

Legislation behind closed doors

In the Council of the EU, the officials of the national governments of Europe negotiate laws - in camera. A report from Investigate Europe

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In the Council of the EU, the officials of the national governments of Europe negotiate laws - in camera. PHOTO: DPA

Emily O'Reilly is familiar with hidden power structures. When she once applied for a job as a journalist in Dublin, she was told to learn to type, then she could work as a secretary. She didn't take the typing course, but 20 years later she was the head of politics for the Irish Sunday Times. Soon after, when she was appointed the first Ombudsman for Ireland, she came across a web of state institutions juggling billions, beyond public control, to manage the bad securities of ailing banks. She did not rest until all the bodies involved were subject to parliamentary scrutiny.

Since 2014, she has been working as a "European Ombudsman" with EU Commissioners and **ECB** directors to shed light on their entanglements with lobbyists and corporations – again with success. Parliament immediately elected her for another term of office.

But just with, what she says is the "most important part of my work," the pugnacious Irishwoman has not made any progress for years. "All citizens have the right to participate in the democratic life of the Union," the EU Treaty guarantees. But that right, O'Reilly says, "they can't take exercise." This is the result of the Office's investigations into Europe's most powerful institution: the Council of the European Union, or The Council of Ministers, the

body where the government officials of the 27 member states negotiate and adopt EU laws before agreeing with Parliament on the final legislative texts.

Europas Gesetzgeber



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O'Reilly repeatedly notes that , who exactly negotiates and what exactly is negotiated, and which national government takes which position is systematically kept secret. That is why it is "virtually impossible for citizens to know how a European law came about". But this "undermines their right to hold their elected representatives to account" and "takes them to the heart of the EU's legitimacy," she says.

Transparency International also criticises the EU

Secret legislation bypassing EU law? This is a serious accusation. But, O'Reilly is not alone. Transparency International also warns of the "gap in accountability" and the "democratic deficit" in the Council apparatus. "It is not possible to follow the legislative deliberations in the Council properly," the civil rights activists write in a detailed study they will present next week.

The same complaint is being made by parliamentarians from 20 national parliaments and with them prominent lawyers, including the former Advocate General of the European Court

of Justice, the Portuguese Miguel Poaires Maduro. The Council's secrecy practice "contradicts the applicable case law," he said in an interview with [Investigate Europe](#). The European team of journalists has therefore begun a long-term research into what happens when national diplomats forge the laws for the EU. The first results open up insights into a largely unknown sphere of politics. In the Brussels Council

- not elected politicians, but national government officials, legislate, so the rules of confidential diplomacy apply, not those of a transparent democracy;
- diplomatic secrecy hinders decision-making and public discourse, which is why dozens of important legislative proposals have been stuck and failed for years without the citizens ever knowing about them;
- reforms to tax policy in the protection of secrecy will be blocked as well as a quota for women on supervisory boards. Ironically, the long-term record is held by a regulation for greater transparency, which has been hanging in the nirvana of the negotiations for twelve years;
- those responsible for their results and their mistakes almost never have to justify themselves publicly, which allows lobbyists and crooked deals behind the backs of the electorate.

4000 meetings and 150 committees

All this is happening in a powerful apparatus which, unlike Parliament or the EU Commission, is completely unknown to most EU citizens. It can only be seen when ministers meet under the colourful flags of Europe to exchange their views for the cameras or to give their formal blessings to decisions taken long ago.

However, the actual negotiation of the legislative texts takes place in more than 150 committees and working groups, in which officials from the national representations and ministries of the capitals meet. Their work is coordinated by the Council of Permanent Representatives, in EU jargon after the French acronym 'Coreper'. At its side is a "General Secretariat" which organises the complex wheelwork with 3,000 officials. Together, all the participants come to around 4000 meetings a year, which take place in the three council buildings, just opposite the headquarters of the European Commission, behind closed doors and without public protocols.



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How dysfunctional this legislation - decided often by diplomatic means - is, is demonstrated by the fate of a bill with which the EU Commission wants to combat one of the greatest injustices of the globalised economy: tax avoidance by multinational corporations. They often book their profits where, as in Ireland, tax rates are particularly low, even though they generate the associated turnover in other countries.

Just over 40 percent of all corporate profits worldwide are shifted to such tax evasion centers, [calculates the team of economist Gabriel Zucman of the University of Berkeley](#) in California. According to the Commission's estimate, this costs EU-country treasuries up to EUR 70 billion a year, as much as almost half of the EU's annual budget.

That is why the Commissioners want to oblige all international companies operating in the EU with annual turnover of more than EUR 750 million to disclose how much tax they pay on what income in which country. The so-called "public country-by-country reporting will help to investigate the tax behaviour of multinational companies" and "encourage them to pay taxes where they make a profit," [the Commission argues](#). For big banks, which have had to report this since 2014, it has already had the desired effect through them reversing their tax evasion. The EU Parliament therefore adopted the draft as early as June 2017, knowing the vast majority of EU citizens behind them.

The law does not exist - to this day

The law still does not exist today. Because behind the veil of diplomacy, the corporate lobby managed to organise a blockade in the Council. The most important helpers were and are the economic ministers of the German Federal Government. They objected because it was alleged to be a disadvantage for German companies in international competition, as the current minister, Peter Altmaier, claims.

This is not credible, because the law is intended to apply to all companies operating in Europe, including those from China or America. And data that may reveal trade secrets may be reported in a delayed manner anyway. But the German stance follows the line of the lobby group Stiftung “ Familienunternehmen” (family owned businesses), which, contrary to the name suggests, mainly represents large companies such as Lidl, Henkel or Oetker.

However, no government alone can block a law for the EU's internal market, not even the German one. As a rule, a bill requires a double qualified majority: **the supporters must represent 65 percent of the population and 15 Member States, then it is adopted.** The rule protects small countries from the supremacy of the large ones and makes perfect sense. Conversely, however, it says that 36 percent of the population or 13 governments are enough to prevent new laws.

Such a blocking minority is therefore the perfect tool for internationally organised lobby groups to stop or dilute inconvenient legislative proposals against the will of the majority. And that is exactly what is happening with the proposal to force corporations to be transparent about taxes. For years, there were always enough allies for the German position. But who are they? The electorate did not know which governments, together with the Merkel coalition, are protecting the tax avoiders. Consequently, the ministers involved did not have to justify themselves in the other states.

Program and behaviour stand in complete contradiction

This only changed when the MEP Sven Giegold published the list of naysayers with the help of an informant a year ago. And it was quite surprising. Willing helpers were not only the governments of the Irish, Lithuanians, Luxembourgers, Maltese, Czechs, Hungarians or Cypriots, who themselves with lax tax laws invite the transfer of corporate profits. The Social Democratic governments in Sweden and Portugal, whose parties publicly promise the opposite, were also present.

When Investigate Europe reported on this in both countries, protests arose. This is "incredible," said Ana Gomes, a long-time MEP for Portugal's Socialists. "The government programme and the behaviour in the Council are completely at odds." Promptly, the government changed its position and Lisbon's Economy Minister Siza Vieira assured his approval.

This would have allowed a sufficient majority for the law for the first time in November 2019. But in the crucial session - contrary to what had previously been announced - the Croatian minister suddenly opposed it, and the chairman called off the vote due to a lack of a necessary majority. The Croatian Government does not provide any information on the motive for the unexpected 'no' vote.

But a question from the left in the Bundestag revealed that Economy Minister Altmaier had spoken with his Croatian counterpart Darko Horvat about the issue two days before the vote, as the Federal Government had to admit. His spokesman declined to say whether Altmaier was under pressure or offered a deal.

The attempt to bury the law failed

However, the attempt to bury the law has not yet been successful. Austria's government, which had previously voted with the Germans, has since moved to the supporters' camp, a spokesman for Vienna's finance ministry confirmed. That is why there would now be a qualified majority if it were to be put to the vote. But that is precisely what the German Government is once again preventing. Because she currently holds the six-monthly rotating presidency of the Council, it is up to the Merkel cabinet to set the agenda for the Council meetings. However, Germany and its Minister for Economic Affairs refuse to even open a vote on the matter. The law remains on hold and tax avoiders remain untroubled.

The method is commonplace. By negotiating without results, countless projects simply end up in nowhere when the minority of opponents cannot enforce their demands. [In](#) October, the official register of the European Parliament cited 30 laws that have been passed in Parliament but have been stuck in the Council for more than three years. Many of these directly affect the everyday lives of EU citizens, such as the rights of air passengers or the technical safety of products. Several bills on environmental protection and nature conservation have also been pushing governments forward for years. And the list would be much longer if the EU Commission did not withdraw many of its proposals at some point.



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The following case reported by MEP Evelyn Regner is archetypal. The Vienna Social Democrat, who has been a member of the European Parliament for eleven years, is responsible for the EU directive, which is intended to oblige public limited companies to increase the proportion of women on supervisory boards to 40 percent. As early as 2012, a broad majority in Parliament had voted in favour. After all, "it has long been proven that companies with enough women in management positions are more successful," says Regner.

But in the Council there was resistance from social-conservative governments such as in Poland, the Czech Republic and Portugal. And then "the typical big drop-off came," the MP recalls. The governments postponed the decision one by one, "and time and again I had to fight to keep the law in the race," says Regner. "They are diplomats who shy away from the decision in conflict, they fear the cultural struggle," she explains the phenomenon.

As a result, governments such as the German or Danish ones, in which quotas have long been the norm for women, have also moved to a common legal trick: they declared the EU not competent and women's rights a purely national matter. Or, as a spokesman for [Minister for Women, Franziska Giffey](#), puts it: there is a "reservation of scrutiny with regard to the legal basis". Because only the CDU sees it that way, while the SPD minister is in favour, the Federal Government is officially abstaining. In the Council, however, two-thirds of all votes are required for the adoption of a law. That is why abstention seems to be just like a 'no'. Because of "the rejection of eight other Member States", therefore "no qualified majority is achieved," explains Giffey's spokesman.



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But the federal government does not reveal who these eight are. The General Secretariat of the Council does not provide any information on this either. Investigate Europe could only find out unofficially with the help of a friendly Brussels diplomat. In addition to the Germans and Danes, the Swedes and The Netherlands are also on the brakes, and with populists and conservatives in Poland, Hungary, Croatia, Slovakia and Greece, they are forming a blocking minority. For eight years, social liberals have been acting with right-wing conservatives in an unholy alliance against more women's rights. At national level, this would be impossible. But behind the closed doors of the Council bodies, the ministers responsible do not have to fear protests.

Promised to democratise the EU

But, in principle, everything should be very different. When Europe's leaders launched the modern EU with the Lisbon Treaties 13 years ago, they promised to democratise the Union. Citizens should be given an explicit opportunity to participate. "Decisions will be taken as openly and as closely as possible to the citizens," they wrote in the text of the treaty. "In order to promote good governance and ensure the participation of civil society, the Union institutions shall act in the greatest possible respect of the principle of openness," it continues.



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Parliament and the Commission have also largely complied with this. But national governments still do not want to allow this to apply to their own actions as legislators. To do so, they hide their negotiations behind a legal wall of silence i.e. Regulation 1049 of 2001 on 'public access to documents' of the EU institutions. This allows documents to be kept under lock and key 'if disclosure would seriously affect the decision-making process of the institution'.

This is precisely what the officials of the Council Secretariat rely on when, on behalf of the governments, they refuse journalists or activists documents showing which government takes what position on a legislative project. The formula can be used as desired and is used even when there is nothing left to hide. Last April, for example, the Council even refused to consult three-year-old documents dealing with the negotiations on tax transparency for corporations. At that time, everything had been said long ago, and even a majority for the law would have been possible if it had been put to the vote. But the German government was keen to avoid public debate and refused.

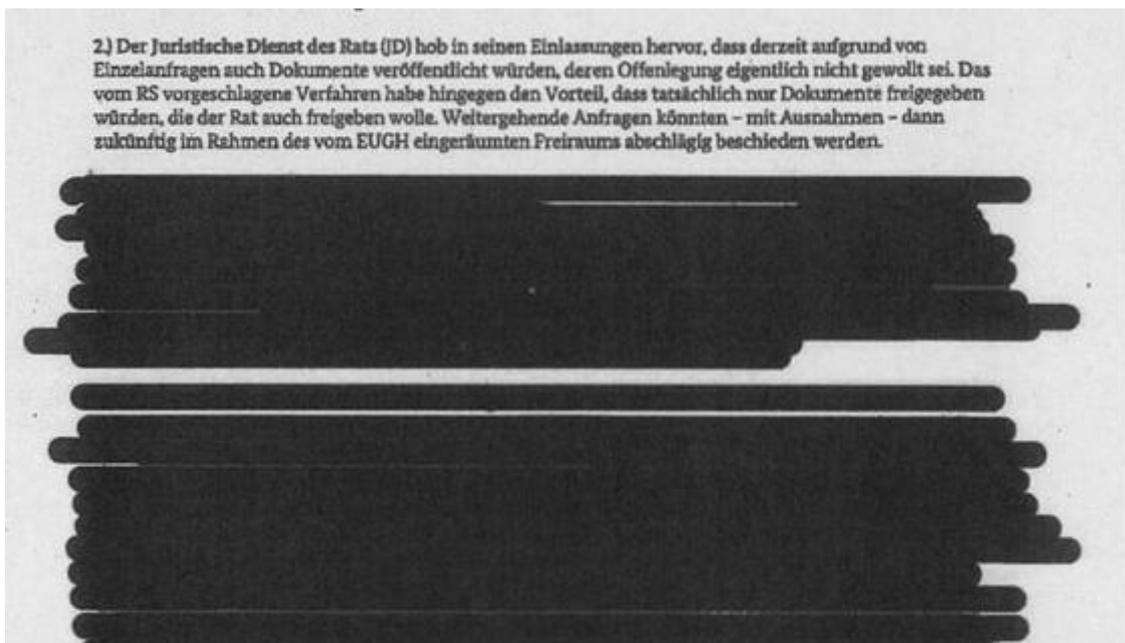
France's government also played a part. Because "the dossier is still being discussed" could "seriously affect the ongoing decision-making process," the French representative wrote in the minutes sent to Investigate Europe. The documents remained classified.

The case illustrates how outdated the regulation is and preserves the spirit of the old EC. As early as 2008, the EU Commission had therefore proposed an amendment to adapt the rules to the Lisbon Treaty. Parliament adopted an even more far-reaching version in 2011. But the governments have been refusing to take a decision on the reform for twelve years, making transparency reform the oldest draft law to be stuck in the Council.

The reports on transparency are also secret

Ironically, the Council Secretariat even keeps secret the reports on how the Council should deal with the demand for greater transparency raised by Ombudswoman O'Reilly and, with her, the European Parliament. In order to find out more, the reporters from Investigate Europe submitted requests for access to the files of the relevant ministries of several states. The result is sobering. The French government quickly defined the issue as part of foreign policy, for which citizens "in principle" do not have the right to access the file. In Sweden, where the government otherwise follows strict transparency rules, it released the files.

But all the passages described, which representative as argued, were blackened/ redacted. The Foreign Office did the same. The disclosure of the blackened passages "would damage the necessary confidentiality of ongoing international negotiations," the official in charge wrote. The federal government must be "able to conduct negotiations without unauthorized outside influence." In short, there is not even transparency about the course of the transparency debate.



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This sounds a little ridiculous like secrecy by principle. After all, influencing legislation - even without permission - is a feature of democracy. But behind the argument is the strategic dilemma of European integration. Because the economy has long been intertwined across all borders, the majority of laws must apply across the EU, including European decisions. However, there is no elected European government, only 27 national ones. And their politicians promise their voters to first defend supposedly national interests in Europe.

The enormous tension that arises from this has been followed for decades by the French diplomat Pierre Sellal. For three prime ministers, he coordinated EU policy in Paris. For a total of 15 years, he was France's ambassador to the EU and earned a reputation among colleagues as the "Oracle of Brussels" who brings all the strings together. In this respect, Sellal is certainly not an anti-European. But he is convinced that "the diplomatic effort that constitutes a European negotiation cannot be mixed up with a discussion in the public arena."



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In the council, there is "always a moment when one or the other says, 'Now I have told you what my instructions are, I am removing myself from the official discussions for a moment, so I can go in the search for a compromise elsewhere.' And at some point the chairman says, 'I know all your national positions, could we try to find a solution in this direction that is different from your instructions?'" But this cannot be discussed publicly, the savvy ex-diplomat assures. "If you were to make this public, you would immediately have someone to say, "What is the name of this official paid for by our taxes who is considering something other than the subject of his instructions?" Such a thing must take place behind closed doors, Sellal says. If "everything that happens in the council chamber has to be public, then we have breakfast or go to the bar and talk. I don't think that improves efficiency."

"Little room for manoeuvre"

Michael Roth, Germany's Minister of State for Europe at the Foreign Office, sees it very similarly. The Federal Government is committed to "making more of the work in the Council public". But for Ombudswoman O'Reilly and the European Parliament to call for the early

announcement of the positions of individual governments, "I see little room for manoeuvre at the moment," Roth said [in an interview with Investigate Europe](#). "This concerns the preparatory meetings in the working groups and the Permanent Representatives Council." There, "confidentiality is needed to have a protected space for the difficult search for compromises." To infer from this that the EU is legislating created under "secretiveness" is "a distortion of Europe that is dangerous and plays into the hands of nationalists and populists," Roth says.

Is closedness alienating citizens from politics?

O'Reilly and her supporters in Parliament see it the other way around. Negotiating "behind closed doors risks alienating citizens and feeding negative feelings against the EU," she warns. Because Roth and his colleagues have kept everything secret until a law has been passed, voters always only experience EU policy as a creation of a *fait accompli*, because they do not know what is going on beforehand. By contrast, O'Reilly stresses "the legitimate right of citizens to influence." That is why the Council must inform at a 'reasonable time' before everything is done. Even then, there would be plenty of room for confidential negotiations.

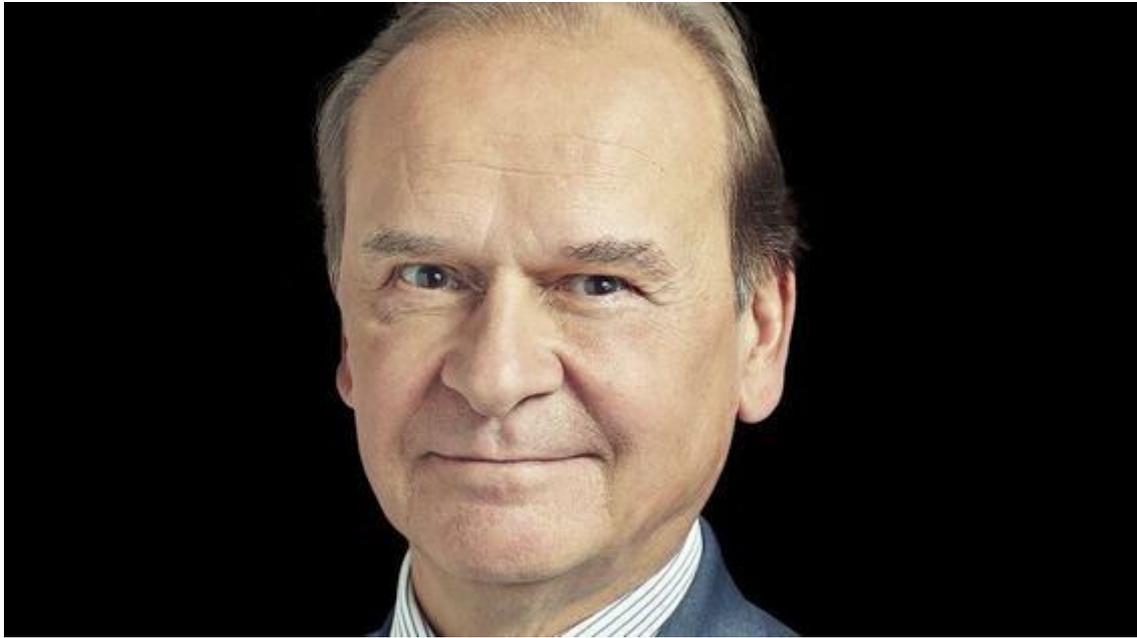
This change is also demanded by Linn Selle, President of the European Movement Germany (EMGD). "Our politicians still run Europe as a foreign policy," she says. "but it should just be about normal governance." For this, "participation is necessary, and this cannot be done without transparency," she demands, knowing that from employers to trade unions to environmentalists, large sections of society, whose associations carry their organisation, are behind them.

Nothing has yet arrived from the cultural change

To achieve this, Selle and O'Reilly are betting on a cultural shift that has already begun, as the Ombudsman says. However, nothing of this has yet arrived in the everyday life of the Council machine. Governments even refuse to respond to the Ombudsman's or the European Parliament's demands. Nor did any of the senior officials want to answer Investigate Europe's questions. But the Council will probably not get away with it for long. For the critics have a powerful ally: the European Court of Justice. This is what the Dutch lawyer Onno Brouwer has achieved. The lawyer, a partner in the main profession at the large law firm Freshfields for business law, has also represented activists and parliamentarians pro bono in their dispute over transparency in the EU for many years.

On several occasions, the Luxembourg judges have had to negotiate the complaints made by Brouwer for access to information on what is happening in the Council. And so far, they have always been right in their claimants. The ruling by which they decided in favour of the access-info organisation in 2012 was a landmark. The latter had appealed for the publication of the national opinions on the amendment to the Documents Regulation and was fully

entitled. The judges rejected the usual claim that this undermined the decision-making process.



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Even more spectacular is a verdict of March 2018. At the time, Emilio de Capitani, formerly head of the secretariat in the EP's Committee on Legal Affairs, had, with Brouwer's help, complained that the Council's positions would be published during the negotiations with Parliament. The judges also upheld this claim. And [their explanatory statement](#) reads like a leaflet from civil rights activists. "Transparency in the legislative process in particular" contributes "to giving the institutions greater legitimacy in the eyes of European citizens ... because it makes it possible to openly discuss differences between several points of view," the judges wrote.

"The opportunity for citizens to find out about the basics of legislative activity is a prerequisite for effectively exercising their democratic rights," they clarified, adding: "In fact, it is the lack of information and discussion that can cause doubt among citizens, and not just about the legality of a single piece of legislation. , but also the legality of the decision-making process as a whole.'

"Like a defiant child"

It is all the more astonishing that this and other judgments have so far not changed the practice of Europe's most powerful legislator. "The institution behaves like a defiant child," Brouwer scoffs, "absolutely not" following the case law. The answer could therefore only be to "continue to go to court" in order to "call and shame those responsible." In the end, he predicts, "the judges will lose patience."

Investigate Europe is a team of journalists from nine countries who work together to research topics of European relevance and publish the results across Europe. In addition to the authors, Cécile Andzejewski, Wojciech Ciesla, Thodoris Chondrogiannos, Ingeborg Eliassen, Juliet Ferguson, Maria Maggiore, Paulo Pena and Elisa Simantke have worked on the research. The project is supported by the Schöpflin Foundation, the Rudolf Augstein Foundation, the Hübner & Kennedy Foundation, the Fritt-Ord Foundation, the Open Society Initiative for Europe, the Gulbenkian Foundation, the Adessium Foundation and private donors. **Media partners** include Il Fatto Quotidiano, Publico, Efimerida ton Syntakton, Mediapart, Gazeta Wyborcza, Klassekampen and Utrikesmagsinet.