



29 November 2017

Corporate Europe Observatory response to [European Ombudsman inquiry](#) on transparency of legislative work within Council preparatory bodies

Council consultation - OI/2/2017

We are pleased that the office of the European Ombudsman is investigating the transparency of legislative work within Council preparatory bodies. We consider that the Council is an under-scrutinised body and that many of its deliberations in relation to legislation should be made far more transparent in order to enable public scrutiny and democratic accountability. Our particular concern is to shed more light on the lobby influence that targets the Council and its 28 members, and which can have a significant impact on the legislative positions that the Council adopts, and indeed on the final result of the whole law-making process.

In summary our position is as follows:

- there should be as much proactive transparency for legislative documents as possible
- documents should be easy to find via web pages for each working group and for each legislative dossier
- detailed minute-taking should become the norm for all Council preparatory bodies
- the positions promoted and adopted by member states should be recorded and made transparent during the process

Accessibility of information and documents

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?

- It should be immediately clear from the Council website which working parties will look at each legislative proposal. This is not currently the case.
- Each legislative proposal should have a Council web page which hosts all related documents and which is kept up-to-date. These documents should include: meeting agendas, accompanying papers, meeting minutes, Presidency proposals,

Presidency notes to delegations, and all other relevant documents. It would be important that this web page is set up as soon as the Council starts its work on a proposal.

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[3]. Are there other measures the Council could take to make legislative documents easier to find?

- It is the working parties which carry out the bulk of the work to develop a Council position on a legislative dossier. But as mentioned above, it is not immediately obvious which working group is the lead on a particular dossier.
- While a calendar of meetings has some use, it is very important to shed more light on the specific work of working groups. We think it is far more likely that citizens would visit the Council website to find meetings of a particular working party or about a particular dossier, rather than for meetings held by the Council on a particular day.
- Therefore, there should be a prominent list of all working parties and each group should have a web page which hosts all its relevant documents. These should include a list of the dossiers it worked or worked on (including links to their specific web pages), as well as meeting agendas, accompanying papers, meeting minutes, Presidency proposals, Presidency notes to delegations, and all other relevant documents.
- The current web pages for the working parties need substantial improvement. For example, see the [Working Party on telecommunications and the information society](#) which does not provide much additional information on the work of the group, other than could already be gleaned from its name. It lists future meetings of the group but not past ones, and it contains no documents whatsoever, nor a clear list of legislative dossiers being worked on. Overall, this kind of working group web page gives the veneer of transparency without actually providing any meaningful transparency.
- Additionally, we have been told that this working group [does not produce minutes of its meetings](#) which we consider is not only bad administrative practice but also prevents legitimate scrutiny of its work.

II. Transparency of discussions

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

- There should be proactive transparency by the Council of its documents. This would include: meeting agendas, accompanying papers, meeting minutes, Presidency

proposals, Presidency notes to delegations, and all other relevant documents..

- This should be done in a way which enables oversight of both specific legislative dossiers and the work of working parties as a whole, and which makes the documents easy to find (hence the proposal that each dossier and each working group has a comprehensive web page). At the moment, even the documents which are published are not easy to find: they are not published in logical places and the website relies on the user running complex searches for documents (which requires a pre-existing degree of knowledge). The 'search' function does not even allow you to choose from a list of working groups or dossiers.
- As previously mentioned, we find it shocking that at least some working groups do not produce minutes of their meetings. We do not know the extent of this bad administrative practice but it should become a clear Council rule that all such meetings are properly minuted, and that those minutes are published.
- A further concern is that the Council says it will not release some documents when a dossier is still going through the legislative procedure. For example on the recent Securitisation dossier Corporate Europe Observatory was refused access to three documents on the following [grounds](#): "Given that there are still important procedural steps (legal-linguistic revision, adoption by the Parliament and Council, and signature) outstanding, there is a risk that disclosure could lead to the compromises reached on those highly sensitive issues or related issues such as mandates and deadlines for regulatory technical standards being opened up again. The disclosure of the documents would seriously undermine the decision-making process in view of its potential effect on the finalisation of the decision-making process and the possibility to conclude it successfully in a timely manner."
- We agree with the European Ombudsman that there should be greater transparency regarding documents in the trilogue phase of negotiations, and we further consider that to refuse to release documents after the trilogue phase has ended is clearly unnecessary and further extends the period of time for which it is not possible for there to be scrutiny of EU decision-making.

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.

- As is noted, the Council produces various documents - meeting agendas, accompanying papers, meeting minutes, Presidency proposals, Presidency notes to delegations, and others – and our strong preference is that there should be a basic presumption in favour of the proactive publication of all of them.
- We have previously mentioned the problematic absence of minutes by working groups. But in fact we think that across the Council there is too much reliance on "summary records" rather than proper minutes. See for example this ["summary record"](#) of a COREPER meeting in October 2016 which simply states (on the topic of wholesale roaming charges): "The Committee held an in-depth discussion on the way forward on this file and reached an agreement on the key elements of the compromise necessary to prepare the Council's general approach." This does not

leave the reader any the wiser.

- As a result, we consider that all Council bodies which discuss policy should keep detailed minutes, rather than summaries or ‘outcomes of proceedings’ which are far too anodyne.
- Additionally, to be able to map lobby influences on a particular dossier, we find it very important to know which countries adopt which positions, which countries promote certain arguments, and how a Council position is ultimately agreed. We know that there is substantial lobbying of member state ministers and officials (via permanent representations in Brussels and via national capitals) and being able to track if and how that lobbying is influencing national positions during Council policy-making is an important element of exposing the impact of lobbying on EU decision-making.
- Of course, we recognise the dichotomy which sees much of this lobbying occurring at the national level, while the consequences of it are seen at the EU level. While far more should be done to improve lobby transparency at the member state level, there must also be far greater transparency of the policy-making process at the EU level, and this should include opening up the processes by which the Council forms a position and takes decisions.

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

- No. It does not include the information that we would like to see published per legislative dossier to provide scrutiny of ongoing and completed procedures, as listed above. While the Council says that its legislative database gives “information on each step for each legislative file”, a look at say the [Securitisation file](#) indicates that the Council elements have not been kept up-to-date.
- For dossiers currently in the legislative process, the [European Parliament’s Legislative Observatory](#) is rather more comprehensive and user-friendly.

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.

- No. We take the view that the starting position should be default proactive transparency within both. The working groups do a lot of the detailed analysis and drafting of positions; Coreper takes important decisions and also provides a political steer on policy.

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?

- We are not familiar with the details of how the LIMITE marking is applied. However, we repeat our view that default proactive transparency should apply to all legislative documents including meeting agendas, accompanying papers, meeting minutes,

Presidency proposals, Presidency notes to delegations, and all other relevant documents.

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?

- As stated above, to be able to map lobby influences on a particular legislative dossier, we find it very important to know which countries adopt which positions, which countries promote certain arguments, and how a Council position is ultimately agreed ie. how member states voted. We know that there is substantial lobbying of member state ministers and officials (via permanent representations in Brussels and via national capitals) and being able to track if and how that lobbying is influencing national positions during Council policy-making is an important element of the story of how EU legislation is agreed.
- For example, a 2016 [report](#) by the Alliance for Lobbying Transparency and Ethics Regulation mapped lobbying directed at the permanent representations in Brussels. It showed that while many permanent representatives did not record data on lobby meetings held or would not release such data publicly, those that did produce data were having significant numbers of lobby meetings with corporate interests. Additionally, our recent exposes of lobbying on dossiers such as [ePrivacy](#), [Securitisation](#), [roam like at home](#), [the Marrakesh Treaty](#) and others, show both the importance of lobbying directed at the Council and its 28 members (both in terms of the position adopted by the Council and on the final outcome of the dossier), and the difficulties in obtaining satisfactory information about the lobbying itself and what influence it plays.
- Knowing about individual member states' approaches to specific legislative dossiers would additionally boost accountability of member state governments at home for the actions that they take at the EU level. This is important as we know that sometimes member states publicly indicate or imply a position on one issue to domestic audiences, but adopt a contrary position at the EU level, hiding behind the lack of transparency in decision-making in Brussels. Positions and votes should all be made transparent.
- Finally, this would create a level-playing field. At the moment, the lack of transparency in this area means that those wishing to either influence decisions or even simply to know about them are dependent upon leaked information. Receiving leaked information is mostly about 'who you know' and this is a route to obtain information which is likely to mostly benefit those with the capacity and resources to reach-out to contacts ie. the corporate sector, or where there is a 'revolving door' link. As one specific example of this, we were recently told how a corporate trade association "had information/access to Council working documents" on a particular issue "way before they were published". These documents were obtained by a former Permanent Representation staff member who now works on the same issue for the corporate trade association, and were then shared with the association's corporate members. During some of our investigations, Corporate Europe Observatory has also been passed leaked information which has shed light on

current lobby battles.

III. Other

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

We have four further points to make:

1. Use of Council press passes to secure lobby access

An April 2017 [investigation](#) by Corporate Europe Observatory and Seas at Risk showed how lobbyists from fisheries lobby groups were obtaining access to the Council building via the use of press passes. Some lobbyists were even carrying out lobbying of ministers on Council premises, including in the press room, while Agri-Fish Council meetings to agree important fishing quotas were going on nearby. This investigation raised a number of important questions including: why are Council procedures so lax that industry representatives, mostly writing for in-house or industry magazines, are able to gain Council press passes, with all the privileged access to officials and ministers that this could enable? Why are there no rules to ban all lobbying in the Council building during ministerial meetings?

In our view, the Council must start to take a far more holistic approach on transparency including towards legislative documents as set out above, but also towards lobbying on its own premises, and on wider lobby transparency.

2. EU lobby register

While this inquiry does not specifically cover the EU lobby transparency register, we hope the following remarks might be useful. In our view:

- The EU transparency register should be extended to cover the Council and the European Council, meaning that organisations lobbying these EU institutions should declare those activities accordingly.
- In addition, all officials at the Council and the European Council should ensure that they do not meet unregistered lobbyists.
- Furthermore, officials at the Council and the European Council should practice proactive lobby transparency and publish lists of all lobby meetings held.
- We consider that the Permanent Representations should also be covered by lobby transparency rules. As these are so patchy at the member state level, we consider that the Permanent Representations should be brought into the scope of the EU register. Until this can happen, ALTER-EU has been encouraging Permanent Representations to voluntarily agree to abide by its rules. Permanent Representations should also be far more vigilant in monitoring which lobbyists it meets and releasing information about this.

3. Comitology

Comitology committees, where decisions about the implementation of EU law are made, are one of the key fora in which member states make decisions at the EU level. As we have seen with glyphosate and the endocrine disruptors issues, comitology decisions are very important and can attract much public interest. Much of what we have written above (on proactive transparency, proper minute-taking etc) should apply to comitology as well, including that voting should be made transparent ie. it should be clear which country voted which way. Even if no formal voting has taken place, the minutes should specify members states' positions.

4. Undue influence and corporate capture

For Corporate Europe Observatory, while transparency is important, it is never enough.

That is why we were pleased to read the Ombudsman's recent speech to EPACA which said: "What is not acceptable is undue influence—when privileged space is given to certain interests, where lobbying is not transparent. The practical consequences can be significant: one business sector gains an unfair advantage over another, innovation may be stifled unfairly, environmental standards are set a little lower; consumer rights are weakened; or, in the case of the tobacco regulation, health clauses diluted."

We entirely agree and we consider that the European Ombudsman could usefully produce some recommendations in this area for the Council and its 28 member states. This is because, in too many EU dossiers, the European Parliament consistently plays the role of trying to tone down the pro-corporate positions put forward by the Commission and the Council. We consider that some dossiers are captured by corporate interests at an early stage, and that the Council too often reinforces this.

As you know, President Juncker has [said](#) that "... Members of the Commission should seek to ensure an appropriate balance and representativeness in the stakeholders they meet." While ALTER-EU has [exposed](#) how this statement has yet to be backed by proper guidelines or practical action, such a commitment could be of use if these were put in place. Other policy options to roll back corporate capture could include: applying the World Health Organisation's article 5.3 rules to sectors other than tobacco; complete lobby bans during sensitive periods of decision-making; more public participation in decision-making, as the [Aarhus Convention](#) sets out for environmental decision-making, and many others.

We consider that the Council as an institution, as well as member state officials and those who work for the Council itself, should show far more awareness about the risk of lobbying, of undue influence, and of corporate capture, and the need to prioritise public interests rather than corporate interests when making policy. Ombudsman recommendations in this area would be important and welcome.

For more information on this submission, please contact:

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