

STUDY

For the AFCO committee



The Council of the EU: from the Congress of Ambassadors to a genuine Parliamentary Chamber?



Policy Department for Citizens' Rights and Constitutional Affairs
Directorate General for Internal Policies of the Union
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EN

The Council of the EU: from the Congress of Ambassadors to a genuine Parliamentary Chamber?

STUDY

Abstract

This study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee discusses the parliamentary nature of the Council. It analyses how the Council is in between a pure parliamentary institution and a non-parliamentary one from a wide range of perspectives, for example its structure, procedure and transparency. The study recommends incremental reforms towards further parliamentarisation rather than radical ones.

ABOUT THE PUBLICATION

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To contact the Policy Department for Citizens' Rights and Constitutional Affairs or to subscribe to its newsletter please write to: poldep-citizens@europarl.europa.eu

RESPONSIBLE RESEARCH ADMINISTRATOR

Eva PAVY

Policy Department for Citizens' Rights and Constitutional Affairs

European Parliament

B-1047 Brussels

E-mail: poldep-citizens@europarl.europa.eu

AUTHOR

Olivier ROZENBERG, Sciences Po, Paris

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LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
COREPER	Committee of Permanent Representatives
COSAC	Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union
EU	European Union
EUR-Lex	Official on-line portail on EU law
MP(s)	Member(s) of Parliament
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

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EXECUTIVE SUMMARY

Background

The Committee on Constitutional Affairs has requested the Policy Department for Citizens' Rights and Constitutional Affairs expertise on two specific areas concerning the Council, which are interlinked:

- The structure and working methods of the Council knowing that in its resolutions of 16 February 2017, the European Parliament proposed ways of transforming the Council "a true legislative chamber"¹;
- The transparency of the Council legislative process in the context of the recommendations made in 2017 and 2018 by the Ombudsman and the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC).

Councils are not parliaments

- Parliament is not just about elections and transparent debates. A close look at classical writings on representation allows for the development of a richer template for a given institution's parliamentary dimension. This template covers elements that relate to the actors, their activities, the organization, and decisional procedures.
- The report addresses how both kinds of Council fit with the parliamentary template, element by element. It concludes that both the Council of the European Union (hereafter "Council") and European Council are in between a parliamentary style of organisation and a non-parliamentary one, although the Council, as a pluralist and partly transparent legislative body, is closer to the parliamentary style. There is also a certain complementarity between the two kinds of Council in their relation to the parliamentary template.
- Options for reforming the Councils to strengthen their parliamentary feature are considered. The implementation of the more radical ones would dramatically change the very nature of both the Council and the European Council. The 2017 Parliament proposals on Council unification are also considered. A rather critical assessment is made based on several considerations, and especially on the ministers' direct involvement in the legislative process.

Councils are not fully transparent

- The Maastricht Treaty was the initial text that called for more transparent practices. Ensuing treaties and regulations gradually implemented high standards of access to EU documents and transparency regarding the legislative process. The Amsterdam Treaty took a clear step towards transparency and led to the adoption of the main legislative text in the field: the Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents². These texts developed two dynamics. First, the regulation related to transparency obeys shared principles and is not solely decided by each EU institution. Second, EU Institutions, and especially the Council, are induced to move from a passive attitude (accepting requests for document consultations) to a more active one (making information available).

¹ [European Parliament resolution of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty \(2014/2249\(INI\)\)](#), OJ C 252, 18.7.2018, p. 215–234, and [European Parliament resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union \(2014/2248\(INI\)\)](#), OJ C 252, 18.7.2018, p. 201–214.

² [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](#), OJ L 145, 31.5.2001, p. 43.

- Before ministerial meetings, the Council is characterised by a dense network of working groups and ambassador meetings (COREPER). Despite the secrecy of these settings, progress has been made over the past years in both institutions. Minimal information is provided through a public register. Many COREPER documents are made available. But existing regulations appear to be obsolete since they focus on the ministerial stage. Suggestions have been made for gathering more publicity at earlier stages of the negotiations, and especially curtailing the practice of disseminating “limité” documents.
- Although efforts have been made to increase the availability of documents related to Council debates and negotiations, there is no general and systematic access to them. This reflects a certain culture of opacity as well as a need to preserve the effectiveness of negotiations between member states. In addition, a risk exists that any further opening of the documents would result in their impoverishment. Possible reforms include more information on positions taken in preparatory bodies and greater standardization of Council meeting minutes.
- Since 1994, Council votes have been made public. This requirement gradually ended the “silent qualified majority” practice and forced national delegations to take positions. But there are limits to this process. No systematic information is available on the preceding informal stages. Defeated or delayed bills therefore remain under the radar. There can also be a discrepancy between the informal positions taken and the final one, given the consensual mood within the Council. Lastly, the Council’s publication of legislative act summaries is delayed.
- Over the past years, informal negotiations between the Council, the European Parliament and the European Commission have gained ground. The closed-doors meetings between representatives from the three institutions – the trilogues – have become more numerous and important. In most cases, a political agreement is reached in this setting during the first reading, and then merely approved by both legislating institutions. The informality of these meetings accounts for their efficiency, but also raises huge issues regarding transparency. Proposals have been made to enhance the information gathered on trilogues.

Further parliamentarisation? Recommendations from this report

- The report points to several caveats regarding the transformation of the Council in a more parliamentary way. The view that a diplomatic body made of representatives of governments could be transformed into a true Senate appears as illusory given the need for efficient bargains in the one hand, and the perverse effect of any reforms that would strengthen further informal bargains on the other hand.
- Yet, some reforms are welcome in the report and are focussed on the initial and final stages of the decision-making process. The organisation of an initial public debate within the Council, on the model of the Parliament one, could create more politisation and “drama” around Council bargains. A greater transparency related ministerial positions in the final stage of the decision-making process could also feed the accountability process.

INTRODUCTION

“Parliament is not a *congress* of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member indeed; but when you have chosen him, he is not member of Bristol, but he is a member of *parliament*.”

Edmund Burke, *Speech to the Electors of Bristol*, 1774³.

This famous speech by the Irish philosopher Burke would seem idealistic to any member of parliament in modern democracies. Indeed, representatives care more specifically about their constituents. But there is still some truth to the idea that parliament does not just adjust pre-existing positions but also adopts new ones thanks to the virtues of parliamentary institutions: deliberation, publicity, pluralism, and iterative procedures, among other features.

The assertion that “parliament is not a congress of ambassadors” raises doubts about the possibility of transforming the Council of the European Union (hereafter “Council”) into a parliamentary setting of sorts. There is no doubt that the Council is a congress of ambassadors. It is literally the case for the Comity of Permanent Representatives (COREPER), since Permanent Representatives do have the rank of ambassadors. It is also the case for other kinds of formations: the working groups of the Council, the ministerial formation, and even the European Council. All members of these institutional settings are supposed to represent their respective Member State. Except for their president, they do not speak in the name of the whole institution to which they belong. A member of the European Parliament (hereafter “Parliament”) could say, “I am the parliament”, while a member of the Council can only say, “I am Greece or Spain” or another member state.

Could the Council and the European Council adopt a more parliamentary form despite their diplomatic nature? The question points to two distinctive trends of parliamentarisation that the European Union (EU) has experienced over the last decades.

The first one has to do with relations between EU institutions. The notion of parliamentary regimes refers to the legislative power’s ability to control and sanction the executive branch. In this sense, relations between the European Commission and the Parliament have become more parliamentarian over the years⁴. The Parliament quasi-censured the Commission in 1999 and imposed its pick for President of the Commission on the European Council in 2014⁵. It is not easy to place the Council and the European Council from this perspective. The Council is responsible for legislating and can be considered as a high chamber in a bicameral system. But the European Council does not legislate and in practice operates like an executive power through (legislative) agenda setting or emergency response. This first aspect is therefore not central to this report⁶.

The second type of parliamentarisation relates to an organisation’s internal transformations and activities. In view of democratising the EU, efforts have been made since Maastricht to turn the Council into a more parliamentary body. Votes and legislative debates are for instance recorded and made available. Legally, this should also be the case for most internal documents, but it is not in practice.

³ P.B. Kurland and R. Lerner (eds.) (1987) *The Founders’ Constitution*, Volume 1, Chapter 13, Document 7.

⁴ Hix S., Hoyland B. (2011) *The political System of the European Union*, Basingstoke, Palgrave Macmillan (3rd edition), Magnette P. (2005) *What is the European Union?*, Basingstoke, Palgrave.

⁵ Müller Gómez J., Wessels W. (2016) ‘The Spitzenkandidaten Procedure: Reflecting on the Future of an Electoral Experiment’, *Iai Working Paper* 16/8.

⁶ A precise discussion from this perspective is developed in Fabrini S. (2015) *Which European Union? European After the Euro Crisis*, Cambridge, Cambridge University Press and in Wiesner C. (2018) *Inventing the EU as a democratic polity: Concepts, Actors and Controversies*, Basingstoke, Palgrave Macmillan.

Such “internal parliamentarisation” is less the case for the European Council, which is characterized by the secrecy of its meetings.

This report aims to assess these transformations and discuss further evolutions. The first part focuses on the general shape of the Council and the European Council, and especially the structure of these institutions. The second one deals with a specific point that is currently receiving a lot of attention from various organisations: the transparency of the Council’s activities.

1. THE STRUCTURE OF THE COUNCIL

KEY FINDINGS

- Parliament is not just about elections and transparent debates. A close look at classical writings on representation allows for the development of a richer template for a given institution's parliamentary dimension. This template covers elements that relate to the actors, their activities, the organization, and decisional procedures.
- The second section addresses how both kinds of Council fit with the parliamentary template, element by element. It concludes that both the Council and European Council are in between a parliamentary style of organisation and a non-parliamentary one, although the Council, as a pluralist and partly transparent legislative body, is closer to the parliamentary style. There is also a certain complementarity between the two kinds of Council in their relation to the parliamentary template.
- Options for reforming the Councils to strengthen their parliamentary feature are then considered. The more radical ones are mentioned first in order to stress that their implementation would dramatically change the very nature of both the Council and the European Council. Softer reforms are then positively mentioned. They relate to the organisation of an initial public debate within the Council. Finally, recent Parliament proposals on Council unification are considered. A rather critical assessment is made based on several considerations, and especially on the ministers' direct involvement in the legislative process.

This Chapter first considers what the components of the parliamentary template are. It distinguishes a dozen of organisational elements that, put together, characterise the parliamentary style of a given institution. In a second section, this template is used in order to assess the parliamentary character of both the Council and the European Council. It stresses the great complementarity of both institutions from that perspective. The last section discusses what could be the reform for parliamentarising further the Council. The respective merits of a hard or soft option as well as two 2017 recommendations by the Parliament are discussed in details. Those two texts are the [resolution of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty](#) and [the resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union](#)⁷.

1.1. The parliamentary template

Parliaments are collective bodies made of equal representatives in charge of debating and legislating. From a constitutional perspective, the notion of parliamentary regimes refers to the parliament's right to control and possibly censure the government. All European democracies, with the exception of Cyprus and Switzerland, are parliamentary. Beyond these two definitions, the notion of parliamentarism and the parliamentary feature of a given organization cover a dense set of rules and

⁷ [European Parliament resolution of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty \(2014/2249\(INI\)\)](#), OJ C 252, 18.7.2018, p. 215–234, and [European Parliament resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union \(2014/2248\(INI\)\)](#), OJ C 252, 18.7.2018, p. 201–214.

practices⁸. Based on various classical⁹ and contemporary sources¹⁰, this section proposes to distinguish between these elements by grouping them around four categories: the members of a parliamentary organisation, the activities, the type of organization, and the decision-making process.

Table 1 synthesises the elements that are developed in the rest of the section.

Table 1: The parliamentary template

Categories	Components
Members	<ol style="list-style-type: none"> 1. Representativeness 2. Pluralism 3. Equality 4. Formal autonomy from constituents
Activities	<ol style="list-style-type: none"> 5. Legislation 6. Executive oversight & possibly sanctions 7. Sovereignty and formal monopoly in both tasks
Organisation	<ol style="list-style-type: none"> 8. Unitary 9. Centralized 10. Divided
Process	<ol style="list-style-type: none"> 11. Deliberative 12. Organised 13. Transparent

Source: Author

1.1.1. Members of parliament (MPs)

Four distinct features characterise the members:

- *Representativeness*. MPs stand for a group, a community, or a territory that is formally absent but represented through them. This does not imply that MPs are necessarily elected. In some parliaments, and especially several high chambers in Europe, another authority nominates members. But their non-elected status does not prevent them for talking in the name of absent groups.
- *Pluralism*. In contrast to a government, a parliament is necessarily an organisation where members who disagree seat next to each other. Conflict is generally not hidden but accepted as a means to

⁸ Palonen K. (2014) *The Politics of Parliamentary Procedure*, Olpaden, Barbara Budrich Publishers. I thank Professor Kari Palonen for his advices on this report.

⁹ Especially: Bagehot W. (1963) [1867], *The English Constitution*, Oxford, Oxford University Press; Bentham J. (1843) "Essay on Political Tactics", in *Collected Works of Jeremy Bentham*, vol. 2. Édimbourg, Tait; Constant B. (1815) "Principes du politique applicables à tous des gouvernements représentatifs et particulièrement à la Constitution actuelle du France", in *De la liberté chez les Modernes*, Paris, Pluriel; Dicey A.W. (1915) [1885], *Introduction to the Study of Law and Constitution*, London, Macmillan; May T.E. (1844) *A Treatise upon the Law, Privileges, Proceedings and Usage of Parliament*, London, Charles Knight &co.; Poudra J., Eugène P. (1878) *Traité de droit politique, électoral et parlementaire*, Versailles, Cerf.; Weber M., (2004) [1918], "*Parlement et gouvernement dans l'Allemagne réorganisée* ", in Max Weber, *Œuvres politiques 1895-1919*, Paris, Albin Michel.

¹⁰ Especially: Costa O., Kerrouche E., Magnette P., eds (2004) *Vers un nouveau du parlementarisme en Europe?*, Brussels, éd. de l'Université de Bruxelles; Leston-Bandeira C., Thompson L., eds (2018) *Exploring Parliament*, Oxford, Oxford University Press; Manin B. (1997) *The Principles of Representative Government*. Cambridge: Cambridge University Press; Martin S., Saalfeld T., Strøm K., eds (2014) *The Oxford Handbook of Legislative Studies*, Oxford, Oxford University Press; Przeworski A., Stokes S. and Manin B., eds (1999) *Democracy, Accountability and Representation*. Cambridge, Cambridge University Press; Rozenberg O., Thiers E. (2018) "Introduction", in O. Rozenberg, E. Thiers (eds), *Traité d'études parlementaires*, Brussels, Bruylant.

reach various ends: reaching a compromise, offering a set of alternative views on a given topic, forcing ministers to justify their decisions, etc. Despite the pluralist nature of parliaments, a broad consensus is still possible within legislatures, but it appears to be the exception rather than the norm.

- *Equality*. MPs are formally equal in terms of voting rights. When they are elected, this equality derives from the equality of the voters who selected them. Equality also expresses the parliamentary commitment to deliberation. A given view has a greater chance of being convincing if the member who developed it has equal participation rights in the final decision.
- *Formal autonomy from constituents*. As indicated in the aforementioned Burke quote¹¹, MPs are supposed to have some autonomy from their electorate. In countries like France the imperative mandate is even explicitly prohibited. Their relative autonomy within modern representative regimes has been understood as enabling representatives to both stave pressure from voters, and identify the best outcome possible¹². The German Bundesrat appears as an exception on this feature as minister-presidents of the Lander may instruct their representatives within this assembly.

1.1.2. Activities

Parliaments are generally understood to be institutions in charge of legislating. The main bill that is passed annually in parliaments is the budget, but all kinds of laws are also approved. MPs themselves can propose new bills but the majority of texts approved in Europe originates from the government. Individual or collective amendments are the main instruments used to modify bills throughout the legislative process.

As indicated at least since Bagehot¹³, legislating is not the only task performed in parliament. Oversight of the government is another significant task that translates into various activities (debates, questions, inquiries, etc.). In Europe, as already mentioned, the power to dismiss the cabinet for political reasons lends credibility to oversight tasks.

A distinctive feature of parliaments *vis-à-vis* legislation and oversight is their willingness to monopolize them. National legislatures do not act with full independence when they pass a bill. They must ensure that the piece will comply with the Constitution and EU legislation. Similarly, governments may resign for a variety of reasons, not just because of a vote of non-confidence. Yet from a formal perspective, parliaments are generally considered to be the only institution able to transform bills into laws¹⁴, and to force the government to resign¹⁵. In addition, they act with full sovereignty when performing these tasks, meaning that their decision cannot be appealed.

1.1.3. Organisation

The parliamentary organization has three particular aspects:

- First, it is a *bounded* and *unitary* organisation. Parliamentary assemblies include a defined number of members for a given period of time. Be they 60 or 700, these members are the only persons allowed to vote, and they are the main speakers in committees and on the floor, although some non-members may speak as well (notably ministers).
- Parliaments are also *centralized* organisations. With the exception of the Parliament, there is one central building for a given parliamentary assembly, and within it, one central large room where sessions take place. Many activities, beginning with legislation, need to occur in the central room at

¹¹ Please see page 9.

¹² Manin B. (1997) *The Principles of Representative Government*. Cambridge: Cambridge University Press.

¹³ Bagehot W. (1963) [1867], *The English Constitution*, Oxford, Oxford University Press.

¹⁴ Often with the people itself if a referendum is organised.

¹⁵ For political matters.

some point. This rule automatically reduces the legislature's ability to simultaneously organize some activities.

- Parliaments are divided organizations. Their standing order foresees several kinds of divisions of labour depending on the type of activity performed and the stage of the process. A central division opposes floor and committee stages -committees being smaller and more focused. The legislative process predominantly operates on the basis of comings and goings between places.

1.1.4. Specific processes

Last but not least, the parliamentary template assumes specific ways of making decisions. Three elements may be distinguished here:

- *Deliberation*. As indicated by the origin of the word parliament, it is a place where people talk. Given the diverse membership, discussions are pluralist. They embed people who disagree and try to justify their views in order to convince each other and/or their audience. The parliamentary setting appears as a place where pro and contra speeches are produced¹⁶. Standing orders may seek to foster the diversity of views expressed in committees or on the floor.
- *Organisation*. The "parliamentary state of nature"¹⁷ is either a myth or an anachronism. Parliamentary assemblies all around Europe are organised through (often detailed) rules of procedure seeking to organise debates while preserving the institution's capacity to make decisions. Historically, the development of filibustering has justified a greater centralisation of the agenda and formalisation of the rules.
- *Publicity*. As representative institutions, parliaments act under the gaze of third parties who may quietly attend debates or report them to the media. Both debates and decisions are made public. This constitutes a key difference with the governmental process in most European democracies. The virtues of such transparency are supposedly manifold. It enables voters to control their representatives. It may also feed the public space via the dissemination of statements made in parliament during debates. It is also worth noting that while some parliamentary procedures and settings are made public, this is not the case for all activities. Some committees meet in public while others meet in camera. Parliamentary party groups generally meet behind closed doors. Informal talks and encounters in lobbies and offices are most often kept secret.

It appears from the elaboration of the parliamentary template that the notion of parliament is ultimately rather complex. It is also difficult to prioritize one element over another. A parliament is indeed a place where the members, activities, organisations, and processes are specific. The notions of debate, pluralism, and publicity probably constitute the core of shared conceptions of the nature of parliamentary assemblies.

1.2. The European Council and the Council through the lens of the parliamentary template

Both kinds of Council are assessed on the basis of the template developed.

1.2.1 The Council of the European Union

- *Representativeness*. Members of the Council are representatives of the Member State they originate whatever the formation of the Council considered.
- *Pluralism*. The issue is rather complex. Collectively, the Council's composition is quasi certainly pluralist. It is indeed highly unlikely that the same political family could lead governments in all member states. But at the state level the representation is not pluralist. Each national delegation is

¹⁶ Palonen K. (2014) *The Politics of Parliamentary Procedure*, Olpaden, Barbara Budrich Publishers.

¹⁷ Cox G. (2006) "The Organization of Democratic Legislatures", in D. Wittman and B. Weingast (eds) *The Oxford Handbook of Political Economy*, Oxford: Oxford University Press, chap. 8.

supposed to speak with one voice. As a result, there is no competitive representation of the same territory, contrary to what happens in most chambers in Europe (since they are elected through proportional representation).

- *Equality.* Members of the Council do not have equal voting shares. Their weight depends on the demography of the country they represent.
- *Formal autonomy from constituents.* Council participants are dependent on a hierarchical authority at all stages. Within working groups and COREPER, participants are civil servants mandated by their capital to defend a given position. Written instructions are indeed the norm. Ministers sitting in the Council are more independent, but politically, they must adhere to the views collectively developed within the cabinet and/or to the Prime Minister's instructions. Moreover, all governments in the EU (except Cyprus) depend on the confidence of the parliament. National (and sometimes regional) parliamentary chambers often express their views in advance. These opinions are rarely legally binding but they do carry political weight¹⁸. Despite this limited autonomy, it should be noted that the Council's Rules of procedure do not mention anything about an imperative mandate.¹⁹
- *Legislation.* The Council is a legislative body, and legislation is actually its main task. Unlike the Parliament, the Council does not yet have the capacity to directly initiate legislation.
- *Oversight and sanctions.* No institution depends on the confidence of the Council. Members do not even have a say on the presidency of the Council, which depends on a pre-established list of rotating members.
- *Sovereignty and monopoly.* The Council meets both criteria regarding legislation. Together with the Parliament in 90% of cases²⁰, the Council holds a monopoly over EU law making. No directive or regulation can be passed without the approval of one of the ten formations.
- *Unitary.* The Council is not at all unitary. The government composition of Member States frequently changes. Furthermore, the respective governments' Member States are free to select the delegation as they please. Germany famously decided that Lander representatives should vote when decisions fall under their competences. As a result, the Rules of procedure never state who the "members" of the Council are. There is simply a quorum rule for the ministerial formation. Ambassadors may represent Member States; this would be impossible in official parliamentary meetings.
- *Centralized.* Likewise, the Council is a remarkably decentralised institution. The number of formations was reduced to ten with the treaty of Lisbon, but from a legal perspective there is no hierarchical relationship between them since each one is allowed to adopt legislation. There are differences in the frequency of these formations' meetings at the ministerial level, as indicated in Table 2.

¹⁸ Hefftlar, C., Neuhold, C., Rozenberg, O. and Smith, J., eds. (2015) *The Palgrave Handbook of National Parliaments and the European Union*, Basingstoke. Palgrave Macmillan.

¹⁹ See [Comments on the Council's Rules of procedure - European Council's and Council's Rules of Procedures, European Union 2016](#).

²⁰ Source: *Observatory of European Institutions*, Sciences Po.

Table 2: Number of meetings of the Council's formations (2015-18)

Council formations	2015	2016	2017	2018	Total
Foreign affairs	13	15	14	17	59
Economic and financial affairs	10	10	10	10	40
Agriculture and fisheries	10	8	9	9	36
General affairs	8	9	10	9	36
Transport, telecom; and energy	7	3	6	6	28
Justice and home affairs	10	8	5	4	27
Environment	5	5	3	4	17
Competitiveness	5	4	3	4	16
Employment, social policy, health and consumer affairs	4	3	4	3	14
Education, youth, culture and sport	2	3	3	3	11

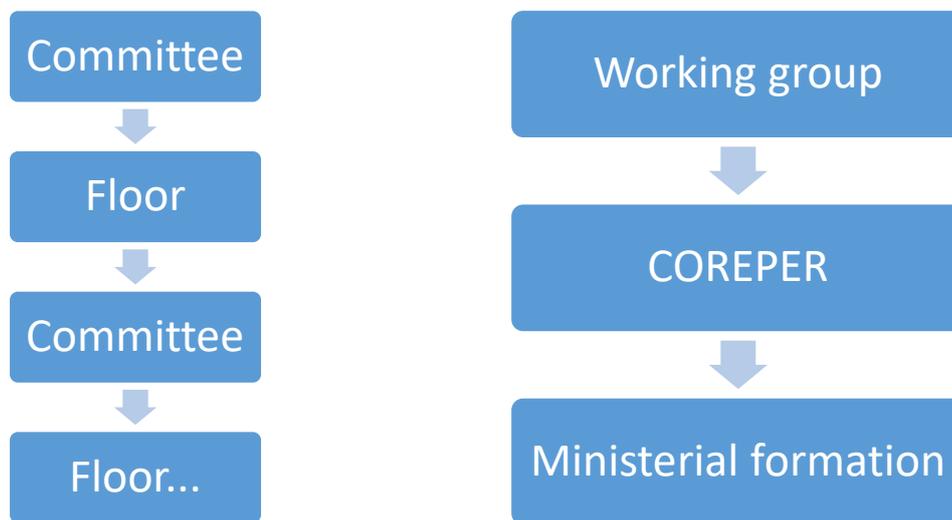
Note: formal meetings only have been counted

Source: [the Council online agenda](#)

- *Divided.* The Council is internally divided through at least three kinds of configurations: working groups, COREPER, and formal ministerial meetings. In practice, the number of divisions is higher as there are two kinds of COREPER, with different participants, and also informal (but frequent) meetings at the ministerial level. This division of labour differs from the parliamentary one in two respects. First, contrary to the committee / floor divide, the identity of actors attending meetings

changes from one configuration to the next. Second, contrary to the iterative feature of the parliamentary process, the Council's internal process follows the bottom-up direction. Actors are indeed hierarchically involved: problems that cannot be solved at the lower level are transferred to the upper ones. By contrast, in the parliamentary world, the same actors consider similar issues over and over again in order to adjust or redefine their preferences. Figure 1 sketches this processual difference.

Figure 1: The iterative process in parliaments (left) and the bottom-up process in the Council (right)



- *Deliberation.* The Council is an institution where participants take the floor to justify their views. From this very minimal perspective, it is a deliberative setting. Yet, all the evidence shows that the quality of this deliberation is limited. Intergovernmental diplomacy is based on the assumption that each participating state has staked its positions in advance, with the ideal result being a compromise whereby participants would remain as close to their original position as possible. By contrast, a parliamentary-style assembly relies on the creative power of debates, and on new insights into the strengths and weaknesses of positions brought to the floor over the course of the debate.

Some provisions of the Rules of procedure confirm the limited value of debates. The Council does feature a certain type of parliamentary initiative of the Member States, aside from that of the chair troika and the Commission (Article 3.2), that consists of “[asking] delegations to present in writing their proposals for amendment of a text under discussion before a given date, together with a brief explanation if appropriate” (Article 20.1d). The provision emphasizes the role of amendments, but when paired with the next clause (“ask delegations which have identical or similar positions on a particular item, on a text or on part of a text to choose one of them to express their shared position at the meeting or in writing before the meeting” (Article 20.1e)), it gives the impression that Member States should stake their positions in advance, thus devaluing the significance of Council meeting deliberations.

- *Organisation.* Debates and votes in the Council are organised. Although article 20 of the Rules of Procedure speaks of “smooth conduct of discussions” (which could suggest that gentlemen agreements prevail), the provision includes classical time-limiting devices, such as *cloture* and *guillotine* (without these termini). In addition, the publicity rule regarding legislative debates in the

Council (see Chapter 2) forces officials and participants to constantly distinguish between both kinds of settings (legislative ones and non legislative ones).

- *Publicity.* The issue of transparency is developed throughout Chapter 2. Although some imperfections can be noted, the principle that legislative debates should be made public, and final votes be recorded, is now well established.

1.2.2. The European Council

A similar kind of assessment can be applied to the European Council. The remarks are the same as for the Council on the two first points of *Representativeness* and *Pluralism*.

- *Equality.* Regarding equality between members, it can be argued that the heads of State and government tend to be more egalitarian when they meet than their ministers. The ministers' main task is to legislate, and their influence depends, as mentioned, on the demography of their country. By contrast, the prime ministers' main task is to set the general agenda, discuss diplomatic issues, and answer urgent and/or unsolved problems. There is no doubt that some members at the European Council table are more influential than others in fulfilling these tasks. Yet the absence of direct legislative tasks and the emphasis placed on internal debates can lead to more egalitarian practices. As members of the European Council, presidents and prime ministers consider each other as peers, somehow placed at the same level by dint of all being leaders of a Member State. As a result, when they have to make decisions in line with treaty provisions or in view of influencing the Council decision – something that the Parliament is critical of²¹ – unanimity tends to prevail.
- *Formal autonomy from constituents.* As leaders of the executive power in their country, members of the European Council enjoy greater autonomy than their ministers. However, the vast majority of them²² are still accountable to their parliament and often have to justify their position *ex post* and/or *ex ante*²³.
- *Legislation.* As mentioned, the European Council is not officially tasked with participating in the EU legislative process. Decisions of a legal nature may be taken, but the list is limited.
- *Oversight and sanctions.* The European Council selects its president and may decide not to re-nominate him/her. The European Council also participates, with the Parliament, in the selection of the President of the Commission. Keeping the confidence of the (majority of) heads of State and government is therefore a key concern for both presidents. Regarding the president of the Commission, formal censure prerogatives lie with the Parliament – not the Council. The European Council decides on most other key positions in the EU, although many of these appointees are formally independent once nominated, such as the members of the executive board of the European Central Bank.
- *Sovereignty and monopoly.* For reasons explained in the two previous points, the European Council cannot be considered to hold either a sovereign or monopoly position *vis-à-vis* legislation and oversight.
- *Unitary and Centralized.* The European Council is both a unitary and centralized institution. The list of its members is known in advance and set to 28 (so far) plus the president. The room in which these participants meet can be considered the geographical centre of the institution. Since Lisbon, official meetings all take place in Brussels. Informal meetings and/or meetings that only include

²¹ In its [resolution of 16 February 2017 on improving the operation of the European Union building on the potential of the Lisbon Treaty \(2014/2249\(INI\)\)](#), the Parliament "Demands that the Council switch completely to QMV wherever this is possible under the Treaties, and that it abandon the practice of transferring contentious legislative fields to the European Council, as this goes against the letter and the spirit of the Treaty, which stipulates that the European Council can only decide unanimously, and should only do so on broad political goals, not on legislation" (paragraphs 33).

²² The representatives for Lithuania, France, Cyprus, and often Romania are not responsible *vis-à-vis* their parliament.

²³ Wessels, W., Rozenberg, O., Van Den Berge, M., Heffler, C., Kreiling, V. and Ventura, L. (2013) *Democratic Control in the Member States of the European Council and the Euro zone summits*. European Parliament.

some participants (like the Eurozone ones) have become more frequent over the years. However, the number of official formations has also simultaneously increased²⁴.

- *Divided.* The European Council is not divided into committees. On the contrary, all members attend all formal meetings. The only division developed with the Lisbon treaty is between its permanent president and the rest of the members. This kind of soft presidentialisation does not bring the institution closer to parliamentary templates though.
- *Deliberation.* Experts and academics should be cautious when discussing what happens during European Council meetings given the lack of information about them. Yet testimonies by former participants²⁵ offer valuable insights into the closed-doors atmosphere. They confirm that participants speak during meetings and that exchanges of views play a key role in the meetings' dynamics when key decisions must be taken. But these debates are probably far from the *pro* and *contra* models whereby debates aim to develop opposite views on a given topic. The parliamentary dimension of these oral exchanges is therefore questionable.
- *Organisation.* Council meetings are organised. The president sets the agenda. Written rules of procedure have been established. Yet testimonies point to less formalised interactions than those in the Council. For instance, lunches and dinners appear to be key events during the two-day meetings; non-members are invited to participate (like the president of the ECB during the dinner on the first day), and key decisions may be taken then.
- *Publicity.* European Council meetings are not public.

1.2.3. Summary of the findings

Table 3 synthesises the elements developed in the last two subsections.

Table 3: The parliamentary template and the Councils

		Council	European Council
Members	Representativeness	Yes	Yes
	Pluralism	Yes / No	Yes / No
	Equality	No	Yes / No
	Autonomy	No	Yes
Activities	Legislation	Yes	No
	Oversight & sanctions	No	Yes / No
	Sovereignty & monopoly	Yes	No

²⁴ Wessels W. (2015) *The European Council*, Basingstoke, Macmillan.

²⁵ For instance: Van Rompuy H. (2014) *Europe in the Storm: Promise and Prejudice*, Leuven, Davidsfonds.

Organi- sation	Unitary	No	Yes
	Centralized	No	Yes
	Divided	Yes / No	No
Procedure	Deliberative	Yes / No	Yes / No
	Organised	Yes	Yes / No
	Transparent	Yes	No

Source : Author

Two conclusions can be drawn from Table 3. First, both the Council and the European Council appear to be **in between the parliamentary and non-parliamentary form**. These diplomatic settings are not totally in contradiction with the parliamentary way of doing politics. This results from both the density of the network of relations between Member State representatives at the EU level (which is comparable to the density of relations between MPs within a given parliament), and the progressive reform of the EU architecture since Maastricht toward democratizing the Union. Given the key elements related to the legislative activity and its publicity, it appears that **the Council is closer to the parliamentary template than the European Council** which has more intrinsically diplomatic features.

However, the second conclusion, made apparent through the colour coding used in Table 3, is that there is a **remarkable complementarity** between both kinds of Council and the parliamentary template. Very often, the Council presents parliamentary characteristics that the European Council lacks and vice versa. In the Council, divided representatives sometimes legislate in secrecy, and sometimes in public: these elements are not so far from the parliamentary world. In the European Council, divided peers meet to talk and find solutions to on-going crises: the key role of egalitarian talks is also evocative of parliaments. Although the Council is closer to a parliamentary assembly, there is indeed a **division of labour** of sorts between both institutions *vis-à-vis* the parliamentary template.

1.3. Which reforms?

This last section of the first part addresses the issue of possible and needed reforms to the structure of the Council and the European Council. A radical option – hard parliamentarisation – is first considered, followed by a more moderate one – soft parliamentarisation. In conclusion, the 2017 Parliament proposals regarding the Council structure are discussed in detail.

1.3.1. The perils of hard parliamentarisation

Several radical reforms could transform the Council in a true parliamentary chamber. For instance:

- **Pluralist representation** of the Member States and a subsequent division of the voting rights given to each member. With the end of the voting points system for qualified majority votes in the Council since 2014, it would be difficult to implement such reform but not impossible.
- Unification of the Council through the occasional meeting of all members. Ministers participating in each formation could meet once or twice a year and thus create a **Senate of the EU**. A debate with the presidents of EU Institutions could be organised at this occasion.

- Unification of the Council through the creation of a **single legislative body with a set number of participants** with ministerial status. These participants would *de facto* have the status of deputy prime ministers in charge of European issues.
- Greater transparency with **publicity for all kinds of meetings at the ministerial level**. Regarding the European Council, a greater parliamentary feature would also require totally or partially opening up its closed-doors meetings.

These proposals appear to be either **anecdotal or harmful** to the smooth operation of the EU. A Senate entirely composed of ministers would probably be anecdotal. The infrequency of meetings would make unlikely the development of transnational coalitions on party bases between ministers from different members. The implementation of a pluralist representation of Member States raises deep practical challenges – especially given the difference in the status and size of the parliamentary opposition from one country to the next. It would also seriously complicate negotiations within the Council and with the Parliament – and could therefore further strengthen their informality.

Creating a single legislative body with a set number of participants would be more feasible and would probably facilitate policymaking both in the Council and with other EU institutions. But the permanency of the ministers in such a Council would likely strengthen their political status. These quasi-deputy prime ministers active in Brussels would soon be considered as rivals by the prime ministers. As they would spend most of their time on EU deals, they could also be criticized for being too remote from grassroots realities. In short, it is far from certain that the benefits of such reform would compensate for its negative aspects.

The issue of transparency is further developed in Chapter 2. Without denying that both Councils could be more transparent, it should be stressed that **full transparency is both harmful and illusory**. First, it would be harmful as it could limit the negotiating capabilities of Member State representatives. Compromise sometimes necessitates secrecy. It would also be illusory since the transparency requirement placed on formal practices could result in the development of more informal ones. Secret ad hoc meetings and phone calls would become the heart of the Council if all formal Council meetings were live-streamed.

1.3 2. The merits of soft parliamentarisation

In contrast with these radical proposals, a more moderate one to deepen the parliamentary nature of the Council can be formulated. It would consist of organizing a **public debate at the ministerial level at the beginning of the legislative process**.

- The **information** of the public, observers, interest groups, and other EU Institutions would be enriched by such debate. The initial position of each ministerial representative would be known and could serve as a reference point throughout subsequent negotiations.
- There is a possibility that such public debate would create some **drama** and oratory performances. A parliamentary style does not always involve theatrics but it certainly requires them from time to time²⁶. Drama and performance help people identify with their decision-makers. It is also an incentive to follow what is happening.
- The recommendation is also made **in reaction to the generalisation of first-reading agreements** and the crucial role played by closed-doors trilogues. It now takes nearly two years on average to reach agreement on EU draft legislation²⁷. Given the generalisation of first-reading agreements, there are no mandatory opportunities for Member States to provide their official positions during this long span of time. It is only at the very end of the process, once a draft has been extensively

²⁶ Rozenberg O. (2013), "Laissez parler le Parlement! Les débats parlementaires comme réponses fragiles à des problèmes politiques majeurs", in C. Galembert, O. Rozenberg, C. Vigour (eds), *Faire parler le Parlement*, Paris, LGDJ.

²⁷ Source: *Observatory of European Institutions*, Sciences Po.

amended, that positions are revealed. An initial declaration of each Member State's views would at least enable observers to be informed of the starting views.

- Last but not least, such reform would necessarily **increase the involvement of ministers** in the legislative game. Ministers currently most often become involved at a rather late stage, once negotiations have taken place within working groups and COREPERs. An obligation to publicly stake positions at the very beginning of the process would force ministers to more closely follow the issues and therefore more specifically instruct their diplomats – an incentive that can only be seen as positive from a democratic perspective.

There is an obvious **drawback** to such a proposal: the public debate could artificially develop internal conflicts within the Council. Identifying a compromise would then become more difficult. Member States could feel boxed in by the initial view they took and therefore unable to compromise. While it should not be ignored, this risk might be worth taking to democratize EU policymaking. Indeed, the Parliament followed a similar path in 2016 when its standing orders were reformed. At the time, it decided that committees' work on draft legislation should be preceded by a floor debate to provide each group with an opportunity to publicly provide its (initial) views. What has been considered good for democracy in the Parliament could also be seen as such in the Council.

This report leaves open the question of whether an **orientation vote** should be organised at the end of this initial debate. An orientation vote is a resolution that provides an institution's the broad view on the principle of a text without considering its details and without taking a definitive position on it. Generally speaking, it is always better in parliamentary settings to link debates and votes. It avoids mere talking shops and makes debates more vibrant. But there is a danger that an initially negative Council position could politically "kill" a proposal without giving policymakers the chance to make it more acceptable through amendments.

The recommendation is summed up in Table 4.

Table 4: Recommendation related to the initial legislative stage in the Council

This report
<p>One month after the Commission officially proposes a draft legislation, a public debate is organized at the ministerial level in the Council.</p> <ul style="list-style-type: none"> - Exceptions in case of emergency are foreseen. - An orientation vote may eventually be organised at the end of this initial debate.

1.3.3. A critical assessment of the Parliament proposals

On 16 February 2017, the Parliament adopted two resolutions on institutional matters: the resolution on improving the functioning of the European Union building on the potential of the Lisbon Treaty, and the resolution on possible evolutions of and adjustments to the current institutional set-up of the European Union²⁸. Among many points, these converging texts mention the structure of the Council and more broadly the institutional architecture of the EU. The relevant points from both resolutions are copied in Tables 5 and 6.

²⁸ [European Parliament resolution of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty \(2014/2249\(INI\)\)](#), OJ C 252, 18.7.2018, p. 215–234, and [European Parliament resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union \(2014/2248\(INI\)\)](#), OJ C 252, 18.7.2018, p. 201–214.

Table 5: Parliament proposals regarding the structure of the Council that do not involve modifying EU treaties

European Parliament 2017 recommendations
[The Parliament] proposes that the Council be transformed into a true legislative chamber by reducing the number of Council configurations by means of a European Council decision, thus creating a genuinely bicameral legislative system involving the Council and Parliament, with the Commission acting as the executive; suggests involving the currently active specialised legislative Council configurations as preparatory bodies for a single legislative Council meeting in public, similarly to the functioning of the committees in the Parliament (paragraph 29).
[The Parliament] demands that the Council switch completely to QMV wherever this is possible under the Treaties, and that it abandon the practice of transferring contentious legislative fields to the European Council, as this goes against the letter and the spirit of the Treaty, which stipulates that the European Council can only decide unanimously, and should only do so on broad political goals, not on legislation (paragraph 33).

Source: [European Parliament resolution of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty \(2014/2249\(INI\)\)](#)

Table 6: Parliament proposals regarding the structure of the Council that involve modifying EU treaties

European Parliament 2017 recommendations
[The Parliament] proposes transforming the Commission into the principle executive authority or government of the Union with the aim of strengthening the 'Union method', increasing transparency and improving the efficiency and effectiveness of action taken at the level of the European Union (paragraph 47).
[The Parliament] proposes that all Council configurations and the European Council be transformed into a Council of States whereby the European Council's principal responsibility would be to provide direction and coherence to the other configurations (paragraph 54).
[The Parliament] considers that the Council and its specialised configurations, as the second chamber of the EU legislature, should, in the interest of specialism, professionalism and continuity, replace the practice of the rotating six-month presidency with a system of permanent chairs chosen from their midst; suggests that Council decisions should be taken by one single legislative Council, while the existing specialised legislative Council configurations should be turned into preparatory bodies, similar to committees in the Parliament (paragraph 55).

Source: [European Parliament resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union \(2014/2248\(INI\)\)](#)

Both recommendations are close and can be boiled down to three points. First, the main suggestion consists of reducing Council configurations in favour of a unique legislative one, while existing configurations would be equivalent to parliamentary committees. Second, elected members should permanently chair these configurations, as opposed to rotating chairs. Third, the Council and the European Council should be placed under an umbrella called Council of States. The European Council,

in charge of “providing direction and coherence”, would still remain distinct from the unique legislative Council, probably composed of ministers.

Those proposals would undoubtedly strengthen the parliamentary feature of the Council. The unique legislative configuration after a committee stage would indeed make the procedure closer to the parliamentary one. It would strengthen the unicity of the institution. The selection of chairs among members within committee-like configurations could strengthen specific habits and norms within each committee – as is classically the case in parliaments.

However, this report is rather critical of these proposals. The critical views do not relate to the parliamentary issue but rather to other possible consequences.

Considering first the reduced configuration of the Council:

- As indicated in the literature (see Chapter 2), a major stake regarding the functioning of the Council relates to the **involvement of ministers vis-à-vis** civil servants. The level of task delegation from government members to bureaucrats is undoubtedly a democratic challenge in the EU’s case given the legislative nature of these tasks. If most of the Council’s ministerial meetings were deprived of a final say in the legislative process, there is a risk that ministerial involvement in these structures would decrease. Direct decision-making power is a strong incentive for preparing meetings, attending them, and being active during them.
- More generally, the organisation of the Council by policy field corresponds to **existing structures both within the Parliament and the administrative directorates of Member States**. This structuration is rather robust and could be lost if a Council configuration is turned into a simple committee.
- As developed in the previous section, if the same minister sat in the unique legislative configuration of the Council, it would turn him/her into a *de facto* **deputy prime minister** who might become a rival to the prime minister, and become dangerously far-removed from domestic politics and realities. If the ministers sitting in the unique body changed at each meeting, there is a risk that the meetings might become pure **rubber-stamping exercises** where pre-cooked committee agreements would be merely approved without further debate. The attractiveness of these settings for politicians and the interest of observers would therefore be rather limited.

Considering second the end of the rotating presidency:

- It should be noted that, in this hypothesis, the duration of the presidency could not really be decided by the members of the Council configuration considered given the ministerial status of Councils’ participants. All ministers in the EU depend on the confidence of their prime minister. This would give a **disproportionate influence to the leader of a given Member State** regarding the functioning of a given configuration. A “battle of the flags” wherein each Member State would try to influence the EU placement of nationals in key positions would be certain when electing these chairs.
- From a different perspective, the advantage of a rotating presidency is to facilitate **crosscutting bargains**, known as “log-rolling” in the literature. A Member State can be convinced of a need to compromise in policy field A if its representative receives an attractive offer regarding policy field B. Ending the rotating presidency would alter this compromise-building mechanism. Leaving the difficult task of organising log-rolling solely to the European Council could lead to develop the European Council’s legislative role – something the Parliament does not want.

Considering third the embedment of the Council and European Council under the framework of the “Council of States”:

- It is not clear whether such a proposal would be **purely nominal** since the distinction in the composition and roles of both institutions would remain. Also, there is **already an obvious**

leadership of the European Council over the Council. Heads of state and government already seek to provide direction and coherence to all Council configurations.

- From a different perspective, Table 5 recalls the Parliament view that the Council should “abandon the practice of transferring contentious legislative fields to the European Council”. A **clear institutional distinction** between the European Council and the Council is probably a better way to reach this end.
- More generally, the view that there should be a Council of States is based on an analogy with the division between the executive and legislative powers. According to the Parliament, there should be “a genuinely bicameral legislative system involving the Council and Parliament, with the Commission acting as the executive”. The ascendance of the European Council *vis-à-vis* the other EU Institutions, especially since the Great Recession (2009-2012), raises doubts on whether this analogy holds true. The European Council often acts as a legislative agenda setter, asking the Commission to make (sometimes rather precise) draft proposals. In so doing, **the European Council de facto performs a task played by the executive power in all Member States.**

2. TRANSPARENCY IN THE COUNCILS

KEY FINDINGS

- The Maastricht Treaty was the initial text that called for more transparent practices. Ensuing treaties and regulations gradually implemented high standards of access to EU documents and transparency regarding the legislative process. The Amsterdam Treaty took a clear step towards transparency and led to the adoption of the main legislative text in the field: the Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents²⁹. These texts developed two dynamics. First, the regulation related to transparency obeys shared principles and is not solely decided by each EU Institution. Second, EU Institutions, and especially the Council, are induced to move from a passive attitude (accepting requests for document consultations) to a more active one (making information available). Especially with regard to the Council, there is a contrast in the regulation between the transparency requirement for legislative (final) activities and the lack of regulation – if not the secrecy requirement – for other activities. The legal texts also allow for large exceptions to the principle of access to documents.
- Before ministerial meetings, the Council is characterised by a dense network of working groups and ambassador meetings (COREPER). The literature disagrees on the influence of these preparatory bodies over the final decision, and on the mixed loyalties of their participants. The disagreements result from the secrecy of these settings. Progress has actually been made over the past years in both institutions. Minimal information is provided through a public register. Many COREPER documents are made available. But existing regulations appear to be obsolete since they focus on the ministerial stage. Suggestions have been made for gathering more publicity at earlier stages of the negotiations, and especially curtailing the practice of disseminating “limité” documents.
- Although efforts have been made to increase the availability of documents related to Council debates and negotiations, there is no general and systematic access to them. This reflects a certain culture of opacity as well as a need to preserve the effectiveness of negotiations between Member States. In addition, a risk exists that any further opening of the documents would result in their impoverishment. Possible reforms include more information on positions taken in preparatory bodies and greater standardization of Council meeting minutes.
- Since 1994, Council votes have been made public. This requirement gradually ended the “silent qualified majority” practice and forced national delegations to take positions. But there are limits to this process. No systematic information is available on the preceding informal stages. Defeated or delayed bills therefore remain under the radar. There can also be a discrepancy between the informal positions taken and the final one, given the consensual mood within the Council. Lastly, the Council’s publication of legislative act summaries is delayed.
- Over the past year, informal negotiations between the Council, the Parliament, and the Commission have gained ground. The closed-doors meetings between representatives from the three institutions – the trilogues – have become more numerous and important. In most cases, a political agreement is reached in this setting during the first reading, and then merely approved by both legislating institutions. The informality of these meetings accounts for their efficiency, but also raises huge issues regarding transparency. Proposals have been made to enhance the information gathered on trilogues.

²⁹ [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, OJ L 145, 31.5.2001, p. 43.](#)

The European Council and the Council have often been criticised for lacking transparency, both in terms of their input methods (negotiations) as well as their output (publicising information). For much of the Council's history, the institution remained a challenging “black box” for researchers to study, but since the 1990s the state-of-the-art has significantly improved thanks to more publicly available data (such as voting records) and greater academic attention³⁰. In this Chapter issues pertaining to transparency in the Councils’ decision-making process are raised. The goal is to provide **a bigger picture of the situation and evaluate the extent to which current rules and processes promote transparency throughout the decision-making and legislative process**. The first aspect to be examined is the legal basis of transparency: the treaties since the Maastricht Treaty, relevant regulations, and the rules of procedure of the two bodies. The next subject is transparency in the preparatory stages of the Council. This includes the preparatory meetings and decisions in working groups and COREPER (I & II). Regarding the actual Council meetings, transparency is examined as an essential element both during debates and meetings of the two Councils as well as during the voting procedures. Finally, transparency in the steps of the legislative procedure, trilogues, and the interaction of the Council with both the Parliament and the Commission are analysed.

2.1. A dense legal basis

Lack of transparency in EU decision- and policy-making processes has often been deemed responsible for the democratic deficit and the increasing lack of trust of its citizens in European institutions. The issue of transparency has been addressed in EU treaties, various regulations, as well as rules followed by EU Institutions. Yet it remains debatable whether the current legislative framework sufficiently protects the democratic right of access to information for all European citizens. After examining the current legal basis for ensuring transparency, it is worth exploring the evolution of this legal basis for transparency to answer two questions; first, whether current regulations are satisfactory, and second, to what extent they ensure transparency throughout the institutions’ decision-making process. This first part distinguishes between the treaties, and other kinds of text, such as statements and secondary legislations. To finish, both Councils’ rules of procedures are considered.

2.1.1. Treaties

The European founding treaties did not include any provision on the transparency of the work of the EU Institutions. On the contrary, [the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965](#)³¹ clearly stated that the documents and archives of the Communities are inviolable, and therefore not accessible or examinable.

Until the Maastricht Treaty, the Commission’s general practice was to make documents available only upon request and on condition that they not include any information that could harm the Commission’s semi-judicial role. Still, the Council was not yet required to publish any information about the preparatory or executive aspect of the decision-making process. The Treaty on European Union signed in Maastricht in 1992 was a turning point for the ways in which EU Institutions ensure their decision-making process is transparent and easier to monitor, slowly moving towards more democratic decision-making procedures. Examining the treaties of the European Union since Maastricht allows for a complete overview of the evolution in the incorporation of the transparency principle in European hard law.

- **The [Treaty on European Union \(Maastricht, 1992\)](#) included a **Declaration on the right of access to information**³². The objective of the declaration was to introduce public access to information about the decision-making process, thereby strengthening the Union’s democratic nature and**

³⁰ Lewis, J. (2012). Council of Ministers and European Council. In E. Jones, A. Menon, & S. Weatherill (Eds.), *The Oxford Handbook of the European Union*. Oxford Publications.

³¹Treaty establishing a single Council and a single Commission of the European Communities, final act, preamble, OJ L52, 13.7.1967, p. 17.

³² The relevant extract from the texts as well as for the following ones are all reproduced in the appendices.

public confidence in the administration. The 1993 report that was recommended in the declaration led to the adoption of a Code of Conduct on 6 December 1993 that lays out the principles public access to the documents of the Council and the Commission.

- With **Article 195**, the Treaty of Maastricht introduced the role of the European Ombudsman, which was linked to the introduction of “European citizenship”. The Ombudsman’s main goal is to help EU Institutions become more effective, transparent, and accountable. The European Ombudsman has concretised the requirements of “openness” in decision-making processes. Since its introduction, the Ombudsman has pursued various initiatives to both monitor the practices of EU Institutions and propose concrete measures for their improvement.³³
- The **Treaty establishing the European Community (Amsterdam, 1997)** was an important step towards transparency. Prior to it, transparency-related measures were viewed as a matter for the affected institutions to address themselves since the measures involved their internal functioning and hence fell under their respective rules of procedure. This essentially self-regulatory approach meant that the initial tendency was to view the principle of public access to documents as, at most, a voluntarily followed specific principle of administrative law that gradually, via case law, acquired some procedural flesh and substance³⁴.

With the Treaty of Amsterdam, the issue of openness rose to the constitutional level. According to Article 1, decisions must now be taken “as openly as possible” in all three so-called pillars of the EU. The chosen phrasing, however, can be seen as a step back from a more transparent procedure, since there can be many interpretations of what is “possible”.

The amendments introduced with the Amsterdam Treaty marked a move towards providing citizens with access to more information on how decisions are taken, making available the actual content of those decisions. EU Institutions must have a justifiable reason for denying access to documents. Article 255 called for the adoption of general principles on the actual content of “public or private interests”, based on which certain restrictions on access to information can be justified, giving a timeframe of two years from the entry into force of the Treaty. Finally, the Treaty called for the development of Rules of Procedure by each institution separately to provide access to their documents.

Article 255

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

*3. Each institution referred to above shall elaborate **in its own Rules of Procedure** specific provisions regarding access to its documents.*

Although the Treaty can be seen as a clear step towards more transparency, it is important to note that information disclosure was limited to access to documents, leaving aside the important issue of official/unofficial meetings. It is evident that more emphasis was placed on monitoring the output rather than the input of the institutions’ decision-making process.

³³ See for instance the press release about an inquiry on trilogues on 14 July 2016:

<https://www.ombudsman.europa.eu/en/press-release/en/69214>

³⁴ Curtin, Hofmann, & Mendes, *Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda*, 2013.

- In 2000, the [Charter of Fundamental Rights of the European Union](#) (which now has the same legal standing as the Treaties) acknowledged that “Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.”
- The [Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007](#), in force since December 2009, includes several reforms emphasising open decision-making, citizen participation, and the role of transparency and good administration in building a democratic Union. The Treaty includes various core provisions on democratic principles applicable to all areas of EU action, and mainly to European institutions’ obligations to ensure access to information.

In order to guarantee the right of ‘every citizen’ to ‘participate in the democratic life of the Union’, the Treaty establishes that ‘decisions shall be taken as openly and as closely as possible to the citizen’ (Article 10 TEU) and that both citizens and representatives should be given opportunities to ‘make known and publicly exchange their views in all areas of Union action’ (Article 8 B TEU).

Article 8 B

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to **make known and publicly exchange their views in all areas of Union action**.
2. The institutions shall maintain an open, **transparent and regular dialogue** with representative associations and civil society.
3. The European Commission shall carry out **broad consultations** with parties concerned in order to ensure that the Union's actions are coherent and transparent.
4. Not less than one million citizens who are nationals of a significant number of Member States may take the **initiative of inviting the European Commission**, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 21 of the Treaty on the Functioning of the European Union.

Article 10

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.
3. Every citizen shall have the right to participate in the democratic life of the Union. **Decisions shall be taken as openly and as closely as possible to the citizen.**
4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

These provisions are linked to both the new citizens' initiative and to Article 15 TFEU, which requires the legislature to act publicly and establishes that citizens have the right to access documents held by all EU Institutions, bodies, and agencies.

Article 15 (ex Article 255 TEC)

*1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work **as openly as possible**.*

2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.

*3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, **shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.** Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific **provisions regarding access to its documents**, in accordance with the regulations referred to in the second subparagraph. The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks. The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph*

Although the principle of an open and citizen-friendly decision-making process is repeated in Article 10 TEU, there is no indication as to when the information must be made public. Yet transparency also involves making relevant information available to citizens in a timely manner, in order to reduce any possible information gaps between citizens and lobbyists.

- The **Treaty on the functioning of the EU (TFEU, 2007)** calls for all of the 'institutions, bodies, offices and agencies' of the EU to 'conduct their work as openly as possible', 'in order to promote good governance and ensure the participation of civil society', calling for a more specific application of the general rule stated in Article 1 TEU.

The introduction of Article 15(3) lays out rules on the adoption of legislation on access to documents. Such legislation applies to all EU Institutions, bodies, offices, and agencies, instead of just the Council, Commission, and Parliament. In practice, most EU bodies are already either covered by [Regulation \(EC\) No 1049/2001 regarding public access to European Parliament, Council and Commission documents](#) (hereafter Regulation No 1049/2001)³⁵ directly, or have adopted the rules on their own initiative.

The Court of Justice of the European Union (CJEU), the European Central Bank, and the European Investment Bank are obliged to follow these new rules only when they are 'exercising their administrative tasks'. A process to allow access to these bodies' documents and procedures is left to their own initiative.

³⁵ [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, OJ L 145, 31.5.2001, p. 43.](#)

All EU bodies, Institutions, and agencies are also required to adopt rules on access to documents as part of their rules of procedure. The general rules on access to documents, take priority over the more specific rules. Finally, Article 15 TEU also requires that the Parliament and the Council “ensure publication of the documents relating to the legislative procedures, in accordance with the general rules”. This provision calls for greater access to such documents than at present, taking account of the obligation to hold open meetings on legislative procedures.

2.1.2. Other texts

Apart from the Treaties’ provisions, there are a few texts, declarations and legislation covering the issue of transparency. Four are particularly worth mentioning.

- Through the [Council Decision of 20 December 1993 on public access to Council documents \(93/731/EC\)](#)³⁶, the Council adopted provisions to ensure the implementation of the principles laid down in its Code of Conduct on the basis of Article 151 (3) EC and Article 22 of its internal Rules of Procedure. Article 1 stipulates that “The public shall have access to Council documents under the conditions laid down in this Decision.” However, the decision only covers documents *originating from* the Council, excluding any document emanating from third parties (natural or legal entities, other institutions, or Member States). Moreover, the right to access a document can be denied on the grounds of protecting the confidentiality of the institutions’ proceedings.
- The [Presidency Conclusions of the European Council meeting in Laeken, 14 and 15 December 2001](#) states that the EU must be “brought closer to its citizens”. The openness of European Institutions is considered a focal point to that end. As a concrete example of how transparency could be enhanced in the institutions, the declaration suggests that the meetings of the Council “at least in its legislative capacity” be public. It also raises the issue of improved access to Council documents.
- Adopted in view of implementing the treaty of Amsterdam provisions, the [Regulation No 1049/2001](#)³⁷ **stipulates that** “Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation” (Article 2). It is built on the principle of “widest possible access” and has together with case law been instrumental in operationalising the right of citizen access by establishing procedures and standards for citizens to exercise their democratic rights. **All documents held by the Parliament, Council and Commission are public on principle, but certain public and private interests are protected through specific exceptions under Article 4.** But since exceptions derogate from the principle of the greatest possible public access to documents, they must, according to established case law, be interpreted and applied narrowly³⁸.

The original Regulation No 1049/2001 directly only to the Parliament, the Council, and the Commission. However, its application has been extended to the agencies by virtue of a specific provision in their respective founding acts. Furthermore, a number of institutions and bodies have adopted voluntary acts laying down rules on access to their documents that are identical or similar to Regulation No 1049/2001.

Academic work on EU transparency has shown that the opportunities to censor legislative records written into Regulation No 1049/2001 have been used extensively to deny public

³⁶ [93/731/EC: Council Decision of 20 December 1993 on public access to Council documents \(93/731/EC\), OJ L 340, 31.12.1993, p. 43–44.](#)

³⁷ [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, OJ L 145, 31.5.2001, p. 43.](#)

³⁸ See the Annex for the list of exceptions.

access³⁹. In other words, a legislative text which official aimed to granting access to documents has been intensively referred to in order to justify the exceptions to the right to public access.

Although the right of access to EU documents does apply in principle to all EU Institutions, bodies, and agencies, there are three institutions that are technically covered only insofar as they exercise their administrative tasks. These are the CJEU, the European Central Bank and the European Investment Bank.

First, the introduction of Regulation No 2001/1049 had a major impact on the amount of information available about Council negotiations. Before its introduction, the standard approach was not to release documents relating to negotiations, but since its introduction, most documents have eventually been released to the public. Furthermore, transparency has gradually increased over the period, at least in terms of the timeliness of record release. Regulation No 2001/1049 has thus been successful in its stated aim of increasing legislative transparency⁴⁰.

- **The European Parliament's decision of 15 April 2014 on the modification of the interinstitutional agreement on the Transparency Register (2014/2010(ACI))**⁴¹ foresees the creation of a transparency register, constituting a major step towards more democratic monitoring of the meetings and consultations that take place behind closed doors. The scope of the register covers all activities that directly or indirectly influence the formulation or implementation of policy and the decision-making processes of EU Institutions, irrespective of where they are undertaken and of the channel or medium of communication used. However, the European Council and Council are only invited to join the register, without being subject to any added pressure. Moreover, it is noteworthy that the register does not apply to a wide range of EU partners, such as churches and religious communities, political parties, Member States' government services, third countries' governments, international intergovernmental organisations and their diplomatic missions, regional public authorities and their representative offices, sub-national public authorities, networks, platforms, and other forms of collective activity, which have no legal status or legal personality.

2.1.3. Rules of procedure

- **The rules of procedure of the European Council establish the non-transparent character of the institution.** As indicated in Article 53: "Meetings of the European Council shall not be public". Meeting agendas do not have to be circulated in advance but are adopted at the beginning of the meetings (Article 3(3)). According to Article 4(2), all meetings of the European Council are held behind closed doors, and there are no specific rules about publicising information about the meetings or third parties invited to the Council's meetings. Citizens and civil society have no way of accessing information on what is discussed, with whom, and under which context decisions and compromises are made. There is a window of up to 15 days before the minutes of each meeting, as approved by the Council and the Secretariat, are made available to the public (Article 8). This raises questions as to whether the timing respects the right to access information in a direct and timely manner. Moreover, the minutes refer to the documents and decisions but not to internal debates.

Deliberations in the European Council are covered by secrecy, significantly limiting the public's right to access documents. Article 11 of its Rules of procedure explicitly refers to "the obligation of

³⁹ Cross, J. (2013) "Striking a pose: Transparency and position taking in the Council of the European Union", *European Journal of Political Research*, 52(3), 291-315; Cross, J. (2013) "The seen and the unseen in legislative politics: Explaining censorship in the Council of Ministers of the European Union", *Journal of European Public Policy*, 21(2), 268-285.

⁴⁰ Cross, J. P., & Bølstad, J. (2015) "Openness and censorship in the European Union: An interrupted time series analysis", *European Union Politics*, 16(2), pp. 216-240.

⁴¹ [European Parliament's decision of 15 April 2014 on the modification of the interinstitutional agreement on the Transparency Register \(2014/2010\(ACI\)\)](#), OJ C 443, 22.12.2017, p. 228-248.

professional secrecy". The Council may decide what can and cannot be publicised, creating distrust about the nature of the documents that are made available.

There are slightly more constraints when votes are organised. Legislative items should be automatically published in the agenda of the Council. Article 10(1) mentions that the European Council "may decide" to make vote results public. Yet it remains a voluntary option, not an obligation. Moreover, the Council hardly ever holds formal votes.

- Contrary to the European Council, the Council's agenda is drafted by the President and then forwarded to national parliaments for consideration, [as stipulated in Article 3\(2\) of the Rules of Procedure of the European Council and Rules of Procedure of the Council](#). There is a security period of 14 days between the dispatch and the meeting.

Regarding the meeting's publicity, Article 5(1) stipulates that: "**The Council shall meet in public when it deliberates and votes on a draft legislative act.**" In other cases, meetings are to be public as a rule. There are exceptions to making debates and votes on non-legislative acts public (article 8). Cases in point are: some non-legislative proposals "relating to the adoption of rules which are legally binding in or for the Member States, by means" (Article 8); the public policy debate of the General Affairs and External Relations Council on its 18-month programme and policy debates in other Council configurations on their priorities; the Commission's presentation of its five-year programme, its annual work programme, and its annual policy strategy, as well as the ensuing debate in the Council; decisions taken by the Council or by COREPER by a qualified majority, and public debates on important issues affecting the interests of the European Union and its citizens.

Although there are numerous, detailed provisions in favour of publicity, **the principle remains that non-legislative debates take place behind closed doors**. Article 6(1) mentions for instance that deliberation "shall be covered by the obligation of professional secrecy" under the exceptions mentioned below. Likewise, the standing orders list the types of votes that should be made public in addition to those where the Council acts in its legislative capacity (Article 9). Yet Article 9(3) makes clear that "except in cases where Council deliberations are open to the public [...], votes shall not be made public in the case of discussions leading to indicative votes or the adoption of preparatory acts". The Council therefore remains a diplomatic forum where bargains should be kept secret until a final agreement is reached.

Any natural or legal person may access Council documents, subject to the principles, conditions and limits laid down in the special provisions in Annex II to the Rules of Procedure and the Regulation No 1049/2001 Documents qualified as sensitive, particularly on public security, defence and military issues, must be given special treatment depending on whether they are classified as "très secret/top secret", "secret" or "confidentiel"⁴².

The Council's transparency policy does not only involve *making public the decision-making process* and *public access to documents*. Another aspect of transparency is official concern with the quality of the drafting of legislative texts (Article 22 of the Rules of Procedure).

2.2. Transparency in the pre-ministerial stages

The preparatory stages of Council meetings include the Council's working groups and the COREPER. In this part, these two preparatory stages are evaluated in terms of transparency in their current processes.

⁴²https://www.cvce.eu/obj/transparency_in_the_council_of_the_european_union-en-17c906d0-5a12-4726-bf6c-7279a73e8d8d.html

2.2.1. Working groups

The need for the creation of committees and working groups to assist the work of Ministers in the Council was evident from the very first steps of the European Communities. COREPER was created so that members of the Council would have a permanent representation in Brussels over an extensive period of time. According to Article 240(1) TFEU:

A committee consisting of the Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the latter. The Committee may adopt procedural decisions in cases provided for in the Council's Rules of Procedure.

The Council consists of three basic stages: working groups, preparatory bodies such as the Committee of Permanent Representatives (COREPER I and II), and the ministerial level. Working groups represent the most basic element of the Council's work. Estimates of the actual number of working groups vary depending on the research but usually range **between 170–200 working groups**⁴³. The function of the working groups is to facilitate negotiations among of Member States, softening their positions. Each group is composed of one or more representatives from each Member State, members of the Council General Secretariat, members of the Commission staff, and the Chair. The group is tasked with discussing legislative and non-legislative documents prior to COREPER or the Council in order to find a compromise that maximally suits the parties involved.

Working groups meet at very irregular intervals, ranging from every week to every six months, depending on the number of legislative acts within the working group's remit⁴⁴. They may be permanent, temporary, or ad hoc; in fact, a working group might meet only once and then be dissolved⁴⁵. Naurin uncovered prevailing patterns of discussion within working groups⁴⁶. He argues that most often the main intention behind giving explanations is to try to convince others rather than to clarify one's position in order to facilitate compromise within the working group. In a more recent study, Naurin challenges the prevailing conceptualization of the Council as an arena where intergovernmental negotiations can be characterized as consensual, claiming that the 'Big 3' in particular (France, Germany, and the United Kingdom) are unwilling to make generous concessions⁴⁷.

The actual negotiations in the working groups are based on instructions given to national representatives by their national authorities, defining the position of the Member State on a given topic. Participating officials must report back to their national authorities, verbally or in writing, to describe the course of the meeting, the negotiating positions of other Member States, and the representative's achievements during the negotiations. The report serves as a control mechanism for national authorities and gives them an idea of what is going on in the working groups⁴⁸.

The nature of the working groups as described above, with secluded meetings and only national and European civil servants participating, has not allowed for adequate research on its processes. Most of the information gleaned by researchers is based either on estimates of the inputs and outputs, or on information from insiders. Some of the first research on working groups is in a textbook on the Council, where Hayes-Renshaw and Wallace estimate that committees are responsible for 85–90 per cent of all Council decisions⁴⁹. The preparatory stages of decision-making, from the moment an item is put on the agenda to the moment of its formal adoption, are precisely the stages being influenced by core

⁴³ The Council Secretariat regularly publishes a list of working groups. In the last such overview from July 2018, there were 196 'preparatory bodies' altogether, 162 of which were chaired by the Presidency and 34 of which were chaired by a permanent chairman.

⁴⁴ Olsen, I. (2011). *Council working groups: Advisors of de facto decision makers?* Aarhus: Politica.

⁴⁵ Hayes-Renshaw, F., & Wallace, H. (1997). *The Council of Ministers*. New York: St. Martin's Press, p. 97.

⁴⁶ Naurin D. (2010), "Most Common When Least Important: Deliberation in the European Union Council of Ministers", *British Journal of Political Science*, 40 (01), pp. 31-50.

⁴⁷ Naurin, D. (2015). Generosity in intergovernmental negotiations: The impact of state power, pooling, and socialization in the Council of the European Union. *European Journal of Political Research*, 54(4), 726-744.

⁴⁸ Olsen, I. (2011). *Council working groups: Advisors of de facto decision makers?* Aarhus: Politica.

⁴⁹ Hayes-Renshaw, F., & Wallace, H. (1997). *The Council of Ministers*. New York: St. Martin's Press.

constitutional principles that may well be changing the rules of the game in a manner that is not yet fully visible or operationalised⁵⁰.

Current research, however, has repeatedly challenged such figures. Häge found that working groups were responsible for less than 40 per cent of decisions⁵¹. Olsen notes that an even smaller amount of decisions – only 33 per cent – are made by working groups⁵². In many cases, it is not possible to observe which working group dealt with which legislative acts, and whether or not the Council working groups asked COREPER to solve outstanding issues.

The transparency of the decision-making process in working groups is limited. However, the openness and data availability of the Council's Public Register has increased over the years. The database now contains references to Council documents, including meeting reports and notes sent from the Council working groups to COREPER, and from COREPER to the Council of Ministers. National officials are not directly controlled or accountable to their domestic parliaments, so the involvement of bureaucrats in the Council's legislative decision-making raises important questions about the democratic legitimacy of Council decisions⁵³.

Relying on the working groups and COREPER in Council decision-making may have clear advantages, as it may ensure the effectiveness and technical quality of Council decision-making. However, as Häge underscores, the democratic legitimacy of Council decision-making depends on the circumstances under which the working groups act alone or pass legislative acts on for further discussion at the higher levels of the Council. **If working groups handle solely technical issues and leave the more conflictual and political decisions to higher levels in the Council, then examining transparency issues becomes less critical. The lack of access to the relevant information, however, makes it difficult to determine the extent of working groups' influence in the final decision-making process.**

2.2.2. COREPER

All council decisions are prepared in a meeting of the permanent representatives of each EU Member State, the Committee of Permanent Representatives (COREPER). The decisions in COREPER are prepared in hundreds of more specialised Council working groups, which include national civil servants from each Member State who specialise in a specific subject. If a proposal is agreed upon in a lower-level meeting, it is not discussed at the higher-level meeting. As a result, according to some experts, minister debate only about 15 per cent of all items on the Council of Minister's agenda. The other 85 per cent are agreed upon in COREPER's relevant working group, and therefore do not require further discussion in the Council of Ministers⁵⁴.

- Current research suggests that delegates acting in these groups have shared loyalties, both to the group and to their respective states⁵⁵. Members of COREPER develop process and relationship interests, as well as a sense of collective responsibility. Lewis claims that COREPER is driven not only by the logic of consequences, but also by the logic of appropriateness⁵⁶. Trondal and Veggeland confirm the shared loyalty thesis even with regard to Member State delegates in Commission

⁵⁰ Curtin, D., Hofmann, H., & Mendes, J. (2013). Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda. *European Law Journal*, 19, pp. 1-21.

⁵¹ Häge, F. M. (2012). *Bureaucrats as Law-Makers: Committee Decision-Making in the EU Council of Ministers*. London: Routledge.

⁵² Olsen, I. (2011). *Council working groups: Advisors of de facto decision makers?* Aarhus: Politica.

⁵³ Häge, F. M. (2012). *Bureaucrats As Law-Makers: Committee Decision-Making in the EU Council of Ministers*. Routledge.

⁵⁴ Hayes-Renshaw, F., & Wallace, H. (1997). *The Council of Ministers*. New York: St. Martin's Press, p. 7.

⁵⁵ Lewis, J. (1998) "Is the "hard-bargaining" image of the Council misleading? The COREPER and the local elections directive", *Journal of Common Market Studies*, 36(4), pp. 479-504; Lewis, J. (2003) "Institutional environment and everyday EU decision making. Rationalist or constructivist", *Comparative Political Studies*, 36(1-2), pp. 97-124.

⁵⁶ Lewis, J. (2005) "The Janus Face of Brussels: Socialization and Everyday Decision Making in the European Union", *International Organization*, 59(4), pp. 937-971, here p. 942.

committees⁵⁷. **The prevailing message from existing research seems to be that socialization takes place at lower levels of the Council (particularly at the COREPER level) and actors behave in a manner that is far from being solely driven by self-interest⁵⁸.**

All this research relies on data gathered from insiders or on the detailed study of the negotiation of one or more pieces of legislation. Reliance on insider information, however, runs the risk of biased data. First, insiders may overestimate their own roles, mix the formal versus informal levels of negotiation, or simply provide only the information they are comfortable discussing⁵⁹. Also problematic is the fact that insiders are often asked to evaluate not just themselves, but other delegates and positions as well, or to adopt a general stance resulting in a 'mean stance' for the particular Member State.

- One important aspect is the gap between actionable documents and those made available to the public. **In 2016, the Dutch Presidency of the Council sought to lift legislative documents' "limité" status as soon as possible and make them available to the public.** The specific goal was to provide public access to legislative documents immediately after discussion in the COREPER, since up until that point it was unclear when such documents were made public.

A 2017 paper from the Dutch COSAC delegation on EU transparency recommended that legislative Council documents be systematically made public without delay⁶⁰. More precisely, within the Council, it suggested that routine procedures and **working methods be established to carefully assess** whether a new document should be made available to the public immediately or whether one of the refusal grounds mentioned in the Transparency Regulation applies. This assessment must be made on a document-by-document basis and right after circulation among Member State governments. **This means legislative documents would be directly available at all times, unless one of the exceptions enumerated in the Transparency Regulation was applicable.** According to the same proposal, the Council should also broaden the definition of "legislative document" to include presidency conclusions, state-of-play documents and multi-column texts.

- **EU legislation on access to documents does appear to be outdated** both in terms of the Treaty of Lisbon and of framing institutional practices by a range of EU Institutions, organs, bodies, and agencies operating across a wide range of policy fields. The scope and substance of the legal framework need to be adjusted in line with Article 15 TFEU and Article 10 TEU⁶¹.

Regulation No 1049/2001 currently governs the regime applicable to public access to documents. And its institutional scope is only directly applicable to the Parliament, the Council, and the Commission. In April 2008, the Commission submitted a proposal to rework the 2001 Regulation with a view to enhancing transparency and accountability by promoting good administrative practices. This proposal remains the basis for negotiations between the co-legislators.

There are already proposals on how transparency can be improved in the processes of the pre-Council stages. **The Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) suggested in a letter to EU Institutions that the legislative process could further be enhanced by regular public exchanges of views at COREPER or at the ministerial level, for instance every three months or after every five working-group meetings⁶².**

⁵⁷ Trondal, J., & Veggeland, F. (2003). Access, voice and loyalty: the representation of domestic civil servants in EU committees. *Journal of European Public Policy*, 10(1), 59-77.

⁵⁸ Kaniok, P. (2016). In the Shadow of Consensus: Communication within Council Working Groups. *Journal of Contemporary European Research*, 12(4), 881-897.

⁵⁹ Ibid.

⁶⁰ Staten Generaal (2017), *Opening up closed doors: Making the EU more transparent for its citizens. Bringing Europe closer to its citizens*, Paper from the Dutch COSAC delegation on EU transparency.

⁶¹ Curtin, D., & Leino-Sandberg, P. (2016). Openness, Transparency and the Right of Access to Documents in the EU. In-Depth Analysis. *EUI Working Papers*.

⁶² Letter from the COSAC delegations to the European Institutions, The Hague, 20 December 2017.

Meanwhile, on 9 February 2018, the **Ombudsman** made specific recommendations and several suggestions to the Council on how to improve the transparency of its legislative process. First, when opening her inquiry, the Ombudsman noted a certain degree of **consistency in the documentation produced in the context of COREPER meetings, as opposed to working groups' meetings**. With all the different types of documents (papers, reports, notes, etc.) and different levels of access to them, concerns about the lack of opportunity for citizens' participation in the legislative activities were raised. The Ombudsman concluded that preparatory bodies have a decisive influence on the final legislative text and that their discussions are therefore a crucial part of the EU legislative process that should be taken as openly and closely as possible to the citizen⁶³. Although the Register is seen as a positive step towards more transparent procedures, the Ombudsman noted that there is still room for improvement, especially with regard **to ease of access and "visibility"**, and suggested the development of a dedicated and up-to-date **webpage for each legislative proposal**, following the example of the Parliament's Legislative Observatory.

2.3. Transparency during Council debates and meetings

In the Council, the Secretariat is tasked with deciding which records to release when on a record-by-record basis. The rules that constrain the Secretariat when making these decisions are set out in Regulation No 1049/2001. As discussed above, this regulation requires that all legislative records be released immediately unless justification for delaying or refusing release can be found in the set of exceptions listed in article 4. Access to records can be refused for various reasons, including the protection of public or private interests, the protection of legal proceedings, and issues related to security or defence.

2.3.1. A trade-off between transparency and efficiency

Legislative transparency is attractive to policy practitioners, civil society, and the general public, as it is intimately connected with the opportunity to hold decision-makers accountable for their negotiation behaviour and resulting decisions⁶⁴. However, research also suggests that transparency can make compromise decisions more difficult to reach⁶⁵. Much of the debate surrounding transparency in the EU has thus revolved around the **trade-off between granting access to legislative records in order to legitimize decisions and censoring them to protect the decision-making process**⁶⁶. Transparency determines the amount of information available to observers about legislator behaviour during the negotiation process. When more information is available, observers are better able to attribute a reputation that accurately reflects a legislator's performance⁶⁷. It follows that while transparency is appealing to those who perform well in negotiations, it is less appealing to those who perform poorly. Under conditions of transparency, it takes highly skilled and experienced negotiators to reach compromise decisions while appearing to do a satisfactory job from an observer's perspective. Indeed, succeeding on both fronts may not always be possible. Accordingly, the end result achieved from these formal models is that negotiators' concern with their reputation may interfere with their ability to reach compromise decisions.

⁶³ European Ombudsman (2017) *Special Report of the European Ombudsman on the strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process*, Strasbourg.

⁶⁴ Naurin, D. (2007) *Deliberation Behind Closed Doors: Transparency and Lobbying in the European Union*. Colchester: UK: ECPR Press.

⁶⁵ Cross, J. (2013) Striking a pose: Transparency and position taking in the Council of the European Union. *European Journal of Political Research*, 52(3), pp. 291-315.

⁶⁶ Cross, J. (2013) The seen and the unseen in legislative politics: Explaining censorship in the Council of Ministers of the European Union. *Journal of European Public Policy*, 21(2), 268-285.

⁶⁷ Cross, J. P., & Bølstad, J. (2015) "Openness and censorship in the European Union: An interrupted time series analysis», *European Union Politics*, 16(2), pp. 216-240.

As Lewis notes, **norms of cooperation and compromise function best in closed-door settings**⁶⁸. Indeed, Hayes-Renshaw and Wallace state that “participants in Council negotiations often want to speak in unvarnished terms and to deploy arguments that they would not repeat so easily in a more explicit and public form”⁶⁹. In closed-door settings, “ministers and their officials build coalitions, exercise leverage and do deals, benefiting from the veil of secrecy that largely cloaks their actions”⁷⁰. Delegations avoid debate in open sessions and negotiate during the lunch break, because publicity prevents them from being flexible. During public sessions, they cannot make concessions and have to support national positions. By contrast, they have more leeway and can find solutions in their bilateral talks with the Presidency⁷¹.

2.3.2. The information available

While the agendas of European Council meetings are published in advance, minutes of meetings are not published in a prompt or systematic manner. **Reporting from the meetings is limited** to the conclusions of summits, with documents submitted to the European Council, and background notes on meetings published on the institution’s website. A video archive of post-summit press conferences is also available. While detailed information on meeting proceedings is limited, the available material does reportedly accurately reflect events, despite the fact that a significant volume of ‘canvassing’ frequently takes place on the side-lines, often on issues unrelated to the meeting itself.

The ‘[Open Sessions](#)’ webpage on the Council website allows **live streaming of all Council sessions that are open to the public. However, only a relatively small share of Council meetings are subject to this coverage**, thus calling into question the level of transparency actually afforded to the bulk of Council decision-making. Also, during Council sessions, when the ministers need to debate because their representatives were not able to solve a political problem at the COREPER level, the Presidency interrupt the broadcast⁷².

[Council timetables](#) for meetings held in the Justus Lipsius building in Brussels are accessible through an online calendar. Agendas are available for Council meetings at ministerial, COREPER I and II, special committee and preparatory levels, and are presented as such in an online database. However, no agendas or minutes from trilogue or conciliation committee meetings are made available. While the rotating Presidency could in principle deliberately delay the publication of agendas, this is reportedly unlikely to occur given its desire to be seen as an honest broker.

Two lists of Council minutes – one related to general matters and another specifically focused on the adoption of legislative acts – are accessible online. The Council website hosts an online archive of public voting results. Monthly summaries of the Council’s legislative acts are also available online but are not published until a variable number of months later.

Additionally, the Council (in cooperation with the other main institutions) reports that it is currently developing a system on EUR-LEX for the public to access visual depictions (e.g. timeline representations) of the lifecycle of legislative proposals as well as individual institutional input and interventions. No contacts between third parties and council members or input from the former are currently systematically recorded or disclosed, although they could shed light on the legislative process.

2.3.3 Limits & recommendations for improving transparency

While the CJEU ruling of the 17 October 2013 on *Council vs. Access Info EU* did not immediately constitute binding EU law, it shed light on the Council practice of blacking out Member State positions

⁶⁸ Lewis, J. (2010). How institutional environments facilitate co-operative negotiation styles in EU decision-making. *Journal of European Public Policy*(17(5)), pp. 648-664.

⁶⁹ Hayes-Renshaw, F., & Wallace, H. (2006). *The Council of Ministers*. New York: St. Martin’s Press.

⁷⁰ Ibid.

⁷¹ Novak, S. (2011). Is there a tension between transparency and efficiency in decisions? The case of the Council of the European Union. *EUI Working Papers*, 33.

⁷² Ibid.

in minutes discussing legislative proposals before the documents are made public. In their examination of Council transparency, Hillebrandt, Curtin and Meijer identified a struggle between a pro-transparency Council minority and a transparency-sceptic majority, demonstrating **a culture of reluctance** to interpret transparency regulations more liberally⁷³. The Court's ruling clearly supports a broader reading of transparency provisions in practice. The Council has responded to the ruling by calling for a "policy review" of whether delegation names should continue to be recorded in minutes at all. Despite deciding that (for the time being) delegation names will remain in documents, the Secretariat simultaneously raised the issue of document restriction rules, emphasising the rules on unauthorised disclosure of "limité" (or "sensitive unclassified") documents. It would therefore be reasonable to expect that the Council will increase the number of documents marked "limité", thus maintaining the content of the documents, but rendering them less accessible to the public.

Neither the declarations of interest from Council members, nor the membership lists of the different Council policy groups are publicly available. Legislative debates typically do not involve and debating at all: instead, each minister reads a pre-written text. Ministers tend to state flexible or imprecise positions because they take the floor under the shadow of negotiations that will take place behind closed doors in committees and working groups. Transparency rules do not require that positions delegations took in working groups and in committees be divulged⁷⁴.

Available documents vary in their informational content. For example, individual Member State positions are frequently not recorded in working group reports and presidency notes. In other words, even if the Council made more documents available, the transparency of Council deliberations would not necessarily increase. On the contrary, if the Council was forced to publish them more often, it might record less information in official documents. Standards for reporting on deliberations could help prevent this. Without such flanking measures, the democratic right of citizens to follow the evolution of discussions on legislative proposals within the Council in a timely manner would remain hamstrung even if wider access to these documents were granted.

To solve this problem, **the Council could standardize the reporting** on Council meetings and preparatory Council meetings in the legislative field (and establish these standards in its rules of procedure). This means that a comprehensive agenda would need to be distributed for each meeting in which legislation is discussed. Furthermore, the minutes of the meetings could provide details on the discussed issues and points, submissions by Member States, and any formal or interim/informal votes, even if no progress was made. The legislative process could further be enhanced by regular public exchanges of views at COREPER or at a ministerial level, for instance every three months or after every five working-group meetings. Adopting these rules could be a significant step in making the Council more transparent for national parliaments.

In the **Ombudsman proposals**, the legislative discussions in the preparatory bodies must be documented, Member State positions in preparatory bodies should be recorded, and timely and easy access to legislative documents must be provided. Making more information public would also help discourage national Ministers from 'blaming Brussels' for EU laws they themselves helped shape and adopt⁷⁵.

2.4. Transparency in the voting procedure

Although both the transparency of decision-making and the information flow about Council decisions have significantly increased, notably since the mid-1990s, a gap in the systematic analysis of the

⁷³ Hillebrandt M., Curtin D.M. and Meijer A. (2013) "Transparency in the Council of Ministers of the EU: An Institutional Approach", *European Law Journal*, vol. 19, issue 5.

⁷⁴ Novak, S. (2014). The surprising effects of transparency on the EU legislative process. *Cuadernos Europeos de Deusto*, 51, 45-70.

⁷⁵ European Ombudsman (2017) *Special Report of the European Ombudsman on the strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process*, Strasbourg.

Council's voting behaviour remains. Voting procedure results for Council members are only made public when the Council acts as a legislator. Votes can also be accompanied by an explanatory note, which the person who cast the vote can request to make public.

2.4.1. The publicity of the votes

Existing studies acknowledge that an **“active” policy of transparency has replaced “passive”** transparency: while transparency initially referred to citizens' right to request documents, it now involves requiring the Council to publish information on its website⁷⁶. However, little empirical research exists on the implementation and effects of transparency rules on the European legislative process, since this analysis would have to compare what happens behind closed doors with the outcomes of public sessions.

Since 1994, Council votes have been made public. According to the Article 16(8) TEU, “The Council shall meet in public when it deliberates and votes on a draft legislative act” and according to the Treaty Council's rules of procedure (Article 9), “the results of votes (...) shall be made public”. The publicity of votes was a crucial step towards more substantial transparency, given that no information on the Council sessions had been made public prior to 1994. Since 2006, when the Council started co-deciding with the Parliament, votes must be posted online. This has enhanced actors' accountability by putting an **end to the “silent qualified majority”** practice (asking permanent representatives instructed to oppose the decision to remain silent). The publication of votes prevents this kind of strategy since it makes the existence of a blocking minority obvious⁷⁷. Two lists of Council minutes – one on general matters and another specifically focused on the adoption of legislative acts – are accessible online. The Council website hosts an online archive of public voting results. Monthly summaries of the Council's legislative acts are also available online but are not published until months later.

2.4.2. The limits to transparency

There are several limits to the transparency of Member State votes.

- There can be a **gap** between the position taken by a Member State during informal negotiations and its final recorded position. The Commission and the presidency frown on voting against an adopted text or abstaining in the Council⁷⁸. The Commission and presidency try to listen and to take into account the demands of the different ministries: a refusal to join the majority is seen as disrespectful their work.

National representatives who do not actually vote until the final stage make decisions behind closed doors. The Presidency does not systematically ask each delegation its position but tries to identify who has presidency during negotiations. This unwritten rule aims to avoid the situation of a public session in which a measure would be unexpectedly rejected before ministers coming to Brussels expressly to adopt the measure. In this context, ministers tend to join the qualified majority when they see that they cannot block a measure anymore. Except for the few Member States in which ministers receive strict parliamentary mandates, the general tendency is to join the qualified majority even if one is not satisfied with a measure⁷⁹. problems with the proposed measures. In the diplomatic setting of committees, the method tends to deter unsatisfied delegations from taking the floor because they do not want to be seen as marginalised⁸⁰. When votes become public, however, they do not necessarily reflect the positions taken by national representatives behind

⁷⁶ Novak, S. (2014). The surprising effects of transparency on the EU legislative process. *Cuadernos Europeos de Deusto*, 51, 45-70.

⁷⁷ Novak, S. (2011). Is there a tension between transparency and efficiency in decisions? The case of the Council of the European Union. *EUI Working Papers*, 33.

⁷⁸ Novak, S. (2014). Transparency as Organized Hypocrisy? The Case of the EU Legislative Process. *Studies in Public Policy*, 507.

⁷⁹ Novak, S. (2014). Transparency as Organized Hypocrisy? The Case of the EU Legislative Process. *Studies in Public Policy*, 507.

⁸⁰ Novak, S. (2011). Is there a tension between transparency and efficiency in decisions? The case of the Council of the European Union. *EUI Working Papers*, 33.

closed doors. According to an unwritten rule, when the presidency of the COREPER or of the Special Committee for Agriculture has stated that a measure can be adopted, ministers cannot oppose it if they did not previously inform the

- **Voting results are published only if a measure is adopted, without any data on the rejected acts; only insiders are aware of the votes on rejected acts.** Member State representatives fear that public votes against proposals and abstentions might have harmful consequences at the national level. They need to face journalists during the press conferences following Councils and tend to withdraw from the obligation to justify a negative vote or an abstention, which might be perceived as failures in the negotiations.
- **There are no records of the positions taken before the final stage.** Transparency rules do not provide a sufficient indicator of actors' positions, since only the final stage of the decision-making process is public and votes are only published once the measure has been adopted, with no information about rejected measures. As Novak notes⁸¹, the absence of voting in the COREPER allows for the concealment of representatives' positions. The Presidency does not open voting procedures, partly because the defeated delegations might be embarrassed and do not want to be considered defeated by their peers. Moreover, delegations are not used to clearly stating their positions during negotiations process to keep room for manoeuvre. Stating a clear position would diminish their flexibility and ability to seek a compromise.

There is actually a **double opacity** in the Council: delegations' positions are not revealed because ministers fear domestic reactions, and also because behind closed doors, opacity favours diplomatic relationships among peers and decisional productivity⁸². If the Presidency opened a voting procedure on a given measure, delegations that remained silent without really approving the measure might abstain or even vote against it, possibly resulting in a rejection of the measure. Although the prospect of a vote clearly affects the dynamics and outcome of negotiations, the actual act of voting is still a last resort in the Council⁸³. The absence of voting is sometimes interpreted as evidence that Council decision-making is governed by informal supranational norms and values – the so-called "culture of consensus"⁸⁴.

2.5. Transparency and trilogues

The EU's two legislative bodies – the Parliament and the Council – enact legislation based on a proposal from the European Commission. During this process the co-legislators, assisted by the Commission, often negotiate in so-called Trilogues, which are informal meetings between representatives of the three institutions involved.

2.5.1. The development of trilogues

During a Trilogue, the Parliament and Council try to agree on a common text based on their initial position. The text is then voted on according to the formal legislative procedure. Trilogues may be held at all stages of the process and at various levels of representation, depending on the nature of the expected discussion. They have proven to be very effective at reaching agreements, and most legislation is now adopted this way. **Informal politics is a successful strategy for dealing with the complexity of the ordinary legislative procedure.**

⁸¹ Ibid.

⁸² Novak, S. (2011). Is there a tension between transparency and efficiency in decisions? The case of the Council of the European Union. *EUI Working Papers*, 33.

⁸³ Häge, F. (2012). *Bureaucrats as Law-Makers: Committee Decision-Making in the EU Council of Ministers*. London: Routledge.

⁸⁴ Heisenberg, D. (2005). The institution of 'consensus' in the European Union: Formal versus informal decision-making in the Council. *European Journal of Political Research*, 44(1).

The routine use of trilogues is at the heart of the political controversy over, and the normative criticism of, the informalization of co-decision. Indeed, trilogues differ from the EU's formal legislative arenas in four ways⁸⁵:

1. First, membership in trilogues is restricted and non-codified. Parliamentary plenaries and Council meetings include all legitimate decision-makers.
2. Trilogues are secluded, and their seclusion has neither been formally decided nor publicly justified.
3. The rules specifying what is allowed or not in trilogues are informal.
4. The political process cannot be concluded in the informal arena; any agreement reached in a trilogue is intermediate until formalized by the Parliament's plenary and a Council meeting.

Trilogues allow representatives from the Commission, Council, and Parliament to pre-negotiate politically urgent legislation. Trilogue representatives also need to be creative; to strike a deal, they must accommodate the interests of the Parliament and of 28 Member States (or a qualified majority). Furthermore, negotiators work on an evolving goal: at this early stage, the Parliament has not yet issued its first reading opinion, and the Council has not yet adopted its common position; new evidence is likely to emerge; the assessment of the policy problem and available solutions are likely to change; positions are likely to develop; and coalitions are likely to shift. Finally, when sensitive national interests are involved, and specific domestic concerns must be accommodated, **Trilogue negotiators need discretion**⁸⁶.

2.5.2. A deficit of transparency

Discharging a potentially unwieldy procedure, trilogues reduce transaction costs and increase the speed of decision-making. They have therefore been praised for making EU legislation more efficient and for promoting inter-institutional cooperation. Although many stages of EU legislation development are more transparent than they are in Member States, a decisive stage in co-decision procedures disappears behind closed doors. The increased use of informal talks in the trilogue format has resulted in 90% of EU laws now being agreed at first reading. However, **minutes of these meetings do not exist; participants and their positions remain unknown; and various documents are sometimes selectively made available to lobbyists but not the general public.**

Trilogue transparency is an essential element of EU law-making legitimacy, since it allows citizens to scrutinise the performance of their representatives during a key part of the legislative process. In her proposals for improving transparency during trilogue discussions, the **Ombudsman** noted that "*trilogue dates, initial positions of the three institutions, general Trilogue agendas, "four-column" documents, final compromise texts, Trilogue notes that have been made public, lists of the political decision makers involved and as far as possible a list of other documents tabled during the negotiations*" should be made available in an easy-to-use and easy-to-understand joint database⁸⁷. Negotiators may be exploiting the lack of transparency surrounding trilogues to negotiate political compromises that reflect their own individual preferences.

The informal arrangements surrounding trilogues not only affect public access, but also **access within the institutions**. As far as the Council is concerned, first reading agreements practically mean that deals are effectively concluded before they reach the ministers, since the Council position is settled by COREPER. National parliaments often experience difficulties following decision-making in trilogues, especially since amendments are made at great speed, hindering effective scrutiny at the national level.

Trilogues may be well suited to a problem-solving style of decision-making, but they reduce access opportunities for wider social and political interests and, when the Parliament and Council collude,

⁸⁵ Reh, C. (2014). Is informal politics undemocratic? Trilogues, early agreements and the selection model of representation. *Journal of European Public Policy*, 21, 822-841.

⁸⁶ Ibid.

⁸⁷ European Ombudsman (2017) *Special Report of the European Ombudsman on the strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process*, Strasbourg.

they weaken public control through mutual checks and balances⁸⁸. The restriction of trilogues differentiates access to, and control over, de facto decision-making, while seclusion differentiates access to information. Such differentiation arguably disproportionately empowers big political parties and bigger Member States at the expense of small political groups and rank-and-file parliamentarians.

2.6. Conclusion and recommendations

In conclusion to this Chapter on transparency, it appears that over the past twenty years the EU has made significant efforts to improve the information available regarding the legislative procedure, but that much remains to be done. This transparency deficit at the Council level partly results from a diplomatic culture of secrecy and compromise that has already been limited through various legal instruments. Among the issues for which legislation should be updated, the pre-ministerial stages of the Council appear to be particularly crucial.

But this deficit is also an indirect consequence of past efforts to formalise and publicise negotiations at the EU level. The development of the trilogues considered in the previous section can indeed be understood as a consequence of greater publicity constraints placed on EU policy-makers. Greater informality could be the paradoxical price to pay for higher standards of transparency.

2.6.1. Recommendations from past reports

The Ombudsman, COSAC, and Transparency International EU⁸⁹ recently developed some proposals to address these shortcomings. These recommendations, mentioned throughout this Chapter, are summed up in the following Tables.

Table 7: The Ombudsman’s recommendations (2018)

Ombudsman
<p><i>The Ombudsman recommended that the Council should:</i></p> <ul style="list-style-type: none"> - <i>Systematically record the identity of Member State governments when they express positions in Council preparatory bodies.</i> - <i>Develop clear and publicly available criteria for how it designates documents as ‘Limité’, in line with EU law.</i> - <i>Systematically review the ‘Limité’ status of documents at an early stage, before the final adoption of a legislative act, including before informal negotiations in ‘trilogues’, at which point the Council will have reached an initial position on the proposal.</i>
<p>In addition, the Ombudsman made a number of suggestions to the Council on how to improve the transparency of its legislative process, with a view to enhancing the consistency of documentation generated within its preparatory bodies and the accessibility of that documentation via the Council’s website and public register. The Ombudsman suggested that the Council:</p> <ul style="list-style-type: none"> - Conduct a review of how it meets its legal obligation to make legislative documents directly accessible. - Adopt guidelines concerning the types of documents that should be produced by preparatory bodies in the context of legislative procedures and the information to be included in those documents.

⁸⁸ Reh, C. (2014). Is informal politics undemocratic? Trilogues, early agreements and the selection model of representation. *Journal of European Public Policy*, 21, 822-841.

⁸⁹ Transparency International EU is part of the global anti-corruption movement. Transparency International EU’s mission is to prevent corruption and promote integrity, transparency and accountability in EU institutions, policies and legislation. More information: <https://transparency.eu/>

- Update the Council's rules of procedure to reflect the current practice of **disclosing legislative documents** containing Member States' positions, as outlined by the 2016 Dutch Presidency of the Council.
- **List all types of documents in its public register**, irrespective of their format and whether they are fully or partially accessible or not accessible at all.
- Improve the user-friendliness and 'searchability' of the **public register** of documents.
- Develop a dedicated and up-to-date **webpage for each legislative proposal**, following the example of the Parliament's Legislative Observatory.

Source: European Ombudsman (2017) *Special Report of the European Ombudsman on the strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process*, Strasbourg.

Table 8: Recommendations by the COSAC (2017)

COSAC
<p>Legislative Council documents must systematically be made public without delay.</p> <ul style="list-style-type: none"> - Routine procedures and working methods must be established to carefully assess whether a new document should be made available to the public immediately, or whether one of the exceptions in Article 4 of the Transparency Regulation applies. - The Council should also broaden the definition of "legislative document".
<p>The Council must adopt more specific and detailed rules regarding reporting on legislative deliberations.</p> <ul style="list-style-type: none"> - A detailed report of all meetings that involve submissions made by Member States, voting results, informal views, etc. - A general exchange of views at COREPER or at the ministerial level every three months or after every five working-group meetings
<p>Informal but influential bodies must be formalized and, at the very least, start applying the Transparency Regulation internally, as foreseen in article 15(3) TFEU.</p>
<p>Negotiations on the Transparency Regulation must be reopened in order to align the regulation with the expanded requirements under article 15(3) TFEU.</p> <ul style="list-style-type: none"> - All EU bodies and institutions should be covered.

Source: Letter from the COSAC delegations to the European Institutions, The Hague, 20 December 2017.

Table 9: Recommendation by Transparency International EU (2016)

Transparency International
Publishing more detailed results/minutes [of Council meetings]
Providing detailed information on Member State negotiating positions, ideally before compromises have been reached or votes have been held.
Extending live-streaming to Council and COREPER debates;
Making trilogue meetings more transparent by publishing agendas, participant lists, negotiating positions, and proposals for compromises before the meetings, and detailed minutes in a timely fashion afterwards.
Reforming the Council's information access policy to comply with legal obligations, including a clear and public assessment framework for limité documents.
Generalising best practise at each stage of the decision-making process (Working Parties, COREPER, and Council) and across different Council configurations, including "informal" configurations such as the Eurogroup.

Source: Yannick Bendel, *Overfishing in the Darkness*. A case study in Council transparency, Transparency International EU, 2016.

Many similarities appear across these proposals. A greater opening of negotiating documents and greater transparency in both the pre-ministerial stages of the Council and of the Trilogues, constitute the two major priorities for the institutions and NGOs considered. Existing reports also call for establishing a shared and routinized methodology for decisions on whether or not to circulate documents. A greater predictability in the transparency practices is required in order to make the access to documents less dependent of ad hoc or arbitrary positions.

2.6.2 Caveats and recommendations from the report on transparency

The aforementioned recommendations would certainly enable the development of better knowledge on the legislative procedure, and this report generally welcomes them. It seems especially necessary to develop transparency requirements for the Trilogues given the greater role they play in the decision-making process.

Yet two caveats can be formulated regarding the proposals to develop transparency during the legislative procedure.

First, there are **drawbacks to transparency** that any reformer should be aware of. An obvious one is the **trade-off between publicity and efficiency** in complex, inter-institutional and diplomatic negotiations. In comparison with the Parliament, the number of actors involved in internal Council negotiations is greater and therefore requires informal cooperation and dialogue to identify internal points of compromise.

There is another, less frequently mentioned drawback that has been stressed throughout this Chapter: the fact that **stricter rules on formal practices may lead to the development of more informal practices**. For instance, if the positions expressed by Member State representatives within the Council's working groups were made available to the public, these meetings might become less important as real negotiations might increasingly take place in more informal settings (ad hoc meetings, corridors, phone calls, etc.). The smaller Member States and less endowed interest groups would have much to

lose from this kind of de-formalisation.

Second, this report's focus on the parliamentary template provides a reminder that **genuine parliamentarisation does not necessitate full transparency**. As an institution, parliaments include components that are more (the plenary) or less (committees and party meetings) open to the public. The parliamentary template certainly requires that some steps of the legislative process be made public, but not necessarily all events. The alternation of sequences open to the public and meetings behind closed doors allows actors to get "the best of both worlds". It ensures that their deals can be realised but also publicly supported. In many parliaments, standing committees are in a grey zone with regard to transparency. That is, some of their activities are public while others are not (or less so). This situation is ultimately not so different from what have been depicted as the regulations related to transparency in the Council.

These two caveats do not challenge the view that the public should be informed about the EU legislative process, but rather underscore the importance of **transparency related to the final outcome of the legislative procedure**. Tellingly, the recommendations considered above do not focus on the final votes made in the Council, as if the progress on this front were sufficient. It is true that all votes are now officially registered and that online access is rather quickly provided to this information. But this information may still be difficult to access to the large public and national MPs who may be unfamiliar with the relevant on-line sources.

In addition, registered votes make sense if they are associated with the final version of the text. Yet, it can take some weeks before this draft is fully available. All this leads to calls for the immediate and "user-friendly" publication of both the final version of the approved text and the votes of each Member State. **The immediacy and comprehensiveness of information appears to be essential to a genuine accountability process**. National parliaments would then be able to question their ministers on positions taken in a matter of days after the Council.

The implementation of this recommendation, as well as the view that it would contribute to the accountability process, calls for a break with the practice of officially adopting legislation within an unrelated formation of the Council. Ministers should be personally committed to the position endorsed.

Table 10: Recommendation related to the final legislative decision in the Council

This report
<p>Once a decision is made, immediate, comprehensive and "user-friendly" information should be provided on both:</p> <ul style="list-style-type: none"> - The final version of the text - The position taken by each Member State representative <p>To that end, a similar brief could be directly sent to journalists and national parliaments in the 20 hours following a Council.</p>
<p>Final adoption of a text in the Council by the relevant formation – not another one</p>

CONCLUSION

To conclude, the study has raised doubts about the likelihood and desirability of transforming the Council, a congress of ambassadors, into a genuine parliamentary organisation.

Compared to classical international organizations, the Council has developed some noticeable parliamentary features such as non-unanimous decision-making procedures, oral debates, and public availability of legislative debates and votes. These elements are far from negligible. However the institution also remains a diplomatic one with an internal process organised according to a bottom-up model, from (almost) non-transparent working groups to ministerial meetings, rather than back-and-forth between the committee and floor stages. In addition, the evolution of EU policy-making, with the generalisation of first-reading agreements negotiated over months, also contributes to limiting the transparency of the legislative procedure.

The study discusses existing proposals related both to the structure of the Council and its transparency. In both cases, the remarks made are rather cautious. A deep parliamentarisation would necessitate radical and uncertain reforms. Per the Parliament's 2017 proposal, keeping just one formation to adopt legislative acts while transforming the others into committees would be more feasible and would actually bring the Council closer to the parliamentary template. But it might reduce ministers' involvement in EU activities and strengthen the claim that the "Brussel bubble" is too remote from Member States. Similar remarks have been made regarding transparency. More could be done to update the 2001 legislative framework. "Limité" documents could especially be more... *limité*, i.e. bounded. A list of all produced documents, included non-available ones, could also be circulated and updated in real time. However, the view that Member States should systematically make their positions public during negotiations could seriously alter their ability to compromise. Most importantly, it would contribute to the development of informal relations between them and other EU Institutions.

The study also considered in several instances the specific issue of the European Council. This institution appears to be farther from the parliamentary template than the Council despite its emphasis on peer discussions. Its organisational specificities call for maintaining a clear distinction between the European Council and the Council. A greater parliamentarisation of the latter could even be threatened by a greater leadership of the former.

These caveats aside, the report offers two recommendations in relation to the parliamentarisation of the Council, and more generally to EU governance. First, it calls for organizing an early public debate within the Council in order to provide information on the initial views of each capital. There is something highly parliamentarian in the possibility that such live-streamed meetings could be colourful, salient, and lively – that is, in a word: interesting. Second, the final positioning of the Member States should be quickly circulated along with the final version of the bills. This last point would help foster domestic parliamentary ex post control over the positions taken by individual ministers. In other words, a Europeanisation of national parliamentary control could take priority over a parliamentarisation of the European actors. It should be noted that these two recommendations call for enhancing debates and transparency at both the beginning and end of EU negotiations. In between, decision-makers would probably benefit from less third-party pressure in order to reach compromises. Such alternation between transparent episodes and closed-doors negotiations is ultimately not so different from the daily functioning of national parliamentary democracies.

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ANNEX

Treaty on European Union (Maastricht, 1992)

Declaration on the right of access to information

The Conference considers that **transparency of the decision-making process** strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.

Article 195

1. The European Parliament shall appoint an Ombudsman empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning **instances of maladministration in the activities of the Community institutions or bodies**, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

In accordance with his duties, the Ombudsman shall **conduct inquiries** for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings. Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution concerned. The person lodging the complaint shall be informed of the outcome of such inquiries.

The Ombudsman shall submit an annual report to the European Parliament on the outcome of his inquiries.

Treaty establishing the European Community (Amsterdam, 1997)

Article 1

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called "the Union". This Treaty marks a new stage in the process of creating an ever-closer union among the peoples of Europe, in which **decisions are taken as openly as possible** and as closely as possible to the citizen. The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.

Article 255

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have **a right of access to European Parliament, Council and Commission documents**, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits **on grounds of public or private interest** governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution referred to above shall elaborate in its own **Rules of Procedure specific provisions regarding access to its documents**.

[Charter of fundamental rights of the European Union \(2000\)](#)

Article 42

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, **has a right of access to European Parliament, Council and Commission documents.**

[Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007](#)

Article 8 B

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity **to make known and publicly exchange their views** in all areas of Union action.
2. The institutions shall maintain an open, **transparent and regular dialogue** with representative associations and civil society.
3. The European Commission shall carry **out broad consultations** with parties concerned in order to ensure that the Union's actions are coherent and **transparent**.
4. Not less than one million citizens who are nationals of a significant number of Member States may take the **initiative of inviting the European Commission**, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 21 of the Treaty on the Functioning of the European Union.

Article 10

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.
3. Every citizen shall have the right to participate in the democratic life of the Union. **Decisions shall be taken as openly and as closely as possible to the citizen.**
4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

Article 16-8

The Council shall meet in public when it deliberates and votes on a draft legislative act. To this end, each Council meeting shall be divided into two parts, dealing respectively with deliberations on Union legislative acts and non-legislative activities.

[Consolidated version of the Treaty on the Functioning of the European Union \(2007\)](#)

Article 15 (ex Article 255 TEC)

1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work **as openly as possible**.
2. The European Parliament shall **meet in public**, as shall the Council when considering and voting on a draft legislative act.
3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, **shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined**

in accordance with this paragraph. C 326/54 EN Official Journal of the European Union 26.10.2012 General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure. Each institution, body, office or agency shall ensure that its **proceedings are transparent** and shall elaborate in its own **Rules of Procedure** specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph. The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks. The European Parliament and the Council shall ensure **publication of the documents** relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph.

Presidency Conclusions of the European Council meeting in Laeken, 14 and 15 December 2001

The Union needs to become **more democratic, more transparent and more efficient**. It also has to resolve three basic challenges: how to bring citizens, and primarily the young, closer to the European design and the European institutions, how to organise politics and the European political area in an enlarged Union and how to develop the Union into a stabilising factor and a model in the new, multipolar world. It is accordingly necessary to put a number of specific questions.

Rules of Procedure of the European Council

Agenda and preparation

Article 3(3)

The European Council shall adopt its agenda at the beginning of its meeting. As a rule, issues entered on the agenda should have been examined beforehand, in accordance with the provisions of this **Article**.

Article 4(3)

Meetings of the European Council shall not be public.

Article 8

Minutes of each meeting shall be drawn up; a draft of those minutes shall be prepared by the General Secretariat of the Council **within 15 days**. The draft shall be submitted to the European Council for approval, and then signed by the Secretary-General of the Council.

The minutes shall contain:

- a reference to the documents submitted to the European Council,
- a reference to the conclusions approved,
- the decisions taken,
- the statements made by the European Council and those whose entry has been requested by a member of the European Council.

Article 10(1)

In cases where, in accordance with the Treaties, the European Council adopts a decision, the European Council **may decide**, in accordance with the voting arrangement applicable for the adoption of that decision, to make public the results of votes, as well as the statements in its minutes and the items in those minutes relating to the adoption of that decision. Where the result of a vote is made public, the explanations of the vote provided when the vote was taken shall also be made public at the request of

the member of the European Council concerned, with due regard for these Rules of Procedure, legal certainty, and the interests of the European Council.

Article 11

Without prejudice to the provisions on public access to documents, the deliberations of the European Council shall be covered by the obligation of **professional secrecy**, except insofar as the European Council decides otherwise. The European Council may authorise the production for use in legal proceedings of a copy of or an extract from European Council documents which have not already been released to the public in accordance with Article 10.

Rules of Procedure of the European Council and Rules of Procedure of the Council

Article 3(1)

Taking into account the Council's 18-month programme, the President shall draw up the provisional agenda for each meeting. The agenda shall be sent to the other members of the Council and to the Commission at least 14 days before the beginning of the meeting. It shall be forwarded to Member States' national Parliaments at the same time.

Article 3(4)

Only items in respect of which the documents have been sent to the members of the Council and to the Commission at the latest by the date on which the provisional agenda is sent may be placed on that agenda.

Article 5(1)

The Council shall meet **in public** when it deliberates and votes on a draft legislative act. In other cases, meetings of the Council shall not be public except in the cases referred to in Article 8.

Article 6(1)

Without prejudice to Articles 7, 8 and 9 and to provisions on public access to documents, the deliberations of the Council shall be covered by the obligation of professional secrecy, except in so far as the Council decides otherwise.

Article 6(2)

The Council or Coreper may authorise the production for use in legal proceedings of a copy of or an extract from Council documents which have not already been released to the public in accordance with the provisions on public access to documents.

Article 7(1)

The Council shall meet in public when it deliberates and votes on a draft legislative act. To that end, its agenda shall include a part entitled 'Legislative deliberations'.

Article 7(2)

Documents submitted to the Council which are listed under an item on the 'Legislative deliberations' part of its agenda shall be made public, and likewise those sections of the Council minutes which relate to that part of the agenda.

Article 7(3)

The opening to the public of Council meetings relating to the 'Legislative deliberations' part of its agenda shall be made through public transmission by audiovisual means, notably in an overflow room and through broadcasting in all official languages of the institutions of the European Union using videostreaming. A recorded version shall remain available for at least one month on the Council's Internet site. The outcome of voting shall be indicated by visual means. The General Secretariat shall take steps to inform the public in advance of the dates and approximate time on which such

audiovisual transmissions will take place and shall take all practical measures to ensure the proper implementation of this Article.

Article 7(4)

The results of votes and explanations of votes by members of the Council or their representatives on the Conciliation Committee provided for under the ordinary legislative procedure, as well as the statements in the Council minutes and the items in those minutes relating to the Conciliation Committee meeting shall be made public.

Article 7(5)

Where legislative proposals or initiatives are submitted to it the Council shall refrain from adopting acts which are not provided for by the Treaties, such as resolutions, conclusions or declarations other than those accompanying the adoption of the act and intended for entry in the Council minutes.

Article 9(1)

Where the Council adopts non-legislative acts referred to in Article 8(1), the results of votes and explanations of votes by Council members, as well as the statements in the Council minutes and the items in those minutes relating to the adoption of such acts, shall be made public.

Article 9(2)

Moreover, the results of votes shall be made public:

- (a) when the Council acts pursuant to Title V of the TEU, by a unanimous Council or Coreper decision taken at the request of one of their members;
- (b) in other cases, by Council or Coreper decision taken at the request of one of their members.

When the result of a vote in the Council is made public in accordance with points (a) and (b) of the first subparagraph, the explanations of votes made when the vote was taken shall also be made public at the request of the Council members concerned, with due regard for these Rules of Procedure, legal certainty and the interests of the Council.

Statements entered in the Council minutes and items in those minutes relating to the adoption of the acts referred to in points (a) and (b) of the first subparagraph shall be made public by Council or Coreper decision taken at the request of one of their members.

Article 9(3)

Except in cases where Council deliberations are open to the public in accordance with Articles 7 and 8, votes shall not be made public in the case of discussions leading to indicative votes or the adoption of preparatory acts.

Article 13(4)

The minutes of the 'Legislative deliberations' part of meetings of the Council, once approved, shall be forwarded directly to national Parliaments, at the same time as to Member States' governments.

Article 17(1)

The following shall be published in the *Official Journal of the European Union* (hereinafter referred to as the 'Official Journal') by the Secretary-General:

- (a) the acts referred to in paragraph 1 and the second subparagraph of paragraph 2 of Article 297 of the TFEU;
- (b) the positions at first reading adopted by the Council in accordance with the ordinary legislative procedure, and the reasons underlying those positions;

(c) the initiatives presented to the Council in accordance with Article 76 of the TFEU for the adoption of a legislative act;

(d) international agreements concluded by the Union.

Reference shall be made in the Official Journal to the entry into force of such agreements;

(e) international agreements concluded by the Union in matters concerning the common foreign and security policy, unless the Council decides otherwise on the grounds of Articles 4 and 9 of Regulation 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. Reference shall be made in the Official Journal to the entry into force of agreements published in the Official Journal.

Article 17(2)

Unless the Council or COREPER decides otherwise, the following shall be published in the Official Journal by the Secretary-General:

(a) initiatives presented to the Council in accordance with Article 76 of the TFEU in cases other than those referred to in paragraph 1(c);

(b) directives and decisions referred to in the third subparagraph of Article 297(2) of the TFEU, recommendations and opinions, with the exception of the decisions referred to in paragraph 3 of this Article.

Article 17(3)

The Council or COREPER shall decide unanimously, on a case-by-case basis, whether there should be publication in the Official Journal by the Secretary-

General of the decisions referred to in Article 25 of the TEU.

Article 17(4)

The Council or COREPER shall decide, on a case-by-case basis and taking account of possible publication of the basic act, whether the following should be published in the Official Journal by the Secretary-General:

(a) the decisions implementing the decisions referred to in Article 25 of the TEU;

(b) the decisions adopted in accordance with the first and second indents of Article 31(2) of the TEU;

(c) other Council acts, such as conclusions or resolutions.

Article 17(5)

Where an agreement concluded between the Union or the European Atomic Energy Community and one or more States or international organisations sets up a body vested with powers of decision, the Council shall decide, when such an agreement is concluded, whether decisions to be taken by that body should be published in the Official Journal.

This study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, discusses the parliamentary nature of the Council. It analyses how the Council is in between a pure parliamentary institution and a non-parliamentary one from a wide range of perspectives, for example its structure, procedure and transparency. The study recommends incremental reforms towards further parliamentarisation rather than radical ones.

DISCLAIMER

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