Re: European Ombudsman - Public consultation - Transparency of legislative work within Council preparatory bodies

Case: OI/2/2017/TE

31 December 2017

Dear Ms O'Reilly

Please find below my contribution to your inquiry.

Sincerely
Dimitris Xenos

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?

The Commission's legislative proposal are usually accompanied by an impact assessment study, as it is often this study that guides the legislative proposal and provides also the necessary information about any implications (negative/positive) involved.

However, the Commission may have a pre-defined agenda (which is typical and characteristic to its lobby culture). In such a situation, the Commission's impact assessment studies seek to create an advertising, communication narrative (incl. executive summaries, press releases, keywords/slogans for their multiple Facebook and Twitter accounts). As a result, there may be no comprehensive and objective study on the given matter, however important that matter may be. It could also be the case that the more important the matter under consideration is, the less preparation is made.

It is regularly observed that the Commission and the other institutions take decisions and organise their communicative narratives based on aggregate numbers, 'European' averages, and future benefits for 'European' enterprises (incl. SMEs), as if the impact of their legislative (or institutional) proposals is assessed in relation to an imaginative, federal state. In that way, it may not be possible to discern a negative impact or unbalanced economic effect that their measures may have on certain national states. In this respect, the answer to the question '[w]hat useful information might be given [by the Council working parties]', depends, first and foremost, on what information has been communicated to these working parties by the Commission.

As the national element/factor may not have been considered (either at all or adequately) by the Commission's impact assessment studies, the 'useful information [that] might be given [by the Council working parties' includes often the kind of information that

Commission has *not* communicated to the Council. As the institutional role of the Council is to preserve, to a good extent, the national element, it should be a standard requirement in intra-institutional communications between the Council and the Commission, for the later to have access to relevant national information during the preparatory stages of its impact assessment studies. In addition, whether or not the Commission has considered the impact of its legislative/institutional proposals on all national states, the public has the right to know whether the Council and also, more importantly, its national representatives in the Council, have asked or considered the national impact, and how they have communicated with the Commission in this respect.

By way of example, the Commission commissioned an impact assessment study for a new judicial institution, the European Unified Patent Court, as it is connected to the relevant EU Unitary Patent Regulations[1] for a unitary (federal) effect of the patents of the European Patent Office. The issue is not simply about a legislative proposal for an ordinary piece of legislation but for a new powerful institution in one of the most important economic areas that exist. The Commission's impact assessment on the UPC was prepared by just one, German academic, Professor Dietmar Harhoff, and it is entitled, 'Economic cost-benefit analysis of a unified and integrated European patent litigation system", (2009) (Tender No. MARKT/2008/06/D 1).[2]

The words 'European' and 'economic cost-benefit analysis' in the title of the study appear to be misleading. First, the study is not 'European', as only a handful of European, national states were covered, leaving out the majority of national states that are members of the EU and especially, those that have a very high risk exposure under the new institution. Second, the study can hardly be characterised as 'economic', as its scope is very limited, and hence it does not provide a comprehensive and balanced 'cost-benefit analysis'.[3]

The first question that comes to mind is where is the Council's involvement in the preparatory stages of the Commission's study and in its post-publication scrutiny? The 'useful information [that] might be given [by the Council working parties' regards its input, contribution and scrutiny of the national impact of the Commission's proposals. Where is it?

Some member states had undertaken national impact assessment studies about the impact of the Commission's proposals regarding the UPC. The Commission also admitted that they were aware of some national studies[4] but did not take them into account.[5] Therefore, the question '[w]hat useful information might be given at this stage to allow the public to see and to understand how the discussions develop' presupposes that relevant discussions have taken place. The whole issue of the current inquiry about access to information at the stages of the Council's preparation does not arise if relevant information is non-existent.

The other point that the 'Commission makes a legislative proposal' and 'it is discussed in one or more Council working parties' needs a coherent and consistent approach. The emphasis should be put on the choice of the words 'one or more Council working parties'. It is not generally enough for the Commission's proposals to be discussed by one Council working group. There should be a consistent and regulated system about which group(s) should discuss what. As most of the issues are interdisciplinary in nature and may also

[1] Regulation No 1257/2012 and Regulation No 1260/2012.
[2] It is available at:
[redacted].
[3] For detailed comments, see, 'The European Unified Patent Court: Assessment and Implications of the Federalisation of the Patent System in Europe, (2013) 10(2) SCRIPTed - Journal of Law, Technology & Society 246-277, p. 262.
[4] Ibid, notes 6, 68, 71, 76, and 40-41.
[5] Ibid, notes 40-41.

touch public law matters (e.g. human rights, procedural justice, etc.), their examination usually require the involvement of more than one groups of the Council's system. A consistent approach will also require inter-institutional dialogue with the relevant and competent department and working groups of the Commission.

Let's see how things have been done with the UPC: Continuing from above, the Commission presented its impact assessment study which was advertised as 'economic' – as seen in its title quoted above. Its subject matter was about a new pan-European institution in the field of patents which relate to technology, innovation and monopolies. This 'economic' study did not pass pre-legislative scrutiny by any economic committee of the EU Parliament, but only by its Legal Affairs. The same situation applies to the Council's approaches.

So, in addition to the point that for access to information there should be first a thorough discussion within the Council regarding the national impact of the Commission's proposals, it is reasonable to expect that this discussion can only be undertaken by relevant and competent groups. A clear regulation of the competences and of the necessary involvement of specific Council's groups should be made. This will often require the involvement of more than one group due to the interdisciplinary nature of the issues at hand and for checks-and-balances purposes.

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 preparatory committee for the UPC that reports to the Council for its various tasks, and especially for its main one, the Rules and Procedure of the UPC, has operated a website for communication purposes [redacted]. Information is not easy to find. One has to check one by one the entire newsletter archive to find the identity of additional members of a sub-committee that have prepared and co-ordinated the work for the draft of UPC Rules and Procedure. The newsletters makes also reference to other groups that have been formed, but there is no specific information. Where individual members are mentioned, the only information that exists is their names and, possibly, an indication of their nationality. As biographical information is absent, it is difficult to check for a conflict of interest. Also, the Council does not include any information about the existence of that preparatory committee on its website.

Again, the question whether there are 'other measures the Council could take to make legislative documents easier to find?', depends on the existence of relevant and important information. If it has not been provided, the current inquiry's question about how to find it, becomes irrelevant.

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

The main problems that I have identified above (questions 1 and 2) relate to the lack of information.

However, I will describe one occasion when I knew that information existed but was not made available. In 2013, I participated in the public consultation that the UPC Committee organised on the 15th draft of the UPC's Rules of Procedure. The subsequent draft that was produced lists all participants and makes a selective evaluation.

For your public consultations, you do the same thing, but you publish all contributions so that interested individuals can understand what evidence has been given, what points have been raised and evaluate also your evaluation and what you left out and why. With the UPC Committee, this is impossible, since they have not published the contributions (they are not many anyway). If this information is hidden, then how other Council groups and national representations can have a thorough understanding of what is going on – that is to go beyond what has selectively been presented to them.

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.

The most important documents are those of pre-legislative work and scrutiny. Post legislative follow up is important but the whole setting relates to a fait accompli, and given the cumbersome nature and known institutional deficiencies of EU-decision making process, the most effective way to deal with it is to avoid a serious legislative error rather than try to rectify it ex post. In addition, as the EU is not a state, let alone a federation, the degree of pre-legislative scrutiny should be rigorous and transparent. The idea or argument for an efficient decision-making in terms of speediness that relies on secrecy may be relevant to a certain extent to the work of a national state but it makes no sense at all for a supranational organisation, such as the EU that consists of national states. If things get delayed because of more openness and media coverage, it is because the matter attracts the attention of the public and more discussion and information should be provided and debated.

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

Yes, but as I noted above it is the pre-legislative stage that is the most important.

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.

The same comments apply here, as well. The points of evaluation concern the nature and seriousness of the subject matter, the known institutional deficiencies in the decision-making process and the nature of the EU, as a supranational organisation of independent, national states. In this respect, a much higher degree of scrutiny is necessary and necessitates correspondingly a very high degree of transparency at all levels.

In addition, the matter is often a formality, because in practice it is the initial, preparatory stage that sets the tone and scope of scrutiny and also, in this kind of business, it is those who know things and provide expert advice that are more influential. That a subsequent stage is more formal does not change the fact that the matter has already been set and framed at the earlier, expert level. Therefore, the issue of transparency is about substance and ability rather than formality.

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?

Please see my answers to questions 4, 5, 6

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?

Please see my answers to questions 4, 5, 6

It is essential for members of the public of the national state to understand the work of their representatives at EU level and especially within the Council's system, since this is the main institution that allows some involvement of national representatives in the official legislative system of the EU. If their positions are not well recorded, it is very difficult to understand if and how the national position and interests have been expressed and taken into account. A higher level of transparency will require them to participate more effectively and allow others to evaluate their participation or assist them.

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.

With reference to my answer to question 2, I have stressed that adequate biographical information about the individual members of the Council's working groups should be provided in order to identify and avoid conflicts of interest.

A working group (or sub-group), ad hoc or otherwise, should have a webpage connecting to the Council's, and vice-versa. It should provide relevant biographical information proving the competence of its members and their individual interests in the subject matter (incl. those of their external, current or former employers).

From the information that is available on the UPC's preparatory committee and its spin-off, it is not clear why their members are nationals of few states only. Should it be reasonable to see a fairer composition and representation so that working groups and committees will have members from all or most of the national states of the EU?

In addition, there are some well-known economic policies of the EU institutions that are repeated on almost every occasion, such as the interests of SMEs, that is the business entities accounting for 99% of all businesses in the EU zone. So, does it not make sense that members of the Council's groups should have a fair representation of experts and include those who have worked for or represented SMEs (if only to balance those with corporate links)?

A suggestion has been made above for a regulatory framework that regulates the competence and involvement of specific Council's groups. If such involvement does not take place or the group's contribution is ignored, there should be a possibility to annul the Commission's or Council's proposal for non-exhaustion of the relevant scrutiny. To use my example above regarding the Commission's impact assessment on the UPC, is it reasonable

that their economic study about a new powerful institution that will affect permanently one of the most important (or the most important) area of business, that of industrial property, was not examined by an economic committee of the EU Parliament? When such disregard of institutional scrutiny procedure occurs, there should be a way to enforce compliance by annulling the Commission's or the Councils' documents for incorrect/insufficient scrutiny.

I would like to point out that some standards of legal liability should be regulated in relation to the individual members of the Council's groups, whether ad hoc or permanent, as well as to all experts influencing decision-making in the EU. There are various malpractices for which certain standards of duty of care and legal liability should be defined. For example, it has also come to my attention that a member of the committees for the UPC that answer to the Council disclosed confidential information about the legal case that challenged an EU Unitary Patent Regulation before the CJEU when the case was still active[6] – a possible incident of contempt of court which, in some countries, is a criminal offence. This incident had a domino effect: The disclosure of confidential information was made in an article which, in turn, was picked up by the research service of the CJEU which, in turn, ended up accompanying the case file as suggested bibliography (an exclusive one) which, in turn, was picked up by AG Bot,[7] as clearly seen in the formulation of his opinion adopting the article's arguments which, in turn, was picked up by the CJEU following AG Bot. If one considers the high economic stakes and context involved, this incident takes another dimension. It is possible to attempt a political interpretation of this incident. This is a positive act, a clear political move – without considering whether or not it was illegal. A political move was set in motion not by an elected politician or a member of EU institutions but by an expert that Member states used. So, an isolated member (an expert individual) of a sub-committee of a preparatory committee for the UPC that answers to the Council, makes a political move on his own initiative, to intervene in the way he did, in an active legal case concerning the UPC whose judicial outcome would affect the entire European continent in the crucial economic context of industrial property. This is how the game is being played and this is why I have made the comment above in questions 4, 5, 6, 7, namely that it is not the formal stage or the label that is put on the pre/post-legislative documents but their content and substance and hence, the need for more transparency at all levels of expert opinion.

Because transparency cannot be secured without the parallel safeguard of accountability (and legal standards of behaviour), the scope of the current inquiry should reasonably cover accountability issues, as well. In this respect, my above-mentioned suggestion for more transparency relating to the experts' biographical information appears to be essential. If you check who the expert of the sub-committee of the preparatory committee for the UPC that answers to the Council was, as described immediately above, and ask who this person works for and/or what his affiliation(s) are, you may get useful information.

In addition, the level of the EU Ombudsman's scrutiny should be intensified by involving the public in a more direct and transparent way. I see your function – what you do and what we may need. So, going beyond the name of your institution and its Scandinavian origins, it will be helpful to adopt the level of public scrutiny that the US institutions have with their televised and prolonged hearings that afford a more detailed, serious and in-depth scrutiny, and a much wider base of witnesses. Unlike the US, we do not form a state or one people, and reasonably, therefore, the level of transparency should be much higher than the US's – and it is not.

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[6] See, 'Unitary Patent and the Pending Spanish Cases (C‑146/13; C-147/13): An Open Letter to the Judges of the European Union' available at < [redacted] >, pages corresponding to footnotes 21-23.
[7] Ibid.