



## **Besluit inzake strategisch onderzoek OI/2/2017/TE naar de transparantie van het wetgevingsproces in de Raad**

Besluiten

**Zaak** OI/2/2017/TE - **Geopend op** 10/03/2017 - **Aanbeveling omtrent** 17/05/2018 - **Speciaal Verslag over** 16/05/2018 - **Besluit over** 15/05/2018 - **Betrokken instellingen** Raad van de Europese Unie ( Na een speciaal verslag gesloten zaken ) | Raad van de Europese Unie ( Wanbeheer vastgesteld ) |

Dit strategisch onderzoek betreft de transparantie van besprekingen over ontwerpwetgeving in de voorbereidende instanties van de Raad van de Europese Unie (de "Raad").

Wetgevingsberaadslagingen moeten voldoende transparant zijn om te waarborgen dat Europese burgers hun democratisch recht tot deelname aan het besluitvormingsproces in de EU goed kunnen uitoefenen en de betrokkenen ter verantwoording kunnen roepen.

De vergaderingen en besprekingen over regelgeving in het kader van de formele goedkeuring van EU-wetgeving door de regeringsleiders van de 28 lidstaten in de Raad zijn openbaar. Voordat de Raad een formeel standpunt kan innemen, vinden er echter beraadslagingen plaats in meer dan 150 voorbereidende instanties. Juist op dat niveau worden de meeste wijzigingen in ontwerpwetgeving voorgesteld en wordt naar compromissen tussen lidstaten gezocht.

Bijeenkomsten van voorbereidende instanties vinden echter plaats achter gesloten deuren. Burgers kunnen hun democratisch recht op het volgen van wetgevingsberaadslagingen alleen uitoefenen door inzage te nemen in de verslagen van deze bijeenkomsten. Dit betekent dat wetgevingsbesprekingen in voorbereidende instanties naar behoren gedocumenteerd moeten worden en de betreffende stukken tijdig en eenvoudig toegankelijk moeten zijn.

Tegen die achtergrond heeft de ombudsvrouw in maart 2017 dit strategisch onderzoek geopend. Ze heeft specifieke vragen aan de Raad gesteld, een openbare raadpleging georganiseerd en wetgevingsdossiers van de Raad doorgenomen.

De ombudsvrouw stelde vast dat de huidige werkwijzen van de Raad neerkomen op wanbeheer. Haar kritiek betrof vooral het verzuim van de Raad om systematisch bij te houden welke lidstaten in de voorbereidende instanties standpunten innemen, en de wijdverbreide praktijk om gedurende het besluitvormingsproces de toegang tot wetgevingsdocumenten te beperken (de zogeheten markering 'Limité').



Op 9 februari 2018 heeft de ombudsvrouw drie specifieke aanbevelingen en een aantal suggesties gedaan aan de Raad om het wetgevingsproces transparanter te maken.

De Raad verzuimde binnen de wettelijk voorgeschreven termijn van drie maanden op haar aanbevelingen te reageren. De ombudsvrouw heeft de zaak daarom afgesloten met een bevestiging van haar bevindingen, aanbevelingen en verbeteringsuggesties. Er zal bij het Europees Parlement een speciaal verslag worden ingediend.

## Background

**1.** The Council of the European Union (the Council) is comprised of the governments of the EU Member States. Together with the European Parliament [1], the Council adopts EU legislation. Before the ministers from the Member States reach a formal position on draft legislation at Council meetings, preparatory discussions take place in the Council's Committee of Permanent Representatives ('Coreper') [2] and in the over 150 Council preparatory bodies attended by national civil servants, including so-called 'working parties' [3]. In many cases, these preparatory bodies have a decisive influence on the final legislative text. The discussions in all these preparatory bodies are therefore a crucial part of the EU legislative process.

**2.** Ensuring that citizens are able to follow the progress of legislation is a legal requirement. Under the EU Treaties, every citizen has "*the right to participate in the democratic life of the Union*" and EU decisions must be taken "*as openly and as closely as possible to the citizen*" [4]. The Treaties specifically require that the Council meets in public "*when considering and voting on a draft legislative act*" [5].

**3.** The importance of legislative transparency is also anchored in the EU's rules on public access to documents [6]. These rules state that "*legislative documents*" must be directly accessible to the public to the widest possible extent [7].

**4.** In the context of concerns about a perceived lack of accountability of, and consequent lack of opportunity for, citizens to participate in the legislative activities of the Council, the Ombudsman decided to inquire into the matter on her own initiative via a 'strategic inquiry'. The strategic inquiry

**5.** The inquiry focused on the transparency of legislative discussions in Council preparatory bodies. In particular, it concerned how the General Secretariat of the Council (the 'Secretariat') administratively supports the legislative process in recording discussions that take place between Member States in preparatory bodies and by registering, managing and publishing the related documents.

**6.** On 10 March 2017, the Ombudsman put 14 questions to the Council [8], to which the Council replied on 26 July 2017 [9].

**7.** The Ombudsman then launched a public consultation inviting members of the public, civil



society, academics and national parliaments to put forward their views on the issues raised. All those who made contributions expressed concerns, to varying degrees, about the accountability and transparency of legislative discussions in the various Council preparatory bodies [ 10 ] .

**8.** On 23 January 2018, the Ombudsman's inquiry team inspected [11] files from Council on three legislative proposals that were finalised in 2016: the Data Protection Regulation [12] , the Decision on tackling undeclared work [13] and the Directive on the accessibility of websites and mobile applications of public sector bodies [14] . The inspection aimed to give the Ombudsman an insight into how the Secretariat produces, distributes, registers and publishes documents tabled at meetings of Council preparatory bodies.

**9.** Following a detailed analysis of the feedback received during the public consultation, the results of the inspection and the views put forward by the Council, the Ombudsman found that the Council's current practices constitute maladministration.

**10.** On 9 February 2018, the Ombudsman made three specific recommendations to the Council on how it could increase the transparency of its legislative process. She also asked the Council to reply to a set of suggestions for improvement [15] .

**11.** In line with the EU Treaties [16] and the European Ombudsman's Statute [ 17] , the Ombudsman granted the Council a period of three months to provide a detailed opinion on her recommendations and suggestions.

**12.** To the Ombudsman's disappointment, the Council did not reply to her recommendations and suggestions within the legally-prescribed timeframe, which elapsed on 9 May 2018. In view of the importance of the issue of legislative transparency, the Ombudsman decided not to grant the Council any extensions beyond this deadline.

## **The Ombudsman's recommendations**

**13.** The starting point of the Ombudsman's assessment was the importance of transparency for the democratic legitimacy of EU legislation and the EU. Since the Council's preparatory bodies do not meet in public, citizens can exercise their democratic right to follow legislative discussions only by accessing records of these discussions.

**14.** For this to be possible, legislative discussions in the preparatory bodies must be documented; where Member States take positions in preparatory bodies, this must be recorded; and timely access to legislative documents must be easily available.

**15.** The Ombudsman found that the Council's failure systematically to record the identity of Member States when they express positions in discussions within preparatory bodies [18] constitutes maladministration. She also found that the Council's current practice of designating most legislative documents, while decision-making is ongoing, as 'LIMITE' [ 19] , thus restricting public access, constitutes maladministration.



16. The Ombudsman therefore **recommended** that the Council should:

**1. Systematically record the identity of Member State governments when they express positions in Council preparatory bodies.**

**2. Develop clear and publicly-available criteria for how it designates documents as 'LIMITE', in line with EU law.**

**3. Systematically review the 'LIMITE' status of documents at an early stage, *before* the final adoption of a legislative act, including before informal negotiations in 'trilogues', at which point the Council will have reached an initial position on the proposal.**

17. In addition, the Ombudsman made a number of suggestions to the Council on how to improve the transparency of its legislative process, with a view to enhancing the consistency of documentation generated within its preparatory bodies [ 20 ] and the accessibility of that documentation via the Council's website and public register [ 21 ] .

18. The Ombudsman **suggested** that the Council should:

**1. Conduct a review of how it meets its legal obligation to make legislative documents directly-accessible. This review should be concluded within 12 months of the date of this Recommendation and should lead to the adoption of appropriate new arrangements within a further 12 months.**

**2. Adopt guidelines concerning the types of documents that should be produced by preparatory bodies the context of legislative procedures and the information to be included in those documents.**

**3. Update the Council's rules of procedure to reflect the current practice of disclosing legislative documents containing Member States' positions, as outlined by the 2016 Dutch Presidency of the Council.**

**4. List all types of documents in its public register, irrespective of their format and whether they are fully or partially accessible or not accessible at all.**

**5. Improve the user-friendliness and 'searchability' of the public register of documents.**

**6. Develop a dedicated and up-to-date webpage for each legislative proposal, following the example of the European Parliament's Legislative Observatory.**

Conclusion

The Ombudsman closes this strategic inquiry with the following conclusion:

**The Ombudsman confirms her findings of maladministration, her recommendations and her suggestions to the Council, as detailed in her Recommendation dated 9 February 2018.**



## **The Ombudsman will make a Special Report to the European Parliament.**

The Council will be informed of this decision .

Emily O'Reilly

European Ombudsman

Strasbourg, 15/05/2018

[1] Under the ordinary legislative procedure, Article 294 of the Treaty on the Functioning of the EU (TFEU).

[2] The 'Committee of the Permanent Representatives of the Governments of the Member States to the European Union' is made up of Permanent Representatives (Coreper II) or Deputy Permanent Representatives (Coreper I) of the 28 Member States.

[3] The list of preparatory bodies is available at:  
<http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/>

[4] Articles 1 and 10(3) of the Treaty on European Union (TEU).

[5] Article 15(2) of the TFEU.

[6] 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 2001 L 145, p. 43 (Regulation 1049/2001).

[7] Recital 6 and Article 12(2) of Regulation 1049/2001.

[8] The Ombudsman's opening letter can be found here:  
<https://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/76929/html.bookmark>

[9] The Council's reply can be found here:  
<https://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/83029/html.bookmark>

[10] The Ombudsman received 22 submissions to the public consultation, which can be found here:  
<https://www.ombudsman.europa.eu/en/cases/case.faces/en/49461/html.bookmark>

[11] The Ombudsman's inspection report can be found here:



<https://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/89637/html.bookmark>

[12] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

[13] Decision (EU) 2016/344 of the European Parliament and of the Council of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work.

[14] Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies.

[15] The Recommendation can be found here:

<https://www.ombudsman.europa.eu/en/cases/recommendation.faces/en/89518/html.bookmark>

[16] Article 228 of the TFEU.

[17] Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties, Article 3(6).

[18] See paragraphs 14-21 of the Recommendation.

[19] See paragraphs 28-35 of the Recommendation.

[20] See paragraph 13 and Annex I of the Recommendation.

[21] See paragraphs 23-27 and Annex 2 of the Recommendation.