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NOTE

From: General Secretariat of the Council
To: Delegations
Subject: Legislative transparency - examination of options

Delegations will find in Annex a note on legislative transparency following the discussion in Coreper on 2 May.

Legislative transparency - examination of options

1. On 2 May, Coreper held an exchange of views on the basis of a note (doc. 7888/19) and tasked the Antici group (Anticis + 1, legal advisers) to take work forward on the basis of the guidance provided.
2. This note aims to provide options to focus the discussion in the Antici+1, with the aim of identifying the approach meeting the broadest support.

A. Use of General Approach

3. During the Coreper discussion, there was broad support for the principle of adopting initial mandates for legislative files as General Approach at Council level, as a general rule. Several delegations called for the possibility of exceptions to be foreseen in order to prevent hampering the efficiency of the legislative process. One delegation called for examination of the legal and political implications of the level of decision-making by either of the co-legislators with regard to the interpretation of Article 294 TFEU.
4. Therefore, it is proposed to have recourse to General Approaches at Council level systematically for all initial mandates, either as B item at a Council session in the relevant configuration for the substance of the file or as A item at the first available Council session (in any configuration) or in written procedure. The exception to the rule would be an adoption of the initial mandate at the level of Coreper; an agreement reached at the level of the working party could not constitute an initial mandate for negotiations unless it is validated by Coreper.
5. It is proposed to define the exceptions to this general rule as applying when all the following circumstances are met. An initial mandate can be granted at Coreper level:
 - a. upon the initiative of the Presidency;
 - b. when the calendar of planned negotiations so requires;
 - c. with the agreement of Coreper; and
 - d. making the mandate public after its examination in Coreper.

6. In practice, this would cover situations where either the calendar of planned Council meetings or logistical requirements for the processing of the documents (including translations) would entail, in the opinion of the Presidency, a detrimental delay to the start of negotiations, for instance due to the need for entry into force of the act before a certain date. A note to Coreper would be prepared, inviting explicitly to agree (by simple majority) to grant the mandate at Coreper level and noting that the document would be made public after its examination by Coreper.
7. The proposed approach would only apply for initial mandates; it would not have an impact on the practice applicable for revising mandates during the negotiations.

B. Targeted publication approach

8. During the Coreper discussion, while there was no consensus on a specific option, there was broad support for pursuing reflection on the third option presented in the note to Coreper, a targeted publication approach.
9. This note aims to identify concrete elements which could be included in such a targeted approach, starting from the elements mentioned by delegations during the Coreper discussion and taking as a reference the milestones table in annex to the GSC policy paper of July 2018 (doc. 11099/18).
10. No objections were expressed in Coreper to the inclusion in a possible targeted approach of:
 - a. the initial Council mandate (in line with above);
 - b. the final position (the "fourth column" of the last 4-column table reflecting the final outcome of negotiations), after examination by Coreper; and
 - c. progress reports submitted to Coreper, after examination by Coreper and if no objection has been raised in Coreper to their publication.

11. For 10b above, it should be noted that what is meant is only the agreed text, rather than the whole 4-column table representing the outcome of the last trilogue; therefore, such an element could be included in a targeted approach without prejudice to any decision on 4-column tables.
12. For 10c above, it is proposed that an objection could be raised by a single delegation and no specific grounds would be required. The objection would only reverse the presumption of proactive disclosure while the relevant rules will apply as concerns making public a document (simple majority, Art 6(1) RoP) and access to documents rules would continue to apply in case of a request for access. It is understood that the current practice for progress reports submitted to Council would continue to apply, in line with the applicable rules; the new process would concern progress reports submitted to Coreper only.
13. With reference to the milestone table in annex to doc. 11099/18, it can be noted that the general practice for several of the documents mentioned therein is to issue these as public. Among the documents in the table, some documents reproduce contents already issued as public, or about to be issued as public, by other parties; some do not concern specifically the substance of the file, thus their public or non-public nature would not have any consequence on the protection of the negotiation process.
14. It is thus proposed to issue as public documents the following:
 - a. ST document with the Commission proposal (already generally issued as public in practice, in light of its otherwise public content);
 - b. documents relating to the adoption stage of a legislative file - PE-CONS document, approval or non-approval of EP position at first reading, Council position at first reading, statement of reasons, approval or non-approval of EP amendments at second reading (already generally issued as public in practice, in line with applicable rules given their submission to Council);
 - c. working party agendas on which legislative files feature as items (already generally issued as public in practice in line with the Council's Rules of Procedure, annex II);
 - d. the offer letter once sent to the EP (given that its contents would not have any consequence on the protection of the negotiation process). The annex to this letter would correspond to 10b above and would thus be also public in the proposed approach.

15. For the case of documents produced in the context of trilogues, the following could be envisaged:
- a. trilogue agendas, where applicable, would not be considered for proactive publication;
 - b. lists of participants for trilogues, where applicable, would not be considered for proactive publication (including in light of data protection requirements);
 - c. 4-column tables established in preparation for a trilogue or as outcome for a trilogue could be made public, in coordination with EP and Commission if they are co-authors of the document, upon initiative of the Presidency, after examination by Coreper and if no objection has been raised in Coreper to their publication (an objection could be raised by a single delegation and no specific grounds would be required since the objection would only reverse the presumption of proactive disclosure while the relevant rules would apply as concerns making public a document (simple majority, Art 6(1) RoP) and access to documents rules would continue to apply in case of a request for access).
16. It could be envisaged to consider the approach in point 15 above as a position of the Council in view of discussions with the other institutions involved in the trilogue process, in order to allow for a common approach to be agreed on the handling of these jointly-held documents.

The Antici group is invited to:

- confirm the proposal in point 4 and 5;
- confirm the elements in point 10 and examine which of the elements in points 14 and 15 meet the broadest support.

Following the discussion, an orientation note would be prepared by the GSC in view of endorsement by Coreper.