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

CM1911 Note on the transparency of EU decision making following the "Seminar on the Future of EU Transparency" organised by the Finnish EU Presidency

25 November 2019

On Tuesday 24 September 2019, the Finnish Presidency held a seminar on the future of EU transparency in Brussels. At this seminar, dr. Hielke Hijmans delivered some remarks on behalf of the Meijers Committee on the future of EU access to documents in a broader context. The present note elaborates on the remarks of dr. Hijmans.[1] In particular, it highlights three themes: (1) steps to be taken in relation to legislative transparency; (2) the need to design both legislative and non-legislative transparency in a way that is meaningful and accessible to outsiders; (3) the relation between transparency and data protection.

1. *Improving legislative transparency*

The legal and policy debates around EU transparency have in large part centred on the question of legislative transparency. While the Meijers Committee reminds that the principle of transparency applies to non-legislative decision making as well, it considers the elevated attention for legislative matters understandable. The legislative procedure is a primary vehicle for the exercise of public authority, and for this reason, open legislative debate and decision making has since long been considered a key principle across the European national democracies. At EU level, the principle of legislative transparency has been laid down at treaty level (TFEU article 15(2)) and in secondary legislation (Regulation 1049/01, recital 6 and article 12(2)). There can thus be no doubt that the Union legislator intended the legislative procedure to take place in public. This interpretation has been reiterated on various occasions by the Court of Justice of the EU.[2] It is further strengthened by TEU articles 10(1) and article 6(1), which respectively reflect that the EU is a representative democracy under the rule of law and with respect to the fundamental rights as laid in to the Charter of Fundamental Rights (the Charter). Article 42 and Article 11 of the Charter protect a right of access to documents and the freedom of (expression) and information. It is for this reason that the Court of Justice has found that the legislative institutions can refuse the disclosure of legislative documents only in exceptional cases, which must be duly justified on the basis of article 4 of Regulation 1049/2001, demonstrating that the legislative process would be actually, specifically, and seriously undermined by disclosure.[3]

The reason for ensuring that legislation takes place in public view is three-fold. Without having access to pivotal information about the legislative process, European citizens would not be able (a) to form an opinion about EU decision making, (b) to try to influence decisional outcomes by participating in the process as it is under way, and (c) to hold EU legislators accountable for their role in the decision-making process at election time. This view is supported by Regulation 1049/2001, which states that decisions should be taken "as closely as possible to the citizen", enabling "citizens to participate more closely" and guaranteeing "that the administration […] is more accountable to the citizen in a

1 The remarks of dr. Hijmans were made in his personal capacity. This note has a wider perspective and reflects the views of the Meijers Committee.

2 E.g. cases *C-39/05P Sweden and Turco v Council*, *C-290/11P Council v Access Info Europe*, *T-540/15 De Capitani v European Parliament*.

3 See, in particular, *Council v Access Info Europe*, para 63 and *De Capitani v European Parliament*, paras 61 and 112.

democratic system" (recitals 1 and 2). In practice, this means that EU citizens should have access to information concerning:

1. The *what*: where decisions are made and by whom, and how decision makers voted.
2. The *why*: why a law is proposed, and who disagrees with (aspects of) the legislative proposal, for what reasons.
3. The *how*: how the legislative debate develops in real time, allowing citizens to participate in this debate in order to influence it.

The above discussion leads to the following observations as to the direction in which the legislative transparency policy might be developed further:

- In practice, an exception to the principle of legislative transparency would be expected to be invoked only very rarely. For this reason, the institutions involved should take further steps to reduce instances in which access to documents related to the legislative process is denied. Instead, in line with article 12(2) of Regulation 1049/2001, the Meijers Committee underlines the importance of the proactive publication of these documents on the register, in each case directly after issuing the document. The Council is legally free to conduct a prima facie assessment of the applicability of an exception to disclosure. However, considering that non-disclosure negatively affects citizens' right and ability to participate in the legislative process, the Council must make this assessment at the earliest possible moment. The Meijers Committee believes that the royal road (and most objective manner) to do so would be to treat any decision regarding non-disclosure as a procedural decision requiring a simple majority.

- Union law foresees in no exceptions to the rule of immediate proactive disclosure other than those stated in article 4 of Regulation 1049/2001. This provision equally applies to documents drawn up or submitted to the legislative institutions as part of a legislative procedure at any institutional level or procedural stage (including Council working parties) and trialogue negotiations (so-called four-column documents). At all times, elected politicians are politically accountable for the contents of these documents.

- We reiterate in this context our long-standing opinion that the practice of applying the so-called 'limite' label to legislative documents is hardly compatible with the duty of direct disclosure. We do not see how the application of the 'limite' label to prevent direct disclosure of legislative documents for more than the briefest amount of time (until a decision is taken whether an exception under art. 4 applies) is reconcilable with transparency law as it currently stands.

- Adherence with the spirit of legislative transparency legislation cannot be ensured through compliance with the public access rules alone. An important related factor concerns the quality of document drafting. In this regard, greater efforts should be made to ensure that legislative documents are drawn up at regular intervals and in a standardised manner that includes all information relevant to citizens. In this sense, the proposal made by nine Member States, to systematically add member states statements to state-of-play documents would signify a considerable step forward.[4] The Meijers Committee supports this proposal.

4 Non-paper on legislative transparency (BE, DK, EE, IE, LV, LU, NL, SK, SE), https://www.permanentrepresentations.nl/documents/publications/2019/06/18/non-paper---transparency-and-accountability, 21 June 2019, updated October 2019. In this context, we note that while the *Access Info Europe* case law (C-

- However, this practice could not replace the direct disclosure of the identity of member states proposing amendments. We agree with the European Ombudsman who pointed out in her own-initiative inquiry, the deliberate omission from legislative documents of pivotal legislative information such as amendments or statements concerning the state of play constitutes an instance of maladministration.[5]

2. ***Designing transparency in a meaningful and accessible way***

Although the Meijers Committee is a committee of legal experts, we readily submit that transparency does not stop at the letter of the law. In order to be meaningful, the idea of transparency must also be part of the DNA of all persons involved in the work of the European institutions. Where transparency goes beyond a duty to be complied with, to become a habit, it is not seen as a danger, but as a useful, and even necessary way of informing citizens of the functioning and decision making of the European institutions. A strong case exists for the idea that the EU, being both in a geographical and a mental sense further removed from the citizen, needs transparency more than national governmental institutions do. In an age of ubiquitous disinformation, a real possibility exists that citizens turn away from the institutional channels to seek their information about the EU from (deliberately) inaccurate and malicious sources. It would be regrettable if a reluctant implementation of the EU's transparency rules were to contribute to this development.

For this reason, the Meijers Committee views proactiveness as an important way forward. Proactiveness relates in the first place to the disclosure of documents and information. However, it also comprises a design principle. The institutions have already made changes to their procedures to allow for more proactive disclosure. Among these efforts, the policy of the Dutch government, during its 2016 Presidency of the Council, to actively reduce the application of the 'limite' label, as well as the decision of the current Finnish Presidency to continue and evaluate this policy are particularly commendable.[6]

However, we also note that these efforts, which fall within the discretion of the Presidency, have not led to a more structural revision of the 'limite' handling practice. Moreover, other steps can be envisaged to enhance accessibility and traceability into the Council's online communication channels. This relates for example to the completeness of document trails, but also the manner in which documents are presented and to the provision of proper contextualisation. Currently, the Council's opaque decision-making structure and the often non transparent institutional trajectory of policy decision making mean that one needs to be an 'insider', or at least have a relatively high level of knowledge about the EU to navigate its information resources online. This high threshold is problematic from the perspective of equality of access, and the wider effectiveness of EU information policies.

Another aspect of proactiveness consists of better knowing the needs and grievances of citizens seeking access. To this end, the institutions could, at the implementation level, engage stakeholders

280/11P) found that the identity of Member States that provide legislative inputs recorded in the requested documents cannot be suppressed, current law still does not prevent the Council from leaving such inputs out of documents altogether.

5 European Ombudsman, Special report in strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process, 16 May 2018, paras 25-6.

6 Government of the Netherlands, Guidelines on dealing with LIMITE documents during the Netherlands Presidency 2016, 16 September 2016.

through surveys or consultations, much in the same way that the Ombudsman did in her own-initiative inquiry related to access to Council documents in the legislative process.[7] More proactiveness may in some cases enhance the efficiency of the transparency policy, by pre-empting document requests, or engaging in dialogue with citizens to seek reasonable solutions in cases of complicated requests. In other cases, proactiveness does not necessarily lead to less requests, enhancing the assertiveness and curiosity of citizens. Yet this, too, must be welcomed as a successful attainment of policy goals related to transparency, and where necessary, supported by the necessary administrative resources.

Another pivotal manner to create a transparency policy better connected to the needs of citizens is through technological adaptation and innovation. The document register of the Council are consulted nearly half a million times per year, and are thus clearly a sought-after information source, which is a clear sign of success.

Nonetheless, the register's interface has remained essentially unchanged since it went live in 1999 whereas new technologies provide novel tools for transparency. The Commission, in turn, discloses its documents through various registers which regrettably remain unconnected. The European Parliament offers an elaborate and useful legislative decision-making portal; yet this portal remains disconnected from the information efforts of the other institutions involved in legislation. In all cases, improvements are very slow to come forth. Consolidation of the Commission's document portals is foreseen to take several more years; meanwhile, plans to create a single legislative observatory, announced in the 2014 Inter-institutional Agreement on Better Law-Making, remain unrealised without a clear time path of action. We furthermore plead for further work on efficiency improvements on the 'backside' of the decision-making system, for example pertaining to an updated document system for Council working parties (extranet), for or for trilogue negotiations (the 'trilogue editor').

To ensure the continued relevance of the EU's transparency and information policy, it is important that it adapts not only to the new digital possibilities, but also realities. In relation to the growing reliance on algorithms in EU or national decision making (such as those pertaining to databases in the area of Justice and Home Affairs) for example, it is imperative that new meaningful ways of creating transparency are developed that do justice to the principle of accountability. Relating other new forms of data falling within the legal definition of a document for the purpose of Regulation 1049/2001, novel ways of accessible disclosure could be imagined. Technology may also be employed to filter out malicious (e.g. automated, machine-originated) access requests falling outside of the scope of Regulation 1049/2001.

3. Relation between transparency and data protection

A recurring issue in the discussions on EU transparency is its relation to the right to the protection of personal data. The balance between two fundamental rights protected by Article 42, respectively Article 8 of the Charter of Fundamental Rights and regulated under secondary law (see Articles 15 and 16 TFEU) is complicated, as is also demonstrated by the case law of the Court of Justice.[8]

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7 European Ombudsman, Own-Initiative Inquiry OI/2/2017/TE on the transparency of the Council legislative process, https://www.ombudsman.europa.eu/pl/decision/en/94896.

8 Case *C-28/08 P Commission v Bavarian Lager* and further case law based on this judgment.

In 2018, the new instruments on data protection entered into application, in particular: the General Data protection Regulation (GDPR)[9] and, for the processing of personal data by the Union institutions and bodies, Regulation 2018/1725.[10] These new EU instruments reaffirm and strengthen the right to data protection.

Notwithstanding the importance of the right to data protection, it should be ensured that the right to data protection is not abused as a way of avoiding transparency. The right to data protection is not an absolute right. In many cases, transparency requires the disclosure of personal information. Under these circumstances, a balanced approach is needed, taking into account the rights and interests of the individuals affected. This, however, does not mean that persons should be protected against the disclosure of views they took in official capacities during or outside the legislative process, or, in cases where there is an interest of the public, to understand the publicly financed expenses of public office holders.

Proactiveness is a way forward. Institutions and bodies should *ex ante* inform persons involved in EU processes about the politics on disclosure. Another way forward is the use of technology. This is part of the accountability of EU institutions and under EU data protection law. EU databases, including public registers, should be built with respect to the principles of data protection by design and by default. This could lead to systems where full transparency is provided, albeit in many cases without revealing the identity of individuals in processes. This all is part of the accountability of EU institutions and bodies and underlines that there is no natural contradiction between transparency and data protection.

4. Conclusions and recommendations

In this document, we have highlighted some of the most salient areas requiring attention to ensure the continuing relevance of the EU's transparency policy. This leads to the following recommendations:

Legislative transparency

- Proactive disclosure of all documents related to legislative activity. A prima facie assessment of the applicability of an exception to the principle of public access should be conducted, without delay, upon tabling of the document.
- Further minimisation of the use of the 'limite' label for legislative documents, and the exclusion of the 'limite' label where trilogue documents are concerned. An exception under Regulation 1049/2001 must apply to legislative documents labelled 'limite' that are not proactively disclosed.
- The inclusion in documents of all relevant information pertaining to the legislative process, including information concerning (a lack of) progress in trilogue negotiations, legislative drafts, amendments tabled, interventions, and identities of member states involved.

Designing transparency

9 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119/1.

10 Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295/39.

- Continuous awareness-raising efforts among EU officials of citizens' need of transparency and the legitimacy costs entailed in lacklustre implementation.
- A proactive search for ways of widening disclosure, minimising exceptions to disclosure, and inclusion of the citizens' needs and grievances regarding transparency policies.
- Further steps towards improvement of information technologies both on the 'frontside' (accessibility, traceability, and coupling of different information sources and databases) and the 'backside' of transparency instruments (coupling decision-making processes to information repositories more effectively, designing transparency into algorithmic decision making, identifying malicious access requests).

Transparency and data protection

- Ensuring that no disproportionate obstacles exist to ensuring appropriate transparency of the actions of persons in a public capacity.
- Exercising an ex ante policy of informing data subjects of the (potential) public uses of their personal data.
- Designing appropriate levels of proactive disclosure into EU databases for public use.

The Meijers Committee suggest that the institutions actively cooperate in order to make these further improvements a reality. We suggest that the new Commission takes the lead in developing an action plan, as one of its priorities.[11]

11 As per the mission letter to Commissioner-elect Vera Jourova for Values and Transparency, see here: https://ec.europa.eu/commission/files/vera-jourovas-mission-letter_en