Fundamental Rights European Experts Group
FREE Group
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Brussels 19/06/2015

To the attention of
Klaus WELLE
Secretary General of the
European Parliament

Dear Secretary General,

Following Your letter (doc A(2015)4931- on June 3, 2015) I hereby submit a confirmatory application of my request of access to preparatory documents (and in particular the multicolumn tables) linked with so called "trilogues" drawing to early agreements in the "ordinary legislative procedures" still pending before the EU co-legislators on April 15,2015.

In fact the only information I have obtained from the EP is the list of the pending legislative procedures for which an early agreement is currently negotiated and no multicolumn document has been transmitted (even if reference has been made to the existence of 119 documents).

I therefore reiterate my request for these legislative preparatory documents and in order to take in account your concerns on the number of documents involved I herewith narrow down and limit my request to the legislative procedures whose legal basis fall in the freedom security and justice area (Title V) TFEU and on art. 16 TFEU (data protection).

I take also this occasion to explain why I consider your refusal to give access to multicolumn documents unjustified from a constitutional, institutional and operational point of view.

On Constitutional Grounds:

Although access should already be granted on the basis of the principle of widest possible access contained in Regulation 1049/01, from a constitutional point of view, your letter does not take in account the fact that since the entry into force of the Lisbon treaty EU legislative activity should comply with transparency standards that are even higher than previously foreseen by Regulation 1049/01 (and the latter should be interpreted accordingly).

Is worth recalling that since 1st December 2009 :
- the scope of what should be considered of legislative nature is now defined by the treaty (and no more by the Council as previously stated by art. 207 of TEC ;
- the European Parliament and the European Council should not only vote but also publicly debate legislative measures (art. 16.8 TEU and 15 TFEU). In the Council case the Treaty clearly states that it *"..shall meet in public when it deliberates and votes on a draft*

legislative act. To this end, each Council meeting shall be divided into two parts, dealing respectively with deliberations on Union legislative acts and non-legislative activities".

The same obligation of transparency applicable to the European Parliament and the Council when acting alone shall be respected when they establish an interinstitutional dialogue linked with a legislative procedure. If this was not the case the EU institutions could create a sort of grey zone to circumvent their constitutional obligations and making it impossible for EU citizens (and national parliaments) to understand how the different positions inside the European Parliament or the Council are evolving during the procedure.

This can of course not be accepted and would be contrary to the Lisbon obligations. To put it simple : citizens (and national parliaments) should understand if the members they have elected in the Parliament or the State of which they are citizens, is acting in a way that they can agree on.

The possibility to have access to legislative preparatory documents and therewith enable the traceability and understanding of - and debate and accountability relating to - legislative negotiations is moreover squarely acknowledged by the Court of Justice of the EU to be an essential aspect of the normative choice the EU has made in favour of transparency and the democratic entitlement of citizens to know and be able to participate and debate.

Moreover, it is not without reason that art. 294 of the Treaty describes in a very detailed way how the EU institutions should interact during the different phases ("readings") of the legislative procedure and requires that each institution adopts in turn publicly, its position by also explaining (in the case of the Council and of the Commission) the reasons justifying it.

Now, the current daily practice of hidden negotiations during early agreements makes the provisions of Article 294 meaningless and it is particularly worrying that this already happens during the first legislative phase when the European Parliament has to play the guiding role and can require the Council to abide with the highest legislative transparency standards.

Under this perspective the fact that votes on negotiations mandates are taken publicly in the EP (as orientation) and in the Council (as general approach) is only a first initial step in the right direction. However it remains useless if all the subsequent dialogue does not follow the same level of transparency. As things stands now the EU citizens are acquainted only of the legislative compromise once reached by the two co-legislators months (if not years) later. But at that moment it will be not only impossible to disentangle the positions of each actor but also to influence a different outcome as everything will be settled by a single vote in the Committee and in the Plenary.

This situation has become particularly worrying as early first and second readings now cover almost 90% of EU legislative procedures.

The need to recognise the position taken by each institution during the first two legislative readings is not contradicted but confirmed by the fact that Article 294 of the Treaty foresees a "conciliation" mechanism. The latter can be considered as the exception which confirm the rule of individual responsibility of each institution. It can be triggered only as ultima ratio in case of persistent divergences between the co-legislator after the EP second reading and is framed by the Treaty on a mandate limited in time and by requiring that, for instance all the

member states should be represented (when instead during early "trilogues" they remain hidden behind the Council Presidency…).

Given this, according to the Treaty, exceptional nature of the conciliation procedure, your statement that the "multi-column" documents during the earlier phases of the legislative procedure (first and second reading) are stemming "…from the conciliation procedure" (which is a specific feature of the third reading) create a confusion between procedural phases that art. 294 TFEU separate in a very strict way .

But even more worrying is your statement according to which "*full disclosure of the compromise proposals before agreement, without a prior individual assessment of each requested document, might affect the required mutual trust between the institutions and thus, the negotiating process, thereby diminishing the chances of reaching an overall agreement."*

When legislative negotiations are at stake, the Lisbon Treaty makes no more reference to the possibility of avoiding request for access to documents with the need to preserve "the effectiveness of the (Council) decision making process" (as it was previously stated in Article 207 of the TEC referring to Council legislative role). By deleting these words it has been made clear that legislative transparency is the pre-precondition of such an effectiveness because it makes possible a wider participation, also of the national parliaments and of civil society to the EU legislative process (see art 11, 12 of the TEU and art.15 of the TFEU as well as the protocol 1 and 2 to the Treaty).

From an Institutional perspective

It seems that until now the European Parliament Plenary has been rather consistent in favour of generalised transparency on legislative procedures notably when it voted on the revision of Regulation 1049/01 in December 2011 as well as when, on 11 March 2014, it called *on "... the Commission, the Council and Parliament to ensure the greater transparency of informal trilogues, by holding the meetings in public, publishing documentation including calendars, agendas, minutes, documents examined, amendments, decisions taken, information on Member State delegations and their positions and minutes, in a standardised and easy accessible online environment, by default and without prejudice to the exemptions listed in Article 4(1) of Regulation (EC) No 1049/2001;"* (See par.28 of the European Parliament resolution of 11 March 2014 on public access to documents for the years 2011-2013 (2013/2155(INI)<\'http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/2155(INI)\'>). Since then has the European Parliament changed its mind ?

From an operational perspective

According to the EP the early first and second reading agreements now cover more than 90% of the legislative procedures and 1557 trilogues meetings already took place during the last term (2009-2014). However as far as I know no records are currently accessible on these essential phases of the legislative process . I do believe that this is a clear violation of EU citizens right to access legislative preparatory works .

A first possible step to overcome such a massive lack of information should be to grant the timely access to the different versions of a multicolumn documents before and after each trilogue meeting.

Transparency being the rule to be followed during legislative procedures, this also means that there is no ground or reason for the EP to ask the opinion of the Council to diffuse a document (or a column in a multicolumn document) representing its position/suggestion, once it has transmitted it to the EP.
If in in exceptional cases (what in legislative works appears rather unlikely to happen) the Council consider that a special treatment is needed it is up to him to justify it and to the EP to evaluate if the request can override the right to access of the EU citizens.

If a general obligation exists for EU officials this is to swiftly put the preparatory documents (trilogues related documents included) on the institution's register as already clearly required by Regulation 1049/01.

I finally note that for the reasons set out in the above, there is also an overriding public interest in granting access. Indeed, the interest in contained in the Lisbon Treaty and is also clear from the case law of the Court regarding access to legislative documents (Turco, Access Info, Schlyter).

I Thank you in advance for considering my more limited request and the arguments set out in the above for granting access.

Best regards,

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[redacted] ***the***
Fundamental Rights European Experts Group
(FREE Group)