

Opening up closed doors: making the EU more transparent for its citizens

*Paper from the Dutch COSAC delegation on EU transparency
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In a representative democracy citizens have the right to know whether their legislators voted in favour of or against a law or proposal. Citizens have the right to know what the available policy options are. Both transparency and accessibility of documents are therefore essential.

The EU Council is a legislator. Members of national parliaments have insufficient access to documents and voting records, including informal voting records, to be able to oversee and scrutinize their governments' actions.

For citizens, it is even harder to gain access to documents, to acquire knowledge of their government's actions or to understand the process by which parliaments make decisions.

Therefore, our democracy is imperfect. If our citizens don't have access to what is going on in their government, how can they possibly cast an informed vote?

Transparency is essential to making democracy meaningful. Without transparency, there can be no public space in which citizens, stakeholders and media can deliberate and thus participate in decision making. Transparency can be a means to bring the EU closer to its citizens. In this position paper, we argue that the EU currently does not live up to this democratic standard and that the Council, in particular, regularly violates EU transparency regulations. If we want to continue influencing EU decision making on behalf of our electorate, we, members of the national parliaments within the EU, should take action.

We propose the Council adopt the following measures:

- 1. Legislative Council documents must systematically be made public without delay.**
- 2. The Council must adopt more specific and detailed rules regarding reporting on legislative deliberations.**
- 3. Informal but influential bodies must be formalized and, at the very least, start applying the Transparency Regulation internally, as foreseen in article 15(3) TFEU.**
- 4. The negotiations on the Transparency Regulation must be reopened in order to align the regulation with the expanded requirements under article 15(3) TFEU.**

We propose pursuing the following course of action:

- We request the Council and other bodies like the Eurogroup and the EU-27 adopt the concrete measures listed above in a joint letter of participating COSAC delegations.**
- We open a parliamentary debate on these measures with our national**

governments at home or adopt a corresponding resolution.

- **We return to the issue of transparency at the next plenary COSAC to assess our progress.**

The lack of transparency in the EU

There are many examples of EU legislation and other decisions adopted by the Council in a non-transparent fashion which have significant implications for member states and their citizens. As the three examples below clarify, this concerns decisions made by member states both inside and outside the formal Council framework.

- The EU budget for 2017, which entails expenditures of up to €157 billion, was presented by the European Commission in June 2016. The Council's Budget Committee examined the text in June and July 2016 and the final text was approved on 20 July 2016. This text was subsequently adopted by the Council by written vote in September 2016. During this speedy negotiating process, no documents were made available containing either information on the issues debated between member states or on their points of divergence. The negotiations with the European Parliament were also conducted swiftly and the budget was ready to be published in the Official Journal by December 2016. National parliaments were given no real opportunity to have their say on the allocation of the EU's resources.
- The various bail-out mechanisms created in the course of the European sovereign debt crisis, such as the EFSF (European Financial Stability Facility) and the ESM (European Stability Mechanism), are further examples of non-transparent decision making. These mechanisms are intergovernmental by nature but only partly so in practice, because much of the decision making takes place in the Eurogroup and the European Commission. Although national parliaments were aware of the possible risks to national budgets when they signed up for these mechanisms, the actual budgetary risks are determined by individual loans and reform programmes that are approved by the Eurogroup and monitored by the European Commission and others, but are outside the direct scope of influence of national parliaments. As the Dutch and European Courts of Audit have pointed out on various occasions, Eurogroup decision making is notoriously opaque, not only in relation to the bail-out funds, but in general.
- A third noteworthy example is the Brexit negotiations. No formal framework applies in the EU-27. Even though Parliaments will have to ratify a settlement of future relations with the UK, they can follow the negotiations with great difficulty. Understanding a government position in the informal discussion is often impossible. The EU does not actively involve national parliaments in the input for the negotiation rounds, and the results are only communicated in a terse manner. Therefore, for parliaments it is hard to follow the progress of the negotiations, let alone influence them.

Why transparency matters to us

As the above examples show, the decision making of member states, both inside and outside the formal Council framework, tends to be particularly opaque. This lack of transparency is a violation of article 15(3) TFEU and keeps citizens and their representatives far from decision making in the EU.¹ Too often, this has resulted in EU policies that citizens do neither understand nor consider to be legitimate.

Parliaments are expected to oversee and scrutinize the Council's actions on behalf of their constituents. Without proper insight into the Council's thinking, we cannot perform this task. Instead, we are continually confronted with done deals. If parliaments allow themselves to be sidelined like this, they risk losing their relevancy as representative bodies in the context of EU decision making. This has become all the more urgent as the European Council recently announced its intention to create a new dynamic in EU decision making through high-level informal summits of member states. The aim is to speed up the process and to overcome differences. It is up to us, the parliaments responsible for monitoring the national governments, to make sure this new dynamic is performed in a democratic and transparent manner.

Indeed, precisely because of our role of overseeing and scrutinizing the Council's actions, we are in the best position to act. Members of national parliaments can demand that our governments maintain a solid commitment to transparency in their dealings with each other. Together with the European Parliament, we can generate a strong force for greater transparency and democracy. The European Parliament and many other actors, including the courts, the European Ombudsman, academics and civil society organisations, have been working for a long time to achieve a greater degree of Council transparency. We propose the COSAC now join them by jointly submitting the following concrete measures to the Council.

1. Legislative documents must systematically be made public without delay.

¹ Article 15(3) TFEU reads as follows: "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph."

The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks. The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph."

Regulation 1049/2001 (the "Transparency Regulation")² requires that all Council documents are made public immediately, unless one of the exemptions listed in that regulation applies. Only in this case, a document can be withheld from publication. The *limité* label the Council often applies is not listed as an exemption and, in principle, should not be applied to legislative documents at all. However, the Council has turned the Transparency Regulation around: according to the Council's internal guidelines and rules of procedure, documents will not be made public unless it is clear that no refusal ground applies.³ This has led to the disproportionate practice of withholding information from the public and representative bodies. In 2016 alone, over 4,500 legislative documents were produced by Council preparatory bodies. Of these, 2,500 (60%) were not made public or only after negotiations had been finished. In contrast, 1,800 of those 2,500 *limité* documents were released after access-to-information requests from citizens.⁴ In other words, it appears that the Council is too quick to label documents as *limité* and, when asked to reconsider, often has to change its initial decision to withhold documents from the public eye. The *limité* label has become a tool to delay publication of documents until an internal discussion has been neutralised.

According to legal advice from the lawyer of the Dutch parliament,⁵ the Council's handling of documents is in violation of EU law and the European Court of Justice's judgments.⁶ In the Access Info case, the CJEU was of the opinion that documents that are part of the normal legislative process, including various proposals for amendment or redrafting made by the member states, could not be regarded as "sensitive" "by reference to any criterion whatsoever".⁷ Therefore, institutions cannot refuse access to documents on the basis of Article 4(3) of Regulation (EC) No 1049/2001 by relying on the "sensitivity" of such documents.

To comply with the legal framework, the Council must assess on a document-by-document basis whether an exemption applies and clearly motivate an exception when it denies access to documents. This must be done immediately upon circulation of a legislative document among delegations and not only after negotiations have been finished. The Treaty of Lisbon, the Transparency Regulation and the case law of the European Court of Justice require that

² Regulation 1049/2001 of the European Parliament and the Council of 30.05.01 regarding public access to European Parliament, Council and Commission documents, OJEU, 31.05.01, L 145/43.

³ Guidelines for handling of documents internal to the Council, Council document of 09.06.11, no. 11336/11 and Council Decision of 01.12.09 on the adoption of the rules of procedure, OJEU L 325/25 of 11.12.09.

⁴ See council document 7903/17 of 12 May 2017, 15th annual report on the implementation of regulation 1049/2001.

⁵ See: <https://www.houseofrepresentatives.nl/news/internal-eu-council-documents-often-wrongly-undisclosed>

⁶ Inter alia: CJEU, C-350/12P, Council / In 't Veld, ruling of 03.07.14, ECLI:EU:C:2014:2039, par. 48; CJEU C-280/11P, Council/ Access Info Europe, ruling of 17.10.13, ECLI:EU:C:2013:671, par. 28; CJEU C-506/08P, Sweden / MyTravel and Commission, ruling of 21.07.11, ECLI:EU:C:2011:496, par. 73; CJEU, joined cases C-514/07P, C-528/07P and C-532/07P, Sweden and others / API and Commission, ruling of 21.09.10, ECLI:EU:C:2010:541, par. 69; CJEU, joined cases C-39/05P and C-52/05P, Sweden and Turco / Council, ruling of 01.07.08, ECLI:EU:C:2008:374, par. 33.

⁷ See paragraph 63 of the Access Info Judgment.

wide access must be granted to the public especially when it comes to legislative documents.

Therefore, we call upon the Council to start applying the Transparency Regulation as intended and in line with the Court's case law. This means that within the Council, routine procedures and working methods must be established to carefully assess whether a new document should be made available to the public immediately or whether one of the refusal grounds mentioned in the Transparency Regulation applies. This assessment must be made on a document-by-document basis and directly upon circulation among Member State governments. This means legislative documents must be directly available at all times, unless one of the exceptions enumerated in the Transparency Regulation needs to be applied. The Council should also broaden the definition of "legislative document" in order to include presidency conclusions, state-of-play documents and multi-column texts.

2. The Council must adopt more specific and detailed rules regarding reporting on legislative deliberations.

At the moment, several types of legislative documents exist and those available vary in their informational content. For example, individual Member State positions are frequently not recorded in working party reports and presidency notes. In other words, even if the Council started applying the transparency legal framework as intended, the transparency of Council deliberations would not necessarily increase. On the contrary, if the Council was forced to publish them more often, the risk would be that less information is recorded in official documents. This can be prevented by formulating standards on reporting on deliberations. Without such flanking measures, the democratic right of citizens to follow the evolution of discussions on legislative proposals within the Council in a timely manner, would still be hampered even if wider access to these documents were granted.

To solve this problem, we call upon the Council to standardize the reporting on Council meetings and preparatory Council meetings in the field of legislation and to establish these standards in its rules of procedure. This means that a comprehensive agenda must be distributed for each meeting in which legislation is discussed. Furthermore, the minutes of the meetings must provide details on the discussed files, the points of discussion, the submission by the member states and any voting results, either formal or interim/informal, even if no progress was made. Additionally, the legislative process could further be enhanced by regular public exchanges of views at COREPER or at a ministerial level, for instance every three months or after every five working-group meetings. Adopting these rules will be the first step in making the Council more transparent for national parliaments.

3. Informal but influential bodies must be formalized and, at the very least, start applying the Transparency Regulation internally.

The documents of high-level and informal organs such as the European Council, the Eurogroup, the Euro Summit and the EU-27, which are circulated prior to meetings, are usually labelled as informal. This means the Transparency Regulation does not apply to those documents. Consequently, access to such documents cannot easily be obtained relying on these rules. This is at odds with the treaties and particularly with article 15(3) TFEU that prescribes that the EU institutions, bodies and organs shall conduct their work as openly as possible and develop provisions in their rules of procedure on transparency and that citizens shall enjoy access to documents.

A solution is to call upon these bodies to start applying the Transparency Regulation and to develop rules of procedure that are in line with the standards developed in EU legislation and case law.

This would still allow for confidentiality when the exemption grounds of article 4 of the transparency regulation apply.

For example a document shall not be disclosed if necessary to protect financial, monetary or economic policies (article 4(1) Regulation 1049/2010) of it would seriously undermine the institution's decision making process, unless there is an overriding public interest in disclosure (article 4(3))

This will enhance transparency in a proactive and voluntary manner and at the same time leave room for these bodies to refuse access to documents on the grounds listed in the Transparency Regulation.

4. The negotiations on the Transparency Regulation must be reopened in order to align the regulation with the expanded requirements.

In 2008, the European Commission proposed to amend the current Transparency Regulation. The European Parliament adopted its position on that proposal in 2011. However, the Council has not agreed on a negotiation mandate to date, thus effectively blocking negotiations.

We call upon the Council to reopen the negotiations on the Transparency Regulation and to establish a general approach in the near future, so that the inter-institutional negotiations may start. This general approach should at least align the Transparency Regulation with the expanded requirements under article 15(3) to encompass all of the EU's bodies, offices and agencies. However, this should not obstruct the rights granted by the current Transparency Regulation and its case law.

Balancing effectiveness and transparency

- As the Transparency Regulation also recognizes, confidentiality is sometimes needed in order to avoid blocking ongoing negotiations. We agree that some space to think freely may help parties with diverging views to reach a compromise. However, the current Council rules and practices go too far in protecting their interests at the expense of citizens' democratic rights. It should be underlined that we are not advocating total transparency; we just ask for a better anchoring of the principle of transparency that has already been recognized by the EU since the Amsterdam Treaty. The present situation is in violation with the Treaty of Lisbon and the Court of Justice's case law. We thus ask the Council to change its internal guidelines and practices in order to comply with the law. We do not advocate more transparency regarding the real sensitive issues. The present exceptions for issues like national security and defence matters should stay in place. We mainly focus on the legislative deliberations within the Council and the policy discussions, including economic policy discussions, taking place in high-level informal groups. We are calling on the Council and its preparatory bodies to start behaving like a proper legislature when acting in their co-legislative role.

- Another argument against imposing stricter transparency obligations on a deliberative forum is that it can cause the real negotiations and deal making to move elsewhere (see also point 2). Indeed, a change of the formal rules will probably only work accompanied by a change of mind and a change of culture. It is impossible to force these changes, but this should not prevent us from demanding better rules on transparency. Furthermore, we are convinced that a broadly shared call from national parliaments with pinpointed demands will make clear to the Council that it is high time the Council started taking transparency seriously and made transparency a part of its DNA.

- Lastly, we recognize that in this position paper we mainly focus on the Council. We are open to any pressing transparency issues regarding other EU institutions and to devising a way to address them.
 We focus on the Council for two reasons: national parliaments scrutinize their governments actions in the Council and there is a lot of room for improvement in terms of transparency in the Council.

The way forward

We propose pursuing the following course of action: at the coming meeting of the COSAC in Tallinn, we will present this paper in greater detail during the panel discussion on the EU and the role of citizens. During the meeting, a letter addressed to the Council will be available for delegations to sign. This letter will contain an invitation to the Council to adopt the measures stated above. We also call upon the COSAC delegations to table the issue of transparency in their own parliaments in a way they see fit, for example by organizing a debate with their governments or by adopting a resolution. Lastly, we propose returning to the issue at the next COSAC plenary meeting in Bulgaria to assess our progress.

The case for more transparency has frequently been made by individual member states within the Council and some steps in the right direction have been taken over the past years. Notably, in 2015, Denmark, Estonia, Finland, The Netherlands, Slovenia and Sweden jointly submitted a series of proposals to enhance the transparency of the Council. Furthermore, the inter-institutional agreement on better law making has a promising paragraph on transparency. The European Parliament has frequently championed the issue, and the European Ombudsman has issued recommendations on trilogues and is currently investigating the Council's transparency.⁸

These developments are very welcome, but they fail to address some of the core issues that we address in this paper. Real change is needed as the current lack of transparency lead to a real lack of democratic accountability in the European Union.

Members of the national parliaments have both the interest and the influence to open up closed doors and make the EU more transparent for themselves and the citizens.

⁸ <https://www.ombudsman.europa.eu/en/cases/caseopened.faces/en/59816/html.bookmark>