



## Statewatch

# The Treaty of Lisbon and EU Openness and Transparency

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If the Treaty of Lisbon is ratified, there would be a number of additional provisions of the Treaties relevant to the issue of EU openness and transparency.

### *The revised Treaty on European Union*

The first provision worth looking at is Article 1 of the Treaty on European Union (TEU), which would still provide (as it does today) that the EU should act as ‘openly as possible’. The Court of Justice would obtain jurisdiction to interpret this provision.

Next, a new Title II of the TEU would concern democratic principles. Article 11(1) of the TEU would require the EU institutions to give ‘citizens and representative associations the opportunity to make known and publicly exchange their views’ regarding ‘all areas of EU action’. Article 11(2) would expressly require an ‘*open*, transparent and regular dialogue with representative associations and civil society’. Article 11(3) would require, *inter alia*, that the Commission shall carry out consultations with parties in order to ensure that EU actions are ‘*transparent*’.

As for the institutions, Article 16(8) TEU would require the Council to ‘meet in public when it deliberates and votes on a draft legislative act’, with no exceptions provided for. This would change the status quo, according to which the Council meets in public when discussing measures to be adopted by means of the ‘co-decision’ procedure. But this practice is established by the Council’s Rules of Procedure, which can be changed by a simple majority of Member States - as compared to the Treaty, which would have to be amended by unanimous consent of Member States, including national ratification. Also, the Council’s rules of procedure, unlike the proposed Treaty, provide for possible exceptions. Moreover, the rules of procedure, unlike the proposed Treaty, do not require

the Council to meet in public when discussing legislation to be adopted by *other* legislative procedures.

The change in Treaty rules should logically require a rethink of the rules on access to documents, with greater openness provided for as a consequence of the increased number of open Council meetings. Ideally the Council would also develop the practice of making available a written record of its public debates.

### **The definition of ‘legislative acts’**

This begs the question of the definition of ‘legislative acts’. Article 289 of the revised Treaty on the Functioning of the European Union (TFEU; the new name for the current Treaty establishing the European Community, or TEC) would specify that EU legislation would normally be adopted by means of the ‘ordinary legislative procedure’ (Article 289(1) TFEU). This would be a new name for the current co-decision procedure, the substance of which would not really change (see Article 294 of the TFEU). Otherwise legislation, in about 35 cases, would be adopted by means of various types of ‘special legislative procedure’ (Article 289(2) TFEU). Simply put, wherever the Treaty refers to the adoption of measures by means of the ordinary or special legislative procedure, then any acts which are proposed or adopted are legislative acts (Article 289(3) TFEU).

Other acts are *non*-legislative acts, including all acts adopted by the Commission or the European Council (EU leaders’ summit meetings). A particular category of non-legislative acts would be provided for in the new Article 290 TFEU, which would specify that EU legislation can delegate power to the Commission to ‘supplement or amend certain non-essential elements of the legislative act’. This procedure would probably constitute a process to adopt ‘non-legislative acts of general application’, as referred to in the Commission’s proposal to amend the access to documents Regulation.

The current provisions concerning ‘comitology’ - the process governing the power conferred on the Commission to adopt measures implementing EC acts - would be replaced by Article 291 TFEU. One variant of the current comitology rules, which sets out a special ‘regulatory procedure with scrutiny’ to give the European Parliament special powers to supervise the adoption of Commission comitology measures which supplement or amend certain non-essential elements of EC legislation adopted by means of the co-decision process, would probably be replaced by the procedure for adopting *delegated* measures (which would also apply to legislative acts which were not adopted by means of the co-decision procedure). The remaining variants of the comitology procedures would probably be kept in some form to govern the Commission’s adoption of *implementing*, rather than *delegated*, acts. At least some of these implementing measures would probably have general application.

The Treaty would also provide for the Commission to adopt measures directly in specific cases, such as the application of competition and state aids law. These would generally be measures of individual application.

### **New rules on openness and access to documents**

Next, Article 15 of the TFEU would deal in more detail with the issue of openness. It would replace Article 255 of the current EC Treaty, which is the legal base for adopting legislation on access to documents held by the Council, Commission and European Parliament. Article 255 was the legal base for the adoption of Regulation 1049/2001, which currently governs the issue of access to documents, as well as the proposed amendment to this Regulation which the Commission issued in April 2008.

First of all, Article 15(1) would require *all* of the ‘institutions, bodies, offices and agencies’ of the EU to ‘conduct their work as openly as possible’, ‘in order to promote good governance and ensure the participation of civil society’. This is a more specific application of the general rule set out in Article 1 of the TEU.

Article 15(2) would require the European Parliament to meet in public, as well as the Council when considering and voting on legislative acts. As regards the Council, this repeats the obligation in Article 16(8) TEU.

Article 15(3) would amend the rules concerning the adoption of legislation on access to documents. Such legislation will now apply to all EU institutions, bodies, offices and agencies, instead of just the Council, Commission and European Parliament. However, in practice at the moment, most other EU bodies are already either covered by Regulation 1049/2001 directly, because a separate legislative act has extended that Regulation to them, or have adopted on their own initiative rules which broadly parallel that Regulation. However, the European Council and the Court of Justice have not adopted any rules on access to documents.

These bodies would be covered by the new rules - although Article 15(3) would go on to provide that the Court of Justice, the European Central Bank and the European Investment Bank would only be covered by the new rules when they are ‘exercising their administrative tasks’. However, it would still be open to these bodies to adopt rules providing for further access to their documents on their own initiative.

Article 15(3) would also specify that each of the EU institutions, bodies, offices or agencies would have to adopt specific provisions regarding access to documents in their rules of procedure, ‘in accordance with’ the general rules to be adopted. Currently this obligation only extends to the European Parliament, Commission and Council (in the current Article 255(3) of the EC Treaty), although most other EU bodies have in fact already adopted rules on access to documents as part of their rules of procedure. The new provision would also

make it clear that the general rules on access to documents would take priority over the more specific rules.

Finally, Article 15(3) would require the European Parliament and the Council to ‘ensure publication of the documents relating to the legislative procedures’ in accordance with the general rules. This could be understood to require greater access to such documents than at present, taking account also of the obligation to hold open meetings relating to legislative procedures. This would replace the current Article 207(3) of the EC Treaty, which requires the Council to provide for greater access to documents when it acts in its legislative capacity.

If the Commission’s proposal to amend the rules on access to documents is still under discussion when the Treaty of Lisbon enters into force, if that Treaty is ratified, then the legislation, once adopted, would be broader in scope and would have to take account of the new provisions of the Treaty.

### **Data protection**

Article 16 of the TFEU would concern data protection. It would replace the current Article 286 of the EC Treaty, which requires the European Parliament and the Council to adopt data protection legislation applying to the EU institutions within the scope of the ‘first pillar’ only. The new Treaty Article would apply to the current third pillar (policing and criminal law) as well, along with the public authorities of Member States, which are currently subject to Directive 95/46. However, the new Treaty Article would not seem to apply to the adoption of legislation governing the private sector. Presumably the private sector would remain governed by Directive 95/46, which could still be amended by means of the EU’s continuing powers to regulate the internal market (Article 114 TFEU).

Legislation on this issue would be adopted by means of the ‘ordinary legislative procedure’, which would be a change as regards the ‘third pillar’, which is currently subject to unanimous voting and consultation of the European Parliament. The practical consequence of this is that the current controversial third pillar general data protection rules, which were agreed in 2006, could be revisited. The European Data Protection Supervisor could be given jurisdiction to supervise data protection as regards EU policing and criminal law bodies.

The new legal base would not apply to foreign policy measures, which would be subject instead to a separate ‘foreign policy’ legal base (Article 39 TEU). This would mean that there would be no involvement of the European Parliament as regards the foreign policy data protection rules, as well as no jurisdiction of the Court of Justice. This measure would not be a legislative act, and would not be proposed by the Commission, but by a Member State, the EU’s foreign policy High Representative, or by the High Representative with the Commission’s support (Article 30 TEU). The Council would vote unanimously

(Article 31 TEU). There might be an argument as to whether this specific ‘legal base’ or whether the more general data protection legal base would cover the issue of the exchange of passenger name records with countries including the United States.

### **Administrative law**

The new Article 298 TFEU would provide first of all that EU ‘institutions, offices, bodies and agencies... shall have the support of an *open*, efficient and independent European administration’. Next, there is a new legal power to adopt regulations to that end.

This could be a legal base to adopt rules on access to EU *information* as distinct from access to EU *documents*, and to adopt rules relating to other aspects of the EU’s current ‘Transparency Initiative’, including rules on the regulation of lobbyists and on consultations. Some of these issues are addressed in the European Ombudsman’s proposed Code of Conduct on good administration, which has been approved in some form by some EU bodies and institutions already.

### **The EU Charter of Fundamental Rights**

Finally, the Treaty of Lisbon would specify that the EU’s Charter of Rights will have the same legal value’ as the Treaties (Article 6 TEU). The Charter includes the right of access to documents ,the right to good administration (which arguably encompasses the right to *open* administration, including access to information) and the right of data protection. This could possibly enhance the enforceability of those rights within the EU legal system.

See the Statewatch Observatory on Access to documents in the EU:

<http://www.statewatch.org/foi/foi.htm>

and its: Observatory on the Regulation on access to EU documents: 2008 - 2009:

<http://www.statewatch.org/foi/observatory-access-reg-2008-2009.htm>

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