the CCLM at its 74th Session that the EU would not be entitled to participate in the Executive Committee if the representative for Europe is not a Member State of the EU.
22. With respect to the second point concerning the EU competence, Rule II (5), (6) and (7) of the Codex Rules of Procedure govern the terms on which a Member Organization must indicate its competence –and that of its Member States – with respect to each agenda item of a Codex body.<sup>21</sup> It is noted that, at the time of its accession

<sup>17</sup> CL 123/16, par. 20.

<sup>18</sup> ALINORM 03/33A, par. 75.

<sup>19</sup> ALINORM 03/33A, par. 76.

<sup>20</sup> ALINORM 03/33A, par. 77.

<sup>21</sup> **Rule II (5)** of the Codex Rules of Procedure: *“Before any meeting of the Commission or a subsidiary body of the Commission in which a Member Organization is entitled to participate, the Member Organization or its Member States shall indicate in writing which, as between the Member Organization and its Member States, has competence in respect of any specific question to be considered in the meeting and which, as between the Member Organization and its Member States, shall exercise the right to vote in respect of each particular agenda item. Nothing in this paragraph shall prevent a Member Organization or its Member States from making a single declaration in the Commission and each subsidiary body in which a Member Organization is entitled to participate for the purposes of this paragraph, which declaration shall remain in force for questions and agenda items*



to the Codex Alimentarius Commission, the EU submitted a single declaration regarding the distribution of competence with its Member States in respect of matters dealt with by the Commission, in line with Rule II (5) of the Codex Rules of Procedure. This Declaration was stated to apply “to all meetings of the Codex Alimentarius Commission and any of its subsidiary bodies, unless the European Community decides or another Codex Alimentarius member requests in respect of any particular agenda item before the meeting to make a specific statement.”<sup>22</sup> It has been the practice of the EU to submit a declaration of competence prior to each session of the Commission, in line with Rule II (5) of the Codex Rules of Procedure.

23. As regards the Executive Committee, since its 2003 Declaration, the EU has not participated as a Member in CCEXEC sessions and no declaration of competence have been submitted prior to sessions of CCEXEC. However, individuals employed at the European Commission have occasionally attended sessions of CCEXEC as advisers to the Member for Europe, as reflected below.

**(iv) Attendance of personnel from the European Commission (EC) as advisers to the Member of Europe in CCEXEC sessions**

24. In 2012, 2013 and 2014, the elected Member for Europe was accompanied by an adviser who was employed by the EC. The records of the relevant CCEXEC meetings do not show any objection to this participation by other Members.<sup>23</sup> However, in 2020 and 2021, the elected Member for Europe, Germany, was accompanied by a staff member of the EC and objections were raised by the Member for North America on these occasions.<sup>24</sup>
25. At the 78th Session of CCEXEC in February 2020, the Member for North America expressed the view that the EC Declaration “was a commitment and condition of EU membership in Codex Alimentarius and that FAO rules did not permit a member organization to participate in committees with restricted membership”. She further considered “that there was no declaration of division of competence in CCEXEC as specified in the [Codex Procedural Manual], which made it impossible for members to know if EU participation was consistent with the declaration presented at CCGP18”.<sup>25</sup> Similar concerns were raised at the subsequent session of CCEXEC in July 2020.<sup>26</sup>
26. The Member for Europe indicated at the 78th Session of CCEXEC that “all items on the agenda of this meeting were of EU Member State competence.” He also stated “that they had chosen their advisors in good faith not to represent countries or organizations, but to advise them in the interest of the Codex Alimentarius Commission as a whole; that the Procedural Manual (PM) did not provide any specific rule on the participation of advisors in the Executive Committee and that at previous sessions of CCEXEC (in 2012, 2013 and 2014) a staff member of the EU had participated as an advisor to a previous Member for Europe (France)”.<sup>27</sup> At the 79th Session of CCEXEC, the Member for Europe reiterated that “there was no issue of division of competence as he was participating as the geographical member with the mandate to act in the interests of the Commission as a whole”. He also stated that “the Member had selected his advisors on the basis of the information available, and in accordance with the rules applying to the selection of individuals as advisors, who were selected based on their expertise and not according to their country or employer”.<sup>28</sup>

**Relevant rules and practices**

**(i) The composition of delegations**

to be considered at all subsequent meetings, subject to such exceptions or modifications as may be indicated before any individual meeting”.

**Rule II (6)** of the Codex Rules of Procedure: “Any Member of the Commission may request a Member Organization or its Member States to provide information as to which, as between the Member Organization and its Member States, has competence in respect of any specific question. The Member Organization or the Member States concerned shall provide this information on such request”.

**Rule II (7)** of the Codex Rules of Procedure: “In cases where an agenda item covers both matters in respect of which competence has been transferred to the Member Organization and matters which lie within the competence of its Member States, both the Member Organization and its Member States may participate in the discussions. In such cases the meeting, in arriving at its decisions, shall take into account only the intervention of the party which has the right to vote”.

<sup>22</sup> Single Declaration by the European Community on the exercise of competence according to Rule VI of the Rules of Procedure of the Codex Alimentarius Commission: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003D0822> .

<sup>23</sup> REP12/EXEC2; REP 14/EXEC; REP13/EXEC.

<sup>24</sup> REP20/EXEC2, par. 3-9; REP21/EXEC1 par. 5.

<sup>25</sup> REP20/EXEC1, par. 4.

<sup>26</sup> REP20/EXEC2, par. 3.

<sup>27</sup> REP20/EXEC1, par. 5-6.

<sup>28</sup> REP20/EXEC2, par. 4.

27. In FAO, the composition of delegations is a matter of sovereignty, i.e. it is the prerogative of each Member to decide on the composition of its delegation. Rule III.1 of the GROs provides that the “*term ‘delegation’ means all the persons appointed by a Member Nation or Associate Member to attend a session of the Conference, that is to say, its delegates and his alternates, associates and advisers*”. Similarly, Article V.1 of the FAO Constitution specifies that “[e]ach Member of the Council may appoint alternates, associates and advisers to its representatives”.
28. A similar provision is enshrined in Rule VI (4) of the Codex Rules of Procedure, providing that “[e]ach Member of the Commission shall have one representative, who may be accompanied by one or more alternates and advisers”.
29. It is noted that at its 18th Session in 1989, the Commission welcomed the advice of the CCGP, at its 9th Session, with respect to the composition of the Executive Committee, noting that the “*practices of the CCEXEC had evolved, especially over recent years, such that its members which were the Representatives of geographical regions were more frequently accompanied by advisors at the Executive Committee’s session*”. In this respect, the Commission adopted the following recommendation of the CCGP on the composition of the Executive Committee:
- (i) “*Except for the Chairman and the three Vice-Chairmen, the six further members of the Executive Committee elected by the Commission to represent the geographic locations are countries not individuals.*
  - (ii) *The delegate of a Member may be accompanied by not more than two advisors from the same geographic location.*
  - (iii) *Regional Coordinators shall be invited to attend meetings of the Executive Committee as observers.*
  - (iv) *Only members or, with the permission of the Chairman, observers, may take part in the discussions”* (emphasis added).<sup>29</sup>
30. Accordingly, both in FAO and in Codex, the advisers accompanying the representative of a Member form part of the delegation of that Member. In the case of Codex, the sovereign right of a Member to choose its advisers is subject to two conditions, i.e. that they be from the same geographic location and be no more than two.

**(ii) The role of advisers**

31. The core functions of advisers are to advise the Member’s representative and attend the session as part of that Member’s delegation only. As a result, the right of advisers to speak in Codex sessions is not automatic, but must be granted by the Chairperson. Rule VI (5) of the Codex Rules of Procedure states in that regard that “*upon the request of the representative or any alternate so designated, the Chairperson may allow an adviser to speak on any particular point*”.
32. Furthermore, advisers cannot vote unless they replace the Member’s representative. Article V.1 of the FAO Constitution provides that the “*Council may determine the conditions for the participation of alternates, associates and advisers in its proceedings, but any such participation shall be without the right to vote, except in the case of an alternate, associate or adviser participating in the place of a representative*”. A similar provision is included under Rule VIII (1) of the Codex Rules of Procedure, stating that “[a]n alternate or adviser shall not have the right to vote except where substituting for the representative”.
33. It derives from the above that any adviser is present at a session as part of the Member’s delegation, without any other status or rights.

**(iii) The participation of the EU in sessions of CCEXEC**

34. In view of the legal framework governing the composition of delegations and the related role of advisers as outlined above, the presence of an employee of the European Commission as adviser to the Member for Europe at CCEXEC would not amount *stricto sensu* to participation of the EU in a meeting within the meaning of Rule II (2) of the Codex Rules of Procedure. However, it is apparent that some Members perceive a lack of clarity as to the distinction between this presence and the broader question of the EU’s entitlement to participate in CCEXEC sessions.
35. In this regard, it is recalled that:

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<sup>29</sup> ALINORM89/40, par. 183.

- Rule V (1) of the Codex Rules of Procedure provides that the Executive Committee shall include “*seven (...) Members elected by the Commission at regular sessions from among the Members of the Commission, one each coming from the following geographic locations: Africa, Asia, Europe, Latin America and the Caribbean, Near East, North America, South-West Pacific*” and that “[n]ot more than one delegate from any one country shall be a member of the Executive Committee (...)” (emphasis added).
  - Rule II (2) of the Codex Rules of Procedure provides that “*Member Organizations shall have the right to participate in matters within its competence in any meetings of the Commission or its subsidiary bodies in which any of its Member States is entitled to participate*”, without any reference to the Executive Committee.
  - The EU submitted its Declaration in 2003 by which it “*g[ave] up in every case the possibility of taking part in the proceeding of the Executive Committee when a Member State of the European Community is elected for the Region of Europe and that an agenda item would be of European Community competence*”.
36. Moreover, it must be recalled that, as reflected in paragraphs 7 to 10, the EU’s participation in sessions of FAO bodies is a complex matter as it is not only governed by the rules of the Organization but also the practice that has developed over time, on the basis of guidance from FAO Governing Bodies. In the case of Codex, the question of the participation of the EU in sessions of CCEXEC touches upon several aspects, such as the *sui generis* nature of the EU’s participation in FAO meetings (i.e. the distinction between the EU’s right to be present at meetings or participate and exercise membership rights), the apparent gap in the rules with respect to the right of Member Organizations to participate in CCEXEC, the CCLM’s recommendations at its 74th Session, the voluntary Declaration of the EU in 2003, as well as the fact that the Declaration has not been formally addressed or recognized by the Codex Alimentarius Commission.

### **Conclusion**

37. For the reasons set out in this document, the FAO/WHO Legal Offices consider that the matter currently under discussion raises two different issues, i.e. whether the personnel of the European Commission can attend CCEXEC as part of the delegation of the Region of Europe and whether the European Union can participate in CCEXEC in its own name. These two issues are both ultimately for deliberation by the membership of the Commission.

### **Proposed actions by the Commission**

38. Accordingly, the Commission is invited to review the present document and discuss the matter, as appropriate.