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INFORMATION NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Rules governing the handling and conditions for release of LIMITE documents to the public
– Information from the General Secretariat of the Council

BACKGROUND

1. At the Working Party on Information (WPI) meeting held on 12 January 2016, the NL Presidency presented its work programme on transparency and access to Council documents. In this context, the Presidency proposed that an exchange of views be held in the Working Party on Information on the handling of "LIMITE" documents and on the rules governing possible release of such documents to the public.

APPLICABLE RULES

2. In view of this discussion, it is recalled that the relevant provisions and guidelines on the handling of "LIMITE" documents are set out in Annex II to the Council's Rules of Procedure (CRP)¹ and in document 11336/11 setting out guidelines on the "Handling of documents internal to the Council"².

¹ OJ L 325, 11.12.2009, p. 36 - Annex II: Specific provisions regarding public access to Council documents.

² Doc. 11336/11: "I/A" item note from the Antici Group to Coreper/Council on the handling of documents internal to the Council.

3. Documents issued by the GSC with the marking "LIMITE" are internal to the Council, and are therefore not made directly accessible to the public upon circulation. As stated in paragraph 4 of the said guidelines, "LIMITE" is a *distribution marking*, and *not* a classification level within the meaning of the Council's security rules. As a general principle transparency should be ensured where possible³ and Council documents are circulated to delegations as "LIMITE" documents only when their disclosure to the public could harm the protection of one or more of the interests mentioned in Article 4 (1), (2) or (3) of Regulation (EC) 1049/2001⁴.
4. Once marked "LIMITE", these documents may not be distributed to the general public without prior authorisation. This authorisation has to be given by the GSC ("duly authorised Council officials")⁵ or, where relevant, by the Council, acting in accordance with Regulation (EC) 1049/2001 and the implementing provisions set out in Annex II of the Council's Rules of Procedure. When a "LIMITE" document is released to the public by the GSC, its change of status is indicated with a grey watermark marking on the first page of the document.
5. The Rules of Procedure of the Council distinguish between documents submitted for consideration by the Council (at ministerial level), i.e. at an advanced stage of the decision-making procedure, and documents prepared as a basis for discussion at working party/Coreper level: All legislative documents listed on the Council's agenda must be publicly available (see paragraph 8 below), whereas legislative documents submitted to Council working parties or to Coreper may be disclosed, provided they do not fall under any of the exceptions provided for in Regulation (EC) No. 1049/2001.

DOCUMENTS DIRECTLY ACCESSIBLE TO THE PUBLIC

*Documents available to the public upon circulation*⁶

6. Documents that do not fall under any of the exceptions laid down in Regulation 1049/2001, shall not bear the marking "LIMITE", but shall be made available to the public as soon as they have been circulated to delegations in accordance with Article 11(3) of Annex II to the Council's Rules of Procedure in line with the principle of the widest possible access to documents⁷. Such documents include, notably:

³ See notably the provisions of Article 12 of Regulation (EC) No 1049/2001.

⁴ When appraising the *potential prejudice* entailed by the release of a document *to the decision-making process of the Council*, the following criteria are taken into account: the *state of the file* (has agreement been reached or is it still under discussion?), the *degree of sensitivity* of the file and the content of the document (of a factual nature or addressing more strategic issues). See also paragraph 12 below as well as the guidelines set out in Staff Note 134/02, paragraph 8.

⁵ See section V (paragraphs 20 - 22) of the guidelines set out in document 11336/11.

⁶ Roughly 70% of all documents recorded in the Council's register of documents are made available to the public upon circulation.

⁷ As set out in recitals 4 and 6 of Regulation (EC) No 1049/2001 and in Article 12 of that Regulation.

- a. documents originating from a third party, which have been made public by the author or with his consent;
 - b. provisional agendas for meetings of the Council in its various configurations;
 - c. any text adopted by the Council and to be published in the Official Journal.
7. Provided that they are clearly not covered by any of the exceptions provided for in Article 4 of Regulation (EC) No 1049/2001⁸, the General Secretariat of the Council may also make the following documents available to the public upon circulation:
- a. provisional agenda of committees and working parties;
 - b. other documents, such as information notes, reports, progress reports and reports on the state of discussions in the Council or one of its preparatory bodies which do not reflect individual positions of delegations.

Documents submitted to the Council in view of a public deliberation or a public debate

8. In addition to the documents referred to in paragraphs 6 and 7, the GSC shall make the following documents available to the public:
- a. documents submitted to the Council which are listed under an item on its agenda included in the "legislative deliberations" part or marked with the words "public deliberation" or "public debate"⁹ ;
 - b. notes submitted to Coreper and/or to the Council for approval ("I/A" and "A" item notes) concerning draft legislative acts ;
 - c. acts adopted by the Council during an ordinary or a special legislative procedure as well as joint texts approved by the conciliation committee under the ordinary legislative procedure.

Documents made public after adoption of a legal act

9. Following the final adoption of a legislative act, subject to any of the exceptions provided for in Article 4 of Regulation (EC) 1049/2001, the General Secretariat shall make available to the public any preparatory documents relating to the legislative act concerned, which were drawn

⁸ E.g. agendas containing sensitive information relating to public security or defence and military matters.

⁹ This rule also applies to Council documents, which may initially have been circulated with the marking "LIMITE".

up in the course of the legislative procedure, with the exception of opinions and contributions from the Legal Service.¹⁰

DOCUMENTS MADE AVAILABLE UPON REQUEST

10. It follows from the existing rules governing production, distribution and recording of Council documents¹¹ that *all texts submitted to the Council, or to one of its preparatory bodies, which are to serve as a basis for deliberations¹², influence the decision-making process¹³ or reflect the progress made on a given subject¹⁴, must be produced as an "ST" (Standard) document¹⁵ and as such be recorded in the Council's public register*. Hence, while ST documents issued to delegations as "LIMITE" are not public, but their existence is *recorded* in the Council's register of documents, and "LIMITE" documents are thus regularly requested by members of the public.
11. In case of a request for public access, the content of a "LIMITE" document is examined on its merits in order to establish, whether or not its release to the public could harm the protection of one or more of the interests mentioned in Article 4 (1), (2) or (3) of Regulation (EC) 1049/2001.
12. In particular, when appraising the potential prejudice entailed by the release of a document to the decision-making process of the Council, the following criteria are taken into account:
 - a. *the state of the file*: has agreement already been reached within the Council or one of its preparatory bodies on the act to be adopted or is the dossier still under discussion;
 - b. *the degree of sensitivity of the dossier*: is it a routine matter (for example, a question of procedure or of implementing existing rules) which does not raise any political problems or is it a politically sensitive (legislative or other) draft on which it is difficult to reach agreement;

¹⁰ Thus, in 2015, a total of 3.475 preparatory documents, drawn up during the two previous years, were made available to the public in full following final adoption of the legislative acts to which they relate.

¹¹ See CP 134/02 of 24 September 2002 (re-circulated in CP 200/08 of 4 December 2008), paragraphs 1-2.

¹² E.g. notes from the Presidency or a delegation, containing drafts or proposals for a compromise on a Council act and cover notes from the General Secretariat containing drafts on which the Council or one of its preparatory bodies is called upon to express a position.

¹³ For instance, contributions from a delegation to discussions on a draft act referred to the Council.

¹⁴ In particular, outcomes of proceedings and summary records of Council preparatory bodies.

¹⁵ As a result, the references of this document (number, date, subject-matter) appear in the public register of Council documents.

- c. *the content of the document*: does the document set out the facts on the progress of work within the Council on the matter, without going into detail as to the questions still pending or does the document give options for solving the outstanding issues.¹⁶
 - d. *the origin of the document*, in case the document originates from a third party.
13. Given that each document has to be assessed on its merits, "LIMITE" documents relating to an on-going legislative procedure can be made public upon request at certain stages of the procedure. The General Secretariat of the Council handles "LIMITE" documents in accordance with the procedural aspects and the applicable legal framework referred to above.
 14. As an example, the preparatory documents relating to the proposals for the General Data Protection Package¹⁷ was the subject of 354 requests regarding 284 documents in 2015. All requested documents were released following previous examination and taking into account the guidelines set out in paragraph 12.

Concluding remarks:

15. Approximately 70 % of the more than 30.000 documents, that are produced and recorded in the Council's public register each year, are made available to the public upon circulation, in accordance with the relevant provisions of Article 11 of Annex II to the CRP.
16. In addition, more than 1.500 documents initially issued as "LIMITE" documents, are released to the public each year, either because they serve as a basis for a public Council session (public deliberation or public debate), or because they have been drawn up in the framework of an ordinary or special legislative procedure and hence released upon adoption of a legislative act.
17. Finally, approximately 3.000 - 4.000 documents relating to on-going legislative procedures are released following a request for public access and previous examination by the relevant services of the General Secretariat of the Council.

¹⁶ See in particular Staff Note 134/02, paragraph 8.

¹⁷ Interinstitutional files:

- 2012/0011: Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)
- 2012/0010: Proposal for a directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data.