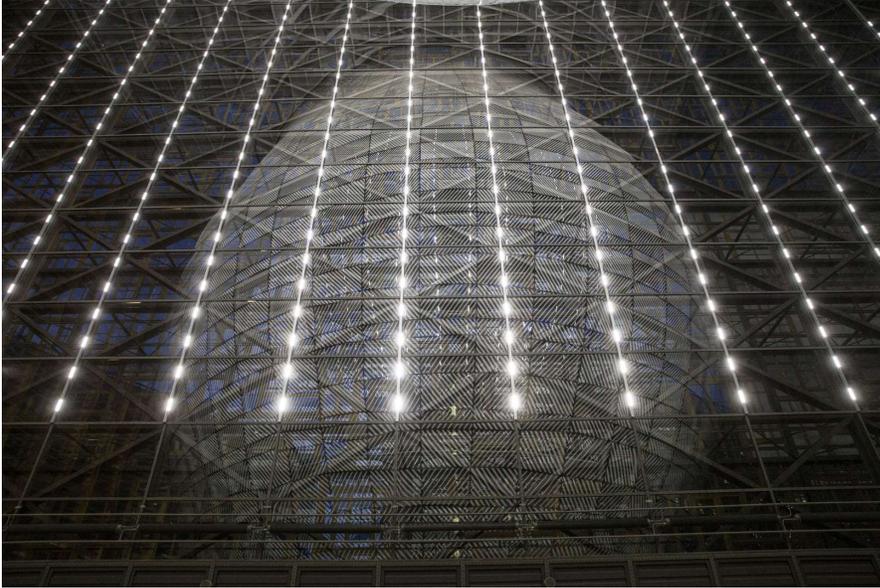




Removing the secrecy in EU decision-making

Luukas Ilves / Apr 2018



The EU's watchdogs are on the warpath for greater transparency in the legislative process. This March, The EU Ombudsman Emily O'Reilly recently released a report calling for the Council of the European Union – the half of the EU legislature made up of representatives of national governments – to open up its decision making. She calls on the Council to publicly release documents created and distributed by the Council, and also to publicly identify positions taken by individual countries in legislative negotiations. The Member States – led by the Bulgarian Presidency – have until May to respond to her recommendations. Separately, the EU General Court has also ruled that the European Parliament must make available documents concerning trilogue negotiations between the Parliament, Council and Commission.

The Ombudsman's recommendations strike a personal note for me. During the Estonian Presidency of the Council last year, I chaired the Working party on telecommunications and information society. I am convinced an approach of transparency by default would be to the benefit not only of EU citizens, but is also in the institutional interests of the Council itself. I say this from personal experience: I have practiced some of the transparency measures she is now advocating be made mandatory across the board.

In the Telecoms working party, nearly all documents produced by the Presidency were immediately made public on the Council's website. This was a practice started under the preceding Presidency, and made our work fairly transparent to anyone interested: by lining up working party documents, which always include explanatory cover notes detailing the changes made to previous versions, one could assemble a clear and detailed picture of how negotiations were unfolding in the Council.

Not once did I feel this transparency hurt our work in the Council. Far from abhor this transparency, many of my colleagues representing national governments were actively thankful for it. Public documents made it easier for them to have an open discussion with stakeholders at home over ongoing negotiations and update their national positions.

Transparency also made the life of the Council Presidency easier. Instead of answering press inquiries with coy, evasive answers or figuring out what to say off the record, I could always share a link to our Working Party documents. And when an NGO implied the Estonian Presidency had cynically deleted a portion of the e-Privacy regulation for reasons of our own national interest, I rebutted them with public documents showing the claim to be baseless and factually incorrect (the change in question had been made by the preceding Maltese Presidency, and simply moved the text from one piece of draft legislation to another).

I even found myself relying on the public document register for my own workflow – it was easier to find old versions of our working papers there than in the Council's internal portal for national delegations, which is slow and hard to navigate, or in my overstuffed email inbox.

The Ombudsman correctly identifies inconsistencies in the Council's current practice. Indeed, I can find no compelling reason why documents on the telecoms code or e-privacy regulation should be public but, for instance, negotiations on copyright shouldn't be.

I actively regretted those few times when I did not make documents public. The secrecy of confidential documents fed a rumor mill about our plans. When confidential documents were leaked to the press, the leak itself became a sensational story, and undermined trust between colleagues in the Council (Who, they were all asking themselves, was the leaker?). Better to be open in the first place.

Yet transparency does not rest in the Presidency's hands alone. The Ombudsman is also calling for the views and written positions of individual national delegations, which have always remained confidential, to be made public.

Some of my former colleagues may worry that such transparency would undermine the consensus-oriented approach of work in the Council. While formal votes in the

Council are a sleepy affair and most decisions are reached by consensus, the preceding negotiations are often frantic and cutthroat. Too much transparency would make it harder for diplomats to manoeuvre and to save face when compromising, drive currently open discussions in Working Parties into back rooms and smaller groupings of Member States and deepen divisions between countries, the fears go.

But the emperor is already without clothes. On controversial and important issues, ministers' public statements and parliamentary positions leave no mystery as to where countries disagree. On lower-profile questions, there is a huge informational asymmetry. The best-connected lobbyists (and those who have expensive subscriptions to news services like MLex or Politico Pro) have a pretty nuanced sense of what is going on in a particular file. Others – SMEs, smaller interest groups and journalists without a Brussels presence, never mind individual citizens – are left in the dark. Making national positions public would certainly require an adjustment in institutional culture, but may not be as fundamental a change as many diplomats would fear.

An approach of transparency by default does not mean automatic transparency. There should always be the possibility to make exceptions, especially for sensitive negotiations (e.g. on foreign policy and security issues), where publicity would truly harm the collective interests of the EU. But this should be the exception, and subject to close scrutiny.

Should the Member States not fully endorse all of the Ombudsman's recommendations, this report still provides the Council an opportunity to build on the work it has already done towards greater transparency. In particular, the Council could begin by making all working party documents public immediately as long as they don't contain individual positions of Member States or ideas for negotiations with the European Parliament or foreign countries. Additionally, Member States could commit to reviewing the process by which they give input during negotiations to make this more transparent. Even if not every position paper is made public, the Council secretariat could for instance compile initial negotiating positions approved by national Governments and (in some cases) Parliaments, which are usually already public. In parallel, the Council could also commit to asking lobbyists to make their documents and proposals they make to Member States, the Commission and Parliament public.

The changes the Ombudsman is calling for evolutionary, not revolutionary. The Council of the EU I know and worked in for four years is no shadowy club, but a place where the transparent and democratic mandates of 28 governments come together. It's time for Europe's Member States to show this to the world.

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