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LIMITE

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NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee

Subject: Legislative transparency

Delegations will find in Annex a note to Coreper seeking guidance on the way forward on legislative transparency.

Legislative transparency within the Council***State of play***

The Council has started a reflection on legislative transparency, in the context of ongoing developments in other institutions, a large number of access requests, developments in the relevant case-law and technological evolutions such as the trilogue editor, as well as the report of the Ombudsman regarding the transparency of the Council legislative practices.

On 18 July 2018 Coreper examined a draft policy paper on legislative transparency presented by the GSC which proposed a "Milestones approach"¹ and mandated the Antici + 1 (Legal Advisers) to continue work towards a more coherent approach to legislative transparency. Following three Antici+1 meetings as well as consultations based on a questionnaire, there appears to be broad acknowledgement of the incoherencies of the current practice, and some expressions of support for the Milestones approach, but no consensus could be found on the principle of pro-active publication of documents.

Beyond the consideration that the existing access to documents rules² may not be sufficient in light of today's context, it would be in the Council's interest to agree on a clear position in order to avoid being forced to react and adapt to decisions taken by other institutions. In addition, increasing coherence and consistency of practice would be beneficial for the good functioning of the Council as an institution.

Guidance from Coreper is therefore required on the way forward.

¹ ST 11099/18.

² Under Regulation 1049/2001, there is a requirement for all institutions to have access to document rules. Such rules currently feature in Annex II to the Council's Rules of Procedure, which are adopted under Art 240(3) TFEU by simple majority.

Use of General Approaches

Some elements of the draft policy paper are also useful for protecting the Council's interests beyond legislative transparency considerations. This is most notably the case for the proposal to set, as a rule (with a possibility of exceptions in duly justified cases), the Council's negotiating position for legislative files at the level of the Council (i.e. the generalised use of General Approaches). This will guarantee a role for Coreper in the preparation of all mandates. Moreover, it will strengthen the negotiating position of the Presidency vis-à-vis the European Parliament, where negotiating mandates are adopted by the plenary.

The principle of the proactive approach

The policy paper of July 2018, which set out the "Milestones approach", aimed to ensure more coherence in the handling of documents related to legislative files, by identifying which categories of documents are to be made public at which point in time. It thus proposed a more pro-active approach, based on making more legislative documents directly accessible to the public at an earlier stage (those associated with "milestone" stages listed in the annex to that paper, which would be issued as a general rule as public documents), while ensuring the necessary space for reflection and negotiations by protecting those documents that merit protection (in between milestones)¹.

The proposed proactive approach has given rise to numerous questions. For that reason, several options are being proposed for consideration:

1. Preserve the principle of a proactive approach?

This would entail a need to continue the reflection on the milestone approach as described in the July document with a view to reaching as broad a consensus as possible. Such an approach would have the advantages explained in the draft policy paper. However, this process would probably take a long time and hence lead to the other institutions determining the policy for commonly-held documents.

¹ Without prejudice to the application of the relevant rules of Regulation 1049/2001 in case of requests for public access to documents.

2. Abandon entirely the proactive approach?

This would entail maintaining the status quo, with some possible technical and administrative adjustments required by the development of new tools (e.g. trilogue editor). While the GSC would attempt to streamline its internal practices to the extent possible within its remit, such an approach would not result in significant benefits either in terms of ensuring consistency across files and sectors, or in terms of the Council's position towards possible decisions of the other institutions on commonly held files or on general policy lines.

3. Pursue a targeted publication approach?

It could be envisaged to explore limiting the "milestones" and simplifying the proposed approach, in order to avoid the risks perceived by some delegations while increasing the coherence and predictability of the handling of the legislative process.

- There is first of all space for improvements in current practice which would have no detrimental consequences. There are documents which contain content which is already public, or about to be made public (such as the initial and final 4-column tables, containing respectively the proposal and the mandates of the institutions, and the provisional agreement); these could be public without any additional implications. Other documents which are currently produced, while similar in content (e.g. progress reports), are either public or not depending on the level to which they are addressed (Coreper/Council), and handling could be streamlined.

- Secondly, Coreper's central role could be recognised by providing that, for those documents for which publication as a rule would be agreed, any delegation can raise objections to the publication of a specific document during its examination in Coreper. One could envisage practical steps such as the following:
 - progress reports to Coreper could be submitted as LIMITE, but unless delegations object during Coreper the LIMITE marking could be removed after examination by Coreper;
 - the outcome 4-column documents of trilogues could be made public after examination in Coreper, unless delegations object to such publication during Coreper.

Coreper is invited to:

- agree to resort in the future as a rule to General Approaches for all legislative files in order to protect the interests of the Council in negotiations;
- confirm whether the principle of proactive publication should be pursued, as set out in the draft policy paper of July 2018, or in a more targeted and simplified approach, or dropped altogether.
