

European Ombudsman Consultation On Transparency of the Council of the EU

– Submission by Access Info Europe

Access Info welcomes the European Ombudsman's initiative to conduct a public consultation on the transparency of the Council of the European Union, with a particular focus on the legislative process.

We note that our understanding is that ensuring transparency of everything that the EU does is part of good administration and hence the transparency around the legislative role of the Council should fall within the remit of the European Ombudsman.

We hereby submit our response to the specific questions by the European Ombudsman.

I. Accessibility of information and documents Δ

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

Access Info Europe: There are two ways in which public understanding could be improved. The first is improvement in the publication and organisation of information so that it is possible to follow a particular legislative process. We note that more information is now available about working parties and we welcome the fact that the Council is working on greater transparency.

Ensuring linkage between what is published by each institution is essential. There is also a balance between ensuring publication of documents with the Council's working logic and making them more accessible to the public (the European Parliament's Legislative Train is a nice initiative in this sense, although perhaps not the ultimate solution either): given the huge amount of work that has been done in addressing such transparency challenge in a number of Member States, we strongly recommend that input be sought from those who have developed the better practices around the EU.

The second way is to significantly increase the volume and detail of information made public at all stages of the legislative process. The detail issue is a matter of more detailed record creation, so that, for example, names of Member States, and details of discussions are better recorded. The volume question is about publishing far more information. Currently the Council estimates that it publishes about half of the documents circulated relating to a legislative proposal. This seems to Access Info to be woefully low, particularly as given that some of the information needed to follow, participate in and ensure accountability of any particular process (we discuss some more specifics below).

Access Info has developed general recommendations on transparency of meetings which are relevant to cite here:

Type of Information	What published	Frequency of Publication
Information on upcoming meetings	<ul style="list-style-type: none"> ▪ Date, time and location of the meeting ▪ Expected participants ▪ Agenda of the meeting ▪ Issues to be discussed ▪ Documents submitted by any parties in advance of the meeting 	<p>As soon as communicated to participants in the meeting, ideally at least one month / 20 working days before a meeting and at the very latest one week (5 working days) before the meeting.</p> <p>Any information or documents coming later that this should be made public as it is communicated to participants.</p>
Information to ensure accountability after a meeting	<ul style="list-style-type: none"> ▪ Date, time, location and duration of the meeting ▪ Participants present (specify clients/interests represented) ▪ Issues discussed ▪ Copies of all documents presented or considered during the meeting if not previously published ▪ Minutes of the meeting which must include at a minimum all agreements or conclusions reached ▪ Copies of any texts concluded or revised during the meeting 	<p>Within one week (5 working days) of the meeting taking place or as soon as relevant documents, such as minutes, are finalised.</p>

Notes on the information to be compiled and published:

Agendas: the agenda should contain a sufficient level of detail for the public to know which issues will be discussed at a meeting. Agendas should be made public as far in advance of the meeting as possible, and at latest when the meeting participants are notified of the meeting.

Minutes: A record of the meeting – minutes – should be kept, and it should be sufficiently detailed to permit members of the public to know which were the main issues discussed at the meeting and to be informed of any agreements reached or decisions taken.

Record Creation Rules: there should be clear rules about record creation and timeframes for publication. Each meeting should be required to have a regular note taker or to designate one at the start of each meeting.

Tracking debate: there should be standard rules on how to keep track of proposals and amendments so it is possible to follow and understand the evolution of legislative proposals and, where relevant, the evidence used in developing them and the justifications for decisions.

✓2. In its reply to the Ombudsman, the Council describes the actions it is currently taking to make it easier to find documents on its website, such as improving its search form, giving access to documents via a calendar of meetings and developing the ‘joint legislative database’ provided for in the Inter-institutional Agreement on Better law-making[3].

Are there other measures the Council could take to make legislative documents easier to find?

Access Info Europe: We welcome these initiatives and note that there have been improvements in transparency in recent times. Please see our responses to question 1 as well as other questions below.

What we do notice in the Council’s reply to the European Ombudsman is that there is, in general, a certain imprecision in the answers. We would be extremely interested to have access to more data, such as data about the subject matter of requests or the number of times that a LIMITE document is released after a request or how often Legal Opinions are made public in their entirety. The same goes for data about what is consulted on or downloaded from the Council’s register. This would enable us to have a more fact-based discussion on some of the matters and to understand where there is a demand for transparency, in order to ensure that that demand is being met.

Similarly, we would like to have more specifics about the trainings that are conducted in order to understand better what kind of resources are being dedicated to improving transparency.

And very importantly, data on timeframes for release of documents, either proactively or in response to requests is essential in order to understand whether there is sufficiently timely transparency for there to be meaningful participation in public debate.

Proactive communication about how and where to find information should be conducted. This should include meetings with civil society, journalists, and interested citizens at the national level would help those who do not work regularly on European Union matters but who may have an interest in a particular topic, to be able to follow a process and participate. Such discussions should include “focus group” type sessions where an opportunity is given to members of the public to give feedback. Such practices are common in developing transparency at the national level across Europe (including as part of e-government and open government initiatives, and under the Open Government Partnership) and can result in structuring information in a way that makes it more relevant to and valuable for citizens.

Another issue not raised by the European Ombudsman nor touched on in the Council’s reply is the language in which documents are created and in which the Council’s transparency initiatives are conducted. We see the majority of documents are in English, sometimes in French. It is laudable that the European Ombudsman permits people to participate in this discussion in any language, but the fact is that for those without dominance of English, the Council will seem inaccessible, whatever else it does to become more transparent or to present information in a way that is relevant to citizens. We believe that the language issue should be part of future discussions.

II. Transparency of discussions

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

Access Info Europe: It is particularly important that there be transparency of discussions at all stages of discussions in the Council

- i) We have found confusions of terms, including one case in which a request was submitted for minutes of meetings, the requester was told that no minutes were taken, and then it turned out that the “outcomes of proceedings” exist and would have helped answer the question.
- ii) Incredibly sketchy minutes are a serious problem, at various levels, and we urge the issue of record creation to be addressed. We are interested to understand more about the standards for note taking as we have not seen clarity on that in the Council’s response to the European Ombudsman.
- iii) Time frames: we have found some delays in responses (although not particularly serious ones) caused by internal processes of review by the WPI of confirmatory applications. More data from the Council on timeframes would help understand the scale of this problem.
- iv) The application of LIMITE is an issue we have seen. We currently have a complaint with the European Ombudsman re a Council Legal Opinion. It seems to us that there is a serious problem of over-broad application of exceptions although we don’t have the full data to understand how serious it is (see note on need for more data above). It may be that there is a tendency to apply LIMITE broadly, and then a reluctance to change an initial assessment the LIMITE categorization; to do so is a problem (we address this further below).

On a positive note, we would like to point out that in other aspects of processing access to documents requests record keeping, the Council is generally good at respecting the rules, and we have seen professional treatment of requesters and some very detailed responses (for example relating to transparency expenses) that support the Council’s assertion that it is taking transparency seriously, and that also indicated good record creation and records management practices. (We note that these are impressions as we don’t have hard data).

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

Access Info Europe: We emphasise the importance of knowing Member State positions from an early stage.

Another recommendation is to use plain English and/or be flexible in terms of responding to requests (outcomes of proceedings: will these be provided if someone asks for “minutes of meetings”). Perhaps explaining what the rules are in plain language, which kind of document serves which purpose, so that the public can see better how the system works. The

development of an integrated inter-institutional system to allow the public to follow the legislative process, and one that is designed with the public in mind, will no doubt contribute to ensuring a better-informed public.

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

Access Info: We have sometimes both ourselves and on behalf of others. We know of others (CSOs, journalists, and academics) who have sought to do so, so it is important that relevant documentation be public and be organised and findable.

We have also endeavoured to establish the status of a particular legislative procedure by looking at sources in the three institutions. This can result in a rather confusing picture for someone not familiar with the way things work. Hence we would welcome any initiative to join up initiatives on transparency of legislative procedures so that it becomes easier to both follow in real time and to conduct research at a later stage.

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

Access Info: As matter of principle, the same transparency requirements should apply to working parties and discussions in Coreper. The overarching transparency requirement should be that there is a presumption of openness and hence a presumption that all documents are in the public domain unless it can be demonstrated that (all or part of) a document should be withheld based on the exceptions permitted by Regulation 1049/2001 and after application of the public interest test. Particular consideration should always be given to the EU treaty requirements on openness of the legislative process.

This principle goes for both proactive publication and transparency in response to access to documents requests. Indeed, given that many crucial decisions are taken at working party level it is essential that particular consideration be given to transparency in the early stages of legislative proposals so that there may be informed public debate and appropriate level of participation, including by national parliamentarians and civil society, as per the description given above of the need for an effective transparency system that delivers participation and accountability.

We do not believe that the early stages of discussion justify lower levels of transparency as a result of less specific record creation such as only summary notes of meetings or not recording the names of Member States. We expand on this in response to Question 8 below.

One area where there may be debate on whether different levels of transparency is with respect to the names of Member State representatives participating in the working parties. We understand that there is some concern that sometimes the person sent along to the meeting may not be the person ultimately “responsible” for the negotiation, and hence would not want to have their name associated with the outcome of a particular meeting where they might have been standing in for someone else (for example, a junior officer from the permanent representative goes in lieu of someone from the capital). Whilst a legitimate concern, that is something that has to be balanced against the public being able to know who is engaged in developing EU legislation. For citizens of a particular Member State, they might want to know whether their government is sending an appropriately qualified

representative with a sufficient level of decision taking power. Hence we believe that the balance will fall the great majority of cases in favour of knowing who in particular participated in each working party meeting.

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

Access Info: There are a number of problems with the current system of LIMITE documents that need to be thoroughly reviewed.

The first is that it is not strictly true that “documents which bear the distribution marking “LIMITE” are not disclosed to the public without prior authorisation.” Many interested parties (lobbyist, civil society representatives, journalists and others) get to see LIMITE documents on a reasonably frequent basis. The sources of such “leaks” are multiple: because the documents are circulating within Brussels (Perm Reps, Commission, Parliament) and they get passed on, and also because many (although not all) parliamentarians at the national level do have access to these documents and then pass them on to others, and government sources in the national capitals who are working in particular issues also have access and can pass them on. Furthermore, there seem to be no legal consequences for such leaks, so they are done with ease and impunity.

Hence, the reality is that those who are well connected can often secure access to LIMITE documents, whilst those who are a bit outside the “Brussels bubble” or who do not have the same government contacts, will find it harder. This creates a serious problem of a non-level playing field for participation in debate on any particular issue.

There is, therefore, is a need to review system the system by which documents are classified as LIMITE. We note that in the Council’s response to the European Ombudsman it states that this is done on the basis of “*prima facie* assessment of the existence of a risk” for one or more of the exceptions in Regulation 1049/2001. As noted above it would be useful for data on how often this assessment is later overturned, either partially or in full.

In any case, Access Info asserts that a major paradigm shift is needed. The arguments we have seen used in refusing to grant wider access to documents include an insistence on the sensitivity of certain processes and concern that public comment or participation through making representations (either at the national level or directly in Brussels) would somehow damage the process. In the *Access Info Europe* case concern was also raised about the negative impact on time for reaching decisions if they were to be taken openly.

Given that, as noted above, well-connected interest groups – those most likely to make representations and engage in lobbying – do in fact have access to relevant documents, these arguments do not hold water. The result, however, is that those being excluded are citizens, who are either excluded from accessing documents directly or from having discussions with their national elected representatives or their representatives in the European Parliament, neither of whom should be sharing LIMITE documents with the people who elected them. We do not believe that, in the vast majority of cases, having only an inner circle of actors getting full access to documents is appropriate in a 21st Century participatory democratic

system. And there is a further concern: the current framework allows for “policy laundering” through Brussels and hence for national governments to “blame” the European Union for decisions that might be politically challenging at home. This in turn undermines respect for the European Union and all that it does, the harmful consequences of which have become all too obvious in the past couple of years. As part of addressing this problem – which the Council should have a vested interest in taking very seriously – a much more rigorous transparency regime that includes greater transparency of documents being circulated in the Council is absolutely essential.

In terms of the role of national parliaments, we note that while most have access to LIMITE documents, not all do, and furthermore access to classified documents is possible for an even more limited set of parliamentarians, meaning that some across Europe see the documents, and others do not. Research by COSAC into this (see here: <http://www.cosac.eu/denmark2012/plenary-meeting-of-the-xlvii-cosac-22-24-april-2012/d1-17%20Bi-annual%20Report%20-%20FINAL%20280312.doc>) dates from 2012 so we do not have data on the current situation. We presume that the Council would hold such information, and we believe that it should be made public if so. If this information is not held, we strongly urge the European Ombudsman to work with COSAC to gather updated information, as this would serve to understand better the entire scrutiny and accountability ecosystem around European Union law making and permit a more informed debate about how to ensure that it is functioning well and that there are adequate levels of transparency built into it.

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

We have already noted above that we believe that it is essential that there be complete and detailed recording of the names of Member States.

This information is essential for both national parliamentarians and for citizens.

There should be an obligation to justify any instances in which Member States names are not recorded and where use is made of a more general reference. We believe that this requirement to justify in and of itself would have a positive impact in that more Member States names would be recorded, with the end result being increased transparency.

This issue of the stage of the decision-making process is something that was argued in the *Council v. Access Info Europe* case, and as we note above, it is particularly important to know which positions are being taken by Member States at all stages of the process. Furthermore, as was noted by the General Court in its ruling on the *Access Info Europe* case: “By its nature, a proposal is designed to be discussed ... not to remain unchanged Public opinion is perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently.” Hence, the fact that positions might change is not sufficient to justify less openness, particularly given the negative impact that such lack of transparency could have on real-time participation as well as on accountability.

Access Info does not currently have a clear picture of the impact of the *Access Info Europe* case. We note in the answers to the European Ombudsman that that Council states that it continues recording Member States names “where it deems appropriate” and that when recorded these are disclosed “save in duly justified and exceptional cases,” explaining that this means that Member States names are released, except in cases where they are not. Here more precise information on the current practices of record creation as well as more data on the number of refusals and how broad they are would be most useful.

We note that the Council has said (in Document 5109/1/17 REV 1) that in the legislative field, about half of documents circulated are public. This seems to us to be rather a low number: a full 50% of documents relating to legislative files cannot be obtained by the public. And the particular concern here is that, according to the Council, the half that is released does not include documents containing Member State positions, seriously undermining transparency and accountability to those at the national level (parliamentarians and citizens). Indeed, if qualitative information necessary for public scrutiny is not being released, the quantitative evaluation of half of all documents being public is misleading and does not tell much about transparency of the legislative process.

III. Other Δ

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

Just to summarise for convenience here some of the “additional measures” that we have touched upon in our responses above, and adding a couple more, we believe that the Council should undertake the following:

- Gather better data on how the current system is working and make this public so that there can be more informed discussions.
- Hold consultations with representatives of COSAC and national parliaments about transparency to national parliaments.
- Consult with stakeholders across Europe on how it can improve transparency of the legislative process in the Council and how best to present this information
- Working with the other institutions, in particular the European Parliament, examine the best practices on transparency of the legislative process from Member States.
- Seek input from relevant specialists such as those engaged with the Open Government Partnership, and bodies such as the OECD, where significant expertise has been developed.
- Once an improved system has been developed, ensure that it is communicated to EU citizens, particularly to organised civil society, through activities conducted at the national level and in relevant languages. To this end consider use of appropriate communications tools (such as via social media) to reach relevant stakeholders and interested persons.
- Join the Transparency Register to ensure full transparency of any lobbying activity directed at the Council and designed to influence legislative processes.

Madrid, 31 December 2017