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on the Special Report from the European Ombudsman following the draft recommendation to the Council of the European Union in complaint 2395/2003/GG concerning the openness of the meetings of the Council when acting in its legislative capacity
(2005/2243(INI))

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Rapporteur: David Hammerstein Mintz

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

**On the Special Report from the European Ombudsman following the draft recommendation to the Council of the European Union in complaint 2395/2003/GG concerning the openness of the meetings of the Council when acting in its legislative capacity
(2005/2243(INI))**

The European Parliament,

- having regard to the Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the Council of the European Union in complaint 2395/2003/GG¹,
 - having regard to Article 1 of the EU Treaty,
 - having regard to Article 255 of the EC Treaty, which relates to access to documents of the European Parliament, the Council and the Commission,
 - having regard to Articles 195 and 207 of the EC Treaty,
 - having regard to the Laeken Declaration on the future of the European Union²,
 - having regard to the Presidency Conclusions of the Seville European Council of 21 and 22 June 2002,
 - having regard to Article 3(7) of the Statute of the European Ombudsman³,
 - having regard to Rules 45 and 195(3) of its Rules of Procedure,
 - having regard to the report of the Committee on Petitions (A6-0000/2006),
- A. whereas Article 195 of the EC Treaty empowers the European Ombudsman to receive complaints from any citizen of the Union concerning instances of maladministration in the activities of the Community institutions or bodies,
- B. whereas the complainants in complaint 2395/2003/GG to the European Ombudsman alleged that the meetings of the Council acting in its legislative capacity are not in conformity with Article 1(2) of the EU Treaty and are only open to the extent provided for in Articles 8 and 9 of the Council's Rules of Procedure of 22 July 2002⁴,
- C. whereas the complainants considered that the meetings of the Council acting in its legislative capacity should be public and requested a change of the Council's Rules of Procedure to that end,
- D. whereas the Council acts in its legislative capacity within the meaning of the second

¹ OJ

² Annex I to the Presidency Conclusions of the European Council meeting in Laeken on 14 and 15 December 2001.

³ OJ L 92, 9.4.2002, p. 13.

⁴ OJ L 230, 28.8.2002, p. 7.

subparagraph of Article 207(3) of the EC Treaty when it adopts rules which are legally binding in or for the Member States, by means of regulations, directives, framework decisions or decisions, on the basis of the relevant provisions of the Treaties, with the exception of discussions leading to the adoption of internal measures, administrative or budgetary acts, acts concerning inter-institutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions)¹,

- E. whereas, pursuant to Article 1(2) of the EU Treaty, decisions in the EU should be taken "as openly as possible and as closely as possible to the citizens",
- F. whereas, on 19 November 2003, Mr Solana, the Council's Secretary General, in his reply to the complainants' open letter stated that opening up the Council's legislative deliberations to the public was an issue that found the very widest support;
- G. whereas the Council, in its reply to the Ombudsman, acknowledged that the principle of openness laid down inter alia in Article 1(2) of the EU Treaty is of great importance,
- H. whereas the Council, in its Rules of Procedure adopted in 2000, introduced rules that provided for greater openness as regards the meetings in which it is acting in its legislative capacity,
- I. whereas, in October 2004, the Member States signed the Treaty establishing a Constitution for Europe, which contains an express provision to the effect that the Council is to meet in public when considering and voting on a draft legislative act,
- J. whereas, in its reply to specific questions by the Ombudsman, the Council did not refer to any obstacles to the implementation of the amendment of its Rules of Procedure as requested by the complainants, nor to any principles or aims of a higher order that would entitle it to refuse to open the meetings in which it is acting in its legislative capacity to the public, but contended that the adoption of its Rules of Procedure was a political and institutional matter to be decided upon by the Council itself,
- K. whereas, in his Annual Report for 1997², the European Ombudsman considered that maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it,
- L. whereas the Ombudsman concluded that the fact that the Council refused to decide to meet publicly whenever it is acting in its legislative capacity without giving good reasons for that refusal was an instance of maladministration,
- M. whereas the Ombudsman in his draft recommendation to the Council pursuant to Article 3(6) of the Statute of the European Ombudsman stated that: "The Council of the European Union should review its refusal to decide to meet publicly whenever it is acting in its legislative capacity"; whereas the Ombudsman in his Special Report reiterated his recommendation to the Council and suggested that the European Parliament consider adopting his recommendation as a resolution,

¹ Article 6 of the Council Decision of 31 May 1999 adopting the Council's Rules of Procedure (OJ L 147, 12.6.1999, p. 13.)

² http://www.euro-ombudsman.eu.int/report97/pdf/en/rap97_en.pdf

- N. whereas, in particular when Council adopts acts as "A-points", the actual debate and legislative work is done by COREPER and the acts in question are only approved by Council,
- O. whereas the Council is also acting in its legislative capacity in the meetings of the conciliation committees,
- P. whereas the accountability and public responsibility of ministers require that Member States' positions and votes in Council be known to the public,
- Q. whereas the two legislative branches of the EU still work on the basis of partially different sets of information; whereas the documents held by Parliament are in general public, while the Council often works on the basis of classified documents and information as well, including when it considers certain questions which require adoption by co-decision procedure,
- R. whereas the UK Presidency made two alternative proposals to the Council with the aim of responding to the Ombudsman's recommendations, one of which would have involved amending Council's Rules of Procedure, while the other merely sought to improve transparency within the scope of the existing rules,
- S. whereas Council subsequently chose not to amend its Rules of Procedure,
1. Endorses the European Ombudsman's recommendation to the Council;
 2. Considers it unacceptable that the EU's most important law-making body still meets behind closed doors when acting as legislator;
 3. Is of the opinion that, at a time when the EU sees itself as a promoter of democratisation and accountability, the Council should respond to the calls for greater transparency coming from parliaments, civil society and the general public;
 4. Believes that it is not only a matter of principle that legislative bodies should meet in public, but that it is also of direct relevance to the efforts of the European Parliament and national parliaments, as the representatives of European citizens, to fulfil their scrutiny role;
 5. Considers that it is of the utmost importance for national parliaments to be able to hold their governments and ministers to account; is of the opinion that this cannot be done effectively if it is unclear how ministers have acted and voted in the Council;
 6. Believes that the recent developments in connection with the debate surrounding the ratification process of the Constitutional Treaty have illustrated clearly that European citizens want the European decision-making process to be more open;
 7. Believes that meeting in public would make Council's work both more transparent and more relevant to European citizens and would increase the public's confidence in the way the European Union and its representatives work;
 8. Is convinced that greater openness will lead to the ministers of Member State governments

shouldering greater collective responsibility and will promote and intensify public discussion on European matters;

9. Calls on the Council further to amend its Rules of Procedure and change its working methods so that the meetings in which it is acting in its legislative capacity will be open and accessible to the public;
10. Considers that the meetings of COREPER are an essential part of the legislative deliberations of the Council and that, therefore, they should be covered by the rules on openness; considers that Council should take its decisions by formal vote and not only by approval;
11. Recalls that Council is also acting in its legislative capacity when participating in conciliation procedures;
12. Notes that, at present, preparatory documents for items on Council meeting agendas are not accessible to the public; stresses that, in its adapted Rules of Procedure, the Council should clearly specify the classification and hierarchy of such documents and make them accessible to the public;
13. Welcomes the Council conclusions of 22 December 2005 as a step in the right direction, but regrets that the Council did not follow the Ombudsman's recommendation to amend its Rules of Procedure;
14. Recalls that an amendment of the Council's Rules of Procedure requires the support of thirteen of the twenty-five Member States;
15. Considers that, since all Member State governments have signed the Treaty establishing a Constitution for Europe, agreement on an amendment of the Council's Rules of Procedure should not meet with opposition, as the principle has already been politically accepted by all Member State governments;
16. Stresses that the European Parliament has fully endorsed the Treaty establishing a Constitution for Europe and the efforts to bring it into force; stresses that an amendment of the Council's Rules of Procedure should not be seen as a substitute for all or parts of the Treaty establishing a Constitution for Europe but as a long overdue adaptation to European reality and institutional equality in law-making in the European Union;
17. Calls on the Council to take all measures needed to make the meetings in which it is acting in its legislative capacity open and accessible to the public; requests the Council also to broadcast, including on the internet, its public meetings and to provide the dates and agendas of those meetings in good time and issue official transcripts thereof;
18. Suggests to the Council to launch a pilot project on "more transparent decision making", whereby one or more topical legislative issues would be discussed in a fully open and accessible Council meeting, with special emphasis on explaining the procedures followed and decisions made, so that they would be easier for citizens to understand;
19. Calls on the Presidency-in-Office of Council to put the issue of opening Council meetings to the public on the agenda of the European Council as a matter of priority;

20. Calls on all interested parties to bring maximum pressure to bear on the Council in order to persuade it to follow the Ombudsman's recommendation and adapt its Rules of Procedure;
21. Instructs its President to forward this resolution to the Council and the governments and parliaments of the Member States.

EXPLANATORY STATEMENT

Introduction

At the October 2005 meeting of the Committee on Petitions the European Ombudsman - for the first time appearing at his own request (pursuant to Article 195 (3) of Parliament's Rules of Procedure) - submitted his Special Report on transparency of meetings of the Council of Ministers when it acts in its legislative capacity. The Committee decided to request authorisation to draw up an own-initiative report on the Ombudsman's Special Report, and Mr Hammerstein Mintz was nominated rapporteur.

In his Special Report Mr Diamandouros found that the Council had given no valid reasons for refusing to conduct its legislative meetings in public. His recommendation was that: "The Council of the European Union should review its refusal to decide to meet publicly whenever it is acting in its legislative capacity." The Ombudsman added that Parliament could consider adopting his recommendation as a resolution.

The Ombudsman's inquiry into this matter is based on a complaint by Mr Elmar Brok, MEP, and a representative of the youth group of the German CDU, in which they allege that the Council's Rules of Procedure are not in conformity with Article 1 (2) of the Treaty on European Union (as amended by the Treaty of Amsterdam in 1997), according to which the Council and the other Community institutions and bodies must take decisions as openly as possible and as closely as possible to the citizens.

The Council maintained that the degree of openness of its meetings is a political choice to be made by the Council. The Ombudsman disagreed, on the grounds that the second paragraph of Article 1 of the Treaty on European Union, the very first article of the Common Provisions underlying the European Union, applies to the Council. Although Article 207 (3) of the EC Treaty provides for the Council to adopt its own Rules of Procedure, it does not provide that the degree to which its legislative meetings should be open to the public should be regarded as a political choice and left to its discretion. The Council was of the opinion that Article 1 (2) of the Treaty on European Union merely indicated that the future Union should be as open as possible.

Article 207 (3) further specifies that for the purpose of Article 255 (3) of the EC Treaty the Council must lay down in its Rules the conditions under which the public shall have access to documents and define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to Council documents. According to the Ombudsman the developments since 1997 should also be taken into account. He pointed out that in 2000 the Council adopted new Rules of Procedure which provided for increased openness of its meetings as a legislator. Thus, the Council had made clear that steps to increase the transparency of its legislative activity had to - and could be - taken. The adoption of these new Rules of Procedure also confirmed that doing so was - and is - possible under current Community law.

The Ombudsman therefore concluded that the Council had failed to submit any valid reasons as to why it cannot amend its Rules of Procedure with a view to opening up the relevant meetings to the public and considered this to be an instance of maladministration.

Transparency

More openness in European decision-making has been demanded by the European Parliament, national parliaments, NGOs and civil society since long before the Laeken Declaration.

Recently there have been renewed calls for opening up Council meetings to the public, notably from a number of British MEPs, of various political groups, in a Written Declaration¹ calling for the Council to apply the principles of openness and transparency to its legislative work. Also, the British Presidency has heeded the call for greater transparency, with Mr Blair arguing before the European Parliament that there is a "strong case" for the Council to legislate in public and suggesting considering this issue under the UK Presidency. Moreover, public opinion polls and statements by NGOs, civil society and the academic world underscore citizens' wish for increased accountability of their governments regarding EU issues.

It is not only a matter of principle that legislative bodies should meet in public, it is also of direct relevance to the European Parliament as well as national parliaments in their scrutiny role. For national parliaments it is of the utmost importance to be able to hold their governments and individual ministers to account and this cannot be done effectively if it is not clear how ministers have acted in the Council.

The recent developments in connection with the Constitutional Treaty have shown quite clearly that the European citizens want greater openness of European decision-making. Meeting in public would make the Council's work both more transparent and more relevant to citizens.

The implications of openness could be far-reaching and will change the character of the Council profoundly. Ministers will have to express themselves and discuss under the direct control of the media and the national parliaments. The European public will be able to witness the discussions on laws which will become binding on them as citizens of the European Union. National governments will be forced to publicise and justify the positions they have taken in the Council. This will promote and intensify public discussion on European matters as well as underline the collective responsibility of the ministers, and it will increase the honesty and transparency of the debate. Openness of Council meetings will also mark the next step in ending the obfuscated "diplomatic" decision-making tradition in the Council and open it up to the European reality in which legislative decisions are taken in all openness and transparency.

The European Parliament's role

In accordance with Article 195 of the EC Treaty it is the Ombudsman's competence and obligation to identify and investigate instances of maladministration in the activities of the Community institutions or bodies, as well as promote good administrative behaviour. Therefore the Ombudsman's Special Report deals with the issue of transparency from a technical point of view and the Ombudsman is careful to underline that the complaint he has investigated does not concern the legislative activity of the Council as such, but the question as to whether the meetings of the Council acting in its legislative capacity should be public.

The Ombudsman considers that the meetings of the Council when it acts in its legislative capacity are not open to the public and that the Council's refusal to decide to open up these

¹ Written declaration 0045/2005 by Chris Davies, Nigel Farage, Timothy Kirkhope, Jean Lambert and Gary Titley on the Council of Ministers and secretive law-making.

meetings is an instance of maladministration.

The Special Report shows it does not require a Treaty change to be implemented, it could be brought about through a change in the Council's Rules of Procedure. Indeed, following the reforms agreed at Seville¹, these Rules have been changed in order to increase transparency, and the Council now occasionally meets partly in public when legislating.

Your rapporteur endorses the Ombudsman's conclusions and considers it unacceptable that an important law-making body of the EU still meets behind closed doors when acting as a legislator, especially at a time when the EU sees itself as a promoter of democratisation and accountability. It should therefore be seen to be practising what it preaches.

Your rapporteur is of the opinion that the European Parliament, through its competent committees, and together with all other parties that are working towards greater transparency of European governance, should bring maximum pressure to bear on the Council in order to persuade it to follow the Ombudsman's recommendation and adapt its Rules of Procedure.

The complainants in the case also referred to a provision of the Treaty establishing a Constitution for Europe, which provides for the Council always to meet in public "when considering and voting on a draft legislative act" (Article I-50 (2)). The Ombudsman stresses however that his Special Report was based solely on the existing Treaties and current Community law.

Considering that all EU-governments have signed the Treaty and therefore agreed with its Article I-50 (2) it is difficult to see why they should not now be able to reach an agreement on amending the Council's Rules of Procedure, especially since this would require the support of only thirteen of the twenty-five member states. Your rapporteur wishes to stress however that such a change of the Rules should not be seen as a substitute for the Treaty on the Constitution or as "cherry-picking", since the European Parliament still endorses full implementation of the Treaty. The requested amendments should be regarded as a long overdue adaptation of the Council to the European reality and institutional equality in law-making.

If the Council changes its Rules it will also be important to establish clearly how public meetings of the Council when legislating should work in practice and which issues should be discussed in the Council's public meetings, so as to prevent the real debate being transferred to informal meetings, the COREPER or even upward to the European Council, with the public meeting doing nothing more than rubber-stamp decisions already taken. It is also essential that the Council's Rules should clearly specify all the types of documents that are being used to prepare the Council's meetings as well as their status and that these documents should be accessible to the public, so it can follow all the steps leading up to the legislative meetings.

Your rapporteur further recommends that the European Parliament press for public meetings of the Council to be broadcast and web cast, as well as for official transcripts of the legislative meetings to be issued.

¹ Presidency Conclusions of the Seville European Council of 21 and 22 June 2002.