

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law

CM2107 'Working Documents' in the Council of the EU cause a worrying increase in secrecy in the legislative process

June 2021

Summary

Which EU legislative documents are or are not public has long been controversial in the Council of the EU, in spite of clear case law from the Court of Justice. With the introduction of the so-called 'Delegates' Portal' in 2015, all categories of informal Council documents were replaced by the new label 'working document' (WK). In April 2021, the Netherlands and Sweden spoke out against the Council's refusal to disclose certain WK documents as part of an Ombudsman complaint procedure. The Meijers Committee wholeheartedly supports their plea to curb the secrecy of legislative documents. This note examines the introduction of the WK label, the number of documents involved and the consequences for legislative transparency. On this basis, the Meijers Committee makes six recommendations for improving the transparency, identifiability, and democratic legitimacy of the current Council documents practice:

1. The prompt entry of all WK documents in the register of Council documents;
2. The immediate proactive disclosure of all legislation-related WK documents;
3. The implementation without further delay of the 'one-stop shop' online legislative observatory as already agreed by the European institutions in 2016;
4. The improvement of search functionalities on the Council's public document register;
5. The establishment of *de minimis* guidelines for document capture of key legislative information;
6. The identification of further document categories of 'legislative documents' that are currently issued as WK documents, and a related revision of Annex II, Article 11 of the Council's Rules of Procedure.

Introduction

Recently, the Council defended itself in a letter to the European Ombudsman in a complaint procedure concerning the non-disclosure of legislative documents requested by a citizen. The documents concerned carried a Working Document (WK) label.¹ These documents had been circulating within the Council in the context of internal negotiations on a proposal to amend Regulation (EC) No 715/2007 on emission values for motorised vehicles.²

During the internal discussion of this letter, the Netherlands and Sweden opposed the Council Legal Service's interpretation of the transparency legislation on this issue. The two Member States criticised the weak justification for the existence of a public interest against disclosure

¹ Letter from the Council to the European Ombudsman concerning its enquiry in complaint 360/2021/TE of 19 April 2021, <https://www.ombudsman.europa.eu/en/opening-summary/en/138654>

² Council document 5122/21 of 28 January 2021

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and, on the contrary, saw an overriding public interest in favour of disclosure. In this consideration, they particularly took into account the sensitivity of the subject matter and previous public criticism about it against the Council.³ The Meijers Committee wholeheartedly supports this position and applauds the Netherlands and Sweden for repeatedly and as a matter of principle confirming - together with Finland - the need for strict compliance with access to document legislation and case law. In doing so, these Member States go against the contrasting trend of many Member States in the Council.

In this note, the Meijers Committee elaborates on a recent development within the internal organisation of the Council that underlies the current, exemplary, Ombudsman complaint procedure: the introduction and application of the aforementioned WK label for Council documents. In defiance of the legal and jurisprudential duty of disclosure in the legislative procedure, the Council implemented the WK label in 2016 with very negative consequences for the Treaty principle of legislative transparency.

The note first briefly discusses the legal framework for legislative transparency in the EU. It then outlines the meaning, scope, and transparency-undermining effect of the WK label. The note concludes with a number of concrete recommendations to align the WK label with legislation and case law and to improve the transparency, knowability and democratic legitimacy of the Council's legislative process.

The legal framework for legislative transparency in the EU

Legislative transparency is a general principle of law and a treaty obligation in EU law.⁴ According to European legislation and case law, legislative documents should, subject to very strict and limited exceptions, be made without delay and in their entirety.⁵ The input and positions of Member States are an essential element in the democratic accountability of the legislative process.⁶ This also applies to legal advice in the context of the legislative process,⁷ in particular where the discussion concerns the correct Treaty basis.⁸ Negotiations between the Council and the European Parliament should, in principle, be made public, even when they take the form of informal trilogues.⁹ As regards proactive disclosure, higher standards also apply to legislative documents. In all cases, the European institutions should register all their documents online, except for certain classified documents, and - where possible - make them directly downloadable. In the case of legislative documents, the public access requirement goes even further; the institutions must generally make these documents directly and entirely available online.¹⁰

³ Council document CM 2663/21 of 19 April 2021

⁴ Article 15 TFEU

⁵ In particular Regulation 1049/2001

⁶ 17 October 2013, C-280/11 P, *Council v. Access Info Europe*

⁷ 1 July 2008, C-39/05 and C-52/05 P, *Sweden and Turco v. Council*

⁸ 21 April 2021, T-252/19, *Pech v. Council*

⁹ 22 March 2018, T-540/18, *De Capitani v. European Parliament*

¹⁰ Regulation 1049/2001, Articles 9(3), 11 and 12 respectively

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The vast majority of formally drawn up documents mentioned in the Council register bear the label ST ('Standard Text').¹¹ Shortly after the turn of the century, the Council developed a protocol for so-called 'limite' documents. These are formal documents (often ST) included in the Council register but whose circulation is restricted until the moment of formal disclosure based on a Regulation 1049/2001 request. A large proportion of documents with the 'limite' label are proactively disclosed after the legislative process is completed.¹²

Beyond that, there has been a long-standing practice within various Council working groups to create standardised informal document categories, including MD ('Meeting Document'), DS ('Document de séance'), and SN ('sans numéro').¹³ The practice of informal documents is very much at odds with the above-mentioned legal transparency obligation. After all, these documents are not mentioned on the register, let alone made public directly. For this reason, this informality in the Council's document policy has been criticised by the Ombudsman and Transparency International, among others.¹⁴

What is the WK label?

To counteract the proliferation of document practices within the Council's working groups and to further standardise document registration and circulation, in 2015, the Council began with the introduction of the so-called 'Delegates' Portal'.¹⁵ This is an online environment for filing, controlled circulation, and archiving decision-making documents, both formal and informal.

The first plans for a more efficient closed document portal were already discussed in Coreper in February 2013 under the telling name COCOON (Council Collaboration Online).¹⁶ Around the same time, the court case of *Access Info Europe* caused commotion among the Member States. In its 2011 judgment, the General Court had ruled against the Council in its refusal to grant access to input from the Member States in an ongoing legislative procedure, in a case in which many Member States had intervened, and against which the Council had subsequently appealed.¹⁷ Coreper later decided that Member States' positions would only be included in Council documents 'where appropriate'.¹⁸

¹¹ Other less common formal document labels are CM, PE, AC, and AD. See Council document 7385/16 of 2 May 2016

¹² Council document 11336/11 of 9 June 2011

¹³ Already in 2008, the Council Secretariat made efforts to curb the proliferation of such informal document credentials. See Staff Note 200/08 of 4 December 2008.

¹⁴ European Ombudsman, Special Report in strategic inquiry OI/2/2017/TE of 16 May, Annex 2; Transparency International, *The Backroom Legislator: Transparency, Integrity, and Accountability at the Council of the EU*, report of February 2021, p. 16

¹⁵ Council document 7385/16 of 2 May 2016

¹⁶ Council document 6704/13 of 21 February 2013

¹⁷ Judgment T-233/09, *Access Info Europe v. Council*. At the time, the appeal against this judgment was pending, which resulted in a reaffirmation of the earlier judgment in Case C-280/11P *Council v Access Info Europe*.

¹⁸ Council document 9900/14 of 5 June 2014

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The Delegates' Portal was launched in April 2015 for a pilot phase. Upon evaluation of this pilot, the portal was deemed suitable for general introduction. Between May and November 2016, its predecessor, the Extranet portal, was gradually phased out. In the process, all previous informal document categories were not migrated to the Delegates' Portal with it and were replaced by the single label WK ('Working Document').¹⁹ The underlying idea was to introduce a seamless communication channel that would eliminate the great diversity of informal document categories and the internal circulation of a document via email that would only include recipients on a 'need to know' basis. This created the envisaged 'cocoon', i.e. a closed information platform with a login system overseen by an 'assigned delegate' from the relevant network (e.g. a Council working group). A first internal evaluation established that a list of WK documents circulated within the Delegates' Portal would be established 'periodically' for display on the public register. The frequency of compilation of this list was left to the relevant section of the Council Secretariat based on 'reasonable expectations'.²⁰

Increased number and proportion of documents with WK label

It is difficult to determine precisely how many WK documents the Council produces per year. The Council does not report the number of such documents in its annual report on the implementation of regulation 1049/2001. In addition, as mentioned above, each Council working group produces its own periodic list of drafted WK documents, sometimes covering a quarter, sometimes half a year or a whole year. For the year 2020, for example, 205 such lists were published in the Council register, indicating document numbers and date of drafting as well as a description of the subject, in varying degrees of detail.²¹ In the early years of the WK label (2015/2016), however, the lists seem to have been kept less precisely, making comparison over time difficult.

Therefore, there are currently only estimates. An obvious way of counting is based on the serial number, which assumes that the Council issues these numbers in consecutive order and without gaps. For 2020, the highest observed WK number was 14981. This is considerably higher than what could be observed for 2016, when the WK numbers did not exceed 2000. To establish whether the serial number does indeed give an accurate picture, we have, as a random sample, counted the lists of WK documents listed in the Council Register for the second half of 2020. This gives us 6196 WC documents produced between 1 July and 31 December 2020, which is fairly compatible with the estimated total of 14981 documents for the same year.

¹⁹ Council document 13277/15 of 26 October 2015, point 11

²⁰ Council document 13277/15 of 26 October 2015, point 16. It is unclear whether this refers to the expectations of members of the Council working party or those of citizens.

²¹ See for example Council document 5002/21 of 4 January 2021 (Six-monthly review by the Financial Counsellors/ECOFIN Working Group), Council document 5333/21 of 19 January 2021 (Quarterly review by the Non-Proliferation Working Group), and Council document 5734/21 of 4 February 2021 (Annual review by the Friends of the Presidency Group on the integrated political crisis response arrangements and the solidarity clause implementation). Topics described range from ECOFIN Council on 4.11.2020 – Room document' to Draft Council conclusions on strengthening resilience and countering hybrid threats and disinformation in the aftermath of the COVID-19 pandemic - Presidency compromise proposal'.

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What is striking is the significant variation by working group and sector in using WK documents, which cannot be directly traced back to functional explanations, as the Ombudsman also concluded in her recent report on Council transparency during the corona pandemic.²² For example, in the second half of 2020, some working groups drafted a few dozen WK documents, or even none at all, while the Council working groups on Environment and International Environmental Affairs, for example, drafted more than 1,100 WK documents in this period. The document descriptions in the lists show that WK documents cover a wide range of subjects. WK documents include agendas and pro forma letters from other institutions, but also projected budgets, input from member states (including proposed amendments), powerpoint presentations, and proposals from the Council Presidency. From the lists, it is sometimes not clear whether documents are related to legislative procedures. The answer to a recent access to information request indicates that about a quarter of the WK documents relate to legislation.²³ This estimate fits within the picture that emerges from our sample.

Criticism of the WK label

In the view of the Meijers Committee, the Council's extensive use of WK documents violates or circumvents EU transparency law in three respects.

First, by (temporarily) withholding WK documents from the register, the Council is in breach of its obligation under Regulation 1049/2001, Article 11(1), to mention the existence of documents in its register without delay. Delaying this action by up to one year is clearly not compatible with this obligation. In addition, it is questionable whether it is sufficient for the Council to display references to WK documents *in lists in ST documents*, rather than directly in the register. After all, this makes the vital functionality of the online register, to search the register for individual characteristics of documents, wholly impossible for the documents in question. In a register that contains hundreds of thousands of documents, WK-documents, therefore, remain de facto hidden from view, even after they have been mentioned. The temporary failure to mention and subsequent poorly visible inclusion of WK documents in the register seriously undermines the transparency of the decision-making process. After all, anyone who is not familiar with basic decision-making documents such as agendas, proposals and input from the EU Member States is unable to follow the process, let alone participate effectively in the democratic system, even when this is a Treaty right for all Union citizens (Article 10(3) TEU).

Where WK documents relate to the legislative process, the Council breaches the explicit duty of disclosure. Under Article 12(2) of Regulation 1049/2001, the Council is not only required to place legislative documents directly in the register, but also to make them immediately available to the public, unless there is a specific, actual, and not-hypothetical reason for doing

²² European Ombudsman, Decision in Strategic Investigation OI/4/2020/TE of 24 March 2021

²³ According to the information obtained on the basis of this request, this specifically concerns 1,498 legislative-related WK-documents in the period from October 2020 to March 2021.

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so. That a part of the WK documents concerns legislation is beyond dispute, as demonstrated by the Council's response to the Ombudsman's questions in the aforementioned recent complaints procedure.²⁴ With the broad application of the label 'WK', the Council effectively places part of the decision-making in the legislative procedure outside of the legal disclosure obligation without concrete and individual justification.

Second, the WK document practice undermines the right of Union citizens and residents, under Regulation 1049/2001, to request Council documents. Indeed, when applicants do not know of the existence of documents, they are seriously restricted in their ability to request them. In addition, as evidenced by the reasoning of the reply to the Ombudsman's questions formulated by the Council's Legal Service, the refusal to disclose a legislative WK document on request does not appear to meet the threshold for lawful secrecy as developed in the case law. In its letter, the Council presents general, hypothetical, and abstract arguments for refusing access to legislative documents. It mentions the need for "workable conditions [...] to allow for effective political decision-making", "the risk that Member States become more entrenched in their positions", and "an asymmetric situation" vis-à-vis the European Parliament, all unspecified arguments that in principle apply to any legislative process. On the other hand, the (repeatedly confirmed) case-law shows that access to a document may only be refused where there is evidence that disclosure would "specifically and actually undermine" a legally established public interest, in a manner that must moreover be "reasonably foreseeable and not purely hypothetical".²⁵ The present situation has become the subject of a recent case.²⁶ However, the Meijers Committee thinks that, based on existing case law, it can already be established that the current practice with WK documents is contrary to the right of transparency, as the Netherlands and Sweden also rightly pointed out in their statement attached to the Council's letter to the Ombudsman.²⁷

The third point of criticism concerns the impact of the WK label on the quality of (published) documents. If a large part of the legislative decision-making process ends up in poorly visible and partly never disclosed documents, this may affect the quality of regular ST documents. A direct relationship between the rise of the WK label and the quality of ST documents is difficult to establish. The number of new (ST) documents placed on the register has remained reasonably constant since 2015. It may be added to this that informal documents already existed before the WK label was introduced. However, in the legislative process, a clear decrease in public documents can be observed from 2016 onwards. In 2020, over half fewer legislative documents were directly made public than in 2015. The numbers of LIMITE documents, both secret and public, also decreased significantly during this period to around one-third of the original number (see table). According to the Ombudsman, this happened even though the Council actually circulated more documents in 2020 in connection with the significantly increased number of meetings by video conference due to the corona

²⁴ Letter from the Council to the European Ombudsman concerning its investigation into complaint 360/2021/TE of 19 April 2021, <https://www.ombudsman.europa.eu/en/opening-summary/en/138654>

²⁵ Case T-540/15, *De Capitani v. European Parliament*, para 62

²⁶ T-163/21, *De Capitani v Council*

²⁷ Council document CM 2663/21 of 19 April 2021

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pandemic.²⁸ These are clear indications that a large proportion of legislative documents have ‘disappeared off the radar’.

Table: Documents in the Council Register

Year	All documents (formal)	Legislative documents (formal)		
		Directly public	LIMITE	LIMITE public
	<i>New documents (public and non-public)</i>			
2015	25,010	3,115	5,555	4,683
2016	22,671	1,955	2,545	1,748
2017	25,514	1,933	4,171	2,406
2018	25,349	2,765	2,332	1,178
2019	23,111	1,965	2,408	1,649
2020	22,375	1,481	1,912	1,440

Source: Annual reports of the Council on the implementation of Regulation 1049/2001, indicator 18.

At the same time, it is possible that the introduction of the WK label brings certain advantages for the documentation of the legislative process. Compared to the previous diversity of document forms, it represents a standardisation of the documentation of steps in this process. Therefore, the Ombudsman speculates that the WK label may even have improved the document basis of the process, in the sense that more relevant information is recorded in documents in a more understandable manner.²⁹

On the other hand, the number of informal documents has likely increased considerably due to the new WK guidelines. Hence, a trade-off occurs, whereby more information ends up in more documents, but the number of public documents structurally decreases in a manner that contradicts transparency law.

Proposals for the harmonisation of the WK label with the principle of legislative transparency

Overall, the increase in secret legislative documents with a WK label is a worrying development from a democratic perspective. In addition, the practice in which these documents are drawn up and circulated in a parallel, transparency-avoiding system clearly contravenes current EU transparency law. The Meijers Committee considers the call for a ‘space to think’ in decision making to be understandable but at the same time concludes that such a space is already provided for in European legislation through the statutory exceptions to disclosure. To counteract the undesirable situation that has arisen and to improve the openness of the legislative process in the Council, the Meijers Committee makes six proposals for improving this practice.

²⁸ European Ombudsman, Decision in Strategic Investigation OI/4/2020/TE of 24 March 2021, para 42

²⁹ European Ombudsman, Decision in Strategic Investigation OI/4/2020/TE of 24 March 2021, para 42

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Implementation of transparency rules

1. As laid down in Regulation 1049/2001, the Council should promptly make all **WK documents** available on the public document register. Any exceptions to this rule should be applied very sparingly.
2. As laid down in Regulation 1049/2001, the Council should make all **WK documents related to the legislative process** publicly available on the document register. Any exceptions to this rule should be applied very sparingly and only on the basis of an individual assessment and sufficient legal justification. The Council should be extremely cautious about making exceptions to the rule of direct disclosure, taking into account recital 6 in Regulation 1049/2001 and the relevant case law (*Sweden and Turco v. Council*, *Council v. Access Info Europe*, *De Capitani v. European Parliament*, *Pech v. Council*).

Improving the transparency infrastructure

3. Of great importance for the familiarity of the legislative process in the Council is a clear presentation of relevant information, which places negotiations in the Council in the context of the larger process. Accordingly, the European institutions should, **without further delay, realise the legislative observatory** that was already agreed on in an interinstitutional agreement in 2016.³⁰
4. Separately, the Council could further **improve the search functionality of its register** by making documents retrievable per Council formation and specific working group.

Review of transparency regulations

5. The introduction of the WK label seems to have improved the quality of legislative information. The Council could continue in this direction by **drawing up de minimis directives concerning the inclusion of essential legislative information in documents**. This could include systematic tracking of all Member State proposals for textual amendments to legislative proposals and periodic reporting on the status of legislative negotiations, including when no progress has been made, based on a previously agreed document protocol.
6. Given the diversity of information recorded in WK documents, the Council Secretariat (DG COMM) could **identify further categories of documents that are covered by the term 'legislative document'** as referred to in Regulation 1049/2001, Article 12(2).³¹ This and other extensions should lead to a revision of the Council's Rules of Procedure,

³⁰ Interinstitutional Agreement on Better Law-Making, April 2016, Part VI, Point 39. See also CM 2004 note of 4 May 2020, point 3

³¹ This aligns with the internal agreements adopted during the German Council Presidency to make additional categories of legislative documents directly accessible in the future. See Council document 9493/20 of 9 July 2020

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Annex II, Article 11, which operationalises the concept of a 'legislative document' for direct disclosure.