

Legislative Transparency- Legal framework

Although transparency is often used synonymously with public access to documents, the two terms have not the same scope. They have though the same results, as they make Council's documents accessible to the public. In transparency the public character of the document is defined a priori (more 'pro-active') while in access to documents a request of the public is needed in order to assess the 'disclosability' of a document.

- Transparency in the Treaties

Several provisions in the Treaties are directly relevant for the EU's transparency policy:

- Art.1 TEU provides in its relevant part that EU decisions *are taken **as openly as possible and as closely as possible to the citizen.***

-Art. 10(3) TEU second intent: *Decisions shall be taken **as openly and as closely as possible to the citizen.***

(Both of these TEU provisions are not though directly applicable)

- Art. 15(3) TFEU is a detailed provision providing for a right to public access and is the legal basis of the regulation 1049/2001: particularly relevant for the legislative transparency is its last intent, where is underlined that *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.*

- Art. 42 of the Charter of Fundamental Rights of the EU confirms the right of access to documents.

- The Council's Rules of Procedure

Annex II of the Council's Rules of Procedure contains the specific provisions regarding public access to Council documents. Art.11 of Annex II covers the 'documents directly accessible to the public' (meaning the documents to be available in the Public register of Council documents (art.10 of Annex II)):

- According to Art. 11 (3), upon distribution of their final version to delegations the following documents **shall be published** in the Public register:

(a) documents of which neither the Council nor a Member State is the author, which have been made public by their author or with his or her agreement;

(b) provisional agenda for meetings of the Council in its various configurations;

(c) any text adopted by the Council and intended to be published in the Official Journal.

- Moreover, according to Art.11 (5), the GSC **shall make** available to the public **legislative documents** and the following documents, as soon as they have been circulated:

(a) cover notes and copies of letters concerning legislative acts and acts referred to in Article 8(1) of the Rules of Procedure addressed to the Council by other institutions or bodies of the European Union or, subject to Article 4(5) of Regulation (EC) No 1049/2001, by a Member State;

(b) documents submitted to the Council which are listed under an item on its agenda included in the 'legislative deliberations' part or marked with the words 'public deliberation' or 'public debate' in accordance with Article 8 of the Rules of Procedure;

(c) notes submitted to Coreper and/or to the Council for approval ('I/A' and 'A' item notes) concerning draft legislative acts and acts referred to in Article 8(1) of the Rules of Procedure, as well as the draft legislative acts and acts referred to in Article 8(1) of the said Rules to which they refer;

(d) acts adopted by the Council during an ordinary or a special legislative procedure and joint texts approved by the Conciliation Committee under the ordinary legislative procedure.

- If not covered by an exception of Art.4 of the regulation 1049/2001, according to art.11(4) **may be made public**: a) provisional agenda of committees and WP, b) other documents such information notes etc on the state of the discussions in the Council/WP, excluding Legal Service opinions and contributions.

- The Regulation (EC) No 1049/2001 regarding public access to documents

- A key provision in case law is recital 6 in the preamble to Regulation (EC) No 1049/2001, according to which '**wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent**'

- The **obligation to ensure the widest possible access** is emphasised in case law and it is confirmed in Art. 1 (a) of the Regulation (EC) No 1049/2001: (The purpose of this Regulation is...) to define the principles, conditions and limits on grounds of public or private interest governing the right of access ... in such a way as **to ensure the widest possible access to documents.**

- According to art. 2 para 3, the Regulation '*applies to all documents held by an institution, that is to say, documents **drawn up or received** by it and in its possession, in all areas of activity of the European Union*'. The definition the term 'document' can be found in art.3 (a) ;'*document shall mean **any content whatever its medium**...concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility*'.

- The key provision in the Regulation on **direct access** to Council's is art. 12, especially para.2: '*...**legislative documents**, that is to say, documents **drawn up or received** in the course of procedures for the adoption of acts which are legally binding in or for the Member states, **should**, subject to articles 4 and 9, **be made directly accessible**'.*

- **General principles relating to access to documents** (constantly underlined in case law)

- The right of access to documents of the institutions is **connected with the democratic nature** of the institutions (C/280/11 P para 10).

- It is the **principle of democratic legitimacy** which requires those responsible for the proposals contained in a requested document **to be publicly accountable for their actions**, especially where that document is part of the **legislative procedure** (C-280/11 P para 13).

Also : in a system based on the principle of democratic legitimacy, co-legislators must be held accountable for their actions to the public. If citizens are to be able to exercise their democratic rights they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information. (T-540/15, para 98)

- Primary EU law establishes a **close relationship** that, in principle, exists **between legislative procedures and the principles of openness and transparency**. In particular, Article 15(2) TFEU lays down that 'the Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act' (T-540/15 para 77).

- The **principles of publicity and transparency** are therefore **inherent to the EU legislative process** (T-540/15 para 81).

- **Legislative transparency in recent case law**

Two important cases related to legislative transparency are:

- C-280/11 P (Access Info Europe) on a refusal of access to information relating to the identity of MS which put forward proposals in the course of the legislative process for the revision of the Regulation No 1049/2001, and

- T-540/15 (De Capitani) on the presumption that access should be refused to 4-column tables drawn-up for the purposes of trilogues.

Useful case law confirmations to be recalled during the discussions:

* **Proposals for amendments made by MS are part of the normal legislative process.** As a result, they are not 'particularly sensitive' to the point that a fundamental interest of the EU or of the MS would be jeopardised if the identity of those who made the proposals were to be disclosed (C-280/11 P, para 15).

* Openness where the Council is acting in its legislative capacity contributes to strengthening democracy by enabling citizens to scrutinise all the information which has formed the basis for a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights (Sweden and Turco v Council, para 46, C-280/11 para 33).

* **Trilogue tables form part of the legislative process;** the Court referred to the Rules of Procedure of the Parliament to confirm it (T-540/15 paras 73-75).

* Giving the public the widest possible right of access entails that the public must have a right to **full disclosure** of the requested documents, (...) those considerations are clearly of particular relevance where those **documents are part of the European Union's legislative activity**, a fact reflected in recital 6 of Regulation No 1049/2001, which states that even wider access must be granted to documents in precisely such cases (T-540/15, para 80).

* Although the risk of external pressure can constitute a legitimate ground for restricting access to documents related to the decision-making process, the reality of such external pressure must, however, be established with certainty, and evidence must be adduced to show that there is a reasonably foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure (T-540/15, para 99).

* The preliminary nature of the information contained in the 4th column does not per se justify the application of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001, since that provision does not draw a distinction according to the state of progress of the discussions. It is irrelevant whether the documents at issue were produced or received at an early, late or final stage of the decision-making process. (T-540/15, para 100-101)

* The refusal to grant the access to 4 column documents **cannot legitimately be justified by its temporary character**, without exception and without distinction. Such a blanket justification, capable of being applied to all trilogues, operating to all intents and purposes as a general presumption of non-disclosure, has been rejected (T-540/15, para 109).