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Council Consultation - OI/2/2017

Transparency of legislative work within Council preparatory bodies

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Our response to the Public consultation is guided by our personal experiences studying EU trade policy. The responses detailed below can be summarised in three main suggestions:

- 1) Develop a user-friendly online central repository (with OEIL and votewatch.eu as templates)
- 2) Provide clarity of institutional guidelines for classifying documents and assign responsibility for decisions on disclosure.
- 3) Nudge member states to be transparent about their position (and representation)

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?

At the level of the Council:

1. A **specification of the working party** where the proposal is being discussed and, if applicable, other working parties that will offer their opinions on the proposal.
2. A recurrently updated **calendar indicating when the proposal will be discussed**.
3. **Meeting minutes** to be released afterwards.

At the level of the member states:

1. **Member states' position papers** commenting the initial proposal. National delegation briefings stating member state positions can ensure more active involvement of non-state actors (consumption of transparency) compared to the GSC putting meeting documents online. Admittedly, the member states may prefer not to reveal their position publicly to safeguard negotiating space but they can also provide

a balanced position with room for discretion making it easier to explain potential compromises in light of the initial position.

2. The **national representative (expert) in the working party** discussing the legislative proposal.
3. Possible **amendments proposed by (groups of) member states** through consecutive discussions in Council Working Parties would also help to understand the development of the legislative discussions.

At the inter-institutional level:

1. Dates at which trilogue meetings take place
2. The four column documents

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?

Much depends on the comprehensiveness of the ‘joint legislative database’ to be developed. Building upon the **EURLEX** platform, the level of detail can be improved using the Legislative Observatory of the European Parliament (**OEIL**) as a template. Here you can find committee opinions & reports, plenary debates, and proposed amendments linked to the same legislative initiative. We consider such a central, one-stop repository essential in promoting the actual use of transparency, compared to publishing documents on several different webpages in a seemingly uncoordinated and scattered manner. An indicative agenda for on-going procedures (when can we expect a new discussion?) would also be convenient. An ability to provide stakeholders an automated update should there be a change in the legislative file would also be convenient.

Additionally, online platforms like **votewatch.eu** provide a more convenient overview of roll-call votes by MEPs. This enables interested citizens to quickly assess how their representatives or political groups have voted on legislative initiatives or resolutions. The graphical interface is also more user-friendly and intuitively.

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

See in the responses on questions 1 and 2. It should be more convenient to find all documents related to the same procedure. Now it requires significant effort to piece together all meetings in which a policy initiative was discussed.

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.

In view of promoting actual consumption of the provided information, it must be acknowledged that the general public will not be familiar with legislative jargon, nor technical details of the dossier. Therefore, clarity and a one-stop shop mentality should be a priority. Presidency compromises might be the most useful in this regard, as this provides a summary of the state of affairs at the moment of drafting, provides the most comprehensive overview of ongoing discussions, and gives an initial idea of what the final legislative act may look like.

Having consecutive compromises publicly available would allow interested parties to follow up on changes throughout the discussions, and possibly use available access points to react to the current compromise. Depending on the stage of the discussions, it should be made clear that this concerns intermediate compromises and not the final text, in order to avoid confusion. While providing too many documents containing information about the same preparatory meeting could result in an information overload, obfuscating rather than clarifying the decision-making process, we would still argue in favour of a central procedure file containing references to all documents produced during the discussions to allow easy access to all relevant documents (cf. OEIL).

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

Occasionally.

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.

In principle, we think the same requirements should apply.

One could argue that COREPER discussions cover more politically sensitive issues, increasing the need for transparent proceedings. It appears there currently already is a higher level of transparency for discussions within COREPER. Notes submitted to COREPER for approval concerning draft legislative acts are made public at the time of circulation, and summary records of COREPER meetings are also publicly available in the Council register. Simultaneously, technicality of issues should not be a determinant for transparency considering the ambiguity in determining political saliency.

If sufficiently detailed general transparency requirements are in place, we see no need to apply different requirements between working parties and COREPER. Such separate requirements would also counteract harmonisation efforts that are being undertaken in the framework of the Inter-Institutional Agreement on better law-making. Finally, national delegates in both working parties and COREPER are not politicians fulfilling a political role but bureaucrats and diplomats accountable to national governments and not directly to citizens, hence distinguishing between the two in terms of transparency requirements would not be relevant from an accountability perspective.

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 main problem with the ‘Limité’ classification is its broad interpretation. In practice, it would seem that all documents that are neither classified as confidential, nor released as public are marked as

‘Limité’. In addition, it appears that the practical guidelines for release of ‘Limité’ documents are dependent on the current Presidency, which does not promote the consistency of such guidelines.

Hence, we ask ourselves whether there is a general guideline, except that ‘Limité’ documents "are made public or not upon circulation *following a judgment call by the originating department*, according to the provisions of the Council's Rules of Procedure and taking into account the fact that, in accordance with Article 12 of Regulation (EC) No 1049/2001, legislative documents (...) should, subject to Articles 4 and 9, be made directly accessible." (Council reply to enquiry, emphasis added)?

We consider the requirement ‘following a judgment call by the originating department’ as too indistinctive and argue that a more systematic procedure would be beneficial. A separation between documents containing member state positions and those that do not, may be useful to this end.

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?

From our perspective, the Council cannot adequately fulfil its representative functions if the citizens cannot find out what position national delegations have taken in Council negotiations.

We are aware that a certain degree of discretion is required to allow national delegations to deviate from initial positions and achieve compromises. Ideally a system should be sufficiently flexible to accommodate such situations. The problem, however, is that neither the motivations underlying the decision to remove member state names nor the responsible actors (member states, GSC, presidency) are mentioned, leaving a disorderly impression of the whole procedure. Hence our proposal of making clear who is responsible for blacking out member state names, and who decides what information is made public or remains classified. It should be possible for the public to identify the responsible actor for deciding whether or not information is made public.

The belief within the Council -and corresponding attitude- that democratic oversight of the institution’s members should proceed through the domestic sphere, also shifts the focus from the European to the national level. Yet, domestic means to procure such information are -in many cases-

less straightforward and huge divergences between the member states persist. Admittedly, it goes beyond the scope of the consultation to scrutinize member state procedures and customs of handling such information. Still, we would appreciate a facultative approach whereby member states report their initial positions and follow-up statements for the “joint legislative database”. Making this optional would grant a degree of flexibility for reluctant member states without holding back the other member states pushing for greater transparency. At the same time, it increases the pressure on closed delegations to open up in response to their colleagues.

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.

If not yet publicly available, clear internal GSC guidelines as to how documents are drafted, classified and marked (as ‘Limité’ for example) should be public and easily accessible, which would promote process transparency because they provide insight into how documents are drafted. This in turn clarifies what type of information is available at working party level. Having the guidelines publicly accessible also allows access to documents requests to be more specific and streamlined, aiding the GSC in their response to such requests.