

**European Ombudsman's Public consultation
Transparency of legislative work within Council preparatory bodies
CIVIL SOCIETY EUROPE RESPONSE**

Introduction

Civil Society Europe welcomes this timely consultation in a context of growing citizens' distrust in institutions both at EU and national and level¹. Increasing transparency as a means of enhancing dialogue with citizens and their representative associations is therefore vital. The Council remains the least accessible and least transparent EU institution involved in the legislative process. Citizens have the right to know what position their government takes in decisions that impact their lives.

1. Once the European Commission makes a legislative proposal, it is discussed in one or more Council working parties. What useful information might be given at this stage to allow the public to see and to understand how the discussions develop?

If the Council is serious about its own transparency, then it would ensure that the agenda and relevant documents for its working parties are made public in advance of all the meetings. It would further publish a report and make it available to all right after the meetings. There should also be transparency on who the external experts invited at meetings are, and the Council should also invite CSO representatives as experts.

2. In its reply to the Ombudsman, the Council describes the actions it is currently taking to make it easier to find documents on its website, such as improving its search form, giving access to documents via a calendar of meetings and developing the 'joint legislative database' provided for in the Inter-institutional Agreement on Better law-making[3]. Are there other measures the Council could take to make legislative documents easier to find?

Council documents are accessible via the calendar of meetings but the information they give is meager. For most of the working groups the information available is limited to the time and venue of meetings, and an incomplete agenda. For some of them, the agenda is not available at all. Further information is uploaded for some working groups only after the meeting has taken place. All relevant information should be made available before and after meetings take place, for all levels of decision-making, from working group to Council meetings for all legislative work. We would further recommend that the Council opens its meetings to the public for real transparency. As regards

¹ See also Report by the EC President Special Adviser Luc Van de Brande:
https://ec.europa.eu/commission/publications/reaching-out-eu-citizens-new-opportunity_en, October 2017

Coreper meetings, the criteria for access to documents is not at all clear: some documents seem to be made available on request whilst others are published in time for the meeting. It would be helpful to get some clear guidelines from the Council on this specific aspect.

The joint legislative database badly needs improving. It is not user-friendly. Search by keywords or subject matter is not straightforward enough. It can remain opaque to a citizen who is not familiar with the different types of documents and numbering system applied in the database. Most of the time you need to consult first the other institutions' databases to get access to the interinstitutional code of a legislative proposal before you can start searching the Council database. Simplifying document types would help facilitate access by members of the public.

3. Please describe any difficulties you have faced in obtaining information or documents linked to discussions in Council preparatory bodies and any specific suggestions for improvement

Obtaining documents that are not available online is always a lengthy process and the information they provide is far too limited. Often the only way to get draft documents in good time (especially at working group stage) is through Member States Permanent Representations or national ministries; not via the Council. When the Council does release documents, these do not include information on Member States' positions. This makes decision-making opaque and selective since only those who are able to engage in personal contacts or relations can access documents and their information. National governments are accountable to their own citizens: it is their duty to make their position publicly available at all stages of the decision-making process.

4. Various types of documents can be produced and circulated in Council preparatory bodies (outcomes of proceedings, Presidency compromises, progress reports, etc.) In your opinion, are certain documents more useful than others in informing the public about ongoing discussions? Please explain.

All EU member states' citizens should have access to as many documents as possible. These documents should contain more substantial information; this would be, for instance, on the positions of national delegations, discussions among member states' representatives, with the EU institutions, on compromises and all the outcomes.

5. Do you ever consult the legislative file the Council publishes after the legislative act has been adopted?

Having access to the legislative file after the adoption of an act is rarely relevant unless the file is due to come back on the agenda after a relatively short period. Timely transparency is crucial.

6. Do you consider that different transparency requirements should apply between discussions in working parties and discussions in Coreper? Please give brief reasons for your answer.

We do not believe that discussions in working parties and discussions in Coreper should have different transparency requirements. Both should be as transparent as possible and at the relevant time. As a matter of principle, as both processes may affect the legislative procedure that impacts EU citizens, they should be transparent and accountable to those citizens. There may be only very specific issues, in very sensitive areas that affect security-related issues, that could justify limited access. However, clear rules and criteria for this should be defined in advance, and not be subject to a case-by-case decision. Furthermore a majority of the matters concern co-legislative procedures, and it makes no sense that one of the co-legislators provides transparent information on all stages of debate and the other one does not. We also insist that transparency rules apply to trilogue discussions, even though the present consultation does not cover this issue. Finally, transparency will contribute to increasing the quality of Member States' input: if national delegates know that their position is publicly known, they will be better prepared and more proactive by ensuring that they have adequate information from other relevant ministries and bodies (relating for example existing rules and standards in their own country) or have coordinated their position, and have properly consulted civil society at national level.

7. While discussions are ongoing, documents which bear the distribution marking "LIMITE" are not disclosed to the public without prior authorisation. In your opinion, what additional steps could be taken to further regulate and harmonise the use of the "LIMITE" marking concerning legislative documents?

The reasons for why documents are classified as LIMITE should be clearly articulated, given also that LIMITE is a distribution marking and not a classification marking. It is not clear which exceptions are covered by those documents in addition to restrictions in EC regulation 1049/2001

regarding public access to European Parliament, Council and Commission documents². Also according to Council Note on “Handling of documents internal to the Council”³, almost a quarter of Council documents had a marking LIMITE in 2010 which is particular high percentage that would justify compliance with EC regulation 1049/2001. Furthermore the note rather refers to the fact that the “untimely public disclosure of such documents could adversely affect the Council's decision making processes” which seems to be a very broad and vague criterion.

We believe that proper investigation should be made on the criteria that govern such marking to order to ensure full compliance with EC regulation 1049/2001.

8. Bearing in mind that delegations' positions may evolve during the negotiations and that the Council must protect the effectiveness of its decision-making process, to what extent do you believe positions expressed by national delegations during negotiations in Council working parties/Coreper should be recorded? How important would it be for you to find out the position of the national delegation?

Please see also responses to questions above on this critical matter at the core of the accountability of a government to its own citizens.

Citizens and civil society organisations that represent them must be able to be informed on a timely matter of the position of their own Government. Furthermore as contributing to the Council decision as co-legislator, national representatives are also accountable to other EU citizens, just as all members of the European Parliament. For this reason, we believe that positions of national delegations should be recorded during negotiations in Council working parties and Coreper.

Our organisation is undertaking research into whether and how national delegations consult the public before forming a position on EU policies and legislation. There is substantial confusion as to how citizens and grassroots organisations can participate in the EU decision-making process at the national level: there is a lack of information about whether such consultation practices exist, where to access them and how they function more generally, and a lack of feedback of the outcomes of such consultations regarding the position of the Member State on a specific issue.

² <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&from=EN>

³ <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011336%202011%20INIT>

By mid-July 2017, we had contacted all 28 Member State Permanent Representations for clarity on the above. Eleven⁴ Member States have responded so far (at the time of writing, in December 2017). The responses indicate that States differ substantially on their practices. Most Governments do not have any rules in place regarding consultation of their citizens prior to defining their own positions in the Council. When consultations do occur, they tend to focus on broad themes such as the Commission's reflection papers on the future of Europe. Some governments like the Czech Republic and Sweden have engaged in civil society roundtables or thematic fora on EU issues. In some countries consultation is foreseen only through the social dialogue, but not civil dialogue with NGOs and citizens' associations. In some countries, individual ministries do in practice organise consultations on specific pieces of legislation, but there is no clear rules as to what should fall under the consultations and who should be invited. In Latvia, there is a legislative framework that lays down the procedure for the preparation, coordination, approval and update of the national positions on EU policies and draft legislations. There is an obligation to contact and consult "relevant NGOs" (and social partners) in preparation of the national position as well as on results and follow up. This is a good practice. In theory. However, we understand that in reality such consultations are often conducted with extremely short deadlines and very few organisations have therefore the capacity to participate. Also Latvia consults NGOs and social partners before each European Council. Bulgaria has a framework in place for public consultations on EU policy positions including a dedicated portal for this. However, the portal does only include information on a limited number of files. The Council of European Affairs defines the position to be taken through its working groups to which civil society representatives can be invited upon decision of the chair. We should also note that none of the four largest States, in terms of Council qualified majority voting power (Germany, France, UK, Italy), have responded to our enquiry.

One positive aspect to note: when holding the EU Presidency, Member States do tend to consult their own citizens more. However, sadly, this practice generally seems to stop when the Presidency ends.

Consequently, we believe that EU delegations' positions should be published as clearly as possible and well in advance of negotiations. Citizens should be able to be involved with the EU decision-making process via their national representatives. This should be a citizen's' right and should not be left to the willingness of Member States and their wish to be transparent or not on how they form their positions, and what positions they take. We also believe that making national positions known in advance, and opening up the possibility for civil dialogue at national level will enable citizens to feel more empowered in their interaction with the EU, increase civic participation.

⁴ Belgium, Bulgaria, the Czech Republic, Denmark, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Poland and Sweden. A full report will be available in the first part of next year.

It will also contribute to increased trust both in the EU and in national Governments and a greater understanding of the role of elected National Governments in EU decision making.

9. Please comment on any other areas or measures which in your opinion are important to enhance the transparency of legislative discussions within Council preparatory bodies. Please be as specific as possible.

Our organisation, Civil Society Europe, has undertaken a survey into the experience of civil society organisations' engagement with the EU, including the Council. We have included the feedback regarding the Council as an Annex to this response document.

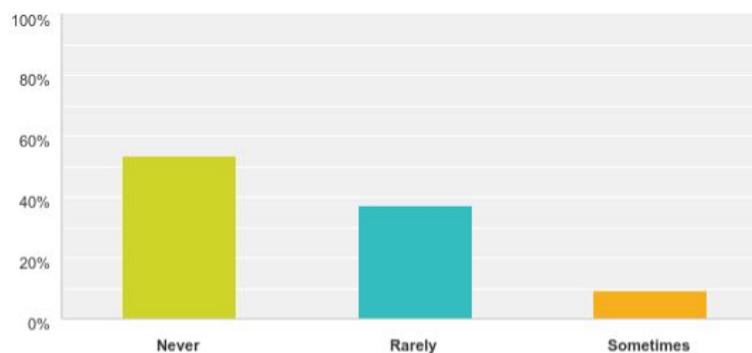


Annex - Survey Data Regarding Civil Society's Engagement with the Council of the European Union

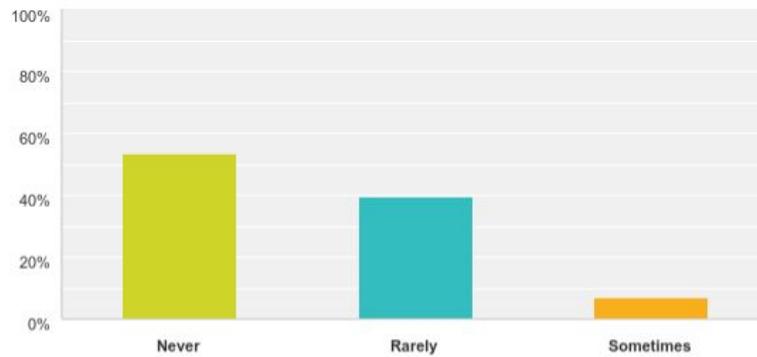
The following is taken from a study undertaken by Civil Society Europe that examines the experience of civil society organisations (CSOs) and their interaction with the EU at all institutional levels, including the European Commission (EC), the European Parliament (EP) and the Council of the European Union (the Council), as well as the possibility of CSOs to share their expertise and influence EU decisions on policies and legislation.

Data has been collected via an electronic survey initiated by Civil Society Europe between June 2016 and June 2017. 53 survey responses were collected. Survey questions included both closed and open questions, allowing for quantifiable impact ratings and opportunities for respondents to expand upon answers in depth. Respondents included European organisations and their members, as well as national and grassroots organisations. Note, the survey was designed in such a way that respondents could skip questions that they didn't want to answer, consequently the number of responses to some questions vary. Response rate (RR) is indicated for each question as a percentage of the 53 responses. When asked to provide examples, a selection of responses have been provided in this report for demonstrative purposes.

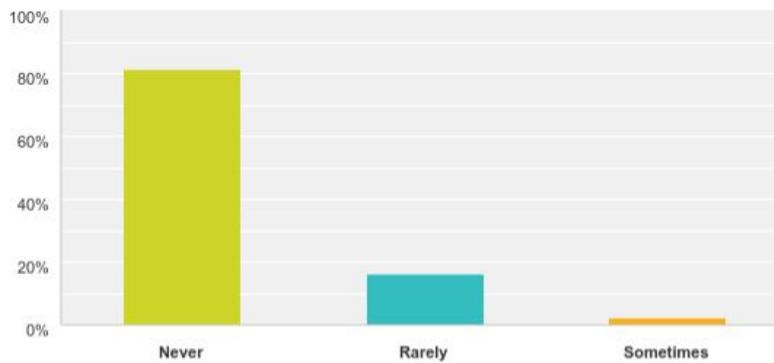
Do you have contact with the Council of the European Union and its presidency? (RR=81.1%)



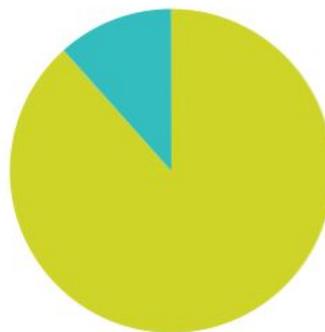
Do you ever meet with national permanent representations of the Council? (RR=81.1%)



Do you ever meet with the Council Secretariat? (RR=81.1%)



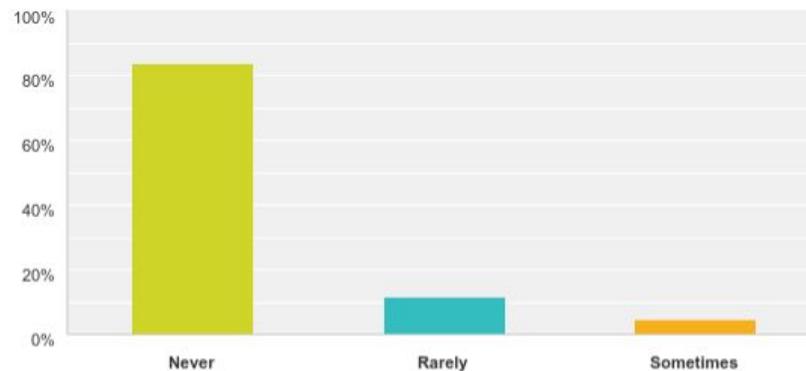
Have you ever met with the European Council President or cabinet? (RR=81.1%)



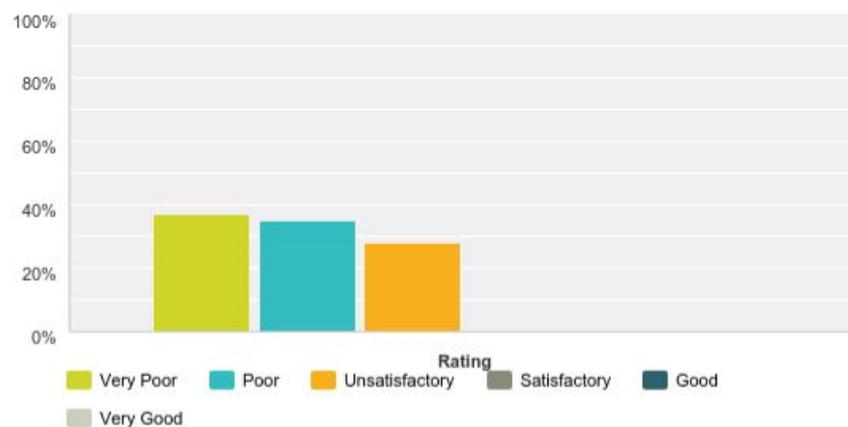
Legend: No (Yellow), Yes (Cyan)

Yes: 11.6% No: 88.4%

Have you ever participated in informal Council meetings? (RR=81.1%)



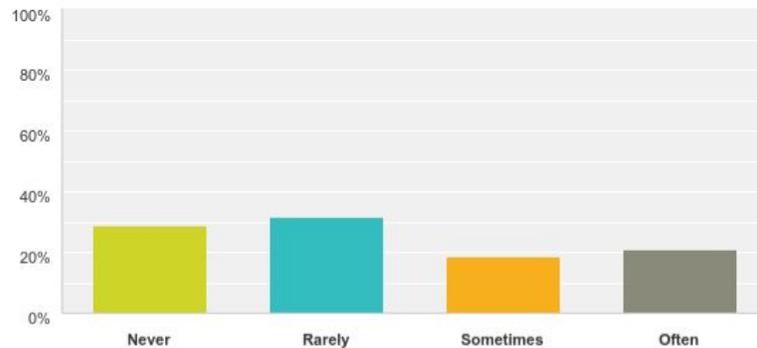
Could you evaluate the transparency of the Council? (RR=81.1%)



If any, can you give concrete examples of your contacts with the Council (Permanent Representations, Secretariat, Presidencies) or European Council? (RR=20.8%)

- Participation in seminars and bilateral meetings
- Regular meetings with rotating presidency and occasionally permanent representatives
- Meetings with permanent representatives on specific topics
- One contact with the Council Presidency regarding a specific piece of legislation

Do you have meetings with you national Ministries on EU policies and legislation? (RR=71.7%)



Does your government organise public consultations on draft EU policies and legislation? (RR=52.8%)



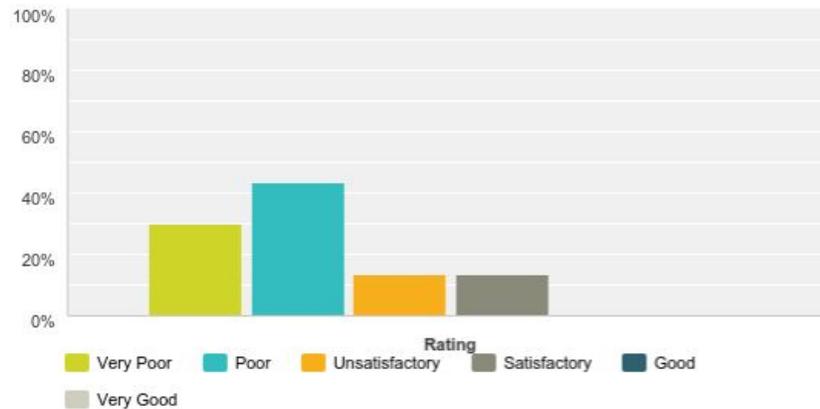
Yes: 32.1% No: 67.9%

If yes, could you please give some examples? (RR=17.0%)

Some respondents provided examples from Italy, such as on Social Economy in 2014, Slovenia, the “More Europe-More Slovenia” consultation, and another provided the example of Denmark but did not specify.

Some respondents who did not provide specific examples, but said “yes” on the above question were based for instance in Belgium and Germany. However, many other respondents said “no” from the same countries. This indicates that there is a significant lack of awareness of what is happening at the National Level in terms of public consultations on EU proposals. This is supported by the most common response to this question of “don’t know” or “I assume it does”.

Do you consider you are having an impact through your involvement with the European Council and the Council of the European Union? (RR=56.6%)



Do you have other comments regarding your involvement with the European Council and the Council of the European Union? (RR=11.3%)

The most frequent comments relate to issues of transparency. These include a lack of information of how CSOs can interact with the Council, a lack of feedback on work undertaken, the issue of undocumented trilogues, and restrictions on access to certain documents. One respondent recommended the complete abolition of trilogues.

Other comments raise issues with the political structures of the Council insofar as the structures impedes interaction with smaller grassroots NGOs, and that the lack of social actor status of NGOs (unlike trade unions for example) impedes interaction.

One respondent suggested that the Council articulates clear strategic political orientations in order to counter populist movements within the EU.