Council of the
European Union

Brussels, 23 May 2018
(OR. en)

9163/18

INF 82
API 55
OMBUDS 7
JUR 243
INST 197

COVER NOTE

From:	Ms E. O'Reilly, European Ombudsman
date of receipt:	17 May 2018
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
Subject:	Decision of the European Ombudsman in the above inquiry on the transparency of the Council legislative process (Own-Initiative Inquiry OI/2/2017/TE)

Delegations will find enclosed a copy of a letter sent by the European Ombudsman to the Council concerning the abovementioned subject.

European Ombudsman

Emily O'Reilly
European Ombudsman

Mr Jeppe Tranholm-Mikkelsen
Secretary-General
Council of the European Union
1048 BRUSSELS
BELGIQUE

Strasbourg, 15/05/2018

Own-Initiative Inquiry OI/2/2017/TE

Decision of the European Ombudsman in the above inquiry on the transparency of the Council legislative process

Dear Mr Tranholm-Mikkelsen,

Please find enclosed a copy of my decision in the above-mentioned own-initiative inquiry.

I have decided to close this inquiry with the following conclusion:

The Ombudsman confirms her findings of maladministration, her recommendations and her suggestions to the Council, as detailed in her Recommendation dated 9 February 2018.

The Ombudsman will make a Special Report to the European Parliament.

Yours sincerely,

Emily O'Reilly
European Ombudsman

Enclosure: Decision on own-initiative inquiry OI/2/2017/TE

1 avenue du Président Robert Schuman
CS 30403
F - 67001 Strasbourg Cedex

T. + 33 (0)3 88 17 23 13
F. + 33 (0)3 88 17 90 62

www.ombudsman.europa.eu
eo@ ombudsman.europa.eu

European Ombudsman

Decision

in strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process

This strategic inquiry concerned the transparency of discussions on draft legislation in the preparatory bodies of the Council of the EU (the 'Council').

In order for European citizens properly to exercise their democratic right to participate in the EU's decision-making process, and hold those involved to account, legislative deliberations must be sufficiently transparent.

When the 28 Member State governments in the Council formally adopt EU legislation, meetings and any legislative discussions are public. However, before the Council reaches a formal position, discussions take place in more than 150 preparatory bodies. It is at this level that most changes to draft legislation are proposed and compromises between Member States are sought.

However, preparatory bodies do not meet in public. Citizens can exercise their democratic right to follow legislative discussions only by accessing records of these discussions. This requires that legislative discussions in preparatory bodies be properly documented and that timely access to the relevant documents be easily available.

Against this background, the Ombudsman opened this strategic inquiry in March 2017. She put specific questions to the Council, launched a public consultation and inspected legislative files of the Council.

The Ombudsman found that the Council's current practices constitute maladministration. She specifically criticised the Council's failure to record systematically the identity of Member States taking positions in preparatory bodies, and the widespread practice of restricting access to legislative documents while decision-making is ongoing (the so-called 'LIMITE' marking).

On 9 February 2018, the Ombudsman made three specific recommendations and several suggestions to the Council on how to improve the transparency of its legislative process.

The Council did not reply to the Ombudsman recommendations within the legally-prescribed timeline of three months. The Ombudsman therefore closed the case, confirming her findings, her recommendations and her suggestions for improvement. A Special Report to the European Parliament will follow.

1 avenue du Président Robert Schuman
CS 30403
F - 67001 Strasbourg Cedex

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F. + 33 (0)3 88 17 90 62

www.ombudsman.europa.eu
eo@ ombudsman.europa.eu

Background

1. The Council of the European Union (the Council) is comprised of the governments of the EU Member States. Together with the European Parliament[1], the Council adopts EU legislation. Before the ministers from the Member States reach a formal position on draft legislation at Council meetings, preparatory discussions take place in the Council's Committee of Permanent Representatives ('Coreper')[2] and in the over 150 Council preparatory bodies attended by national civil servants, including so-called 'working parties'[3]. In many cases, these preparatory bodies have a decisive influence on the final legislative text. The discussions in all these preparatory bodies are therefore a crucial part of the EU legislative process.

2. Ensuring that citizens are able to follow the progress of legislation is a legal requirement. Under the EU Treaties, every citizen has *"the right to participate in the democratic life of the Union"* and EU decisions must be taken *"as openly and as closely as possible to the citizen"*[4]. The Treaties specifically require that the Council meets in public *"when considering and voting on a draft legislative act"*[5].

3. The importance of legislative transparency is also anchored in the EU's rules on public access to documents[6]. These rules state that *"legislative documents"* must be directly accessible to the public to the widest possible extent[7].

4. In the context of concerns about a perceived lack of accountability of, and consequent lack of opportunity for, citizens to participate in the legislative activities of the Council, the Ombudsman decided to inquire into the matter on her own initiative via a 'strategic inquiry'.

The strategic inquiry

5. The inquiry focused on the transparency of legislative discussions in Council preparatory bodies. In particular, it concerned how the General Secretariat of the Council (the 'Secretariat') administratively supports the legislative process in recording discussions that take place between Member States in preparatory bodies and by registering, managing and publishing the related documents.

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[1] Under the ordinary legislative procedure, Article 294 of the Treaty on the Functioning of the EU (TFEU).
[2] The 'Committee of the Permanent Representatives of the Governments of the Member States to the European Union' is made up of Permanent Representatives (Coreper II) or Deputy Permanent Representatives (Coreper I) of the 28 Member States.
[3] The list of preparatory bodies is available at: http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/
[4] Articles 1 and 10(3) of the Treaty on European Union (TEU).
[5] Article 15(2) of the TFEU.
[6] 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, OJ 2001 L 145, p. 43 (Regulation 1049/2001).
[7] Recital 6 and Article 12(2) of Regulation 1049/2001.

6. On 10 March 2017, the Ombudsman put 14 questions to the Council[8], to which the Council replied on 26 July 2017[9].

7. The Ombudsman then launched a public consultation inviting members of the public, civil society, academics and national parliaments to put forward their views on the issues raised. All those who made contributions expressed concerns, to varying degrees, about the accountability and transparency of legislative discussions in the various Council preparatory bodies[10].

8. On 23 January 2018, the Ombudsman's inquiry team inspected[11] files from Council on three legislative proposals that were finalised in 2016: the Data Protection Regulation[12], the Decision on tackling undeclared work[13] and the Directive on the accessibility of websites and mobile applications of public sector bodies[14]. The inspection aimed to give the Ombudsman an insight into how the Secretariat produces, distributes, registers and publishes documents tabled at meetings of Council preparatory bodies.

9. Following a detailed analysis of the feedback received during the public consultation, the results of the inspection and the views put forward by the Council, the Ombudsman found that the Council's current practices constitute maladministration.

10. On 9 February 2018, the Ombudsman made three specific recommendations to the Council on how it could increase the transparency of its legislative process. She also asked the Council to reply to a set of suggestions for improvement[15].

11. In line with the EU Treaties[16] and the European Ombudsman's Statute[17], the Ombudsman granted the Council a period of three months to provide a detailed opinion on her recommendations and suggestions.

12. To the Ombudsman's disappointment, the Council did not reply to her recommendations and suggestions within the legally-prescribed timeframe, which elapsed on 9 May 2018. In view of the importance of the issue of

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[8] The Ombudsman's opening letter can be found here: https://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/76929/html.bookmark
[9] The Council's reply can be found here: https://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/83029/html.bookmark
[10] The Ombudsman received 22 submissions to the public consultation, which can be found here: https://www.ombudsman.europa.eu/en/cases/case.faces/en/49461/html.bookmark
[11] The Ombudsman's inspection report can be found here: https://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/89637/html.bookmark
[12] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.
[13] Decision (EU) 2016/344 of the European Parliament and of the Council of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work.
[14] Directive (EU) 2016/2012 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies.
[15] The Recommendation can be found here: https://www.ombudsman.europa.eu/en/cases/recommendation.faces/en/89518/html.bookmark
[16] Article 228 of the TFEU.
[17] Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties, Article 3(6).

legislative transparency, the Ombudsman decided not to grant the Council any extensions beyond this deadline.

The Ombudsman's recommendations

13. The starting point of the Ombudsman's assessment was the importance of transparency for the democratic legitimacy of EU legislation and the EU. Since the Council's preparatory bodies do not meet in public, citizens can exercise their democratic right to follow legislative discussions only by accessing records of these discussions.

14. For this to be possible, legislative discussions in the preparatory bodies must be documented; where Member States take positions in preparatory bodies, this must be recorded; and timely access to legislative documents must be easily available.

15. The Ombudsman found that the Council's failure systematically to record the identity of Member States when they express positions in discussions within preparatory bodies [18] constitutes maladministration. She also found that the Council's current practice of designating most legislative documents, while decision-making is ongoing, as 'LIMITE'[19], thus restricting public access, constitutes maladministration.

16. The Ombudsman therefore recommended that the Council should:

1. **Systematically record the identity of Member State governments when they express positions in Council preparatory bodies.**

2. **Develop clear and publicly-available criteria for how it designates documents as 'LIMITE', in line with EU law.**

3. **Systematically review the 'LIMITE' status of documents at an early stage, *before* the final adoption of a legislative act, including before informal negotiations in 'trilogues', at which point the Council will have reached an initial position on the proposal.**

17. In addition, the Ombudsman made a number of suggestions to the Council on how to improve the transparency of its legislative process, with a view to enhancing the consistency of documentation generated within its preparatory bodies[20] and the accessibility of that documentation via the Council's website and public register[21].

18. The Ombudsman suggested that the Council should:

1. **Conduct a review of how it meets its legal obligation to make legislative documents directly-accessible. This review should be**

[18] See paragraphs 14-21 of the Recommendation.
[19] See paragraphs 28-35 of the Recommendation.
[20] See paragraph 13 and Annex I of the Recommendation.
[21] See paragraphs 23-27 and Annex 2 of the Recommendation.

concluded within 12 months of the date of this Recommendation and should lead to the adoption of appropriate new arrangements within a further 12 months.

2. Adopt guidelines concerning the types of documents that should be produced by preparatory bodies the context of legislative procedures and the information to be included in those documents.

3. Update the Council's rules of procedure to reflect the current practice of disclosing legislative documents containing Member States' positions, as outlined by the 2016 Dutch Presidency of the Council.

4. List all types of documents in its public register, irrespective of their format and whether they are fully or partially accessible or not accessible at all.

5. Improve the user-friendliness and 'searchability' of the public register of documents.

6. Develop a dedicated and up-to-date webpage for each legislative proposal, following the example of the European Parliament's Legislative Observatory.

Conclusion

The Ombudsman closes this strategic inquiry with the following conclusion:

The Ombudsman confirms her findings of maladministration, her recommendations and her suggestions to the Council, as detailed in her Recommendation dated 9 February 2018.

The Ombudsman will make a Special Report to the European Parliament.

The Council will be informed of this decision.

Emily O'Reilly
European Ombudsman

Strasbourg, 15/05/2018

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