European Ombudsman

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European Ombudsman

Recommendation

of the European Ombudsman in case OI/2/2017/TE on the **Transparency of the Council legislative process**

Made in accordance with Article 3(6) of the Statute of the European Ombudsman[1]

EU citizens have a treaty-based right to participate in the democratic life of the Union. Citizens cannot properly exercise this right unless the EU legislative process is sufficiently open to allow citizens to participate and also to hold their elected representatives accountable.

Increased accountability regarding the positions taken by national governments on EU legislation may ***reduce the 'blame Brussels' culture*** *for decisions ultimately agreed by national governments themselves.*

In the past, this 'blame Brussels' phenomenon, which misrepresents the reality of how EU legislation is agreed, has raised concerns about the democratic legitimacy of the Union. This in turn helps to promote Euroscepticism and anti-EU sentiment.

Making the positions of the Member States publicly known, in a timely and accessible manner, can help reduce citizen alienation from the EU institutions. It may also help clarify that the decisions on legislation taken at EU level are ultimately taken by elected representatives and not by so-called 'faceless bureaucrats'.

Citizens should be empowered to exercise their right to participate in the democratic process and seek to influence decisions on new legislation. At election time, whether for the national parliament or for the European

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

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Parliament, then citizens will also have the opportunity to hold their elected representatives accountable. This is the ***intent of a representative democracy****.*

The Ombudsman opened an inquiry in March 2017, put specific questions to the Council, launched a public consultation, inspected Council files and today makes recommendations on how to improve the transparency of the Council's legislative process.

She has found that the current practice of the Council constitutes maladministration.

Background

1. The Council of the European Union (the "Council"), together with the European Parliament, adopt EU laws. **They are equal legislators under the EU Treaties (for the ordinary legislative procedure).** Before the national Ministers meeting in the Council reach a formal position on a draft law, preparatory discussions take place at ambassador-level, in the Council's Committee of Permanent Representatives ('Coreper')[2], and in the over 150 Council preparatory bodies attended by national civil servants[3]. These preparatory bodies can have a decisive influence on the text eventually approved by the Ministers in the Council. The discussions in all these preparatory bodies are therefore a crucial part of the EU's law-making process.

[2] The 'Committee of the Permanent Representatives of the Governments of the Member States to the European Union' is made up of Permanent Representatives (Coreper II) or Deputy Permanent Representatives (Coreper I) of the 28 Member States.
[3] The list of preparatory bodies is available at: http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/

2. Under EU Treaties, every citizen has the right to participate in the democratic life of the Union and EU decisions must be taken as openly as possible and as closely as possible to the citizen[4]. The treaties specifically require the Council to meet in public *"when considering and voting on a draft legislative act"*[5].

3. The importance of legislative transparency is also anchored in the EU's law on public access to documents[6]. These rules state that "*legislative documents*" must be directly accessible to the public.

4. Aware of concern about a perceived lack of accountability and consequent lack of opportunity for citizens' participation in the legislative activities of the Council, the Ombudsman decided to inquire into the matter on her own initiative via a 'strategic inquiry'.

The strategic inquiry

5. As a first step in her inquiry, the Ombudsman put 14 specific questions to the Council. The Council replied on 26 July 2017[7]. The Ombudsman then launched a **public consultation** inviting citizens, national parliaments, academics and civil society to put forward their views on the issues raised in the strategic inquiry. All the contributions expressed concerns, with differing nuances and emphases, regarding the accountability and transparency of legislative discussions in the various Council preparatory bodies[8].

6. The Ombudsman then inspected[9] three Council files which had been completed in 2016 - the files concerning the enactment of the Data Protection Regulation[10], the Decision on tackling undeclared work[11] and the Directive on the accessibility of websites and mobile applications of public sector bodies[12] - in order to get an insight into the practices of the General Secretariat of the Council (GSC) in producing, circulating and publishing documents tabled in meetings of Council preparatory bodies.

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[4] Articles 1 and 10(3) of the Treaty on European Union.
[5] Article 15(2) of the Treaty on the Functioning of the EU (TFEU).
[6] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43 (Regulation 1049/2001).
[7] The Council's reply can be found here: https://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/83029/html.bookmark
[8] The Ombudsman received 22 submissions to the public consultation, which can be found here: https://www.ombudsman.europa.eu/en/cases/case.faces/en/49461/html.bookmark
[9] The inspection report can be found here: https://www.ombudsman.europa.eu/en/cases/case.faces/en/49461/html.bookmark
[10] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.
[11] Decision (EU) 2016/344 of the European Parliament and of the Council of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work.
[12] Directive (EU) 2016/2012 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies.

7. The Ombudsman's recommendations take into account the arguments and views put forward by the Council, the results of the inspection, and the feedback from the public consultation.

The Ombudsman's assessment

Preliminary Comments

8. Fundamentally, this inquiry has important implications for the accountability of the Council's legislative process; it is related to the capacity of EU citizens to know, during the process, how any particular legislative process is progressing, to know the various options that are being discussed and which positions are being promoted or opposed by national governments. Ensuring that EU citizens are kept informed on the progress of legislation is not simply something to be desired; rather, it is a legal requirement. This kind of transparency is meant to apply during **the entire legislative process**, and not simply retrospectively after the particular legislative matter has been concluded. This is crucial for citizens to be able to enjoy their treaty-based right to participate in the democratic life of the Union.

9. In the EU, the Council and Parliament are co-legislators who together adopt laws. The directly elected European Parliament already has a high degree of transparency, and thus accountability, when handling legislation. There are, in comparison however, significant deficits regarding the transparency, and thus the accountability, of the Council's legislative work.

For comparison, the typical major steps of the **legislative process in the European Parliament**, and associated standard of transparency, are as follows:

Draft Committee report	Published
Committee debate(s)	Public
Committee amendments	Published
Compromise amendments	Published
Committee roll call votes	Published
Committee report	Published
Plenary amendments	Published
Plenary debate	Public
Plenary roll call votes	Published
Plenary report	Published

10. The relevant documents in this inquiry are those tabled at Council preparatory bodies (working parties and COREPER), dealing with draft laws. All of these documents are "legislative documents" in the sense in which this term is used in the EU's public access to documents law, that is, Regulation 1049/2001. According to this Regulation, "*legislative documents*" are "*documents drawn up or received in the course of procedures for the adoption of acts which are*

legally binding in or for the Member States"[13]. Regulation 1049/2001 requires that these legislative documents be made directly accessible to the public "*in electronic form or through a register*". This requirement is qualified by the provisions within Regulation 1049/2001 for certain exceptions to the right of public access to documents[14]. However, only rarely will any one of these exceptions apply to legislative documents, given the clear public interest in disclosing such documents so that citizens can effectively exercise their right to scrutinise the law-making process[15].

11. The current situation is that legislative documents of the Council are not, to any significant extent, being made directly and proactively accessible to the public while the process is ongoing. For the most part, it is not possible at present for EU citizens to keep themselves informed, in real time, on legislative matters being dealt with by the Council. Individual requests for public access to legislative documents of the Council are, in general, dealt with in accordance with the provisions of Regulation 1049/2001. But because of shortcomings in how the Council publicly registers these documents, the public is not generally in a position to know, in real time, which documents actually exist. Citizens cannot request public access to a document if they do not know that it exists. The Ombudsman is aware that the Council has made significant progress in enhancing its internal document management procedures. However, the more fundamental issue is the commitment of the Council to ensuring transparency and thus accountability in its role as an EU legislator.

Documenting the work of Preparatory Bodies

12. In November 2016, the Council introduced a new IT system for recording and distributing documents submitted to Council meetings, including meetings of preparatory bodies. The new system ensures that **all documents** submitted to the Council's preparatory bodies are now systematically registered. This includes, for example, Member States' written comments that the GSC receives via email and documents drafted during meetings of preparatory bodies (these are incorporated into post-meeting documents and registered in the IT system). The Ombudsman welcomes the introduction of this new comprehensive recording system. She recognises that it has the potential to contribute substantially to the transparency of legislative discussions.

13. In the course of this inquiry, the Ombudsman found however inconsistencies within the Council regarding the documentation generated by the different preparatory bodies. There are inconsistencies regarding the **extent** to which the work of the preparatory bodies is recorded, diverging practices regarding the **manner** in which activities are recorded, as well as some **documentation gaps** (see Annex 1). Clearly, it is important that the Council

[13] Article 12(2) of Regulation 1049/2001.
[14] Article 4 of Regulation 1049/2001.
[15] According to the Court of Justice, the interests protected by Article 4 of Regulation 1049/2001 must be weighed against the public interest, which is "*clearly of particular relevance where the Council is acting in its legislative capacity*", Case C-280/11 P *Council v. Access Info Europe* [2013] para. 33.

should have a comprehensive and generally consistent approach to the creation of documents generated in the course of the legislative work of its preparatory bodies. Such an approach is essential in order to facilitate citizens wishing to track the progress of any particular legislative proposal. Diverging practices, which are not justified by an objective need, risk creating unnecessary confusion for those citizens seeking to follow and understand a legislative procedure in detail. The Ombudsman therefore suggests that the Council should adopt guidelines concerning the types of documents that preparatory bodies produce in the context of legislative procedures and the information to be included in those documents.

Recording and Disclosing Member States' positions

14. There are different practices regarding the recording of Member States' positions in documents drafted and circulated within Council preparatory bodies. The inspection of the three legislative files showed that, in only some cases, the identities of Member States which take a view on a file are systematically recorded. In other cases, Member States are not identified as supporting any particular position and, instead, there are vague references to unidentified "*delegations*".

15. In its reply to the Ombudsman, the Council said that this question was discussed by Coreper in May 2014 after the Council lost an important Court case[16] concerning the release of Member States' **recorded positions**. Coreper concluded that there was no legal obligation to record and identify the positions of individual Member States. Coreper agreed that Member States would be identified if deemed **'appropriate'**. It stated that this depended on:

- "coherence with respect to the practice in a specific file and subject-matter";
- "impact on the efficiency of the Council's decision-making and the Member States' negotiating flexibility";
- "the particular need for Member States to keep track of the evolution of the negotiations";
- "other considerations linked to the specific nature of the file or subject-matter, notably its sensitive character"[17].

16. The Ombudsman is aware of the sensitivity of some national governments regarding the positions they adopt, or do not adopt, in the course of the Council's legislative work. Some Member State governments may be reluctant to have their positions disclosed **in advance** of a formal vote on, or the eventual adoption of, a particular legislative proposal. The Council's Secretariat, in turn, may feel inhibited in the extent to which it can make legislative documents proactively and directly accessible to the public. In fact, under the Council's

[16] Case C-280/11 P *Council v. Access Info Europe* [2013].
[17] GSC, Evaluation of the impact of the Court ruling in case C-280/11 P (*Council v. Access Info Europe*), 8863/16, 18 May 2016, p. 3.

rules of procedures, the GSC cannot **proactively** make available documents which "*reflect individual positions of delegations*"[18] **while discussions are ongoing**. In addition, even after the enactment of the particular piece of legislation, a Member State may request that documents reflecting its individual position are not made directly accessible to the public[19].

17. The Court of Justice considered, however, that the Council was wrong to refuse public access to parts of a note from the GSC to the Working Party on Information that contained proposals for amendments tabled by a number of Member States. The Court clarified that the EU's rules on access to documents "*aim to ensure public access to the entire content of Council documents, including, in this case, the identity of those who put forward proposals*"[20]. The Ombudsman welcomes the Council's confirmation that, as a consequence of the Court's ruling, legislative documents containing Member States' positions are now disclosed **upon request**, "*save in exceptional and duly justified cases*". The Ombudsman suggests that the Council update its rules of procedure to reflect this practice[21]. However, this will not deal with the wider issue of the obligation to make these documents directly and proactively available during the legislative process. Of course this commitment means little, if Member States' positions are not even recorded appropriately in the first place.

18. It is important to note that Member State representatives involved in legislative work are **EU legislators and should be accountable as such**. Democratic accountability demands that the public should know which national government took which position in the process of adopting EU legislation. Without this "*minimum and essential item of evidence*"[22], **citizens will never be able to scrutinise how their national representatives have acted**. It is also important for **national parliaments**, in their task of overseeing their own governments' actions, to be able to know the positions taken by their own government.

19. Importantly, **for the legitimacy of EU law and the EU, more transparency regarding Member States' positions is likely to reduce the temptation to 'blame Brussels'** for decisions ultimately taken by national governments themselves. In the past, this "blame Brussels" phenomenon, which misrepresents the reality of how EU legislation is agreed, has encouraged Eurosceptic and anti-EU sentiments. Ensuring that the positions of the Member States are made known, in time, may help reduce citizen alienation from the EU institutions. Many contributions to the public consultation strongly emphasised the importance of knowing individual Member States' positions during negotiations.

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[18] Article 11(4)b, Annex II, Council rules of procedure.
[19] Article 11(6), Annex II, Council rules of procedure.
[20] Case C-280/11 P *Council v. Access Info Europe* [2013] para. 40.
[21] The 2016 Dutch Presidency of the Council suggested that "*the Rules of Procedure of the Council, specifically Article 11 of Annex II regarding public access to Council documents, are not fully in line with recent case-law. Although in practice the Council seems to comply fully with the Access Info Ruling, the presidency takes the view that the implementing provisions laid down in Article 11 of Annex II to the Rules of Procedure ought to be adapted to the recent case-law of the EU Courts*", see GSC, Working Party on Information 19 May 2016, 9536/16, 26 May 2016, p. 3.
[22] See Opinion of AG Cruz Villalón in Case C-280/11 P *Council v. Access Info Europe*, para. 61.

20. There may be a reluctance by some Member States to disclose that they have moved position in the course of a particular legislative process. However, being willing to change position, and achieve a compromise, is a central part of democratic decision-making. Explaining these changes in positions, and the resulting compromises, to the public is arguably a crucial element of accountability. In the words of the General Court, "[*i*]*f citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information. The identification of the Member State delegations which submit proposals at the stage of the initial discussions does not appear liable to prevent those delegations from being able to take those discussions into consideration so as to present new proposals if their initial proposals no longer reflect their positions. By its nature, a proposal is designed to be discussed, whether it be anonymous or not, not to remain unchanged following that discussion if the identity of its author is known. Public opinion is perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently*"[23].

21. Given the significance for citizens of knowing Member States' positions, the Ombudsman takes the view that the current administrative practice of the Council's General Secretariat, not to record systematically the positions expressed by Member States in discussions within preparatory bodies, constitutes maladministration. **The Ombudsman recommends that the GSC should systematically record those positions**. The documents disclosing the positions of the Member States should, in principle, be made proactively and directly available to the public in a timely manner. Any refusal to release the name of a Member State, which should be rare, needs to be based on the duly reasoned application of an exception listed under Article 4 of Regulation 1049/2001 and be consistent with the case-law.

Accessibility of Preparatory Body Documents

22. There are two specific issues arising here: i) the completeness and accessibility of the Council's public register of documents; and ii) the Council's tool to restrict access to very many legislative documents while decision-making is ongoing, the so-called 'LIMITE' marking.

i. The Council's public register of documents

23. The existence of a public register suggests a certain completeness or comprehensiveness of its contents, that the register will list every type of document the Council produces. Having a complete and accessible public register is **key** to a transparent document trail. In order to allow **citizens** to fully enjoy their **right of access** to documents, all legislative documents produced in working parties and/or circulated to delegations should be listed therein, irrespective of their format and whether they are (fully, partially or not at all) accessible. If they do not appear in the register, the existence of those documents is invisible to the outside world. In addition, in order to enable the

[23] Case T-233/99 *Access Info Europe v. Council of the European Union* [2011], para. 69 (emphasis added).

public actually to access them, the documents must be easy to find on the Council's website. Only a complete and accessible public register gives the public the necessary tool to gain a full picture of deliberations taking place in preparatory bodies.

24. The Ombudsman has found that the Council's public register of documents is **incomplete** and **not very user-friendly**. For example, the current practice of publishing lists of "working documents", which have no separate entry in the register, is unsatisfactory as it hinders citizens from easily finding out, in good time, that such documents exist. Currently, an extensive knowledge of the Council's functioning is required in order to find a specific document. It is cumbersome for the general public to access information on negotiations in preparatory bodies. More information on the Council's public register of documents is contained in Annex 2.

25. The Ombudsman suggests that the Council list all types of documents in its public register, independent of their format and of whether they are fully, partially or not at all accessible. In order to avoid an information overload, this should be done in tandem with improved accessibility to documents via the register.

26. In the context, the Ombudsman believes that it would greatly facilitate access if preparatory documents were organised chronologically on a single webpage for each legislative proposal[24]. The Council has told the Ombudsman that it plans to enhance the visibility and access to documents by providing a link to the Publications Office's 'Legislative Procedure' page and to give access to documents via a calendar of meetings of the Council and its preparatory bodies. The Council added that a reflection is currently ongoing with a view to further simplifying access to documents in the public register. The Ombudsman welcomes these initiatives to improve the accessibility of the public register and encourages the Council further to enhance its user-friendliness and search function in the light of her observations.

27. The Ombudsman considers however that the public is more likely to search the Council's website to find meetings of a particular working party, or details of a particular piece of proposed legislation, than to search all meetings held by the Council on a particular day. The Ombudsman therefore encourages the Council to develop a dedicated and up-to-date webpage for each legislative proposal, **following the example of the Parliament's Legislative Observatory**. In this context, the Ombudsman welcomes the progress made by the Council, the European Parliament and the Commission in setting up the 'joint legislative database'.

[24] In the "Policies" section of its website, the Council has set up dedicated webpages for major legislative packages but they only mention the result of deliberations at Council – sometimes Coreper – level. To have a summary of discussions at preparatory body level, it is necessary to search for the latest progress report in the public register.

ii. The 'LIMITE' marking

28. The Council has a practice of marking most of the documents circulated within preparatory bodies as 'LIMITE'. Recipients of documents which bear this marking are expected to ensure that such documents remain internal to the Council. The Council does not make such documents **directly accessible** to the public on its website[25]. However, the Ombudsman understands that marking a document as 'LIMITE' does not necessarily imply that the particular document will be refused where access is sought under the EU's law on public access to documents.

29. EU law requires that "*legislative documents*" must be made directly accessible to the public[26]. Like the European Parliament, its co-legislator, the Council, should be making its legislative documents[27] proactively available on its website without delay. Only by making these documents directly available, without delay, can the Council ensure that it respects the treaty provisions that *"[e]very citizen shall have the right to participate in the democratic life of the Union. [And that] [d]ecisions shall be taken as openly and as closely as possible to the citizen"*.[28]

30. The GSC is responsible for marking documents 'LIMITE'. The Council explained to the Ombudsman that the GSC marks a document as 'LIMITE' based on a *"prima facie* assessment" of the existence of a risk to one or more of the interests protected by the exceptions to the EU's law on public access to documents[29].

31. The Ombudsman's inspection of the three files showed, however, that documents with an inter-institutional code circulated between the GSC, working parties and Coreper relating to the three legislative acts were generally and systematically marked 'LIMITE'[30]. This suggests that, across the different GSC departments, **there is a certain automatic or default response of marking preparatory level legislative documents as 'LIMITE'**. The Council's rules of procedure seem to encourage the practice of 'erring on the safe side' and of making directly accessible only those documents that are *"clearly not covered"*[31] by any of the exceptions to the EU's law on public access to documents. This arguably turns on its head the legal requirement that there should be the widest possible public access[32] to legislative documents[33].

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[25]The relevant provisions for the handling of 'LIMITE' documents are the Council's rules of procedure and internal guidelines on the "handling of documents internal to the Council", Document n°11336/11.
[26] According to the EU's law on access to documents, legislative documents "*should be made directly accessible to the greatest possible extent*", see Recital 6 of Regulation 1049/2001.
[27] Council legislative documents can be meeting agendas, accompanying papers, reports, outcomes of proceedings, summary records of discussions, compromise texts, notes, etc.
[28] Article 10(3) of the Treaty on European Union.
[29] Articles 4(1) to (3) of Regulation 1049/2001.
[30] With the main exception being those documents that have to be made directly accessible in line with the Council's rules of procedure, see Articles 11(3) and (5), Annex II, Council rules of procedure.
[31] See Article 11(4), Annex II, Council rules of procedure.
[32] For the principle on the widest possible public access, see Joint Cases C-39/05 P and C-52/05 P *Sweden and Turco v. Council* [2008] ECR I-4723, para. 34 and Case C-280/11 P *Council v. Access Info Europe* [2013] para. 27.
[33] A paper from the Dutch COSAC delegation on EU transparency, 'Opening up closed doors: Making the EU more transparent for its citizens', which the Tweede Kamer (Second Chamber) of the Netherlands

32. The Council has told the Ombudsman that any lifting of the 'LIMITE' status, while legislative discussions are ongoing, is in general **request-driven**. A systematic review of the 'LIMITE' status of documents takes place only *after* the final enactment of the legislative act[34]. In complex legislative procedures, documents may thus not be proactively published until several years later[35]. The Ombudsman notes in particular that, in the case of requests for public access to documents relating to on-going legislative procedures in 2015, and marked as 'LIMITE', 84% were released[36]. In the case of the Data Protection Regulation, 310 out of 321 'LIMITE' documents related to the file were made fully accessible upon request while negotiations were still ongoing. This means that **the vast majority of legislative documents were not covered by one of the exceptions to disclosure**[37].

33. The Council has told the Ombudsman that the departments of the GSC have now been encouraged[38] to review the 'LIMITE' status when it ceases to be justified and that *"[t]he GSC is currently conducting a reflection on developing technical tools to make it easier for the originating department to release LIMITE documents in the public domain*". Such technical tools would allow the GSC departments to uncheck the relevant 'LIMITE' box within the new recording system that the Council introduced in November 2016. Currently, it is necessary to issue a *corrigendum* – a correction - in order to lift the 'LIMITE' status, which is a lengthy procedure. The implementation of this system is in the Council's work programme for 2018.

34. The Ombudsman considers that restrictions on access to legislative documents should be both exceptional and limited in duration to what is absolutely necessary, as defined in the EU's law on public access to documents. Accordingly, the Ombudsman believes that the default position regarding Council legislative documents should be that they are to be made directly accessible to the public to the greatest possible extent. The Ombudsman considers that **the current widespread and arbitrary practice, of marking most preparatory documents in ongoing legislative procedures as 'LIMITE', constitutes a disproportionate restriction on citizens' right to the widest possible access to legislative documents**. This constitutes maladministration.

35. The Ombudsman recommends that the Council develop clear and publicly available criteria for the application of the 'LIMITE' status. In effect, the 'LIMITE' status should apply only to those documents which, at the point of assessment, are exempt from disclosure on the basis of one of the exceptions provided for in the EU's law on access to documents. And in order to ensure the widest possible access, the Ombudsman recommends that the Council systematically review the 'LIMITE' status of documents *before* the final adoption of the particular piece of legislation. This review should be undertaken before informal

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submitted as contribution to the Ombudsman's public consultation, argues that "*the Council's handling of documents is in violation of EU law and the European Court of Justice's judgments*".

[34] GSC, Issuing and release of LIMITE documents, 5109/1/17 REV 1, 2017, p. 3.

[35] In the case of the Data Protection Regulation, five years after the Commission's proposal.

[36] https://www.eerstekamer.nl/bijlage/20170217/information_note_of_the_general/document3/f=/vkbtj89ausrl.pdf

[37] As provided in Article 4 of Regulation 1049/2001.

[38] GSC, Issuing and release of LIMITE documents, 5109/1/17 REV 1, 2017, p. 3.

negotiations between Council, European Parliament and Commission start, in so-called 'trilogues', at which point the Council will have already reached an initial position (formally or '*informally*') on the legislative proposal.

36. Finally, the Ombudsman notes that according to its own rules of procedure (Article 9(3)) and attached comments[39], **the Council itself, Coreper or working parties can, and often do, take so-called 'indicative votes'; these are not deemed a 'formal' vote** within the meaning of the Treaties, have no legal effect and are not made public.

Conclusion

37. The Ombudsman's conclusions, are as follows: 1) at a general level, the Ombudsman finds that the Council's present approach to making its legislative documents directly accessible to the public falls short of what is expected of the Council in terms of legislative transparency and that this constitutes maladministration; ii) at a specific level, the Ombudsman finds that the Council's failure systematically to record the identities of Member States that take a position in a legislative procedure, and its disproportionate application of the 'LIMITE' status to documents, constitute maladministration. She therefore makes three corresponding recommendations below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

Recommendations

On the basis of the inquiry into this complaint, the Ombudsman makes the following recommendations to the Council:

The Council should:

1. **Systematically record the identities of Member States expressing positions in preparatory bodies.**

2. **Develop clear and publicly available criteria for the application of the 'LIMITE' status, in line with EU law.**

3. **Systematically review the 'LIMITE' status of documents at an early stage, *before* the final adoption of a legislative act, including before informal negotiations in 'trilogues', at which point in time the Council will have reached an initial position on the proposal.**

[39] Council, Comments on the Council's Rules of Procedure, 2016, p. 54, available here: http://www.consilium.europa.eu/media/29824/qc0415692enn.pdf

The Council will be informed of these recommendations. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Council shall send a detailed opinion by 9 May 2018.

Given the importance of this issue to EU citizens, the Ombudsman would not welcome a request for an extension of this three month timeline.

Suggestions for improvement

The Council should:

1. **Conduct a review of how it meets its legal obligation to make legislative documents directly accessible. This review should be concluded within 12 months of the date of this Recommendation and should lead to the adoption of appropriate new arrangements within a further 12 months.**

2. **Adopt guidelines concerning the types of documents that preparatory bodies should produce in the context of legislative procedures and the information to be included in those documents.**

3. **Update the Council's rules of procedure to reflect the current practice on the disclosure of legislative documents containing Member States' positions, as outlined by the 2016 Dutch Presidency of the Council.**

4. **List all types of documents in its public register, irrespective of their format and whether they are fully accessible, partially accessible or not accessible at all.**

5. **Improve the user-friendliness of the public register of documents and its search function.**

6. **Develop a dedicated and up-to-date webpage for each legislative proposal, following the example of the European Parliament's Legislative Observatory.**

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Strasbourg, 09/02/2018

Annex 1 - Documenting the Work of Council Preparatory Bodies

When opening her inquiry, the Ombudsman noted that there was a certain degree of consistency in the documentation produced in the context of Coreper meetings[40]. However, there seemed to be different practices in other Council preparatory bodies, most notably within working parties, regarding **which documents to produce and the information to be included therein**.

Regarding the **consistency** of documentation generated across the preparatory bodies, the Ombudsman understands that the Council produces various types of documents to record the progress and outcomes of negotiations in preparatory bodies. These can be meeting "agendas", accompanying "papers", "reports", "outcomes of proceedings", "summary records" of discussions, "compromise texts", "notes" to delegations, etc.

The inspection of the three legislative files showed that the drafting practices varied depending on the preparatory body and the responsible department within the GSC. For instance, while the GSC drafted detailed '*outcomes of proceedings*' for some of the meetings of the preparatory body [41] that prepared the Council's position on the draft Decision on tackling undeclared work, no such records exist for meetings of the other two preparatory bodies that discussed the Data Protection Regulation[42] and the Directive on the accessibility of websites and mobile applications of public sector bodies[43]. Similarly, the GSC regularly produced *'notes'* with compilations of written comments by Member States on the draft Data Protection Regulation, but no such '*notes*' exist for the other two legislative acts. These observations were confirmed by several contributions to the Ombudsman's public consultation, which expressed concerns in particular about the absence of minutes for some preparatory bodies.

The Ombudsman acknowledges that a certain degree of flexibility in producing documents is needed to take account of the different types of preparatory bodies and the variety of subjects under discussion in order to make the negotiation process as effective as possible. Different drafting practices should, however, only be justified by the nature of the legislative file and the particularities of the relating preparatory discussions. However, the Council's reply to the Ombudsman acknowledges that the divergence in practices between GSC departments is not just related to the nature of the specific file; the different approaches also stem from different administrative practices.[44]

Annex 2 - Council's Public Register of Documents

The Council maintains an online document register, which is run by the GSC. It contains about 350 000 documents in their original languages. Some of the documents are also available in other sections of the website, such as the section relating to Council meetings, meetings of preparatory bodies or the "Policies" section.

The GSC usually records the progress and outcome of discussions within preparatory bodies in so-called "standard" documents (these are commonly referred to as "ST" documents). These all

[40] Coreper agendas are published before the meetings and summary records are usually published shortly after the meetings.
[41] Working Party on Social Questions.
[42] Working Party on Information Exchange and Data Protection (DAPIX).
[43] Working Party on Telecommunications and Information Society.
[44] Annexed to its reply, the Council enclosed the general conclusions of an evaluation conducted by the GSC during the first half of 2015 concerning the drafting of documents relating to the Council's legislative activities. The study confirmed that drafting practices and the format of documents distributed to delegations during negotiations do vary from one GSC department to another.

bear an individual reference number and the inter-institutional code, which links documents to a specific legislative proposal. Standard documents are listed in the public register by default (although the documents themselves may not be immediately directly accessible to the public).

Until recently, the Council also produced a wide series of other documents[45]. Some of these types of documents are no longer in use. Rather, today, since the introduction of a new IT system, all documents that are not classified as standard documents are referred to as working documents. Working documents may, for instance, contain written comments or questions by Member States on draft laws or "non-papers"[46] on various subjects linked to a specific draft law.

Working documents are not automatically listed in the public register at the time they are drafted. Instead, the GSC publishes quarterly, and for each working party, a "*standard*" document on the public register that contains a list of working documents which have been distributed by the GSC to the specific working party during the relevant time period. Working documents thus have no separate entry in the public register of documents, nor do they bear an inter-institutional code linking them to a specific legislative file.

The Ombudsman also examined how documents and information relating to draft legislation can be found in the Council's public register.

In the case of legislative proposals, the register may contain hundreds of documents spread across various sections of the website. In order to get a full picture of all documentation made available by the Council concerning one piece of legislation - from the Commission's proposal to its adoption by the Council - it is necessary to carry out four different searches in the register for negotiations in preparatory bodies[47] and two searches in other sections of the website for discussions at Council level[48].

The most complete search of the register one can currently run is based on the inter-institutional code of a legislative act. The Ombudsman's inspection showed that such a search does not necessarily display certain key documents related to a draft legislative act, such as contributions of the Council legal service.

The current display of the documentation available also makes it difficult to reproduce chronologically all steps of a negotiation. Several contributions to the Ombudsman's public consultation noted that it was difficult to identify the role, status and place of individual documents in the overall legislative process. The inspection also revealed difficulties in identifying documents in the register based on their title. Overall, an extensive prior knowledge of the Council's functioning may be required in order to find a specific document.

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[45] For example, "*document de séance*" (DS), meeting documents (MD), working documents (WK) or document "*sans numéro*" (SN), see GSC, Understanding the Council's open data datasheets, 2016, p. 14 and 16.

[46] A "non-paper" refers to an informal document tabled during negotiations with the purpose of finding agreement on contentious issues - without necessarily committing the author (which may be the European Commission, the Council's Presidency or individual Member States).

[47] By interinstitutional file code for the list of preparatory documents; by working party/committee name for agendas and possible outcomes of proceedings linked to working parties/committees involved in the discussions; by date in the sections "Agendas" and "Summary records of Coreper" for Coreper discussions; by document number for certain related documents which do not bear an interinstitutional file number (for example Commission Communications).

[48] In the "Meetings" section of the website for Council minutes and additional documents such as agendas, background briefs and minutes and in the "Press" section of the website for streaming of Council public sessions.