

Report on the inspection of documents and meeting of the European Ombudsman's inquiry team concerning Council transparency during the COVID-19 crisis

Correspondence - 07/07/2021

Case OI/4/2020/TE - **Opened on** 27/07/2020 - **Decision on** 24/03/2021 - **Institution concerned** Council of the European Union (No maladministration found) |

Inquiry: OI/4/2020/TE

Title: Council transparency during the COVID-19 crisis

Date : Friday, 13 November 2020

Location: Council of the EU, Brussels

Present

Representatives from the Council of the European Union, including two members of the legal service, four members of the transparency team and six persons dealing with the inspected files.

Four representatives from the European Ombudsman.

Purpose of the inspection meeting

The purpose of the meeting was to understand better the transparency arrangements put in place by the Council during the COVID-19 crisis, in particular as regards the documentation available on the Council decision-making process. In order to gain a full understanding, the following documents were inspected:

- File relating to the adoption of Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak;
- File relating to the adoption of Regulation (EU) 2020/696 of the European Parliament and of the Council of 25 May 2020 amending Regulation (EC) No 1008/2008 on common rule for the



operation of air services in the Community in view of the COVID-19 pandemic;

- File relating to the adoption of Decision (EU) 2020/701 of the European Parliament and the Council of 25 May 2020 on Marco-Financial Assistance to enlargement and neighbourhood partners in the context of the COVID-19 pandemic;
- File relating to the adoption of Council Decision on confirmatory application 6/c/01/20 on access to documents WK 11963/19 and WK 14081/18;
- File relating to the adoption of Council Decision (EU) 2020/789 of 9 June 2020 on the renewal of the Agreement for scientific and technological cooperation between the European Community and the Government of the Republic of India;
- Document ST 6934 2020 INIT, entitled “ *Exceptional measures on the continuation of decision making in the Council* ”, of 19 March 2020.
- Documentation available on the operation of three Working Parties (including agendas, meeting minutes, records of informal meetings of tele- or videoconferences and outcomes of written consultations) in the time period of 1 January to 30 June 2020. The Council selected the Working Party on Aviation, the Working Party on Information and the Audiovisual Working Party.

Introduction and procedural information

The meeting was organised pursuant to Article 3.2 of the Statute of the European Ombudsman and Article 4 of the European Ombudsman’s Implementing Provisions.

The meeting started at 10:00am and finished at 2:00pm.

The Ombudsman’s inquiry team set out the object and purpose of, and procedure for, the meeting within the context of the Ombudsman’s strategic inquiry OI/4/2020/TE. In particular, the inquiry team explained that this inquiry aims at ensuring that the Council, while adapting its functioning in light of the COVID-19 crisis, maintains the highest standards of transparency in relation to its decision-making process. This is of particular importance given the great impact on EU citizens of the decisions taken by the Council in this period.

The Ombudsman representatives also informed the Council representatives that, if they want to provide the Ombudsman with any documents that they identify to be confidential, no access may be granted to third parties without the Council’s prior agreement. Information and documents of this kind will be deleted from the Ombudsman’s files shortly after the inquiry has ended.

Discussion during the meeting

1. Background to Council decision making during COVID-19

Council representatives first underlined the general effort made by the Council to ensure the transparency of its decision-making process during the COVID-19 crisis. They explained that a summary of all decisions is, in most cases, available and that the records of written procedures



are available in the publicly accessible register.

The Council also noted that, despite the crisis, it has respected the deadlines to reply to public access to documents requests under Regulation 1049/2001, [1] except in a few cases.

a) Temporary derogation from the Council Rules of Procedure

In response to the COVID-19 crisis, the Council had to react rapidly and adapt its internal procedures to ensure the continuity of its decision making. In normal times, most of the Council's decisions are adopted in formal physical meetings. The ordinary written procedure is foreseen for “*urgent matters*” only and the decision to use it is taken by the Committee of Permanent Representatives (COREPER) by unanimity.

On 23 March 2020, the Council adopted Decision 2020/430 [2] that puts in place a temporary derogation from the first subparagraph of Article 12(1) of its Rules of Procedure. [3] This derogation facilitates the use of the ordinary written procedure. The derogation has been extended five times since March and is currently applicable until 15 January 2021. [4]

The derogation allows COREPER to decide to use the ordinary written procedure by applying the voting rule applicable for the adoption of the Council act concerned (e.g. by simple majority, qualified majority or unanimity as the case may be). The aim is to enable the Council to take decisions at a time when it is impossible or very difficult for certain Council members to travel with a view to being physically present at Council meetings held at the Council's seat. At the same time, Council representatives emphasised that it was of particular importance that the decision-making process complied fully with the principle of transparency. In fact, the derogation has been adopted with a view “*to ensure to the maximum extent possible, among others [...] public transparency*”. [5] The adoption of the derogation itself was done within the legal framework as it stands and in full compliance with transparency requirements.

Council representatives further explained that the Council adopted Decision 2020/430 on 23 March following a paper prepared by the General Secretariat of the Council and presented to COREPER on 19 March 2020. The paper, entitled “*Exceptional measures on the continuation of decision making in the Council*”, [6] proposed two options (and a combination thereof) to COREPER on how to adapt the Council's decision-making process in the current exceptional situation. The option to derogate temporarily from the first subparagraph of Article 12(1) of the Council Rules of Procedure and to facilitate the use of the written procedure was suggested by COREPER. The other option proposed by the Secretariat was to continue formal Council meetings, but to derogate temporarily from the quorum requirement set out in Article 11(4) of the Council Rules of Procedure. This option envisaged that Council members, who could not physically attend a meeting, participate through videoconferencing means, but still be counted as part of the quorum.

Council representatives further stated that the options paper prepared by the General Secretariat was initially marked as LIMITE, [7] but made publicly available on 14 October 2020 following a public access to document request under Regulation 1049/2001. They pointed out



that the Council Rules of Procedure are under the Treaties not a legislative act and, therefore, a decision to derogate from them is not subject to the same transparency standards as acts adopted via a legislative procedure. The initial choice of marking the document as LIMITE was certainly also linked to the uncertain development of the COVID crisis at the time and the possibility to further consider options on how to react.

b) Practical workings of informal ministerial videoconferences and working parties

Informal ministerial videoconferences

With the outbreak of COVID-19, it was clear that not all Council members would be able to travel to the Council's seat and attend formal Council meetings. Instead, informal ministerial video- or teleconferences are organised. At such videoconferences, no acts or conclusions can be adopted. In line with the temporary derogation from the Rules of Procedure, acts of the Council can be adopted by written procedure following a decision of COREPER to this end. The Council Rules of Procedure do not apply as such to informal ministerial videoconferences.

Council representatives explained that the way these informal ministerial videoconferences were organised was adapted over time. Initially, the changes put in place in light of COVID-19 were perceived as applying only for a short period of time. As the COVID-19 crisis evolved, the derogation lasted longer than originally foreseen and the Council had to adapt in order to respond better to the situation. At the start of the pandemic, from March to May 2020, the Council was focused on COVID-19 and the EU's response to the crisis. Informal ministerial videoconferences of Ministers of health took place regularly in order to ensure a level of coordination between Member States. There was little activity at ministerial level compared to what the Council undertakes under normal circumstances. It was only after a certain period, due to the prolonged character of the situation, that Ministers wanted to discuss matters which are normally discussed at formal Council meetings such as legislative and other files.

With experience gained from the early days of the crisis, the Council was able to determine better how to proceed and adapt its decision making under these circumstances also with a view to continue ensuring full respect of transparency requirements. Consequently, the Council took organisational measures to ensure that informal ministerial discussions are open to the public. On 29 June 2020, a document was submitted to delegations entitled “*Modalities on the convening, preparation and organisation of informal videoconferences of ministers during the COVID-19 crisis*” [8] and was approved by the Council on 3 July 2020. This document was originally marked LIMITE, but made publicly available via the Council's register after approval on 6 July 2020. The document provides that an agenda of informal ministerial meetings should be made publicly available. Furthermore, the General Secretariat of the Council started to web stream informal ministerial videoconferences when discussions are held on legislative acts or on other items where deliberations should be held in public within the meaning of Article 8 of the Council's Rules of Procedure. Moreover, it publishes on a dedicated website a list of participants, recordings (if available) and related documents.

Council representatives pointed out that these arrangements were not yet formalised in May



and June 2020, when the relevant decisions were adopted in the files the Ombudsman is inspecting.

Operation of working parties

Council representatives explained that there are more than 150 working parties and committees in the Council that help prepare its work. Working parties each operate and organise their work differently in accordance with the Council's Rules of Procedure. During the COVID-19 crisis, working parties could no longer hold physical meetings, except in exceptional circumstances. At the same time, it was of particular importance to ensure the continuity of their work. The COVID-19 working arrangements vary between working parties and apart from physical meetings include informal video- and teleconferences. Where physical meetings were not possible, working parties were initially instructed not to issue agendas in the form of CM (Communication) documents. However, right from the start, the public register contained a document listing all 'essential meetings', whether those are physical meetings or informal video- or teleconferences of the members of a working party. Therefore, the public was at all times informed which meetings, whether physical or not, were held. Where an agenda was communicated to the informal video- or teleconference, it was directly distributed to members by e-mail or in the form of a WK (Working) document. However, as it became clear that the situation would pertain, working parties, which meet in informal videoconferences, were instructed to register agendas in the form of a CM document, which is publicly available.

In order to assist the staff of the General Secretariat of the Council with practical advice in a situation where it was difficult to meet in person to exchange views and best practices while facing similar challenges, internal guidance was given as an administrative management tool.

2. Discussion on the adoption of five files and the activity of three working parties during COVID-19

a) Aviation

Working Party on Aviation

Council representatives dealing with the Working Party on Aviation explained how the working party operates under the current circumstances and gave an overview of the files adopted during the crisis so far.

In normal times, the Working Party on Aviation meets physically and Member State representatives provide their views on the files under discussion. With COVID-19, the Working Party followed the advice and guidance received.

The outbreak of COVID-19 has affected the Working Party's working arrangements and slowed down its working pace. Member States now send their views also in writing, which are compiled in WK documents. While this was also done before the pandemic, the practice is more prevalent now. Separate WK documents are issued for each agenda item (i.e. for each file). WK



documents are not initially made publicly available but a list of these WK documents is periodically published in an ST (Standard) document. Moreover, access to these WK documents can be granted upon a request for public access to documents by either asking specifically for these documents based on the publicly available list or by asking for all documents associated with a file. The draft legislative proposals are published as ST (Standard) documents and marked LIMITE while under negotiation and access to those documents can similarly be granted upon a request for public access. Once the final act is adopted, the ST documents and the WK documents linked to the file are made available to the public. [9]

Council representatives noted that the practice of written comments is not new and existed before COVID-19. However, it was more widely used during the crisis since informal videoconferences of the members of the Working Party are considered cumbersome and difficult to arrange, with technical problems that impede progress. Over time, some improvements were made, but it remains challenging to discuss major legislative files in informal videoconferences. Therefore, written comments are also needed. The wider use of written comments has led to an increase in the number of documents issued by the Working Party.

Concerning the transparency of the process, Council representatives noted that, in a certain way, the Working Party's operation led to the production of more documents under the COVID-19 situation. Whereas under normal circumstances, the exchanges in meetings are mainly oral, with COVID-19, the positions of members of the Working Party are collected and registered more in formal documents.

Regulation (EU) 2020/696 on common rules for the operation of air services in the Community in view of the COVID-19 pandemic

Council representatives noted that, in normal times, amending a Regulation can take up to 18 months. In the case of Regulation (EU) 2020/696 on common rules for the operation of air services in the Community in view of the COVID-19 pandemic, due to the urgency of the situation, it was done in three weeks.

The proposal had been published by the Commission on the delegates portal on 29 April 2020. Delegations were asked to submit written comments. The proposal was also discussed in an informal videoconference of the Working Party on 5 May 2020. The comments were compiled in a compromise document sent to COREPER on 8 May 2020. COREPER slightly amended the Commission's initial proposal. The Council position was then communicated to Parliament. Parliament submitted further amendments on 15 May 2020. On 25 May 2020, Parliament's proposal was sent to COREPER and adopted via written procedure.

Ombudsman representatives noted that not all documents related to the file bear the inter-institutional code and those documents were difficult to find in the Council's public register. Council representatives noted that the written consultation of the Working Party was launched with document 7586/2020, inviting Member State delegations to submit written comments. The results are contained in document 7613/2020. Whereas the former document does not bear the inter-institutional code, the later does bear this code. Where the relevant document does not



bear the inter-institutional code, this is due to a technical oversight.

Council representatives also noted that Member States' written comments can be found in the public register. However, as they are registered in the form of WK documents, they have no separate entry in the register. Instead, at regular intervals usually at the end of the rotating six-monthly Council presidency, an ST document is published, which contains a list of WK documents issued over the past months.

Council representatives further explained that there is no standardised formal procedure for Member States to submit written comments. Such submissions may take different formats in various sectors, including sending e-mails or documents with tables, documents with comments or a list of comments. The variety of formats is the result of different working methods and can at times create challenges for compiling the comments. Bearing in mind these differences and the various stages at which comments may be collected, it is difficult to envisage that members of a Working Party were to be required to submit comments in a certain format. It was noted that written submissions formalise a position which may lead to less flexibility in the course of negotiations.

b) Audiovisual Working Party

The Council representative dealing with the Audio-visual Working Party introduced its activities during the COVID-19 crisis.

In normal times, when the Working Party examines a file, it first issues a text prepared together with the Presidency in form of an ST document. In some cases, it asks for written comments from Member States. However, generally a physical meeting takes place during which Member States' positions are expressed orally. There are no minutes of Working Party meetings. The focus lies on the preparation of the next version of the text in light of Member States' comments, which are frequently submitted in writing after the meeting. The next version of the text is published as a new ST document and the process then repeats itself until agreement - or a maximum degree of agreement - is reached. The file is then transmitted to COREPER. The Council representative noted that written comments can sometimes render the negotiating process more difficult and the interactive exchanges at physical meetings are usually preferred. However, over the years, written comments have become more common.

In COVID-19 times, the Working Party adapted its functioning, switching to written consultations with Member States. Physical meetings no longer take place and no informal videoconference took place between 14 March and 7 June 2020. Written consultations are registered in the form of WK documents. The Council representative noted that this has resulted in a more transparent process, as Member States' positions are available in WK documents and public access to such documents can be requested under Regulation 1049/2001.

c) Economic

Council Decision (EU) 2020/789 of 9 June 2020 on the renewal of the Agreement for scientific and



technological cooperation between the European Community and the Government of the Republic of India

The responsible Council representative explained that the file followed the normal procedure for international agreements, with the exception that the written procedure was used to request Parliament's consent and for the adoption of the decision.

The process that led to the adoption of the decision started prior to the COVID-19 crisis. Therefore, the responsible Research Working Party initially met physically. With the outbreak of COVID-19, the Working Party adapted its operation and the file followed the written procedure for formal adoption by the Council.

Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak

The representative of the General Secretariat of the Council, who dealt with the file at the time, explained that measures for a coordinated response to the economic fallout of the COVID-19 pandemic were discussed by the Eurogroup, as requested by EU leaders on 26 March 2020. The discussion took place in a videoconference on 7-9 April 2020, in the so-called 'inclusive' format. Ministers agreed on a report to the leaders, [10] which reflected their political views on and support for a series of proposals, including the SURE instrument, which was put forward by the Commission on 2 April 2020. Ministers invited to start the legislative work on the SURE instrument without delay.

Further meetings, during which the file was discussed, were those of the responsible Financial Counsellors Working Party, and they were held physically. Consequently, the decision-making process did not change from the normal procedure, except that the act was finally adopted by the Council by written procedure. There are no records of the physical Working Party meetings, which is not specific to the COVID-19 situation. In relation to the adoption of the SURE Regulation, one document [11] - a note to COREPER, which, in line with the usual practice, serves to explain the content and process of preparing legal or legislative acts for the adoption by the Council - provides information on how the negotiation proceeded. This document was marked LIMITE and was made public following the adoption of the act.

Concerning the fact that some documents relating to the file do not bear the inter-institutional code, the Council representative confirmed that this was a technical oversight.

Council Decision (EU) 2020/701 of the European Parliament and the Council of 25 May 2020 on Macro-Financial Assistance to enlargement and neighborhood partners in the context of the COVID-19 pandemic

Council representatives explained that the adoption of Decision 2020/701 was considered urgent in the context of the COVID-19 crisis. It was negotiated with the European Parliament at a very fast pace in an informal manner to limit the time spent on amendments. The contacts with



Parliament were therefore even more informal than during normal trilogues. The informal contacts involved phone calls to ensure that the legislators were on the same page and to avoid any deviation from the proposal that would slow down the legislative procedure. There is no record of these informal exchanges with Parliament.

The responsible Council representative explained that, as the proposal was dealt with by the Financial Counsellors Working Party (like the SURE Regulation), there was hardly any change of working arrangements. The Working Party continues to meet physically during the crisis.

d) Transparency

Working Party on Information

The Working Party on Information works on matters related to communication, information and transparency. In terms of public access to documents and transparency, it applies Regulation 1049/2001 and follows its strict deadlines.

The absence of physical meetings and the lockdown rendered the Working Party's work more difficult and slowed down its operation, especially due to the systematic use of the written procedure for the adoption of Council acts. Overall, the responsible Council representative considered, however, that the Working Party had been responsive during the crisis. No specific delays were encountered in dealing with public access to documents requests.

Council Decision on Confirmatory application 6/c/01/20

The Council representative, who dealt with the file, explained the Working Party's operation based on the example of this confirmatory decision, which concerned documents on sanctions imposed on Russian authorities.

3. Further discussion

In her letter of 27 July 2020, the Ombudsman had also asked the Council to give an overview of how often working parties that did not have physical meetings found agreement on legislative acts between 23 March 2020 and 30 June 2020.

Council representatives explained that such data is not available since working parties do not reach decisions on legislative acts. It was, however, noted that the Council had decided 163 times by way of written procedure. Of these, the Council was seized 25 times to take decisions on files in the ordinary legislative procedure and six times on files in a special legislative procedure between 23 March 2020 and 30 June 2020. Concerning the interaction between working parties and COREPER, COREPER was seized 65 times on items in the ordinary legislative procedure by the working parties at various stages in the legislative procedure. This includes decisions to use the written procedure for the adoption of the act, mandate for negotiations with the European Parliament, progress reports and reports on the state of play.



Council representatives clarified that by “ *essential meetings* ” the Council refers to all meetings that take place, either physically or by tele- or videoconference. The term “ *essential* ” is used as a justification to organise any type of meeting.

Information exchanged / documents inspected

The Ombudsman representatives obtained copies of documents held by the Council relating to the four files on:

- Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak;
- Regulation (EU) 2020/696 of the European Parliament and of the Council of 25 May 2020 amending Regulation (EC) No 1008/2008 on common rule for the operation of air services in the Community in view of the COVID-19 pandemic;
- Decision (EU) 2020/701 of the European Parliament and the Council of 25 May 2020 on Macro-Financial Assistance to enlargement and neighbourhood partners in the context of the COVID-19 pandemic;
- Council Decision (EU) 2020/789 of 9 June 2020 on the renewal of the Agreement for scientific and technological cooperation between the European Community and the Government of the Republic of India.

The Ombudsman representatives also inspected the documents related to the Working Party on Aviation, the Audio-visual Working Party and the Working Party on Information prepared by the General Secretariat of the Council for the period from 1 January and 30 June 2020.

The Council requested the documents to be treated confidentially.

Brussels, 12 January 2021

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[1] Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, available at:

<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001R1049> [Link].

[2] Council Decision (EU) 2020/430 of 23 March 2020 on a temporary derogation from the Council's Rules of Procedure in view of the travel difficulties caused by the COVID-19 pandemic



in the Union, available at :

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020D0430&from=EN> [Link]

[3] Article 12(1) of the Council Rules of Procedure says in its relevant part: “ *Acts of the Council on an urgent matter may be adopted by a written vote where the Council or Coreper unanimously decides to use that procedure. In special circumstances, the President may also propose the use of that procedure; in such a case, written votes may be used where all members of the Council agree to that procedure* ”.

[4] Council Decision (EU) 2020/1659 of 6 November 2020 further extending the temporary derogation from the Council's Rules of Procedure introduced by Decision (EU) 2020/430, and extended by Decisions (EU) 2020/556, (EU) 2020/702, (EU) 2020/970 and (EU) 2020/1253, in view of the travel difficulties caused by the COVID-19 pandemic in the Union, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020D1659&from=EN> [Link].

[5] Council Decision (EU) 2020/430 Recital 4

[6] Document 6934/20.

[7] Recipients of documents which bear the marking LIMITE are expected to ensure that such documents remain internal to the Council. The Council does not make such documents directly accessible to the public on its website.

[8] Document 9188/20

[9] The so-called Article 11(6) procedure under the Council Rules of Procedure.

[10]

<https://www.consilium.europa.eu/en/press/press-releases/2020/04/09/report-on-the-comprehensive-economic-policy>

[11] Document ST 7277/20.