

Tweede Kamer der Staten-Generaal

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New Commission proposals and initiatives from the Member States of the European Union

Nr. 2533 LETTER FROM THE MINISTER OF FOREIGN AFFAIRS

To the President of the Tweede Kamer der Staten-Generaal

The Hague, April 6, 2018

In response to the request by the Standing Committee for European Affairs, dated February 22, 2018, I hereby send you, on behalf of the Cabinet, our appreciation of the recommendation of the European Ombudsman on transparency of the legislative process of the Council. It is with great interest that I took note of the research and recommendations the European Ombudsman has made of her own initiative on transparency in the Council's legislative process. As I have already reported to your House in my letter of February 23, the Cabinet attaches great importance to strengthening transparency in European decision-making. The Netherlands has been carrying out a proactive transparency agenda in the Council for years. Despite the efforts of The Netherlands, together with a number of like-minded Member States, improving transparency of EU decision-making is (still) not widely supported within the Council. The success of an ambitious European transparency agenda is only possible if transparency is considered to be a shared responsibility by all EU institutions and Member States. The government is therefore pleased that the European Ombudsman, with her report, also calls for transparency in the Council and contributes to the discussion on improving transparency in the European Union. The Ombudsman makes three recommendations and six suggestions for improvement of transparency of the Council's legislative process. I will discuss these point by point. In addition, I state for the sake of completeness, that this letter provides a representation of the Dutch efforts. In view of the above-mentioned field of influence in the Council, it is not in line with expectation that the Dutch position will be (fully) taken over by the Council. During the discussion of the Council's reaction to the recommendation of the European Ombudsman, the Dutch input will be along the lines of this Cabinet response.

Recommendations for the Council:

1. Systematically establish the identity of Member States that hold standpoints in preparatory bodies.

In her report, the Ombudsman briefly discusses European law and the case law of the European Court of Justice (EU Court), specifically the *Access Info Europe* case, with regard documents in legislative procedures. In doing so, she pays attention to recording Member States' positions during ongoing discussions. In addition, she refers to the obligation to release the relevant documents in a request for access to documents in which positions expressed by Member States have been made, and the obligation to proactively and directly disclose documents in current legislative files. The Ombudsman hereby states that exceptions under the Eurovob can oppose such proactive public disclosure. The Cabinet is of the opinion that the Council has followed the judgment of the EU Court in this case. It should also be noted that there is no obligation arising from the Eurovob Ordinance, nor from the case law of the EU Court, in order to proactively and directly render all legislative documents public. The *Access Info Europe* judgment relates only to the publication of stated Member States' positions and not to the inclusion of positions as such. This does not detract from the fact that the government sees possibilities for improving transparency in the Council in this area. After the *Access Info Europe* judgment, Member States have agreed that the names of Member States are listed in documents if this is deemed “appropriate”. When requesting access in an ongoing legislative process to a document containing positions of Member States, these positions

will be published in accordance with the judgment unless one of the ground for exception from Regulation 1049/2001 (hereinafter the Eurovob) opposes this. Despite the fact that the judgment does not require this, the Netherlands at the time argued for the amendment of the Council's Rules of Procedure (hereinafter "RvO") so that in the case of a request for access to documents in current legislative dossiers which include positions, in principle these should be released. The Netherlands' plea to change the RvO, a change the Ombudsman also advocates, could not count on the support of other Member States at the time. The field of influence within the Council does not appear to have changed since then.

2. ***Develop clear and publicly available criteria for the application of "Limit status", in accordance with EU legislation; and***
3. ***Systematically review "Limit status" of documents at an early stage, before the final adoption of a legislative act, even prior to informal negotiations in "trilogues", as by then the Council has already taken a provisional position on the proposal.***

For each Council document, the decision is always made on whether a document can be public or should carry the Limite mark. The "public, unless" principle forms the basis for the Council's policy. The grounds for exception from the Eurovob ordinance are guiding the consideration of whether a document may carry the marking. The Ombudsman's observation that the majority of Council documents are directly awarded the Limite mark is incorrect, as shown by the Council's annual report on the application of the Eurovob. The same applies to the conclusion in the report that an obligation ensues from European law to make all documents in current legislative processes directly and proactively accessible to the public. As mentioned earlier, grounds for exception can oppose proactive disclosure. However, the Eurovob and jurisprudence of the EU Court state that wider access must be granted to legislative documents and that these must be actively disclosed unless an interest mentioned in the Eurovob opposes this (see eg recital 6, article 2(4), article 12 Eurovob). As far as the government is concerned, documents that are part of the current legislative process should, if possible, be actively made public. The Cabinet is also of the opinion that Limite markings must be applied with reservation and, where possible, be lifted at the earliest possible moment. Of course, the above considerations always have to take place with due regard for the applicable assessment framework. During the 2016 Presidency, the Netherlands deployed a clear assessment framework for the application of the Limite marking. The Cabinet will once again draw attention to this in the Council.

Suggestions for improvement of the Council:

1. Conduct an evaluation of how it complies with the legal obligation to make legislative documents directly accessible. This evaluation must be completed within 12 months of the date of this recommendation and lead to the adoption of appropriate new arrangements within a further 12 months. There is no legal obligation to make legislative documents directly accessible. The starting point is that these documents should be rendered public unless this is not possible. The grounds for exception from the Eurovob are the guiding principles and should always be properly justified when applied. The government endorses the importance of evaluating the application of the "public, unless" principle. The annual report of the Council provides insight into the way the Council implements the principle. The annual discussion of this report in the Council is part of this annual evaluation.

2. Establish guidelines on the type of documents that preparatory bodies must produce in the context of legislative procedures and the information to be included in these documents.

At the moment, rules for the various Council formations have already been laid down in the RvO with regard to the agendas and documents that are present in a legislative deliberation. This

suggestion for improvement concerns an internal matter of the Council. This does not detract from the fact that the Cabinet is of the opinion that there is still a profit to be gained from the provisions in the RvO when it comes to reporting on legislative deliberations. The Cabinet intends to continue the course already set on this point and therefore argues for an adjustment of the RvO in the light of the case law of the EU Court. These points have already been discussed several times in Council meetings, including during the Dutch presidency. At the time there was too little support from other Member States to implement the adjustments desired by the Netherlands. And it is very likely that the field of influence within the Council has not changed. In this context, it remains important to increase the support for revision by other Member States.

3. Update the Rules of Procedure of the Council to reflect the current practice of disclosure of legislative documents with positions of Member States, as outlined by the Dutch presidency of the Council of 2016. For several years now, the Netherlands has indeed argued for the alignment of Annex II of the RvO with the case law of the EU Court.

As already mentioned in the letter of February 23, during previous discussions on this subject in the Council, as during the Dutch presidency, too little support has been found to implement the adjustments desired by the Netherlands.

4. Register all documents in the public register, regardless of format and whether they are fully accessible, partially accessible or not at all accessible.

The Council is already meeting this suggestion of the Ombudsman: all texts submitted to the Council or to one of its preparatory bodies, which serve as a basis for deliberations, affect the decision-making process or progress on a particular subject, should be produced as an "ST" (standard) document, and included as such in the Council's public register. This means that although ST documents issued to delegations as *Limite* are not public, the existence of these documents has been recorded in the Council's register of documents. Access to these documents can and is therefore regularly requested by interested parties.

5. Improve the user-friendliness of the document register and the search function; and

6. Develop a specific and updated web page for each legislative proposal, similar to the "Legislative Observatory" of the European Parliament.

The government considers a well-functioning register to be an important instrument for improving the accessibility, availability and comprehensibility of documents shared by the Council. One of the proposals from the non-paper in 2015, which was initiated by the Netherlands in cooperation with Denmark, Estonia, Finland, Slovenia and Sweden, is the establishment of a one-stop-shop IT portal. The Netherlands is convinced that such a portal, in which users can follow the legislative cycle at a glance and trace the documents drawn up during all steps in the decision-making process of the three institutions, will make a useful contribution to improving transparency and understandability of the decision-making process in the EU. The government will therefore continue to actively press for action in Brussels together with like-minded Member States.

Minister of Foreign Affairs, S.A. Blok