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European Union

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From:	Ms E. O'Reilly, European Ombudsman
date of receipt:	17 May 2018
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
Subject:	Special Report of the European Ombudsman following her own-initiative inquiry OI/2/2017/TE on the transparency of the Council legislative process

Delegations will find enclosed a copy of a letter sent by the European Ombudsman to the Council concerning the abovementioned subject.

E-MAIL / [illegible]

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17.05.2018

European Ombudsman

Emily O'Reilly
European Ombudsman

Mr Jeppe Tranholm-Mikkelsen
Secretary-General
Council of the European Union
1048 BRUSSELS
BELGIQUE

Strasbourg, 16/05/2018

Special Report of the European Ombudsman following her own-initiative inquiry OI/2/2017/TE on the transparency of the Council legislative process

Dear Mr Tranholm-Mikkelsen,

Please find enclosed a copy of the Special Report, which, in accordance with the Ombudsman's Statute, I have submitted to the President of Parliament following the above-mentioned own-initiative inquiry.

Yours sincerely,

Emily O'Reilly
European Ombudsman

Enclosure:
- Special Report to the European Parliament

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European Ombudsman

Special Report

of the European Ombudsman in strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process

Made in accordance with Article 3(7) of the Statute of the European Ombudsman[1]

Following her inquiry into the transparency of legislative discussions in the preparatory bodies of the Council of the EU (the 'Council'), the Ombudsman, Emily O'Reilly, is sending this special report to the European Parliament to seek its support on the matter.

In order for European citizens properly to exercise their democratic right to participate in the EU's decision-making process, and hold those involved to account, legislative deliberations must be sufficiently transparent.

In order also for citizens to be able to hold their governments to account for the decisions they make on EU laws, they need to know how their governments positioned themselves during the legislative process. Making such information public would also oblige Member State governments to assume greater responsibility for this legislation and discourage them from 'blaming Brussels' for EU laws they themselves helped to shape and adopt.

The Ombudsman opened this strategic inquiry in March 2017. She put specific questions to the Council, launched a public consultation, and inspected legislative files of the Council.

The Ombudsman found that the Council's current practices constitute maladministration. In particular, she criticised the Council's failure to record systematically the identity of Member States taking positions in preparatory bodies, and the widespread practice of restricting access to legislative documents while the decision-making process is ongoing (the so-called 'LIMITE' marking).

On 9 February 2018, the Ombudsman made three specific recommendations and several suggestions to the Council on how to improve the transparency of its legislative process.

The Council did not reply to her recommendations and suggestions within the legally-prescribed timeline of three months.

[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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Given the importance of the issue of legislative transparency, the Ombudsman considers it appropriate to bring the matter to the attention of the European Parliament, so as to seek its support in prevailing upon the Council to act on her recommendations and suggestions.

Background to the strategic inquiry

1. The Council of the European Union (the 'Council') is comprised of the governments of the EU Member States. Together with the European Parliament[2], the Council adopts EU legislation. Before the ministers from the Member States reach a formal position on draft legislation at Council meetings, preparatory discussions take place in the Council's Committee of Permanent Representatives ('Coreper')[3] and in the over 150 Council preparatory bodies attended by national civil servants, including so-called 'working parties'[4]. In many cases, these preparatory bodies have a decisive influence on the final legislative text. The discussions in all these preparatory bodies are therefore a crucial part of the EU legislative process.

Council of national ministers

COREPER of national ambassadors

Working parties of national civil servants

2. Ensuring that citizens are able to follow the progress of legislation is not something to be desired; it is a legal requirement. Under the EU Treaties, every citizen has *"the right to participate in the democratic life of the Union"* and EU decisions must be taken *"as openly and as closely as possible to the citizen"*[5]. The Treaties specifically require that the Council meets in public *"when considering and voting on a draft legislative act"*[6]. This kind of transparency is meant to apply during the entire legislative process, in good time, and not only retrospectively after the process has been concluded. Fundamentally, this is aimed at ensuring that citizens can know how any particular legislative process is progressing, the

[2] Under the ordinary legislative procedure, Article 294 of the Treaty on the Functioning of the EU (TFEU).
[3] 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.
[4] The list of preparatory bodies is available at: http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/
[5] Articles 1 and 10(3) of the Treaty on European Union (TEU).
[6] Article 15(2) of the TFEU.

various options that are being discussed and the positions that are being promoted or opposed by national governments.

3. The relevant documents in this inquiry are those tabled at Council preparatory bodies dealing with draft legislation. All of these documents are *"legislative documents"* in the sense in which this term is used in the EU's rules on public access to documents[7]. Such documents must be made proactively available by the 'EU legislator', so as to ensure the widest possible public access.[8] Access to public documents may be restricted only under the circumstances envisaged by the 'exceptions' provided for under the EU's rules on public access to documents[9]. Except in very unusual cases, even if such exceptions were to apply, they can be overturned if there is an overriding public interest in disclosure. Given the clear public interest in disclosing such documents so that citizens can effectively exercise their right to scrutinise the legislative process[10], only rarely will any one of these exceptions justify non-disclosure of legislative documents.

4. The Council and the European Parliament are 'co-legislators' under the EU Treaties[11]. The directly-elected European Parliament already has a high degree of transparency, and thus accountability, when deliberating on and adopting legislation. The main steps of the legislative process in the European Parliament, and corresponding transparency provisions, 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

5. At present, legislative documents of the Council are not, to any significant extent, being made directly and proactively accessible to the public while the legislative process is ongoing. Individual requests for public access to

[7] Article 12(2) of 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). According to this article, 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"

[8] Recital 6 of Regulation 1049/2001. For the principle of the widest possible public access, see Joint Cases C-39/05 P and C-52/05 P *Sweden and Turco v. Council* [2008] ECLI:EU:C:2008:374, para. 34; Case C-280/11 P *Council v. Access Info Europe* [2013] ECLI:EU:C:2013:671, para. 27 and Case T-540/15 *De Capitani v. Parliament* [2018] ECLI:EU:T:2018:167, para. 80.

[9] Article 4 of Regulation 1049/2001.

[10] 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] ECLI:EU:C:2013:671, para. 33; Case T-540/15 *De Capitani v. Parliament* [2018] ECLI:EU:T:2018:167, para. 79.

[11] Under the ordinary legislative procedure, Article 294 of the TFEU.

legislative documents of the Council are, in general, dealt with in accordance with the EU's rules on access to documents. However, because of shortcomings in how the Council registers these documents, the public is often not in a position to know, in real time, what documents actually exist. The Ombudsman is aware that the Council has made significant progress in improving its internal document management procedures. The Ombudsman commends the Council for these steps. However, the more fundamental issue is the level of commitment of the Council to ensuring transparency and thus accountability in its role as an EU legislator.

6. In the context of concerns about a perceived lack of accountability of, and consequent lack of opportunity for citizens to participate 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

7. The inquiry focused on the transparency of legislative discussions in Council preparatory bodies. In particular, it concerned how the General Secretariat of the Council (the 'Secretariat') administratively supports the legislative process in recording discussions that take place between Member States in preparatory bodies and by registering, managing and publishing the related documents.

8. On 10 March 2017, the Ombudsman put 14 questions to the Council[12], to which the Council replied on 26 July 2017[13].

9. The Ombudsman then launched a public consultation inviting members of the public, civil society, academics and national parliaments to put forward their views on the issues raised. All those who made contributions expressed concerns, to varying degrees, about the accountability and transparency of legislative discussions in the various Council preparatory bodies[14].

10. On 23 January 2018, the Ombudsman's inquiry team inspected[15] files from Council on three legislative proposals that were finalised in 2016: the Data Protection Regulation[16], the Decision on tackling undeclared work[17] and the Directive on the accessibility of websites and mobile applications of public

[12] The Ombudsman's opening letter can be found here:
https://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/76929/html.bookmark
[13] The Council's reply can be found here:
https://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/83029/html.bookmark
[14] 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
[15] The Ombudsman's inspection report can be found here:
https://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/89637/html.bookmark
[16] 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.
[17] 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.

sector bodies[18]. The inspection aimed to give the Ombudsman an insight into how the Secretariat produces, distributes, registers and publishes documents tabled at meetings of Council preparatory bodies.

11. Following a detailed analysis of the feedback received during the public consultation, the results of the inspection and the views put forward by the Council, the Ombudsman found that the Council's current practices constitute maladministration.

12. On 9 February 2018, the Ombudsman made three specific recommendations to the Council on how it could increase the transparency of its legislative process. She also asked the Council to reply to a set of suggestions for improvement[19].

13. In line with the EU Treaties[20] and the European Ombudsman's Statute[21], the Ombudsman granted the Council a period of three months to provide a detailed opinion on her recommendations and suggestions.

14. To the Ombudsman's disappointment, the Council did not reply to her recommendations and suggestions within the legally-prescribed timeframe, which elapsed on 9 May 2018. In view of the importance of the issue of legislative transparency, the Ombudsman decided not to grant the Council any extensions beyond this deadline.

The Ombudsman's assessment and findings

15. The starting point of the Ombudsman's assessment was the importance of transparency for the democratic legitimacy of EU legislation and the EU. Since the Council's preparatory bodies do not meet in public, citizens can exercise their democratic right to follow legislative discussions only by accessing records of these discussions. For this to be possible, (A) legislative discussions in the preparatory bodies must be documented, (B) where Member States take positions in preparatory bodies, this must be recorded, and (C) timely public access to legislative documents must be easily available.

A. Documenting the work of Council preparatory bodies

16. In November 2016, the Council introduced a new IT system for recording and distributing documents submitted to Council meetings, including meetings of preparatory bodies. This system ensures that all documents submitted to

[18] 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.
[19] The Recommendation can be found here:
https://www.ombudsman.europa.eu/en/cases/recommendation.faces/en/89518/html.bookmark
[20] Article 228 of the TFEU.
[21] Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties, Article 3(6).

Council preparatory bodies are now systematically registered. This includes, for example, comments from representatives of Member State governments that the Secretariat receives via email and documents drafted during meetings of preparatory bodies[22]. The Ombudsman recognises that this system has the potential to contribute substantially to improving the transparency of legislative discussions.

17. However, in the course of this inquiry, the Ombudsman found inconsistencies with the documentation generated by the Secretariat for the different preparatory bodies. The work of the different preparatory bodies is recorded to different extents, and there are diverging practices regarding how activities are recorded, as well as some documentation gaps (see Annex 1 for a detailed overview of the Ombudsman's findings).

18. The Ombudsman takes the view that a comprehensive and consistent approach to the documentation in Council preparatory bodies would greatly facilitate tracking the progress of legislative proposals. Diverging practices, which are not justified by an objective need, risk creating unnecessary confusion for those seeking to follow and understand a legislative procedure in detail. **The Ombudsman therefore suggested that the Council adopt guidelines concerning the types of documents that are produced in the context of legislative procedures in preparatory bodies, as well as concerning the information to be included in those documents.**

B. Recording and disclosing Member States' positions

19. There are different practices regarding how the positions of Member States are recorded in documents drafted and circulated within Council preparatory bodies. The inspection showed that, only in some cases, were the identities of Member States that take positions in preparatory bodies recorded. In other cases, Member States were not identified as supporting any particular position and, instead, there were references to unidentified *"delegations"*.

20. The Ombudsman stresses that Member State representatives involved in legislative work are part of the EU legislature and should be accountable as such. In order to be able to hold their governments to account for decisions on EU legislation, the public must be able to find out which national government took what position in the process of amending and adopting EU legislative proposals. Without this *"minimum and essential item of evidence"*[23], citizens will never be able properly to scrutinise how all their national representatives have acted. It is also important for national parliaments, in their task of overseeing their governments' actions, to be able to know the positions taken by their governments.

[22] These are incorporated into post-meeting documents and registered in the IT system.
[23] See Opinion of AG Cruz Villalón in Case C-280/11 P *Council v. Access Info Europe* [2013] ECLI:EU:C:2013:671, para. 61.

21. Greater transparency regarding the positions taken by national governments on EU laws is also important for the legitimacy of EU legislation. Making such information public would oblige Member State governments to assume greater responsibility for this legislation and discourage them from 'blaming Brussels' for decisions they have ultimately taken themselves. Many contributions to the public consultation strongly emphasised the importance of being able to find out the positions taken by individual Member States during legislative negotiations.

22. In its initial reply to the Ombudsman of July 2017, the Council confirmed that the question of recording Member States' positions had been discussed in a Coreper meeting of May 2014 after a related ruling of the Court of Justice of the EU[24]. Coreper had concluded that this ruling did not establish an obligation to record and identify the positions of individual Member States, but that Member States would be identified if deemed *"appropriate"*[25].

23. The Ombudsman is aware that 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 Secretariat, in turn, may feel inhibited as to what legislative documents it can proactively and directly make accessible to the public. In fact, under the Council's rules of procedure, the Secretariat cannot proactively make available documents which *"reflect individual positions of delegations"*[26] 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[27].

24. However, being willing to change position, and achieve a compromise, is a fundamental characteristic of democratic decision-making. Making citizens aware of these changes, and explaining to them these changes and the resulting compromises, is arguably a crucial element of accountability[28]. The Court of Justice therefore considered, in the abovementioned case, that the Council was wrong to refuse public access to parts of a note from its Secretariat that contained amendments tabled by a number of Member State governments. 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"*[29].

25. The Ombudsman welcomed 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 suggested that the Council update its rules of**

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[24] Case C-280/11 P *Council v. Access Info Europe* [2013] ECLI:EU:C:2013:671.
[25] Council General Secretariat, 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.
[26] Article 11(4)b, Annex II, Council rules of procedure.
[27] Article 11(6), Annex II, Council rules of procedure.
[28] See also the General Court's judgment in Case T-233/99 *Access Info Europe v. Council of the European Union* [2011] ECLI:EU:T:2011:209, para. 69.
[29] Case C-280/11 P *Council v. Access Info Europe* [2013] ECLI:EU:C:2013:671, para. 40.

procedure to reflect this practice[30]. Of course this commitment means little, if Member States' positions are not recorded appropriately in the first place.

26. Given the significance for citizens of knowing Member States' positions, the Ombudsman found that the Secretariat's failure systematically to record the identity of Member States when they express positions in discussions within preparatory bodies constitutes maladministration. The Ombudsman therefore made the following recommendation to the Council:

The Council should systematically record the identity of Member State governments when they express positions in preparatory bodies.

C. Accessing documents from preparatory bodies

27. The Ombudsman identified two specific issues regarding easy and timely access to documents from preparatory bodies: i) the completeness and accessibility of the Council's public register of documents; and ii) the Council's practice of restricting access to legislative documents while the decision-making process is ongoing (the so-called 'LIMITE' marking).

The Council's public register of documents

28. Having a complete and accessible public register is key to legislative transparency. To enable the public to exercise fully the right to access documents, all legislative documents produced and/or circulated in preparatory bodies should be listed in a public register, irrespective of their format and whether they are fully or partially accessible or not accessible at all. If documents do not appear in a public register, the public cannot know what documents actually exist. In addition, in order to enable the public actually to access these documents, they must be easy to find on the Council's website. Only through a complete and accessible register of documents can the public get a proper overview of deliberations taking place in preparatory bodies.

29. The Ombudsman found that the Council's current public register of documents is incomplete and not very user-friendly[31]. For example, the practice of publishing lists of *'working documents'*, which have no separate entry in the register, is unsatisfactory, as it makes it difficult for members of the public to find out easily and in good time that such documents exist. Overall, an extensive knowledge of the Council's functioning is required in order to find a specific document. This makes it cumbersome for the general public to access information on negotiations in preparatory bodies.

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[30] 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 Council General Secretariat, Working Party on Information 19 May 2016, 9536/16, 26 May 2016, p. 3.

[31] Detailed information on the Council's public register of documents is contained in Annex 2.

30. Based on her analysis, **the Ombudsman suggested that the Council list all types of documents in its public register, regardless of their format and of whether they are fully or partially accessible or not accessible at all.**

31. In order to avoid an information overload, this should be done in tandem with improving accessibility to documents via the register. The Ombudsman believes that it would greatly facilitate access if preparatory documents were organised chronologically on a single webpage for each legislative proposal[32]. **The Ombudsman therefore suggested that the Council develop a dedicated and up-to-date webpage for each legislative proposal, following the example of the 'Legislative Observatory' on the European Parliament's website.** In this context, the Ombudsman welcomed the progress made by the Council, the European Parliament and the Commission in setting up the 'joint database' on legislative files.

The 'LIMITE' marking

32. The Council restricts access to documents in ongoing legislative procedures by designating documents with the so-called 'LIMITE' marking[33]. Recipients of documents which bear this marking are expected to ensure that such documents are not disclosed outside the Council. The Council does not make such documents directly accessible to the public on its website. However, the Ombudsman understands that marking a document as 'LIMITE' does not necessarily imply that access to the document will be refused where there is a request under the EU's rules on public access to documents.

33. The Secretariat is responsible for marking documents 'LIMITE'. The Council explained to the Ombudsman in July 2017 that the Secretariat marks a document as 'LIMITE' based on a *"prima facie* assessment" of whether there is a risk to one or more of the interests protected under the exceptions set out in the EU's rules on public access to documents[34].

34. The Ombudsman's inspection showed, however, that documents with an interinstitutional code distributed between the Secretariat, the working parties and Coreper relating to the three legislative files were generally and systematically marked 'LIMITE'[35]. This indicated that, across the different departments of the Secretariat, there is a practice of automatically marking preparatory legislative documents as 'LIMITE'. The Council's rules of procedure seem to encourage this practice of 'erring on the safe side' and of making directly accessible only those documents that are *"clearly not covered"*[36] by any of the exceptions in the EU's rules on public access to documents. This

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[32] In the "Policies" section of its website, the Council has set up dedicated webpages for major legislative packages but these pages give only 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.
[33] 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.
[34] Articles 4(1) to (3) of Regulation 1049/2001.
[35] 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.
[36] See Article 11(4), Annex II, Council rules of procedure.

arguably turns on its head the legal requirement that there should be the widest possible public access[37] to legislative documents[38].

35. The Council told the Ombudsman in July 2017 that, in general, it lifts the 'LIMITE' status, while legislative discussions are ongoing, only in response to specific requests. A systematic review of the 'LIMITE' status of documents takes place only after the final enactment of the legislative act[39]. In complex legislative procedures, documents may thus not be proactively published until several years later[40]. The Ombudsman notes that, in 2015, 84% of requests for public access to documents marked as 'LIMITE', and relating to on-going legislative procedures in 2015, were granted[41]. 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 was ultimately not covered by any of the exceptions to disclosure under the EU's rules on public access to documents[42].

36. The Ombudsman stresses that restrictions on access to legislative documents should be both exceptional and limited in duration to what is absolutely necessary. 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 rules on access to documents. The Council should make its legislative documents[43] proactively available on its website without delay, in the same manner as its co-legislator, the European Parliament.

37. In light of the above, the Ombudsman found that the current practice of designating most preparatory documents in ongoing legislative procedures as 'LIMITE' represents a disproportionate restriction on citizens' right to the widest possible access to legislative documents. This constitutes maladministration. The Ombudsman therefore made the following recommendations to the Council:

The Council should develop clear and publicly-available criteria for how it designates documents as 'LIMITE', in line with EU law.

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[37] The principle on the 'widest possible public access' has been established in EU case-law: see Joint Cases C-39/05 P and C-52/05 P *Sweden and Turco v. Council* [2008] ECLI:EU:C:2008:374, para. 34 and Case C-280/11 P *Council v. Access Info Europe* [2013] ECLI:EU:C:2013:671, para. 27.

[38] The paper 'Opening up closed doors: Making the EU more transparent for its citizens', which was submitted by the Dutch delegation to the Conference of Parliamentary Committees for Union Affairs, and which the Tweede Kamer (Second Chamber) of the Netherlands 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"*.

[39] Council General Secretariat, Issuing and release of LIMITE documents, 5109/1/17 REV 1, 2017, p. 3. The departments of the Council General Secretariat are encouraged to review the 'LIMITE' status when it ceases to be justified.

[40] For example, in the case of the EU Data Protection Regulation, five years after the Commission's proposal.

[41] https://www.eerstekamer.nl/bijlage/20170217/information_note_of_the_general/document3/f=/vkbtj89au srl.pdf

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

[43] Council legislative documents can be meeting agendas, accompanying papers, reports, outcomes of proceedings, summary records of discussions, compromise texts, notes, etc.

The Council should systematically review the 'LIMITE' status of documents at an early stage, *before* the final adoption of a legislative act, including before informal negotiations (so-called 'trilogues') between the Council, the European Parliament and the Commission start, at which point the Council will have reached an initial position on the legislative proposal.

Conclusion

38. On the basis of the foregoing, the Ombudsman considers that the Council should improve the transparency of its legislative process. Given the importance of the issue of legislative transparency to the accountability of the EU's decision-making process, the Ombudsman seeks the European Parliament's support in prevailing upon the Council to act on her recommendations and suggestions.

The Ombudsman's recommendations

The Ombudsman made the following recommendations to the Council:

The Council should:

1. **Systematically record the identity of Member State governments when they express positions in Council preparatory bodies.**

2. **Develop clear and publicly-available criteria for how it designates documents as 'LIMITE', 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 the Council will have reached an initial position on the proposal.**

The Ombudsman's 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 should be produced by preparatory bodies 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 of disclosing 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 or partially accessible or not accessible at all.**

5. **Improve the user-friendliness and 'searchability' of the public register of documents.**

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

The European Parliament could consider adopting a resolution accordingly.

Emily O'Reilly
European Ombudsman

Strasbourg, 16/05/2018

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[44]. 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 Council's Secretariat. For instance, while the Secretariat drafted detailed 'outcomes of proceedings' for some of the meetings of the preparatory body [45] 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[46] and the Directive on the accessibility of websites and mobile applications of public sector bodies[47]. Similarly, the Secretariat 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 the Council Secretariat's departments is not just related to the nature of the specific file; the different approaches also stem from different

[44] Coreper agendas are published before the meetings and summary records are usually published shortly after the meetings.
[45] Working Party on Social Questions.
[46] Working Party on Information Exchange and Data Protection (DAPIX).
[47] Working Party on Telecommunications and Information Society.

administrative practices among the different department of the Council's Secretariat[48].

Annex 2 - The Council's Public Register of Documents

The Council maintains an online document register, which is run by the Council's Secretariat. 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 Secretariat 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 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[49]. 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"*[50] 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 Council's Secretariat 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 Secretariat 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.

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[48] Annexed to its reply, the Council enclosed the general conclusions of an evaluation conducted by the Council's Secretariat 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.

[49] 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.

[50] 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).

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[51] and two searches in other sections of the website for discussions at Council level[52].

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.

[51] 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).
[52] 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.