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From: Ms E. O'Reilly, European Ombudsman
date of receipt: 15 March 2017
To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

Subject: Own-initiative inquiry OI/2/2017/AB by the European Ombudsman
concerning access to documents relating to Council preparatory bodies
when discussing draft EU legislative acts

Delegations will find attached a copy of a letter on the above-mentioned subject.

E-MAIL / ~~FAX~~

European Ombudsman

Emily O'Reilly
European Ombudsman

SECRETARIAT GÉNÉRAL DU
CONSEIL DE L'UNION EUROPÉENNE
SGE17/02536
Reçu le 15-03-2017
DEST. PRINC. VDF-Access to docs
DEST. COMITÉS Service Juridique
M. TRANHOLM-MIKKELSEN

Mr Jeppe Tranholm-Mikkelsen
Secretary-General
Council of the European Union
1048 BRUSSELS
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M. CLOOS

Strasbourg, 10/03/2017

Access to documents relating to Council preparatory bodies when discussing
draft EU legislative acts (OI/2/2017/AB)

Dear Mr Tranholm-Mikkelsen,

I have decided to open an inquiry concerning the disclosure of documents from discussions on draft EU legislative acts in Council preparatory bodies. The inquiry will examine the extent to which the present arrangements adequately facilitate public scrutiny of the progress of such discussions.

I appreciate that the Council is already committed to the principle of transparency and to facilitating citizens' knowledge of, and capacity to be involved in, the EU legislative process. My inquiry is intended to be of assistance to the Council in that regard. More specifically, the reasons for my opening this inquiry are the following:

1. Preparatory discussions on draft legislation take place in the Council through Coreper I and II¹, and through more than 150 other committees and working parties.² In some cases, especially those dealing with more technical matters, agreement can be achieved at preparatory body level; the agreed texts are then adopted without discussion by the Council meeting at the level of government ministers. In other cases, especially those which involve more political matters, the preparatory bodies will consider that issues are best

¹ Made up of the Permanent Representatives (Ambassadors) or Deputy Permanent Representatives of the 28 Member States.

² Preparatory bodies can be divided into two main categories: Committees set up by the treaties, intergovernmental decisions or by Council act, which are mostly permanent, and Committees and working parties set up by Coreper, which deal with specific subjects.



discussed and agreed upon in Council meetings involving the relevant ministers.

Recital 6 in the preamble to Regulation 1049/2001 on public access to documents makes clear that the greatest possible direct access should be given to 'documents in cases where the institutions are acting in their legislative capacity'. Documents tabled at preparatory bodies clearly fall into this category³.

2. There seem to be different practices in the preparatory bodies as regards producing documents, such as outcomes of proceedings, progress reports or compromise proposals. Legislative proposals that are subject to lengthy discussions may yield hundreds of documents, whereas there may be little information available before Coreper level for other legislative proposals⁴. The timing of the release of documents during negotiations and after the adoption of the act also seems to vary.

I am mindful of the fact that documents tabled by preparatory bodies serve primarily to record the progress of discussions and to formalise possible compromises, in order to make the negotiation process as effective as possible. It is also clear that a certain degree of flexibility is needed to take account of the different types of preparatory bodies and the variety of subjects under discussion. However, in many cases these documents are the only possible source of information by which the public can follow how decisions are prepared before being discussed or approved in public by the Council.

3. The General Secretariat of the Council (GSC) does not proactively make available documents reflecting the positions of individual Member States during negotiations. This approach, however, is without prejudice to the right of public access to documents provided for in Regulation 1049/2001⁵. These documents can be made available after the act in question has been adopted, provided that they are not covered by any exception laid down in Article 4 of Regulation 1049/2001.

In its ruling on case C-280/11 P (*Council v. Access Info Europe*), the Court of Justice ruled 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 noted that the mere fact that the request for disclosure was made at a very early

³ EU access to documents rules apply a broad definition of 'legislative documents': '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 ...'

⁴ A concrete example of this was the Council's deliberations during the negotiation of the EU budget for 2017. Following the Commission's proposal, the Budget Committee carried out its examination in June and July 2016 and the final compromise text was approved by Coreper on 20 July 2016. Council endorsed this compromise by written procedure in September 2016. The available documents are the Budget Committee's agendas, a series of tables highlighting the proposed changes compared to the Commission's proposal and an explanatory note. The explanations in the note are very general and do not describe the key issues that were debated between Member States nor the possible points of divergence.

⁵ Article 11 of Annex II to the Council's Rules of Procedure: https://europa.eu/european-union/sites/europa.eu/files/docs/body/rules_of_procedure_of_the_council_en.pdf



stage in the legislative process was not sufficient to trigger the application of the relevant exception.⁶

The Council has subsequently held internal discussions on the implications of the Court's decision for its practices and Rules of Procedure. It is important to assess the outcome of these discussions.

4. Written comments made by delegations in the course of the legislative procedure are usually enclosed in a note from the GSC and made available in the Council's register. Preparatory documents related to the same legislative proposal carry the same interinstitutional file code. The GSC's "Guide for the drafting of documents" for the Council and preparatory bodies nevertheless reveals that some working documents "do not have a Council document number, for example certain 'meeting documents'".⁷ It would be useful to know if the distribution of documents without a number is a frequent practice during negotiations and which types of documents are concerned.

My staff have already held two constructive meetings with the General Secretariat of the Council to discuss these matters. I understand that improvements are being made on a regular basis. I would therefore be grateful if, **as a first step in this inquiry**, the Council could reply to the following questions to further our understanding of the present arrangements and of any plans to improve them:

I. Consistency of practices between working parties

1. When the Commission submits a legislative proposal, does the Council publicly state in which preparatory bodies the proposal will be discussed?
2. What actions does the Council take in order to decide whether preparatory documents can be made directly accessible to the public or should be marked as 'LIMITE' and thereby not made directly accessible? It would be helpful to know, for example, who makes the assessment, what criteria are used to determine this and how long the process takes?
3. Are guidelines available on how and when 'LIMITE' documents can be made available to the public?
4. Following the work done on this topic by the Dutch Presidency (January - June 2016), what further work has been done on the issue of the GSC periodically reviewing the status of LIMITE documents relating to ongoing legislative procedures?
5. Following the final adoption of a legislative act, what is the average time taken to make documents related to the adoption of that act available to the

⁶ The Court of Justice confirmed the General Court's judgment which annulled the Council's decision refusing public access to parts of a note from the GSC to the Working Party on Information which contained proposals for amendments tabled by a number of Member States. <http://curia.europa.eu/juris/liste.jsf?num=C-280/11&language=EN>

⁷ GSC, *Guide for the drafting of documents* (2011) p.7. Available at the following address: https://delegates.consilium.europa.eu/xnet_dochelp/documentation/presidency/Guide%20redaction_EN_int.pdf



public (as provided for in Article 11(6) of Annex II of the Council's Rules of Procedure)? How is the process organised?

6. What is the Council doing to further improve the sharing of best practices on the drafting standards applicable for the various types of document, such as presenting modifications in track changes, summarising the previous steps of discussions and highlighting the main issues?

II. Recording Member States' individual positions

7. Although in practice the Council's register contains many documents reflecting the positions of individual delegations, documents sometimes refer to "the majority of delegations", "several delegations" or "a significant number of MS" when summarising the state of play of negotiations. Can the Council please say how, and by whom, the decision is taken to record, or not to record, the individual position of a delegation at working party level? Has the GSC issued guidance on this subject?

8. Can the Council please explain the impact of the Court's ruling in *Access Info Europe* on its disclosure policy and publish the written results of the evaluation carried out by the GSC during the first half of 2015⁶?

9. Can the Council please say if it considers it necessary to amend its Rules of Procedure in order to adapt them to the *Access Info Europe* ruling?

III. Completeness of the Council's document register

10. Can the Council please say if the distribution of documents without a number is a frequent practice and which types of documents are concerned?

11. If it is the case that these documents are not listed in its public register, can it explain why it does not record them after the meeting as part of the legislative file?

12. I understand that the Council is already reflecting on how to improve transparency concerning these documents. I would appreciate it if the Council could explain the actions that it has taken or envisages taking.

IV. Accessibility of documents on the Council's document register

13. What has the Council done, and what does it plan to do, to make it easier to find preparatory documents relating to draft legislative acts on its public register, and more generally on its website?

⁶ The results of this evaluation were presented to the Working Party on Information on 19 May 2016.



14. Has the Council already drawn up a policy on the inclusion in the joint legislative database⁹ of preparatory documents relating to draft legislative acts? If so, I would ask that you include a copy of the policy in your reply.

I would be grateful to receive your reply within **three months** of receipt of this letter. Should you require any further information or clarifications concerning the inquiry, please contact the Strategic Inquiries Unit (Ms Alice Bossiere, Tel: +32 228 33 401).

Thank you for your co-operation on this matter.

Yours sincerely,

Emily O'Reilly
European Ombudsman

cc: Mr Hubert Legal, Director-General of the Legal Service
Mr Reijo Kemppinen, Director-General of Communication and Information

⁹ Provided for in the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ 2016 L 123, p. 1, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016Q0512%2801%29>