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From: [REDACTED]
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Subject: [EOWEB] Council consultation - OI/2/2017
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Sender

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To Council consultation - OI/2/2017
Date Wednesday, December 13, 2017 5:29:56 PM CET

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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

Dear [REDACTED],

Through this email, I have the pleasure of submitting a written contribution on behalf of the Standing Committee of Experts on International Immigration, Refugee and Criminal Law (Meijers Committee) to the European Ombudsman's public consultation that forms part of her own-initiative inquiry into the transparency of legislative work within Council preparatory bodies.

Content The contribution may be attributed to the Meijers Committee (contact and further details in the submission) or our chairman, prof. dr. Theo de Roos.

Needless to say, I remain available for any further questions that may arise.

Best wishes,
[REDACTED]

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refugee and criminal law

European Ombudsman own-initiative inquiry OI/2/2017/TE

European Ombudsman's Public Consultation regarding the transparency of legislative work within Council preparatory bodies

Input offered by the Meijers Committee
13 December 2017

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?

As an organisation, the Council breaks down into preparatory bodies, the Committees of Permanent Representatives (COREPERs), and the ministers' meetings. Sometimes a parallel is made with informal backroom negotiations, parliamentary committees and plenary at the national level. However, that comparison unfortunately does not hold.

First, because Council decision making reveals a clear upward hierarchy in a way that parliaments do not. Whereas in parliamentary negotiations negotiators at all stages are formally of equal rank (namely, MPs), this is clearly not the case in the Council where decision making moves upward through a chain of command with ministers at the top (political representatives) delegating the details of negotiations to their subordinates (administrative officials) in the preparatory bodies. Because of this bureaucratic model, lower-level Council decision makers, who are only accountable to their minister, tend to follow ministerial instructions and have no interest in/extremely limited means for rendering public account in the same way that national parliamentarians do. At the same time, a very large part of decisions on the amendment of Commission proposals are de facto taken at the lowest levels.

Second, in national legislative processes, only a cross-section of representatives participate in committee negotiations. Even when the plenary usually takes cues from committee proposals and amendments, this is not self-evident. After coming out of the committee phase, legislative proposals are therefore likely to be subjected to meaningful plenary debate, with either reversals of amendments or rejection of a proposal as a result. By contrast, in the Council, the 28 members (the member states) are present from the beginning. Even when negotiators in working parties are generally of lower rank, they negotiate on the basis of ministerial instructions, meaning that member states pursue a consistent political line/strategy from the outset. As negotiations progress and political problems are resolved, proposals moves upward through the Council, until they reach the ministers in (near-)finalised stage. As legislative processes are only exposed to full transparency at the ministerial level, most of the political disagreements and choices which are made at earlier stages remain invisible to the outside. Furthermore, in reality only a very limited number of contested issues reach the

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ministerial level.

While attaching political accountability to national administrative officials at the preparatory stage appears inappropriate and undesirable because only ministers are politically responsible for the progress and result of Council negotiations, at the same time the structure of Council decision making means that reserving full and direct transparency merely for the final (ministerial) stage is unsatisfactory from the perspective of democratic accountability.

To a certain extent, the current access to documents rules address this problem as they require the direct publication of legislative documents. However, due to the Council's practice of withholding large parts of legislative documents until completion of (parts of) a legislative process on the basis of the LIMITE document label, these rules do not guarantee sufficient transparency of Council legislation. A number of measures can be taken to remedy the current transparency deficit:

- Introduce periodical mandatory public debates, at Coreper or ministerial level, on the state of the legislative dossier. Such debates could for example be held twice every Presidency, or every fifth meeting. Organising debates *throughout* the legislative process replaces the oft-perceived ritualistic/rhetorical character of current post-negotiation debate by more politicised debates when negotiations are still ongoing. Furthermore, citizens and interest groups are given information cues to which they can respond, enabling the exercise of their right to participate in the EU legislative process.
- Reduce reliance on LIMITE documents to the absolute minimum. Where the Council does decide that the LIMITE label is necessary, documents should in all cases be shown on the public register. As LIMITE documents are not a priori excluded from the right of public access on the basis of a request, the public should have knowledge of their existence. In principle, the LIMITE label has no place in the legislative process, which should be characterised by the widest possible extent of transparency punctuated by only very limited instances of restrictively interpreted exceptions that are based on EU law.
- A duty of professional secrecy for member state representatives has no place as an official norm in the legislative process. The Council should therefore take steps to remove the duty of professional secrecy from all documents concerning legislative proposals. Member states would still be able to protect themselves from untimely disclosures of their negotiating strategy by introducing national rules to preserve hierarchical chain of responsibility in line with their national constitutional arrangements.
- In certain cases, relevant background information or data are missing in Commission proposal texts. When the public is informed about ongoing debates in a timely manner, it is possible for specific stakeholders or experts to enrich the legislative

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debate or sound the alarm bell by providing such missing information to their representatives either within the Council, the European Parliament, or their national parliament. However, when the disclosure of pivotal information about the legislative process is characterised by a timelag, the capacity to tap from the 'wisdom of the crowd' is undermined.

- A similar situation arises when the public is not in a position to familiarise itself with legislative amendments tabled by specific member states, or the arguments that are brought against these amendments. In the case of these types of information, while national parliaments are given direct access to pivotal documents carrying the LIMITE label, this is not the case for the public. The timing of disclosure however is of significant influence for citizens' ability to exercise their rights to participate in the EU's decision making, and for national legislators to benefit from specific expert input in order to identify sensitive points in the legislative (compromise) text.

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?

The current document register clearly needs improvement; it presupposes a too high level of knowledge of the Council institution from persons interested in seeking access. The current efforts to create a joint legislative observatory with the European Parliament and Commission are therefore highly welcome. Such as legislative observatory should be as complete as possible, containing all relevant documents as well as meeting calendars and voting roll calls. The observatory should furthermore consider how the general public, who are overwhelmingly outsiders to the legislative process, can most efficiently identify the information/documents that are of interest to them. The institutions could investigate the online structures that national parliaments use to make such information available.

Further steps could include:

- The introduction of minimal requirements concerning documents to be drawn up and information to be included in these documents, as well as documents that provide a complete overview of the state-of-play at regular intervals, irrespective of the amount of progress made. This would create a uniform document trail.
- The introduction of formal standards for the registration of legislative negotiations in document, creating a document trail that is visually easier to navigate for outsiders.

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

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improvement.

- It is usually rather difficult to trace a document trail pertaining to specific legislative dossiers. Documents are often drafted in a manner that makes it hard to perceive their place in the larger process of decision making (i.e., what is the document's role in the process, what decisional steps preceded the documents, etc.).
- This situation is further complicated by the fact that different Council formations have very diverse ways of structuring their legislative processes, particularly regarding the division of labour in different working parties. When many working parties are involved in small parts of a legislative dossier, it becomes even harder to follow proceedings. This is exemplified by the fact that many legislative documents at the preparatory stage are often addressed to several working parties at the same time, using internal codes of addressees.
- Different Council policy areas also document their progress in highly divergent and sometimes idiosyncratic ways. In some cases, much progress is tracked in informal documents, the existence of which is difficult to know for an outsider as they are not listed in the public register. Although the Council is supposed to periodically draw up lists of informal documents introduced in the course of a legislative dossier, we are not certain that documents containing such lists are systematically placed on the register.

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.

We think that all inputs in the legislative decision making process are important and potentially useful to take notice of for citizens, particularly stakeholders of (those affected by) a particular legislative proposal. In this regard, we apply three questions as a rule of thumb:

1. Can citizens see who is responsible for the decision and in what way, in particular as regards their own national representatives?
2. Can citizens perceive the main lines of disagreement among member states, and can they know the reasons for this disagreement?
3. Is enough, sufficiently detailed information published to allow citizens to participate, particularly to intervene to make their voice heard concerning elements of the ongoing legislative procedure that affect their personal situation or large public interests?

In order for these criteria to be fulfilled, Council legislative documents should at least cover the following information, immediately upon circulation among the member state

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delegations:

- Commission original proposal, and presidency compromise/state-of-play texts
- Written inputs of member states, particularly proposals for amendments
- Sufficiently detailed summaries of debates / exchanges of views
- Council common positions in negotiations with the European Parliament, regular updates of these common positions
- Voting records and justification of votes

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

For particular types of academic research questions (i.e., reconstructions of the policy process), it is helpful to have ex post access to a legislative file that is as complete as possible. We further consider roll calls, explanations of the vote and statements attached to the minutes a useful shorthand to specific member states' position in a 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.

Not necessarily, for the reasons provided under point 1. However, it must be acknowledged that even in legislative procedures, decision makers require a certain negotiation space. In the case of the Council, this space pertains to the search for compromise solutions in order to find a required qualified majority for proposals, as well as the space to formulate strategies for negotiations with the European Parliament, particularly in trilogue negotiations.

- As regards the former, bilateral and multilateral meetings outside of formal Council sessions appear to sufficiently cater for this, particularly since currently a very large part of Council decisions is adopted with a number of votes that far exceeds the required qualified majority.
- As regards the latter, the space that Coreper claims to formulate negotiating instructs currently exceeds what would generally be deemed legitimate in terms of democratic transparency (see three questions formulated under point 4). Particularly, the current negotiating method makes it very difficult for outsiders to trace back the position taken and inputs provided by individual member states at late stages in the legislative procedure, even after an agreement has been reached.

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

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steps could be taken to further regulate and harmonise the use of the “LIMITE” marking concerning legislative documents?

See second suggestion for improvement provided under point 1. In general, the LIMITE label occupies a complicated place in the legislative process, which should in principle be characterised by full direct disclosure under the existing transparency rules. The Council’s current practice however seems to be to label documents LIMITE until an official access request is filed, after which a large majority are directly made available. This throws up the question why such documents could not have been proactively disclosed in the first place.¹ The current framework is also somewhat unclear as to how the application of the LIMITE label relates to exceptions to disclosure as cited in Regulation 1049/01, article 4. One would presume that all legislative documents that are not directly made available can only be withheld on the basis of an exception ground cited under article 4, in accordance with article 12(2) of the same regulation.

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?

Very important. Democratic decision making is at its core about the promises that elected representatives make, and the results that they eventually participate in delivering. Changes in position as part of compromise-seeking are a normal part of democratic politics. Sufficiently explaining and justifying changes in positions and compromises is an essential part of the accountability process that cannot be omitted.

It may be added that the Court of Justice already alluded to this principle in the *Council v Access Info Europe* judgment. Although that case merely dealt with instances in which a decision was taken to identify the input of specific and named member states, there is no justified reason why this principle should not be extended to the duty to record all member state input in a manner that makes it attributable to specific member states (see also three criteria provided under point 4).

¹ Council document 7903/17 of 12 May 2017: Fifteenth annual report of the Council on the implementation of 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 (<http://data.consilium.europa.eu/doc/document/ST-7903-2017-INIT/en/pdf>), p. 4.

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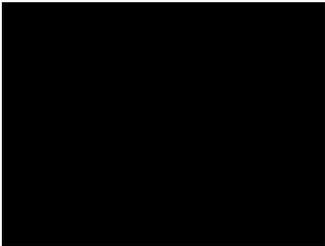
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III. Other

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.

While an institutional approach to necessary changes in the Council's current transparency practice helps us see the steps that could be taken towards a better-functioning democratic process at the EU level, these steps largely depend on their internalisation by those involved in the decision-making process. Therefore, constant efforts must be made to nurture a transparency-oriented culture in the Council's legislative process. Many efforts are already made in this regard, for example by the Council Secretariat's DG-F (Information and Communication) which organises regular staff trainings and undertakes steps to improve its information interfaces, and the 2016 Dutch Presidency which took active steps to reduce the number of LIMITE documents and the duration for which these documents carried this label.

Yours sincerely,



Prof. Th. A. de Roos

Chairman

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About

The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and international migration, refugee, criminal, privacy, Anti-discrimination and institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation.

The Meijers Committee is funded by the Dutch Bar Association (NOVA), Foundation for Democracy and Media (Stichting Democratie en Media) the Dutch Refugee Council (VWN), Foundation for Migration Law Netherlands (Stichting Migratierecht Nederland), the Dutch Section of the International Commission of Jurists (NJCM), Art. 1 Anti-Discrimination Office, and the Dutch Foundation for Refugee Students UAF.

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