

CM2515

MEIJERS COMMITTEE COMMENT ON 'WORKING DOCUMENTS' AND TRANSPARENCY OF THE LEGISLATIVE PROCESS IN THE COUNCIL OF THE EU

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In spite of successive clarifications offered by the case-law of the Court of Justice (CJEU, hereinafter: the Court), the question of which legislative documents are or are not to be made public has been controversial for a long time in the Council of the EU. The introduction of the 'Delegates Portal' in 2015 replaced all categories of informal Council documents with the 'working document' (WK) label. The lack of full transparency with regard to this document category undermines the comprehensiveness of the Council's register, as well as previous efforts of the institution for greater transparency, such as the creation of the EU law tracker. Considering that the Council has over 150 preparatory working parties and committees, WK documents are highly important both for the activities of the institutions and for citizens to grasp the nature of decision-making processes, particularly those of a legislative nature. This aspect has been highlighted multiple times by the Court, in line with the obligation of the Council to disclose documents related to the legislative process (Article 15(3) TFEU). This note examines the current state of transparency in the legislative process in the Council, highlighting the potentially detrimental consequences of the use of WK documents for legislative transparency.



Standing committee of experts on international
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Based on its analysis, the Meijers Committee offers five recommendations for enhancing transparency, democratic legitimacy and alignment with the principle of good administration:

1. The Council should include information on its recourse to WK documents in the annual report of the Council on the implementation of Regulation 1049/2021, including at least overall annual numbers of WK documents and the proportion of WK documents relating to legislative decision making;
2. Council should enter each individual WK documents in its register, rather than in lists of distributed WK documents;
3. The Council should invite COREPER to establish criteria for labelling a certain document as WK rather than as ST documents, relating inter alia to permissible purposes and duration of application and envisaged relation to Regulation 1049/2001, in order to prevent overuse of the former label;
4. The Council should invite COREPER to require that each WK documents is accompanied by a short justification for their classification;
5. The Council should enable better follow-up on access to documents judgements through systematic implementation reports.



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Introduction

Over the years, the Council's administration has grown increasingly accustomed to the requirements of transparency: its document registers, as well as its annual reports, are generally quite complete in comparison with other European institutions.¹ However, the insufficient disclosure regime of so-called 'Working documents' (WK) jeopardises the institution's efforts towards greater transparency of its work.

WK documents comprise a category of documents with the distinct purpose of recording the state of play on internal decision-making files. They are not referenced separately in the Council's register. Citizens can only be made aware of their existence from distribution lists, which are released by working parties with considerable delay, sometimes quarterly or even bi-annually. According to these distribution lists, some working parties appear to produce thousands of WK documents, while others produce none at all.

WK documents play a pivotal role in the accessibility and reconstruction of legislative processes. Thus, their transparency is important from the viewpoint of democratic legitimacy, participation, and accountability. Nevertheless, the way in which they are currently used regrettably defies the Council's legal and jurisprudential duty of disclosure in the legislative process.

This note examines the current status of transparency in the legislative process in the Council, with a focus on the use of WK documents. First, it briefly discusses the legislative framework for transparency in the EU. It, subsequently, discusses relevant developments in the case-law on legislative transparency in the Council, as well as the current status of WK documents and the consequences they entail for legislative transparency. Finally, the Meijers Committee discusses the above-mentioned five recommendations for enhancing the transparency and democratic legitimacy of the Council's legislative process.

Legislative framework for transparency in the EU

Article 15 TFEU establishes the principle of legislative transparency that aims to promote good governance and ensure the participation of citizens and interested organisations. It further mandates the obligation of the Council to publish documents related to the legislative procedure.

Additionally, according to Regulation 1049/2001 and the case law of the Court, legislative documents should be made public without delay and in their entirety, subject to very strict and limited exceptions.² The Court has clarified multiple times which documents are to be considered as related to the legislative process. In this sense, it has emphasised the importance of the positions of Member States,³ as well as of the legal advice of the Council Legal Service during this process.⁴ Furthermore, even if legislative negotiations take the shape of informal trilogues between the Council and the European Parliaments, they should in principle be publicly available.⁵

With regard to proactive disclosure, the European institutions have the obligation to list all their documents in a publicly accessible online register (with the exception of classified documents) and, in the case of legislative documents, they should be made immediately available in their entirety online.⁶

Nevertheless, the TFEU lacks a clear provision on good record-keeping. This omission is concerning, especially considering the various situations in which records were deemed missing by the European Court of Auditors, implausibly announced non-existent by the Commission, or considered existent but not regarded as documents in line with

¹ Matthias Haller and Domenico Rosani, 'Eu Document Registers: Empirical Gaps Limiting the Right of Access to Documents in Europe', *Common Market Law Review* 61: 449–490, 2024, available at: <https://kluwerlawonline-com.proxy-ub.rug.nl/journalarticle/Common+Market+Law+Review/61.2/COLA2024028>.

² Regulation 1049/2001, recital 4. Also 8 June 2023, C-408/21 P, *Council v. Laurent Pech*, para 32-41.

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

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

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

⁶ Regulation 1049/2001, Article 12.

Regulation 1049/2001 by the Council, based solely on the internal guidelines of the institutions. The Meijers Committee has highlighted this hiatus in a recent proposal for Treaty amendments, putting forward a draft Treaty Article for a single legal basis for ensuring the quality of EU records.⁷

The majority of the documents in the Council register can be found under the label 'ST'. In the early 2000s, the Council developed a protocol for 'LIMITE' documents. These are formal ST documents that are included in the document register of the Council but are only formally disclosed following a Regulation 1049/2001 request by a citizen or another interested party. In contrast to WK documents, currently the Council proactively and fully discloses a considerable portion of 'LIMITE' documents after the completion of a legislative process.

In this context, the current practice for the use of WK documents as informal documents appears at odds with the obligation to ensure transparency. This is a fortiori the case because WK documents are not made public directly or in the least individually entered into the register.

Insights from the case-law

Looking at the relevant case-law on legislative transparency, a pattern can be identified by which from 2008 onwards, the Council has repeatedly relied on similar justifications for denying access to legislative documents, which the Court rebuffed multiple times on the basis of highly similar considerations. The Council frequently relies on the protection of legal advice, the protection of the decision-making process and the absence of a particular overriding public interest in disclosure. In response, the Court repeatedly provides a similar assessment,⁸ which includes, inter alia, the following:

1. *The legislative process concerned would be undermined **specifically, effectively and in a non-hypothetical manner** by the disclosure of the documents at issue.* On various occasions, the Court found that the Council relies on mere assertions, that are unsubstantiated by detailed arguments and that do not reveal a real risk, which is reasonably foreseeable and not purely hypothetical, of the invoked interest being undermined.⁹
2. *When relying on the protection of the decision-making process, **the Council needs to show how disclosing the document at issue would affect that process.** In doing so, it needs to demonstrate that such a risk is **reasonably foreseeable and not purely hypothetical.***¹⁰ In most cases, the Court highlights that the reasons put forward by the Council in relying on the exception for the protection of the decision-making process **take the form of general statements that do not suffice.**
3. The strong presumption in favour of legislative transparency does not preclude a refusal but **requires, however, a detailed reasoning for such a refusal from the institution.**¹¹

These frequently reiterated interpretations by the Court of Regulation 1049/2001 reveal an insistence on transparency standards on the part of the Court, when faced with the Council's repetition of arguments that have been previously established as insufficient justifications for the denial of access to legislative documents. The Court has long established a direct connection between access to legislative documents and democratic legitimacy, since the latter 'requires those

⁷ Meijers Committee, 'CM2507 Proposals for EU Treaty amendments by the Meijers Committee', May 2025, available at: <https://www.commissie-meijers.nl/comment/cm2507-proposals-for-eu-treaty-amendments-by-the-meijers-committee/>

⁸ See, for instance Joined cases C-39/05 P and C-52/05 P (*Turco v. Council*) [2008] ECLI:EU:C:2008:374, Case T-710/14 (*Herbert Smith Freehills v Council*) [2016] ECLI:EU:T:2016:494, Case C-350/12 P (*Council v In 'T Veld*) [2014] ECLI:EU:C:2014:2039.

⁹ 17 October 2013, C-280/11 P, *Council v. Access Info Europe*, para 31; 25 January 2023, T-163/21, *De Capitani v Council*, para 69; 8 June 2023, C-408/21 P, *Council v. Laurent Pech*, para 34.

¹⁰ 17 October 2013, C-280/11 P, *Council v. Access Info Europe*, paras 55-60; 25 January 2023, T-163/21, *De Capitani v Council*, para 87; 8 June 2023, C-408/21 P, *Council v. Laurent Pech*, para 88.

¹¹ 18 September 2015, T-395/13, *Miettinen v Council*, para 27; 25 January 2023, T-163/21, *De Capitani v Council*, para 57; 8 June 2023, C-408/21 P, *Council v. Laurent Pech*, para 43.

responsible for the proposals contained in the requested document to be publicly accountable for their actions, especially where that document is part of the legislative procedure’ and ‘enables citizens to participate more closely in the decision-making process’.¹²

Despite the Court’s criteria for restricting access which has been clearly and consistently reiterated in the past years, there is a persistency on the side of the Council in invoking exceptions without providing the requisite justification. This pattern not only reveals a mismatch between the Council’s practices and the legal standards set by the Court’s jurisprudence, but also raises concern about the effectiveness of the Court in guiding institutional behaviour.

Currently, the Council’s annual reports include the relevant case-law of the Court on transparency.¹³ Nevertheless, in applications for access the Council puts forward the same, or highly similar arguments that the Court has previously rejected. This could lead to the rulings of the Court becoming a blunt tool for redress and simultaneously reduce the authority of the Court and hence, the rule of law within the EU.

In order to counter these consequences, there should be a follow-up procedure relating to “access to documents” judgements through which implementation reports may be drawn up, for example, by the Council’s General Secretariat working in tandem with the Working Party on Information. Such a report should identify substantive points of law on which the Court annulled a Council decision to refuse access, a discussion of possible internal organisational and administrative arrangements that might hinder the implementation of an institutional adjustment, and foreseen mitigating steps. A summary of such an implementation report could be included in the annual report on the implementation of Regulation 1049/2001. This would represent a positive step in ensuring that the Court’s decisions have an impact on the Council’s practices pertaining to legislative transparency.

The current status of WK documents

As outlined in an earlier comment¹⁴, the number of WK documents is not mentioned in the Council’s annual report on the implementation of Regulation 1049/2001. Therefore, the exact number of such documents produced by the Council per year cannot be definitively established. This is due to the fact that lists of WK documents are produced periodically by the Council working groups, with each working group establishing its own list, sometimes covering a whole year, and other times covering half a year or just a quarter. The lists typically indicate the document numbers, the date of drafting, and a description of the subject. Moreover, lists of working documents are usually made available in the Council register months after their actual distribution within the working parties. For the year 2024, 220 of said lists were published in the Council register. This number has remained steady to a large extent for the past years, as in 2023 the Council published 225 lists of WK documents, while in 2022 and 2021 there were 223 and 261 lists published, respectively.

For the year 2020, our previous comment provided an estimate of 14,981 WK documents being produced, with 6,196 WK documents produced in the second half of 2020. For the year 2024, by counting the documents published in the period of July to December 2024, 6,661 documents were identified. This suggests that the use of WK documents has not varied significantly since our last count. However, establishing a clear broader picture of the use of WK documents is quite difficult. Furthermore, despite being listed in the Council Register, the content of certain lists of WK documents is not always publicly available.¹⁵ As a result, there can only be rough estimates for the number of WK documents that the Council and the Member States produce.

¹² 17 October 2013, C-280/11 P, *Council v. Access Info Europe*, paras 17 and 32.

¹³ Council, 23rd annual report of the Council on the implementation of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 31 March 2025; Council, 22nd annual report of the Council on the implementation of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 3 May 2024.

¹⁴ Meijers Committee, ‘CM2107 Comment ‘Working Documents’ in the Council of the EU cause a worrying increase in secrecy in the legislative process’, June 2021, available at: <https://www.commissie-meijers.nl/comment/cm2107-working-documents-in-the-council-of-the-eu-cause-a-worrying-increase-in-secrecy-in-the-legislative-process/>

¹⁵ See, for instance, List of working papers (WK) distributed in the Working Party on Fisheries Policy in the second quarter of 2024.

The WK label and legislative transparency practices

The Meijers Committee considers that the Council's use of WK documents, and more broadly its current practices regarding legislative transparency, breach or undermine the EU primary and secondary law on transparency in different aspects.

First, by using the WK label for documents related to the legislative process, the Council breaches the commitment in Article 12(2) of Regulation 1049/2001 to placing legislative documents directly in its document register and making them immediately available to the public when no specific, actual and non-hypothetical reason is provided for doing so on a case-by-case basis. Currently there are no criteria for labelling a certain document as 'working document', nor is an individual justification provided when a document is labelled as such. The broad and unregulated application of the WK label allows the Council to place a part of the decision-making in the legislative procedure outside of the legal duty of disclosure since, as a rule, such documents are not proactively published. Additionally, the fact that the Council does not report the number of WK documents in its annual report on the implementation of Regulation 1049/2001 is at odds with the principle of good administration and the principle of legislative transparency. Until 2016, a similar practice of excluding LIMITE documents from the annual reports was also taking place. References to the number of LIMITE documents produced by the Council can only be found starting from the fourteenth annual report of the Council on the implementation of Regulation 1049/2001.¹⁶ This demonstrates that there is room for improving the Council's practices with regard to transparency in the legislative process.

Second, the Council breaches the requirement under Article 11(1) of Regulation 1049/2001 to provide for the existence of documents in the register 'without delay' in order to 'make citizens' rights under this Regulation effective'. As mentioned above, the lists of WK documents are not published at the time that they are circulated within the working parties, in fact in most cases they are made public months afterwards. Furthermore, the Council's practice to refer to WK documents in lists in ST documents, instead of making them separately available in the register, defies the main purpose of the online register. As such, it makes it impossible for citizens to search for the specific characteristics of the document in question. This means that even though WK documents are mentioned, the way in which they are included in the Council register creates practical obstacles for transparency.

Third, the quality of regular ST documents may be affected, considering that a part of the legislative decision-making processes can be found in documents which are poorly visible or never disclosed. It remains relatively difficult to establish whether there is a direct relationship between the increased use of WK documents and a potential loss in quality of ST documents. While the number of new documents (ST documents) in the register has been relatively constant in the past years, a decrease in public documents in the legislative process can be observed from 2016 onwards. For instance, for the year 2023, one-third of the LIMITE legislative documents have not been made public (see table below). According to the Council, LIMITE documents can only be made public in three situations: following the outcome of an access to documents request, after the subsequent publication by the General Secretariat of the Council following the advancement of the file, or after the finalisation of the file and publication of all the file's preparatory documents.¹⁷ The last situation always occurs when a legislative instrument is adopted by the legislator. While Article 11(1) of Regulation 1049/2001 establishes the requirement to provide for the existence of documents in the register 'without delay', the distinction between listing in the register and actual publication should be noted. Most LIMITE documents appear to be listed even when they are not directly made publicly accessible. In practice, this means that

¹⁶ Council, Fourteenth annual report of the Council on the implementation of Regulation (EU) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 2 June 2016.

¹⁷ Information obtained from the public information service of the Council, in the context of an inquiry about the Council's work and activity.

although the legal requirement to provide for the existence of documents is formally fulfilled, the delay in public accessibility raises questions as to whether Article 11(1) is respected in full spirit.

Table: Documents in the Council Register

Year	All documents (formal)	Legislative documents (total)	Legislative documents (formal)		
			Directly public	LIMITE	LIMITE public
2024	23,780	4,438	1,979	2,459	1,744
2023	26,165	5,538	2,299	3,039	2,006
2022	24,760	4,340	2,201	2,139	1,207
2021	24,341	3,586	2,259	1,327	839
2020	22,375	3,393	1,481	1,912	1,440
2019	23,111	4,373	1,965	2,408	1,649
2018	25,349	5,097	2,765	2,332	1,178
2017	25,514	6,104	1,933	4,171	2,406
2016	22,671	4,500	1,955	2,545	1,748
2015	25,010	No data available	3,115	5,555	4,683

Source: Annual reports of the Council on the implementation of Regulation 1049/2001. The annual reports do not provide separate information about WK documents.

Conclusion

The Meijers Committee has previously drawn attention to the transparency problems surrounding the Council's extensive use of the informal WK document category. This note builds on our prior analysis published in 2021, updating the general overview of labelling and publication practices and discussing them in the light of recent case law of the Court. It finds that current practices surrounding the use of the WK label, combined with the impact that the Council's repeated justifications of restrictive publication practices have on the role of the Court and the risk of its rulings becoming 'toothless', indicate no sign of real improvement. Instead, the current trend indicates concerning deficits from a legislative transparency and democratic point of view. While the Meijers Committee appreciates that decision making requires a space for political negotiation and strategic deliberation, it should be noted that EU law already provides for such a space in its exceptions to disclosure. In order to align the Council's practices on transparency with European legislation, the Meijers Committee makes five recommendations:

1. The Council should include information on its recourse to WK documents in the annual report of the Council on the implementation of Regulation 1049/2021, including at least overall annual numbers of WK documents and the proportion of WK documents relating to legislative decision making;

2. The Council should enter each individual WK documents in its register, rather than in lists of distributed WK documents;
3. The Council should invite COREPER to establish criteria for labelling a certain document as WK rather than as ST documents, relating inter alia to permissible purposes and duration of application and envisaged relation to Regulation 1049/2001, in order to prevent overuse of the former label;
4. The Council should invite COREPER to require that each WK documents is accompanied by a short justification for their classification;
5. The Council should enable better follow-up on access to documents judgements through systematic implementation reports.