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NOTE

From: General Secretariat of the Council
To: Delegations
Subject: Letter by the European Ombudsman on Own-initiative inquiry
OI/8/2015/FOR concerning transparency of trilogues

On 17 June, Coreper discussed the letter sent by the Ombudsman stating that an own-initiative inquiry had been opened on the transparency of trilogues¹. In the letter the Ombudsman asked the Council to reply to questions which could broadly be divided into two categories: the organisation of trilogues and the handling of documents (drafting and accessibility). The deadline for responding was set on 30 September 2015. The Ombudsman also requested "to inspect" two concluded legislative files: the *Mortgage Credit Directive* (2014/17/EU), and the *Clinical Trial Regulation* (536/2014) .

On that occasion, Coreper deemed it appropriate to seek legal clarification as to the extent to which some or all of the Ombudsman's questions might fall within her competence under the Treaty. The Council Legal Service has delivered an opinion on the scope of the Ombudsman's mandate². On the basis of the Legal Service opinion, and in order to facilitate Coreper discussion and its decision on the reply to be given, the Secretariat has prepared the draft reply in Annex.

¹ See doc. 9666/15.

² See doc. 11440/15.

The request to authorise the inspection of the two concluded files is dealt separately as a 'I' item.³

COREPER is therefore invited, in accordance with Article 19(7)(k) of the Council's Rules of Procedure, to approve the draft letter in Annex, to be sent as the Council's reply to the Ombudsman letter of 26 May 2015.

³ See doc. 11933/15.

DRAFT

Brussels,

Ms Emily O'Reilly

European Ombudsman

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Subject: Inspection of Council documents relating to own-initiative inquiry OI/8/2015/FOR

I. INTRODUCTION

1. On 26 May 2015 the European Ombudsman launched an Own Initiative Inquiry (OII) concerning the Council of the EU, the European Parliament and the European Commission as regards the transparency of the trilateral informal meetings that the three Institutions usually hold in the framework of the ordinary legislative procedure, and which are commonly referred to as "trilogues".
2. In accordance with Articles 2(2) and 3(1) of the Ombudsman's Statute⁴, the European Ombudsman invited the Council to reply to a set of 12 questions, regrouped under four themes. The Ombudsman further informed the Council of her intention to inspect two closed trilogue cases, concerning respectively the Mortgage Credit Directive⁵ and the Clinical Trials Regulation.⁶
3. In reply to the Ombudsman's letter, the Council is pleased to submit the following observations.

⁴ Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties of 9 March 1994 (OJ L 113, 4.5.1994, p. 15), subsequently amended by decisions of 14 March 2002 (OJ L 92, 9.4.2002, p. 13) and 18 June 2008 (OJ L 189, 17.7.2008, p. 25).

⁵ Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) n. 1093/2010 (OJ L60, 28.2.2014, p. 34).

⁶ Regulation (EU) No 536/2014 of the European Parliament and of the Council of 16 April 2014 on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC (OJ L 158, 27.5.2014, p. 1).

II. PRELIMINARY REMARKS ON THE SCOPE OF THE INQUIRY

4. At the outset, the Council would like to share with the Ombudsman certain concerns regarding the scope of - and the existence of sufficient grounds for - the current own initiative inquiry.
5. To start with, the Council deems it useful to stress the crucial distinction between the notion of (mal)administration and the exercise of the legislative activity in the framework of the ordinary legislative procedure.
6. The Treaties establish a clear institutional and procedural framework for the exercise of the legislative power at the EU level. They attribute to the European Parliament and the Council the joint responsibility for the exercise of the legislative function (Articles 14 and 16 TUE) according to a specific decision-making procedure (Articles 289 and 294 TFUE) and link such responsibility to their different but complementary democratic legitimacy (Article 10 TUE). This institutional set-up clearly distinguishes the ordinary legislative procedure from administrative activities.⁷
7. The Council is of the view that the exercise of legislative powers is not limited to the adoption of political choices on the merits of legislative files. It also includes the choices according to which the legislators decide to organise the legislative process itself. The organisation of the legislative process cannot be considered an administrative activity – and therefore cannot give rise to possible instances of maladministration - but ought rather to be regarded as an essential aspect of the exercise of the legislators' prerogatives.
8. Such a conclusion not only reflects the ordinary meaning of the notions of - and respective relationship between - "administration" and "legislation" as commonly understood in the EU and member States legal orders. It also clearly ensues from the Treaties which spell out the Institutions' prerogatives in the organisation of their own functioning (Articles 232(1) and 240(3) TFUE)⁸ and in the organisation of the legislative function (Article 289 and 294 TFUE).⁹

⁷ The Council notes that the Ombudsman has taken the view that the merits of EU legislation cannot be assessed via the concept of maladministration and has consistently refused to deal with complaints that contest the substance of legislation, either adopted or under discussion. A good example is provided by the Decision of the Ombudsman of 1 July 2011 in case 875/2011/JF.

⁸ From Articles 232(1) and 240(3) TFUE the Court of Justice has inferred the principle of institutional autonomy which safeguards the Institution's power to organise their functioning.

⁹ In that respect, the Council notes that the Ombudsman has in principle acknowledged that decisions pertaining to the internal organisation of the Institutions fall outside the scope of her mandate. See for instance cases 1156/2008/CHM and 1176/2008/WP. In a 2005 case concerning the Council, however, the Ombudsman took a more nuanced position. The Council remains unpersuaded by the arguments put forward by the Ombudsman in that case and remains at disposal of the Ombudsman for explaining with greater detail the reasons of its position, if need may be.

9. As a consequence, choices on the way the political dialogue is organised through a legislative procedure fully pertain to the political responsibility of the EU co-legislators, who, in different but complementary forms, are democratically accountable to citizens. As the Ombudsman has already pointed out, when political decisions are made, "*the concept of political responsibility, rather than the one of possible maladministration, comes into play. This is an element of central importance in the functioning and in the system of checks and institutional balances of the European Union*".¹⁰ A different approach would inevitably put at risk the constitutional principle of institutional balance, in light of which Article 228 TFUE shall be read¹¹.
10. It is in this framework that the current own initiative inquiry on the transparency in trilogues has to be considered. In that regard, the Council deems useful to stress that trilogues are working arrangements that the co-legislators have put in place in exercise of their treaty prerogatives to organise the conduct of the legislative activity. Decisions on whether and how to conduct trilogues meetings - and notably decisions on when to conduct trilogues, in which composition, on whether and how to issue support documents - pertain to the political responsibility of the co-legislators, not to their administrative action.
11. Moreover, and on a different note, the Council would like to stress that according to Article 228(1) TFUE, and more specifically Article 3(1) of the Ombudsman's Statute, a suspicion of maladministration (e.g. sufficient elements to suspect the existence of an instance of maladministration) is required for the Ombudsman to open an inquiry and this is all the more so in case of inquiries which are not complaint-based. In the present case, however, the Ombudsman's opening letter refers to very limited elements of fact in relation to only certain issues covered by her inquiry. In relation to others (e.g. the linguistic regime of trilogues) no elements are provided to explain the existence of grounds for an inquiry.
12. Additionally, the Council notes that the Ombudsman has constantly applied a policy of self-restraint in relation to complaints concerning issues on which the Parliament had exercised or was exercising its "political" activity.¹² In the present case, as the Ombudsman has acknowledged, the Commission has included the transparency of trilogues among the issues to be discussed with Parliament and Council in the framework of its proposal for an Interinstitutional Agreement on Better Regulation.¹³ This proposal is currently under discussion between the Commission and the two co-legislators. The decision to launch an own initiative inquiry on the very same matter appears therefore in contradiction with the previous Ombudsman practice.

¹⁰ See case 655/2006/(SAB)ID concerning a decision taken by the Parliament's plenary in the framework of its budgetary functions.

¹¹ See also Article 1(2) of the Ombudsman's Statute.

¹² Typically, the Ombudsman has constantly declared that no grounds exist to open inquiries on complaints concerning issues that have already been submitted to (or decided by) the Parliament's Committee of Petitions or that are being considered by another Parliamentary Committee. See for instance the Decisions of the Ombudsman in case 646/97/IJH and in case 143/97/JMA.

¹³ Communication from the Commission to the European Parliament and the Council: Proposal for an interinstitutional agreement on better regulation; COM(2015) 216 final.

13. By contrast, the Council emphasises that a number of administrative activities are put in place by the services of Council and Parliament in order to support the legislative decision-making process. These activities include for instance the handling, archiving and publishing of documents relating to legislative files, as well as the processing of requests for public access under Regulation 1049/2001. In relation to the parts of the inquiry that cover those issues, the Council is ready to engage in a fruitful debate with the Ombudsman.

III. THE COUNCIL'S OBSERVATIONS ON THE MERITS OF THE INQUIRY

General remarks

14. Under the terms of the Joint Declaration on Practical arrangements for the codecision procedure, the Institutions shall cooperate in good faith throughout the procedure with a view to reconciling their positions as far as possible thereby clearing the way, where appropriate, for the adoption of the act concerned at an early stage of the procedure. They shall cooperate through appropriate inter-institutional contacts to monitor the progress of the work and analyse the degree of convergence at all stages of the co-decision procedure. This cooperation often takes the form of tripartite meetings ('trilogues'). This trilogue system has demonstrated its vitality and flexibility in increasing significantly the possibilities for agreement at first and second reading stages, as well as contributing to the preparation of the work of the Conciliation Committee.
15. Such trilogues are usually conducted in an informal framework. They may be held at all stages of the procedure and at different levels of representation, depending on the nature of the expected discussion. Each institution, in accordance with its own rules of procedure, will designate its participants for each meeting, define their mandate for the negotiations and inform the other institutions of arrangements for the meetings in good time.¹⁴

Handling of trilogue documents

16. In order to facilitate the negotiations, most trilogues use a so-called "multi-column document" as a basis for discussion. A multi (most often four) -column document is a shared document belonging to an informal process and containing the positions of the three Institutions depending on the stage of the procedure. The order and the number of columns may vary according to the political and negotiating circumstances relating to the file. It is prepared by the services in charge of handling the file of either the European Parliament or the Council.

¹⁴ Joint Declaration on Practical arrangements for the codecision procedure, OJ C 145 of 30.06.2007, p.5 (points 4,5,7 and 8).

17. Within the Council, most four column documents are prepared as standard Council documents ("ST" documents) and are therefore referred to in the public register upon circulation to Council delegations. The General Secretariat of the Council, after final adoption of a legislative act, makes any ST document relating to this act available to the public via the public register. Before that moment, ST documents can be made available to the public upon request in line with the rules provided for in Regulation 1049/2001. In particular the General Secretariat services will carry out consultations with the author of the document if required and then assess whether the disclosure of the requested document would undermine the protection of one of the interests identified by Article 4 of the said Regulation. A particular attention will be paid to the existence of the risk that disclosure may seriously undermine the on-going decision-making process. In such a case, access will be refused unless an overriding public interest can be identified.
18. The General Secretariat of the Council regularly receives specific requests for access to four column documents from researchers (closed files) and occasionally from NGOs with a specific interest in trilogues (open files). Other applicants apply for four column documents, in the same way as they would apply for any other preparatory documents relating to a legislative procedure
19. The Council is actively engaged in the implementation of a new document and file management policy aiming at moving away from paper-based and local filing structures towards a centralised electronic filing repository, the effect of which will be greater traceability of informal working documents currently not prepared as ST documents.

IV. FINAL REMARKS

20. In the context of the current OII, the Council wishes to emphasize that it remains fully committed to the principle of transparency, as laid down in articles 1 TEU and 15 TFEU.
21. The Council has engaged in a renewed effort for increasing the effectiveness and transparency of the legislative and regulatory processes in the framework of the ongoing debate on the Interinstitutional Agreement on Better Regulation.

Sincerely yours,

Jeppe Tranholm-Mikkelsen