



Statewatch analysis

Openness and transparency in the Council

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Introduction

At the most recent summit of EU leaders (European Council), it was decided that a greater proportion of the meetings of EU Member States' ministers (the Council) will be held in public. The following analysis examines the relevance and possible impact of this decision, and comments on the planned implementation of this decision and on further steps which the Council should take to hold public meetings.

Background

Council meetings were traditionally held entirely in secrecy. The first exception to this rule was agreed in 1992, when a prior EU summit agreed that the Council would meet in public in order to hold: open debates on the Council Presidency or Commission work programme; 'regular open debates on major issues of Community interest'; possible open debates, 'whenever appropriate', on 'major new legislative proposals'; and publication of the voting record, including explanations of the vote, where the Council acted as a legislature (See Annex 3 to Part A of the Edinburgh European Council conclusions). However, it was expressly specified that '[n]egotiations on legislation in the framework of the Council shall remain confidential', and that the decisions to hold open debates on major issues affecting the interests of the Union, or on specific legislative proposals, had to be taken unanimously by the Member States' delegations in the Council. Moreover, 'public access' only meant that the debate would be televised for viewing in the Council press area. These provisions were put into effect in amendments to the Council's rules of procedure adopted in 1993.

For a number of years, the focus of subsequent development was the rules on access to official EU documents, which were initially adopted by the Council and Commission in 1993 and which are now set out in a Regulation

adopted in 2001. This Regulation is further implemented by the Council's and Commission's Rules of Procedure.

The Treaty of Amsterdam, in force in 1999, had addressed the issue of access to documents (requiring the adoption of the 2001 Regulation), and had required that 'when the Council acts in its legislative capacity, the results of votes and explanations of votes shall be made public' (Articles 207 and 255 of the EC Treaty, as revised by the Treaty of Amsterdam). But there was no specific provision in the Treaty of Amsterdam on open Council meetings; instead Article 1 of the Treaty on European Union (TEU) was amended, to provide vaguely that decisions of the Union have to be taken 'as openly as possible'.

When the Council amended its Rules of Procedure in 1999 to take account of the Treaty of Amsterdam, it made no change to the rules on public Council debates. However, the Council expanded on its obligation to publish votes and explanations of votes concerning legislation, by obliging itself to publish 'statements in the Council minutes and the items in those minutes relating to the adoption of legislative acts'. It also widened the definition of cases when it 'acts in its legislative capacity', to include the adoption of 'third pillar' framework decisions and decisions. The Council also expanded its obligations to publish measures, to provide that it must publish most 'third pillar' measures, as well as Conventions between Member States and international agreements concluded by the Community or pursuant to the second and third 'pillars'. However, publication of other adopted measures, or Member States' proposals, remained optional.

The Council Rules were amended again in 2000, mainly in order to adapt the functioning of the Council in light of the planned EU enlargement. At this point the Council made an amendment to the Rules to facilitate openness and transparency: a public debate on an important new legislative proposal or another important issue affecting the interests of the Union can be held if a *qualified majority* of Member States (which entails calculating the vote of Member States according to a special procedure) supported it.

Next, the Seville European Council (summit) in June 2002 agreed further changes to the functioning of the Council and summit meetings, including an extension of public debates in the Council. From this point on, the Council meets publicly for a portion of its discussions relating to acts adopted by the 'co-decision' procedure (which entails joint decision-making powers of the Council and the European Parliament, and almost always entails qualified majority voting in the Council as well). In particular, the Council always meets in public when voting on acts subject to the co-decision procedure, including the final deliberations leading up to the vote and explanations of the vote; the outcome of voting is to be displayed by visual means. It also meets in public when the Commission presents the 'most important legislative proposals' subject to the co-decision procedure, and holds an ensuing debate on those proposals. These changes were set out in a revised version of the Council's rules of procedure.

But the rules on public debates on other types of legislation, and on non-legislative measures and policy debates, were essentially unchanged; they were amended only to specify that the Council debates in public its *annual* programme, rather than the programme of each Member State holding the six-month Council Presidency. This change in fact halved the number of public debates on the Council's overall programme.

Given the clear distinction as regards public Council meetings between measures subject to the co-decision procedure and measures which are not, it is important to be aware of the circumstances in which the co-decision procedure applies. At present, the procedure applies to almost all EU 'internal market' law, including industry and research policy, along with most social and environmental law. In the area of Justice and Home Affairs, co-decision applies to legislation on visas, borders, asylum, irregular migration, and civil law (except family law). The most significant issues *not* subject to co-decision are agriculture, fisheries, international trade, legal migration, family law, policing and criminal law, foreign and defence policy, taxation and monetary policy measures, international treaty-making generally, and the annual or multi-annual budget procedure (although the rules governing most individual non-agricultural EU funding programmes, for example the EU's social fund, are set out in legislation adopted by the co-decision procedure).

Following a complaint from an MEP, in autumn 2005 the EU's Ombudsman released a special report concluding that secret meetings of the Council breached the EU Treaty obligation for EU institutions to act 'as openly as possible'. This was endorsed by a unanimous vote of the European Parliament in April 2006.

In the meantime, in December 2005, the Council adopted conclusions regarding the implementation of the openness rules (Council doc. 15834/05, 15 Dec. 2005). The conclusions state that the Council will meet in public when the Commission proposes *any* co-decision measure (not just the most important measures) at the Council, and specify what is meant by 'final deliberations' and the visual display of the vote. They also state that the Council 'may consider' making public its discussions during other parts of the co-decision process. As for legislation not covered by the co-decision process, the conclusions state that the Council will in future hold more public debates on 'important new legislative proposals'. For non-legislative issues, the Council may hold public debates if they concern 'important issues affecting the interests of the Union *and its citizens*'.

The conclusions also address the practice of public Council meetings, stating that public debates and votes will be grouped together as far as possible, specifying how the public will be informed in advance of public meetings, and deciding that public Council discussions will be video-streamed from the summer of 2006.

The revised rules

The EU summit in June 2006 has agreed on a significant extension of public meetings in the Council. The Council will now meet publicly throughout the entirety of its discussions of any proposal subject to the co-decision procedure, although it may be decided in specific cases not to hold the debate in public. As for other types of legislation, the initial discussion on any measure presented by the Commission will be held in public, and further debates on other types of legislation *may* be held in public. There will be public debate on the Council's *18-month* programme, along with sectoral Councils' discussions of their priorities, and the Commission's annual work programme, five-year work programme and legislative strategy. Finally, the Council will regularly hold public debates on important policy issues.

The conclusions also address the issue of giving further publicity to open debates, and require that records of video-streamed Council public meetings will be retained for at least one month.

Presumably the Council's rules of procedure will shortly be amended to give effect to these new conclusions. This is an opportunity to address the openness of the Council more broadly - an issue considered in detail below.

Assessment

First of all, the latest developments on open Council meetings can be compared to the provisions on this issue in the EU's stalled Constitutional Treaty. That Treaty, if it were ever ratified, provides that the Council will meet in public when discussing all stages of all legislation; no exception is provided for. It also includes a wider definition of legislation than the Council's rules of procedure, in particular defining the EU's annual budget process as legislative.

In comparison, the current practice even following the June 2006 changes will still permit exceptions to public meetings during the co-decision process, requires only limited public meetings for legislation not covered by co-decision, and retains a narrower definition of legislation.

There is no convincing reason why the Council should not already open its meetings as far as the Constitutional Treaty would require. This should not be considered as 'cherry-picking' that Treaty, since the issue of public meetings is already regulated by existing rules. It should be recalled that EC legislation outside the scope of the co-decision process addresses issues of such great public concern as taxation, migration and criminal law; it is hard to see why such matters should continue to be discussed in secret.

Moreover, there is no practical reason why there should be a distinction between legislation adopted by co-decision and legislation adopted pursuant to other procedures. In fact, the distinction is quite suspect, since the

'nitty-gritty' of negotiations on legislation adopted via means of the co-decision process happens in secret meetings between MEPs and national officials, while the 'real' negotiations on legislation adopted pursuant to other procedures take place at the Council meetings. So if anything, if the goal is to shed light on EU decision-making, Council meetings should be *more* open, not less open, when discussing legislation not adopted via the co-decision process.

While the introduction of video-streaming, including recorded copies of Council public debates, is welcome, it is unfortunate that the Council has not yet considered publishing a 'Hansard' of its public debates (a written version of the public statements). To save time and money, this could be published on the Internet only. This would provide for the public a lasting and easily accessible record of the Council's public deliberations.

It remains to be seen whether the public debates of the Council will be comprehensible to the public. To this end, it may be necessary to review the Council's working methods (set out presently in Annex IV to the rules of procedure) to ensure that when discussing legislation, the Council is more obviously following a 'parliamentary' process.

It is also unfortunate that the summit meeting did not take the opportunity to address other aspects of transparency besides public Council meetings. In particular, the rules and practice on access to Council documents could have been addressed, especially because these documents give a full insight into the negotiation on legislation within the Council, as most of this negotiation takes place at the level of national experts (Council working groups) or national ambassadors to the EU ('Coreper'), and these discussions will *not* be opened to the public by the agreement at the EU summit.

For instance, it makes no sense to continue the Council's current practice of censoring the names of Member States holding certain positions when it releases documents concerning legislation under discussion, since the positions of the Member States will become obvious anyway when Council discussions are broadcast. Other improvements to the Council's documents rules, such as fuller automatic release of documents during the legislative process (for instance, making the release of documents covered by Article 11(4) of Annex II to the Rules of procedure mandatory and deleting Article 11(6) of the Annex), should also have been considered. The Council will still have the opportunity to address these issues when it amends its rules of procedure shortly.

Another issue which should be addressed when the Council's rules of procedure are amended is the principle (stated in the current rules) that Council discussions are secret as a rule and that any public meetings or access to documents are the exception. In light of the summit agreement on openness, this should be reversed to make clear that openness is the rule and secrecy is the exception.

The amendment of the rules of procedure would also be an opportunity to review the current exceptions to publishing the voting record of the Council, explanations of the vote and Council statements attached to measures, as well as the exceptions to the rules on publication of Council measures. These current exceptions should be replaced by an obligation to publish all measures and to make public all voting (including explanations of the vote and Council statements), except where this would genuinely threaten public security or the EC's negotiating position on international treaties.

It would also be useful to provide in the rules of procedure for an annual report on the application of the rules on openness in the Council, in particular to provide information on the cases where the discussions on measures subject to the co-decision procedure were not held in the open. This report could form part of the Council's annual report on access to documents.

Finally, it should be observed that one striking EU transparency problem has developed quite recently: agreements between the European Parliament and the Council on legislation at the 'first-reading' of the co-decision process, which now applies to over two-thirds of legislation adopted using that process (and, so far, to *all* proposed legislation concerning visas, borders, immigration and asylum covered by the co-decision). The problem is that there is no information to the public as to whether first-reading discussions are even taking place, and no information as to the drafts under discussion. The process of reaching a first-reading deal is not even regulated by an informal published agreement between the EP and the Council.

This compares to the formal process applied where the co-decision process continues to a second reading or to the conciliation procedure, which entails public knowledge about the state of the procedure and the texts under discussion, as well as a public explanation of those text (for example, the Council's statement of reasons for adopting a common position).

The issue of transparency of first-reading co-decision deals needs to be urgently addressed jointly by the EP and the Council in order to improve the currently unjustifiable situation.

Conclusions

The decision to hold open Council meetings when discussing legislation to be adopted during the co-decision process is welcome, but it still falls well short of the minimum level of openness that the EU should ensure. There is still an open-ended exception to the public meetings requirement which could easily be abused in practice, and many key issues addressed by EU legislation fall outside the scope of the new commitment entirely, since they are not adopted by means of the co-decision process. The new rules will not be fully effective at increasing openness unless the Council publishes a record of its public proceedings. Also, the Summit missed the opportunity to consider improving the Council's transparency in other

respects, in particular as regards access to documents. Finally, the Council and the EP need to consider urgently improving the transparency of the process of reaching first-reading deals as part of the co-decision procedure.

The Council should take the opportunity provided by the forthcoming amendment of its rules of procedure to address these issues fully.

Sources:

Council rules of procedure, 2000 (OJ 2000 L 149/21)

Council rules of procedure, 2002 (OJ 2002 L 230/7)

EU ombudsman special report on Council public meetings, 2005

Council conclusions on greater openness, December 2005

EP plenary resolution on Ombudsman special report, April 2006

European Council conclusions, June 2006

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