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INTERNATIONAL**
the global coalition against corruption

EU OFFICE



OVERFISHING IN THE DARKNESS

A case study on transparency in Council decision-making

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Transparency International EU leads the movement's EU-focussed advocacy, in close cooperation with national chapters worldwide, but particularly with the 25 national chapters in EU Member States.

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EXECUTIVE SUMMARY

For centuries the seas of north-western Europe have been a source of wealth for coastal communities and there has been a huge expansion of fisheries in pursuit of food and profit. Over the few last decades, however, continued overfishing has had serious consequences for the environment, peoples' jobs and the food we eat. In the North East Atlantic and Baltic Sea half of all fish stocks are subject to overfishing and 61 per cent are below biologically safe limits.¹ The sustainability and viability of fish stocks is under threat. Part of the problem is that European fisheries ministers set annual fishing limits that are in many cases above scientifically advised levels year after year in the Council of the European Union (referred to henceforth as 'the Council'). These decisions are made behind closed doors with little or no accountability and have real and damaging impacts on our lives.

This report closely examines the state of transparency and accountability of the Council around the annual negotiations on fishing quotas in the Fisheries Council (AGRIFISH). It looks at the appetite of European Union (EU) Member States for reform and suggests best practices for transparent decision-making.

This study comes at a moment when, for the first time in history of the EU, the citizens of a Member State have voted to leave the Union – forcing governments to revisit the very foundations and democratic governance structures of the EU. With multiple parallel crises in the areas of migration, terrorism, environmental degradation and in the face of rising Euroscepticism, the EU is in dire need of good governance and broad public support to address future challenges. Transparent and accountable EU institutions are seen to be an essential component in rebuilding the democratic legitimacy of decision-making and to prevent the kind of policies that lead to problems like overfishing.

In this context the Council has been identified as a priority for reform. Whereas the European Parliament, European Commission and a number of national governments are already operating under stricter transparency and disclosure obligations, it remains virtually impossible for citizens to understand how deals are made in the Council. Finding out whether their representatives were in favour or against a certain provision is challenging and stands in the way of holding members to account. Led by a number of influential Member States, there has been considerable reluctance to commit to any reforms and to implement concrete improvements to increase transparency and accountability. A closer look reveals that the current legal framework would easily allow to go much further – but these possibilities are not used in practice.

Our case study on the annual EU negotiations on fishing quotas shows that the lack of transparency and accountability can have real and detrimental effects on the quality of decisions. Despite the recent reform of the Common Fisheries Policy, overfishing and depletion of EU fish stocks is continuing at alarming rates. Narrow national interest politics, politicians' self-interest in getting re-elected and the influence of lobbyists currently all stand in the way of sustainable fishing, which is in the long-term interest of all parties involved.

The results of this study confirm that the Council is lagging a long way behind other EU institutions in terms of transparency. The report presents the results of a questionnaire among Member States on their positions to increase the transparency of AGRIFISH negotiations in particular and the Council more generally. Only a small number of Member States have come out in favour of ambitious reform. At the same time, the replies point to a number of best-practice examples and promising ideas for practical next steps. Among other things, the potential role of national parliaments to increase transparency and democratic accountability has been emphasised. A number of governments already provide written information to their parliament in the run-up to all meetings. These 'annotated agendas' provide an overview of the topics to be discussed and, in some cases, reveal the negotiating position of other Member States and the EU institutions. In the Netherlands and Sweden, for example, these documents are publicly available. However, this alone cannot replace the direct accountability of the Council towards EU citizens.

Citizens in all EU Member States have the same rights and should have equal access to information and should be able to understand what their government is doing in their name in Brussels. Any future reform process should be guided by a clear commitment to more transparency in Council decision-making and should translate into tangible, concrete steps towards reform. With this in mind, Transparency International EU has compiled a number of practical recommendations that address both Council decision-making in general and the specific case of the AGRIFISH Council (for a more detailed list of recommendation, see Observations & Recommendations at the end of the report).

RECOMMENDATIONS

Increase the transparency and accountability of the Council

The existing legal framework should be fully followed to release more detailed, meaningful and timely information at each stage of the decision-making procedure (Working Parties, Committee of Permanent Representatives (COREPER) and Council). This includes the publication of **more detailed results/minutes**, detailed **information on Member State negotiating positions** – ideally before compromises have been reached or votes have been held – as well as an **overhaul of the access to information policy** of the Council to comply with legal obligations.

Moreover, **live-streaming should be extended to all Council and COREPER debates** with limited exceptions **Best practice** in transparency **should be generalised** at each stage of the decision-making procedure and across different Council configurations.

Become a full member of the EU Transparency Register

The Council should finally follow suit to participate in the Joint Transparency Register between the European Parliament and the European Commission. This would mean that **unregistered lobbyists should not be able to arrange meetings or access buildings**. Permanent representations of Member States as well as the rotating presidency should also pledge that they will no longer meet with unregistered lobbyists – both in Brussels and in national capitals. To enable the public to monitor the implementation of the above principle, the Council should **publish details of meetings with lobbyists**, as is current practice for the European Commission. The Council should **publish all written input by lobbyists** in a central location to allow the establishment of an EU Legislative Footprint in a joint database with the European Parliament and Commission.

Make AGRIFISH Council negotiations on fishing opportunities transparent and accountable

The general demands to increase the transparency and accountability of the Council decision-making process outlined above also apply for the AGRIFISH Council. Specifically, this includes making all **scientific and socio-economic evidence** used in negotiations open to public scrutiny and to allow **live-streaming of the ministers' exchange of views**.

INTRODUCTION

The Council of the European Union (henceforth ‘the Council’) is not only one of the most powerful institutions in the EU legislative process, it is also the most opaque EU institution. While in theory the Council is on equal footing with the European Parliament, in practice it often has the final say on European legislation. It also retains exclusive competence in some policy fields and acts much as an upper chamber would in other political systems. In its role as co-legislator and executive body, the Council takes decisions on all EU legislation – whether through amending Commission proposals, adopting or blocking legislative proposals. The Council's decisions affect the daily lives of 500 million EU citizens.

Unfortunately, however, the Council does not have the best track record of ensuring accountability in its proceedings, especially when compared to other EU institutions. This reputation has been reinforced by its reluctance to comply fully with the 2013 Court of Justice of the EU (CJEU) ruling,² which required the Council to make its deliberations much more transparent.³

At a time of markedly declining public trust in all the EU institutions,⁴ with many citizens fearing that decisions taken behind closed doors are not in their best interest, perceived secrecy can undermine support for the EU project. Opaque Council negotiations are, of course, not the only problem in this regard. However, by making Council decision-making more transparent and by showing clear links between decision-makers and their decisions some of the lost trust may be regained.

The political call to increase the transparency of EU institutions, including the Council, is not new. The December 2001 Laeken Declaration⁵ already included several important paragraphs on making the EU more open, transparent and accountable. EU leaders also understood the inherent connection between the transparency of EU institutions, the democratic legitimacy of the EU and the future of the EU project:

“The European Union derives its legitimacy from the democratic values it projects, the aims it pursues and the powers and instruments it possesses. However, the European project also derives its legitimacy from democratic, transparent and efficient institutions. [...] The first question is thus how we can increase the democratic legitimacy and transparency of the present institutions, a question which is valid for the three institutions.”

More than a decade and a half later, the European project seems to be at a critical turning point. Several crises and declining public support for more EU integration have underlined that the European project indeed derives its legitimacy from democratic, transparent and efficient institutions. The case for reform is now more pertinent than ever. However, it is not clear to what extent there is still political willingness among Member States’ representatives to prioritise and push for substantial transparency reform.

With the other EU institutions have made progress towards greater transparency, the blind-spot of EU decision-making clearly lies in the Council.

Over recent years, Transparency International EU has closely followed the reform processes of EU institutions and has worked to provide practical recommendations. In 2014, we published the first ever comprehensive assessment of the EU's main political institutions – *The European Union Integrity System report*.⁶ This report was complemented in 2015 by an in-depth study, *Lobbying in Europe*,⁷ which focused specifically on lobbying regulation across Europe and for the three core EU institutions.

Against this background, Transparency International EU has set out to take a renewed look at Council decision-making and the possibility for reform. The current study has two objectives: (1) to take stock of Member States' position on Council transparency; and (2) to come up with concrete and practical recommendations for reform. As part of a nine-month project, entitled *Overfishing in the darkness*,⁸ we chose the annual negotiations on fishing opportunities in the Agriculture and Fisheries Council (AGRIFISH) as a case study to explore to what extent Member States would be willing to enhance transparency. This report is intended to summarise the findings of this project.

TRANSPARENCY IN THE COUNCIL OF THE EUROPEAN UNION

Transparency in decision-making is commonly understood as the totality of provisions in place to ensure that the public can obtain relevant and timely information about the activities and processes that provide the basis for these decisions. The aim of this is that the public can understand how and why decisions are made in order to monitor and participate in the process. In order for this to be effective, a basic level of transparency is needed. This means that structural information – like timelines of the process, agendas of the meetings, participants' lists and composition of groups – need to be available to the public. Likewise, details of what is being discussed and the different positions and proposed compromises should also be publicly available. Documents of this kind include annotated minutes, briefings and notes summarising discussions, Member States' positions, tabled amendments, compromise proposals, other (working) documents, studies and voting/negotiation results (by Members).

All of these documents and written records are a way to allow outsiders to reconstruct the decision-making process. Access to this information can also be granted through opening up the deliberation process through public sessions via live-streaming or public access to the discussions.

As Transparency International EU has previously pointed out⁹, the Council has the basic infrastructure in place to manage and make information about the decision-making process accessible. The Council maintains a relatively well-structured database¹⁰ for storing documents and recording data on public document requests. The 'Open Sessions' page¹¹ on the Council's website allows viewing of those Council sessions that are open to the public via live-streaming. Two sets of Council minutes – one relating to general matters and another specifically concerning the adoption of legislative acts – are accessible online. The Council website hosts an online archive of public voting results. Monthly summaries of legislative acts of the Council are also available online. As part of the Inter-Institutional Agreement (IIA) on Better Regulation, the Council (in cooperation with the other main EU institutions) is currently developing

a system on the EU's legal document depository, EUR-Lex, where the public can access visual depictions (such as timeline representations) of the life-cycle of legislative proposals and individual institutional input.¹²

Despite all of the above-mentioned provisions, the Council still lacks a basic level of transparency in the decision-making process that would allow citizens, civil society organisations or other stakeholders to better understand how decisions are taken and thus allow them to hold their representatives to account.

This is despite the ruling of the EU Court of Justice of 17 October 2013 on Council vs. Access Info Europe, which underlined that the Council can and has to do more to fulfil the transparency obligations laid out in the treaties. The European Parliament, as the co-legislator, has already demonstrated that it is possible to successfully operate under stronger transparency provisions. In the European Parliament, Committee meetings are live-streamed online, as are the plenary session. Minutes and plenary voting records also allow the public to see which Member supports which policies. The Commission has also started a transparency initiative in 2014, making strong commitments to increase lobbying transparency. Since 1 December 2015, Commissioners, their Cabinets and Director-Generals publish their meetings and only meet with lobbyists registered in the Joint Transparency Register (JTR) of the EU. By increasing its transparency provisions, the Council would, therefore, not be venturing into uncharted territory; on the contrary, it would simply be following what other institutions have already been doing for years.

The opacity of so-called 'trilogue meetings' is emblematic of the continuing problem of a lack of Council transparency and the special status of the Council. Trilogues are informal working meetings between the European Parliament, the Council and the Commission aimed at speeding up the ordinary legislative process. During these meetings, large concessions are often won and lost with currently very little oversight and without public disclosure. During the last legislative term, more than 1,500 trilogue meetings were held, which allowed roughly 85 per cent¹³ of laws to be agreed at a first reading. Since trilogue negotiations have become the new normal in EU law-making, the same transparency provisions should apply to them as for the rest of the legislative process. Currently, the negotiating positions of the other two institutions are mostly known, and the compromises will also be made public eventually. However, the position of the Council and that of its Member States remains opaque. Acknowledging the problem, the European Ombudsman, Emily O'Reilly, recently published recommendations calling for more transparency around these informal negotiations.¹⁴

Furthermore, the Council is currently the only core EU institution that does not participate in the EU Transparency Register, despite being a routine target for corporate lobbyists and other interests. Currently, no contact between third parties and Council members is systematically recorded or disclosed so it is impossible to check the extent of third-party input.

THE CASE FOR GREATER TRANSPARENCY

Transparency International EU acknowledges that some degree of confidentiality in negotiations is necessary. However, we strongly believe that more publicly available information and more openness of the institutions are both essential prerequisites for fair stakeholder participation, protecting the public interest and ensuring democratic accountability. This will ultimately help lead to better policies and greater democratic legitimacy of EU decision-making, which could help to bring the EU institutions closer to its citizens and contribute to a “Union of Democratic Change”.¹⁵ Apart from this, more transparency is also vital to comply with the spirit of the Treaty on European Union (TEU).

A MATTER OF FAIR STAKEHOLDER PARTICIPATION

Transparency International EU firmly believes that greater transparency and greater diversity in stakeholder input into the legislative process can lead to more balanced policy decisions that represent broader interests and would ultimately lead to better outcomes. A transparent legislative process is the best and easiest way to ensure “better regulation”. It would enable greater understanding of the decision-making process among stakeholders and eliminate information asymmetries created by the privileged access of some actors. Involvement and dialogue with civil society in EU decision-making is stipulated in Article 11 of the EU treaty, which states that good governance requires the institutions to ensure participation and debate with civil society.

A MATTER OF PROTECTING THE PUBLIC INTEREST

Secrecy in decision-making fosters undue influence. Well-connected and well-resourced lobbyists are often fully aware of the negotiations taking place behind closed doors and manage to feed in their recommendations and demands. Much of the influence remains hidden and informal and certain groups enjoy privileged access to decision-makers. Those with less money and connections cannot follow the process and only become aware of the state of the discussions after a deal has been struck – often when it is too late to make any further changes. Citizens and interest groups have little opportunity to know who is influencing public decisions, on what issues and how. As a consequence, many citizens fear that decisions taken behind closed doors are not taken in their best interest. Over the last decade, researchers have collected evidence that public trust in the EU institutions is declining. Increasing transparency would partly mitigate risks of undue influence and domination of policy-making by special interest groups. It would also provide citizens and other stakeholders with better opportunities to participate in the legislative process and to monitor whether policies are truly made in the public interest. This could ultimately help to restore part of the public trust that has been ebbing away over recent times.

A MATTER OF RIGHTS

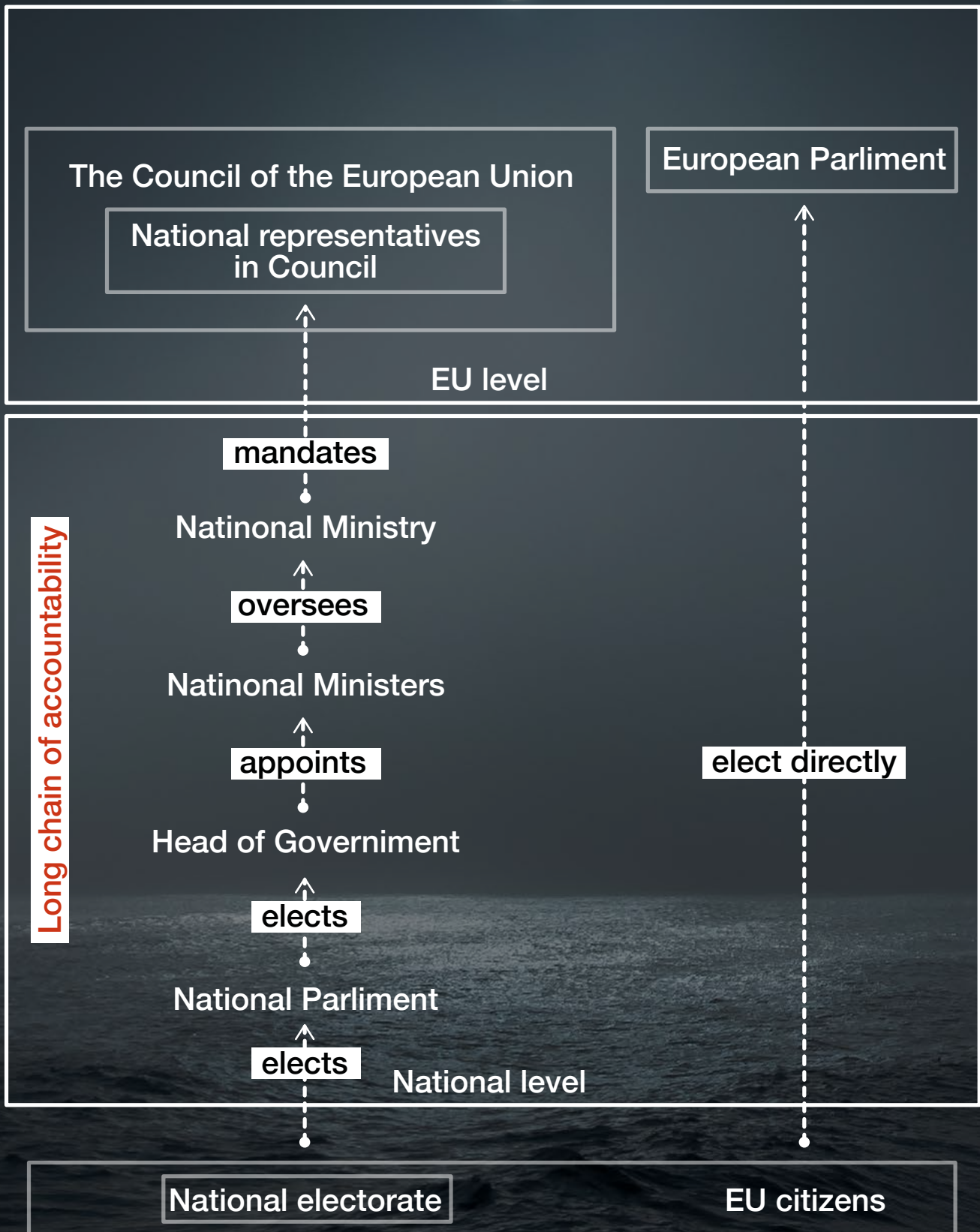
The principle of transparency and citizen participation is enshrined in Article 1 of the TEU, which states that “in the process of creating an ever closer union among the peoples of Europe, [...] decisions are taken as openly as possible and as closely as possible to the citizen”.²⁰ This applies to all stages of the legislative process. The Treaties explicitly spell out that the European Parliament (Art. 15(2) TEU) and the Council (Art. 16 (8) TEU), as the two co-legislators, are obliged to meet in public when considering and voting on a draft legislative act. These general principles are confirmed in Article 10 (3) TEU, which states that every citizen has the right to participate in the democratic life of the Union. This has been confirmed by several court rulings underlining that the transparency and openness of the process is essential to understanding how and why a decision has been taken, and is thus “a precondition for the effective exercise of their democratic rights”.²¹ Making the legislative process transparent is thus a question of fundamental principles for the EU, as well as being a basic democratic rights for EU citizens. process transparent is thus a question of fundamental principles of the EU as well as basic democratic rights of EU citizens.



© European Union, 2016 Picture of a Trilogue meeting in the Council

✗ No direct accountability

✓ Direct accountability



A MATTER OF DEMOCRATIC ACCOUNTABILITY

Lack of transparency can also stand in the way of accountable decision-making. Without all the relevant information, it is difficult for citizens or their representatives in national parliaments to fully understand which position their politicians are defending in their name and to hold them accountable for it. This lack of transparency gives decision-makers the opportunity to deny responsibility for decisions that they clearly supported. In the context of the EU, this can have another adverse effect, when politicians use the EU institutions as a scapegoat for unpopular decisions at home. As it is difficult to check individual Member State positions, it is easy for ministers to return to their countries and claim the opposite of what they have themselves decided in Brussels. This can seriously undermine the credibility of EU politics and can help to fuel Euroscepticism.

One of the problems with the accountability of Council decision-making in this regard is the length of the ‘accountability chain’. According to Article 10 (1) TEU, citizens are indirectly represented by their governments in the Council. Article 10 (2) recognises the democratic accountability of the Council of Ministers and the European Council. As Member States’ positions remain opaque and the negotiation mandate in many cases is transferred further, accountability can become weak. Figure 1 depicts the different intermediate steps of the accountability chain:

Due to the current lack of transparency, there is very little possibility for the national electorate in EU Member States to hold decision-makers in the Council directly to account. This is currently the role of national parliaments, which are tasked – as recognised in the Amsterdam protocol¹⁷ – with monitoring and checking what is decided in the Council on the basis of the principle of subsidiarity. In addition, more transparency of the decision-making process could strengthen both direct accountability – linking the governing to those who are governed – as well as the indirect accountability channel through national parliaments. In a number of Member States, for example, it is already best-practice that the government sends so-called ‘explanatory notes’ before and after meetings in the Council to their national parliament to brief them on the progress of the negotiations. In practice the level of detail varies substantially between different EU countries – from being completely non-existent to including different Member States’ positions.¹⁸ For a few countries these notes are also made public on a freely accessible database of the parliament (for example, in the Netherlands, the UK and Sweden as well as other).¹⁹

CASE STUDY: MURKY WATERS

The annual Council decisions on setting fishing limits in EU waters are a sticking point that highlights the lack of transparency in the Council. Civil society organisations have repeatedly complained that the public interest has not fully been reflected in the final decision of ministers, as well as highlighting how such decisions have led to serious mismanagement of a public resource.²² For this reason, it is a good case study to better understand the dynamics of Council decision-making and how greater transparency could help to overcome some of the persistent problems.

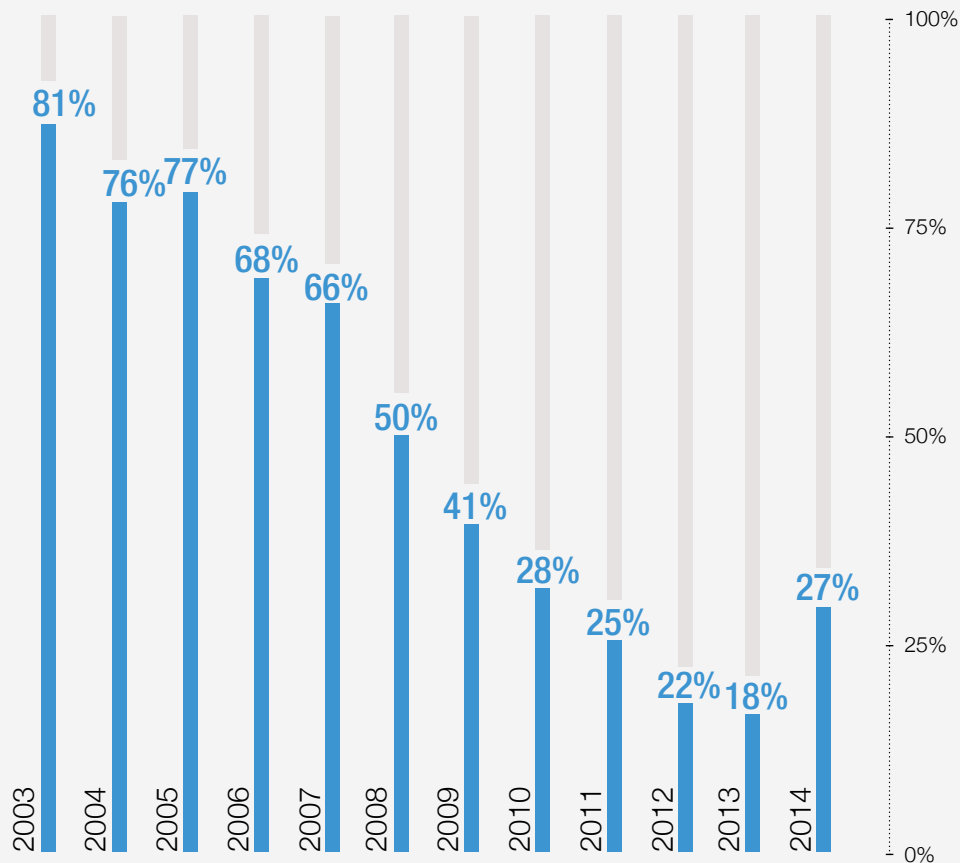
Fish stocks are a public resource and should be managed in the public interest. Yet, many fishing limits set annually by EU fisheries' ministers regularly exceed scientifically advised levels. While most decision-makers agree that overfishing has a negative long-term impact, they too often favour the short-term interests of the fishing industry over longer-term sustainability of fish stocks for the whole of the EU.²³



THE EVIDENCE OF OVERFISHING

Research recently published in the *Journal of Marine Policy* and featured in *Nature* shows that, while EU ministers head into negotiations with scientific advice in hand, over the past 15 years they have been exceeding the advised fishing levels by 20 per cent, on average. This holds true even after the reformed Common Fisheries Policy (CFP) was introduced in 2013 (see below). Although overfishing has declined over the past decade, in 2014 (the last year for which data is available) a worrying reversal of this trend can be seen. According to the European Commission's scientific body – the Scientific, Technical and Economic Committee for Fisheries (STECF) – the average level of overfishing for 2014 was 27 per cent – more than a quarter above the scientifically-advised Total Allowable Catches (TACs), as the following figure shows. See next section for more information on TACs.

FIGURE 2:
AVERAGE LEVEL OF OVERFISHING IN THE EUROPEAN UNION* ($F > F_{MSY}$)



*Northeast Atlantic (FAO 27), including Western European Waters, North Sea and Baltic Sea

Source: Scientific, Technical and Economic Committee for Fisheries,
"Monitoring the performance of the Common Fisheries Policy (STECF-16-05)". March 2016
© 2016 The Pew Charitable Trusts

The latest analysis, based on data from 2014, suggests that 47 per cent of fish stocks were subject to overfishing and 61 per cent of stocks were below biologically safe limits in the Northeast Atlantic, including the Baltic Sea.²⁶

The political framework in the field of fisheries policies has changed significantly over time. In 2011, after decades of overfishing, which resulted in an unprofitable EU fleet and most fish stocks in bad shape, the European Commission presented a proposal for a major reform of the CFP. One of main objectives of the reform, which was formally adopted in 2013, was to ensure sustainable fishing limits – that is, to end overfishing and also, importantly, to allow stocks to recover to healthy levels. The new CFP includes a legal requirement to cease overfishing by 2015 where possible, and by 2020 at the latest for all stocks. Overall, however, the numbers on overfishing seem to offer compelling evidence that – even though the CFP includes clear legal obligations and a commitment to sustainable fishing – overfishing has not ended and there is some indication that ministers are trying to further delay the process. So what is the underlying reason behind continuing overfishing?

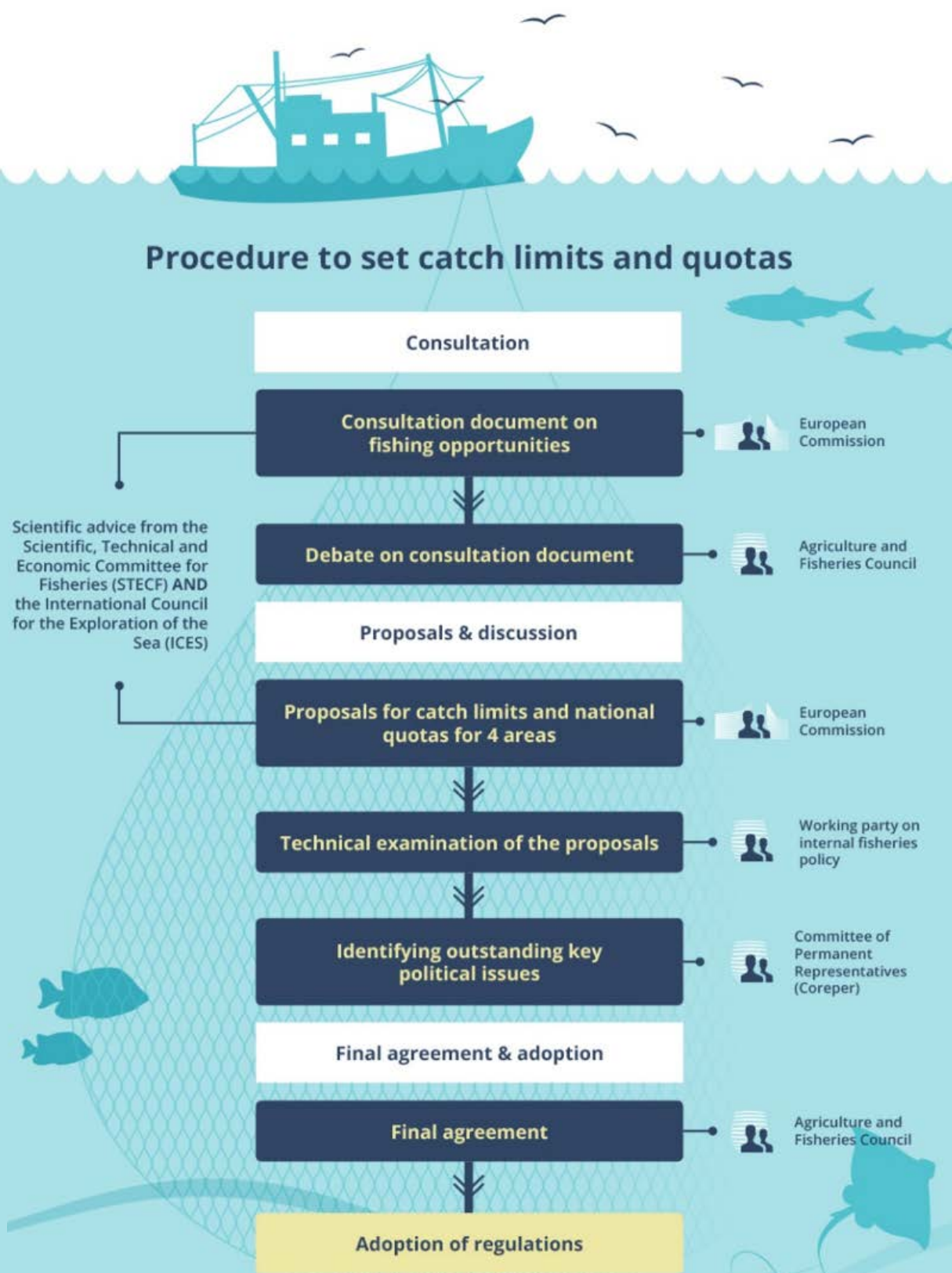
To answer this question, the following will provide an introduction to the challenging dynamics within the decision-making process of the AGRIFISH Council. In the second part of this chapter, we present the findings of a recently conducted survey asking Member States about their position to increase transparency in Council in general and in the AGRIFISH Council in particular.

COUNCIL NEGOTIATIONS ON FISHING OPPORTUNITIES

The Council has an essential role in EU fishery policies and the management of fish stocks. For example, it has exclusive competence over setting fishing limits, so-called Total Allowable Catches (TACs),²⁸ (Article 43, Treaty on the Functioning of the EU). These limits are subsequently divided between Member States by a predefined key – reflecting the ‘relative stability’ principle. The Council makes its decisions on the basis of proposals from the European Commission. This means that every year the Council adopts the revised TACs and quotas for each fish stock, after intensive negotiations between Member States. When the final decision is made, a regulation is adopted towards the end of the preceding year and updated as necessary throughout the year. For example, the TACs and quotas for 2016 were adopted in December 2015. The following figure depicts the political procedure by which catch limits and quotas are agreed:

The figure shows that – unlike most EU legislation or decisions – setting fishing limits is an exclusive competence of the Council. There is no formal role for the European Parliament. This provides ministers with considerable discretionary power. While negotiations are prepared by the European Commission and within the preparatory working party on internal fisheries, the final stage of the process consists of negotiations between ministers in the AGRIFISH Council and the European Commission. For this, fisheries ministers hash out deals in two separate negotiations on different stocks in October to December every year and every two years for the deep sea stocks. The political decision-making process and the lack of transparency create three particular challenges, which partly explain persistent legislation of overfishing.

FIGURE 3:
POLITICAL PROCEDURE TO SET CATCH LIMITS AND QUOTAS



© European Union 2015, adapted from the original:
<http://www.consilium.europa.eu/en/policies/eu-fish-stocks/fishing-opportunities-infographics/>

THE POLITICAL CHALLENGES OF COUNCIL DECISION-MAKING

CHALLENGE 1: NATIONAL INTEREST AND THE TRAGEDY OF THE COMMONS

Reaching an agreement among 28 EU Member States can be a challenging procedure – even more so if the decision involves sharing a limited resource such as fish. Ministers have a political incentive to fight for their national interests and claim victory for tough and successful negotiations. They often emerge from negotiations proclaiming “the best possible deal” for the fishing industry, as the former UK fisheries’ minister Richard Benyon did in 2012.²⁹ A fixed upper limits victory for one side would normally mean a defeat for the other side. In the case of the negotiations of fishing quotas, alliances between Member States have to be built to reach a qualified majority. To get a mutually beneficial compromise, there is a real incentive for ministers to just “make the cake bigger” by setting higher fishing limits than those that are scientifically advised. This way everybody can walk away from the negotiations announcing that they were able to secure a good deal. In the case of the renewable but limited resource of fish, this increases the risk of overfishing and unsustainable catches. Thus, a successful agreement comes at the price of depleting fish stocks and undermining the very basis of profitable fishing in the future.

THE ‘TRADEGY OF THE COMMONS’

Even though it is not in the long-term national interest to support overfishing, from a bargaining position it can seem rational for a government to maximise their own quota if every other government is also pushing for this. This creates a so-called ‘social dilemma’, where what seems to be rational from an individual perspective creates a situation in which everybody is ultimately worse off. In the case of public resources, this intricate situation has become also well-known as the “Tragedy of the Commons”: “a situation within a shared-resource system where individual users acting independently and rationally according to their own self-interest behave contrary to the common good of all users by depleting that resource.”

Without a strong legal framework or a third-party enforcement body, it is difficult to overcome such a situation. Some have argued that this is also why ministers, against their short-term interest, agreed to a reform of the CFP.³¹

CHALLENGE 2: MINISTERS AND THE ELECTION CYCLE

Although making sure fish stocks are managed sustainably is in the long-term national, public and industry interest, fisheries ministers might have a personal self-interest in announcing short-term successes. Due to the election cycle, there is the risk that politicians do not share this long-term perspective but rather focus on being seen as successful during their mandate. On occasion, there might be legitimate reasons to use the narrowly-defined exceptions that allow fishing above scientifically-advised levels up to 2020, to avoid jeopardising the economic and social sustainability of the fleets concerned. However, it is very problematic if exceptions are used year after year outside the narrowly defined limits, which is at the expense of the sustainability of the stocks and in contradiction to the legislation.³¹ The use of these exceptions is also lacking in transparency, as Member States have not yet started to publish their evidence justifying such delays (this needs to be obtained, in truncated or redacted form, through freedom of information requests).

CHALLENGE 3: UNDUE INFLUENCE, PRIVILEGED ACCESS AND SPECIAL INTEREST POLITICS

Without a basic level of transparency there is no way for the public to know if and how other parties – whether non-governmental organisations (NGOs) or industry – have had any influence over negotiations. As a consequence, 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.

THE LACK OF TRANSPARENCY IN AGRIFISH COUNCIL NEGOTIATIONS

In the case of fishing opportunities, the final negotiation between the fisheries' ministers remains an important annual event. Both the media and interest groups show a great deal of interest in these meetings. Considerable concessions between Member States are won and lost and the final decisions have big economic, social and environmental impact. Since these meetings continue to happen behind closed doors, with restricted access for interest representation groups and only a few accredited journalists allowed, it is very difficult for outside parties to obtain first-hand information to monitor the process and verify results.

The opacity of these negotiations makes it virtually impossible for outsiders to understand how final decisions have been reached and which national ministers have been the driving forces behind the deal. In addition, the lack of timely information undermines direct accountability as decisions can only be verified more than a month later (in January) when the regulation is published in the official journal. By that point, any media interest has died down, which means that citizens do not hear from the press about the decisions made (as it is "old news").

In the past, the lack of transparency in these negotiations has fostered an unfair and unequal playing field where only those with the most resources and the best contacts can obtain information and access, while others are left out in the cold. Given the importance of these meetings, both industry interest groups as well as civil society organisations have looked for different ways to be close to the decision-makers to provide direct input to the negotiations and to get first-hand information. One example of this is different groups trying to gain access using press badges, as the following picture shows:



© Confederation Espanola de Pesca, 15 December 2015

Spanish industry representatives published pictures of themselves on Twitter claiming to sit in the Council during the negotiations. The picture shows them wearing press badges.

GREATER TRANSPARENCY TO OVERCOME THE CHALLENGES IN COUNCIL NEGOTIATIONS

Greater levels of transparency and openness in these negotiations could help to address these challenges. Shining a light on the negotiations and opening up the process to public scrutiny could dissuade Member States from increasing the overall fishing opportunities beyond scientifically-advised levels, particularly if they feel under scrutiny to comply with their legal commitments as set out in the CFP to end overfishing. Likewise, a more transparent decision-making process could contribute to making fisheries' ministers more accountable for the decisions they make during the negotiations. The public would be able to better understand the dynamics of the process and what their ministers have been negotiating in their name. More transparency, better information and more openness of the process could also help to mitigate risks of undue influence, privileged access and domination of special interest. It would reduce information asymmetries among other stakeholders and allow for public scrutiny of the process. More diverse stakeholder input, democratic accountability and public scrutiny could help to ensure that decisions are in the public interest.

RESULTS OF TRANSPARENCY INTERNATIONAL'S QUESTIONNAIRE

A questionnaire was designed to take stock of Member States' position on the transparency of Council decision-making in general and for the AGRIFISH Council discussions on fishing limits in particular. On the basis of this in-depth case study and the findings of the questionnaire, Transparency International EU wanted to suggest concrete and practical recommendations for increased transparency.

An online survey (see Annex) was designed to assess individual governments' positions on specific recommendations. The questions were divided up by the different policy-making levels at the Council (i.e. Working Group, COREPER, Council of Ministers). Questions concerned the willingness of Member States to increase transparency by publishing more detailed minutes of meetings and Member States' positions, as well as allowing live-streaming of sessions or at least of initial exchanges of views among the ministers.

The questionnaire was disseminated to the relevant contact persons in the permanent representations of the EU Member States during April and May 2016. To ensure a sufficient response rate, the Dutch Presidency was asked to assist with following up on the mailings in the relevant Working Party. Additionally, individual letters³³ were sent out to the permanent representatives, and Transparency International staff's personal working contacts in the institutions were used to ask governments for a response. As there were several rounds of follow-up and the survey was discussed in the relevant Working Group, it can be safely assumed that representatives from all Member States were informed about the questionnaire. Government representatives were also invited to give additional anonymous feedback in a follow-up interview, which a number of governments did.

METHODOLOGICAL CHALLENGES

Several Member States expressed concerns that the design of the questionnaire and the specificity of the questions would make it difficult to coordinate an answer internally and thus, they would prefer to provide an answer in their own chosen format. In most cases, the response took the form of a letter, outlining the opinion of the government by topic area more generally rather than answering the specific questions raised in the questionnaire.

Due to the fact that many Member States did not directly respond to the questions raised, but chose their own format, it is impossible to make any direct comparisons and quantitative analysis of the answers. Consequently, a qualitative approach was chosen taking anonymous text excerpts to showcase specific types of responses, their diversity and recurring topics in the replies.

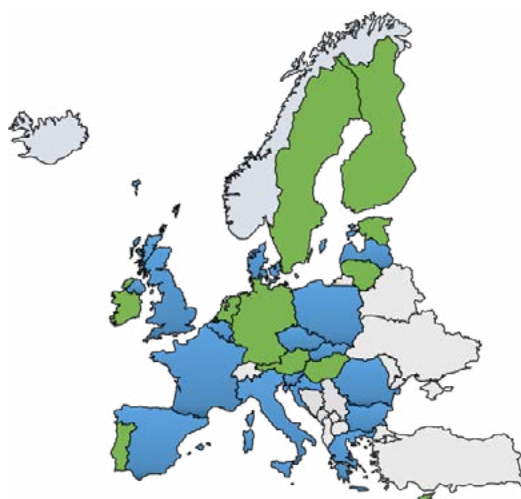


MEMBER STATES RESPONSE RATES

By the end of June, 11 Member States had given feedback. Three more indicated that they were in the process of finalising their answer, but did not respond before the deadline for this report. Member States have been given the opportunity to answer until the end of the year. While these responses cannot be taken into account for the current report, they will be published on the corresponding web page, which is updated on on-going basis.

The response rate can be taken as a first indication of the importance national governments give to transparency issues. While a small distinguished group of Member States is pushing the agenda inside the Council, overall it is not taken up as a priority. Since the questionnaire also had a focus on the AGRIFISH Council, one has also to take into account that some Member States – because of their geography – are more concerned with the developments in fisheries policies than others. The following map shows which Member States participated in this exercise.

FIGURE 4:
MEMBER STATES' RESPONSE RATE



Blue = no respondents Green = respondents

FINDINGS

In general, almost all Member States who replied underlined the importance of transparency in EU policy-making. The responses showed a great variety of different ideas about how to enhance transparency in decision-making. While a clear majority of Member States in terms of simple numbers favoured reform, this again could be due to the selection bias of mostly countries that are interested in the topic replying to the survey. The replies also underlined that larger Member States were very reluctant to embrace more substantial reform in this area.

Ideas about increasing the quantity and timeliness of information to be published (for example, results/minutes of Council meetings and live-streaming of initial exchange of views between ministers at Councils of Ministers) were the most supported initiatives. However, Member States seemed much more reluctant to publish new types of information on the content of preparatory meetings and Member States' individual positions.

For the specific case of the AGRIFISH Council, there have been a number of Member States in favour of publishing more timely and comprehensive minutes/results (including the scientific evidence used in the negotiations) and live-streaming the initial exchange of views between ministers preparing the negotiations on fishing limits and right before each of the negotiations itself.

Apart from the overall picture, there were a number of interesting ideas and opinions offered by individual Member States, which are worth considering and quoting in length.

ON THE GENERAL COAMMITMENT OF MEMBER STATES TO INCREASE THE TRANSPARENCY OF THE COUNCIL

Overall, almost all respondents mentioned and generally emphasised the importance of transparency and openness in the EU decision-making process and its impact on the legitimacy, public support and public trust in policy-making.

The German government wrote:

“An open and transparent EU increases the legitimacy of its decision-making. The Treaty of the EU, in particular Article 11, considers transparency as one of the democratic principles of the EU.”

Another response in this regard was:

“Estonia supports the principle of greater transparency as set out in the Treaties of the European Union. In order to promote good governance and ensure the participation of civil society, the Union’s institutions, bodies and agencies should conduct their work as openly as possible.”

Despite the general support for the principle of transparency, a few responses cautioned against demands for full transparency of all internal processes:

“However, limits to transparency come with individual rights and with the undisputable need to offer spaces to find compromises in the workings of the EU institutions. We will always strive for the right balance.”

“[...] opening up formal negotiation sessions sometimes has a tendency of inducing more informal and even less transparent sessions. “

Some governments were of the opinion that EU institutions, including the Council, were already comparatively open and transparent. For example, Germany replied:

Many instruments for a transparent and open dialogue between the EU and its citizens do already exist – they often go beyond the transparency standards in Member States.

Interestingly, there were also a number of responses making the opposite point, arguing that their government is operating under far stricter transparency and disclosure obligations at home. In parts, these governments mentioned that they were legally obliged to make some information public that is currently not available at EU level as well as reporting back to national parliaments about the status of the legislative process or the negotiations.

ON PUBLISHING MORE DETAILED RESULTS/MINUTES

The majority of governments seemed to agree that, at least on the level of the Council of Ministers, the system could be improved. For example:

“Finland is in favour of publishing more detailed information on the outcome of discussions of the Council of Ministers meetings. In our view, this can be done by publishing more detailed press releases and other informal documents.”

In this regard, the establishment of a joint database for documents from all EU institutions, which had been agreed upon in the General Affairs Council in June 2016 as part of the implementation of the IIA on Better Regulation, was referred to numerous times:

“Finland strongly supports the establishment of a joint database for the EU institutions involved in law-making on the state of play of legislative files as a means of improving the traceability of the legislative process. This database should encompass documents created during all procedural steps of the decision-making process.”

ON MAKING ALL INITIAL EXCHANGE OF VIEWS BETWEEN MINISTERS AT COUNCILS OF MINISTERS OPEN TO THE PUBLIC VIA LIVE-STREAMING

NGOs have repeatedly asked Council presidencies to live-stream initial debates among ministers on fishing limits – but so far without success. Live-streaming is compulsory for initial debates on ordinary legislation, but not on fishing limits.

A few Member States (for example, the Netherlands and Finland) highlighted that exchanges of views among ministers on legislative proposals were already live-streamed:

“The exchange of views in the Council of Ministers on legislative proposals are open to the public via live-streaming. According to Article 7(3) of the Council’s Rules of Procedure (2009/937/EU) “The opening to the public of Council meetings relating to the ‘Legislative deliberations’ part of its agenda shall be made through public transmission by audio-visual means, notably using video-streaming.”

And in a similar spirit:

“[The Member State] is in favour of the Council meeting in public when deliberating and voting on draft legislative acts and making public the Council’s first deliberation on important new proposals. The Council’s Rules of Procedure should be interpreted in a manner that ensures the greatest possible openness.”

Live-streaming pertains specifically to the Council acting in its legislative capacity; the spectrum of decision-making is, of course, much broader than this. The negotiations on fishing limits are not defined as a legislative proposal, but the rules of procedure allow for live-streaming of non-

legislative discussions. The Netherlands explicitly mentioned that is already done in special cases and should potentially be also explored further:

“However, the live-streaming of these discussions could be considered as well, and is not a rare phenomenon. For instance, the whole Telecom Council of May, including non-legislative items, was public via live-streaming. Public debates will also be held on several non-legislative items at the Education, Youth, Culture and Sport Council of 30-31 May, including the foreseen policy debate on improving governance in sport. The Netherlands would, where appropriate, be in favor of bringing more transparency in the Council with regard to non-legislative proposals.”

For the specific case of the AGRIFISH Council negotiations on fishing limits, Finland also put forward convincing reasons for allowing live-streaming of initial exchange of views between ministers at Councils of Ministers:³⁴

“Although the Council Regulations fixing fishing opportunities for certain fish stocks are not adopted under ordinary or special legislative procedure, these Regulations are nevertheless binding legal acts applicable as such in all Member States.”

In one specific case the opinion is then summarised as follows:

“In our view, the first deliberations between ministers at AGRIFISH Council in the context of negotiations on fishing opportunities should be live-streamed on the basis of the Council’s Rules of Procedure. Due to the public interest in managing fisheries resources, allowing citizens to scrutinize the information which has formed the basis of the legal acts in question and giving them the possibility to find out the considerations behind Union action in this field is important for the effective exercise of democratic rights.”

ON PUBLISHING THE NEGOTIATING POSITIONS BY GOVERNMENTS EITHER BEFORE OR AFTER MEETINGS OF THE COUNCIL OF MINISTERS

As far as publishing individual Member States’ negotiating positions are concerned – a demand that has traditionally been hotly debated – several responses referenced the EU Court of Justice ruling on the implementation of the access to information law, especially in regard to publishing documents disclosing this information. The decision was taken as a strong signal that the Council needed to consider how to implement the ruling. One Member State recalls and interprets the court ruling as follows:

“According to well-established case law of the EU Court of Justice, transparency is of particular relevance where the Council is acting in its legislative capacity (see e.g. the judgment in joined cases C 39/05 P and C 52/05 P Sweden and Turco v Council). Following the judgment of the Court in case C-280/11 P Council v Access Info Europe, public access should, in general, be granted to Member States’ negotiating positions in on-going legislative procedures.”

In the specific case of AGRIFISH Council negotiations on fishing opportunities, Portugal supported publishing the negotiating positions/ wording proposed by the government before both the Council of Ministers and COREPER I meetings, stating:

“We have no problems in being 100 per cent transparent on our reasoning and rationales to defend our interests.”

As briefly mentioned above, some Member States already provide more detailed account on policy positions as standard practice. For example:

“The Netherlands government provides written information to parliament in the run-up to all meetings of the Council in its various formats. These ‘annotated agendas’ provide an overview of the topics to be discussed, the position the Netherlands will take, and the views of the EU institutions and other Member States. Before the Council meeting in question, the responsible member of the government will meet with the relevant permanent committee for a preparatory debate. When the Council has taken place, the parliament receives a report of the meeting where again the position of the Netherlands is included. This procedure/work method applies to all Council meetings, including AGRIFISH Council meetings. All these documents and debates are open to the public.”

However, there were also more reluctant voices, questioning the feasibility of disclosing negotiation positions in advance. For example:

“The negotiation process is [...] often very complex and multi-layered, and lasts many months. It is often not until the last moments that participants’ final positions are decided, negotiated, and then reconciled to reach agreement. [...] it would be unusual and indeed, less than prudent, for us to reveal such details in advance of the negotiations. “

OBSERVATIONS & RECOMMENDATIONS

Overall, there seems to be a strong case for increasing the transparency of Council decision-making – not only to improve the quality of policies and democratic legitimacy, but also to comply with legal obligations as stipulated in the Treaty on European Union. Recent court decisions (for example, *Sweden and Turco vs Council*, or *Council vs Access Info Europe*) also have shown that Member States in the Council cannot go on with business as usual, but have to revisit their general approach in this regard.

Public perception clearly underlines that the state of transparency and accountability of EU institutions is only as good as its weakest link. This makes it impossible to ignore the Council and only focus on the other institutions when addressing transparency deficits. If Member States do not start to come together to pull their weight, the reputation of EU institutions – as the Brexit vote has shown – will be further jeopardised. This is particularly regrettable in light of a number of very promising transparency initiatives in this field led by other EU institutions. The good work tends to be all too often forgotten, while at the same time EU institutions need to remain self-critical and open for improvement. Member States should not be the ones standing in the way of making the EU more transparent and accountable to its citizens.

While there has been a group of progressive Member States (Denmark, Estonia, Finland, the Netherlands, Slovenia and Sweden), which previously produced an outline for future reform, the majority of Member States remain rather cautious about substantial changes. The Dutch EU Presidency, which chaired Council meetings during the time of the study and survey, tried to consolidate Member States' position by producing a non-paper on issues related to Council transparency, replacing an older version³⁵ from April 2015. Some of the central demands of this paper have been taken up as part of the new IIA on Better Regulation and announced during General Affairs Council (GAC) on 24 June 2016. One of the key questions remains whether or not there might be a renewed appetite by Member States for reform in this area, especially with regard to the upcoming negotiations on a new IIA to reform the EU Transparency Register, but also setting fishing quotas for 2017.

WHAT LESSONS CAN BE DRAWN FROM MEMBER STATES' REPLIES?

The findings have to be interpreted with caution due to the limited number of respondents and the relative weight of voting power of individual Member States in the Council. For this reason, it is difficult to draw definitive conclusions on the position of the Council as a whole. In general, almost all Member States expressed support for the general principle of transparency in EU policy-making – emphasising the importance and centrality of it in the treaties. The responses showed a great variety of different ideas about how to enhance transparency in decision-making. While a clear majority of Member States in terms of simple numbers favoured reform, this could be due to the selection bias that saw countries that are interested in the topic replying to the survey. The replies also underlined that larger Member States were very reluctant to embrace more substantial reform in this area.

Publishing more detailed results/minutes was supported by most as a means to increase transparency in decision-making. Making the initial exchange of views between ministers at Councils of Ministers open to the public via live-streaming, especially for the non-legislative files, was also supported by some. In several cases, this is already happening on a voluntary and ad hoc basis in some Council configurations on other policy issues. However, it has not yet happened during the annual discussions on fishing opportunities. Currently, the decision to propose live-streaming lies at the discretion of the Presidency, which is subsequently discussed and agreed by the Member States, as laid out by the rules of procedure.

For the specific case of the AGRIFISH Council, it has been difficult in the past to organise a majority of Member States in favour of live-streaming the initial exchange of views between ministers preparing the negotiations on fishing limits and/or right before each of the negotiations itself. This reluctance calls the general support for the principle into question – particularly when it comes to specific, sometimes controversial cases. Transparency does not seem to be a default principle, even for most of the progressive Member States, but is balanced on a case-by-case basis against other conflicting principles – for example, the efficiency of negotiations. Likewise, publishing negotiating positions by governments either before or after meetings of the Council of Ministers remains a controversial point among Member States. The different replies underlined that national legal frameworks and experiences can differ quite substantially in this regard. While some countries claimed to make most of such documents open to the public as part of the scrutiny by national parliaments, to reveal individual positions seems a no-go area for others.

All in all, the survey confirms the initial assumption that currently there is little appetite for reform inside the Council, with Member States mostly stating that the existing rules and procedures are sufficient. However, the experience of the past years has shown that the Council has committed to small steps forward. In this sense, without a major policy shift in key Member States, we cannot expect to see a transparency revolution. This means the way forward will have to consist of many small steps.

THE EXISTING LEGAL FRAMEWORK – A STARTING POINT FOR REFORM

The starting point for reform may be the existing legal framework. The study confirmed that both the Treaties and the Rules of Procedure of the Council would allow for a much more generous interpretation of the principle of transparency in decision-making. In addition, some of the recent rulings of the EU Court of Justice have emphasised that the Council needs to revise, adapt its access to documents policies to open up its decision-making process to the public and explain how decisions come about. The application of transparency provisions in the Council vary substantially both across policy-making levels and between Council configurations. In this sense, the focus should not just be on the design of smart new policies and practical solutions to allow greater transparency but also on the implementation of the existing ones.

It remains to be seen whether the Council will gradually allow more transparency in its decision-making process to an approach that will allow citizens, civil society organisations and other stakeholders to understand the process of how final decisions have been reached and who influenced them. For this to happen there would need to be a greater focus on the transparency of the preparatory bodies (Working Parties, COREPER, etc.). Given the consensual nature of Council decision-making, voting records at minister level are not very telling about actual deliberations, as they conceal concessions and compromises at earlier stages.

Against the background of the larger reform process of the EU in general, it can be hoped that decision-makers will understand that better and more direct accountability of decision-making in the Council will be key to rebuilding the legitimacy of the EU project. Taking this into account, it will be crucial to find ways to enable people to hold their representatives to account. Many of the ideas within this study might become relevant at this point again.

THE WAY FORWARD

There are a number of ongoing or upcoming political initiatives at the EU level that could provide the basis for the next reform steps of Council decision-making.

In the AGRIFISH Council, the upcoming negotiations on fishing limits for 2017 could be taken as a test case for some of our recommendations to increase the transparency of the negotiations.

For the second half of 2016, the start of the negotiations on a new IIA reforming the EU Transparency Register will hopefully address issues related to transparent and ethical lobbying. This is a good time for the Council to finally join the register and to make a substantial contribution to more transparency.

On a higher political level, discussions on the general direction and a reform of the EU are just starting with the informal summit about the future of the EU on 16 September 2016 in Bratislava. Recalling the Laeken Declaration, this is also a good moment to look at the broader political framework that determines the transparency and accountability of EU institutions.

RECOMMENDATIONS

Any future reform process should be guided by a clear commitment to more transparency in Council decision-making and should translate into tangible, concrete reform steps. For this purpose, Transparency International EU has compiled a number of practical recommendations, both addressing Council decision-making in general and the specific case of the AGRIFISH Council. The recommendations incorporate and consolidate ideas from our previous studies in the field, the analysis of the AGRIFISH case and the Member States' feedback to the questionnaire.

RECOMMENDATION 1:

Increase the transparency and accountability of the Council by...

- 1 Publishing **more detailed results/minutes**.
- 2 Providing detailed **information on Member State negotiating positions**, ideally before compromises have been reached or votes have been held.
- 3 Extending **live-streaming to Council and COREPER debates**;
- 4 Making trilogue meetings more transparent by **publishing agendas, participant lists, negotiating positions and proposals for compromises** before the meetings, and detailed minutes in a timely fashion afterwards.
- 5 **Reforming of the access to information policy** of the Council to comply with legal obligations, including a clear and public assessment framework for limited documents.
- 6 **Generalising best practise** at each stage of the decision-making process (Working Parties, COREPER and Council) and across different Council configurations, including "informal" configurations such as the Eurogroup.

RECOMMENDATION 2:

Become a full member of the EU Transparency Register

- 1 **Unregistered lobbyists should not be able to get meetings or access buildings**. Permanent Representations of member states should also pledge to no longer meet with unregistered lobbyist as well as the rotating presidency – both in Brussels and in national capitals;
- 2 To enable the public to monitor the implementation of the above principle, the Council should **publish meetings with lobbyists** as is current practice for the European Commission;
- 3 The Council should **publish all written input by lobbyists** in a central location to allow the establishment of an EU Legislative Footprint in a joint database with Parliament and Commission.

RECOMMENDATION 3: Make AGRIFISH Council negotiations on fishing opportunities more open and transparent by...

- 1 Publishing **more detailed results/minutes** at each stage of the decision-making process, especially of the working party on internal fisheries and COREPER meetings.
- 2 Making all **scientific and socio-economic evidence** used in the preparatory bodies of the Council negotiations open to public scrutiny.
- 3 Providing detailed **information on Member State negotiating positions** from each level of the Council, where possible, before and otherwise after compromises have been reached or votes have been held.
- 4 Allowing **live-streaming of the ministers' exchange of views** in AGRIFISH Councils in accordance with Article 8 of the Council's Rules (2009/937/EU).

ACRONYMS

AGRIFISH	Agriculture and Fisheries Council
CFP	Common Fisheries Policy
CJEU	Court of Justice of the European Union
COREPER	Committee of Permanent Representatives (the national ambassadors to the EU)
Council	Council of the European Union
GAC	General Affairs Council
IIA	Inter-Institutional Agreement
JTR	Joint Transparency Register of the EU
STECF	Scientific, Technical and Economic Committee for Fisheries
TAC	Total Allowable Catches
TEU	Treaty on European Union
TI EU	Transparency International EU

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32. See <https://twitter.com/CEPESCA/status/67672388852705280>

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34. According to the Rules of Procedures, the decision on whether to live-stream comes from the rotating Presidency in cases where rules are legally binding and if decisions taken are of special public interest: According to the first subparagraph of Article 8(1), "Where a non-legislative proposal is submitted to the Council relating to the adoption of rules which are legally binding in or for the Member States – the Council's first deliberation on important new proposals shall be open to the public. The Presidency shall identify which new proposals are important and the Council or Coreper may decide otherwise, whenever appropriate". According to the second subparagraph of Article 8(1), "The Presidency may decide, on a case-by-case basis, that the subsequent Council deliberations on one of the proposals referred to in the first subparagraph shall be open to the public, unless the Council or Coreper decides otherwise."

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