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Part 2 - Data

To Council consultation - OI/2/2017
Subject Council consultation - OI/2/2017
Content

European Ombudsman public consultation (OI/2/2017) - Transparency of legislative work within Council preparatory bodies

Response prepared by Transport & Environment (T&E)

[EU Transparency Register](#): 58744833263-19

24 November 2017

Summary

The following document is T&E's response to the European Ombudsman's public consultation on transparency of legislative work within Council preparatory bodies ([OI/2/2017](#)). It consists of the nine questions below.

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?

In our experience, this is the hardest part of the EU legislative process to access and follow. The Member States are able to hide behind the faceless figure that is the Council, and thus are able to push agendas, make decisions and bully others with no impunity. The lack of transparency in the Council, as opposed to the European Parliament (EP), has allowed and enabled governments to get away with terrible behaviour. There is a total lack of scrutiny and accountability both in Brussels and in the national capitals. Governments can do whatever they want in Brussels and then blame Brussels for everything that goes wrong, although they were at the table when it was decided. Additionally, governments will make promises to citizens on certain key issues in national media, and yet in Brussels will water down or block the very law that could deliver those promises, all the while blaming Brussels.

Both the European Commission and the EP have made significant transparency efforts and improvements in the last decade. The Council's opacity weakens the entire European project.

Presidency compromises, Member States' positions (both individual and joint ones) as well as outcomes of proceedings should be made public. Moreover, a clear and structured timeline that ensures that discussions are held in a transparent and democratic way are key. That way Member States' experts can contribute in a

timely and appropriate manner. Moreover, agendas and meeting minutes of COREPER meetings should be published.

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[3]. Are there other measures the Council could take to make legislative documents easier to find?

The current website attempts to window dress transparency, but is incredibly user unfriendly. It is a mere document repository site, but not a resource information site. A strong recommendation would be for the Council to undertake significant revision of the Council website with the aim of increasing transparency, usability, communication and active engagement with the public. The lack of communication and website usability increases the notion that the Council is above engaging with the public and that information is for the few and not the many.

Basic information related to Council activities such as meetings, meeting participants, agenda points and meeting notes is still not provided to the public. A web visitor must have a certain amount of information before being able to source documents: meetings dates / lead committee / document code etc. If a visitor does find a relevant document, the PDF is often unsearchable (looking for keywords / terminology), meaning that one cannot actually find information in a document easily, which can be a challenge where a Council conclusion can be very long. This function should be enabled to make searches more user friendly.

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

As described above, Member State positions and subsequent Presidency compromises are not publicly available. Unless one of the Member State permanent representations leak documents, stakeholders have no way of understanding and assessing the various Member States positions, ongoing discussions leading proposed amendments and compromises.

Council presidencies have been seen to backtrack on transparency, one recent example is the type approval regulation (2016/0014(COD)).¹

Originally, the Maltese presidency made the interim working documents public. After a few Member States complained because they were worried about media pressure and public scrutiny, new documents were not published anymore.

As regards the Renewable Energy Directive recast (2016/0382(COD)) (REDII), the Presidency compromises and the Member States' positions are impossible to find. The information that stakeholders can get from the permanent representations is also limited: their positions are not shared publicly and the considerable amount of work given by the package limits the feasibility of meetings. Furthermore, agendas, timelines of meetings, and processes are not always accessible.

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 equally important. However, individual Member States' positions should be accessible, similarly to the EP amendment procedure. The Presidency compromises prepared every few months for Council negotiations should be made public, just as draft reports are in the Parliament.

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

Yes. We compare the final law with Member State's positions (if these are available) to see if the Council introduced some last minute changes. It is also useful to assess which institution was the most progressive during the legislative process.

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. Transparency requirements should apply across the board. Often last minute decisions are made at the higher political level. It is key to understand what the positions are in order to hold governments and politicians accountable.

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 current rules should be better enforced, LIMITE should be the exception not to be the norm. Documents should only be classified as "LIMITE" where there is a real reason for limiting access, such as issues related to foreign policy and security, confidential information of private individuals. Member States should not be able to hide behind documents, just because they might put them in an uncomfortable position vis-a-vis the public. In addition, should access be denied, a public interest test must always be applied.

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?

The process should not be any different from the EP committees, where draft reports and amendments are published and publicly discussed. Stakeholders have the chance to engage with the entire political process leading to the adoption of the EP position. Similarly, knowing the position of the national delegation would allow stakeholders to follow the same approach. Engagement with permanent representations would be more efficient and pertinent.

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.

Although live streaming is done for some Council configurations, web streaming of meetings should become the rule as in the EP.

Furthermore, an area of lawmaking that needs more transparency is the comitology procedure. While not a Council procedure, the national experts in the comitology committees are appointed by Member States and thus also report to them. It is precisely these Member States that are hiding behind the committee outcome. Notoriously, in the aftermath of the VW scandal, national representatives voted to weaken air pollution limits.² Votes were secret and there is no information who represented the Member States. This makes it very easy for Member States to make false promises in public, but not stick to them when it comes down to the final vote on an implementing act. Please see also our report “Shining a light on decision- making” available [online](#).

One example of where access to Member States positions would have been important to push against watering down an EU legislative proposal is the Fuel Quality Directive (FQD). Article 7a of the Fuel Quality Directive (FQD)(2007/0019(COD)) is a law aiming to reduce the carbon intensity of Europe's transport fuels by 6% by 2020. The implementation rules on fossil fuels dragged on for more than four years. The lack of Council transparency and accountability lead to an incredibly complicated legislative process that left industry and NGOs in the dark. Without going into all the legislative machinations that eventually lead to the adoption of a very weak piece of environmental legislation, the positions of certain Member States were crucial in the delays and weakening. However, this is only mere speculation. An overview of the FQD path to adoption can be found [online](#).

Further information

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Endnotes

¹ More info on the file can be found here: For member states Dieseleate never happened: Council opposes strengthening of vehicle testing reform

² “Governments double and delay air pollution limits for diesel cars” available at [\[redacted\]](#) (retrieved 15.11.2017)