

Transparency International EU
Response to European Ombudsman on
Council consultation - OI/2/2017

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1. Once the European Commission makes a legislative proposal, it is discussed in one or more Council working parties. What useful information might be given at this stage to allow the public to see and to understand how the discussions develop?

Transparency International EU has conducted several studies looking at the transparency of decision-making in the Council. Our findings to date suggest that the existing legal framework should be fully followed to release more detailed, meaningful and timely information at each stage of the decision-making procedure - Working Parties, Committee of Permanent Representatives (COREPER) and Council. In particular, there should be:

- A clear, easy-to-understand, description of the legislative process, and at which phase the legislative file is in
- Clear mention of which Council working parties are responsible for/discussing the legislative proposal
- Which individuals are present at each of the working party meetings and conduct the discussions, including a mention of their position
- Full timeline, including the dates of past and future meetings, as well as indication of key milestones in the discussions – e.g. approval of Council negotiating mandate, etc.
- In case of future meetings, agendas should be made publicly available, with enough time so as to allow citizens to follow the process.
- Detailed information on Member State negotiating positions and proposals for compromises – ideally before compromises have been reached or votes have been held
- Publication of more detailed results/minutes, with the position of Member States clearly mentioned
- All scientific and socio-economic evidence used in the preparatory bodies of the Council negotiations open to public scrutiny
- Live-streaming should be extended to all Council and COREPER debates with limited exceptions Best practice in transparency should be generalised at each stage of the decision-making procedure and across different Council configurations.

- 2. In its reply to the Ombudsman, the Council describes the actions it is currently taking to make it easier to find documents on its website, such as improving its search form, giving access to documents via a calendar of meetings and developing the ‘joint legislative database’ provided for in the Inter-Institutional Agreement on Better law-making. Are there other measures the Council could take to make legislative documents easier to find?**

Overall, there is a lack of clarity of where each document falls within the larger legislative process, and how documents relate to other documents which are available and pertinent to the legislative proposal. Also there is a clear need for an improved search form, expanding the subject matters available. A good example of how this system can be improved would be the EU database of the Austrian Parliament. This database allows the access to all the different types of documents – legislative and non-legislative proposals, agendas, press releases, etc. – from the different EU institutions, such as the Parliament, Commission and Council. It also sets out other information relevant to the document, such as:

- What project the document relates to
- The date it was submitted, and which body transmitted it
- What stage in the project the document relates to, and what updated documents are in the database
- Developments in parliamentary scrutiny of the document in the National and Federal Council
- Other relevant documents in the database

The Austrian database also includes documents produced by national authorities, relating to the work done in the Council, such as reports on meetings, etc. This practice of including publicly available documents produced by national authorities on legislation being discussed at EU level should be adopted, as it would allow citizens from the different EU Member States to follow the discussions at both European and National level in a comprehensive manner. A number of governments already provide written information to their parliament in the run-up to all meetings. These ‘annotated agendas’ provide an overview of the topics to be discussed and, in some cases, reveal the negotiating position of other Member States and the EU institutions. In the Netherlands and Sweden, for example, these documents are publicly available. However, this alone cannot replace the direct accountability of the Council towards EU citizens.

3. Please describe any difficulties you have faced in obtaining information or documents linked to discussions in Council preparatory bodies and any specific suggestions for improvement

An illustration of the difficulties faced by Transparency International EU, can be found in the ongoing negotiations for an Inter-Institutional Agreement on a Mandatory Transparency Register. Ironically, the discussions on what could possibly become the largest transparency reform of the EU institutions for years, occur behind closed doors. At the Council level, it is not publicly known who represents the different Member States in the Council discussions, the positions of each country are secret, no minutes are published and key documents produced by the Council are not immediately released.

An example of this is the legal opinion of the Council legal services, which despite having a considerable impact on the Council position and therefore on the negotiations as a whole, was not fully disclosed. This document was later made public, but only after it had been leaked by an unknown source. The result of such approach is that civil society is simply kept outside of the decision-making process, having absolutely no say or way of following an issue that will heavily impact their future. Such approach is in our view contrary to the treaties [art 15(3) TFEU], the 'transparency' regulation 1049/2001, past rulings of the CJEU (17 October 2013 on Council vs. Access Info EU), and the principles of representative democracy. Detailed suggestion on improvement can be found in the response to the last question of the consultation.

- 4. Various types of documents can be produced and circulated in Council preparatory bodies (outcomes of proceedings, Presidency compromises, progress reports, etc.) In your opinion, are certain documents more useful than others in informing the public about ongoing discussions? Please explain.**

Documents which relate to key milestones in the legislative procedure – e.g. legal opinions, etc. – do have a higher importance in terms of their impact in the direction of the discussions and the outcome of a legislative proposal. Still, such documents need to be in context, as they are only a part of an ongoing process. As such, all documents produced by the Council preparatory bodies are of significance, as they allow society to follow the legislative process in a comprehensive manner. This view is shared by many of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC), who in a recent paper openly accused the Council of lack of transparency and asked that all legislative Council documents be systematically published immediately.

5. Do you ever consult the legislative file the Council publishes after the legislative act has been adopted?

Yes. Nevertheless, it should be noted that the availability of all files is important, not because a given organisation consults it or not, but for the reason that their release to the public keeps legislation and the legislative process open and closer to society as a whole. It allows citizens and organisations to consult matters that impact their daily lives, when and if they feel the need to do so. The importance of publication cannot therefore be measured merely in quantitative terms, as in the number of times it is accessed. Citizens in all EU Member States have the same rights and should have equal access to information and should be able to understand what their government decides and does in their name, whether at national level or in Brussels.

6. Do you consider that different transparency requirements should apply between discussions in working parties and discussions in Coreper? Please give brief reasons for your answer.

No. Based on Transparency International's body of research and experience, best practice in transparency should be generalised at each stage of the decision-making procedure and across the different Council configurations. Member State positions in discussions at both working party and COREPER levels reflect, or should reflect, the view of national governments in a certain issue. Governments which were democratically elected by citizens to represent their interests and act in accordance with a certain political programme that they publicly defended. As such, positions of Member States – independently of the level at which the discussions are taking place within the Council – are a continuation of the view defended by those governments.

Not allowing EU citizens to have access to the discussions at all levels within the Council, denies them the right of oversight over the representatives they chose. It also deprives citizens from holding their governments to account if and when the position which their governments defend at EU level is contrary to the position they publicly support and citizens democratically voted for. As such, full transparency in all discussions and decisions should be the rule and not the exception.

7. While discussions are ongoing, documents which bear the distribution marking “LIMITE” are not disclosed to the public without prior authorisation. In your opinion, what additional steps could be taken to further regulate and harmonise the use of the “LIMITE” marking concerning legislative documents?

Although the Council is bound under the EU regulation on public access to documents to state the number of sensitive documents that are not listed on its public document register,¹ the figures that it declares in its annual reporting on the implementation of access to documents rules have been called into question.² In its analysis of Council document disclosure, Statewatch notes that while 117,000 ‘restricted’ documents have been produced by the Council since 2001, only 13184 are actually listed as existing in the Council document register. This underlines that even though exceptions to public disclosure are already being applied by the Council, it takes a further restrictive stance on disclosing even the existence of such documents. Additionally, the classification of documents known as ‘DS’ (‘document de séance’) is used within the Council to categorise documents drawn up by and for working party level meetings. Despite the reality that these documents are acknowledged as forming part of the legislative decision-making process, they are not listed in the public register.

In a rather strange state of affairs, the Dutch delegation of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC), recently published a paper where it clearly affirms that the Council regularly violates EU transparency regulations and asks the Council to, among other measures, systematically publish documents without delay. As stated by the Dutch Parliamentary delegation, the Transparency regulation (1049/2001),³ requires all Council documents be made public immediately. Only in cases when an exemption listed on the regulation applies, can a document be kept from the public. The marking ‘LIMITE’ is not listed in this document as an exemption, and therefore should not be used in legislative files.

The first point of the Transparency regulation states that “the Treaty on European Union enshrines the concept of openness, [...] in which decisions are taken as openly as possible and as closely as possible to the citizen.”. The application of this directive by the Council is in direct opposition to the above text. In its fifteenth annual report on the implementation of Regulation (EC) No 1049/2001, the Council affirms that of the 4500 legislative documents issued by the Council, during the period covered by the report, less than half (1955 documents) were issued as public, while the remaining 2545 documents were issued as LIMITE. These figures clearly show that the Council does not follow the request of its own national Parliaments to publish all documents immediately and, contrary to the intent of the regulation, transparency is the exception rather than the rule.

¹ Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43 (ATD Regulation), art. 17(1)

² Bunyan T, ‘Statewatch analysis: Constructing the secret EU state: “Restricted” and “Limite” documents hidden from view by the Council’, available at <http://www.statewatch.org/analyses/no-240-restricted-documents.pdf>

³ Regulation 1049/2001 of the European Parliament and the Council of 30.05.01 regarding public access to European Parliament, Council and Commission documents, OJEU, 31.05.01, L 145/43.

- 8. Bearing in mind that delegations' positions may evolve during the negotiations and that the Council must protect the effectiveness of its decision-making process, to what extent do you believe positions expressed by national delegations during negotiations in Council working parties/Coreper should be recorded? How important would it be for you to find out the position of the national delegation?**

As already mentioned, positions of Member States at Council level discussions reflect the stance of elected governments on a certain issue. Such positions come after a long process of internal deliberation, where pros and cons are identified, measured and weighed against each other and where an ideal initial position for the Member State is set. Such positions are of course subject to change throughout negotiations, as discussions with other stakeholders brings new information to light, which again needs to be deliberated upon. All initial positions need to adapt to each other and come to common ground which is acceptable to all EU Member States.

Hence, change on the initial positions of Member States is both expected and desirable, as it shows both respect for other Member States and willingness to evolve and develop a policy that is reasonable to all 500 million EU citizens. This evolution throughout the negotiation process should be public, as only then can citizens understand how and more importantly why such changes occurred. This insight into the negotiations also exposes citizens to the difficulties of bringing together different national realities and allows them to understand the difference between the initial position defended at national level and the final position achieved at the EU level. To deny citizens the right to access such negotiations, generates doubts in the public on the democratic validity of the final decision, it detaches even further policy-makers from citizens, it allows for a possible dichotomy of government positions – the public position at national level vs. what is defended at the negotiations – and it deprives citizens the chance to understand the realities of policy-making at European level.

9. Please comment on any other areas or measures which in your opinion are important to enhance the transparency of legislative discussions within Council preparatory bodies. Please be as specific as possible.

Transparency of the work of the Council is primarily fostered through a comprehensive website and an online document register. Despite the existence of the register, evidence suggests that its representativeness of the range of documents actually produced by the Council is limited. Statistics indicate that many documents remain unregistered; meanwhile, internal Council notes suggest powers to classify documents may be being used excessively, hindering public access. The tracing of specific member state activity and positions is very difficult and transparency provisions thus only apply in reality to a limited portion of the Council's work.

The Council's reaction to a recent ruling of the CJEU, with the potential to increase public insight into Council negotiations, points to an institutional resistance to transparency. There is no obligation for Council members to declare (potential) conflicts of interest, or their interaction with third parties or during inter-institutional 'trilogue' discussions of draft legislation. Summing up some of the suggestions made above, areas which are important so as to increase transparency of the Council:

- Publishing more detailed results/minutes.
- Providing detailed information on Member State negotiating positions, ideally before compromises have been reached or votes have been held.
- Extending live-streaming to Council and COREPER debates;
- Making trilogue meetings more transparent by publishing agendas, participant lists, negotiating positions and proposals for compromises before the meetings, and detailed minutes in a timely fashion afterwards.
- Reforming of the access to information policy of the Council to comply with legal obligations, including a clear and public assessment framework for limited documents.
- Generalising best practise at each stage of the decision-making process (Working Parties, COREPER and Council) and across different Council configurations, including "informal" configurations such as the Eurogroup.
- Unregistered lobbyists should not be able to get meetings or access buildings. Permanent Representations of member states should also pledge to no longer meet with unregistered lobbyist as well as the rotating presidency – both in Brussels and in national capitals;
- To enable the public to monitor the implementation of the above principle, the Council should publish meetings with lobbyists as is current practice for the European Commission;
- The Council should publish all written input by lobbyists in a central location to allow the establishment of an EU Legislative Footprint in a joint database with Parliament and Commission.
- Making all scientific and socio-economic evidence used in the preparatory bodies of the Council negotiations open to public scrutiny.