



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 13 May 2014

**8622/1/14
REV 1**

LIMITE

**JUR 222
INF 116
API 44**

NOTE

from: General Secretariat of the Council
to: Permanent Representatives Committee
Subject: Drafting of documents relating to legislative activities

1. In December 2013 Coreper was informed about the implications of the judgment of the Court of Justice in Case C-280/11 P (Access Info)¹ in terms of the handling of applications for public access under Regulation (EC) No 1049/2001². In that respect it was underlined that where documents relating to on-going legislative procedures identify Member States which state their positions, public access will be given to the names of those Member States when the document is disclosed, save in duly justified and exceptional cases³.
2. Conversely, there is no obligation to draw up documents which identify Member States indicating their positions, and practice currently varies within the General Secretariat of the Council (GSC). What the future practice should be in that respect is a matter of policy choice⁴.

¹ Judgment of the Court of Justice (First Chamber) of 17 October 2013 in Case C-280/11 P (Council v Access Info Europe), summarised in the information note from the Legal Service contained in document 15911/13.

² 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 L 145, 31.5.2001, p. 43).

³ See document 17177/13 and document 7356/14.

⁴ Document 17177/13 outlined options for consideration, but no decision was taken in that respect.

3. Coreper is therefore invited to consider and choose from the following three options as regards the recording of names of Member States indicating their positions:

Option 1: To record Member States' names in all documents relating to on-going legislative procedures¹.

Option 2: To cease recording Member States' names in all documents relating to on-going legislative procedures.

Option 3: To continue recording Member States' names in documents relating to on-going legislative procedures where it is deemed appropriate.

Option 1 has the advantage of always providing delegations with a detailed overview of the state of play of on-going negotiations, and ensures that sufficient information is held by those responsible for dealing with the legislative file in question. However, it does not cater for situations where the automatic recording and consequently public release of the names of individual Member States is not deemed appropriate.

Option 2 would address the specific concern that publicly disclosing the names of individual Member States indicating their positions could reduce Member States' negotiating flexibility. Yet, it would also result in a loss of institutional memory and render the preparatory documents less useful for delegations both while negotiations are on-going and once the decision-making process is finalised.

Option 3 appears to be a more suitable option as it allows striking a good balance between the interest in receiving full information and keeping complete records and the interest in protecting the Member States' negotiating flexibility and thus the effectiveness of the Council's decision-making process. The Presidency will remain responsible for providing guidance to the Secretariat with regard to the requirements from the Council or its preparatory bodies, taking into account, inter alia, the following criteria:

¹ As stated above, such names would have to be released as a matter of course when the document is released.

- 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.
4. It is underlined that no changes of the current practice are envisaged in respect of the marking of the documents concerned as "LIMITE"¹. The judgment in case C-280/11 P concerns the obligation to grant public access upon request and therefore does not have a direct bearing on the possibility of using the "LIMITE" marking.
5. Finally, it is recalled that amendments to Annex II of the Council's Rules of Procedure would need to be prepared and submitted to the Council for agreement at an appropriate time, as a consequence of the practical implications of the judgment referred to in paragraph 1 above.

¹ Documents bearing the "LIMITE" distribution code are internal to the Council and deemed covered by the obligation of professional secrecy in accordance with Article 339 of the Treaty on the Functioning of the European Union (TFEU) and Article 6(1) of the Council's Rules of Procedure. "LIMITE" documents are therefore not made public upon circulation. They may only be made public in accordance with applicable procedures, hereunder following a decision taken in accordance with Regulation (EC) No 1049/2001 and the Council's Rules of procedure. Non-classified documents which do not bear the "LIMITE" distribution code are made public upon circulation.