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NOTE

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	7420/17 and 8808/17
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 – Draft reply of the Council of the European Union

Delegations will find enclosed a draft reply from the Council to the European Ombudsman on the abovementioned own-initiative inquiry, approved by the Working Party on Information on 13 July 2017.

It is suggested that the Council, by written procedure, record its agreement on the draft reply annexed to this document.

The Annex is available in English only.

DRAFT

Brussels,

Ms Emily O'Reilly
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Subject: Own-initiative inquiry OI/2/2017/AB on access to documents relating to Council preparatory bodies when discussing draft EU legislative acts

Thank you for your letter of 10 March 2017 relating to your own-initiative inquiry OI/2/2017/AB concerning access to documents relating to Council preparatory bodies when discussing draft EU legislative acts.

You will find herewith the opinion of the Council on the inquiry.

Sincerely yours,

Jeppe Tranholm-Mikkelsen

I. INTRODUCTION

1. On 10 March 2017, the European Ombudsman informed the Council of her decision to open an Own-Initiative Inquiry (OII) concerning access to documents relating to discussions on draft EU legislative acts in Council preparatory bodies.
2. In her opening letter, the Ombudsman underlined four main reasons that would justify an inquiry on the matter. She referred to the particular pressing need for transparency in legislative matters, the existence of divergent practices in relation to the production of documents relating to legislative files, the implementation by the Council of the judgment in the Access Info Europe case (C-280/11 P) and the completeness and accessibility of the Council's public register. As a first step in the inquiry, the Ombudsman asked the Council to reply to a set of 14 questions, divided into four main areas of interest.
3. The Ombudsman's request offers the Council the opportunity to illustrate various improvements recently introduced or currently underway which aim to enhance the traceability and documentation of the legislative process. These improvements attest to the importance the Council attaches to legislative transparency and its commitment to transparent and effective law-making.
4. In reply to the Ombudsman's request, the Council is therefore pleased to provide the Ombudsman with the following clarifications. The Council's reply will be articulated in four sections addressing the four areas of interest identified by the Ombudsman. At the outset, however, the Council considers it necessary to make some points on the scope of the inquiry and the Ombudsman's mandate.

II. PRELIMINARY REMARKS ON THE SCOPE OF THE INQUIRY

5. As the Council already had the opportunity to highlight in the context of previous inquiries¹, the notion of (mal)administration has to be distinguished from the exercise of legislative activity.
6. The Treaties establish a clear institutional and procedural framework for the exercise of legislative power at EU level. They attribute the European Parliament and the Council joint responsibility for the exercise of the legislative function (Articles 14 and 16 TEU) according to a specific decision-making procedure (Articles 289 and 294 TFEU) and link such responsibility to their different but complementary democratic legitimacy (Article 10 TEU). This institutional set-up clearly distinguishes the legislative procedure from administrative activities.
7. The Council is of the view that the exercise of legislative powers is not limited to the adoption of political choices on 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.²

¹ See OI/8/2015/FOR.

² 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) TFEU) and in the organisation of the legislative function (Article 289 and 294 TFEU).

8. As a consequence, choices on the way the legislative process is organised, including choices on how institutions organise the preparatory discussions leading to the adoption of their formal positions, fully pertain to the political responsibility of the EU co-legislators, who are – in different but complementary ways – 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'.³ A different approach would inevitably put at risk the constitutional principle of institutional balance, in the light of which Article 228 TFEU should be read. It is therefore not for the Ombudsman to review the merits of the choices made by the co-legislators when organising the internal procedures for exercising their legislative responsibilities.
9. At the same time, the Council is aware that a number of administrative activities are put in place by its departments 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 (EC) No 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.
10. On a different note, the Council would like to stress that the co-legislators are currently working to implement the commitments for a greater legislative transparency that they have assumed by concluding the Inter-institutional Agreement on better law-making in 2016.⁴ Moreover, the issue of the identification and public access to certain preparatory documents of the legislative process is the subject of a case currently pending before the General Court in which the Council is intervening.⁵ The Council considers that both the co-legislators and the judicial authority should be allowed to exercise their responsibilities on both matters in full.

³ See Case 655/2006/(SAB)ID concerning a decision taken by the Parliament's plenary in the framework of its budgetary functions.

⁴ See notably point 38 of the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on better law-making of 13 April 2016.

⁵ Case T-540/15 De Capitani v. European Parliament, Council and Commission intervening.

In that regard, the Council notes the Ombudsman has constantly applied a policy of self-restraint in relation to complaints concerning issues on which the legislators had exercised or were exercising their 'political' rather than administrative activity and that the Treaties aim at avoiding any interference in the exercise of the judicial role of the Court of Justice. The Council is confident that the Ombudsman will take these considerations duly into account in deciding the course of action to give to her own-initiative inquiry.

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 ?*

The General Secretariat of the Council (GSC) publishes on the Council's website the notices of meetings (in the form of CM documents) containing the agendas of the working party discussing a given Commission legislative proposal. The public can therefore see which Working Party will be discussing a Commission proposal.

These notices of meetings are available in the public register. It is possible to search for these documents by different means:

- via the page '[Latest documents added to the public register](#)'
- via the link '[Agenda of other Council preparatory bodies](#)' available in the page '[Key documents by category in the public register](#)'
- through the [search form](#) of the public register.

The meeting calendar of the Council's preparatory bodies is also available on the website, under '[Meetings](#)'.

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 ?*

Article 7(2) of the Council's Rules of Procedure makes clear that documents submitted to the Council which are listed under an item on the 'Legislative deliberations' part of its agenda shall be made public, as shall those sections of the Council minutes which relate to that part of the agenda. Annex II to the Rules of Procedure, which specifically regulates public access to Council documents, further clarifies that the following categories of document are made public as soon as they are circulated:

(a) Annex II, Article 11(3):

- (i) third party documents made public by their author,
- (ii) provisional agenda for meetings of the Council in its various configurations,
- (iii) any text adopted by the Council and intended to be published in the Official Journal;

(b) Annex II, Article 11(5):

- (i) cover notes and copies of letters concerning legislative acts,
- (ii) 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',
- (iii) notes submitted to Coreper and/or to the Council for approval ('I/A' and 'A' item notes) concerning draft legislative acts,
- (iv) the draft legislative acts to which the notes mentioned under (iii) refer and adopted legislative acts.

Documents that do not fall in the above categories - such as preparatory documents submitted to Council preparatory bodies - are made public or not upon circulation following a judgment call by the originating department, according to the provisions of the Council's Rules of Procedure and taking into account the fact that, in accordance with Article 12 of Regulation (EC) No 1049/2001, *'legislative documents [...] should, subject to Articles 4 and 9, be made directly accessible.'*

Where no case of mandatory LIMITE circulation as defined by the Council's Rules of Procedure applies, this decision is made on the basis of a *prima facie* assessment of the existence of a risk for one or more of the public interests protected by the exceptions in Article 4(1) to (3) of Regulation (EC) No 1049/2001. The GSC has adopted instructions for staff on the production, publication and handling of documents⁶ and holds regular internal training sessions to raise awareness of these rules and of the provisions of Regulation (EC) No 1049/2001.

The summary records of COREPER meetings are public and directly available in the public register. Hence, EU citizens can easily retrieve information about the results of discussions on any legislative files dealt with at COREPER level.

3. Are guidelines available on how and when LIMITE documents can be made available to the public ?

4. What further work has been done on the issue of the GSC periodically reviewing the status of LIMITE documents relating to ongoing legislative procedures ?

While decision-making processes are ongoing, the release of documents initially circulated as LIMITE is in general request-driven. This does not exclude, however, that due to a change in the circumstances, the originating department may reconsider its original assessment and decide to make public a given document. Originating departments are encouraged to review the status of LIMITE documents when the LIMITE status ceases to be justified as clarified in a recent Council document, 5109/1/17 REV 1.

If there is a request for public access, the GSC applies a well-established procedure aimed at ensuring that the criteria of Regulation (EC) No 1049/2001, as construed by case-law, are strictly applied. This process is set out in a recent Council document ST 6896/1/17 REV 1.

⁶ Namely CP 200/08 (Reminder of the instructions on the production and distribution of documents - Rules applicable to meeting documents), ST 11336/11 (Handling of documents internal to the Council), ST 5109/1/17 REV 1 (Issuing and release of LIMITE documents). See also documents 8864/1/16 REV 1 (Rules governing the handling and conditions for release of LIMITE documents to the public) and 14352/16 (Issuing of LIMITE Documents).

The GSC is currently conducting a reflection on developing technical tools to make it easier for the originating departments to release LIMITE documents in the public domain. Furthermore, the GSC regularly organises training sessions for staff to raise awareness of the importance of complying with transparency rules and fostering good transparency practices.

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

The GSC takes very seriously the provision of Article 11(6) of Annex II to the Council's Rules of Procedure which provides that *'After adoption of the acts referred to in paragraph 5 (d) or final adoption of the act concerned, the General Secretariat shall make available to the public any documents relating to this act which were drawn up before one of such acts and which are not covered by any of the exceptions laid down in Article 4(1), (2) and (3), second subparagraph, of Regulation (EC) No 1049/2001, such as information notes, reports, progress reports and reports on the state of discussions in the Council or in one of its preparatory bodies (outcomes of proceedings), excluding Legal Service opinions and contributions'.*

Documents are made public as soon as possible after the adoption of the legislative act.

Documents related to all legislative acts adopted until the end of 2016 are available to the public.

How is the process organised ?

The GSC draws up a monthly summary of Council acts which provides information on the adoption of legislative acts, including:

- the date of adoption,
- the relevant Council session,
- the number of the document adopted,
- the Official Journal reference,
- applicable voting rules, voting results and, where appropriate, explanations of vote and statements published in the minutes of the Council.

On the basis of this monthly summary, the GSC draws up lists of documents related to each adopted act and checks with the relevant departments whether the documents which are not yet public are still covered by one of the exceptions provided for in Article 4 of Regulation (EC) No 1049/2001.

After having received the reply from the relevant departments, the documents are made public by the GSC. In some rare cases, partial access is granted to documents containing information that remains covered by one of the exceptions laid down in Article 4(1), (2) and (3), second subparagraph, of Regulation (EC) No 1049/2001.

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 ?

Council documents are drafted in compliance with the working methods of the Council, which in turn ensure democratic and fair decision-making processes, in line with the Council's Rules of Procedure. The drafting of documents during the legislative process depends mainly on the stage of negotiations and the context. In some cases, a particular presentation (such as track changes, bold, etc.) is used in order to facilitate negotiating processes on wording and language.

That said, the GSC, together with the administrative departments of the Commission and the European Parliament, is taking part in an interinstitutional project to develop a common drafting platform aimed at more efficient management of both format and content.

II. Recording Member States' individual positions

7. *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 ?*

The question as to whether to record delegations' individual positions at working party level was discussed by the Permanent Representatives Committee (COREPER) in May 2014, based on the guidance suggested by the GSC on the drafting of documents relating to legislative activities (ST 8622/1/14 REV 1). COREPER indicated *inter alia* its preference for recording Member States' names in documents relating to ongoing legislative procedures where it was deemed appropriate.

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 2015 ?*

The evaluation of the impact of the Court's ruling in Access Info Europe is set out in document 8863/16 which states that '*The findings of the two-stage evaluation demonstrated that the GSC departments continued the existing practice of recording Member States' names in preparatory documents, where it is deemed appropriate*'. The evaluation carried out by the GSC during the first half of 2015 concerned the **drafting** policy and not the **disclosure** policy.

The Council's practice regarding the **disclosure policy** of documents containing Member States' individual positions changed as a consequence of the Court's judgment in Access Info Europe as follows: save in duly justified and exceptional cases, access to the names of Member States in documents relating to ongoing legislative procedures is provided upon request. In other words, documents related to a legislative act and containing Member States' positions are fully released upon request, whereas before only partial access was granted to them (i.e. the names of the Member States were deleted).

The major conclusions of the evaluation conducted by the GSC during the first half of 2015 on the principles governing the drafting of documents relating to the Council's ongoing legislative activities can be found in the Annex.

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 ?

The Access Info Europe ruling only relates to access following a request under Regulation (EC) No 1049/2001 and thus does not in itself require an adaptation of the Council's Rules of Procedure. The Council stresses that, when applying Regulation (EC) No 1049/2001 and its own Rules of Procedure, it takes full account of – and fully complies with – the relevant case law of the Court.

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 ?

The Guide for the drafting of documents mentioned in your letter is currently under review in the framework of the introduction of a new system for recording Council documents.

Since the autumn of 2016, a new system for recording documents has been introduced in the GSC. The new system, that has been launched following a test phase, aims to facilitate the distribution of documents to delegations and at the same time improve the Council institutional memory. Based on this new system, every single document for the Council and its preparatory bodies – including working papers – is registered and linked to a file. All documents are distributed to delegations via this system.

Drafting during a meeting may be necessary to facilitate discussions, in which case any information, the content of which has the nature of a document, is to be incorporated into post-meeting documents (which will be registered in the system).

Consequently, informal documents are now registered and easily retrievable.

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.*

GSC departments are instructed to publish regularly lists of working documents used by the different preparatory bodies. These lists are available in the public register. The public is therefore aware of the existence of these documents.

In addition, steps have been taken and continue to be taken to ensure that legislative documents are produced as standard documents (ST) mentioned in the public register or turned into such documents later.

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?*

The Council's public register is one of the most consulted Council webpages.

In 2016, the Council's public register was consulted approximately 380 000 times. On 31 December 2016, the public register listed 354 381 original language documents (2 583 926 documents in all language versions). Of the total number of original language documents listed in the register, 70 % (246 901 documents) are public and available for downloading.

The GSC has recently made some changes in the presentation of its search form, based on user tests, to improve the accessibility of Council's documents in the register and make it more user-friendly. The GSC also intends to launch a reflection in the course of 2017 in order to further simplify access to documents in the public register.

The GSC cooperates with the Publications Office and other EU institutions in an initiative to present all documents relating to interinstitutional legislative procedures at a single point on EUR-LEX. For this purpose, the GSC currently transmits information on its preparatory documents on interinstitutional legislative procedures to the Publications Office, which publishes them in EUR-LEX where they are presented in the context of each legislative procedure together with the documents from the other institutions.

In addition, the GSC plans to launch two initiatives to enhance visibility and access to those documents by providing an easy link to the Publications Office's 'Legislative procedures' page and by developing a system to provide access to documents via a calendar of the meetings of the Council and its preparatory bodies.

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

The Council considers the joint database on the state of play of legislative files provided for in Article 39 of the Interinstitutional Agreement on Better Law-Making as an important tool to increase the accessibility of information and documents related to legislative files.

Work on this joint legislative database between the three institutions is ongoing. Existing tools and applications are currently being explored in order to avoid duplication and extra costs. The feasibility of using the possibilities offered by EUR-LEX in order to adapt them to the requirements of Article 39 of the AII is currently under examination.

Subject: Workshop on the principles governing the drafting of documents relating to the Council's ongoing legislative activities - Summary and main conclusions

On 23 January 2015, a workshop was held at the initiative of the GSC Transparency Service (DG F 2 C) with the participation of the CLS and all policy DGs on the implementation of guidelines for the drafting of documents relating to the Council's legislative activities.

Background

These guidelines were drawn up in the light of the judgment of the Court of Justice in Case C-280/11 P (Council v Access Info Europe) and of the conclusions drawn by Coreper 2 in May 2014 following that judgment. In that regard, Coreper indicated its preference for continuing to record Member States' names in documents relating to ongoing legislative procedures where it is deemed appropriate.

See 8622/1/14 REV 1 and 9900/14, p. 14. It follows from the Coreper decision and the abovementioned guidelines that, in determining whether or not to record the names of delegations, the policy departments of the GSC should notably take into account:

- coherence with respect to the practice in a specific file and subject-matter;
- the impact on the efficiency of the Council's decision-making and the Member States' negotiating flexibility that recording and consequently public release of the names of individual Member States would have in the particular case;
- 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

The purpose of the workshop was notably to assess:

- whether the Court ruling had had any impact on the drafting of such documents, and
- whether there was any need for further clarification/guidance with regard to the implementation of the guidelines.

Summary and general conclusions

The following general conclusions can be drawn:

- The guidelines based on the Coreper decision of 15 May 2014 are clear and cater for the drafting requirements experienced by the individual GSC departments, while ensuring the necessary flexibility to accommodate specific circumstances. They also seem to reassure drafters about GSC expectations.
- Drafting practice and the format of documents distributed to delegations during negotiations can vary from one sector to another. This was also the case before the Court ruling: in some policy areas, delegates are used to receiving very detailed outcomes of proceedings circulated in ST format, whereas in other policy areas it has been normal practice to draft and circulate informal and less detailed working documents to delegations.
- Those departments which normally prepare detailed outcomes of proceedings for their working parties all point out that the potential consequences of drafting less detailed documents would be that
 - it would become more difficult for the delegates to brief capitals adequately on the outcome of the discussions,
 - there was a risk of loss of institutional memory for the GSC in the long run, and
 - there could be a loss of transparency for the general public (by the end of the process).
- Those departments which have opted for circulating less detailed working documents confirmed that the need to protect the efficiency of the Council's decision-making and the Member States' negotiating flexibility and the specific nature of the subject matter were important reasons for their decision.