



# Legislative transparency of the Council of the EU

*Note submitted to the Dutch EU Affairs Committee hearing*

*Aidan O'Sullivan - February 2nd 2022*

## 1) Role of the European Ombudsman

The European Ombudsman, created in the Maastricht Treaty, is an independent body that works with EU institutions, agencies and bodies to achieve the highest possible standard of EU administration to the benefit of citizens.

The current Ombudsman is Ms. Emily O'Reilly who was elected first by the European Parliament in 2013 and re-elected in 2019.

The Ombudsman helps people, businesses and organisations facing problems with the EU's administration by **investigating their complaints** about maladministration by the EU, but also by **proactively investigating** into administrative issues.

For her inquiries, the Ombudsman can ask EU institutions, agencies and bodies to provide her with any information, for example, confidential EU documents or classified information. Depending on her findings, the Ombudsman can make recommendations, proposals and suggestions for improvement.

The Ombudsman received about 2,000 complaints a year, and launches 300-400 inquiries per year.

## 2) Transparent EU law-making

Making the legislative process more transparent is an important way to strengthen public trust of the EU and its institutions. It allows citizens to follow and participate in the process of European law making, which is often perceived as remote and bureaucratic.

The Council of the EU, which comprises representatives of the Member States' governments, is one of the two main law-making institutions of the EU (along with the European Parliament). The lack of transparency in the Council's work can be seen as one of the drivers of a **'blame Brussels' culture**, in which governments often take the credit for popular EU decisions, but blame the EU for unpopular decisions which they themselves agreed to as part of the EU.

More transparency of the Council and its preparatory bodies would allow citizens to better understand the process, to participate in EU democracy and allow them to hold their governments accountable for EU decisions.

### 3) Ombudsman's inquiries into Council legislative transparency

In recent years, the Ombudsman conducted various inquiries into Council transparency issues, a selection of which is described below.

#### a) Transparency of Council preparatory bodies

In case [OI/2/2017/TE](#), the Ombudsman systematically reviewed the transparency of Council preparatory bodies, that is, working parties and the committees of permanent representatives (COREPER). She found that the identities of Member State governments expressing positions were often not recorded and not systematically published (in a timely manner). Instead, many documents from these bodies were marked as 'LIMITE', which means such documents should remain internal to the Council and are not published.

The Ombudsman stressed that there should be the widest possible and direct access to EU legislative documents.<sup>1</sup> She said that the Council should

- Systematically record the identity of Member State governments when they express positions in Council preparatory bodies;
- Develop clear and publicly-available criteria for how it designates documents as 'LIMITE', in line with EU law; and
- Systematically review the 'LIMITE' status of documents at an early stage, before the final adoption of a legislative act.

The Council did not reply to the Ombudsman's recommendations and suggestions within the legal time limit and the Ombudsman issued a **Special Report** to the European Parliament.<sup>2</sup> The Parliament endorsed the Ombudsman's findings.

The Ombudsman's inquiry also brought much attention to the issue, from civil society groups and various national parliaments.

In 2020, under the German Presidency, the Council published a note on '[Strengthening legislative transparency](#)' that announced the publication of more types of documents, including agendas of preparatory bodies and certain positions of the Council.<sup>3</sup>

While this was progress, the Council still does not proactively and systematically publish many legislative documents while the legislative process is ongoing. It also does not systematically record the identity of **Member States when they express positions** in preparatory bodies. It also does not publish working papers from Council working parties. It periodically publishes lists of Working (WK) documents, but these documents are not directly accessible via the Council public register.

#### b) Trilogues transparency

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<sup>1</sup> For the principle on the widest possible public access, see Joint Cases [C-39/05 P and C-52/05 P Sweden and Turco v. Council](#) [2008], para. 34 and [Case C-280/11 P Council v. Access Info Europe](#) [2013] para. 27.

<sup>2</sup> When an EU institution fails to implement the Ombudsman's recommendations, she can make a 'special report' on the issue to the European Parliament.

<sup>3</sup> <https://data.consilium.europa.eu/doc/document/ST-9493-2020-INIT/en/pdf>

Trilogues are informal negotiations between representatives of the European Parliament, the Commission and the Council on EU legislation. During a Trilogue, the Parliament and the Council try to agree a common text before voting on it in the formal legal procedure. Trilogues are used in most legislative procedures.<sup>4</sup>

While they are a very effective way of reaching agreements between the co-legislators, Trilogues are less transparent than other parts of the EU legislative process.

The Ombudsman conducted an inquiry into the transparency of informal Trilogues ([OI/8/2015/JAS](#)). In her decision, she said that citizens must be in a position to scrutinise their elected representatives during this key part of the legislative process. Citizens also require information on the topics under discussion during Trilogues to be able to participate effectively in the legislative process.

While she found that Trilogues were already more transparent than in the past, she proposed that the institutions should proactively publish more information, such as meeting dates, general agendas, documents showing the initial position of institutions and the compromise text (*'four-column documents'*), and lists of the political decision makers involved.<sup>5</sup>

The Council replied that it would work on a **'one stop shop' platform** for legislative proposals together with the other institutions where such documents could be published. So far, this platform has not been set up, but there is political agreement between the institutions on its establishment and the EU Publications Office has now been given the task.

### **c) Transparency of decision making in the Council during the COVID-19 crisis**

As for all EU institutions, the COVID-19 crisis affected the legislative work of the Council.

The Ombudsman opened an inquiry into the Council's work during COVID-19 ([OI/4/2020/TE](#)). She found that the Council should have been more transparent about "informal ministerial meetings" in early COVID times and suggested to publish documents related to these meetings.

She also suggested that the Council should list in its public register *all types of documents* at the time they are issued (also documents that are not accessible to the public, including **"WK documents"**).

The Council replied to the Ombudsman that preparations are ongoing to make some of the documents in question public and that it is reflecting on the listing of WK documents in its public register, but has not taken a decision on this question.

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<sup>4</sup> For more information see the European Parliament's [Briefing](#) on informal trilogues.

<sup>5</sup> After the Ombudsman's inquiry, the European Court of justice also dealt with Trilogue transparency in its DeCapitani ruling (Case T-540/15 - De Capitani v Parliament [2018]). It found that the work of the Trilogues constitutes a decisive stage in the legislative process and that Trilogue documents should, in principle, be accessible on request.