

## Meijers Committee

standing committee of experts on international immigration,  
refugee and criminal law

### 1813 Note to the Presidency of the Council concerning the General Secretariat draft policy paper on legislative transparency

3 October 2018

#### General observations

On 13 July, the General Secretariat of the Council of the EU circulated a draft policy note to the Members of the Council with proposals for reform of the policy on legislative transparency (document 11099/18 LIMITE). An initial discussion on these proposals was held at the Coreper meeting of 18 July. On 20 July, *Agence Europe* reported on the substance of the document. On 24 August, the document was published on the website of *Statewatch*.

The Standing Committee of Experts on International, Immigration, Refugee and Criminal Law (the Meijers Committee) has taken note of the document, as well as of the recent revision of the guidelines concerning handling of documents internal to the Council (so-called 'limite' documents) as laid down in document 7695/18 of 10 April. In light of both documents, the Meijers Committee would like to submit to you the following observations. A carbon copy of this letter is submitted to the European Affairs Committee of the House of Representatives of the Netherlands, some of whose members solicited our legal analysis of the measures proposed in the document, as well as to the European Ombudsman.

The Meijers Committee welcomes the Council Secretariat's initiative to update the current internal rules concerning access to documents drawn and/or held by the Council in the context of the EU legislative process, but notes that several aspects of the proposal remain unclear. Further, our assessment is that some of the proposals do not meet the standards of transparency as laid down in Regulation 1049/01 and elaborated in the case law of the EU Court of Justice and the General Court, particularly as regards the reliance on the so-called 'limite' document label during the legislative process. The application of 'limite' to a legislative document prevents it from being made directly and fully available to the public, even when recent case law stipulates that this must be the default case, subject to exceptions cited in Regulation 1049/01.<sup>1</sup> Furthermore, the current inconsistent documentation practice means that the citizen is not guaranteed access to the minimal information that (s)he needs to exercise her/his democratic rights of following the legislative process as it happens and be able to participate in this process. As a general guideline, we propose that any access to legislative documents policy in the Council should meet three standards. It should:

1. Allow European citizens to see who is responsible for decisions made by the Council and in what way, particularly as regards their own national representatives.
2. Allow European citizens to comprehend the main lines of disagreement among Member States, and the reasons that Member States offer for disagreeing.
3. Offer sufficiently detailed and timely information to allow European citizens to participate in ongoing legislative procedures, particularly to make their voice heard concerning proposals that effect their personal situation or significant public interests.

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<sup>1</sup> See case C-280/11P, *Council v Access Info Europe* (17 October 2013); case T-540/15, *De Capitani v European Parliament* (22 March 2018).

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As we will explain below, the proposals do not fully meet these standards, as they will institutionalise rather than break with the current practice of not disclosing many legislative documents fully and directly to the public. In what follows, we offer a point-by-point analysis of the draft policy note, followed by an analysis of the new guidelines for handling of documents internal to the Council.

### Introductory note (page 2)

The Meijers Committee shares the Secretariat's perspective, expressed in the note, that the legal conditions under which legislative transparency in the Council is brought about have been considerably clarified over the past 10-15 years. This clarification occurred both through the case law (*Council v Turco*, *Council v Access Info Europe*, *De Capitani v European Parliament*),<sup>2</sup> as well as through other channels (notably the reports flowing from the European Ombudsman's two recent own-initiative inquiries, concerning respectively the transparency of trilogue negotiation and the legislative process in the Council's preparatory groups,<sup>3</sup> as well COSAC's recent letter to the Presidents of the European Council, the Council, the Commission, and the Eurogroup).<sup>4</sup>

The Meijers Committee subscribes to the view that any changes to the rules should be taken in a way that does justice to the principle of the greatest possible openness,<sup>5</sup> which in the context of the legislative process requires maximum consistency, traceability and pro-activeness in transparency practices. Particular attention should be paid to ensuring that drafting, circulation and disclosure policies are aligned, allowing for a 'virtuous cycle' of openness. As a minimum standard, the Council's practices must fully implement both the letter and the spirit of the applicable treaty law, legislation, and case law.

### "Main elements of a new policy" (introductory paragraph) (page 3)

The Meijers Committee expresses concern about the note's suggestion that the efficiency of the legislative procedure stands in a trade-off relation with the case law. We point out that the need to strike a balance between openness and a 'space to think' is laid down in Regulation 1049/01 (recital 6, article 4(3)), and forms part of the case law of the General Court and the European Court of Justice.<sup>6</sup> The Council's interest in a 'space to think' is thus already accommodated by the rules in place and requires no further trade-off against either these rules or the standing case law. The apparent

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<sup>2</sup> Joined cases C-39/05P and C-52/05P, *Sweden and Turco v Council* (1 July 2008); *Council v Access Info Europe* (see above, note 1); *De Capitani v European Parliament* (see above, note 1).

<sup>3</sup> Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues (12 July 2016); Special report of the European Ombudsman in strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process (16 May 2018).

<sup>4</sup> Letter of 26 Parliamentary Chambers of the Member States of the EU to the President of the European Council, the Presidency of the Council of the EU, the President of European Commission, and the President of the Eurogroup (20 December 2017). The initiators of the letter assessed the responses they received from the European Council, the Council and the Commission to have insufficiently addressed the questions they raised in their letter. The President of the Eurogroup did not respond at all. See the letter of the Chairpersons of the Permanent Committees for European Affairs of the Senate and House of Representatives of the Netherlands and the Danish Parliament to the President of the Eurogroup (12 July 2018).

<sup>5</sup> TFEU, article 15(1) and (2); Charter of Fundamental Rights and Freedoms of the EU, article 42.

<sup>6</sup> E.g., recently in *De Capitani v European Parliament*, at paras 80 and 112 (see above, note 1), also *Council v Access Info Europe*, at para 37 (see above, note 1).

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suggestion in the Secretariat's note that the Council should unilaterally seek to limit access to legislative documents beyond what the formal legal framework permits is therefore unfortunate.

### “a) Milestones approach” (page 3) and Annex (page 7)

The policy paper proposes to centre transparency around “milestones” in the legislative process. The Meijers Committee finds that a decision to centre proactive disclosure around pre-set ‘milestone’ moments has no ground in law. Indeed, as article 12(2) of Regulation 1049/01 holds, “legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, *be made directly accessible*” (italics added). The Meijers Committee has since long called into question the legality of the application of the ‘limite’ predicate to documents pertaining to the legislative documents, since it appears to contradict this provision. This interpretation was last year confirmed in a legal opinion by the Parliamentary Attorney of the Dutch House of Representatives.<sup>7</sup>

The Meijers Committee has on various previous occasions advocated the disapplication of the ‘limite’ predicate in the legislative procedure, or in the alternative, for the reduction of the predicate to the absolute minimum, both in volume and time frame. While successive Council presidencies, including the Dutch presidency of 2016, have made the latter a priority of their institutional agenda,<sup>8</sup> we conclude that the current milestones proposal, far from constituting a sufficient effort to diminish the number of documents labelled ‘limite’ in the legislative process, in fact further institutionalises it. The major innovation proposed by the Council is to make public the Council mandate that forms the basis for the trilogues (the so-called ‘General Approach’). Preparatory or preliminary drafts at Working Party or Coreper level are not to be made public pro-actively, unless they concern state of play documents - but in that case only after consideration by Coreper.

The Meijers Committee holds the view that preparatory or preliminary drafts, forming the basis of discussions at Working Party or Coreper level, are to be regarded as legislative documents. Consequently, they must, in accordance with article 12(2) of Regulation 1049/01, as a rule be made directly accessible. Although we welcome the proposal to directly publish the General Approach, this will only expand EU citizens’ access to legislative information concerning the *outcome* of the internal Council negotiations. The Meijers Committee takes the position that the current proposals are insufficient to meet both the letter of and the spirit of Regulation 1049/01 as expressed in article 12(1) and preamble 6. We highlight that Regulation 1049/01 already foresees in the possibility to withhold documents in the course of an ongoing decision-making procedure under article 4(3) (known as the ‘space to think’ clause). It should be this legal provision, and not the informal solution that the note proposes, which regulates exceptions to the principle of legislative transparency.

The above observations notwithstanding, the Meijers Committee has on previous occasions presented its own notion of the milestones idea.<sup>9</sup> This was based on the logic that, apart from the Council’s obligation, in principle, to directly and fully disclose all legislative documents, the Council’s legislative process would not necessarily gain in transparency if this step would not also be

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<sup>7</sup> Parliamentary Attorney of the House of Representatives of the Netherlands, Parliamentary Opinion: Access to Council documents seen from a European transparency law perspective (6 March 2017).

<sup>8</sup> Guidelines on dealing with LIMITE documents during the Netherlands Presidency 2016 (undated).

<sup>9</sup> CM1615 Notities van de leden van de Commissie Meijers voor de rondetafelgesprek EU-informatievoorziening van de Vaste Commissie Europese Zaken van de Tweede Kamer (2 November 2016); Input offered by the Meijers Committee to the European Ombudsman’s Public Consultation regarding the transparency of legislative work within Council preparatory bodies in own-initiative inquiry OI/2/2017/TE (13 December 2017).

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accompanied by a more expansive documentation of the process, and a greater standardisation of drafting practices. Thus, rather than referring to document disclosure upon reaching specific stages of the legislative process, we advocate the development of *de minimis* standards for documenting of the legislative process alongside the duty to proactively disclose legislative documents.

Milestones in this understanding refer to fixed moments at which documents are drafted, expressed in terms of regular time spaces (e.g. every fifth Working Party meeting, or every three months). They would foresee in the compulsory drafting of a standardised state of play document, irrespective of concrete progress made, and would go accompanied by debates at the ministerial or ambassadorial level.<sup>10</sup> This milestones approach would replace the current post-negotiation ministerial debate that is often described as overtly ritualistic/rhetorical in character, and would allow for more politicised debates when negotiations are still ongoing. The advantage of this approach is that the public is regularly updated concerning ongoing legislative negotiations, which facilitates participation. It furthermore would reduce the potential of artificially stretching out particular phases of the legislative process to postpone disclosure -potentially indefinitely- by requiring regular updates independent of the substantive phase in which the legislative process finds itself. In a regular update document, if no progress was made over the past three months, it would suffice to put this mere fact on the record.

With regard to the Annex on page 7 listing the milestones foreseen and the steps to be taken, we note that this mechanism could indeed serve to set clearer limits on the application of the 'limite' predicate on documents falling outside of the scope of 'legislative documents' as listed in the Council's Rules of Procedure.<sup>11</sup> However, with regard to the timing of disclosure, it remains unclear why some types of documents are foreseen to be disclosed immediately upon circulation, while others must first be discussed in the context of the Coreper/Working Party. Without justification, this distinction appears to introduce an arbitrary and unnecessary delay in the disclosure of documents pertaining to ongoing legislative negotiations. We further point out that documents drawn up at the time where a vote takes place should directly incorporate the voting record and explanations of the votes, next to the text agreed.

### **"b) Built-in flexibility" (page 4)**

The note refers to a need for flexibility. It is however unclear how the note understands the term 'flexibility'. The access to document rules themselves distinguish between various exceptions to disclosure under article 4. The Council can in principle always seek to rely on these exceptions. In this sense, calls for a need for flexibility appear superfluous and create unnecessary ambiguity.

### **"c) Policy coherence" (page 4)**

The Meijers Committee supports the effort to implement the access rules more consistently across the different Working Parties and policy sectors. Under the current policy, the Council applies a

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<sup>10</sup> COSAC has adopted this proposal in its letter to the Presidents of the European Council, Council, Commission and Eurogroup. See above, note 4.

<sup>11</sup> Rules of Procedure of the Council of the EU, December 2009, Annex II, Specific provision regarding public access to Council documents, article 11 containing a list of documents considered 'legislative documents' for the purpose of Regulation 1049/01.

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fragmented policy by which Member State' inputs are sometimes recorded in the official documents, while other times they are not. As the draft note points out, the Council has so far been able to apply this policy since the formal rules and guidelines do not stipulate how a legislative document must be drafted.

While the proposed solution is to create 'categories' of documents for direct disclosure, it remains unclear between what categories the Council distinguishes. Does it intend to categorise document types employed in specific policy sector, capturing current practices (e.g. with regard to 'non-papers', 'sans numéro documents' and 'room documents'), or does the note mean to establish certain categories of documents that are to be applied horizontally? In both cases, it would be useful to enumerate all currently existing categories in advance, rather than to do so on an ad-hoc basis. At the same time, the Meijers Committee recommends the Council to develop a more uniform document trail, which would allow the Council to clearly establish in advance which documents are to be disclosed proactively, and at which point. (In this light, we point out that the current Annex on page 7 is insufficiently clear about the content of the documents that are associated with particular 'milestones'.) A pre-established framework for the 'legislative trail' may also help to curb a fragmented interpretation of the rules, for example where one Working Party considers it opportune to proactively disclose a type of document while another does not.<sup>12</sup>

Finally, where different Council formations work with different categories of documents, this brings up the question as to why this is the case, and whether such divergences in the documentation of the legislative process are desirable. The Meijers Committee considers that in principle, there is no foreseeable reason why the legislative document trail should differ across policy areas. In particular, in some Working Parties we draw attention to the tendency, (e.g., the Trade Policy Committee), to track much of the progress of legislative negotiations in informal documents. These informal documents are not formally numbered, with the consequence that they do not appear in the public register, making it difficult for outsiders to know of their existence. We thus call on the Council to take all necessary measures to curb this tendency to use informal documents.

### **"d) Greater standardization" (page 4)**

Again, the Meijers Committee in principle welcomes the proposal of greater standardisation. However, the proof of the pudding is in the eating. In this light, we observe that the note does not clarify what the minimum content of 'key milestone documents' would entail. Greater elaboration of the proposed document protocols would be required for an assessment of their appropriateness. We furthermore highlight that the formulation 'a certain degree of finalisation' as a criterion for the drafting of progress-tracking documents is vague to the extent that is likely to invite fragmented and inconsistent interpretation/application by different chairpersons. Moreover, the note does not clarify why 'preparatory drafts should be left out', and what 'ephemeral information' the drafters of the note have in mind. Again, this formulation is liable to invite an arbitrary and fragmented interpretation.

Finally, in line with the note's overarching ambition to pay attention to the technical/IT dimension of transparency, it is recommended that the question of document standardisation is connected to the question of the online legislative portal. A high degree of standardisation across all institutions is here

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<sup>12</sup>It currently appears to be the case that different Working Parties have rather different interpretations of the balance between the space to think and proactive disclosure.

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warranted. In this light, the institutions could draw inspiration from the various online structures that national parliaments use to make legislative information available to the public.

### “Two important questions requiring guidance from the Council” (page 4)

- *Proposal 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.*

The Meijers Committee notes that the draft proposal itself finds that the disclosure of the names of Member States, since the implementation of the *Access Info Europe* judgement, has not led to the alleged disruptive effect deriving from undue external pressure. To this it may be added that legislative proposals, by their very nature, produce political outcomes that are likely to spark reactions in society, and that citizens have a legitimate democratic right to seek to participate in the legislative process to attempt to influence it. In this light, we recall the opinion of Advocate General Cruz Villalón in the *Access Info Europe* case, which states at paragraph 67:

“Inconvenient though transparency may be, when carrying out legislative as well as non-legislative functions, it must be said that it has never been claimed that democracy made legislation ‘easier’, if easy is taken to mean ‘hidden from public scrutiny’, as public scrutiny places serious constraints on those involved in legislating.”<sup>13</sup>

In this case, the European Court of Justice eventually struck down the Council’s regular practice of suppressing references to the names of Member States when making proposals for amendments to legislative draft proposals. Since then, as the note states, a practice has developed of recording references to Member States in legislative documents “where appropriate”. It remains unclear what concrete improvement the current proposal of citing Member States’ input on request would entail. By leaving the disclosure of references to specific Member States within the full discretion of the Member State in question, the proposal would allow Member States to avoid democratic control by their electorates. We consider any proposal by which the interventions or proposed amendments in legislative processes of Member States are not recorded, unacceptable. A failure to arrange for sufficient record-keeping amounts to maladministration and represents a significant shortcoming in the democratic legitimacy of the legislative procedure.

Furthermore, the note fails to distinguish clearly between Member States’ formal input into the legislative process, and their political justification of these inputs. While a co-legislator (in this case a Member State) can legitimately claim not to have a position to share with the public, it cannot demand that its participation in the legislative process occurs outside of the public view.<sup>14</sup> For this reason, particularly formal inputs must under all circumstances be disclosed fully and immediately.

- *Proposal to publish trilogue documents at milestone moments.*

As the note highlights, the recent *De Capitani* case law leaves “little room [...] for refusing access to documents produced for trilogues when a request for public access is submitted”. In the judgment, the court establishes that the principle of transparency is inherent to the legislative process (para 81),

<sup>13</sup> Opinion of Advocate General Cruz Villalón in case *Council v Access Info Europe*, at para 67.

<sup>14</sup> See, to this end, *De Capitani v European Parliament*, at para 98.

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that trilogue documents form an integral part of the legislative process (para 75), and that citizens are perfectly capable of grasping the preliminary nature of information contained in four-column documents in ongoing trilogue negotiations (para 103). The court therefore established that the co-legislators may only refuse access to trilogue documents on the basis of article 4(3) of Regulation 1049/01 (para 112).

Following this recent case law, it is apparent that the note's expressed ambition 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" must be interpreted restrictively. In this light, the Meijers Committee considers it unclear how the milestones approach could be applied in a manner that respects the court's finding that, in principle, full and direct access to should be provided to trilogue documents. In particular, we highlight here the distinction that the note draws between "documents that are drawn up as a basis for the trilogue negotiations or to formalise the outcome of the discussion (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". It is unclear how the note intends to draw this distinction, or indeed, whether it is possible at all to make this distinction on the basis of objective factors.

Finally, the Meijers Committee acknowledges that reforms to the trilogue negotiations will require a certain amount of inter-institutional coordination. In this light, we encourage the Council to consider more closely the possibility of widening the instrument of proactive disclosure, as also addressed by the note under point c ("policy coherence"). Coordination problems between the institutions can, to a large extent, be avoided by proactively disclosing as many (types of) documents as possible.

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### **Comments concerning the new “Guidelines for handling documents internal to the Council” (document 7695/18, 10 April 2018)**

On 10 April 2018, the Council adopted new guidelines for handling documents internal to the Council (the so-called ‘limite’ documents). In addition to, and without prejudice to those of the above remarks that relate to ‘limite’ documents in the legislative process, we submit the following comments about these new guidelines.

On the whole, the new guidelines are characterised by limited change and relative continuity. The Meijers Committee observes that the removal in the new guidelines of the statement that most of the Council’s documents are not ‘limite’ (compare point 6 of documents 11336/11 and 7695/18) should not distract from the continuing need to reduce the prevalence of ‘limite’ documents, both in terms of their volume and in the duration of their application.

The Meijers Committee further welcomes the move to formalise the circulation of documents, by no longer allowing the regular circulation of documents via email (instead only via the delegates’ portal) (point 9). This makes it easier for national parliaments overseeing the Council decision-making process to follow the document trail and curbs the habit of informal document circulation.

We are also encouraged by the proposal to shift the authorisation to release ‘limite’ documents to third parties to the General Secretary instead of the Council. This will hopefully enable more consistent, standardised, and impartial decision making concerning the release of individual ‘limite’ documents. It is of utmost importance that the General Secretariat bears in mind the obligations of transparency as set out in Regulation 1049/01, particularly the duty to interpret exceptions to the public right of access to documents as narrowly as possible.

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### **Concluding remarks**

In this commentary, we have discussed the Council Secretariat's recent proposal for an overhaul of the Council's policy on legislative transparency, as well as the Council's recent revision of its internal guidelines concerning 'limite' documents. In light of the observations made above, we particularly call on the Council to align its internal rules and practices with standing treaty law, legislation, and case law concerning public access to (legislative) documents, in a manner that allows citizens to exercise their democratic rights of following and participating in the EU's legislative process. This requires, specifically, that citizens are throughout the legislative process fully and directly informed about the input made by each Council member in legislative decision making, as well as on the legislative points on which Council members disagree with one another, to the extent that they are able to make their voice heard concerning draft proposals that affect them and public interests that they find important.

To this end, the Meijers Committee calls on the Council to:

- take active steps to remove the 'limite' document label from the legislative process, allowing for the full and direct disclosure of all documents pertaining to the EU's legislative process in the context of the Council, and to refrain from taking steps that further institutionalise the reliance on this document label for legislative documents;
- implement clear, unequivocal and sufficient documenting standards for the legislative process, and to standardise these standards for its legislative activities in all policy areas;
- secure the creation of a single legislative portal in which citizens can monitor the documents containing legislative inputs of all three European institutions involved in the legislative process, and the legislators within these institutions (member states/MEPs).