

Enhancing transparency: how does Parliament get tailor-made information from the Government? Experiences from the Flemish Parliament

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1. Introduction

1. Information is power. It is true in everyday life, it is equally true for parliamentarians. When they initiate, discuss, propose to amend, or are invited to cast a vote on a Bill, MPs may gain influence and thus power over the law-making process, if they are, and can show they are, well informed on the matter under discussion. When scrutinizing the Government's policy parliamentarians may bring cabinet members into real trouble if they show to have the same or even better knowledge of the matter as their political opponent. The cabinet member may then be forced to give real answers to real questions, and may not hide his or her uncertain position in a continuous flow of vague words.

2. This is where MPs are confronted with a paradox. On the one hand, as children of their time they are swamped with endless streams of information through digital, social, audiovisual and print media, both from private and official sources, giving them ample opportunity to get informed at any time and any place on nearly every issue that causes minor or major concern in society. On the other hand, as children of their political system MPs lack direct access to specific information sources available to the government, which would enhance the ability to make profound assessments of government policy. In other words MPs have at the same time too much and too little information, they fight information overload, and at the same time they are confronted with an information gap vis-à-vis the government.

Of course, it is true that not all MPs feel this paradox to the same extent: MPs of the majority groups may have good contacts within the government and its administration; other MPs may have gained specialized knowledge in a certain field because of their education, former or actual professional activities outside parliament, their personal informal contacts with interests groups etc. Nevertheless there is in general a strong need of tailor-made information, information which fits the duties of the MPs, information which is accurate, up-to-date and relevant, and gathered, selected and presented to MPs in a systematic, cost-efficient way.

3. Most Parliaments use a dual strategy to support individual MPs in their search for relevant policy information. On the one hand parliament, as a political institution, uses political and formal legal means in order to encourage or even force the government to share its information with the parliament; on the other hand it may, as an independent administrative body, set up its own information and research services, independent from the government, to search, select, disclose and disseminate tailor-made information from external sources to the MPs. This paper will concentrate on the first strategy, using as an example the experiences and initiatives taken by the Flemish Parliament in this field.

Just to situate, Belgium is a federal state with entities (regions and communities) with a great amount of autonomy, each with its own institutions. Flanders is in terms of population and wealth the largest region, the Flemish Parliament is its legislative body. It

has full and exclusive legislative powers in a great number of areas (education, culture, economy, local authorities, health care, agriculture, environment etc.), and administers a budget of approximately 38 billion euros.

2. Just ask the government

2.1. Individual questions

4. In a parliamentary constitutional system it seems to be fairly easy for a parliamentarian to obtain information from the government; you just have to ask for it, using the means granted to parliamentarians by the Constitution or the standing orders of your parliament: written questions, oral questions, interpellations. However, the first aim of these instruments is not to collect information, but to scrutinize and challenge the Government's policy. MPs ask questions to provoke the minister to express his opinion or his intentions on how to deal with a certain problem, to force the minister to make some promises, to hold the government accountable for decisions taken or not taken. In some cases the mere fact of putting a question is just part of a political game, for instance when an opposition Member already knows the answer to his question, and just wants to see what will be the Minister's reply. This creates for the MP in a second move an opportunity to criticize the Minister in public on the basis of other information already available to him or her. There may still be other motives to put a certain question to a Minister, e.g. the MP wants to show the electorate that he or she is concerned, or just seeks media attention. Still, one must agree that parliamentary questions remain an important source of information, for the MP and the public as well.

5. For parliamentarians the use of parliamentary questions to a minister as a means to collect information has a lot of advantages: the MP may ask (nearly) as much as he wants, the deadline for answering the questions is fairly strict, the burden of information-seeking is entirely on the side of the Government.

There are, however, also some disadvantages: this information-seeking is entirely dependent on the repeated and personal initiative of individual MPs, it is unstructured and uncoordinated, with no follow-up mechanism, and it is not really cost-efficient. Moreover, it is not the best instrument to obtain documentary information. Let us therefore have a look at some possible alternatives, as they are used in the Flemish Parliament, both in the framework of parliamentary oversight as in the law-making process.

2.2. Active information policy by the Government

6. The Flemish Parliament has installed in a collective way a number of structural information flows from the government to parliament. The aim is that Parliament be informed by the Government in a structured and systematic way about matters of general interest, independent of the right of individual MPs to put questions to the Government. It is hoped that this would make parliamentary scrutiny more efficient and effective: the stage of pure information retrieval could then be skipped, as this information would be right away available, and parliament would be able to debate immediately and in an informed way on the responsibilities, actions and non-actions of the Government. More specifically the Flemish Parliament has organized such structural flows of information on general government policy (2.2.1.), on the activities of government agencies (2.2.2.), and on the progress and follow-up of long-term projects and important investments in public infrastructure (2.2.3.).

2.2.1. Information flow on general policy

7. Traditionally the Flemish Region is governed by a coalition of two or more political parties. After the elections the majority party leaders negotiate over a *coalition agreement*, which is a fairly detailed working program for the next five years, presented to and approved by Parliament. A coalition agreement focuses mainly on novelties, on new initiatives, it does not cover – and certainly not in detail – the whole of the powers granted by the Constitution to the Executive.

8. This is where the policy memoranda and policy papers come in. Both documents are to be submitted by the Government on the basis of the basic Flemish law on budgetary matters and the standing orders of the Flemish Parliament.

In the first year after the elections, before the end of October each Minister should introduce to Parliament a so-called *policy memorandum* for each policy field separately. These policy memoranda of about 50 pages each – in 2014 we had 26 of them - all have a similar structure: an analysis of the actual state of the policy field concerned, a number of strategic and operational goals for the next 5 years, a list of legislative measures to be taken (although without any timing indicated) and a table linking the different strategic and operational goals to specific budget item.

In the following four years the ministers draw up an annual *policy paper* per policy field, together with the budget. These policy papers face in two directions. As they are linked to the budget, they look forward to the next year, explaining the main initiatives to be taken in the budgetary year to come, including the planning of legislative initiatives. At the same time the standing orders of Parliament force the government to look back, and to report in these annual policy papers on the results of the policy conducted so far: to what extent have the strategic and operational goals been attained? What is the actual budgetary situation ? But also quite specific : have recent Acts of Parliament been duly and fully executed by the Government ? Which actions did the Government undertake following resolutions or motions adopted by Parliament ? How did the Government react on recommendations of the Audit Court, or on decisions of the Constitutional Court or the European Court of Justice, declaring Flemish Acts of Parliament contrary to the Constitution or European Law ?

9. The use of 5-yearly policy memoranda is generally applauded by the MPs. They give insight in the short-, mid- and long-term plans of each Minister; the parliamentary committees take enough time to discuss these memoranda in detail. The same is true for the annual policy papers: they are highly appreciated by the MPs as instruments for information transfer. They contain a lot of much wanted and very relevant information for the MPs, they allow the standing committees to hold each year a profound and global discussion on each policy field for which the Flemish Government holds responsibility. As the categories of information to be included in these documents are defined by parliament in advance, it makes it for the Government more difficult to hide any unpleasant information from Parliament. At the end of all discussions on memoranda and policy papers the Flemish Parliament normally adopts a number of motions with recommendations to the Government.

Personally I believe that there is one minus relating to the timing and part of the contents of the policy papers: by linking these papers to the parliamentary proceedings on the budget, each year in late autumn, and prescribing that these papers should explain the plans of the Government for the next year, the proceedings become locked into the tight time schedule which is typical for the approval of the budget. In my view it would be better to limit the contents of these policy papers to follow-up information, not

looking into the future but mainly evaluating the government policy until then, and to schedule them in a less pressing period such as springtime.

2.2.2. Reports on the activities of government agencies

10. The Flemish Government has installed an impressive number of government agencies with specific tasks and a various degree of autonomy. For the Flemish Parliament it is important to be informed on their activities, as Ministers may be held accountable for the performances of these agencies. Therefore in most laws granting corporate rights to such government agencies there is a clause obliging the agencies to submit an annual report on their activities to the Flemish Parliament. The MPs are informed of the fact that reports have been submitted. It is up to them to use them, either by asking questions to the minister on the basis of the information contained in such annual reports, or to propose a parliamentary committee to organize a discussion or a hearing on this report.

11. Some annual reports are the basis for repeated debates (such as the one from the public broadcasting organization VRT), others are sporadically a source of inspiration for a parliamentary question, but there is a feeling that most annual reports are not used as much as they could or should be. There may be numerous reasons for this. First there simply may be too much annual reports, as there is a huge amount of government agencies, and these reports tend to be rather extensive. So it is just a question of information overload. Secondly, all these annual reports have different tabling deadlines, which makes it difficult to scrutinize whether all these agencies do fulfill their reporting duties. So there may be a challenge in streamlining this flow of information. Thirdly these reports arrive in Parliament, but maybe they are not brought to the attention of the MPs in an appropriate way. So then it becomes also a question of organizing the information services of parliament itself. Fourthly there might be something wrong with the contents of some of these annual reports. In most cases the law merely requires that there be an annual report on the activities of the agency, without specifying what kind of information should be provided, thus granting full freedom and autonomy to the agency concerned to determine its contents. This is not without risk, as some agencies may consider the annual report to be a useful image-building document rather than a document allowing Parliament to evaluate the functioning, the financial state, the input, output and outcome of the actions of the agencies, to hold the government accountable for dysfunctions within these agencies, or to legislate when agencies have pointed out problems in implementing laws in force. Here too it is important for MPs not to be drown under heaps of information, but to receive tailor-made information on the activities of these agencies. The administration of the Flemish Parliament recently has started a project to look at all these aspects, and see what can be done to make the time-consuming activity of making annual reports more useful for parliament.

2.2.3. Follow-up reports on long-term projects

12. A Flemish law of 8 November 2002 contains a specific mechanism for parliamentary oversight on important infrastructure projects with substantial financial consequences and risks for the Flemish Region. The Act states in detail which types of information the Government should provide to Parliament on such projects, both at the stage of preparation and decision-making, as at the stage of execution of the project. The Government informs Parliament at regular times by means of a progress report. Presently, this technique is being used for one major infrastructure project "Masterplan Antwerp 2020" which is in fact a cluster of projects to improve mobility in and around Antwerp, the most expensive and controversial one being the completion of the circular motorway around the city. Each six months the Flemish Government introduces a

progress report to Parliament, it is then analyzed by the Belgian Court of Audit that controls the quality of the information provided, i.e. the relevance, the transparency and the reliability of the information. On the basis of these documents the members of the parliamentary Committee on Mobility and Public Works discuss the progress made and question the ministers on the delays, legal setbacks, financial derailments etc. linked to this project.

13. The technique of the progress or follow-up reports is generally applauded in Flemish Parliament, both from the point of view of efficiency and effectiveness of parliamentary oversight. In fact this model is now copied in some other areas, not necessarily in the field of public works. For example, on 30 May 2007 Flemish Parliament adopted a resolution requiring the Government to report on a regular basis on all projects which are financed in an alternative way (through public-private cooperation). One can imagine that the same instrument could be used to follow-up long-term government projects or action plans such as the struggle against poverty, climate change, equal chances for men and women, or for migrants on the labour market, etc.

2.3. Documentary information

14. According to the standing orders of the Flemish Parliament parliamentary questions and interpellations are instruments to control the Government's policy, not (exclusively) to obtain documentation. When an MP puts an oral or a written question to a Minister, the latter may not just send a document to the MP, stating that he or she may find the answer at page 27. The Minister must give a personal answer, for which he is entirely responsible; in his answer he or she may, of course, quote from existing documents.

15. If an MP needs documentary information, in particular non-published Government papers, he may use under the same conditions as any citizen the Freedom of Information Act, which in fact in Belgium and Flanders is an Act on the Free Access to Government Documents. On the basis of this Act any citizen may request to see or to receive a copy of any document present in the Government administration. He or she cannot request the administration to create a document, make statistics, write an overview of..., etc. (and this is a disadvantage compared to ordinary parliamentary questions), but may only request access to existing documents, statistics, overviews etc. In principle all these documents are freely accessible, but the said Act does contain a number of exceptions to this free accessibility (e.g. for privacy reasons, the protection of commercial secrets etc., or if the request is too broad or too vague).

16. It must be clear that the organized access to governmental documentary information is not an alternative for parliamentary scrutiny. Free access to governmental documents on the one hand and parliamentary scrutiny of the executive on the other hand each have their own goal, although the need for transparency is common to both. For parliamentarians the right of free access to government documents is rather a preparatory instrument: an MP who is well-documented, will stand stronger when challenging the Minister's policy.

17. Members of Parliament often are hesitant to use the right of free access, they believe that as an MP they simply should have the privilege of receiving any governmental document right away. However, they should not neglect the many advantages of using the Freedom of Information Act: the requests get a guaranteed quick reply, all contacts with the administration may be delegated to the personal collaborators of the MP, refusals from the administration to give access to the documents may only be motivated on legal grounds, not on grounds of political opportunity, and they may be appealed in an administrative, costless, quick and again strictly legal way. Once you have been given a copy of the document requested, you can decide for yourself to keep it secret, or to

publish it and to use it in a political fight. Parliamentary questions by contrast are per definition a public matter and published or publicly reported, for the simple reason that the MP is not holding a private conversation or conducting a private correspondence with the Minister, but is acting as a representative of his electorate. The public nature of all scrutiny activities of the parliament is therefore essential.

18. Because of this hesitation several initiatives have been taken by the Flemish Parliament to improve the MP's access to non-published government documentation.

First, since a few years the Flemish Parliament and the Flemish Government have agreed that the MPs be granted access to a database, called DORIS-II, containing all decisions of the Flemish Government and the preparatory documents for these decisions. This extraordinary openness towards Parliament has no formal legal basis, but is the result of informal negotiations between the Speaker of the Flemish Parliament and the Minister-President of the Flemish Government. It certainly has become one of the more popular instruments for information-gathering, especially for the opposition MPs.

Secondly, since a few years the standing orders of the Flemish Parliament contain some rules encouraging the Government to make documentation available that otherwise would be confidential. There is no obligation for the Government to use this procedure, but if it does, then it may determine the conditions under which MPs may get access to the information (e.g. no copies or photos); and MPs not respecting these conditions will be sanctioned with a fine.

Thirdly, the Flemish Parliament has introduced a so-called follow-up register for promises made by Ministers. This register was invented to respond to the phenomenon that a Minister in the heat of a debate promises the MPs to send them all kind of information requested, and that afterwards nothing happens. The register enumerates all promises; if the Minister 'forgets' his promise he will receive after a while a letter from the Speaker reminding him or her of the promise made. It was feared that this mechanism would be counterproductive, that Ministers would no longer make any oral promises during a debate, but in practice there is no indication that this is the case.

3. Be well-informed before you legislate

19. Parliamentary scrutiny of the Executive is a game between institutions, with no immediate effect on the population. Legislating by contrast does have a direct impact on the population, on social and economic everyday life. This is where parliament not just monitors what others (the government) do, but where full responsibility for the decision-making lies with parliament itself. Moreover, legislating is not just a political activity, for which Parliament can be held accountable by the voters. It is also about granting rights and imposing duties, it is a legal activity monitored by independent courts, the Constitutional Court of Belgium, the EU Court of Justice and the European Court of Human Rights. And finally, if legislation is badly drafted, incomprehensible, impossible to implement, parliament will be the first to be criticized in the media. With critics all around, parliament should operate very carefully when legislating. One of the elements that adds to the carefulness is: being well informed before you legislate.

20. Most laws come into being on the initiative of the Government. There lies a long way from the first idea to create or change a law to the moment that a Bill is formally introduced to Parliament. Schematically the procedure consists of the following stages: (1) in a selected number of cases where important legal reforms are at hand the Government may draw up a concept note or a green paper, which is the basis for discussion with stakeholders; (2) upon instruction of the minister the administration makes a regulatory impact assessment with several options, has contacts with experts

and stakeholders, chooses one option, and writes a draft Bill; (3) once the draft Bill is approved in principle by the Government, the opinion is sought of one or more of the strategic advisory bodies (composed of experts in the field and representatives of several economic or social sectors); (4) the text may be changed or not, and is then sent for legal advice to the Council of State, which is an independent legal advisory body for all Belgian legislators; (5) the Government approves the final version of the Bill, and files it with parliament.

Several initiatives have been taken in recent years to ensure the Flemish Parliament be better informed during the whole legislative process.

21. First. The use of concept notes, green or white papers, is a practice which only recently has developed. Such documents are drafted in the first place to consult stakeholders, interest groups, who will undergo the consequences of the new regulation in project. However, these notes are also sent to Parliament, where they will be discussed in the competent Committee. So Parliament is informed about the ideas of the Government on a certain matter in an early stage of the legislative procedure, in fact long before a Bill is submitted. The Committee may formulate recommendations to the Government on the subject. However, Parliament is not a stakeholder or an advisory body for the Government, it is a co-decision-maker that only speaks out pro or contra the reform proposed, at the moment when it casts a final vote on the law incorporating this reform.

22. Secondly. On the basis of an informal agreement the Government sends the draft Bill to Parliament to inform the MPs on what is coming up in the near future. In this way the MPs have ample time to study the Government proposal and collect further information on the subject matter, as to be fully prepared at the moment the Bill is submitted. However, at the stage when the draft Bill is sent to Parliament, the MPs do not have the right to ask any questions to the Government about this, as the Government has not taken a final stand on the text thereof. Discussions may only start when the final Bill is introduced to Parliament.

23. Thirdly. When the Bill is introduced, the rule is that the Flemish Government sends all official information that was available to the Government at the moment when it gave its consent to the final version of the Bill, is also made available to Parliament. This means that Parliament receives: the Bill itself with an explanatory note, and all preceding documents, i.e. the impact assessment made by the administration, the initial draft Bill, the advices of the strategic advisory bodies and the legal advice of the Council of State. All these documents are put together, and published as a parliamentary document on the website of the Flemish Parliament. They contain a lot of material that may be used in the discussions on the Bill. In practice, however, not all material is equally popular with the MPs, with on one extreme the impact assessments which are seldom used in the parliamentary debates, and on the other extreme the legal advice of the Council of State, to which MPs fairly often refer, especially in case the Government refuses to change its initial draft after a negative advice by the Council of State on the whole or parts thereof. The overall impression is, however, that all these documents together make up an enormous pile of paper, and that MPs do not have the time to work their way through all these documents. In fact, as useful as it may be in theory, this extensive documentation may distract the attention from what is really important, i.e. the text of the Bill itself. It is therefore important to create a synthetic document explaining the background, the history, the goals, the impact and the major provisions of the draft of law. This document is the explanatory note.

24. Last year Flemish Parliament and Government have agreed on non-binding directives for the structure and contents of these explanatory notes. The aim is to avoid that the Government would use the explanatory note just to promote its own choices, and would remain silent on relevant aspects, such as possible negative effects of the proposed legislative measures or expert opinions and suggestions for valuable alternatives made

by representative stakeholders during the regulatory impact assessment; or legal critique by the Council of State on the conformity of the proposed law with the Constitution, with EU-Law, with human rights conventions. It is therefore accepted that all key information should be found in the explanatory note and of course in the draft itself, and that all documents annexed to the draft and the explanatory note are just for documentation and further study. It is hoped that by adopting directives on form and contents of the explanatory notes, the informational value thereof, the motivation for the Bill and thus the transparency of the law will be enhanced. Three elements to illustrate this:

a) as explained before one of the main independent sources of information is the legal advice of the Council of State. It is, however, not easy to understand such advice in all its details and to evaluate the importance of the remarks made by the Council. To do so, one should not just read this legal advice, but also the initial draft Bill – because the advice is an advice to the Government on this draft, not on the final Bill submitted to Parliament – and compare the initial draft with the final Bill in order to assess whether the Government has taken the Council's legal critique on the initial draft Bill into account. This time-consuming activity becomes to a great extent superfluous, once the Government is obliged – as is now prescribed by the said directives – to indicate in the explanatory note if and why the Government does not agree with critical remarks made by the Council of State;

b) reading a draft law changing existing law, may prove to be extremely difficult, if no coordinated version is drawn up, making visible how the law would look like if the proposed Bill were to be adopted. Normally this job has been done already by the Government administration, when it was drafting this Bill. Therefore the directives now require the Government to include in the explanatory note a coordinated version of all Sections of existing laws for which changes are being proposed;

c) the explanatory note to Bills transposing European Directives must include transposing tables, allowing the MPs to check whether the transposition process is correct and fully completed, but at the same time helping the MPs to understand that they do not have an unlimited right to amend the Bill: they may only amend it in so far that it does not violate Belgium's obligation to transpose the European Directive into national law.

25. These are just a few examples of measures to make legislative life of parliamentarians a little bit easier, with timely, accurate but focused information supply, directly from the authentic source of this information, which is the Government. Of course, this is not the end, in fact it is for parliamentarians just the start of their legislative activity. MPs will be searching further information, in the media, from interest groups and stakeholders, from parliamentary information services etc. And information gathering continues in the standing committees. They have several instruments at their disposal: they may ask the minister for additional information; they may request the strategic advisory body for additional advice; if amendments are put forward the Committee may request the Speaker to seek again legal advice from the Council of State on these amendments. By far the most popular instrument is the organization of a hearing on the Bill. It has more or less become the standard procedure. There is, however, in the Flemish Parliament no tradition of an open, 'unbiased' hearing, inviting all people with expertise, personal experience or stakeholders to express their opinions on the Bill. The Committees of the Flemish Parliament do not issue a general call to the public for – written – evidence relevant to the subject. In fact a written procedure is seldom used; in most cases there will be an oral hearing in committee. All speakers to be invited are proposed by the political party groups and selected by the committee. In such a procedure one must admit there is no guarantee that those who are critical to the Bill will be invited, although in most cases the majority party groups will seek compromise with the opposition parties, allowing a limited number of notorious critics. In any case the main aim of a parliamentary hearings with politically selected invited witnesses is not so

much to collect relevant, balanced and reliable information, but rather to find additional arguments to support one's political position to the subject.

4. To conclude

26. Information overload and information gap, too much and too little information at the same time: it is certainly no easy task to cut this Gordian knot. Any tool, any instrument, any initiative that would encourage or facilitate the creation and dissemination of tailor-made information sources, adjusted to the specific tasks of the MPs, is to be welcomed. In this paper we have focused on a number of political and legal initiatives taken in the Flemish Parliament in this field. They all come down to obliging the Government to share specific information (sources) with the Parliament in a systematic, regular way. The success of such institutional initiatives is not so easy to assess. It's up to each individual MP to use the available information in legislative and oversight activities.

20150630 This is a draft, still to be finalized. Any questions, comments or suggestions for improvement are welcome at Michiel.elst@vlaamsparlement.be .

The author, Michiel Elst, Ph.D. in Law, specializes in constitutional and parliamentary law, and in Russian law as well. He authored, co-authored and edited several books and articles in this field (e.g. on the right to petition, deontological rules of MPs, election law, division of powers in federal Belgium in the field of culture, tourism etc.). He is member of staff at the Legal Department of the Flemish Parliament and is guest professor at the University of Antwerp (Belgium).