



TRANSPARENCY
INTERNATIONAL EU

THE BACKROOM LEGISLATOR

**Transparency, integrity and accountability
at the Council of the EU**

This in-depth report is an update to the 2014 Transparency International EU study on the EU integrity system

Transparency International EU (TI EU) is a regional office of the global anti-corruption movement, Transparency International. Working closely with the International Secretariat in Berlin, Germany, TI EU leads the movement's EU-focused advocacy in close cooperation with over 100 national chapters worldwide, but particularly with the 23 chapters in EU Member States. TI EU's mission is to prevent and address corruption and promote integrity, transparency and accountability in EU institutions and in EU internal and external policies, programmes and legislation.

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Acknowledgments	1
List of abbreviations	4
METHODOLOGY	5
EXECUTIVE SUMMARY	6
RECOMMENDATIONS	9
INTRODUCTION	10
An intergovernmental institution?	11
ADMINISTRATIVE TRANSPARENCY	13
Council General Secretariat	14
Access to documents	15
Document register	16
Access to document requests	17

LEGISLATIVE TRANSPARENCY	19
Lobby Transparency	21
Preparatory bodies	24
Member State positions	28
Reform efforts	32
National Parliaments	36
ETHICS RULES	37
EU Staff Regulations	37
Whistleblowing policy	38
Member State representatives	39
Council Presidents	40
The Council Presidency	40
The President of the European Council	40
Endnotes	42

LIST OF ABBREVIATIONS

ATD	Access to Documents
CoC	Code of Conduct
CoI	Conflict of Interest
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
COREPER	Committee of Permanent Representatives
COSAC	Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union
DG	Directorate-General or Director-General
DPR	Deputy Permanent Representative
ECA	European Court of Auditors
ECB	European Central Bank
EP	European Parliament
EPP0	European Public Prosecutor's Office
EPSO	European Personnel Selection Office
EU	European Union
EUCO	European Council
GSC	General Secretariat of the Council
HR/VP	High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission
IIA	Interinstitutional Agreement
MEP	Member of the European Parliament
NGO	non-governmental organisation
NIS	National Integrity System
OLAF	European Anti-Fraud Office
OLP	Ordinary Legislative Procedure^
PCY	Rotating Council Presidency
PEG	President of the Eurogroup
PR	Permanent Representation or Permanent Representative (Ambassador)
PSC	Political and Security Committee
QMV	Qualified Majority Vote
RoP	Rules of Procedure
SG	Secretary-General
SJ	Legal Service
SNE	Seconded National Experts
ST	Council document
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VP	Vice-President
WK	Working document (or DS, Document de séance)
WP	Working Party
WPI	Working Party on Information

METHODOLOGY

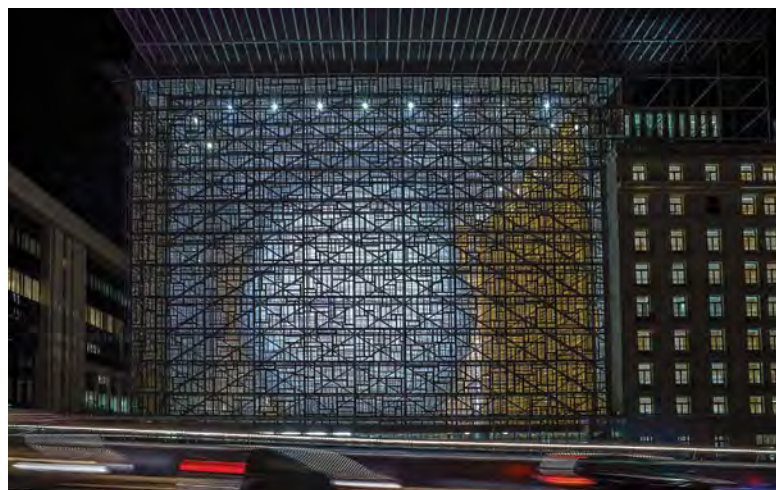
In 2014, Transparency International EU published the first overall assessment of the EU's integrity system, based on the National Integrity System (NIS) assessments. This aimed to evaluate the strengths and weaknesses of the formal integrity framework of different institutions and then assess its use in practice with a view to making recommendations for improvement. The 2014 EUIS study – the EU Integrity System (EUIS) – analysed the 10 main EU bodies dealing with integrity, namely the European Parliament, the European Commission, the Council of the EU, the European Council, the Court of Justice of the EU, the European Court of Auditors, the European Anti-Fraud Office (OLAF), Europol, Eurojust and the European Ombudsman.

This report is one of three updates Transparency International EU is publishing in 2020, providing a deeper analysis of the transparency, accountability and integrity of the EU's three main institutions: the European Parliament, the European Commission and the Council of the EU. These studies focus on reforms of the past years and make recommendations on how to further the legitimacy of decision-making, focusing on transparent procedures, participative democracy and an effective management of conflicts of interests.

The studies are based on academic literature, desk research and interviews with policy-makers. To verify and deepen our research, we conducted interviews with staff of the General Secretariat of the Council. We are grateful for this cooperation and the feedback received on the draft. Any mistakes are the responsibility of the authors alone and do not reflect the views of the people who have been consulted externally, either through interviews or our feedback and review process.

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- ▶ Mario Monti — *Former EU Commissioner and former Prime Minister of Italy*
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The Council's very representative new Europa building was inaugurated in 2016. Its composition from recycled windows and a widely visible glowing orb invite transparency metaphors that stand in stark contrast to its more common description as the 'black box' of EU decision-making.

EXECUTIVE SUMMARY

This report is an in-depth review of the Council's transparency in terms of administrative procedures, its structure between Ministers, preparatory bodies, and the Secretariat, its legislative transparency, lobby transparency, and integrity rules governing Council staff and the various Council presidents.

The study provides an update after Transparency International EU's 2014 assessment of the EU integrity system and comes as part of a three-part series encompassing the European Commission, the European Parliament, and the Council of the EU.

The Council is an interesting hybrid. It is an EU institution, but also the representative of Member State governments. It is a cross between an upper legislative chamber as seen in many confederal systems, and a group of very powerful national executives. Though the Council falls between the distinction of supranational and intergovernmental institution, it sees its role as safeguarding national interests.

Administrative transparency: There have been improvements in document registration, following repeated criticism from the European Ombudsman. Nevertheless, the document register still leaves a lot to be desired, in usability and in giving an overview of documents and what legislative procedure they pertain to. This can only be fully addressed with the introduction of a joint legislative database modelled after the European Parliament's legislative observatory, which was first announced in 2016.

What is the Council? Transparency starts with definitions, and the Council does not only get confused with the European Council or the Council of Europe. Technically, there were only 83 Council meetings in 2019; while the 150 preparatory bodies and working parties amassed 3,681 meetings. The latter are not, strictly speaking, Council meetings and do not conform to the high transparency

standard the Treaties and secondary law foresee for legislative activity in general and for the Council in particular.

Lobby transparency: There are currently no obligations to meet only registered lobbyists, and no requirements to make meetings public. Apart from the small Council Secretariat which facilitates the workstreams and meetings, the Council and its preparatory bodies are composed of national representatives who are not bound by common EU rules.

Integrity safeguards: The same problem applies to integrity. There is no common code of conduct, and no common minimum ethical standard, whether for Ministers or civil servants, and not even for Council Presidencies, with regard to declarations of financial interests or guidelines for corporate sponsorships. The Council Rules of Procedure do, however, impose an obligation of professional secrecy upon Member State representatives partaking in the work of the Council.

Legislative transparency: The most spectacular finding is that for most legislative deliberations at preparatory level, the identity of Member States making statements or proposals on legislative files is not recorded in official Council documents. This is in reaction to a 2014 judgment by the Court of Justice of the EU, ordering the Council to refrain from blacking out country names in such documents. The Council does publish the position on a legislative file agreed between the 27, but it is usually impossible to know what elements of the law any individual government supported or pushed back against, and what trade-offs informed these choices. Attribution of positions to Member States is often only possible from informal minutes by meeting participants, to the extent these are leaked to the press.

Accountability gap: This creates an obvious gap in the democratic legitimacy of the Council's work, as (1) the vast majority of legislative work happens behind closed doors in preparatory bodies, in spite of the clear Treaty-based requirement that the Council's legislative work be public, and (2) the lack of information on individual governments' positions makes it impossible for citizens and often enough for national parliaments to know what their government is advocating for in their name, or to hold them to account over their actions at EU level.

Respecting case law: The Court of Justice has made it clear in no uncertain terms that citizens must know the position of their individual government on the various parts of the law, much like the amendments by each Member of the European Parliament and by each Political Group are made public before they are publicly voted on, paragraph by paragraph. Yet the Council continues to systematically circumvent this requirement, and additionally marks almost all legislative documents as 'LIMITÉ', meaning they may not be disclosed until after the adoption of the legislative act they relate to.

Access to documents: As EU law specifies very narrow exceptions for withholding legislative documents from public view, the Council Secretariat granted access to over 80 per cent of 'LIMITÉ' documents upon access to document requests in 2019. This means that for most documents, the legal exceptions used to hide the documents from public view are not applicable even in the view of the Council. Systematic classification as 'LIMITÉ' therefore violates EU law. To make matters worse, appeals to rejected access to document requests are handled through a Council preparatory body consisting of Member State representatives, invariably leading to a politicisation of whether to grant access.

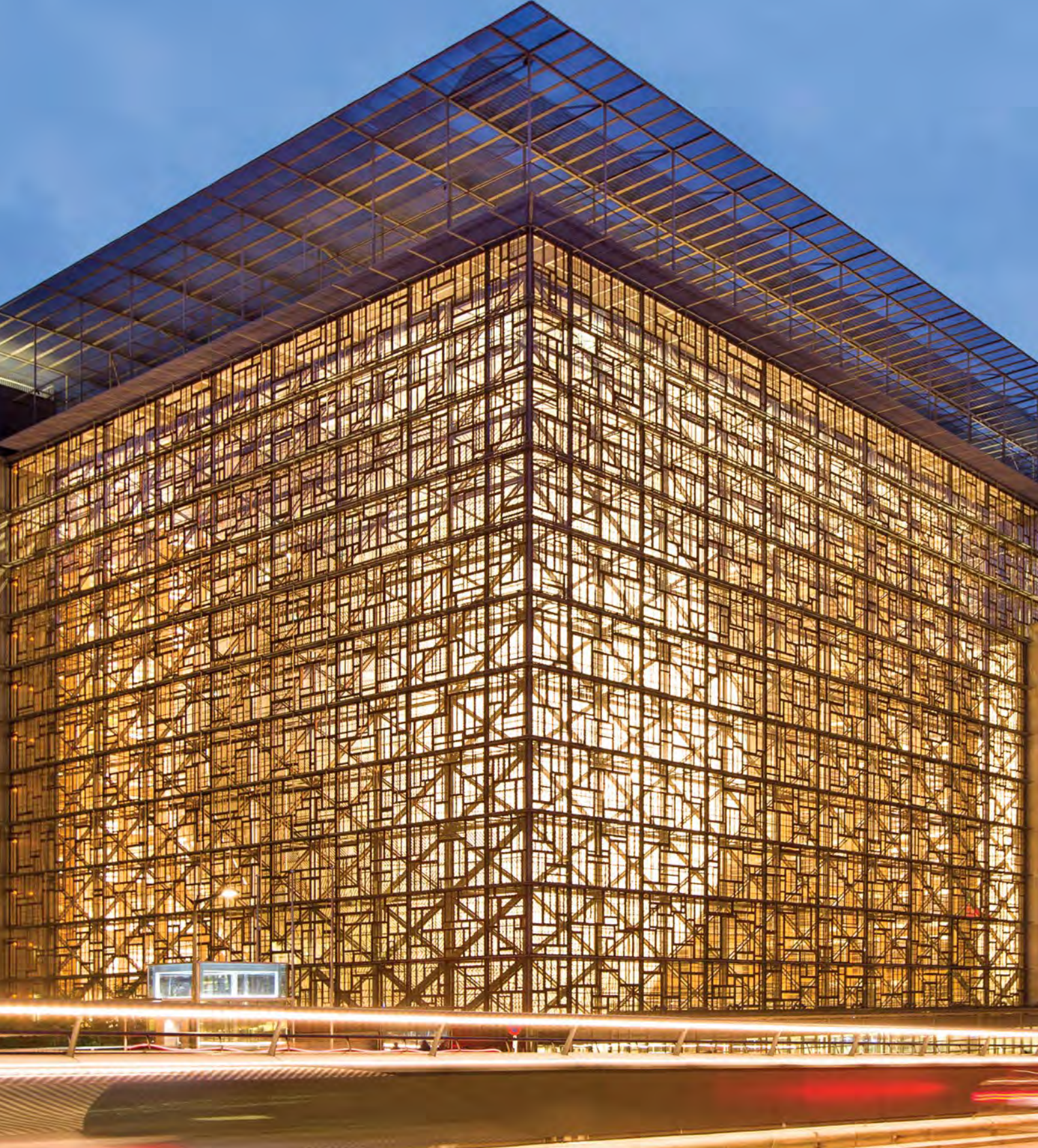
Finding consensus: The culture of multilateral diplomacy that is entrenched in the work of the Council is not conducive to settle a number of longstanding shortcomings. After multiple Court rulings necessitated changes, the Council has still not been able to adapt its rules of procedure to bring them into line with EU law, even though this would merely require a simple majority. More ambitious transparency reforms are also stuck, including wide-ranging reform proposals from the Council Secretariat, which are routinely watered down by national governments.

Tendency to block progress: It is also notable that many legislative proposals put forward by the Commission are acted upon by Parliament, but are left languishing for years in the Council, usually due to an inability to agree a joint position. This fundamentally threatens the legitimacy of the process as it is unclear to citizens which governments are blocking agreement. Increased democratic scrutiny on which governments are preventing progress could help overcome obstacles.

Reform efforts: A coalition of ten EU Member States – Belgium, Denmark, Estonia, Finland, Ireland, Latvia, Luxembourg, Slovenia, Sweden and the Netherlands – has in January 2020 submitted a 'non-paper' containing a series of very important improvements on recording of discussions within preparatory bodies and on the publication of documents in the course of Trilogue negotiations with the Parliament and Commission. It is of utmost importance that more governments come under pressure to join this group and bring the Council's functioning as a legislative chamber in line with EU treaties, secondary law, and the judgments of the Court.

In conclusion, what emerges is an institution whose inability to increase its transparency is only made possible thanks to its lack of accountability. The Council is able to ignore the deafening calls from civil society, repeated criticism of the European Parliament, and stinging charges of maladministration from the European Ombudsman, precisely because it is unaccountable at the European level. Citizens cannot punish the Council as such, they can only ever vote for or against their own national government. Therefore, the Council can afford to sit out demands for reform. Its accountability is fragmented, and change ultimately requires awareness for these shortcomings to emerge in 27 national capitals.

In general political discourse, the Council is best described as 'national governments'. This avoids lumping all EU institutions together as 'Brussels', and more accurately allocates responsibility, thereby improving accountability.



RECOMMENDATIONS

Legislative transparency

- ▶ Introduce a joint legislative database modelled after the European Parliament's legislative observatory, clearly stating at what stage of consideration a given legislative file is, as well as what working parties are working on it, along with a full timeline with dates of past and future meetings, milestones such as adoption of a General Approach – ideally as part of an interinstitutional legislative database.
- ▶ The joint legislative database should include written input submitted by lobbyists, as well as scientific and socio-economic evidence used in the preparatory bodies of the Council.
- ▶ Make Trilogue meetings more transparent by timely publication of agendas, participant lists, and four-column documents before each Trilogue meeting, and timely summaries afterwards.
- ▶ Ensure that official minutes are recorded in working party meetings and preparatory bodies, when legislative files are discussed. Always record Member State positions.
- ▶ Ensure publication in the legislative database of documents on legislative deliberation, whether they are recorded as Council documents ("ST") or working document ("WK"), clearly identifying the positions of all individual Member States that have taken the floor or made written contributions, including any scientific and socio-economic evidence presented.

Lobby transparency

- ▶ Unregistered lobbyists should not be able to secure meetings with representatives of the Council or rotating Presidency, or access Council buildings.

- ▶ The Council Secretariat and Council Presidencies should publish lobby meetings, following the practice of the Commission and Parliament.
- ▶ Permanent Representations should adopt the above two practices for all staff.

Administrative transparency

- ▶ Reform the access to documents policy of the Council to comply with legal obligations, including a clear and public assessment framework for LIMITÉ documents.
- ▶ Council documents should be registered in the database without delay, as required by Regulation 1049/2001.
- ▶ Ensure coherent application of best practices 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.
- ▶ Make agendas of informal preparatory bodies public, as well as their composition.
- ▶ Ensure all documents, including working documents and non-public documents, are listed in the document register.

Ethics rules

- ▶ Formalise procedures for checks on declarations of interest.
- ▶ Introduce a Code of Conduct for Member States representatives, which includes declarations of interest for senior policy-makers and rules on lobby transparency.
- ▶ In the medium term, ethics support functions and sanction mechanisms should be the remit of a well-resourced and independent EU ethics body common to all three EU institutions.

INTRODUCTION

The Council of the European Union, also known as the Council of Ministers, was first formally established in its current form in 1967,¹ and since 1993 is known as the Council of the EU. Since the Lisbon Treaty entered into force in 2009, the European Council is recognised as a separate EU institution, although it shares the Council's meeting rooms, administration and logo. While the Council's seat is in Brussels, according to Protocol 6 attached to the EU's Treaties, Council meetings in April, June and October have to be held in Luxembourg.²

Between the different denominations – Council of the EU, European Council, Council of Ministers or even the entirely separate Council of Europe, which is not even an EU institution, it is easy to get mixed up. Indeed, citizens and also journalists have developed a tendency to simplify things by referring to the whole EU machinery as 'Brussels'. However, it would be a mistake to lump all institutions together, in view of the vast differences between the institutions that this report, in conjunction with the parallel reports on the European Commission and the European Parliament, also shows. To enable accountability, it is important to be precise about who does what. Therefore, when discussing its action in the EU system, the Council is perhaps most accurately encapsulated as 'national governments' or EU Member States.

The Council is the co-legislator, alongside the European Parliament (EP). As the upper chamber of the EU's legislature, it represents the territorial entities of the Union, the Member States, whereas the lower chamber, the European Parliament, represents citizens directly. The German legislature quite closely resembles this model, with the upper chamber (the *Bundesrat*) also made up of the

executives of the *Bundesländer*, although the *Bundesrat* has far fewer powers and nowhere near as many meetings. Indeed, the Council can be thought of a highly complex legislative machinery that operates similarly to a parliament, with Council configurations instead of committees and about 150 working groups churning out legislation in a level of detail unmatched by purely political parliamentary bodies.

While the Council is often thought of as a meeting between Ministers, the overwhelming majority of work within the Council is conducted by diplomats and other ministerial staff seconded to the Permanent Representations of Member States in Brussels. The coordination of the many working parties is done by the Committee of Permanent Representatives (Coreper, from the French *Comité des Représentants Permanents*),³ with Coreper II and I bringing together Ambassadors and their deputies, respectively.

Ministers met for 83 Council meetings throughout 2019. The multiple layers of working groups, working parties and preparatory bodies convened 3,681 meetings in 2019, according to the Council's online meeting calendar.

Staffing this enormous variety of meetings are mainly diplomats and representatives of national ministries posted to the 27 Permanent Representations of the Member States to the EU, although many preparatory meetings bring together national officials flown in from capitals, either because the working group meets too infrequently to justify a posting in Brussels or because it brings together high-level participants such as secretaries of state and equivalent ranks.

In addition to its legislative functions, the Council is also much more powerful than a mere upper chamber when it comes to special legislative procedures (e.g. on foreign policy and taxation) as well as appointments to other EU bodies. Executive powers have, over the years, been concentrated in the hands of the European Commission, with the exception of foreign and security policy, which is administered by a hybrid institution under the intergovernmental control of the Foreign Affairs Council. This in turn is presided over by a Vice-President of the European Commission, the High Representative of the Union for Foreign Affairs and Security Policy (HR/VP), as well as the informal Eurogroup,⁴ both with mainly executive tasks.

The Council brings together the governments of the EU's Member States, meaning opposition parties are not represented here. Legally speaking, the Council is always the same institution, although its members meet in different compositions depending on the policy area. The ten different Council formations broadly reflect the Committees of the European Parliament and the composition of national governments.

BOX 1: Council configurations⁵

- ▶ Agriculture and fisheries
- ▶ Competitiveness
- ▶ Economic and financial affairs
- ▶ Education, youth, culture and sport
- ▶ Employment, social policy, health and consumer affairs
- ▶ Environment
- ▶ Foreign affairs
- ▶ General affairs
- ▶ Justice and home affairs
- ▶ Transport, telecommunications and energy

AN INTERGOVERNMENTAL INSTITUTION?

This report discusses the Council defined as the institution and its staff, as well as the Member State representatives that meet within the Council. Analysing the Council without equally looking at the decision-makers within the Council would be like analysing the European Parliament while disregarding its MEPs. Unlike in the European Parliament, however, policymakers in the Council are not salaried by the EU, and the rules applicable to them, by virtue of Council Rules of Procedure, are minimal when compared to the vast body of rules in place for EU staff, Members of the European Commission⁶ and Members of the European Parliament.⁷

While EU institutions are usually described as supranational, the Council forms an exception and is better described as an intergovernmental institution. The Treaties enable the Council to take action by qualified majority vote in most instances, which allows it to go beyond the consensus-based modus operandi of multilateral diplomacy that is the hallmark of intergovernmentalism. However, government's negotiating in the Council strive to achieve unanimity. This is partly due to deeply rooted diplomatic culture from which the Council and the EU more broadly has evolved, as a group of integrating, but sovereign, nations. The sheer number of decisions across most areas of public policy also enables negotiators to find compromises across disparate files, and reminds everyone involved that, in the next vote or disagreement, they also do not want to end up on the losing side. In this sense, in the face of often diverging national interests, as well as diverging views between small and large Member States, the Council can be described as an efficient compromise machine.



The Council is a hybrid: both supranational EU institution and intergovernmental representative of national executives. The European Council – which brings together Heads of State and Government – sets the broad guidelines for EU action. As a non-legislative institution, it does not meet in public.

However, efficiency is not the only criterion by which to judge the legitimacy of a democratic institution. The more complex and far removed decisions by public institutions are, the more fundamental the role of transparency to ensure accountability and democratic participation are possible. In the present study, we will analyse the transparency of the Council based on the requirements of the Treaties and secondary legislation – both in administrative

procedures and document management, as well as more specifically when it comes to the legislative process. As noted by the European Ombudsman in her recent strategic inquiry into the Council's legislative transparency, at issue is “the level of commitment of the Council to ensuring transparency and thus accountability in its role as an EU legislator”.⁸

ADMINISTRATIVE TRANSPARENCY

All EU institutions are obliged to conduct decision-making as openly as possible, and as closely as possible to the citizen.⁹ This requirement of transparency is doubly emphasised for legislative procedures,¹⁰ where Council discussions and votes have to be made public and even livestreamed. However, the Council only applies this obligation at the ministerial level,¹¹ excluding preparatory bodies. Non-legislative deliberations and foreign policy proceedings do not have to be public.¹²

Reliance on representative democracy requires some degree of transparency to enable democratic accountability. For executive action taken by the Council, accountability should happen at the level at which decisions were taken, i.e. the European level.¹³ For example, the Commission, and to a lesser degree the European Central Bank (ECB) and the Eurogroup all have to answer or be accountable to the European Parliament, something that should be considered also for the European Council, which does not have a legislative role.

Where the Council acts in an executive capacity, e.g. in most of its foreign policy action or in its role in appointing senior policy-makers to EU institutions and agencies, the Council often has to consult with the European Parliament, thereby forming an accountability-relationship at the European level. This is particularly important, as fragmented and national accountability is not effective for decisions taken jointly at EU level. However, the Council's accountability to Parliament is often limited to collecting a non-binding opinion from Parliament, or holding a 'dialogue'. Only when Parliament has legally binding powers, e.g. as part of the Consent-procedure,¹⁴ does this translate into a functioning accountability. This is the case for some high-level appointments, as well as the negotiation and ratification of international treaties, the accession of new Member States, and the EU's seven-year budget framework.

In the context of the Council's executive role, two areas stand out, namely its role in EU economic governance (which we describe in-depth in the Transparency International EU report on the Eurogroup),¹⁵ as well as in foreign policy. The High Representative for the Union's Common Foreign and Security Policy is a hybrid figure between the Commission and the Council, legally mandated to preside over the Foreign Affairs Council, instead of the rotating Presidency,¹⁶ with the European External Action Service as their own civil service at their disposal¹⁷ and participating in meetings of both the College of Commissioners as well as the European Council.¹⁸ In view of the unanimity requirement in the Foreign Affairs Council, the HR/VP is clearly accountable to the Council. The latter also prepares an annual activity report on its implementation of the common foreign and security policy, submitted to Parliament. Twice-yearly debates are organised, and MEPs may pose questions as well as make recommendations.¹⁹ The European Parliament can also ask the Court of Justice of the European Union (CJEU) to review the compatibility of international agreements with the EU's Treaties.²⁰

We cannot judge as part of this report whether the attempt to better coordinate foreign policy action of EU Member States via the creation of a joint diplomatic service under the HR/VP has been successful. However, we note that the combination of fragmented accountability of each national foreign minister to their own national parliaments, in combination with the unanimity requirement for decisions in Common Foreign and Security Policy (CFSP), make it unlikely that the HR/VP can develop the independence needed to be much more than a Chairperson or Secretary of the Foreign Affairs Council.²¹

Like Council meetings on non-legislative measures, informal meetings – which cannot, by their nature, adopt decisions – are also non-public. This practice was officially acknowledged by the European Council in 1999.²² The Lisbon Treaty provision that legislative meetings shall be televised,²³ with the Secretariat responsible for ensuring live video recordings are available for at least one month,²⁴ although livestreaming of Council meetings excludes all levels below ministerial meetings, severely limiting the transparency of the bulk of Council decision-making.

The distinction between legislative and non-legislative business is also reflected in Council agendas,²⁵ revealing that ministerial Council configurations are mostly dealing with non-legislative files including exchanges of views and policy coordination – since most legislative negotiations are dealt with below the ministerial level. It also increased the time ministers spend at breakfast and lunches, as they are considered informal, allowing a less public exchange, also about legislative files.²⁶ While generally the Council presidency will organise one informal meeting in their respective country for each Council configuration, the video meetings held online due to the Covid pandemic were also classified as informal, especially since Member States have not yet been able to agree on common standards as regards encryption of video conferencing,²⁷ although voting can be done by written procedure.²⁸

Council General Secretariat

The work of Member States representatives – whether at ministerial or preparatory level – is facilitated and organised by the General Secretariat of the Council (the ‘Secretariat’), which employs around 3,000 permanent staff in Brussels.

The Council has autonomy over the use of its budget, with responsibility for the budget’s administration lying with the Secretariat.²⁹ However, a “gentleman’s agreement” reportedly stemming from 1970 has stood in the way of the European

Parliament and the Council as the two budget legislators holding each other to account over the implementation of their budgets.³⁰ The treaties foresee a submission of the Council’s expenditure to the Commission and, consolidated with the general budget of the EU, scrutiny over the EU budget by Council and the EP, with Parliament granting discharge.³¹ In 2019, as in all years since 2011, the European Parliament did not grant discharge to the Council, on account of “failure to cooperate in supplying the information it [Parliament] needs”.³² Nonetheless, formal discharge happens for the overall EU budget, so that the refusal to discharge the Council’s specific budget has no practical consequences.

The Secretariat facilitates the over 3,000 yearly meetings of preparatory bodies with the behind-the-scenes work of shuttling around policy documents and ensuring seamless communication with the next level of preparatory bodies.³³ The Secretariat administratively supports the Council, recording discussions and registering documents, as well as ensuring their publication, where applicable. A new document management system introduced in 2016 reportedly ensures that all documents are registered, including e.g. emails received by the Secretariat from national delegations regarding specific files.³⁴ It also provides the support infrastructure to the Council Presidency, whose civil servants, diplomats and ministers generally chair the Council meetings.

The Secretariat has recently been criticised by the Ombudsman for its “widespread practice” of restricting access to legislative documents by marking them as *LIMITÉ* and applying diverging standards on document management across different working groups and policy directorates of the General Secretariat of the Council.³⁵ The Ombudsman particularly took issue with the fact that the Secretariat has a practice of systematically marking all documents pertaining to legislative files as confidential or ‘*LIMITÉ*’, meaning they cannot be disclosed outside of the Council. The department having prepared the document is, however, encouraged to review the marking once it is no longer justified³⁶ – meaning after the conclusion of a legislative process.

The EU Access to Documents (ATD) Regulation could not be clearer about the fact that transparency should be the norm, and secrecy the exception, based on exceptions listed in the regulation.³⁷ The Council rules of procedure, however, are not in line with this regulation, as they turn the burden of proof around, noting that documents may only be made publicly available upon their circulation within Council if they are “clearly not covered”³⁸ by any of the transparency exemptions of the ATD-Regulation. And indeed, when access to document requests are filed, almost all documents are made fully available,³⁹ which is proof that their original marking as confidential did not reflect any of the four exceptions laid out in the regulation.

The Council’s policy is therefore exactly the opposite of what we would require from it on a *prima facie* reading of the applicable rules from the EU Treaties and ATD-Regulation. Instead of making all legislative documents proactively public, as is clearly required and as is the common practice of the European Parliament, the Council marks even those documents as confidential that do not fit into any of the exemptions foreseen in the ATD-Regulation. It is no surprise that this, too, was found to constitute maladministration by the Ombudsman, who recommended that the Council “develop clear and publicly-available criteria for how it designates documents as ‘LIMITÉ’, in line with EU law”, and that it should review such markings as soon as the Council has reached a common position.⁴⁰

We echo the Ombudsman’s recommendations that the rules of procedure of the Council should be brought in line with the narrow exceptions to disclosure as foreseen in the ATD-Regulation, that guidelines should be adopted on what documents to record before, during and after meetings of preparatory bodies (e.g. agendas, summaries, compromise proposals), and what information those documents should contain.

A more contentious type of document produced by the Secretariat includes Council legal opinions, drawn up by the Council legal service.⁴¹ These documents often have a significant effect on the legislative process, and even on the acceptance of the Council of the proposed legal base for a draft legal act.⁴² Cases in which unpublished legal

opinions were held up as the reason why the Council would not move forward on a file abound, including on the EU Whistleblowing Directive ultimately adopted in 2019,⁴³ on country-by-country reporting for multinational companies,⁴⁴ on rule of law conditionality for EU funds,⁴⁵ and, ironically, on the establishment of a mandatory transparency register.⁴⁶ The latter is, to this day, only partially accessible, even following access-to-document requests. A case is currently pending before the EU Courts challenging the Council’s claim that disclosure of a 2018 legal opinion would undermine its decision-making process.⁴⁷ We see no reason why the Council should keep its interpretation of EU law and Treaties, which are public and for all to see, from public view.

Access to documents

The Secretariat has to publish provisional meeting agendas for Council and working party meetings “as soon as they have been circulated”.⁴⁸ It also routinely publishes the agendas of Committees and working parties,⁴⁹ although the rules foresee this only if “they are clearly not covered by any of the exceptions” from the ATD-Regulation.⁵⁰



Search functionality of the Council document register could benefit of further improvements. Ultimately, a joint legislative database between all three institutions should be created.

Council minutes at ministerial level have to contain any decisions and conclusions reached, but are summaries rather than actual minutes of the verbatim record.⁵¹

The Council has a website, an online document register,⁵² a public information service for general enquiries,⁵³ a press office that organises press conferences after Council meetings,⁵⁴ a visitors' service,⁵⁵ units on outreach and communication⁵⁶ and a Council library and archive accessible upon appointment.

Since 2015, the Council participates in the EU open data portal managed by the Commission's publications office with three datasets: the metadata of the Council's public register; the metadata of the database on requests for public access to documents; and Council votes on legislative acts.⁵⁷

DOCUMENT REGISTER

The Council's online document register contains about 350,000 documents in their original languages. Although the website is well designed and modern looking, the register itself could be a lot more helpful, e.g. by providing a list of document type abbreviations, by showing all possible search fields in one view, avoiding the need to scroll through an entire page for each search, by removing the display of a warning message regarding insecure connections and third-party servers at each and every search attempt. The search engine also returned repeated errors while searching for a number of known, public documents, including server errors. In fact the server appeared to be down or severely overloaded on many days spanning our research period, making the attempt to trace decision-making processes even more frustrating than usual.⁵⁸ This could easily be improved by either improving the resilience of the search algorithm and servers, and by limiting the type of characters that can be typed into the document number field, as the search engine appears to crash upon the introduction of letters instead of numbers. Such basic limitations of functionality do not help when searching for documents that are already difficult to find as it is, if they are available at all.

To make it easier to find files related to a specific legislative process, the Ombudsman recommends searching for the inter-institutional code of a (draft) legislative act. However, even this will miss some important documents, including legal opinions from the Council.⁵⁹ The easiest way is to browse specific meetings using the meeting calendar of each preparatory body or Council formation,⁶⁰ although this requires knowledge of when and where a specific legislative file may be discussed, and will work less well for meetings that are not recent.

The Council considers that it is possible for the public to find out which preparatory body is discussing a given legislative file.⁶¹ In practice, this requires searching each agenda of each potentially involved preparatory body, bearing in mind that legislation may be discussed in more than one working group, and that people who do not work within the Council may not know which of the 150 preparatory bodies to consult.

Our 2014 study already flagged the issue of a high number of documents not being registered, including so-called *Documents de séance* (DS), which are widely acknowledged as forming part of the legislative process but are not published. In particular, the European Ombudsman inquiry found that the Council publishes lists of working documents rather than registering each of the documents, and does not list all types of documents in its register,⁶² making it even more difficult to request access to documents whose existence is not acknowledged in the register.

According to the Council annual report on access to documents,⁶³ at the close of 2019, the register contained 420,763 original language documents (and over 3 million counting translations), of which 70 per cent are public and available for download. In line with its obligation to report on the number of classified documents, the Council declares to have registered 908 classified documents, whereas 99 classified documents were not registered, meaning their existence is not even shown on the register. These numbers have, however, been called into question.⁶⁴

In keeping with recent years, the Council produced around 4,300 legislative documents, with less than half of them publicly disclosed upon their circulation. Of the 2,408 documents classified as

'LIMITÉ', 1,649 were made available upon request before the end of the year. This means that 82.6 per cent of Council legislative documents from 2019 are now publicly available.⁶⁵ However, we cannot help but note that firstly, this is not in line with the requirement that legislative business shall be conducted as openly as possible, and secondly, the Council could avoid the massive administrative work of releasing the documents one by one in response to access to document requests. Thirdly, the criteria for refusals to access to document requests are literally the same criteria that apply to classifying legislative documents as 'LIMITÉ' in the first place. This is because Article 2 paragraph 4 of the ATD-Regulation clearly specifies that "documents drawn up or received in the course of a legislative procedure shall be made directly accessible" via an online register, with the exceptions listed in Article 4 and Article 9 of that Regulation being the ones applicable both to proactive publication as well as to access to document requests.

These are therefore the same exceptions that would justify rejecting an access to document request for those same documents. It follows that, if 1,649 documents were made available via such a request, then all of them had been unlawfully classified in the first place, unless another factor changed in the meantime. It is unlikely that all 82.6 per cent of the documents that were first issued as LIMITÉ and then disclosed before the end of the year were released due to the closure of the legislative procedure, as this takes an *average* of 18 months.⁶⁶ We therefore agree with the Dutch delegation to the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) in its assertion that the Council "regularly violates EU transparency regulations".⁶⁷

ACCESS TO DOCUMENT REQUESTS

Nevertheless, documents not immediately available can make the subject of access to document requests, which can be lodged directly from the register, or from a dedicated form,⁶⁸ or via the asktheeu.org-website, which allows users to lodge access to document requests with all EU institutions and bodies, and enables the general public to track

requests and equally access requested documents.

Data from the last four years show relative stability in access to document requests, which are nevertheless at a relatively high level with 2,567 requests lodged in 2019. This involved 8,222 documents, as one request may encompass more than one document. It should be noted that, of the 40 confirmatory applications – where the applicant challenges an initial negative decision by the Council – more than half were at least partially successful. In view of this success rate, and the low number of confirmatory applications, this is a possibility that applicants should make use of more widely.⁶⁹ This lengthens the procedure significantly (see Table 1). Initial applications appear, on average, to be treated almost within the delay set by the ATD-Regulation, which allows 15 working days. The higher average means individual requests may take considerably longer, as noted also by the Council in the context of a recent Ombudsman investigation;⁷⁰ nevertheless, the Council is the only institution to publish such data on delays.

While initial applications are handled by the Secretariat,⁷¹ any confirmatory applications have to be decided by the Council,⁷² upon a draft decision prepared by the Secretariat. Predictably, consulting the Council will politicise this procedure. As the Council will hardly want to discuss this at ministerial level, the Secretariat consults the working party on information (WPI), the preparatory body in charge. And since Member States often enough find it hard to agree between each other, this can lead to very significant delays. The latest case in point is a confirmatory application requesting access to Member States positions (see section on Preparatory bodies under Legislative Transparency) in the case of the legislative proposal on country-by-country reporting on taxes paid by multinational companies. The draft decision by the Secretariat, which would give the applicant access to the documents, is available via the Council's document register.⁷³ And yet, following a vote held by written procedure in Coreper II following deliberations in the WPI, the final reply issued two months later denies access.⁷⁴ Nevertheless, the document attesting to the written procedure⁷⁵ contains Member State declarations in its Annex, with Denmark, Estonia, Finland, Ireland, Italy, Latvia, Lithuania, Sweden and the Netherlands expressing disagreement and endorsing the initial Council position, also in light of

recent case law by the Court.⁷⁶ The vote or written procedure regards a procedural matter,⁷⁷ meaning that a simple majority would suffice.

If an applicant is unsatisfied with a (partial) refusal to access documents, they can turn to the European Ombudsman, who may investigate the decision of the Council, and/or sue the Council at the European Court of Justice. The annual reports of the Council cited above discuss each of these cases, which is useful to gain insight into what is and what is not published.

A look at the reasons for rejected requests is also enlightening. Roughly 26 per cent were rejected due to confidentiality in international relations, whereas 19 per cent were rejected to “protect the Council’s decision-making process”. However, we cannot know in how many rejections this truly played a role, given that 45 per cent, or almost half of all rejections, were based on “several factors”. It would have been preferable to note each reason down with its own percentage, even if the whole may exceed 100.

Clearly, improvements can be made as regards the recording of legislative documents, and grouping the agendas and outcomes of preparatory bodies, systematically, together with the legislative files to which they pertain. It is possible to follow the work of the Council, but this should not require employing a team of well-paid experts from the EU policy

community. In a democratic system of governance serving 450 million citizens across the continent, voters should be in a position to follow policy processes online and at the click of a button.

In 2017, the Council sought to pre-empt criticism from the Ombudsman on its document management by pointing to ongoing efforts “to implement the commitments for a greater legislative transparency that they have assumed by concluding the Inter-institutional Agreement on better law-making in 2016”,⁷⁸ in particular the commitment by the three institutions to establish “a dedicated joint database on the state of play of legislative files”.⁷⁹ However, little progress has been achieved to date, four years after this agreement was reached, and the Commission expects completion of the database only by 2024.⁸⁰ Nevertheless, the legislative observatory of the European Parliament is a good example of how many documents and processes pertaining to a legislative file can be intertwined and presented together. If this can be synchronised with legislative documents of the Council and applied to Trilogue meetings, it could serve as a good basis for the joint legislative database.

As things stand, “legislative documents of the Council are not, to any significant extent, being made directly and proactively accessible to the public while the legislative process is ongoing”,⁸¹ as noted by the European Ombudsman.

Table 1: Access to document requests and disclosure rates

Year	ATD-requests	Disclosed	Partially disclosed	Refused	Average working days	Average working days (confirmatory applications)
2015	2,784	77.9 %	9.5 %	12.6 %	16	29
2016	2,342	76.5 %	5.8 %	17.7 %	16	55
2017	2,597	69.1 %	8.9 %	22 %	16	40
2018	2,474	74.3 %	5.5 %	20.2 %	17	36
2019	2,567	74.7 %	5.7 %	19.5 %	17	37

LEGISLATIVE TRANSPARENCY

Transparency of the legislative process is a core element of the EU's representative democracy. At Union level, EU citizens are directly represented by the European Parliament, and indirectly represented by national governments coming together in the Council.⁸² Citizens and other stakeholders also have a right to participate in the democratic process.⁸³

To achieve this, EU institutions are required by the Treaties to be as open and as close to citizens as possible.⁸⁴ The Council has to deliberate in public when considering legislative business.⁸⁵ Secondary legislation further emphasises the requirement of transparency for legislative documents, noting that “documents drawn up or received in the course of a legislative procedure shall be made directly accessible”,⁸⁶ as does case law of the Court of Justice of the EU (see below under Member State positions).

The right of legislative initiative resides, as a general rule, with the Commission. However, much like the Parliament, the Council can request the Commission to produce “any studies the Council considers desirable for the attainment of the common objectives” as well as “any appropriate proposals”.⁸⁷ The Council's prerogatives go beyond those of the Parliament in fields of national competence, as well as regarding the negotiation mandates for international agreements, although the ratification of these agreements usually requires the consent of the European Parliament.⁸⁸ Some legislative procedures, such as the EU's multi-annual financial framework, are adopted by the Council and only require the consent of the EP.⁸⁹ Nevertheless, holding the right of veto can enable the European Parliament to negotiate significant concessions.

The ordinary legislative procedure is a formal process whereby the co-legislators negotiate, amend and finally adopt a given legislative file, in a process of a maximum of three steps.⁹⁰ Once the Parliament and Council receive a legislative proposal adopted by the Commission, they examine the proposal (the so-called reading). The Council Presidency will negotiate a so-called General Approach, which is an amended version of the legislative proposal that is mutually agreeable to all 27 Member States. These negotiations will usually happen in one or more preparatory body, depending on the substance matter of the negotiation, and can be further discussed or validated at Coreper level. If no agreement can be reached at the Coreper level, the general approach can also be discussed in the Council at ministerial level. The more likely scenario, however, is for Coreper to resolve some disputes and hand the file back down to the working party.

This General Approach can either constitute the Council's position for the first reading under the ordinary legislative procedure, or it can serve as the basis for Trilogue negotiations. This means that the Commission, parliamentary negotiators and the Council Presidency (assisted by the officials from the policy directorate responsible in the Secretariat, as well as the Council legal service) meet for informal negotiations. The General Approach can still be amended later on – usually at the level of Coreper – in between Trilogues, if the Council Presidency requires additional leeway to reach a compromise with Parliament.

Trilogues are a way for both institutions to engineer a first reading position in which they happen to agree, so as to pass the legislation at first reading and avoid a second reading or conciliation

committee. As Trilogues are an informal practice, there are no legal transparency requirements, except for the actual votes to adopt the amended proposal. In particular, ‘votes’ on a General Approach are not formal votes or even indicative votes, but more like a ‘tour de table’ where the Presidency will want to establish that it has support equivalent to a qualified majority vote (QMV) to begin Trilogue negotiations. For an in-depth discussion on Trilogues, see our case study ‘Lost in Triangulation’ included in the parallel report on the European Parliament.⁹¹

An issue that may not receive sufficient attention is the fact that often the Council will not adopt a general approach or first reading position on a file at all. This happens quite frequently, and files are then either left languishing in the legislative pipeline for sometimes up to a decade,⁹² or withdrawn by the Commission with the publication of a new annual work programme. Failure of the Council to move on such files will often be attributable

to difficulties in developing a common position, rather than a wholesale boycott of the proposal by successive Presidencies. Nevertheless, similar to the lack of transparency on individual country positions discussed below (see section on Preparatory bodies), this fundamentally threatens the legitimacy of the process as it is not clear to citizens who is blocking a file and why. Examples abound, including the rule of law conditionality for the disbursement of EU funds, on which the European Parliament moved early after the Commission’s proposal in May 2018 and which could have been adopted swiftly by QMV.⁹³ Instead the Council only moved on this when negotiating the 2021-27 multiannual financial framework, which requires unanimity, giving countries opposed to a strengthened rule of law framework the opportunity to hold the negotiations hostage⁹⁴ – a clear example of the culture of unanimity undermining the ability of the Council to guard against the abuse of EU budget funds in countries where the rule of law is under threat.

Legislative debates between national ministers at Council level are live-streamed, but mostly consist of read-out prepared statements. More dynamic discussions happen in the corridors. Nevertheless, ministers do take ownership of the process in press conferences, while leaving the discussion of detailed paragraphs to civil servants in preparatory bodies.



In the ordinary legislative procedure, the Council needs 55 per cent of Member States representing 65 per cent of the EU population to vote in favour.⁹⁵ In practice, abstentions therefore count as votes against, except in cases where unanimity is required, e.g. on taxation and foreign policy. Here, an abstention will not be counted against the proposal. Absent Council members may delegate their vote to another minister.⁹⁶ While unanimity is often cited as a problem in blocking EU procedures, the European Council has the right to authorise the Council to act by QMV where the Treaties foresee unanimity via the so-called ‘passerelle clause’.⁹⁷

Legislation always has to be adopted by a public vote, although in practice the vast majority of legislation is adopted by a unanimous vote. These votes are made public, though this is not the case for indicative or informal votes e.g. on the Council General Approach for Trilogue negotiations, or indications of position at the preparatory level. There are no formal votes at the preparatory level. In principle, any Member State, the Commission (which is present at Council meetings) may ask for a vote, although a majority is needed to hold one, except for votes called by the Council Presidency.⁹⁸ However, ‘indicative votes’ or votes on preparatory acts are not to be made public,⁹⁹ so no indications can be drawn on the positions of Member States in ongoing (Trilogue) negotiations.

It is clear that the overwhelming majority of legislative work of the Council is done at the level of preparatory bodies, whereas the Council merely adopts the majority of legislative work as an ‘A-item’, meaning adoption without any discussion, and by unanimous vote. Nevertheless, legislative files will usually be the subject of legislative discussion at the level of the Council several times, for the adoption of a General Approach before the commencement of Trilogue negotiations and for final approval. At the same time, legislative discussions at Council level are often not interactive, and consist of the reading of prepared statements, although some discussion can happen – in particular for politically salient files that will attract more media attention – and some negotiations may happen on the sidelines of the meetings and corridor discussions. Therefore, the discussion of Council legislative transparency must further analyse transparency at the preparatory level, where the actual legislative negotiations take place. We will focus on this in the section on ‘Preparatory bodies’ below.

Lobby Transparency

In public imagination, lobbying is rather negatively connotated, and seen as powerful corporate interests exerting undue influence or capturing the political system. Nevertheless, it is also a healthy part of participative democracy and a right under the EU Treaties.¹⁰⁰ However, the public also has a right to know who seeks to influence policy and how. To ensure the positive contribution of stakeholder feedback and lobbying while avoiding the empowerment of particular interests over the interests of the public, stringent lobby regulation is required.

To ensure that lobbying provides a positive contribution to policy-making, clear rules must be enforced so that all interested parties – citizens, non-governmental organisations (NGOs), private companies, business associations, trade unions, think tanks, academia etc. – are afforded equal access to the policy-making process and contribute in a transparent manner. Where this is not the case, decision-making is likely to be skewed towards those interests that can muster the greatest amount of resources, as legislators will face an unbalanced overview of the issues to be taken into consideration in the drafting of the law at hand. Left unchecked, unregulated or inadequately regulated, lobbying can open the door to state capture and corruption, allowing undue and unfair influence to enter the public decision-making processes. Despite this, specific lobby regulation is the exception rather than the rule.

The EU institutions in general are, if compared to the national level, quite advanced in this respect. For a more detailed discussion of the EU’s Transparency Register, see our parallel study on the European Commission.¹⁰¹ The President of the European Council, too, publishes lobby meetings, as part of the schedule.¹⁰² A group of 97 MEPs in 2019 nevertheless called on the Council President to extend this policy to the Cabinet,¹⁰³ with the European Ombudsman also suggesting to only meet registered lobbyists and publish date, location, persons and organisations participating (including their clients in case of consultancies).¹⁰⁴

However, most Member States are not as far advanced when it comes to lobby transparency.

NOT A MEETING

The Council will for the first time participate in the EU Transparency Register as from 2021. But registration will not be a condition to meet lobbyists, and only the two top officials from Permanent Representations will need to publish their lobby meetings, and only every 13 years when they take up the rotating Council Presidency.

As of 2020, only 11 countries in the EU have some sort of regulation on lobbying, varying widely in quality.¹⁰⁵ When neither lobbyists nor public officials are subject to clear and enforceable ethical rules, it becomes difficult for citizens to hold those entrusted with public power to account (see Box 2 for an overview). This unambitious approach to lobby transparency is unfortunately mirrored in the Council as a whole, which has made very few commitments to participating in the EU's transparency register, in spite of its role as a co-legislator alongside the European Parliament and the fact that Permanent Representations and national governments are a constant target of lobbying.

While data is difficult to come by, a recent report analysed data provided by the Permanent Representations of Romania, the Netherlands and Ireland. This confirmed that they were “major target for corporate lobbyists”.¹⁰⁶ In the first half of 2018, the Dutch permanent representation hosted 546 meetings, 73 per cent of which were classified as with business interests.¹⁰⁷ Given that diplomats in the Council represent national interests rather than the interests of Europe as a whole, Member States

can also be tempted to defend national champions or industries on which their country is particularly reliant. This can lead to very high-level influence, including at ministerial and, unusually, at the level of the European Council, which is not formally involved in legislative business.¹⁰⁸

In 2016, the Commission proposed a mandatory transparency register by tying lobby meetings to the requirement to first disclose the lobbying activities via the public register.¹⁰⁹ However, this conditionality would only apply to Ambassadors of the current and incoming Council Presidency, as well as their deputies.¹¹⁰ This would affect only two officials, for the duration of 12 months every 13 years. The Secretary-General and Directors-General of the Secretariat would also be covered by the rules. In so far as they are EU officials, they are also explicitly instructed to act in the best interests of the Union and “neither seek nor take instruction” from outside the institution,¹¹¹ as well as to immediately report any input potentially linked to such interaction to the Council Appointing Authority.¹¹²

Negotiations have just been concluded for some degree of Council participation in the reformed EU Transparency Register that is expected to be adopted in 2021.¹¹³ Ironically, the discussions on what could be the largest transparency reform of the EU institutions for years, occurred behind closed doors. On the side of the Council, it is not known who represents the Member States in its internal deliberations, nor the positions of each Member State. No minutes are published and key documents are not released.

This would leave all regular diplomats and working group participants, as well as national ministers, and the Chairs of all Council preparatory bodies except Coreper I and II, untouched by the requirement to publish meetings¹¹⁴ or meet only registered lobbyists. The European Council President and his Cabinet would also not fall under these rules, in spite of counterparts at the Commission and Parliament being covered.

The proposal foresees the voluntary possibility for Permanent Representations to nevertheless participate in the ‘mandatory’ Transparency Register,¹¹⁵ something a series of Council Presidencies have of late started doing of their own accord, with some declaring their

willingness to continue this practice after the end of their Presidency. Doing so via the proposed interinstitutional agreement may standardise the data, making it possible to make it available to the public for aggregation and identification of trends via Transparency International EU's Integrity Watch tool, which allows citizens, academics and journalists to quantify meetings by topic, company, Commission DG, issue area, and to check on topics

discussed.¹¹⁶ The Dutch Permanent Representation was the first to take up this practice in 2015,¹¹⁷ followed by the Romanian, Finnish and Croatia Presidencies.¹¹⁸

This was the first Council Presidencies Trio to publish the lobby meetings of its Permanent Representative and Deputy.¹¹⁹ Since then, others have followed suit.¹²⁰

BOX 2: Lobby registers in the Member States

Currently 11 EU countries have established a national lobby register. Most of these registers are mandatory but often do not cover all interest representatives seeking to influence the decision-making process. The UK, Poland, Lithuania and Slovenia only require consultants to register, leaving whole categories of lobbyists entirely unregulated. Germany is currently negotiating the introduction of a lobby register following a scandal, although the final outlines are not yet clear.¹²¹ Others such as the Netherlands do not have a lobby register at all and leave it to the discretion of individual parties and law-makers to decide which organisation gets access badges to their respective Parliaments.

Such practices are unlikely to create a level-playing field and can entrench the interests of dominant players. Only France and Ireland come close to adequate legislation as they also publish the lobbying activities performed by registrants, whether it comes in the form of meetings, phone calls, emails, written contributions or communication campaigns. The French and Irish registers were inspired by the EU version, with similarly extensive definitions, although they fall short on the real-time reporting mechanism of meetings implemented (for high-level meetings) by the European Commission. There are currently nine Member States discussing the adoption of national provisions, with Portugal leading the way. It is essential for the EU institutions to implement the most comprehensive lobbying standards possible, as it will shape the lobbying landscape across the continent.

Without an increased level of lobby transparency, the public cannot know if and how private actors – whether NGOs or industry – have influenced the negotiations. Risks of undue influence, privileged access or special interest capture cannot be ruled out. There is anecdotal evidence that a limited number of external actors occasionally have very good connections with ministers, which provides them with privileged access and non-public information.

It is sometimes noted that discussions in preparatory bodies are rather technical in nature and should not be the subject of lobby regulation or indeed legislative transparency. And indeed,

discussions in working parties may be of a far more technical nature than classic parliamentary debates would allow. Bringing in expertise from Member States' national ministries is certainly a key added-value of the Council in the EU's legislative process. But the political nature of even the most technical discussions is obvious when national diplomats consider it natural to advance the national interest, rather than the optimal outcome for the EU as a whole.

It seems logical that the EU institution representing the Member States would, generally, defend national rather than European interests.

Preparatory bodies

For its legislative activities, the Member States are accountable to national parliaments and electorates, in addition to judicial oversight by the Court of Justice of the EU. To enable this accountability at the national level, parliaments and citizens need to know what position each individual government has advocated for or against. As we will see below, the Council goes to great lengths to conceal these positions of national governments, creating an accountability gap.

Of the more than 150 preparatory bodies of the Council, a small number is foreseen by the Treaties, in particular Coreper,¹²² the Economic and Financial Committee,¹²³ the Employment Committee,¹²⁴ the Trade Policy Committee and the Political and Security Committee¹²⁵ (which is situated at ambassadorial level, unlike all other Committees with the exception of Coreper).

Before legislative files or decisions reach the level of ministers, they all converge into one of two horizontal preparatory bodies,¹²⁶ the Coreper II and I, staffed by the Permanent Representatives and their deputies, respectively. Both Corepers are already part of the explicitly political level of decision-making, as the ambassadors channel files to all Council configurations and are not experts of any field in particular. With all files passing through a preparatory body dedicated solely to finding compromise and making decisions, one can see



Drafting of official minutes or summaries of discussion in preparatory bodies is of particularly relevance as these meetings are held behind closed doors and thereby circumvent the need for the Council's legislative deliberations to be public.

how the frequency of meetings and personal relationships can help smooth along outcomes even in contentious files, as this approach also enables compromises spanning several, completely unrelated dossiers.

There have been improvements in the transparency of Council preparatory bodies, with 'Summary Records' publicly released soon after each meeting, within two to four weeks of Coreper meetings,¹²⁷ as well as Coreper procedural votes.¹²⁸ These contain outcomes, but no details of discussions. Agendas are also being published as soon as they are circulated, for both Coreper and all working party meetings. However, no summaries of the meetings are published at working party level and, when it comes to Coreper, the many dozen of files that are 'discussed' or signed off on at each meeting makes it difficult to sort through information on any specific file. To do that, one would need to know exactly what preparatory body or bodies are dealing with it, and then browse the meeting pages of each of those preparatory bodies for clues from the agendas.

The sheer length and complexity of Coreper agendas have also given rise to informal bodies preparing the Coreper meetings, with the Coreper I prepared by the 'Mertens Group' and Coreper II by the 'Antici Group' (the Political and Security Committee is prepared by the Nicolaidis Group). The naming of the groups goes back to individual assistants to Ambassadors having established the practice back in the day, and attests to ways of working based on tradition and precedent rather than formally agreed standards. Needless to say, while it is possible to find occasional agendas of these groups, they lack detail and there is no section on the Council website systematically publishing the agendas of these informal groups.

Whether the Council lives up to the requirements of legislative transparency ultimately depends on whether the Council encompasses only the ministerial level, which has to wave through legislation for it to be adopted, or whether this includes the preparatory bodies doing the actual negotiations on the legal text, agreeing amendments and compromises line by line.

Most of the Council's legislative work happens in its roughly 150 preparatory bodies. Since only meetings between Ministers are defined as Council meetings, the high transparency standard for Council legislative work is not applied. Most preparatory bodies do not even record the identities of Member States making suggestions, let alone publish this information.

COMMITTEES AND GROUPS ESTABLISHED BY COUNCIL ACT	
COMMITTEES ESTABLISHED BY THE TREATIES	A.8 Special Committee on Agriculture (2004) ⁹
A.1 Permanent Representatives Committee (Coreper) *	A.9 European Union External Action Committee (EUAAC) ¹⁰
▶ Part II	A.10 Committee for Civilian Aspects of Crisis Management (CivCom) ¹¹
▶ Part I	A.11 Economic Policy Committee ¹²
A.2 Economic and Financial Committee ¹³ (**)	A.12 Financial Services Committee ¹⁴
A.3 Employment Committee (EMCO) ¹⁵ (*)	A.13 Security Committee ¹⁶
A.4 Trade Policy Committee (TPC) ¹⁷ **	▶ Information on the EU Trade Policy Group (Information Task Force)
▶ Full Members	▶ Security Administration Group (SAG)
▶ Deputies	A.14 Working Party on Energy (WPE) ¹⁸
▶ Experts (GHS, Services and Investment)	
A.5 Political and Security Committee (PSC) ¹⁹ (*)	
A.6 Standing Committee on Operational Cooperation on Internal Security (COSI) ²⁰ *	
A.7 Social Protection Committee (SPC) ²¹ (*)	

COMMITTEES AND GROUPS ESTABLISHED BY COUNCIL DECISION	
A.16 Friends of the Presidency Group	GENERAL AFFAIRS
▶ Regulatory procedure with scrutiny (RPS)	B.1 Working Party on General Affairs
▶ Integrated Political Crisis Response arrangements	B.3 High-Level Working Group on Asylum and Migration ²¹
▶ Clause Implementation (IPCR/SCI)	B.4 Horizontal Working Party on Drugs (HDG) ²²
▶ Integrated Maritime Policy (IMP)	B.5 Working Party on Structural Measures
▶ EU Maritime Security Strategy (EUMSS)	B.6 Working Party on Outermost Regions
▶ Macro-Regional Strategies	B.7 Working Party on Atomic Questions **
▶ Valletta Summit on Migration	B.8 Working Party on Statistics ²³
▶ External Investment Plan/European Fund for Development (EIP/EFSD) ²⁴	B.9 Working Party on Information (***)
▶ European Defence Fund (EDF) ²⁵	B.11 Coordination Committee for Communication and Information Systems (CCCSIS) ²⁶ (*)
▶ Connecting Europe Facility (CEF) ²⁶	▶ CCCIS (TECH) ²⁵
COUNSELLORS/ATTACHES	B.12 Working Party on Codification of Legislation (***)
A.18 Counsellors/Attaches ³⁰	B.13 Working Party of Legal/Linguistic Experts (***)
	B.14 Working Party on the Court of Justice
	B.15 Working Party on the Staff Regulations
	B.17 Ad hoc Working Party on the follow-up to the Council conclusions on Cyprus of 26 April 2004 ²⁸
	B.18 Ad hoc Working Party on the Cooperation and Verification Mechanism in Bulgaria and Romania ²⁷
	B.19 Working Party on Enlargement and Countries Negotiating Accession to the EU
	B.21 Working Party on E-Law ²⁹ (***)
	B.23 Horizontal Working Party on Cyber Issues (Cyber) ^{30,31}
	B.24 Working Party on the 2030 Agenda for sustainable development (Agenda 2030) ³²
	B.25 Ad Hoc Working Party on the Multiannual Financial Framework (MFF) 2021-2027 ³³
	B.26 Horizontal Working Party on Enhancing Resilience and Countering Hybrid Threats ³⁴

COMMITTEES AND GROUPS ESTABLISHED BY COUNCIL DECISION	
ECONOMIC AND FINANCIAL AFFAIRS	JUSTICE AND FREEDOM
D.1 Working Party on Own Resources	E.1 Strategic Working Party on Migration ³⁵
D.2 Working Party of Financial Counsellors	E.2 Migration Working Party (MWP) ³⁶
D.3 Working Party on Financial Services	E.3 Visa Working Party (VWP) ³⁷
D.4 Working Party on Tax Questions	E.4 Asylum Working Party (AWP) ³⁸
▶ Indirect Taxation	E.5 Working Party on Frontiers ³⁹
▶ Direct Taxation	E.6 Working Party on Civil Law Matters
D.5 Code of Conduct Group (Business Taxation) ⁴⁴ (*)	E.7 Working Party on Terrorism
▶ Subgroup (external issues)	E.13 Customs Cooperation Working Party
▶ Subgroup (internal issues) ⁴⁵	E.14 Working Party on Cooperation in Criminal Matters ⁴²
D.6 High Level Working Party ⁴⁶	E.15 Working Party on Substantive Criminal Law
D.7 Budget Committee	E.16 Working Party on Civil Protection (PROCIV) ⁴³
D.8 Working Party on Combating Fraud	E.17 Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons [FREMP] ⁴⁴
D.11 Export Credits Group ⁴⁷	E.23 Working Party on Data Protection
D.14 Ad hoc Working Party on the Strengthening of the Banking Union	E.24 Working Party on External Relations Counsellors (JAEIX)
D.15 Working Party on Customs Union ⁴⁸	E.25 Coordinating Committee in the field of criminal matters (CATS) ⁴⁸
D.16 High Level Working Party of the Directors General of Customs ⁴⁹	E.26 Law Enforcement Working Party
	E.27 Working Party for Schengen Migration
	E.29 Ad Hoc Working Party on JHA Financial Information
	E.30 Working Party on JHA Information Exchange

COMMITTEES AND GROUPS ESTABLISHED BY COUNCIL DECISION	
ENVIRONMENT	COMPETITIVENESS (Internal Market, Industry, Research and Innovation)
J.1 Working Party on the Environment	G.1 Working Party on Competitiveness and Growth ⁵⁰
J.2 Working Party on International Environment Issues ⁷⁶	G.2 Working Party on Public Procurement
	G.3 Working Party on Intellectual Property
	▶ Patents
	▶ Copyright
	▶ Design
	▶ Trademarks
	▶ Enforcement
	G.4 Working Party on Company Law
	G.6 Working Party on Establishment and Services
	G.7 Working Party on Technical Barriers to Trade
	▶ Motor Vehicles
	▶ Construction Products
	▶ Dangerous substances
	G.12 Working Party on Competition
	G.13 Working Party on Research
	G.14 Joint Working Party on Research and Innovation
	G.21 European Research Area
	G.22 Working Party on Space
	G.23 Working Party on Consumer Policy
	G.24 High Level Working Group on Consumer Policy

COMMITTEES AND GROUPS ESTABLISHED BY COUNCIL DECISION	
EDUCATION/YOUTH/CULTURE/SPORT	LIST OF PREPARATORY BODIES WITH A FIXED CHAIR
K.1 Education Committee	I. Committees and Working Parties chaired by a representative of the High Representative of the Union for Foreign Affairs and Security Policy
K.2 Youth Working Party	A.5 Political and Security Committee (PSC)
K.3 Cultural Affairs Committee	A.10 Committee for Civilian Aspects of Crisis Management (CivCom)
K.4 Audiovisual Working Party	C.4 United Nations Working Party (CONUN)
K.5 Working Party on Sport ⁷⁷	C.5 Working Party on OSCE and the Council of Europe (COSCE)
	C.6 Working Party on Human Rights (COHOM)
	C.7 Working Party on Transatlantic Relations (COTRA)
	C.9 Working Party on Eastern Europe and Central Asia (COEST)
	C.11 Working Party on the Western Balkans Region (COWEB)
	C.12 Ad hoc Working Party on the Middle East Peace Process (COMEPP)
	C.13 Middle East/Gulf Working Party (MOG)
	C.14 Mashreq/Maghreb Working Party (MAMA)
	C.15 Africa Working Party (COAFR)
	C.17 Asia-Oceania Working Party (COASI)
	C.18 Working Party on Latin America and the Caribbean (COLAC)
	C.20 Working Party on Non-Proliferation (CONOP)
	C.21 Working Party on Conventional Arms Exports (COARM)
	C.22 Working Party on Global Disarmament and Arms Control (CODUN)
	C.25 Politico-Military Group (PMG)
	C.36 Nicolaidis Group ⁴¹ (*)

COMMITTEES AND GROUPS ESTABLISHED BY COUNCIL DECISION	
III. Committees and Working Parties chaired by the General Secretariat of the Council⁷⁹	TRANSPORT/TELECOMMUNICATIONS/ENERGY
A.13 Security Committee, and its sub-areas	H.1 Working Party on Land Transport ⁷²
A.20 Working Party on the United Kingdom ⁸⁰	H.2 Working Party on Shipping ⁷¹
B.9 Working Party on Information ⁸¹	H.3 Working Party on Aviation ⁷²
B.11 Coordination Committee for Communication and Information Systems (CCCSIS)	H.4 Working Party on Transport – Intermodal Questions and Networks ⁷²
B.12 Working Party on Codification of Legislation	H.5 Working Party on Telecommunications and Information Society
B.13 Working Party of Legal/Linguistic Experts	H.6 Working Party on Postal Services
B.21 Working Party on E-Law	H.7 Working Party on Energy ⁸¹ **

COMMITTEES AND GROUPS ESTABLISHED BY COUNCIL DECISION	
IV. Committees and Working Parties with elected/appointed chairs	
C.1 Working Party of Foreign Relations Counsellors (RELEX) *	F.1 High Level Group of Agriculture ⁸⁶
▶ Sanctions ⁸⁶	▶ Working Party on Agriculture Structures and Rural Development
C.2 Working Party on Public International Law **	▶ Agriculture and Fisheries
▶ International Criminal Court	▶ Agricultural Questions
C.3 Working Party on the Law of the Sea	▶ Agricultural Products
C.4 United Nations Working Party (CONUN)	▶ Common Agricultural Policy (CAP)
C.5 Working Party on Organization for Security and Co-operation in Europe (OSCE) and the Council of Europe (COSCE) (**)	▶ Strengthening of Controls
C.6 Working Party on Human Rights (COHOM)	▶ Working Party on the Production of Agricultural Products
C.7 Working Party on Transatlantic Relations (COTRA) (**)	▶ Organic Farming
C.9 Working Party on Eastern Europe and Central Asia (COEST) (**)	▶ Geographical Indications and Designations of Origin
C.10 Working Party on European Free Trade Association (EFTA) ⁸⁷ **	▶ Specific Measures
C.11 Working Party on the Western Balkans Region (COWEB) (**)	▶ Agricultural Products ⁸²
C.12 Ad hoc Working Party on the Middle East Peace Process (COMEPP) (**)	▶ Sugar and Honey ⁸³
C.13 Middle East/Gulf Working Party (MOG) (**)	▶ Animal Products
C.14 Mashreq/Maghreb Working Party (MAMA) (**)	▶ Working Party on Wines and Alcohol ⁸²
C.15 Africa Working Party (COAFR) (**)	▶ Forestry
C.17 Asia-Oceania Working Party (COASI) (**)	▶ Agricultural Questions
C.18 Working Party on Latin America and the Caribbean (COLAC) (**)	▶ Products of Processed Agricultural Products
C.20 Working Party on Non-Proliferation (CONOP) (**)	▶ Textiles
C.21 Working Party on Conventional Arms Exports (COARM) (**)	▶ Harmonized Organisms
C.22 Working Party on Global Disarmament and Arms Control (CODUN) (**)	▶ Residue Residues
C.25 Politico-Military Group (PMG) (**)	▶ Plant Breeders' Rights
C.36 Nicolaidis Group ⁴¹ (*)	▶ Genetically Modified Organisms (GMO)
	▶ Working Party of Chief Plant Health Officers
	▶ Working Party on Plant Health
	▶ and Inspection
	▶ Materials
	▶ Development Cooperation (CODEV) **
	▶ Disruption Group
	▶ International Development Conferences **
	▶ Convention / Commission on
	▶ Humanitarian Aid and Food Aid (COHAFA)
	▶ PM Affairs
	▶ Working Party of Chief Veterinary Officers ⁸⁸
	▶ Working Party of Veterinary Experts
	▶ Ethnic Health
	▶ Working Party on restrictive measures to combat terrorism (COMET) ⁸⁹ **
	▶ Potsdam Group
	▶ Ad Hoc Working Party on the Neighbourhood, Development and International Cooperation Instrument (MFF NDICI) ⁴³
	E.22 Coordination Working Party
	▶ Food and Agriculture Organization (FAO)
	▶ Organisation for Economic Co-operation and Development (OECD)
	▶ United Nations Economic Commission for Europe (UNECE)
	E.23 Codex Alimentarius Working Party ⁹¹
	E.24 Working Party on External Fisheries Policy
	E.25 Working Party on Internal Fisheries Policy
	E.26 Working Party of Directors-General of Fisheries Departments



With over 150 different preparatory bodies and working groups, the Council is a vast legislative machinery bringing together Member State representatives based at countries' Permanent Representations or flown in from capital.

While contentious and political topics do also get discussed by ministers,¹²⁹ these discussions are rarely detailed and most files are adopted as an 'A-item', by unanimous vote. Even where deep legislative discussions are held, they will concern only a few elements of any given law, as the preparatory bodies will already have ironed out most other issues at lower levels, in efforts to keep the agenda of the Council as light as possible.

As the European Ombudsman notes, "preparatory bodies have a decisive influence on the final legislative text. The discussions in all these preparatory bodies are therefore a crucial part of the EU legislative process."¹³⁰

In principle, civil servants within the preparatory bodies conduct their work under the political guidance of ministers, in that the work conducted through ministries is expected to flow from the priorities of the political leadership. However, an intact political accountability within the ministry does not preclude the need to conduct Council negotiations on legislative files transparently, as

required by the Treaties and EU law. In the case of the European Parliament, amendments from various political groups and even individual MEPs are published for all to see, long before public votes on the amendments and the draft legislation as a whole are held. However, the Council insists it is within its prerogatives to organise its internal procedures in exercising its legislative work.¹³¹

The proliferating tangle of preparatory bodies is difficult to describe and keep an overview of, also due to their widely varying roles, substance and composition. Since its members are strictly speaking representatives of the Member States, the composition of preparatory bodies are not published. Rather, the Council has to disclose the list of preparatory bodies, which is regularly updated.¹³²

In view of the vast differences between the practices adopted by the various preparatory bodies, it would be all the more important to produce Council-wide guidance on what kind of documents must be produced by the Council

Secretariat before, during and after preparatory bodies, so as to ensure a uniform level of transparency. This also holds the promise of improving the operation of preparatory bodies and increasing the public's ability to follow and understand the workings of the Council. We are convinced that civil servants in the preparatory bodies themselves will profit from this increased availability of information.

As things stand, based on three preparatory bodies analysed by the European Ombudsman, each had a different approach. Some drafted detailed 'outcomes of proceedings', and the same goes for agendas, accompanying papers, non-papers, summary records, compromise texts, notes to delegations, etc.¹³³ Each preparatory body has their own 'tradition' as to whether or not to record the identity of Member States making suggestions on any draft legislation under discussion. What documents to produce should flow from the nature of the file at hand, and not be at the discretion of each of the roughly 150 preparatory bodies.

A much better way to organise legislative transparency at working party level would be to collect and display legislative documents based on the procedural file they belong to, so that anyone with an interest in a particular draft legislation can easily find the documents and preparatory bodies related to it. We hope that the joint legislative database to be introduced pursuant to the Interinstitutional Agreement on Better Law-Making¹³⁴ will enable this, based on the positive experiences with the European Parliament's legislative observatory.¹³⁵

As regards the documents that the preparatory bodies work with – the Council's agreed version of draft legislation as facilitated by the Presidency, including the various information notes, suggestions, written input coming from the delegations and other preparatory bodies – all of these documents have to be regarded as legislative documents, understood as "documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States".¹³⁶

Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents further provides that "[i]n particular,

documents drawn up or received in the course of a legislative procedure shall be made directly accessible",¹³⁷ via a public document register. As noted by the Ombudsman in her strategic inquiry into Council legislative transparency, legislative documents "must be made proactively available by the 'EU legislator', so as to ensure the widest possible public access,"¹³⁸ with the concept of the 'widest possible public access' further elucidated in case law.¹³⁹

It is therefore clear that, for all legislative documents, the highest transparency standard is required, specifically, proactive publication in the online document register. The exceptions to this rule are exhaustively spelled out in Article 4 of the ATD-Regulation, and even where an exception applies there is the possibility for an 'overriding public interest' to overturn the exception to disclosure. As noted by the Ombudsman: "Given the clear public interest in disclosing such documents so that citizens can effectively exercise their right to



While the Council proper held only 83 meetings in 2019, it outsources the overwhelming majority of legislative work to its preparatory bodies, where civil servants amassed 3,681 meetings that year. Unlike the Council, or indeed Parliament's Committees, Preparatory bodies meet behind closed doors.



While the Court of Justice of the EU ordered the Council to no longer black out the identity of Member States in documents regarding legislative deliberations...

scrutinise the legislative process, only rarely will any one of these exceptions justify non-disclosure of legislative documents.”¹⁴⁰ She further points to Court of Justice case law, according to which the exceptions in Article 4 must be weighed against the right of the public to follow the legislative process, noting this is “clearly of particular relevance where the Council is acting in its legislative capacity”.¹⁴¹

In summary, we note that transparency standards for legislative business is high. Council preparatory bodies, which do the large majority of Council legislative work, do not share much documentation beyond agendas. In fact, as noted in the previous section on Access to documents, the Council has a systematic practice of marking legislative documents as ‘LIMITÉ’ for as long as the legislative process is ongoing. This appears to be happening in violation of the exceptions under which legislative documents may be kept from public view, given that the Council Secretariat routinely releases thousands of documents via ATD-Regulation, which foresee the very same exceptions to disclosure.

Combined with the lack of an equivalent of the legislative observatory, as provided by the European Parliament, it is not currently feasible to properly follow the legislative deliberations within the Council.

Member State positions

The Council publishes the results in the final votes to adopt legislation, including the positions of individual governments.¹⁴² But this is mostly cosmetic, as by the time a vote is held on the entire legislation, all the compromises have already been struck. In most cases, Council votes lead to unanimous approval, as the interests and preferences of each delegation have been taken account of in some form, leading to adoption by consensus. The nature of the trade-offs and the parts of the law that one’s own government supported or resisted is unknown. There are no votes paragraph by paragraph, as is the case in the European Parliament, and if so, those preparatory votes are not made public.

Why is it so important to access the legislative documents prepared by the Council preparatory bodies? The Council already publishes the General Approach or its first reading position, depending on whether Trilogues are held or not. This constitutes the version of the draft law at hand that the Council could agree on, which amalgamates the positions of all 27 Member States, on the basis of which it will negotiate the final version of the law with the European Parliament. Therefore, the public has access to the position of ‘the Council’ understood as a unitary institution.

However, the absurdity of this approach to legislative transparency becomes clear with a simple comparison to the European Parliament. Clearly, citizens would not be content to be faced merely with the final product of the legislative deliberations between 700+ Members of the European Parliament, without ever finding out what was the position of the various Political Groups, national parties and individual MEPs. Granted, compromise amendments are still negotiated by Political Groups behind closed doors. However, the public knows exactly what the original position of each group was, before they agreed on a

compromise that integrates the various positions. The European Parliament then holds public votes on each and every amendment, paragraph by paragraph. How else could they hold their representatives to account at the next election?

The same applies to the Council. As an EU institution, the Council is unaccountable to its citizens. Only its constituent governments can be held to account by voters, via national elections or their national parliamentary representatives. But no accountability relationship exists between citizens of one country and the other national governments, or indeed with the Council as such. It is therefore not optional to know more or less what national governments are up to in the discussions in Council preparatory bodies. Quite on the contrary, it is absolutely crucial to know exactly what positions individual national governments hold within the Council.

By extension, it is not enough to know whether government X generally supports a legislative proposal received from the Commission. It is also necessary to know whether this government supports changes and amendments brought up by other governments; it is necessary to know whether it supports specific parts of the legislation, or works together with other governments to amend those. Much like in the European Parliament, where every single amendment has to be voted on in public, citizens must be in a position to know which specific provisions its government worked in favour of, or against. Long before there is a vote or general agreement on the final text as a whole.

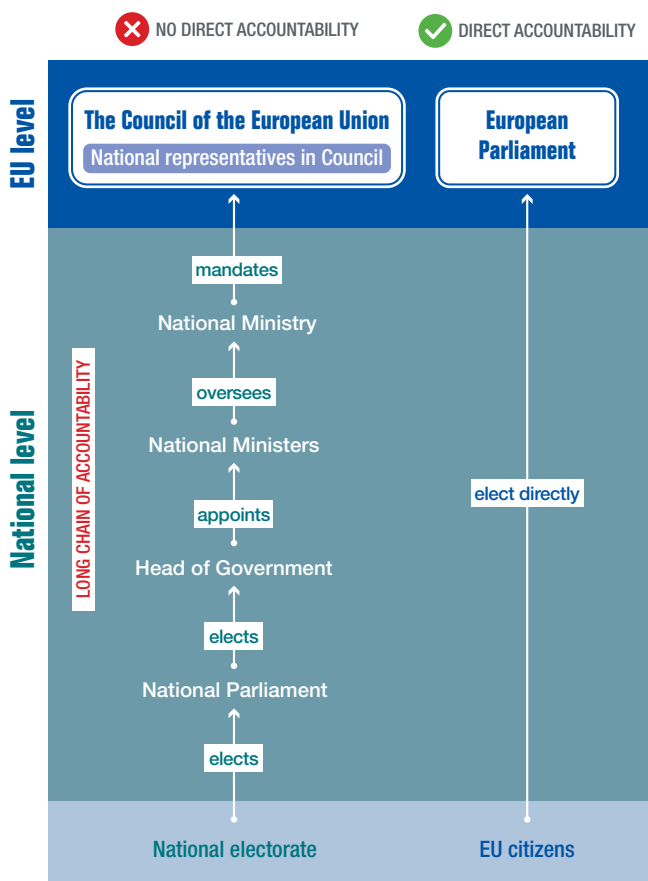
An example may be illustrative. The previously cited draft legislation on country-by-country reporting of taxes paid by multinational companies has been stuck in Council since 2016. In late 2019, it seemed as if there may be a majority within the Council that could enable the adoption of a General Approach via a qualified majority vote. This was not the case in the end, but we do not know, to this day, who is in favour and who is against. Via the work of investigative journalism, a general picture has emerged. But this is not sufficiently clear to lead to media reports in the blocking Member States, perpetuating the lack of accountability. To be very clear: the citizens of Germany, to take one example, do not know for a

fact what position their government has taken as regards increasing transparency of taxes paid by multinational companies.¹⁴³ This creates an obvious accountability gap, given that the government is not held to account for its actions. Attempts to publish the legislative documents containing governments' positions on the file have also been blocked, as we have noted in the section on Access to Documents.

This problem has, of course, been recognised in the past, leading to access to document requests and litigation. The Council had released a document on progress in legislative deliberations, pursuant to an access to document request, with the identity of Member States blacked out, a decision that was challenged in Court. In its 2013 ruling on *Council v Access Info EU*, the Court of Justice emphasised



...the Council adapted its approach in 2014, and may or may not write down the identity of Member States taking the floor in legislative deliberations. If you do not write down the name of a country, there is no need to blacken it out, after all.



Direct accountability vs indirect or fragmented accountability. The Council is farther removed from citizens than the European Parliament, a detail that is often lost on national governments.

that the access to documents regulation aims “to ensure public access to the entire content of Council documents, including, in this case, the identity of those who put forward proposals”.¹⁴⁴

While the Council’s rules of procedure preclude the General Secretariat from making accessible documents that contain Member State positions while discussions on a legislative file are ongoing,¹⁴⁵ the Council Secretariat has to anyhow comply with the ruling, and duly justify any exceptions. However, as the example above shows, there are still circumstances where governments invoke these exceptions to protect the internal decision-making processes, claiming that the ‘free and frank’ discussion within the working group would, if published, “severely affect the negotiating process and diminish the chances of the Council reaching an agreement. Disclosure of documents would therefore seriously undermine the decision making-process of the Council.”¹⁴⁶ In view of previous judgments, this is unlikely to hold up in Court:

disagreements between governments, even if they are free and frank, should hardly keep them from finding a compromise. On the contrary: public pressure on the substance of the file, which is of high public salience, would likely contribute to finding a solid majority.

Even more alarming than the persistence of exceptions to the Court’s rulings in practice is, however, the formal response of the Council. This came in the form of a policy review on whether minutes in preparatory bodies conducting legislative work should henceforth even record the identity of governments making proposals.¹⁴⁷ This was based on the conclusion that the 2013 ruling did not constitute an obligation to record the positions of individual Member States, and that the Council cannot disclose the identity of governments making legislative suggestions if it does not put such information in writing. The decision was therefore taken that Member States’ identities will be revealed if deemed “appropriate”.¹⁴⁸ This means the Council may or may not record the information that the Advocate-General of the Court called the “minimum and essential item of evidence” to enable “political accountability”.¹⁴⁹ Of course, Council services, the Commission and Member State representatives will still draft informal minutes for their internal use, in which they will note down the identity of Member States – but this is of little use for public transparency.

In summary, the maximum discretion enabled by this policy leads to an arbitrary system in which the identities of Member States are likely to be recorded only when this is deemed sufficiently uncontentious. This is the case even though the Council’s own services have helpfully compiled the numerous ways in which EU Treaties, secondary legislation and case law require legislative transparency, noting inter alia that “[p]roposals for amendments made by MS are part of the normal legislative process”, “Trilogue tables form part of the legislative process”, and that for an exception based on the need to protect the decision-making process, “the reality of such external pressure must, however, be established with certainty, and evidence must be adduced to show that there is a reasonably foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure”.¹⁵⁰

We have tried to understand how the preparatory bodies determine whether to properly record deliberations. According to our interviews, held in 2020, the positions of Member States are not recorded in the majority of cases. Many working parties record no minutes anyway, in particular in the case of working parties that meet on a weekly basis. In this case there are only the informal minutes that any participant may prepare – including participants and the Commission. The decision as to whether to record identities or not lies, in practice, with the Presidency; however, there are entrenched traditions within the working parties themselves. In many cases, the Presidency will consider that it is necessary to make a report including the positions of delegations only when the file goes to Coreper or the Council. At Coreper too, a legislative report will likely only contain information on whether positions have changed, but without identifying the Member State.

The 2017-18 special report by the European Ombudsman confirms our impressions, noting that “identities of Member States that take positions in preparatory bodies” are recorded “only in some cases”, whereas in other cases reference is only made to unnamed delegations.¹⁵¹ An Ombudsman Decision in 2020 underscores that little has changed in the meantime. In an investigation by the Ombudsman following a complaint related to fishing quota negotiations, the Council confirmed that Member State positions were not recorded by the working party, but that the Secretariat was producing a document that contains these positions, but which does not constitute formal minutes. The centrality and weight that this document has in the proceedings can be gleaned from its name, as it is commonly known as “the bible”. This is updated multiple times as negotiations evolve. The Ombudsman took the view that this document should be published proactively,¹⁵² and emphasised that proactive transparency is even more important in cases concerning the environment, as they fall under the Aarhus regulation, which further restricts any exceptions that can be made with reference to the ATD-Regulation.¹⁵³ Indeed, in view of the ‘tragedy of the commons’ applicable to such economic negotiations with a high impact on the environment, transparency is required to ensure rational outcomes prevail.¹⁵⁴

Nevertheless, according to the Council's current rules of procedure, even after the legislative file is adopted, governments may ask that documents reflecting their position may not be published.¹⁵⁵ In 2016, the Dutch Presidency suggested that the Council rules of procedure should be amended to reflect the Court rulings and current practice,¹⁵⁶ something the Secretariat had also suggested in 2014.¹⁵⁷ However, it seems that Member States are reluctant to open the procedure because disagreements on how to amend it will be virulent. Nevertheless, it should be noted that amendments to the Council's rules of procedure can be adopted by simple majority, and so cannot easily be blocked.¹⁵⁸ However, we are told this is ‘politically’ very difficult and therefore not even attempted, as Presidencies would seek consensus. This leads to a situation where the Secretariat has to remember all the areas in which practice and case law diverge from the stated rules.

Drafting of legal text to amend legislative proposals is done by the Presidency, with the support of the Council Secretariat and legal service, without systematic written input from Member State delegations. Due to the way the Presidency has to ‘guess’ the feasibility of compromises from the general exchange of views in the room, instead of every delegation submitting amendments, as in the case of the Parliament, it is not always crystal clear which governments support this or that paragraph, or whether they hold an opinion at all. That is not a problem in so far as they do not have to express themselves on each paragraph. However, when the Presidency suggests new language and then solicits delegations’ views, then these positions have to be recorded, along with the identity of the Member States. It is, at its most basic, a matter of public record that the positions of Member States be recorded, even if they are not to be made public until after the legislative procedure is completed.

Currently, it is simply left to the ‘tradition’ of each preparatory body as to whether it records the identity of Member States making suggestions or expressing preferences. The only safe assumption for Member States to operate on is that documents are liable to be released eventually, at the latest after the conclusion of the legislative procedure. Written comments solicited from delegations will also generally be liable to be disclosed.

The Ombudsman condemned the fact that the Council does not systematically record the identity of Member States' positions as expressed in preparatory bodies as 'maladministration',¹⁵⁹ the sharpest criticism in the Ombudsman's toolbox. As she noted, "this commitment [to proactive publication] means little, if Member States' positions are not even recorded appropriately in the first place".¹⁶⁰

Reform efforts

A troubling picture emerges on legislative transparency in the Council. Not only is it failing to comply with the high transparency standards set out in the Treaties, legislation and case law, it actively adopted a policy that allows it to, in many cases, circumvent the possibility that citizens find out what positions their government is defending *in their name*.

This is aggravated by the lack of transparency in the Trilogue negotiations between the Council, Parliament and Commission, which in turn circumvent the high transparency provisions that the Treaties and EU law set for legislative

deliberations, as we show in our case study on Trilogues.¹⁶¹

Coming from a tradition of intergovernmental, multilateral diplomacy behind closed doors, the Council has come some way in improving transparency over time, and our interlocutors expressed optimism that, for legislative files in particular, the Council was slowly becoming a more normal legislative chamber. In particular, in the General Secretariat of the Council, we find currents in favour of increased legislative transparency, as seen in a 2018 draft policy paper on legislative transparency, which notes the advancement of case law, technology and civil society pressure leading to the need to have a fresh look at the issue and conducting "a horizontal review of the Council's policy on legislative transparency".¹⁶² With little to no public reporting on these initiatives within the Council, we would like to acknowledge a wide-ranging series of access to document requests by colleagues at the Corporate Europe Observatory for unearthing these documents.¹⁶³

The milestone approach would see legislative documents, while still issued as 'LIMITÉ', published proactively at each milestone. In other words, they would be published after the adoption of the



It is precisely the Council's lack of accountability at the European level which enables the institution to ignore persistent demands for reform. Its accountability is fragmented into 27 national spheres.

first General Approach (the first stage at which the Council formulates a common position on a draft law), as well as publication of four-column documents after consideration by Coreper or Council, i.e. after a compromise is found during a cycle of negotiations at working party level. This would allow negotiations to happen behind closed doors during the negotiations in Council, but open up delegations' positions to public scrutiny before going into Trilogues and before adopting a final law – although it would not create sufficient transparency in cases where the adoption of a General Approach is blocked. The Secretariat praised this approach for its built-in flexibility, policy coherence and greater standardisation.

The necessity for a new approach became clear when, following the 2018 *De Capitani v European Parliament* case, the Parliament began publishing all Trilogue documents requested, whereas the Council released 87 per cent of requested documents.¹⁶⁴ The milestone approach is seen as the compromise between the stance of the Court and the Council's goal to maximise the 'space to think' during which secrecy appears acceptable to the Court.¹⁶⁵ The milestone approach would notably have led to documents containing positions of Member States (if they are recorded) to be published at multiple stages before the adoption of the law, even if this adoption occurs at first reading.¹⁶⁶

This was a thorough effort of the Council Secretariat to promote a better understanding of the legal requirements to legislative transparency,¹⁶⁷ and an overview of current practices as regards publication of documents in a typical legislative procedure,¹⁶⁸ including a questionnaire for all Permanent Representations,¹⁶⁹ and a thorough presentation of prepared options to improve proactive publication of legislative documents.¹⁷⁰ Based on these consultations,¹⁷¹ Coreper was asked by the Secretariat in 2019 to decide whether to pursue this proactive approach, or whether to abandon it in favour of a less comprehensive approach to reform, or drop it altogether.¹⁷² Following a further discussion of the topic at an ambassadors-only informal Coreper meeting in July 2020, the current version of the document ended up devoid of most meaning, with no mention of the words 'proactive' or 'milestone'.¹⁷³ The list of documents to be published in the course of the legislative procedure is a list of documents that are already being



Ambitious transparency reforms are stuck, including wide-ranging reform proposals from the Council Secretariat, which are routinely watered down by national governments.

published, as the list itself emphasises for most points, except for the systematic publication of a Council General Approach following its adoption. Indeed, previously, almost all negotiating mandates adopted at Coreper instead of Council were, incredibly, still published as *LIMITÉ* documents.¹⁷⁴ Even the progress reports working parties submit to Coreper may still be shielded from public view if one or more delegations so requests. The Council bases this on Article 6(1) RoP, in spite of the fact that EU Treaties, secondary law and case law all trump internal Council rules of procedure.

As regards this latest effort to reform the Council from within, we can note with concern that the pace of progress, if any, is glacial. The unwillingness of the Council to even begin negotiations on the many changes required to its rules of procedure shows an institutionalised reticence to increase transparency. This cannot be excused by pointing to the fact that national ministers are members of the executive back home, or that civil servants are not used to the transparency requirements that come with their work in a legislative chamber.



A coalition of ten EU Member States – Belgium, Denmark, Estonia, Finland, Ireland, Latvia, Luxembourg, Slovenia, Sweden and the Netherlands – has in January 2020 submitted a ‘non-paper’ containing a series of very important improvements to Council and Trilogue transparency.

Additionally, national politicians still hold the ‘interpretative hegemony’ in their domestic media landscape and political discourse, at least if compared to the reach of EU-level institutions and politicians. This provides the often lamented but apparently irresistible opportunity to avoid taking full ownership of decisions reached at EU level when speaking to domestic audiences. Over time, this is shown to erode legitimacy and support for the EU itself. It is too late to simply call on national politicians to take ownership of their political system, which includes the EU level. What is required are structural incentives. Legislative transparency will increase the need for national politicians to explain why they support the compromises and trade-offs reached in the Council.

The severity of the problem should not be underestimated. If more and more actors describe the Council as a ‘black box’,¹⁷⁵ this should ring

alarm bells for one of the most powerful EU institutions. Since the 1980s, the EU has been grappling with the question of how to organise accountability mechanisms to overcome a democratic deficit that is typical for supranational institutions, as they acquire more powers over time. While we have identified many improvements that can still be made for the Commission and Parliament, they are generally more transparent than most national equivalents and there are no fundamental questions as to their democratic accountability. For the Council, however, the lack of transparency on legislative decisions, coupled with the fact that citizens can only hold their own government to account, leads to an accountability gap and therefore a democratic deficit.

The lack of direct accountability of the Council is of course one of the main reasons why it has proven so difficult, over the years, to get the Council to change its ways. Its accountability is fragmented

into 27 distinct political spaces, each with its own national discourse. In principle, 27 different national parliaments and publics would need to put Council reform on the agenda at the same time, if the Council does not set this agenda itself. This fragmentation leads to inertia, as the Council knows all too well, especially in policy areas that require unanimity.

To change the rules of procedure, a simple majority is required.¹⁷⁶ To date, a coalition of ten EU Member States – Belgium, Denmark, Estonia, Finland, Ireland, Latvia, Luxembourg, Slovenia, Sweden and the Netherlands – has come together as an informal transparency coalition. January 2020 saw the latest update to their “non-paper” by the title of ‘Increasing transparency & accountability: The key to a better functioning of the Union’.¹⁷⁷ This is up from six Member States that issued a similar document in June 2019.

With regard to the title of the non-paper, it is correct to note that increased transparency of the Council holds the key to increased transparency and accountability of the EU. Additionally, this accountability will likely increase the pressure on the Council to come up with solutions, rather than strengthen its blockade on key files. The measures suggested by the group include a “more uniform recording of the main political lines of discussion within the Council and national statements”, to be included in the note accompanying the Council’s agreement before entering Trilogue negotiations (the General Approach).

This would amount to summarising the national positions and negotiations leading to the Council’s position. Although it remains to be defined what “milestone documents” are in the context of Trilogue negotiations, this reflects the need to update the public about the substantive progress by publishing legislative documents in line with the law. Finally, legislative transparency cannot rise to the legally required level if the Council does not change its practice with regard to restricting access to documents via the LIMITÉ status.

BOX 3: Suggestions in the January 2020 non-paper signed by 10 Member States

- ▶ “A more uniform recording of the main political lines of discussion within the Council and national statements in the note accompanying the General Approach”
- ▶ “Increase openness in Trilogue negotiations by systematic publication of legislative milestone documents of the Council”
- ▶ “The guidelines for LIMITÉ marking should be updated. Furthermore, a regular review of the LIMITÉ status of documents and a yearly review of the application of these guidelines should be established.”

The group of states further calls for the implementation of the joint legislative database mentioned above “as soon as possible”, an update to the ATD-Regulation, which dates back to 2001, and an increase of transparency in Trilogues by publishing, in advance, dates and annotated agendas of Trilogue meetings, as well as the dissemination of final outcomes, including joint press releases. Similar proposals are spelled out in greater detail in a paper submitted by the Dutch delegation to the Conference of Parliamentary Committees for Union Affairs of Parliaments of the EU (COSAC) in Tallinn in 2017.¹⁷⁸

These are all good measures that should make for a good starting point for reform, as soon as a majority of EU Member States agree, although hopes are not high¹⁷⁹ following Finland’s attempts to put Council transparency on the agenda during its Council Presidency in 2019.¹⁸⁰

The European Parliament regularly calls on the Council to increase its legislative transparency. The most recent resolution to this end endorsed the Ombudsman Special Report and compared preparatory bodies to parliamentary committees, while criticising the lack of proactive publication of legislative documents and the limited user-friendliness of the document register. It adds that

“references to professional secrecy cannot be used to systematically prevent documents from being registered and disclosed”,¹⁸¹ and further encourages the Council to make more frequent use of the possibility of majority voting, as this is a “fundamental characteristic of democratic decision-making”.¹⁸²

It further “deems it unacceptable that the positions taken in the preparatory bodies of the Council by individual Member States are neither published nor systematically recorded, making it impossible for citizens, media and stakeholders to effectively scrutinise the behaviour of their elected governments,”¹⁸³ while noting that “lack of information also hampers the ability of national parliaments to control the actions of national governments in the Council, and enables members of national governments to distance themselves in the national sphere from decisions made at the European level which they shaped and took themselves.”¹⁸⁴

NATIONAL PARLIAMENTS

Of course, the main duty of holding national governments to account falls to national parliaments. In 2017, the Chairpeople of 26 EU Affairs Committees in national parliamentary assemblies co-signed a letter to the Presidents of the Council, European Council, Eurogroup and the Commission, including the view “that the Council, in particular, regularly violates EU transparency regulations” and recommending that “documents must systematically be made public without delay”, while “the Council must adopt more specific and detailed rules regarding reporting on legislative deliberations”.¹⁸⁵ They also call for a formalisation of the Eurogroup, which as an “informal” Council formation of euro area only finance ministers is particularly difficult to capture.¹⁸⁶

The role of national parliaments in the EU has increased steadily, with Protocol No. 1 to the Lisbon Treaty giving substantial information rights to national parliaments, as well as encouraging formal interparliamentary cooperation. In holding their governments to account over their legislative action

in Brussels, however, they too require access to Council documents, in addition to the possibility of holding hearings before and after Council meetings. However, national rules give rise to significant power imbalances when it comes to the prerogatives of national parliaments.¹⁸⁷

Most national parliaments do not have more access to Council documents than the general public. Where they do, it is often enough national constitutional court rulings that strengthen their powers, enabling German and Austrian legislatures to access all Council documents, for example, although they may not cite from them. Measures of the power of national parliaments on EU decision-making vary, but the parliaments of Denmark, Finland, Sweden, Austria and Germany are seen as stronger, whereas those in Belgium, Greece, Cyprus, Luxembourg, Portugal and Spain are seen as weakest.¹⁸⁸ However, even strong parliaments do not systematically hold their ministers to account,¹⁸⁹ as to do so they would need to make use of their right to information, take an active interest in upcoming decisions and hold hearings with the minister before and/or after Council meetings.

The struggle within the Council for increased transparency is an enduring classic,¹⁹⁰ giving way to a culture of reluctance to interpret the EU Treaties and transparency regulation in a more liberal light. What is required is a cultural shift away from a multilateral diplomatic forum or intergovernmental body, and towards the self image of a more political, parliamentary body. Even if the civil servants and ministers in the Council do not see themselves as the second chamber of the EU’s legislature, the powerful role accorded to it increases the transparency standard that citizens can expect of it.

More and more Member States, national parliaments, EU institutions, academics, civil society and citizens at large are realising the extent of the problem and the damage it does. We hope that a critical mass can finally come together to fix the obvious, structural problem at the heart of the EU’s legislative machinery. Re-establishing Council accountability will greatly contribute to fixing the problems of EU governance across the board and deliver better policies to the benefit of the public.

ETHICS RULES

Very different regimes exist for the various groups of people operating in the Council. As in the Parliament and Commission, there is a clear distinction between the 'Members' of the institution and the administrative staff. However, in the case of the Council, the notion of member is very diffuse, as unlike in the Commission or Parliament, representatives of Member States are not salaried by the Council. Formally, the Council is composed of ministers, but in practice, it encompasses all the staff at Permanent Representations who regularly partake in preparatory bodies, as well as national ministerial staff and state secretaries who occasionally come to Brussels for such meetings.

This section will therefore look into rules applicable to Council staff, rules applicable to the representatives of Member States and finally take stock of the integrity rules employed by Council Presidencies, as well as a brief look at the case of the President of the European Council.

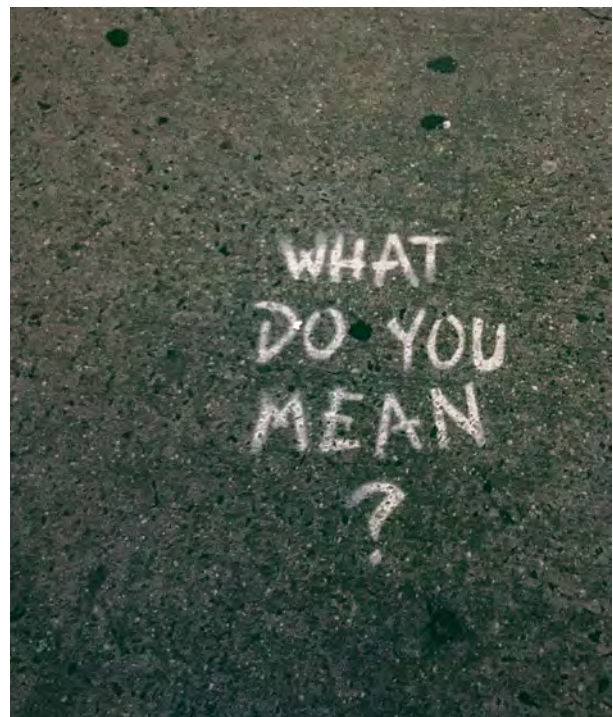
It is notable that the Council as a whole has never "performed a complete risk assessment in the field of ethics to date", as pointed out by the European Court of Auditors in a special report in 2019 focusing on ethics regulation at the Commission, Parliament and Council.¹⁹¹

EU Staff Regulations

Staff at the General Secretariat of the Council are covered by the EU Staff Regulations, including its integrity provisions. This includes the requirement to file ad hoc conflicts of interest when they arise, and make a declaration of financial interests upon recruitment,¹⁹² including the need to disclose the employment of a spouse.¹⁹³ The European Court of Auditors points out this relies on the ability of staff to recognise their own (potential) conflicts of interest. The auditors could not verify whether ad

hoc declarations of interest are cross-checked, e.g. with open source information searchable on the internet.¹⁹⁴ Council staff may not engage in outside activities without permission,¹⁹⁵ although this is capped at €5,000 per year even with permission.¹⁹⁶ Rules are a bit stricter on seconded national experts (SNEs), who are required to act in the interests of the Council¹⁹⁷ (not the Union, as foreseen by the Staff Regulations and the GSC Guide to Ethics and Conduct) and may not undertake any outside activities.

Council staff may not accept gifts without the permission of the institution,¹⁹⁸ although according to the European Court of Auditors guidance, this is not clear enough. Gifts up to €50 may be accepted (e.g. lunch or dinner invitations).¹⁹⁹



Apart from the small Council Secretariat which facilitates the workstreams and meetings, the Council and its preparatory bodies are composed of national representatives who are not bound by common EU ethics rules.

Under the Staff Regulations, staff are subject to post-employment rules. In the first two years after leaving the Council, they need to notify the Council if they intend to work in a policy area that they worked on during the last three years at the Council, an obligation of which staff are made aware by signing a declaration upon leaving the service.²⁰⁰ The Council may impose conditions or prohibit this employment. For senior officials,²⁰¹ the Regulation foresees a standard 12-month ban on lobbying for matters previously under their responsibility,²⁰² with a recent Council Decision promising close scrutiny of the implementation of this ban.²⁰³ Like every EU institution, the Council has to report on senior staff leaving the service, which are posted online.²⁰⁴ However, the last such case goes back to 2016,²⁰⁵ likely in view of the smaller number of staff in comparison to the Parliament and Commission.²⁰⁶

Breaches of the Staff Regulations entail disciplinary procedures,²⁰⁷ although proceedings by the Disciplinary Board of the Council remain secret.²⁰⁸

Generally, the approach of the Council to ethics appears to be a minimalist one. The rules from the Staff Regulations are spelled out in the 'Code of good administrative behaviour for the GSC and its staff in their professional relations with the public'²⁰⁹, which, however, stems from the year 2001.

More up to date, and even more minimalist, is the Council's 'GSC Guide to Ethics and Conduct',²¹⁰ which runs to less than two pages. Shorter rules guarantee clarity and a quick overview. However, they also lack detail, making them look like somewhat of a box-ticking exercise.

This minimalist approach is reflected in a concerning staff survey by the European Court of Auditors, with only 40 per cent of Council staff reporting good knowledge of the ethical framework and 10 per cent reporting to have never heard of it.²¹¹ The Parliament has even lower awareness rates, although this is partially explained by the high turnover in staff due to MEPs and their assistants changing. In the survey, 70 per cent of staff criticise that "ethics guidance that their institutions provide is not specific and is not based on real-life examples",²¹² which we can confirm with a view to the above-mentioned documents.

The European Anti-Fraud Office (OLAF) has the right to investigate any alleged fraud, corruption or other illegal activity by Council staff, including the right to immediate access to Council premises and documentation.²¹³ This is not extended to the Permanent Representations of the Member States to the EU.

WHISTLEBLOWING POLICY

In line with the EU Staff Regulations, since 2014 the Council is obliged to set up an internal whistleblowing policy.²¹⁴ This happened in February 2016 with the Decision of the Secretary-General of the Council adopting internal rules for reporting serious irregularities Procedures for the implementation of Articles 22a, 22b and 22c of the Staff Regulations and 66.8 of the Financial Regulation.²¹⁵

The whistleblowing policy allows staff to either report through the normal channels (their direct hierarchy) or directly to OLAF,²¹⁶ the EU's Anti-fraud Office.²¹⁷ However, the rules only apply to Council staff and seconded staff, although any external staff working on Council premises are also encouraged to make use of the procedures.²¹⁸ Protections are spelled out,²¹⁹ and include protection of the identity. This is emphasised so as to avoid anonymous reporting, although the latter is nevertheless mentioned as an option, which is in line with international best practice.²²⁰ However, staff are encouraged to seek confidential guidance and support if they are unsure.²²¹

Staff are further reassured that promotion exercises will be shielded from adverse consequences, and that anyone taking retaliatory actions against whistleblowers will be penalised. The option to be moved to a different department is also offered, although this seems like a punishment for the person making the report.

The conditionality attached to the protection – which will only come if the report is 'reasonable' and 'honest' – does not help to reduce the impression that reporting may remain risky. Reports that are judged to be frivolous or malicious by the Council carry the threat of disciplinary measures.²²²

This has to be measured against the fact that staff in a position to report serious irregularities may require comprehensive and credible reassurances to take the leap into the unknown and report irregularities by their superiors. The staff survey by the European Court of Auditors finds that just over half of Council staff would feel safe in reporting ethical issues, but only a third believe that people making such reports would be protected.²²³

Nevertheless, protections should be improved for external persons, in view of their heavy footprint on the work of the Council. Generally, the whistleblowing policy should be brought into line with the much more comprehensive coverage, reporting channels and protections of the EU Whistleblowing Directive that the Council and the European Parliament adopted in 2019.²²⁴

Member State representatives

At EU level, apart from Council rules on document secrecy,²²⁵ no integrity rules are in place for national ministers and national civil servants working within the Council. In particular, Member State representatives are not bound by the EU Staff Regulations, nor by the Council's Rules of Procedure. They are governed by national law, meaning provisions are uneven across the 27 Member States.

A recent study notes the uneven provisions applicable to the management of conflicts of interest for heads of state and government, ministers, and other high-ranking officials across EU countries.²²⁶ As noted by the European Court of Auditors, “[n]o assurance exists as to whether national requirements cover all the necessary elements and relevant risks”.²²⁷ An interesting case in this regard are questions on whether the Czech Prime Minister controls a business conglomerate which received significant amounts of EU funds, which could constitute a conflict of interest. While repeated assessments by the European Commission indicate this to be the case,²²⁸ what is notable is that these assessments mostly base themselves on national legislation,²²⁹ as no common standards exist on what constitutes a conflict of interest for Council members.²³⁰

The Treaties do, however, foresee explicit immunity for Member States' representatives, their advisers and technical experts “in the performance of their duties and during their travel to and from the place of meeting”.²³¹

Minimum standards can perhaps be expected based on the objective of a public administration that is open, accountable and free of corruption as laid down in the European Charter of Fundamental Rights, in line with the public's right to good administration,²³² and the EU Treaties' guarantees on institutional openness.²³³ The five non-binding Principles of EU Civil Service drafted by the EU Ombudsman also include integrity.²³⁴

In view of the complete absence of integrity rules, government representatives in the Council should act swiftly to adopt at least a voluntary Code of Conduct for minister, the Presidency and Council delegates. For ministers and the Presidency, this should also entail declarations of financial interests, as is common for comparable positions, including Commissioners, or declarations on outside income in the case of Members of the European Parliament.

It should be noted that, while expenses accrued by national representatives are covered by the Council, the salaries of diplomats and ministers are paid by national governments and will vary considerably. This also has repercussions for the risks to the independence of national officials. This lack of common integrity provisions at EU level for national representatives participating in the work of the Council makes it impossible to sanction any misconduct. Council members are only accountable at national level.

In addition to salaries and integrity frameworks, the sheer size of Permanent Representations also varies significantly. Larger Member States generally have more staff, but some smaller countries attempt to compensate their smaller size with a disproportionately sized embassy. According to a study that received replies from 18 Permanent Representations, staff members vary from 69 to 200, although this can also be affected by some states merging their Permanent Representation with that to NATO or their Embassy to the Kingdom of Belgium.²³⁵

If the Council joins the Transparency Register (as discussed under Lobby Transparency), this will affect some staff members of the Permanent Representations. Nevertheless, it is unclear how such rules by the Council can be binding, from a legal point of view.

Council Presidents

THE COUNCIL PRESIDENCY

The crucial job of the Council Presidency is handed over every six months,²³⁶ making for constant change at the Council, including in the midst of the ever-ongoing negotiations. The intense job of having to chair all working parties and coming up with compromise language that reflects the views of all Member States can perhaps be distributed among many shoulders this way. However, the amount of preparation that regularly goes into its preparation suggests this is nevertheless a heavy burden that could be better institutionalised.

The rotation is set by a decision of the European Council,²³⁷ attempting to nestle one large Member State with a larger national administration to draw from among each Presidency trio. Presidencies group together as trios to reduce the disruption somewhat, developing a common set of priorities and some level of coordination.²³⁸

Where the rotating scheme was in the past seen as a way to increase understanding for EU procedures in national administrations, a Union of 27 Member States means this occurs only once every 13 years, potentially leading to a loss of institutional memory even for countries that have already held Council Presidencies in the past. Additionally, in recent years the rotating Presidency has exposed the EU to some reputational risks, with question marks hanging over the integrity of some members of the Bulgarian,²³⁹ Romanian²⁴⁰ and Croatian²⁴¹ Presidencies. In view of the results of the first round of annual rule of law reports issued by the Commission in 2020, this will continue to haunt the Council in years to come.

Informal rules dictate that a Presidency is keen to be seen as an impartial broker, but with a view to generally eroding norms, also in the midst of

the Council where disagreements on the euro, migration, budgets and the rule of law have increased the political salience of negotiations, the temptation to ‘capture’ the Council agenda could grow. There is also an informal rule that the incoming Presidency should not take strong policy positions, but reportedly this was not the case in a November 2019 indicative vote.²⁴²

Another issue with regard to Council Presidencies is the somewhat surprising idea that they should be sponsored. 97 MEPs had written to the Finnish Presidency calling on them to drop the long-established practice of corporate sponsorship of their Council Presidency, after a long list of corporate giants sponsoring their predecessors, including Coca-Cola, Microsoft and a long list of premium car makers.²⁴³

Other Council Presidencies have had large corporate sponsors, with Corporate Europe Observatory using access requests to show Croatia announced it would only use “a limited number of sponsorship contracts with local business”,²⁴⁴ which in the end translated to sponsorships with Citroën and Peugeot.²⁴⁵ This was following a European Ombudsman investigation and recommendation that common guidance should be agreed by the Council on the use of sponsorship to fund the costs of holding the Council Presidency. The Council accepted this recommendation,²⁴⁶ although the draft guidelines emphasise their non-binding nature.²⁴⁷

As the NGO Corporate Europe Observatory emphasises, the issue of corporate sponsorship is not about the occasional embarrassment, but a “bellwether issue” for whether Member States recognise the “risks of corporate capture, or at least corporate influence, including in the Council.”²⁴⁸

THE PRESIDENT OF THE EUROPEAN COUNCIL

The European Council officially became a separate institution with the entry into force of the Treaty of Lisbon in 2009,²⁴⁹ although it is already prominently mentioned in the Treaty of Maastricht of 1992.²⁵⁰ It still uses the same premises and logo as the Council

of the EU. The European Council is not, however, a legislative institution. As it defines the broad guidelines to be followed by the EU institutions, its deliberations are held behind closed doors.

The Treaty of Lisbon also introduced the new figure of President of the European Council, elected for a 2.5-year term that is renewable only once.²⁵¹ The European Council and its President are served by the same administration as the Council of the EU, but it plays no role in meetings of the Council or its preparatory bodies. The President only presides over meetings of the European Council.²⁵² Nevertheless, the President must also present a report to the European Parliament after each European Council meeting, explaining decisions taken and answering questions.²⁵³ This constitutes an important initial element of accountability in front of the only EU institution that is directly elected by citizens. Based on this practice, we would like to see more robust accountability for the (European) Council's non-legislative functions, in line with regular appearances before the European Parliament by the Presidents of the Eurogroup and the High Representative on Foreign and Security Policy (HR/VP).

Unlike the rotating Council Presidency or Member State representatives, the President of the European Council is salaried by the EU, may not hold national office,²⁵⁴ and falls under a dedicated Code of Conduct. This Code requires a public declaration of assets and financial interests to be updated annually,²⁵⁵ although the Court of Auditors notes it is unclear whether this is checked.²⁵⁶ The Code also prohibits them from lobbying staff or Members of the EU institutions in the 18 months following their term of office. Similar to the rule for Council staff, they must also notify the Secretary-General of the Council about their intention to take up a new role, in advance.²⁵⁷

The President of the European Council can, unlike the rotating Council Presidency, be dismissed in case of "impediment or serious misconduct" by a qualified majority of the European Council.²⁵⁸ For the Cabinet of the President,²⁵⁹ the EU Staff Regulations (see above) is applicable, but there are no additional requirements such as lobby transparency, as is the case for Commissioners' Cabinets, in spite of their prominent political role.

The Council Presidency rotates every six months and represents a particular moment for each country. Eager to be seen as honest broker and rack up as many compromise agreements as possible, the Presidency has to operate within the strict confines set by the Council's negotiating position.



ENDNOTES

- 1 Under the Merger Treaty or Treaty of Brussels, though the Council already existed under both the 1952 European Coal and Steel Community and the 1957 Treaty of Rome establishing the European Economic Community.
- 2 Sole Article, lit. (b), Protocol 6 on the location of the seats of the institutions and certain bodies, offices, agencies and departments of the European Union, as well as Article 1(3) of the Council Rules of Procedure (Council RoPs), at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009Q1211%2801%29>
- 3 Article 16(7), Treaty on European Union (TEU).
- 4 For an in-depth study on what the Eurogroup is and does, see: Transparency International EU: Vanishing Act: The Eurogroup's Accountability, 2019, at: <http://transparency.eu/eurogroup/>
- 5 According to Annex I, Council Rules of Procedure (RoPs).
- 6 See accompanying 2020 Report on the European Commission, Transparency International EU, at: www.transparency.eu/commission
- 7 See accompanying 2020 Report on the European Parliament, Transparency International EU, at: www.transparency.eu/parliament
- 8 Paragraph 5, EO Special report.
- 9 Article 1 TEU, as well as Article 298 TFEU and Article 41 of the EU Charter of Fundamental Rights.
- 10 Article 16(8) TEU.
- 11 Articles 12, RoP.
- 12 Articles 8-9, RoP.
- 13 Benjamin Braun and Marina Hübner: Vanishing Act: The Eurogroup's Accountability, Transparency International EU, 2019, p. 40, at: <http://transparency.eu/eurogroup/>
- 14 Article 289(2), Treaty on the Functioning of the European Union (TFEU), but also for the multiannual financial framework under Article 312.
- 15 See www.transparency.eu/eurogroup
- 16 Article 18(3), TEU.
- 17 Article 27(3), TEU.
- 18 Article 15(2), TEU.
- 19 Article 36, TEU.
- 20 Article 218(11), TFEU.
- 21 Similar to the President of the Eurogroup.
- 22 Puetter, U. The European Council and the Council: New Intergovernmentalism and Institutional Change, 2014, Oxford: Oxford University Press, p. 152.
- 23 Article 16(8), TEU and Article 15(2), TFEU.
- 24 Article 7(3), RoP.
- 25 In line with Article 16(8), TEU.
- 26 Puetter, U. (2014), p. 164.
- 27 Fanta, Alex: Corona offenbart Schwachstellen der EU, Netzpolitik, 8 June 2020, at: <https://netzpolitik.org/2020/corona-offenbart-schwachstellen-der-eu/>
- 28 Article 12, RoP.
- 29 Council Decision of 1 December 2009 adopting the Council's Rules of Procedure, (2009), OJ L325/35, Annex, Article 23(5), RoP.
- 30 EP CONT Committee Workshop Briefing Paper: Discharge of the Council's budget, at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/cont/dv/workshop_council_/workshop_council_en.pdf, p. 94.
- 31 Article 319, TFEU.
- 32 Press Service, European Parliament: MEPs set to refuse discharge for Council's budget, 17 October 2019, at <https://www.europarl.europa.eu/news/en/agenda/briefing/2019-10-21/11/meps-set-to-refuse-discharge-for-council-s-budget>
- 33 Article 23, RoP.
- 34 Paragraph 16, EO Special report.
- 35 EO Special report, summary, at <https://www.ombudsman.europa.eu/en/special-report/en/94921>
- 36 Article 11(6), RoP Annex II as reminded in information note 5109/1/17 REV 1 of 3 February 2017, at: <https://data.consilium.europa.eu/doc/document/ST-5109-2017-REV-1/en/pdf>

- 37 Articles 4(1) to (3) ATD-Regulation.
- 38 Article 11(4), Annex II, Council rules of procedure.
- 39 Para 35, EO Special report.
- 40 Para 37, EO Special report.
- 41 The legal service also issues its own annual activity reports, at: <https://www.consilium.europa.eu/en/general-secretariat/staff-budget/annual-reports/>
- 42 For example, in the cases of the Whistleblowing Directive, see p.23 of the formerly confidential Council legal opinion at: <https://data.consilium.europa.eu/doc/document/ST-14620-2018-INIT/en/pdf> and the proposal for country-by-country reporting for multinational companies.
- 43 See p.23 of the Council Legal Service opinion on the Commission proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law – legal basis, 14 December 2018, at: <https://data.consilium.europa.eu/doc/document/ST-14620-2018-INIT/en/pdf>
- 44 Comte, Jean: MEPs dispute details of corporate transparency bill, *EUobserver*, 13 June 2017, at: <https://euobserver.com/economic/138203>
- 45 Scheppele, Kim Lane; Pech, Laurent; and Kelemen, Daniel R.: Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU budget-related rule of law mechanism, *Verfassungsblog*, 12 November 2018, at: <https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/>
- 46 Council Legal Service opinion on the Commission Proposal for an Inter-Institutional Agreement on a Mandatory Transparency Register, 11 January 2017, at: <https://data.consilium.europa.eu/doc/document/ST-5151-2017-INIT/en/pdf>
- 47 Case T-252/19 (L. Pech v. Council).
- 48 Article 11(3) lit. B, RoP Annex II.
- 49 These can be consulted at <https://www.consilium.europa.eu/en/general-secretariat/corporate-policies/transparency/>
- 50 Article 11(4), RoP Annex II.
- 51 Article 13, RoP.
- 52 See <https://www.consilium.europa.eu/en/documents-publications/public-register/>
- 53 See <https://www.consilium.europa.eu/en/contact/general-enquiries/>
- 54 See <https://www.consilium.europa.eu/en/press/>
- 55 See <https://www.consilium.europa.eu/en/contact/visits/>
- 56 Organisational Chart, at <https://www.consilium.europa.eu/media/35512/gsc-organisation-chart-en.pdf>
- 57 User's manual, available at: <https://www.consilium.europa.eu/media/29365/users-manual.pdf>
- 58 The list of error messages is helpfully available at: <https://www.w3.org/Protocols/rfc2616/rfc2616-sec10.html#sec10.5.4>
- 59 Annex 2, EO Special report.
- 60 See <https://www.consilium.europa.eu/en/meetings/calendar/>
- 61 Annex I to the Council's reply of 26 July 2017 to the Ombudsman's opening of Strategic inquiry, at: <https://www.ombudsman.europa.eu/en/correspondence/en/83029>
- 62 Para. 29-30 EO Special report, as well as Annex 2.
- 63 2019 Council annual report on public access to documents, at <https://www.consilium.europa.eu/en/press/press-releases/2020/06/03/public-access-to-council-documents-2019-report/>
- 64 Bunyan T, 'Statewatch analysis: Constructing the secret EU state: "Restricted" and "Limite" documents hidden from view by the Council'.
- 65 2019 Council annual report on public access to documents, p. 3.
- 66 European Parliament: Activity report: Developments and Trends of the Ordinary Legislative Procedure, 1 July 2014 – 1 July 2019, 2019, p. 4.
- 67 Paper from the Dutch COSAC delegation on EU transparency, Tallinn, November 2017, at: <https://www.statewatch.org/media/documents/news/2017/nov/eu-dutch-position-paper-on-council-transparency.pdf>
- 68 See <https://register.consilium.europa.eu/content/int/?typ=NPDPF&lang=EN>
- 69 2019 Council annual report on ATD, p. 5.
- 70 Para. 29, European Ombudsman case 640/2019/FP, 29 April 2020 at: <https://www.ombudsman.europa.eu/en/recommendation/en/120761>
- 71 A detailed overview of how these requests are handled can be found at: [https://www.asktheeu.org/en/request/6382/response/20965/attach/8/20180904 Current practices ATD PA.pdf](https://www.asktheeu.org/en/request/6382/response/20965/attach/8/20180904%20Current%20practices%20ATD%20PA.pdf) as well as in Council document 6896/1/17 REV 1 of 14 July 2017, at: <https://data.consilium.europa.eu/doc/document/ST-6896-2017-REV-1/en/pdf>

- 72 Article 8, Annex II to the RoP.
- 73 See <https://data.consilium.europa.eu/doc/document/ST-7057-2020-INIT/en/pdf>
- 74 See <https://data.consilium.europa.eu/doc/document/ST-8689-2020-INIT/en/pdf>
- 75 The written procedure is intended to cut waiting times in view of the 15-working day deadline in the ATD-Regulation.
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