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From:	General Secretarit of the Council
date of receipt:	25 March 2021
To:	Delegations
Subject:	Ombudsman Own Initiative inquiry 0I/4/2020/TE - Transparency of Council decision making during the COVID-19 crisis - Decision

Delegations will find in the Annex a copy of a letter sent by the European Ombudsman to the Secretary General of the Council with attached her Decision concerning the own initiative inquiry on the Transparency of Council decision making during the Covid-19 crisis.

European Ombudsman

Emily O'Reilly
European Ombudsman

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

Strasbourg, 24/03/2021

Strategic inquiry OI/4/2020/TE

Decision of the European Ombudsman in the above strategic inquiry on the transparency of decision making by the Council of the EU during the COVID-19 crisis

Dear Mr Tranholm-Mikkelsen,

Please find enclosed a copy of my above decision. I appreciate the difficulties for the EU administration of maintaining our service to citizens during the COVID-19 crisis, and I wish to thank you for the good cooperation on this inquiry.

I have decided to close the inquiry with the following conclusions:

For the initial four months of the COVID-19 crisis, remote ministerial meetings did not adhere to the same transparency standards as in-person Council meetings. However, since then, by web streaming certain 'informal ministerial meetings' and by publishing relevant documentation in relation to these meetings, the Council's ministerial meetings during the COVID-19 crisis now *de facto* meet the applicable transparency standards and obligations.

The Council should have published the paper entitled *'Exceptional measures on the continuation of decision making in the Council'* at the time the decision to derogate from its Rules of Procedure (Council Decision 2020/430) was adopted. However, as the Council has released the document in the meantime, the Ombudsman does not see the benefit of issuing a formal recommendation at this stage.

In addition, I consider it useful to make the following suggestions for improvement to the Council:

1. **The Council should make public relevant documentation, including a record in its meeting calendar, of all 'informal**

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ministerial meetings' that took place between March and June 2020.

2. **The Council should maintain the wider use of written comments, prior to or following working party meetings, also beyond the COVID-19 context, as this has led to better documentation of working party discussions.**

3. **The Council should list in its public register all types of documents at the time they are issued, regardless of their designation and whether it is possible to access the document (or parts thereof) or not.**

4. **The Council should make public the internal guidance issued by its General Secretariat on the organisation of the work of the Council and its preparatory bodies during the COVID-19 crisis.**

Thank you again, and I would be grateful to hear if the Council takes any action in relation to these suggestions for improvement, if possible by 25 June 2021.

Yours sincerely

Emily O'Reilly
European Ombudsman

Enclosure:
- Decision in strategic inquiry OI/4/2020/TE

European Ombudsman

Emily O'Reilly
European Ombudsman

Decision

in strategic inquiry OI/4/2020/TE on the transparency of decision making by the Council of the EU during the COVID-19 crisis

The Ombudsman opened a 'strategic inquiry' on her own initiative to look into the transparency of decision making by the Council of the EU during the COVID-19 crisis. The Treaties require the EU institutions, including the Council, to operate openly. In particular, they require the Council to meet in public when considering and voting on draft legislative acts.

In the context of the COVID-19 pandemic and the challenges of restrictions on travel and gatherings, the Council had to adapt its operating and decision-making procedures to ensure institutional continuity. To this end, the Council decided to derogate temporarily from its Rules of Procedure. In addition to organising virtual meetings and other changes, the Council currently takes most decisions by 'written procedure'.

The Ombudsman assessed how, in the exceptional circumstances of the COVID-19 crisis, the Council ensured it complied with its obligations to operate openly.

The Ombudsman found that national ministers meet by videoconference to discuss the legislative and non-legislative files that are subsequently adopted by written procedure. At the beginning of the COVID-19 crisis, these remote meetings were not held in public, and very little information about them was made public. This was regrettable. As of July 2020, however, the Council changed its practices. It began web streaming certain remote meetings of ministers, and made public relevant documentation. The Ombudsman welcomes this important change. She suggests that the Council make public documentation regarding all ministerial videoconferences that took place at the beginning of the COVID-19 crisis, between March and June 2020.

The Ombudsman also found that, at the outset of her inquiry, there was no information publicly available on how, in the absence of in-person meetings, the Council's preparatory bodies continued their discussions on legislative and non-legislative files. As the COVID-19 crisis continued, the Council took steps to make these remote meetings of national civil servants more transparent, notably by publishing agendas ahead of such meetings. The Ombudsman welcomes the steps taken. She considers, however, that more could be done and is making three further suggestions for improvement to that effect.

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Background to the strategic inquiry

1. The Council of the European Union coordinates policies at EU level and adopts EU laws, in most cases together with the European Parliament. It is composed of national ministers from each EU Member State, who meet in different Council formations, based on policy area. Before national ministers reach a formal position on draft laws at Council meetings, preparatory discussions take place in over 150 Council preparatory bodies.[1] These preparatory bodies include the Council's Committee of Permanent Representatives ('Coreper'), which is comprised of national ambassadors, and so-called 'working parties', which are attended by national civil servants.

2. The Council, alongside the other main EU institutions, is currently deciding on measures of the greatest importance in response to the COVID-19 pandemic. Amongst other measures, the Council adopted an emergency support package to tackle the economic and social impact of the COVID-19 crisis, including the establishment of the Recovery and Resilience Facility that brings EUR 672.5 billion of support to EU Member States.

3. In the context of the COVID-19 pandemic and the challenges of restrictions on travel and gatherings, the Council had to adapt its working procedures to ensure institutional continuity. This included switching from in-person meetings of ministers and civil servants at its places of operation to virtual meetings, among other changes. The Council was also obliged to change its decision-making modalities.

4. Against this background, the Council adopted a decision[2] on 23 March 2020 that put in place a temporary derogation from its Rules of Procedure.[3] This derogation facilitates voting by written procedure, thus enabling the Council to take decisions without ministers being physically present at Council meetings. The derogation has been extended seven times since March 2020 and currently applies until 21 May 2021.[4] It has thus been in place for more than a year.

5. Transparency is central to a well-functioning democracy, as it paves the way for public participation in and scrutiny of decision making. The EU Treaties grant every EU citizen *"the right to participate in the democratic life of the Union"*

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[1] A list of Council preparatory bodies, updated in 2021, is available here: https://data.consilium.europa.eu/doc/document/ST-5020-2021-INIT/en/pdf

[2] Council Decision (EU) 2020/430 of 23 March 2020 on a temporary derogation from the Council's Rules of Procedure in view of the travel difficulties caused by the COVID-19 pandemic in the Union, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020D0430&from=EN

[3] Article 12(1) of the Council Rules of Procedure says in its relevant part: "*Acts of the Council on an urgent matter may be adopted by a written vote where the Council or Coreper unanimously decides to use that procedure. In special circumstances, the President may also propose the use of that procedure; in such a case, written votes may be used where all members of the Council agree to that procedure*".

[4] Council Decision (EU) 2021/454 of 12 March 2021 further extending the temporary derogation from the Council's Rules of Procedure introduced by Decision (EU) 2020/430, in view of the travel difficulties caused by the COVID-19 pandemic in the Union, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021D0454.

and they require EU decisions to be taken *"as openly and as closely as possible to the citizen"*.[5] The EU Treaties specifically require the Council to meet in public *"when considering and voting on a draft legislative act"*.[6]

6. Against the background of its Treaty obligations, the Ombudsman decided to inquire into the matter on her own initiative via a 'strategic inquiry'. The strategic inquiry aimed at ensuring that the Council, while adapting how it functions in light of the COVID-19 crisis, maintains the highest standards of transparency in relation to its decision making.

The strategic inquiry

7. The Ombudsman's strategic inquiry focused on the transparency of Council decision making during the COVID-19 crisis. In particular, it concerned the transparency of the decision-making arrangements put in place during the COVID-19 crisis, as well as how openly the Council and its preparatory bodies have operated in this exceptional situation.

8. On 27 July 2020, the Ombudsman asked[7] to inspect the Council's files relating to five acts adopted via written procedure during the COVID-19 crisis, as well as documentation on the operation of three 'working parties'[8] in the period from 1 January 2020 to 30 June 2020.

9. On 13 November 2020, the Ombudsman's inquiry team met[9] with Council representatives to inspect the requested documents. The inquiry team inspected the following files:

- File relating to the adoption of Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak;
- File relating to the adoption of Regulation (EU) 2020/696 of the European Parliament and of the Council of 25 May 2020 amending Regulation (EC) No 1008/2008 on common rule for the operation of air services in the Community in view of the COVID-19 pandemic;
- File relating to the adoption of Decision (EU) 2020/701 of the European Parliament and the Council of 25 May 2020 on Marco-Financial

[5] Articles 1 and 10(3) of the Treaty on European Union (TEU).
[6] Article 15(2) of the Treaty on the Functioning of the EU (TFEU).
[7] The letter opening the inquiry is available here: https://www.ombudsman.europa.eu/en/correspondence/en/130753
[8] Council working parties bring together civil servants representing the national administrations of the 27 Member States and deal with specific subjects. They are chaired by the delegate of the country holding the rotating 6-month presidency of the Council. More information on Council preparatory bodies: https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/.
[9] The report on the inspection meeting of the European Ombudsman's inquiry team with the Council is available here: https://www.ombudsman.europa.eu/en/report/en/136827

Assistance to enlargement and neighbourhood partners in the context of the COVID-19 pandemic;

- File relating to the adoption of Council Decision on confirmatory application 6/c/01/20 on access to documents WK 11963/19 and WK 14081/18; and

- File relating to the adoption of Council Decision (EU) 2020/789 of 9 June 2020 on the renewal of the Agreement for scientific and technological cooperation between the European Community and the Government of the Republic of India.

The inquiry team also reviewed documentation on the operation of three working parties: the Working Party on Aviation, the Working Party on Information and the Audiovisual Working Party - and discussed various issues raised in the context of the inquiry.

The Ombudsman's assessment and findings

1. Transparency of decision-making arrangements during the COVID-19 crisis

10. The Council's Rules of Procedure require that a majority of Council members be physically present before the Council can vote - the so-called 'quorum requirement'.[10] There is also the possibility to adopt decisions by written vote. However, the 'ordinary written procedure' is foreseen for *"urgent matters"* only and the decision to use it must be taken by Coreper by unanimity.[11]

11. On 23 March 2020, the Council adopted Decision 2020/430,[12] which introduced a temporary derogation from its Rules of Procedure.[13] The aim is to enable the Council to take decisions without its members being physically present at Council meetings.

12. In the meeting with the Ombudsman's inquiry team, the Council's representatives explained that the Council adopted Decision 2020/430 on the basis of a paper prepared by its General Secretariat. The paper, entitled

[10] Article 11(4) of the Council Rules of Procedure.
[11] Article 12(1) of the Council Rules of Procedure
[12] Council Decision (EU) 2020/430 of 23 March 2020 on a temporary derogation from the Council's Rules of Procedure in view of the travel difficulties caused by the COVID-19 pandemic in the Union, available at : https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020D0430&from=EN
[13] Article 12(1) of the Council Rules of Procedure says in its relevant part: *"Acts of the Council on an urgent matter may be adopted by a written vote where the Council or Coreper unanimously decides to use that procedure. In special circumstances, the President may also propose the use of that procedure; in such a case, written votes may be used where all members of the Council agree to that procedure"*.

'Exceptional measures on the continuation of decision making in the Council' (hereafter 'the options paper'),[14] proposed two options (and a combination thereof) to Coreper on how the Council's decision-making process could be adapted in the exceptional context of the COVID-19 pandemic:

1) The first option envisaged the **continuation of formal Council meetings**, while derogating, temporarily, from the quorum requirement in Article 11(4) of the Rules of Procedure. This option stated that those Council members who could not physically attend a Council meeting could participate through videoconferencing. Their participation through videoconferencing would count toward determining if a quorum was reached. The Council could adopt acts at those formal meetings.

2) The second option envisaged that meetings where Council members took part by videoconference would be considered to be **'informal ministerial meetings'** and no Council act could be adopted during these meetings. Instead, votes would take place by written procedure, the use of which would be facilitated by a temporary derogation from Article 12(1) of the Rules of Procedure.

The Council chose the second option.

13. The Ombudsman notes that the political discussions that previously took place in in-person meetings now take place at 'informal ministerial meetings'. The results of those political discussions are then formally adopted by written procedure. As the Council considers that its Rules of Procedure do not apply to these informal meetings, no 'official' Council agenda is required. It was also understood that Article 15(2) of the Treaty on the Functioning of the European Union (TFEU), which requires the Council to meet in public when considering and voting on draft legislative acts, is not applicable to such informal ministerial meetings.

14. If measures were not taken to make these 'informal ministerial meetings' public (see paragraphs 23-30 below), the political discussions themselves, which previously took place in open Council meetings, would no longer be public, as required by the relevant Treaty articles on the transparency of Council meetings.

15. In contrast, the first option proposed by the Council General Secretariat implied that remote meetings would be considered to be formal Council meetings, to which the Council Rules of Procedure would have been fully applicable. With that option, there would have been no uncertainty as regards whether Article 15(2) TFEU would be fully respected.

[14] **Available here:** https://data.consilium.europa.eu/doc/document/ST-6934-2020-INIT/en/pdf

16. The Ombudsman also notes that the options paper prepared by the Council General Secretariat was initially not made public, but was designated as a restricted access document (and given the 'LIMITE' marking).[15] Only several months later, on 14 October 2020 and following a public access to documents request (under Regulation 1049/2001)[16], was it published. In the exchange with the Ombudsman's inquiry team, the Council pointed out that its Rules of Procedure are, under the Treaties, not a legislative act. As such, a decision derogating from the Rules of Procedure is not subject to the same transparency standards as acts adopted via a legislative procedure. There was hence no requirement to proactively publish the options paper.

17. The Ombudsman is not convinced by this argument. The EU Treaties require all EU decisions to be taken as openly and as closely as possible to the citizen.[17] Furthermore, all documents that fall under the definition of a 'document' in Regulation 1049/2001 on public access to documents,[18] independent of whether they are legislative or non-legislative in nature, must be made directly accessible "*as far as possible*"[19]. Access to documents may be restricted only where one or several of the exceptions set out in Regulation 1049/2001 apply.[20]

18. The Council has not given any explanation of how proactively publishing the options paper would have risked undermining one or several of the interests protected by the exceptions foreseen in Regulation 1049/2001. The Ombudsman also notes that the Council released the paper following a public access to document request, meaning that it considered no exception applied at the time of the request.

19. The options paper prepared the ground and defined the available options for the Council to take a decision on how it would operate in the exceptional circumstances imposed by the COVID-19 pandemic. Council Decision 2020/430 essentially determines how the Council decides on legislative and non-legislative files, with important implications for the transparency of its decision-making process, as set out above. Making transparent the Council's considerations and options in taking this far-reaching decision, and hence allowing EU citizens to scrutinise those considerations and options, would have been an important element in ensuring public trust and the legitimacy of the Council's decision-making process during the crisis.

20. In light of the above, the Ombudsman considers that the Council should have published the options paper in March 2020, together with Council

[15] Recipients of documents marked 'LIMITE' are expected to ensure that such documents remain internal to the Council. The Council does not make such documents directly accessible on its website.
[16] Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001R1049
[17] Articles 1 and 10(3) TEU.
[18] Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001R1049
[19] Article 12(1) of Regulation 1049/2001.
[20] Article 4 of Regulation 1049/2001.

Decision 2020/430. However, as the Council has since disclosed the document, the Ombudsman does not see value in issuing a formal recommendation at this stage.

2. Transparency of how the Council and its preparatory bodies operate

21. When the Ombudsman opened her inquiry in July 2020, there was little information publicly available on 'informal ministerial meetings' or on how Council preparatory bodies were continuing their discussions in the absence of in-person meetings.

22. The Ombudsman therefore sought to assess the transparency of informal ministerial meetings and remote meetings of preparatory bodies during the COVID-19 crisis.

2.1 Transparency of informal ministerial videoconferences

23. In its exchange with the Ombudsman's inquiry team, the Council explained that the way informal ministerial videoconferences are organised evolved over time.

24. At the start of the pandemic, from March to June 2020, little information about these informal meetings was made public, and not in a consistent manner. As noted above, there was no requirement to publish agendas or related documents. The meetings were neither web-streamed nor did they consistently appear in the Council's meeting calendar.

25. However, during those initial months, the Council took far-reaching decisions. For example, it decided on:

- the establishment of a European funding programme, the 'temporary support to mitigate unemployment risks in an emergency' ('SURE instrument'), to respond to the COVID-19 crisis;
- common rules for the operation of air services in view of the COVID-19 pandemic; and
- macro-financial assistance to EU membership candidate countries and countries in the EU 'neighbourhood' in the context of the COVID-19 pandemic.

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While there is a record of an informal ministerial videoconference on 7-9 April 2020 at which the SURE proposal was discussed,[21] this videoconference was not web streamed and there is no recording publicly available. The Ombudsman's inquiry team could not find any record of informal ministerial videoconferences in the Council's meeting calendar, at which the other two above-mentioned legislative files could have been discussed.

26. The Ombudsman considers regrettable the very limited information available on informal ministerial meetings between March and June 2020. She notes that, given the nature of these informal ministerial meetings, the Council's initial practice was not in line with the Treaty requirement that the Council should meet in public when considering and voting on draft legislative acts. The importance of maintaining the EU institutions' high standards of transparency - not despite the crisis, but precisely because of the crisis - was already emphasised by the Ombudsman in her letter to the President of the European Council of April 2020.[22]

27. The Ombudsman understands, however, that the situation changed on 3 July 2020, when the Council approved a document entitled '*Modalities on the convening, preparation and organisation of informal videoconferences of ministers during the COVID-19 crisis*'.[23] While the document reiterates that no Council acts can be adopted during informal meetings and that the Council Rules of Procedure do not formally apply to such meetings, it determined that "*as far as possible, the Council's Rules of Procedure should be followed mutatis mutandis when convening, preparing and organising informal videoconferences of ministers*".[24]

28. In line with this commitment, the document states that agendas of informal ministerial meetings should be made publicly available.[25] Furthermore, the Council's General Secretariat should web stream informal ministerial meetings when discussions are held on legislative acts or on other items where deliberations should be held in public within the meaning of Article 8 of the Council Rules of Procedure.[26] Moreover, a list of participants,[27] recordings (if available) and related documents should be published on a dedicated website.

29. The Ombudsman's inquiry team examined the documentation publicly available for all informal ministerial meetings between October and December 2020. It found that, while the required documentation is published for most of these meetings, no agendas are available for some informal ministerial

[21] https://www.consilium.europa.eu/en/meetings/eurogroup/2020/04/07-09/
[22] Letter of the European Ombudsman to the President of the European Council concerning transparency of the EU Covid-19 crisis response, 20 April 2020, available here: https://www.ombudsman.europa.eu/en/correspondence/en/127056
[23] Available here: https://data.consilium.europa.eu/doc/document/ST-9188-2020-INIT/en/pdf
[24] Page 2.
[25] Point 6.
[26] Point 7.
[27] Point 8.

videoconferences.[28] This means that the Ombudsman could also not always assess whether these meetings should have been web streamed, in line with Articles 7 and 8 of the Council's Rules of Procedure.

30. The Ombudsman welcomes that, in July 2020, the Council changed how informal ministerial meetings are organised, in order to ensure that they are subject to the same, or at least comparable, transparency standards as apply to formal Council meetings. The Ombudsman trusts that the Council adheres to the standards it set for itself, and will consistently web stream[29] and publish the required documentation on remote ministerial meetings, as long as these meeting arrangements remain in place due to the pandemic. She also suggests that the Council make public relevant documentation, including a record in the Council's meeting calendar, of all informal ministerial meetings that took place at the beginning of the COVID-19 crisis, between March and June 2020.

2.2 Transparency of remote meetings of Council preparatory bodies

31. While Coreper continued to have in-person meetings throughout the crisis, Council working parties stopped holding in-person meetings, except in exceptional circumstances. In the meeting with the Ombudsman's inquiry team, Council representatives explained that the COVID-19 working arrangements vary between working parties. On rare occasions, there are in-person meetings. There are also informal video- and teleconferences.

32. The Ombudsman assessed the extent to which working parties have diverted from their normal practices of recording discussions, in view of the particular conditions imposed by the COVID-19 pandemic. To this end, the Ombudsman reviewed the documentation available on five Council files and the work of several working parties.

Agendas of informal video- and teleconferences of working parties

33. Working parties normally publish agendas prior to in-person meetings in the form of a CM (Communication) document, which can be accessed via the Council's meeting calendar and is listed in the Council public register of documents.

34. Council representatives explained that, at the beginning of the COVID-19 crisis, working parties were instructed not to issue agendas of informal video-

[28] No agenda is available for the following remote meetings: Video conference of economic and finance ministers of 6 October 2020; Video conference of employment and social policy ministers of 13 October 2020; Video conference of health ministers of 30 October 2020; Video conference of trade ministers of 9 November 2020; Informal video conference of foreign affairs ministers of 19 November 2020; Video conference of defence ministers of 20 November 2020; Video conference of development ministers of 23 November 2020; Informal Video conference of energy ministers of 14 December 2020.
[29] In line with Articles 7 and 8 of the Council's Rules of Procedure.

or teleconferences in the form of CM documents. Instead, where an agenda was communicated to the informal video- or teleconference, it was directly distributed to working party members by e-mail or in the form of a WK (Working) document.

35. WK documents are not automatically listed in the Council's public register at the time they are drafted. Instead, the Council's General Secretariat publishes every few months, and for each working party, an ST (Standard) document in the public register, which contains a list of WK documents that have been distributed by the General Secretariat to the specific working party during the relevant time period. WK documents thus have no separate entry in the public register of documents and are made available only with some delay. The Ombudsman has already criticised this practice in her previous strategic inquiry on the transparency of the Council's legislative process[30] and suggested that the Council list in its public register all types of documents at the time they are issued, regardless of their designation and whether it is possible to access the document (or parts thereof) or not.

36. Registering agendas as WK documents, at the beginning of the COVID-19 crisis, meant that these agendas were not made publicly available prior to the informal video- or teleconferences of the working party.

37. Only when it became clear that the crisis situation would continue were working parties asked to register the agendas of informal videoconferences as CM documents. The Ombudsman welcomes this important change, as it allows the public to know in advance what items and files are to be discussed by working parties in remote meetings.

Records of discussions at informal video- and teleconferences of working parties

38. The Ombudsman understands that there are different practices within working parties regarding which documents to produce and what information to be included therein. Working parties produce different types of documents to record the progress and outcomes of negotiations in preparatory bodies.

39. Already in her previous strategic inquiry into the transparency of the Council legislative process,[31] the Ombudsman emphasised that, since the Council's preparatory bodies do not meet in public, citizens can exercise their democratic right to follow their discussions only by accessing records thereof. While a certain degree of flexibility in producing documents may be needed to take account of the different types of preparatory bodies and the variety of subjects under discussion, different drafting practices should be justified only by the nature of the file and the particularities of the relating preparatory

[30] Own-initiative inquiry OI/2/2017/TE into the transparency of legislative decision making in the Council of the EU. All inquiry-related documents are available here: https://www.ombudsman.europa.eu/en/case/en/49461

[31] OI/2/2017/TE.

discussions. However, in her previous inquiry, she found a divergence in practices that was not just related to the nature of the specific files but also stems from different administrative practices among the different departments of the Council's General Secretariat. When closing this previous inquiry, the Ombudsman therefore suggested that the Council adopt guidelines concerning the types of documents that are produced in the context of legislative procedures in preparatory bodies, as well as concerning the information to be included in those documents.

40. In the COVID-19 context, many working parties had to adapt the way they operate. The Ombudsman assessed their adapted practices based on several examples, including the Working Party on Aviation, the Audio-visual Working Party and the Financial Counsellors Working Party.

Working Party on Aviation

In normal circumstances, the Working Party on Aviation meets in-person and Member State representatives provide their views orally on the files under discussion. There are normally no minutes of its meetings.

During the COVID-19 crisis, Member States send their views also in writing and these views are compiled in WK documents. The Council noted that these written comments can be found in its public register. However, as they are registered in the form of WK documents, they have no separate entry in the register and are made available only with some delay (see paragraph 35 above).

The Council noted that the practice of written comments is not new and existed before COVID-19. However, it has been more widely used during the crisis, since informal videoconferences of the working party are considered cumbersome and difficult to arrange, with technical problems that impede progress. The Council noted that the wider use of written comments has led to an increase in the number of documents issued by the working party.

The Council further explained that there is no standardised formal procedure for Member States to submit written comments. Submissions may take different formats, including sending e-mails or documents with tables, documents with comments or a list of comments. Bearing in mind these differences and the various stages at which comments may be collected, it is difficult to envisage how the members of this Working Party could be required to submit comments in a certain format. It was noted that written comments formalise a position, which may lead to less flexibility in the course of negotiations.

Audio-visual Working Party

In normal circumstances, when the Audio-visual Working Party examines a file, it first issues a text prepared together with the Presidency, which is designated an ST document. In some cases, it asks for written comments from Member States. However, generally an in-person meeting takes place during which Member States' positions are expressed orally. There are no minutes of the Working Party's meetings.

In the context of the COVID-19 crisis, the Working Party adapted how it functions, switching to written consultations with Member States. In-person meetings no longer take place. Written consultations are registered as WK documents.

Financial Counsellors Working Party

The Financial Counsellors Working Party continued to meet in-person during the COVID-19 crisis. Therefore, there was hardly any change of working arrangements. There are no records of in-person meetings, which is not specific to the COVID-19 situation.

The Working Party was responsible, amongst other issues, for the preparatory discussions on Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of the SURE instrument and on Council Decision (EU) 2020/701 of 25 May 2020 on providing Macro-Financial Assistance to enlargement and neighborhood partners in the context of the COVID-19 pandemic-.

The Council explained that the adoption of Council Decision 2020/701 was considered urgent in the context of the COVID-19 crisis. It was negotiated with the European Parliament at a very fast pace in an informal manner, to limit the time spent on amendments. The negotiations with the Parliament were therefore even more informal than during standard 'trilogue' negotiations. These informal negotiations involved phone calls to ensure that the legislators were in agreement on the content, to ensure the legislative procedure would not be delayed. There is no record of these informal exchanges with representatives from the Parliament.

41. Based on the Council files inspected, the Ombudsman understands that working parties, which no longer meet in-person during the COVID-19 crisis, have continued their work via written consultations of working party members, potentially in combination with informal videoconferences.

42. The fact that Member State delegations make their contributions in written form seems to have increased the documentation available on working party discussions, at least for those working parties that normally do not produce minutes of their in-person meetings. The Ombudsman welcomes this increased

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availability of documentation on the negotiations and encourages the Council to maintain the practice of written comments, prior or following working party meetings, also beyond the COVID-19 context.

43. The Ombudsman notes, however, that written consultations are systematically registered as WK documents. This means that these documents, as noted above in paragraph 35, have no separate entry in the Council public register of documents. The public becomes aware of their existence only when they are compiled in an ST document that is published every few months. The Ombudsman is concerned about this increased use of WK documents, as it reduces the transparency of working party discussions. She therefore reiterates her suggestion from her previous inquiry that the Council should list in its public register all types of documents at the time they are issued, regardless of their designation and whether it is possible to access the document (or parts thereof) or not.

44. In the Ombudsman's exchange with the Council, it also became clear that the Council's General Secretariat issued instructions to working parties during the COVID-19 crisis, for example, on how to issue agendas or conduct and record written consultations. In particular, Council representatives stated that, in order to assist the staff of the General Secretariat to implement Council Decision 2020/430 and to organise the work of the Council and Council preparatory bodies, internal guidance was given as an 'administrative management tool'. The Ombudsman notes that this guidance has not been made publicly available. This is regrettable, as it would clearly contribute to a better public understanding of how the Council and its preparatory bodies are working in the exceptional but continuing circumstances of the COVID-19 crisis. The Ombudsman will make a suggestion to that effect.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion[32]:

For the initial four months of the COVID-19 crisis, remote ministerial meetings did not adhere to the same transparency standards as in-person Council meetings. However, since then, by web streaming certain 'informal ministerial meetings' and by publishing relevant documentation in relation to these meetings, the Council's ministerial meetings during the COVID-19 crisis now *de facto* meet the applicable transparency standards and obligations.

The Council should have published the paper entitled *'Exceptional measures on the continuation of decision making in the Council'* at the time the decision

[32] This complaint has been dealt with under delegated case handling, in accordance with Article 11 of the Decision of the European Ombudsman adopting Implementing Provisions

to derogate from its Rules of Procedure (Council Decision 2020/430) was adopted. However, as the Council has released the document in the meantime, the Ombudsman does not see the benefit of issuing a formal recommendation at this stage.

Suggestions for improvement

1. The Council should make public relevant documentation, including a record in its meeting calendar, of all 'informal ministerial meetings' that took place between March and June 2020.

2. The Council should maintain the wider use of written comments, prior to or following working party meetings, also beyond the COVID-19 context, as this has led to better documentation of working party discussions.

3. The Council should list in its public register all types of documents at the time they are issued, regardless of their designation and whether it is possible to access the document (or parts thereof) or not.

4. The Council should make public the internal guidance issued by its General Secretariat on the organisation of the work of the Council and its preparatory bodies during the COVID-19 crisis.

Emily O'Reilly
European Ombudsman

Strasbourg, 24/03/2021