

[REDACTED]

From: [REDACTED]
Sent: 20 December 2017 13:56
To: EO-CouncilConsultation
Subject: [EOWEB] "Council consultation - OI/2/2017": European Digital Rights' response
Attachments: EDRIResponse_EOconsultation_counciltransparency.pdf

Sender

Sender [REDACTED]
To Council consultation - OI/2/2017
Date Wednesday, December 20, 2017 1:56:23 PM CET

Your data

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Language you would like to receive an answer in en - English

Part 2 - Data

To Council consultation - OI/2/2017
Subject "Council consultation - OI/2/2017": European Digital Rights' response
To the European Ombudsman

My name is [REDACTED], and I am writing to you on behalf of European Digital Rights (EDRI). We hereby submit our response to your consultation OI/2/2017 on the transparency of legislative work within Council preparatory bodies.

Content

Thank you very much for your time.

Best regards,

[REDACTED]

Transparency of legislative work within Council preparatory bodies

European Digital Rights (EDRi) is an alliance of [35 civil society organisations](#) working in Europe and worldwide to defend fundamental rights and freedoms in the digital environment.

We appreciate the European Ombudsman's efforts to ensure transparency in the Council. In view of the [public consultation](#) that has been launched, EDRi would like to present its contribution:

I. Accessibility of information and documents

1. Once the European Commission makes a legislative proposal, it is discussed in one or more Council working parties. What useful information might be given at this stage to allow the public to see and to understand how the discussions develop?

It would be useful to know which Council Working Parties are going to work on the file, as well as to have access to their agendas at the earliest possible moment. Their debates should be webstreamed, and detailed transcripts of the discussions should be made available, with clear identification of which national delegation said what. The same is needed for Coreper and Council meetings, as all the Council's bodies should follow the same transparency rules. It would also be useful to have information about the planned timetable for each file.

2. In its reply to the Ombudsman, the Council describes the actions it is currently taking to make it easier to find documents on its website, such as improving its search form, giving access to documents via a calendar of meetings and developing the 'joint legislative database' provided for in the Inter-institutional Agreement on Better law-making. Are there other measures the Council could take to make legislative documents easier to find?

On the website's tabs dedicated to the Council Working Parties, Coreper and the Council configurations, there could be a list of the ongoing and the completed files on which each body is working, including links to the related documents. As for the documents themselves, a better classification system would be welcome. By way of example, they could be classified by the name of the file, then by the type of document (conclusions, working document, etc.) and finally by date of publication. The search function could also be made much more intuitive. Finally, on a positive note, the other institutions could learn from the Council's practice of making non-public documents findable by its search tool, a practice that improves transparency - even if far too many documents are not public.

II. Transparency of discussions

3. Please describe any difficulties you have faced in obtaining information or documents linked to discussions in Council preparatory bodies and any specific suggestions for improvement.

Access to “confidential” documents (including those marked as “LIMITE”) is very difficult. Indeed, while the agendas of the meetings of the different bodies of the Council do often indicate the references of the documents that will be discussed during such meetings, many of them are not accessible to the public. Documents should be available by default, with justifications, and based on a clear, verifiable methodology to be provided, where appropriate. In addition, it is difficult to follow the history of a file, as there is no portal specifying what have been the developments so far or the forecasts for the future steps in adopting the file (compared to the Parliament’s forecasts which, while imperfect, do give useful insights).

The direct and indirect impact on Member State-level discussions and procedures is also worth noting. Member States are precluded from respecting their own transparency and freedom of expression rules.

Consequently, we suggest giving more information to the public regarding the files, particularly which body is working on them, what has been done, national ministries or departments responsible (to allow easier interaction with national administrations) and details of the next steps in the legislative process. Also, we do not understand why the discussions of working groups or Council configurations are not public, as they are public bodies that discuss public matters. Every stage of the negotiations should be accessible to the public in a timely manner. Otherwise, we will still need to depend on leaks or, worse, accept that undue access by certain lobby groups is part of the EU’s legislative process.

4. Various types of documents can be produced and circulated in Council preparatory bodies (outcomes of proceedings, Presidency compromises, progress reports, etc.) In your opinion, are certain documents more useful than others in informing the public about ongoing discussions? Please explain.

All documents are useful to follow the Council’s work on the files, therefore all of them should be published. It would be unhelpful and risky to try to designate certain files as “not useful” and therefore outside transparency rules. It is also crucial to have access to such documents in a timely way, to give to the public the opportunity to properly follow and respond to any developments. As mentioned before, we should be able to have all information relevant to the files, in a structured way. In doing this, proper mechanisms to inform about the publication of documents should be conducted. The Council can learn from other institutions like the Parliament in this regard.

5. Do you ever consult the legislative file the Council publishes after the legislative act has been adopted?

Yes.

6. Do you consider that different transparency requirements should apply between discussions in working parties and discussions in Coreper? Please give brief reasons for your answer.

No. The Council is a public institution, working on public matters, regulating the activities of half a billion people. Hence there is no good reason to not disclose what is being discussed. The public has a right to know what is being decided and how, as well as the positions of the different actors involved in the discussions. When such information is provided, the Council (and the national Governments acting within it) will gain legitimacy and promote its integrity, accountability and scrutiny.

7. While discussions are ongoing, documents which bear the distribution marking "LIMITE" are not disclosed to the public without prior authorisation. In your opinion, what additional steps could be taken to further regulate and harmonise the use of the "LIMITE" marking concerning legislative documents?

The discussions in the European Parliament are public. As a co-legislator, why should the discussions in the Council not be public as well? A file should be marked as "LIMITE" only in clear and justified cases, after an assessment of necessity and proportionality is carefully made. There are many documents marked as "LIMITE" - regarding discussions of working parties or council configurations, working documents, etc - that probably do not meet these requirements. It is necessary to prevent that a limited number of stakeholders access this type of documents informally. This can only lead to abuses. We recommend that:

- documents be public by default;
- restrictions only be imposed when accompanied by documentation (with automatic access by the Ombudsman); and
- restrictions be subject to veto by individual Member States, if the restriction is incompatible with their national transparency rules.

8. Bearing in mind that delegations' positions may evolve during the negotiations and that the Council must protect the effectiveness of its decision-making process, to what extent do you believe positions expressed by national delegations during negotiations in Council working parties/Coreper should be recorded? How important would it be for you to find out the position of the national delegation?

In the net neutrality file, the European Commission's position moved from the Commissioner calling it a "Taliban-like" issue to the Commission proudly confirming its support for this issue, in response to developments in the United States. The positions of the delegations evolve. That is normal. The position of the European Parliament and individual political groups evolve. It is very clear that a transparent mechanism to show the evolution of its position does not jeopardise the effectiveness of the institutions. We do not understand why keeping such positions secret in the Council would help to "protect the effectiveness of its decision-making process".

The question basically asks "how much democratic accountability is too much?". The delegations express the views of national public administrations, and failure to be



transparent about those views undermines accountability on a national level. There is no reason to not disclose their positions and it would indeed help to have more accountability and avoid blaming the “European Union” as the source of the problem when taking decisions. More transparency can only lead to more Europe, to a more effective Europe.

Citizens have the right to be informed of what is being decided by the legislators in order to be able to scrutinise their actions. Transparency ensures that citizens, civil society organisations and other stakeholders can participate in decision-making processes equally, without depending on good lobby relationships.

Therefore, we suggest that all meetings are recorded, as every part of a negotiation can be important for the public. Delegations may need assistance from external experts on different topics, such as civil society organisations: if such experts do not have access to the meetings and are not aware of the positions of the negotiators, they cannot assist them or contribute to improve the results of the discussions. More fundamentally, it is the right of every citizen to know what is being done in their name.

III. Other

9. Please comment on any other areas or measures which in your opinion are important to enhance the transparency of legislative discussions within Council preparatory bodies. Please be as specific as possible.

We strongly suspect that both the Council and Commission systematically obstruct and delay responses to document access requests. Exceptions, such as additional time for answering questions, are the norm. It is difficult to imagine an explanation other than this being a mechanism for dissuading citizens from accessing documents that, often, should have been public in the first place.

An emphasis could be put on root-and-branch reform or abandonment of trilogues. We would like to reiterate our concerns stated in EDRI’s response to the European Ombudsman’s consultation on trilogue reform. These include inconsistencies in access to documents by the Commission, the Council and the Parliament. For more information, please see:



https://www.ombudsman.europa.eu/showResource?resourceId=1464169487725_oi082015_25.pdf&type=pdf&download=true&lang=en