



EURACTIV

LAWMAKING IN THE DARK

SPECIAL REPORT | 23 NOV. - 1 DEC. 2017
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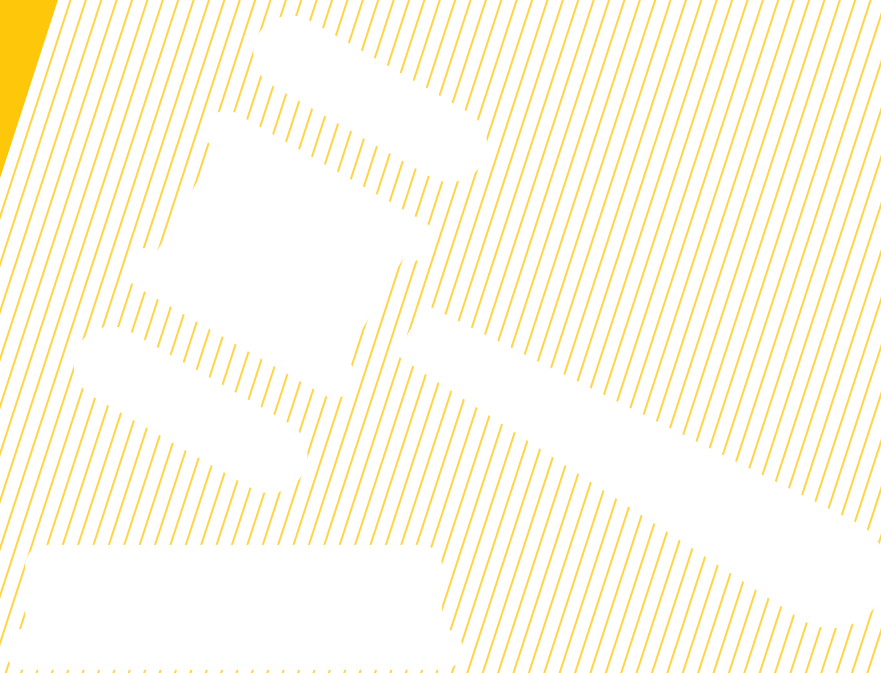
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Balancing secrecy and openness, the EU strives for transparency

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Lobbyists have an image problem in Brussels. [Shutterstock]

EU laws go through a roller-coaster of opacity, with lawmaking only becoming visible in some parts of the process. But a new regime could extend this transparency from conception to birth.

Europe's populist movements vary widely across the continent in both style and substance. But one thing they have in common is the vilification of the European Union as an elite club that makes laws behind closed doors.

The image of unelected bureaucrats making secret deals in smoke-filled rooms has gained increasing traction

in recent years. These claims are greatly exaggerated, as Emily O'Reilly, the European Ombudsman, pointed out earlier this month at the Irish Institute of European Affairs.

"The EU institutions are frequently much more transparent than those in many EU member states, in the sense of opening up their processes and deliberations to public view," she said.

"They have also become much more transparent in recent years."

But the public perception is a problem, she says, and it is based on real transparency problems in large parts of the EU lawmaking process. Yes, national media is to blame for not

transmitting the information that is available to the public. But it is also true that the vagaries of EU lawmaking make much of this information hard to come by in certain parts of the process, even for Brussels insiders.

It is often difficult to assess who is having meetings with decision-makers, and in many cases, who those decision-makers even are.

As we will explore in the rest of this Special Report, EU legislation is conceived in darkness, gestated in sunlight, and then returns to darkness for its birth.

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IN AND OUT OF THE SUNLIGHT

EU laws can only be proposed by the European Commission, the bloc's executive branch. The drafting of these laws takes place largely behind closed doors. There are public consultations to gather the feedback of stakeholders, but the Commission does not comment on the drafting process and the people crafting the decisions are unknown civil servants.

The proposal sees the light of day when the Commission puts it forward, and it passes to the elected co-legislators, the European Parliament and the Council of Ministers. They can then adjust the proposal or reject it.

The two co-legislators are like night and day in terms of transparency. The Parliament holds public debates and publishes all documents. The votes are on the record, so people know which MEPs have voted for what.

The Council, made up of the ambassadors (permanent representatives) of each of the 28 EU member states, holds meetings entirely in secret. Which country has voted for what is usually not a matter of public record. And though it is the elected national ministers who technically make the final decision, in reality, it is usually faceless civil servants at the perm reps who are actually calling the shots. And it is often almost impossible to find out who those people are.

"Although it is a co-legislator, the Council tends to think and act within a traditional international diplomacy framework," said O'Reilly. "Evolving negotiations remain largely secret, as do member states positions."

The Council's position comes into the sunshine once a 'general approach' has been agreed by the countries, usually around the same time that the Parliament has voted on its position. Both positions are public.

The process is then plunged into darkness once again. Negotiations take place between the MEP in charge of the file and the EU country holding the rotating presidency of the Council – at the moment Estonia. These negotiations are called 'trilogues'.

"The trilogues are a black box," says Vitor Teixeira, a policy officer with Transparency International EU. "You don't know how each country comes to the position that they have. You also don't know which lobbyists meet which perm reps. You also don't know how the changes come about. You only see the beginning and the end."

The talks were never meant to be a central part of the lawmaking process. "The trilogues were initially a way to smooth out the edges," he says. "They came after a relatively long legislative process, after second reading. But nowadays most legislative processes go to trilogue immediately after first reading. The process is exempt from the traditional transparency process. The discussions in plenary are webstreamed. The discussions in trilogues are not."

TRANSPARENCY TO COME

The problem of opacity in some parts of the process, especially the trilogues, is well-known in Brussels, and when Jean-Claude Juncker became president of the European Commission in 2014, he vowed to do something about it. He appointed Commission First Vice President Frans Timmermans from the Netherlands, a leading country on transparency, to put a new system in place.

A voluntary register of lobbyists has existed for the Parliament and Commission since 2011. Last year, Timmermans proposed to make it mandatory, and extend it to the Council. Negotiations on this proposal are ongoing, but according to EU sources, a Council position may be agreed next week.

"We need to take a major step

forward on lobbying transparency during this mandate," Timmermans told EURACTIV. "The Commission has led by example by applying a simple principle when it comes to lobbyists: no registration, no meeting. If all three institutions applied that rule, then not being on the register would cease to be an option for Brussels lobbyists."

The proposal, however, would only extend to the Council secretariat and the EU country holding the rotating presidency. The EU does not have the authority to impose transparency rules on the 28 perm reps, which are essentially embassies.

As we will explore in this series, the level of transparency for EU governments varies widely. Scandinavia and the Netherlands tend to be the most transparent, while Central and Eastern Europe are the least open.

Last week, the Dutch government published a paper, to be presented to a 'Bringing Europe Closer to its Citizens' summit in Tallinn on 26 November, asking the perm reps to sign up to a voluntary code of conduct. The hope is to get all 28 perm reps to sign up, but it may be an uphill struggle.

"In a representative democracy citizens have the right to know whether their legislators voted in favor of or against a law or proposal," the paper says. "The EU currently does not live up to this democratic standard and the Council, in particular, regularly violates EU transparency regulations."

It is clear which EU institutions, and which parts of the process, have transparency problems. The question is whether there is the political will to shine more sunlight on these opaque processes.

EU mandatory register for lobbyists, a baby step towards full transparency

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Over time, the business of influence has been honed into a fine art in Western democracies. But that art is becoming increasingly regulated, even if the average citizen perceives lobbyists as cigar-smoking men in suits wining and dining lawmakers to gain an unfair advantage.

What they may not think of is the long-haired environmentalist who is pushing for renewable energy support, or the farmer who is trying to explain to his MP why a new pesticide regulation could put him out of business.

“Speaking with interest representatives is a normal part of our work,” Frans Timmermans, the First Vice-President of the European Commission, told EURACTIV.com. “We need to listen to what stakeholders have to say to get it right. But citizens must also be able to know who is speaking to us – who they are, who they represent, how much they spend on lobbying.”

THE REQUIREMENTS

The European Parliament and European Commission have a voluntary transparency register in

place to record this information. Commissioners and their cabinets will not meet with anyone who is not on the register. But this does not apply to lower-level civil servants such as heads of unit, where many of the real decisions are made.

Members of the European Parliament have their own standards for how to use the transparency register. “I refuse to receive any lobbyist that’s not registered,” Jean-Marie Cavada, a liberal MEP from France, said at a recent transparency event in Brussels. “I’ve never seen a

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lobbyist alone in my office.”

Up till now this code of conduct has been discretionary for MEPs, but a new proposal from the European Commission seeks to make it mandatory, and to extend the regime to the Council of Ministers – the representations of the 28 national governments in the EU. Under the proposal, no lawmaker could meet with a lobbyist unless they are in the register.

BAD INFORMATION

But how useful is the register really? Lobbyists have to say who they are, how many lobbyists they employ, and how much they spend on lobbying. But Vitor Teixeira, a policy officer for EU integrity with the group Transparency International, says that the information provided is often laughably inaccurate.

“The quality of the information provided is terrible,” he says. The problem is that many people don’t know how to fill out the form. Small farmers mistakenly say they spend millions on lobbying while large multinationals claim they spend none. And there is no mechanism to force accuracy. Many people fulfill the online form requirements simply by putting dashes in some fields.

Vlad Olteanu, a lobbyist with cigarette manufacturing company JTI, agrees that the functioning of the register could be further improved. He notes that many people are able to escape having to register, or do not register in a meaningful way.

“We fully support a mandatory transparency register,” he says. “We want full transparency for everybody, and we don’t want to be less transparent or more transparent than others.”

“I’ve been in Brussels since 1999,” he says. “When I look at the register, it’s somehow odd that so

few law firms are on it. Law firms are perceived in Brussels as not being fully transparent.”

The status of law firms is still unclear. Many of them have public affairs departments in addition to their legal activities. But they claim they cannot sign up to the register because they have confidentiality requirements in order to stay on the bar in Belgium.

If the proposal to make the register mandatory is adopted, that may force law firms to get on the list.

A CLIMATE OF FEAR?

Olteanu says he frequently sees double standards for who is the focus of transparency drives. “Some NGOs who get financing from the Commission are not transparent about it,” he says. But these NGOs are rarely in the crosshairs of transparency advocates.

The tobacco industry is often in these crosshairs. This is partly because there are specific requirements for what type of interactions they can have with lawmakers under guidelines from the World Health Organization called the Framework Convention on Tobacco Control. It seeks to limit the amount of interaction between tobacco lobbyists and lawmakers.

Olteanu says that though the framework does not forbid all interaction between tobacco and lawmakers, NGOs often use it to intimidate lawmakers into refusing any meeting with the tobacco industry. People smoke, and it is a heavily regulated area. The industry needs to be consulted for their expertise when crafting these laws or they will not work, he says. But lawmakers are sometimes intimidated against having these meetings.

Frans Timmermans has in the past expressed resistance to the idea of regulating the transparency of some sectors more than others. The Commission’s health department

publishes online all meetings its staff have with tobacco industry representatives and the minutes of those meetings, something it does not do for other sectors.

Following a complaint by Corporate Europe Observatory, European Ombudsman Emily O’Reilly recommended that this tobacco policy be extended to all departments in the Commission. But this was rejected by Timmermans, who told the European Parliament, “the Commission does not intend to implement specific rules for the tobacco sector as it considers the overall rules sufficient.”

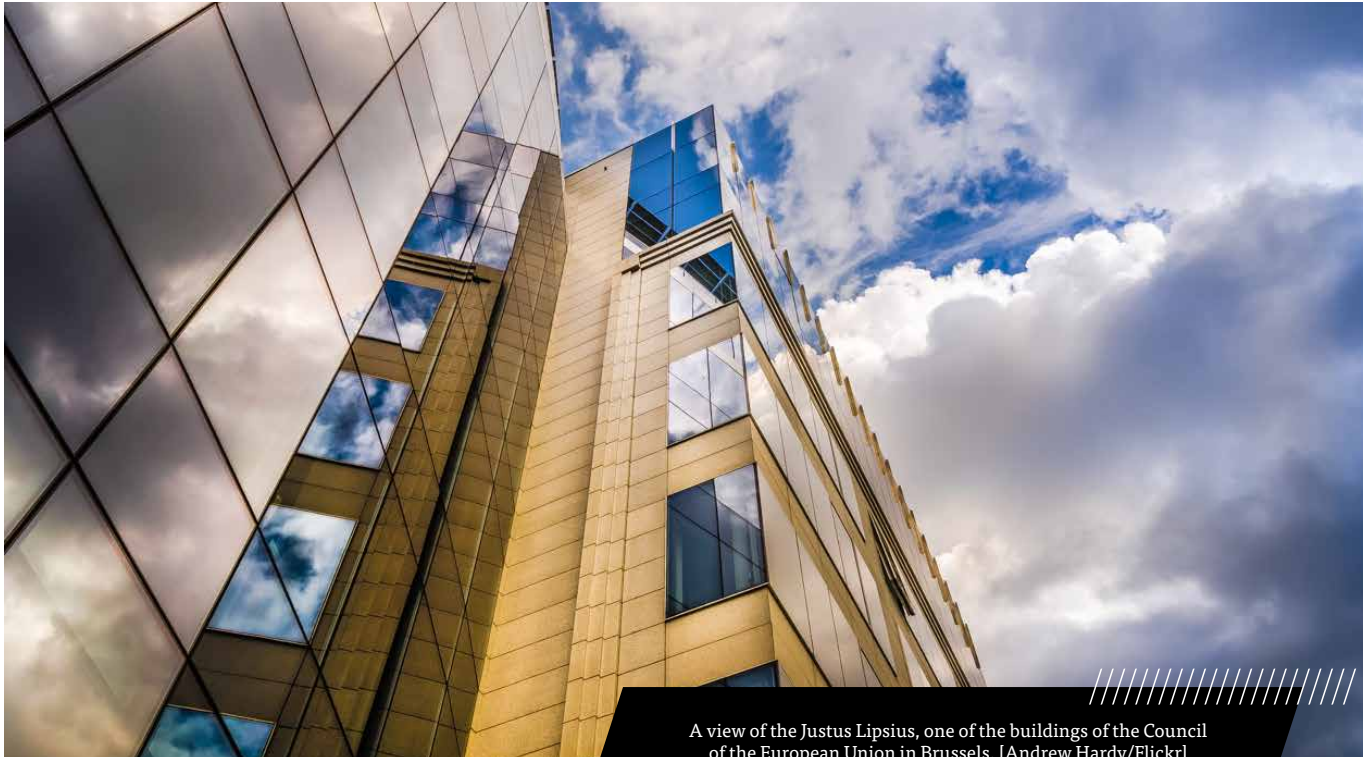
But transparency advocates say the tobacco industry’s history of undue influence with policy makers justifies the special treatment. They also dispute the idea that increased transparency will make lawmakers afraid to meet with ‘unpopular’ industries, even when their technical expertise is needed.

“We have heard these concerns, for example from MEPs who say they want to feel free to seek out all opinions, and that perhaps this will cause fear,” says Teixeira. “But in our view, it is the contrary. It reinforces democracy, to say that I met all the stakeholders in your name, and even after listening to everyone, I chose this, because of A, B and C.”

“What we see many times is when scandals happen, it’s the lack of transparency that causes the scandals and not who they met with,” he adds. “It’s the lack of transparency that causes the big public outcry.”

EU's trying trilogues

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A view of the Justus Lipsius, one of the buildings of the Council of the European Union in Brussels. [Andrew Hardy/Flickr]

It's a typical Brussels story. You've been following a piece of legislation as it has worked its way through the European Parliament, from committee hearings to plenary vote.

The vote is taken, the legislation passed, and you're handed a pile of paper with the result. And with that, the pile of paper promptly disappears.

That's because the lead MEP on the file then takes it from the shiny glass 'house of a million windows' at the European Parliament to the Council of Ministers, the body of the 28 national governments, housed in an imposing concrete bunker called the Justus Lipsius Building. And once the MEP enters, they disappear for months.

He or she needs to square the Parliament's version of the legislation with that adopted by member states – much like the reconciliation process that takes place between the Senate and House in the US Congress. EU legislation is proposed by the European Commission and then adjusted by the Parliament and Council.

THREE-WAY TALKS

This process of squaring the circle is called the trilogues, so called because it is a three-way negotiation between the Parliament, the Council and the Commission, which acts as an arbiter. The 28 member states are represented in the talks by the country which holds the rotating

presidency – which is at the moment Estonia.

The trilogues go on for weeks, sometimes months, until the white smoke emerges from the bunker. Only then does the public learn what has been agreed, but with no idea how or why. Sometimes the legislation that emerges from the trilogues bears little resemblance to the one that was adopted in an open, transparent way in the Parliament.

So how did we get here?

The trilogues were originally meant as a means to make minor adjustments to legislation following an extensive legislative process. They were supposed to come after multiple rounds of voting in the Parliament

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and Council (called ‘readings’), during which time the two versions would come closer together by the transparent actions of legislators.

Now, the lead MEP often heads over to the Council straight after a committee vote, even before the full Parliament has agreed a first reading position.

And that’s where problems begin. The discussions taking place in the Parliament were public. But in the trilogues, with so much of the negotiations behind closed doors, there is no transparency.

Emily O’Reilly, the European Ombudsman, has raised alarm about the situation. “We have looked into the transparency of the trilogues process and are currently looking into what happens to a draft law once it leaves the European Commission and is discussed within the Council,” she told a transparency event earlier this month.

The European Economic and Social Committee recently published a study finding the trilogues to be unacceptably opaque.

On 5 December, Swedish Liberal MEP Fredrick Federley will host an event at the European Parliament asking how the trilogue process can be made more transparent.

“I would claim that the trialogue process is working and the three parties in the EU do often come to agreements,” he says. “But I believe there is a transparency deficit when the citizens are left outside. Documents, agendas and minutes from these informal meetings should be published and accessible.”

But the Parliament knows it can’t

be the only one to solve the trilogue problem. The impetus has to come from their negotiating partners in the Council.

TOP-SECRET DIPLOMACY

So why are the trilogues so secretive? It’s largely because the talks operate under the ethos of the Council, the most opaque EU institution. Because it is a collection of 28 embassies, which are run by the foreign ministries of their respective countries, it is governed by the usual rules of international diplomacy. And that is a world of hyper-secrecy, sometimes just for secrecy’s sake.

In the EU context, this has caused significant problems. The Council is a co-legislator equal to the European Parliament. It is, for all intents and purposes, the upper chamber in the EU’s federal level of government. And yet it behaves more like the United Nations, with each representation closely guarding its secrets and, too often, operating in a zero-sum world.

The consequence is that national governments can take one position in Brussels, then return home and tell their citizens that they took the opposite decision. And because of the opacity of this process, they can get away with it.

This is why the Council has resisted joining the EU’s Transparency Register, which right now only applies to the European Commission and European Parliament. If you are a lobbyist and you want to meet with a commissioner or an MEP, you need to sign up to the register. But if you want to meet with someone from one of the 28 permanent representations in the Council, you don’t.

Last year, the Commission proposed to bring the Council into the register regime. But after more than a year of talks, there is still no agreement between member states in the Council to accept the proposal. The Commission is getting increasingly impatient.

“The Commission put a proposal on the table in September last year,” Frans Timmermans, the Commission’s first vice president, told Euractiv. “It is high time the negotiation started. I don’t think citizens would understand if the EU institutions failed to deliver a mandatory transparency register by the next European elections.”

Estonia has identified getting an agreement on the file as one of the top priorities for its presidency, which ends on 31 December. According to Council sources, a common approach may be agreed by member states this week.

LIMITED SCOPE

That’s the good news for fans of transparency. The bad news is that the new regime will only apply to the Council Secretariat (the small number of people employed directly by the Council, who are not even involved in taking decisions), the EU country holding the rotating presidency, and the country that will take over the presidency next.

The EU does not have the authority to impose transparency rules on the 28 permanent representations [perm reps] because they are sovereign embassies.

But there is some hope that member states may volunteer to make

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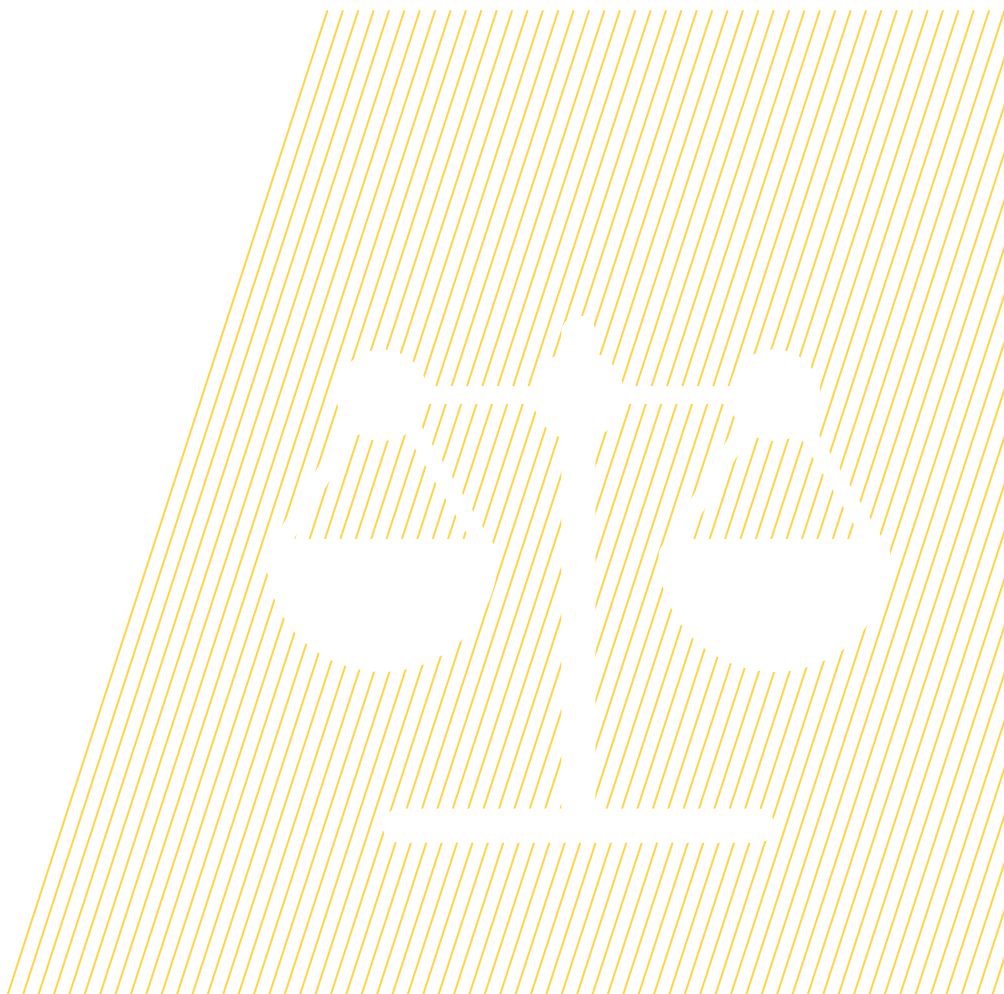
their permanent representations more transparent. Earlier this month, the Dutch government published a paper, to be presented at a 'Bringing Europe Closer to its Citizens' summit in Tallinn on 26 November, asking the perm reps to sign up to a voluntary code of conduct. The hope is to get all 28 perm reps to sign up, but it may be an uphill struggle.

"In a representative democracy citizens have the right to know whether their legislators voted in favour of or against a law or proposal," the paper says. "The EU currently does not live up to this democratic standard and the Council, in particular, regularly violates EU transparency regulations."

The first step to making the opaque trilogue negotiations more transparent will be for the Council to sign up to the transparency register. But it will be only a first baby step on the long road it will take to get national governments to be more open about what they do in Brussels.

People in the Council have noted that it's much easier for the Commission and Parliament to sign up to these transparency requirements because they are single entities. The Council is made up of 28 countries, all with very different traditions when it comes to openness.

That being said, turning 28 different traditions into a common understanding is the story of the European Union. If it can be done with normal legislation, why can't it be done with transparency? The Dutch hope to convince their counterparts to shine some sunlight on the opaque trilogue process.



Excessive complexity hinders transparency of lawmaking

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A lack of understanding of EU legislative procedures hinders transparency. [Pawel Szczepanski/Shutterstock]

Understanding of EU lawmaking among lobbyists and journalists has declined as the processes themselves have become more complex, to the point of making Brussels “a land of incompetence”, experts said at a seminar on Monday (27 November).

Brussels is a Mecca for lobbyists. According to the NGO Corporate Europe Observatory, the EU capital counts some 30,000 of them, all vying to influence EU lawmaking in their favour.

Yet as legislative procedures have grown in complexity, there are only

“a handful” of lobbyists left who really understand how secondary legislation is made, the experts from consultancy PACT European Affairs said at the event hosted by the Press Club in Brussels.

“The more complicated the system has become, the fewer people have educated themselves about it,” said Daniel Guéguen, the president of PACT and a professor of comitology at the College of Europe.

WHAT IS A LOBBYIST?

“In the past, a lobbyist was someone who had technical

knowledge of a certain issue, who had identified the people responsible in the European Commission and went to see them,” said Guéguen, who has previously presided various industrial groups including EU farmers and agri-cooperatives union Copa-Cogeca.

Representatives from civil society organisations, industry bodies and consultancies, which Guéguen referred to as “mercenaries”, are all experts in their own policy areas and are all lobbyists.

But as every aspect of the job, from legislative procedures to methods

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of communication, has increased in complexity, “Brussels has become a land of incompetence”, he said. “There are still a large number of lobbyists who are very competent technically – there are specialists in all sectors – but they no longer understand how the system works.”

The same goes for journalists, he said, who tend to understand the technicalities of the legislation they cover but not the decision-making procedures. “And if you do not understand how decisions are made, you cannot analyse them,” Guéguen said.

For the veteran lobbyist, the turning point was the Treaty of Lisbon, which came into force in 2009 and made the labyrinth of decision-making procedures unnavigable to all but a few.

LAYERS OF COMPLEXITY

Before the Lisbon Treaty secondary legislation was fairly simple. Comitology committees, formed of national experts and presided by a Commission official [usually the head of unit responsible for the subject under discussion], made technical decisions on secondary legislation.

“The purpose of these committees is to adopt the measures that allow the legislation to function in practice,” said Vicky Marissen, the director-general of PACT, who is also a professor of comitology at the College of Europe.

Another layer of complexity was added in 2006, when the European Parliament was given the right to scrutinise, accept or reject secondary legislation. This is known as the regulatory procedure with scrutiny (RPS).

And since the 2009 Lisbon Treaty, the system of delegated acts (granting the Commission the right to amend or supplement non-essential parts of EU legislation) and executive acts

(allowing the Commission to execute decisions based on the EU treaties), each demanding a different procedure, has complicated the legislative landscape even further.

As if that were not complex enough, the procedure to be used when establishing or amending secondary legislation depends on when the original legislation was adopted.

Therefore, changes to pre-2009 legislation, such as the REACH chemicals regulation and secondary legislation relating to the dieselgate scandal, are still made by RPS, while amendments to more recent laws are subject to the provisions of the Lisbon Treaty.

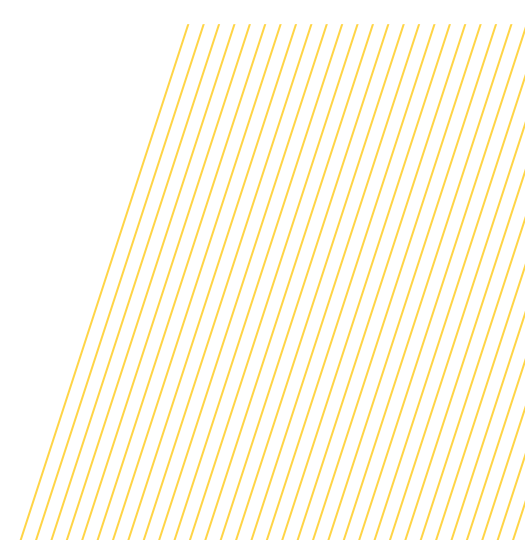
“You may think that the 2006 system has been abandoned, but this is not the case,” said Marissen. “For around 160 legislative texts this RPS procedure is still in use on a daily basis.”

THE IMPLICATIONS FOR TRANSPARENCY

The implications of such a complex system on the transparency of lawmaking are not hard to see: if journalists and other outside observers do not understand who holds the power to make the technical decisions behind EU legislation, they cannot hold them to account.

Similarly, if lobbyists – from small NGOs to powerful industry groups and paid consultants – fail to grasp the procedural subtleties of comitology, their message will not reach the right ears and their efforts to influence legislation will be ineffective.

The interest groups with the money to hire the few consultants capable of navigating this labyrinth are at a significant advantage.



INTERVIEW

Hübner: The European Union is more transparent than national governments



Danuta Hübner [European Parliament]

Compared to the national governments of the member states, the European Union is ahead of the curve when it comes to transparency, former Regional Policy Commissioner Danuta Hübner told EURACTIV in an interview. But improvements are still badly needed.

Danuta Hübner is a centre-right

member of the European Parliament from Poland who chairs the constitutional affairs committee. She was the European Commissioner for Regional Policy from 2004 to 2009.

The EU has made efforts to make the lawmaking process in Brussels more transparent in recent years. How has this been going?

Transparency is not an objective in itself: you have to think as well about accessibility, openness, intelligibility and accountability. Transparency at all levels aims to help citizens to better understand how EU decision-making works, how it is influenced and where the different responsibilities lie. This

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is all about the trust the citizens have in governance in the EU.

For instance, in the Committee on Constitutional Affairs that I am chairing, we worked on a number of reports dealing with the institutional aspects of transparency of decision-making. We were calling on the Council to make its inner workings more transparent and streamlined to reflect more closely the openness that the European Parliament shows today, so that also our citizens are able to follow its deliberations as they do ours.

There is also an important part of transparency related to the access to the documents that reflect the inputs in the legislative process. A revision instrument that regulates this has been stalled for almost 9 years, in spite of the Parliament's continuous commitment to enhance it.

You can think also about the transparency of how the EU is financed, which over the years has become a complex patchwork of instruments, inside and outside the EU. You can also look at the transparency of trade negotiations where the European Parliament has

gained an ever increasing right to information in order to be able to scrutinise the negotiations on behalf of the EU citizens that elected us. Finally, some of these achievements are also reflected in the ongoing Brexit negotiations, which have proven to be an unprecedentedly transparent process as far as the level of disclosure is concerned.

Is the EU's transparency register, in which lobbyists have to register, working?

We certainly made a lots of progress in making the interest representatives that surround the EU institutions more visible. It was the Parliament that first set up its Transparency Register as early as 1995, it was followed by the Commission in 2008 and they developed a joint register in 2011 on the basis of an Inter-Institutional agreement. It has grown on average by 1,000 registrants a year and today it covers over 11,000 organisations and individuals.

A number of technical improvements were made as far as its registration is concerned and incentives added for lobby organisations to register. The

Parliament has been consistently calling for a mandatory registration system and it has ultimately brought an ambitious objective for its revision in the form of its negotiation mandate, responding to the Commission's draft proposal for its modification.

How does the European Parliament compare to the other EU institutions in terms of transparency?

Going further down the road, not all institutions abide by the same standards of transparency. Parliament is a very open institution. This naturally stems from our direct connection to the EU citizens. All the committee meetings and plenary sittings are public and web-streamed, all the documents are directly available online and searchable through the register of documents.

The same goes for the positions of individual MEPs, the number of votes in the plenary are nominal, including naturally the final ones. Everybody can also check how we voted in the committee meetings. You will hardly find a Parliament with such high degree of transparency in the EU.

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On the other hand, our partner in the legislative process – the Council – is often castigated for a lack of transparency in its decision-making. This is understandably inherent to its nature. We might be further away from a diplomatic bargaining style veiled by shade of secrecy. But the fact that it's an EU institution, does not hide the fact that it brings together national diplomats and ministers, coming from the different cultures of transparency, with different mandates and accountabilities.

The biggest problem of course is at the highest level, when we speak about the newest and most prominent institution, the European Council. Lack of transparency at those levels of the decision-making has been consistently detrimental to the EU's image – leaving the national leaders to misrepresent the constraints they faced at the EU level as well as well its collective achievements.

Finally the Commission, in which I myself worked as a Commissioner, has certainly a higher culture of transparency than a number of national governments in the EU member states. This is not a form of

judgment, but transparency binds very much with the acceptance of its actions. And we as parliamentarians have also contributed to improving that, be it in the field of international negotiation or disclosure of the working documents discussed by the various committees and expert groups assisting the Commission in the production of delegated and implementing acts.

Would you say the EU institutions are more transparent or less transparent than national EU governments?

Transparency is enshrined in our Treaties, requiring that all EU institutions conduct their work as openly as possible; to ensure the accountability of the EU institutions and thus increase the possibilities for democratic control.

Those principles don't necessarily always have the same resonance at the national level, but compared to a number of national institutions, the EU's ones are certainly very transparent. If we take the example of transparency of lobbying, let's not forget that the great majority of the EU member states have no statutory rules regulating lobbying and a great

number of those that do have adopted them only at the beginning of the decade. So I would say here we are well ahead of the curve and intend to stay so.

Do you think lobbyists have too much influence in Brussels?

This is not necessarily true. Yes, there is certainly an impressive number of lobbyists. Brussels competes with Washington for the number of active representatives of various interests. But that also stems from the complexity of the regulation at EU level.

When we decide to regulate in a specific field, lobbyists are there to complete the picture and help us understand the impact our legislative activities will have on the ground, in often very specific fields. They are here to complete the picture we are getting from the expertise of the Commission, member states, consultative bodies and research carried out within our institutions. There is also a number of checks and balances – one of them is certainly the transparency register.



Contact us

Dan Luca

pr@euractiv.com
tel. +32 (0)2 226 58 18

Daniela Vincenti

daniela.vincenti@euractiv.com
tel. +32 (0)2 788 36 69