

Commentary

The Puzzle of Transparency Reforms in the Council of the EU

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Abstract

I argue that the transparency reforms that have been implemented in the Council of the EU in the last decades are unlikely to change the perception of the Council as a non-transparent institution. My argument is based on three distinctions: the distinction between transparency (availability of information) and publicity (spread and reception of information); between transparency in process and transparency in rationale; and between plenary and committee decision-making arenas in legislatures. While national parliaments tend to have all these features, the Council of the EU only has two (transparency in process and committee decision-making). As a consequence, publishing ever more documents and detailed minutes of committee meetings is unlikely to strengthen the descriptive legitimacy of the Council. Furthermore, I argue that the democratic transparency problem is the reverse of what is most often argued: It is not the lack of transparency that causes a democratic deficit, but the (perceived) lack of a democratic infrastructure that makes more serious transparency reforms unthinkable to government representatives.

Keywords

democratic deficit; European Union; intergovernmental negotiations; legitimacy; transparency

Issue

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Over the last two decades the Council of the EU has implemented a range of transparency reforms and rules, some of which are more radical than the rules that exist in national parliaments. Thousands of documents have been released, and legislative deliberations are regularly broadcast live on the Internet. So why is it that lack of transparency in the Council is still generally accepted as one of the major democratic deficiencies of the EU?

According to Simon Hix the Council of the EU is “probably the most secretive legislative chamber in the world”, including “the Chinese National People’s Congress” (Hix, 2008, p. 152), while Robert Thomson concludes that “there is no other legislative body in the free world that meets in such secrecy” (Thomson, 2011, p. 263). What does the Council have to do in order to be transparent, if publishing documents and broadcasting deliberations is not enough? What is wrong with the Council compared

to national, democratic legislatures when it comes to transparency?

One answer, of course, is that the Council should publish even more documents, and broadcast even more meetings.¹ If only we could see and hear exactly what not only ministers in the Council but also civil servants from the permanent representations and government ministries say to each other on each and every nitty-gritty working group meeting in the Council hierarchy, then the Council would be transparent and legitimate, and we would have solved a key democratic problem for the EU.

I think this is barking up the wrong tree. The reason why the Council is not transparent in the same way as “normal” democratic legislatures, and is unlikely to be so for the foreseeable future, is because it is not a normal legislature. In my view, the Council is already surprisingly transparent in some ways, but not in those ways that

¹ See, for example, Abazi & Adriaensen, 2017; Gheyle & De Ville, 2017; Hillebrandt, 2017, all in this issue, focusing on access to documents in the areas of foreign affairs and trade negotiations.

make people perceive it as transparent, and therefore find it legitimate.

I will make three conceptual distinctions to help sort out the puzzle of why transparency reforms in the Council do not seem to lead to (perceived) transparency. The first is the distinction between transparency and publicity. The second is the distinction between two types of transparency—transparency in process and transparency in rationale. The third is the distinction between the two faces of a normal legislature—the committees and the plenary debates.

Elsewhere I have argued for the importance of distinguishing between the concepts of *transparency and publicity* (and accountability) (Lindstedt & Naurin, 2010; Naurin, 2006). The concept of transparency captures availability of information. It refers to the degree to which information is made available about how and why decisions are produced within a certain institution. A transparent institution is one where it is possible for people inside and outside to acquire the information they need to form opinions about actions and processes within this institution. The information is there for those who are willing and able to seek it. Publicity on the other hand means that the information is spread to and taken in by people outside the institution. While transparency implies that there is documentation available about the actions of the representatives, publicity means that the content of this information has also become known among the citizens.

Clearly transparency will usually increase the chances of publicity. In most cases information that is easily accessible will stand a greater chance of also being spread. But there will be no publicity, i.e. no actual exposure of behaviour to a public audience, no matter how transparent the process or the institution in question is, if the available information about these actions is left unattended.

Jane Mansbridge has proposed the distinction between *transparency in process and transparency in rationale* as two main forms of transparency (Mansbridge, 2009; for an empirical application of the concepts, see De Fine Licht, Naurin, Esaïsson, & Gilljam, 2014). Transparency in process refers to information on actions, such as deliberations, negotiations, and votes, that took place among decision makers and directly fed into the decision. Such information may be made available in real time (fishbowl transparency) or in retrospect, after the decision has been made. The latter is applied by some central banks, such as the American Federal Reserve and the Bank of England, which release minutes of meetings and votes at some delay after the decision. The live broadcasting of meetings in the Council, on the other hand, is an example of fishbowl transparency in process.

Transparency in rationale refers to information on the substance of the decision and of the facts and reasons on which it was based. Such information is normally directed toward an outside audience, which may be affected by the decision, but is not involved in the decision-making. Conclusions, declarations, press confer-

ences after meetings, and, crucially (see below), parliamentary debates, are forms for achieving transparency in rationale.

Committees and plenary sessions are the two faces of parliaments. There is a clear division of labour between the two. The committees perform the deliberations and negotiations in the law-making process (to the extent that parliament has any real say at all, which in a parliamentary system depends on whether there is a coherent majority government in place or not), while the plenary takes care of the vote and the public debate. The behavioural logic that applies in committees prescribes focus on common ground, compromises and agreements. The logic of plenary debates is the opposite—to clarify differences between parties and positions. While committee meetings are integrative, plenary debates are adversarial. Committee meetings focus on problem-solving and concrete technical details, plenary debates on principles and ideologies.

A national democratic legislator normally has all of these five components to some extent. It has committees and plenary debates. The plenary debates, where majority and minority parties defend their positions and emphasise weaknesses of the other side, when they work well, produce both transparency in rationale and publicity. They make the technical details of committee meetings understandable to a broader audience by highlighting the political content of these technical details, and by drawing attention to alternatives and broader principles at stake. The weak spot of national legislatures is transparency in process, since committee meetings are usually closed to the public in order to provide the MPs with some space for candid talk and give-and-take negotiations. However, at least agendas and minutes of some form are normally available.

The Council of the EU, however, has only two of the five components. It has committee meetings in abundance. Committee decision-making is what the Council does all the time at all levels. The Council is decision-making machinery, and its method is committee meetings. The search for common ground among diverse interests is part of the Council's DNA. The Council also has considerable transparency in process (although it varies between different policy areas, with foreign policy clearly on the darker side) (Hillebrandt, 2017). Agendas and minutes of preparatory meetings are published (although the minutes may, on request, exclude the names of the member states that raised objections in the process). Position-taking in on-going negotiations may even be broadcast live (although under strict formats), something which hardly happens in parliamentary committees.

But the Council does not have the three interrelated components of clarifying plenary debates, publicity and transparency in rationale. When the committees have done their job, and the General Secretariat has shown the voting board to the cameras, which usually signals consensus in spite of sometimes years of tough negotia-

Table 1. The transparency and legitimacy puzzle.

Pieces of the puzzle	Meaning	National democratic legislature	Council of the EU
Transparency	Availability of information		
— in process	Pre-decision activities	Yes	Yes
— in rationale	Substance and justifications of decision	Yes	No
Publicity	Spread and reception of information	Yes	No
Committee	Negotiations	Yes	Yes
Plenary	Justification and debate	Yes	No

tions, the discussion is over. Since no minority views are heard (other than sometimes in the form of a short technical formal statement to the minutes) the majority does not need to justify its position and sharpen its arguments in public debate.

So the Council has some transparency, but not the type that makes people beyond a small circle of EU experts understand why the decision-makers decided the way they did (Table 1). Why is this the case, and what can be done about it? The first question is relatively easy, the second is much more difficult.

The reason why the Council is lacking transparency in rationale is that it is still more akin to an international organization than it is to the legislative chamber of a democratic polity. The members of the Council are representatives of states rather than parties. The conflicts played out in the Council concern national interests at the sector level, rather than general political ideas. The link between the members of the Council and their constituents is based less on political ideology than on geography.

Under these circumstances, it becomes difficult to have the type of plenary debates that create transparency in rationale and publicity. Plenary debates in the Council would not show left vs. right, or liberals vs. conservatives, but Germans vs. Greeks, and Poles vs. Italians. The reason why we do not see these debates is the fear among the members of the Council that we are not “European enough” to handle that.

Those familiar with the democratic deficit (DemDef) literature know the rest of the story: We do not have the democratic infrastructure in Europe to handle divisive public debates, according to this view. We don’t have a public sphere, and a European *demos* able to deal with such conflicts. Public debates in the Council may give transparency in rationale and publicity, i.e. understanding of who won and who lost and why, but rather than helping descriptive legitimacy it will destroy it, because people will not accept being outvoted by “others” on salient issues.

The transparency and the DemDef debates are thus closely connected. However, I believe that the causality is the opposite of what is often heard in these debates.

What is often heard is that a more transparent Council will be an important step towards resolving the democratic deficit of the EU. This is a misconception. In my view, it is the lack of a democratic infrastructure in the EU that is the main cause of the lack of transparency in the

Council. It is the absence of (or at least the perception of an absence of) a European *demos* that accepts defeats across borders—or, if you wish, European party politics with the potential of forming such a *demos*—that has led the Council to refrain from the debates that may produce transparency in rationale, the type of transparency that in turn may generate publicity and (maybe) legitimacy.

Can the Council be transparent not just in process but also in rationale? Is it possible to make ministers stay in Brussels, after they have found the necessary qualified majority in the committees, to give us a real public debate that demonstrates the main alternatives, identifies the interests and arguments behind each alternative, and clarifies the political ideological implications of each alternative, drawing out tensions that attract the media and create publicity? In theory, it is possible to initiate this through a simple change in the Council Rules of Procedure.

In practice, however, the ministers will want to go home after the decision is made. They fear a debate along geographical lines, invoking notions of “us” and “them”. In the end, it is up to us whether they are right or not; we, the people, who are the democratic infrastructure.

Conflict of Interests

The author declares no conflict of interests.

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