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NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee
Subject: Legislative transparency

Delegation will find in the Annex a draft policy paper on legislative transparency.

A new approach towards legislative transparency and information.

The current Council practices for the publication and circulation of legislative documents were conceived several years ago in a legal, political and technological context that has since then significantly changed. There are several reasons for having a fresh look at this issue and for conducting a horizontal review of the Council's policy on legislative transparency:

1. The case law of the Court of Justice has evolved in a significant fashion. In a series of judgments, the Court has confirmed the very special role that transparency plays in law making, notably in strengthening democracy by allowing the citizens to hold decision makers accountable. The most recent case is the *De Capitani* judgement of 22 March 2018, which deals with access to four-column tables produced during trilogue negotiations. The General Court found that trilogues form an integral part of the legislative procedure and that public access to four column tables, even when negotiations are ongoing, should, in principle, be granted unless exceptional circumstances occur.¹
2. New technological solutions (already in use or under development) are changing the way in which we produce and circulate documents. We are moving away from paper-based information to content stored on digital platforms². This paradigm shift needs to be fully taken into account and integrated in our transparency policy.
3. Various actors such as members of national parliaments, the Ombudsman³, and representatives of civil society have addressed calls for more active transparency in Council legislative decision-making.

The arguments mentioned above call for a comprehensive and more pro-active approach to legislative transparency. Such a policy would aim at establishing a better organised system of circulating and publishing legislative documents. It would be based on making more legislative documents directly accessible to the public at an earlier stage, while ensuring the necessary space for reflection and negotiations by protecting those documents that merit protection. The advantages of such a policy are the following:

¹ Case [T-540/15](#). See information note on the judgment, doc. [ST 6693/18](#).

² Delegates Portal was opened in 2017 for distribution of documents. During the AT Presidency a digital platform called Trilogue Table Editor will be introduced which will gradually replace the current working methods for trilogue documents based on Word documents and email. In 2019 the Council will start using a digital Common Drafting Platform with the Commission for drafting of new legislation.

³ On 15 May 2018, the Ombudsman concluded her own initiative inquiry on the transparency of the legislative process in Council (OI/2/2017/TE). In three recommendations and 6 suggestions for improvement the Ombudsman called in particular for a greater proactive transparency and for a systematic recording of MS positions in the legislative domain. A special report to the EP confirming her findings of maladministration by the Council was submitted to the EP a day later.

- improved readability and traceability of the legislative process;
- more coherence, avoiding to make documents accessible in a random fashion, as is currently the case;
- a credible and coherent narrative on the Council's transparency policy;
- an adequate response to the case law;
- a response to calls for greater legislative transparency.

The main elements of a new policy on legislative transparency

To strike the right balance between the case law and various calls for greater transparency, and the need to preserve the necessary flexibility for effective legislative work we propose to structure the new policy around the following elements:

a. Milestone approach

A proactive and balanced transparency policy can be effectively achieved with a milestone approach. Documents associated with milestones will be as a general rule made directly accessible to the public. Milestones will also set the time frame for the revision of the LIMITE status of documents that have not been made public from the outset. The essence of a transparency and information policy based on milestones is to identify which categories of documents will be made public at which point in time. In between milestones, the space to think and negotiate will be protected pending the publication at a later stage.⁴

An innovation proposed in that regard is to generalise the practice of endorsing the initial mandate for trilogue negotiations at the Council level, in the form of a General Approach. The endorsement of the General Approach by the Council (as A or B point) will become a standard milestone for every legislative file. As a consequence, the relevant documents are made public upon inclusion in the Council agenda, in accordance with the Treaties. A systematic endorsement at political level would also strengthen the authority of the Presidency vis-à-vis the European Parliament by providing a higher political mandate for negotiations and at the same time increasing Member States' control on the process.

The revision of the mandate during trilogue negotiations, as is the case now, will be carried out at Coreper level.

A list of key milestones is set out in the Annex.

⁴ This is without prejudice to the application of the relevant rules of Regulation 1049/2001 in case of requests for public access to documents.

b. Built-in flexibility

The rules associated with the new transparency policy should provide for a certain degree of flexibility to take into account the circumstances of a specific case. The normal rule of making certain categories of documents public can be reversed on a case-by-case basis, if the circumstances so require (typically, when one of the exceptions provided in Article 4 of Regulation 1049/2001 applies).

c. Policy coherence

It is important to ensure the same standards of transparency irrespective of the preparatory body responsible for the file. The policy should also be coherent with the practice in case of public access requests. Where documents belonging to a certain category are systematically made public in case of requests for access, pro-active publication of that category of documents should be envisaged.

d. Greater standardization

The production of documents associated with milestones should be subject to greater standardisation. Key milestone documents will have a minimum common content and will be in principle produced as ST documents, thus making them recognisable and allowing a better reading of the various steps of the legislative procedure.

In between milestones, a greater flexibility in document production is allowed so the specificity of a given file can be taken into account. Moreover **documents include content which has reached a certain degree of finalisation** (typically this will occur when a certain content is ready for circulation to all delegations as basis for discussion in a working group) while preparatory drafts and other ephemeral information should be left out

Two important questions requiring guidance from the Council.

There are two important questions that require careful analysis and guidance from the Council. The first one concerns the issue of **recording the positions of Member States**. The second has to do with the **handling of trilogue documents**.

1. Following the judgement of the Court of Justice in *Access Info*⁵ in 2013, COREPER decided that as a rule, the drafter of the document should record Member States' names in documents relating to on-going legislative procedures "where appropriate"⁶.

⁵ Case [C-280/11 P](#) of 17 October 2013 *Council v Access Info Europe*

⁶ [8622/1/14 REV 1](#); [10078/14](#) - Outcome of proceedings

The way this is applied in practice has led to incoherencies and heterogeneity of the documentation of the legislative process.⁷ At the same time, the disclosure of documents relating to ongoing legislative files that contain individual delegations' positions following a request for public access, does not seem to have had any disruptive effects on the decision making process.

The present discussion offers an occasion to reconsider the current regime in light of the milestone approach. In particular it is proposed to record in the note accompanying the General Approach the names of those Member States who have requested to have their position on the record, including with any related statement.

This would improve the readability and the coherence in the documentation of the legislative process. The proposal is also in line with the spirit of the Treaty provisions on the ordinary legislative procedure which foresee that the two co-legislators adopt their respective positions by public vote before entering inter-institutional discussions (while, due to the practice of trilogues, the formal vote currently takes place on the text already agreed with the other co-legislator).

2. Concerning trilogue documents, following the *De Capitani* case law, there is little room left for refusing access to documents produced for trilogues when a request for public access is submitted. In line with the principle of coherence set out above, this calls for a reconsideration of the policy of confidentiality of trilogue documents⁸.

The milestone approach offers the possibility to strike a balance between the required standard of transparency and the need to guarantee a certain “space to think”, as acknowledged by the Court.⁹

This can be realised by making a distinction between documents that are drawn up as a basis for the trilogue negotiations or to formalise the outcome of the discussions (milestone trilogue documents) and preparatory or preliminary drafts that may be used during the negotiations or in preparation thereof, including those exchanged in the framework of technical meetings. Milestone trilogue documents would be made public pro-actively. These include the agenda, dates and a list of participants at political level.¹⁰

⁷ See for instance the different approaches to recording and publishing mandates for trilogues in recent files:

- 2017/0102 (COD) European Solidarity Corps: the mandate tabled for Coreper endorsement contains quite detailed MS positions ([13881/17](#) marked LIMITE)
- 2017/0004 (COD) Carcinogens batch II: the mandate tabled for Coreper endorsement doesn't contain MS positions, except a UK scrutiny reservation ([9926/17](#) and is PUBLIC)
- 2016/0256 (COD) Agencies: the mandate tabled for Coreper endorsement contains 2 MS positions, and a UK scrutiny reservation ([15024/16](#) and is PUBLIC)

⁸ Following the ruling, to date the EP has granted access to ALL 4-column documents requested and even within the GSC about 87% of requested trilogue documents are released.

⁹ See para. 106 of the *De Capitani* judgment

¹⁰ As already communicated in the answer to the European Ombudsman in the context of her inquiry on the transparency of trilogues see [ST 15107/16](#)

Similarly, where four column tables or similar documents are updated during the trilogue process, they would be made public after the Member States have been informed of their content (as ST document, after consideration by the Working Party or COREPER).

Once the Trilogue Table Editor is in use¹¹, these documents would need to be created at pre-defined points in time, for instance every time the mandate is updated. This approach would facilitate the application of a different regime for preliminary or preparatory drafts, exchanged during the talks, ahead of the finalisation of the 4th column or similar document. This different regime will also apply to technical meetings whereby no agenda's or lists of participants are established (and therefore not made public).

Conclusion and next steps

Based on this policy paper, the following items are presented to COREPER for discussion and approval:

1. A new milestone approach for pro-active publication of documents produced during the legislative process;
2. The systematic endorsement of mandates for trilogue negotiations at Council level (i.e. as General Approach);
3. The recording, in the note accompanying the General Approach, of the names of those Member States who have requested to have their position on the record, including with any related statement.
4. The systematic publication of milestone trilogue documents.

Given that trilogue documents are jointly authored by EP and Council and that these documents are held by all three institutions (in the context of a request for access), interinstitutional coordination is required. Notably, a policy on the production and handling of trilogue documents should be agreed with the European Parliament and the Commission, in light of the principles and the milestone approach as proposed above.

Once Coreper has agreed on the elements of the new policy, the PRESIDENCY will contact the Commission and the EP with a view to such coordination.

The Secretary General is invited to assess the need for administrative changes required to implement the policy as agreed by COREPER and to take the necessary internal measures, including a revision of the rules on the distribution of documents (LIMITE marking).

¹¹ Pilot phase starting in autumn during AT Presidency; full use foreseen towards the end of 2019.

MILESTONE DOCUMENTS

Milestones	Documents	Pro-active publication
Receipt of proposal	Commission proposal	Upon circulation
Discussion in Working Party/COREPER	Agendas	Upon circulation
	State of Play/Progress report	After consideration by COREPER.
Debate in Council	Report / Note to Council/COREPER	Upon placing on Council Agenda
	Council mandate (General approach)(basis for starting trilogues)	Upon placing on Council Agenda
Trilogues	Agenda & calendar	Upon circulation
	List of participants (name of Ministers & Perm Reps)	Upon circulation
	4 Column-Table or basis for trilogue	After consideration by Council or COREPER ¹²
	4 Column-Table or (partial) outcome of trilogue	After consideration by COREPER or Working Party
Final trilogue	Consolidated text (4th column)	Upon endorsement by COREPER
	Offer letter to EP	Once sent
Adoption	PE-CONS document	Upon circulation
	Approval or non-approval of EP position at 1st reading	Upon voting
	Council position at first reading	Upon circulation
	Statement of reasons	Upon circulation
	Approval or non approval of EP amendments at second reading	Upon voting

¹² An example where the COREPER mandate has already been made public upon endorsement is [2017/0297 COD - Equivalence of field inspections Brazil and Moldova] in document [ST 7841/18 ADD 1](#)