

CM1514

# Memorandum concerning the non-paper on transparency dated 17 April 2015<sup>1</sup>

28 September 2015

## Introduction

In April of this year, Denmark, Estonia, Finland, the Netherlands, Slovenia and Sweden produced a non-paper on transparency in the EU that was circulated via the Antici group. On April 17 this non-paper was discussed by the Working Party on Information (see the minutes of the meeting). On the basis of six proposals, the paper aims to give the debate on EU transparency a fresh boost. This memorandum discusses the non-paper, with special attention to possible opportunities / outstanding issues.

## Context

The non-paper was produced by the six most transparency-minded Member States in the framework of the inter-institutional agreement on better regulation, which is currently being negotiated. It contains six proposals of varying complexity and controversy, although the overall level of the paper suggests that the Member States' central aim is to reintroduce the issue of transparency to the Council agenda. This issue became severely stalled when, during the first half of 2012, a final serious attempt to finalise the revision of Regulation 1049/2001 (public access to documents of the European institutions) by the Danish EU Presidency was unable to achieve a break-through. This non-paper again seeks to broaden the discussion, as evidenced by the fact that only one of the six points directly addresses the Regulation's revision (which is still ongoing).

In addition to the European context, the non-paper also has a Dutch context. On May 20 this year, access to EU information in a broad sense was discussed once again in the Standing Committee on European Affairs of the Dutch House of Representatives. Following this committee hearing, and in order to further inform the issues raised there, the present memorandum addresses point-by-point the possibilities and outstanding issues raised in the non-paper. As a caveat, it should be borne in mind that the right of the public to access EU documents exists independently of the parliamentary right to information.

## The non-paper

### *1. Accessibility of information made available - one-stop IT portal*

The plan to set up a single portal to provide access to all information concerning the legislative process is to be welcomed, especially considering the fact that the Commission, Council, and Parliament currently coordinate this information only to a very limited extent. User friendliness will be a key factor in the success of such a portal. Accordingly, it is advisable to identify best practices

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<sup>1</sup> This memorandum is a translation of CM1511, which was sent to the Dutch Ministry of Foreign Affairs and the Dutch Parliament in June 2015.

among Member States during the portal's design phase. In anticipation of this exercise, some important design aspects can already be identified. Navigation within the portal should be thematically and chronologically intuitive, with a clear hierarchy in the value of the information presented (i.e. central documents of a legislative process should be presented 'on top', with associated documents 'underneath' them). It is important that the register provides an insight into which decision-making bodies are involved in the legislative process, at what time, and in what role. In addition, the portal will only work when documents are published immediately after they are circulated among the Member States (i.e., prior to meetings), something the Court required in *Access Info Europe*. The value of the portal will further be enhanced when it is built in a way that clearly links current dossiers to previous/formally related legislative and regulatory procedures.

Lastly, it should be noted that, although it is useful for the sake of clarity to limit the one-stop IT portal to legislative procedures, activities undertaken in this direction should not distract from disclosure in the executive sphere, where an equal presumption of access to documents exists.

### *2. A clear framework for limité documents*

EU limité documents have existed for decades, and for about a decade they have been regulated by internal Council guidelines. Nevertheless, uncertainty remains about the legal status and purpose of such documents, as well as the maintenance of an orderly application of this extra-classificatory designation. This is evident from the fact that several national parliaments have varying degrees of access to limité documents (cf. the answer of Minister of Foreign Affairs, Mr Frans Timmermans, to written questions of the Dutch House of Representatives, dated 5 February 2013, and most recently the Standing Committee Hearing of 20 May 2015) and the judgment of the Court of Justice in the *Access Info Europe* case (see the response of the Dutch government to this judgment of 11 April 2014).

Without questioning the fact that restricting access to documents can be justified under certain circumstances, it is of the utmost importance that the principle of the widest possible access to documents as set forth in Article 15(3) TFEU and Regulation 1049/2001 is strictly enforced when reviewing the regulatory framework of limité documents. This means in practice that, pursuant to the *Access Info Europe* case law, documents that are part of the legislative process can no longer carry the label 'limité'. After all, such documents may not be withheld from the public, and they should be made public directly upon circulation. This applies equally to documents drawn up by the Council Secretariat, including the Legal Service, and documents that are introduced by Member States in Council preparatory bodies. No clear legal requirements exist for the remaining Council documents, outside the aforementioned principle of 'public, unless...'. It is important that the limité designation is applied to such documents based on clear criteria regarding the type of document. In parallel to the classification rules, a clear protocol should be drawn up for 'labeling' and 'de-labeling'. In addition, any new framework should also clearly guarantee the right of both national parliaments and the European Parliament to access limité documents.

### *3. Transparency Register for the Council*

The plan to permit the Council to join the lobbying transparency register raises more questions than answers. Discussions on an EU lobby register have been ongoing for about ten years and a first step was taken in 2011 with the creation of a register in which lobbyists could voluntarily record their lobbying activities with the Commission and the Parliament. The Council has not participated in these developments at the time of writing.

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The central question with the new proposal in this non-paper therefore concerns the form of participation in the register that the initiating Member States have in mind. The first distinction in this regard can be made between a register based on voluntary or compulsory participation. NGOs associated in the ALTER-EU collective have repeatedly argued in favour of the mandatory variant because it enhances the register's impact. The non-paper supports this and thereby aligns itself with the proposal expected from the Commission in this direction. However, given the strong political opposition within the Council, it is questionable whether this position will find a (qualified) majority. This creates the risk of a negative spill-over effect, as the Council may demand that the voluntary nature of the transparency register be maintained as a precondition for its participation.

The second distinction concerns the scope of the register within the Council. If the register were only to cover lobbying within the Council Secretariat, this would dramatically limit its impact. Given the bureaucratic impartiality of the Council Secretariat, chances are great that lobbyists will approach the Member States directly. In this light it remains unclear where the Council would draw the boundary of the register's scope. Even if Member States were to show themselves prepared to rein in their sovereign right to speak freely with all parties (for example, by not receiving lobbyists who are not on the register), the risk of circumvention is still great. If the register were to be declared binding on the Member States' Permanent Representations in Brussels, the possibility remains open for lobbyists and Member States to agree to meet at the line ministries in the capital cities. This typical multi-level problem can be overcome by two (simultaneous) measures. The first, 'weak' measure would be to declare the transparency register binding along functional lines: parties then commit themselves to receive only registered lobbyists in the case of EU law or regulation. The second, stronger measure would be to agree to de minimis harmonization of national lobbying regulation in parallel to the Union Register, where the EU rules could serve as a starting point. The latter option, however, will most likely encounter resistance among the Member States.

#### *4. A register of delegated and implementing acts*

No comments.

#### *5. Transparency of trilogues*

The practice of trilogues between the three European legislative institutions has long been the subject of criticism (see for example the report by Notre Europe, dated November 2011). Although the 'space to think' is often considered an essential element to reaching compromises, there is also criticism from within the Parliament and the Council concerning the limited information that flows out of this 'black box', where only small delegations from both institutions are involved. However, this complaint mainly concerns the internal / parliamentary right to information. The non-paper is even less clear about the measures it considers necessary to increase the public's right of access to documents. Although certain elements of the proposal (e.g. information ex ante and ex post facto through the IT portal) are to be welcomed, the practical implementation of the proposal remains unclear. In particular, attention should be given to the provision of information about a trilogue's formal procedural aspects (individuals involved and underlying decision-making bodies, time-frame, topics to be discussed ex ante, and progress made ex post facto).

## 6. De minimis revision of Regulation 1049/2001

No compromise is yet in sight, even seven years after the start of the revision of Regulation 1049/2001 on public access to EU documents. Since the Lisbon Treaty / TFEU entered into force, however, the Regulation no longer complies with treaty law. Article 15(3) TFEU stipulates that access to documents should be applicable to all “institutions, bodies and agencies of the Union”, while the Regulation currently only applies to the Commission, Council and Parliament. In the past 14 years, the institutions, bodies and agencies have already begun to implement the right of access to documents through inter-institutional and internal regulations. This does not mean that the Regulation should not still be aligned. However, a 2011 Commission proposal to that effect was unsuccessful due to the widely divergent positions of Member States and Parliament regarding the degree of revision required. However, as the Regulation has not been in conformity with the Treaties for six years now, and a full compromise is not yet in sight, a de minimis revision would be a suitable alternative.

## Conclusion

This memorandum presents a point-by-point discussion of the recent proposals presented in the Council by the six pro-transparency countries. While the proposals generally have positive and broadly uncontroversial implications, this does not hold for proposals 3 and 5 in particular. Moreover, the scope of most of the proposals is not yet entirely clear. This memo has therefore identified certain elements that require further examination to allow further discussion of the presented plans.

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## About

*The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and International Migration, Refugee, Criminal, Privacy, Anti-discrimination and Institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation.*

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