The Puzzle of Transparency Reforms in the Council of the EU
Naurin, Daniel

Empfohlene Zitierung / Suggested Citation:

Nutzungsbedingungen:
Dieser Text wird unter einer CC BY Lizenz (Namensnennung) zur Verfügung gestellt. Nähere Auskünfte zu den CC-Lizenzen finden Sie hier: https://creativecommons.org/licenses/by/4.0/deed.de

Terms of use:
This document is made available under a CC BY Licence (Attribution). For more information see: https://creativecommons.org/licenses/by/4.0
Commentary

The Puzzle of Transparency Reforms in the Council of the EU

Daniel Naurin

PluriCourts, University of Oslo, 0130 Oslo, Norway; E-Mail: daniel.naurin@jus.uio.no

Submitted: 16 March 2017 | Accepted: 3 May 2017 | Published: 25 September 2017

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

This commentary is part of the issue “EU Institutional Politics of Secrecy and Transparency in Foreign Affairs”, edited by Vigjilenca Abazi and Johan Adriaensen (Maastricht University, The Netherlands).

© 2017 by the author; licensee Cogitatio (Lisbon, Portugal). This article is licensed under a Creative Commons Attribution 4.0 International License (CC BY).

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 Coun-
cil do not seem to lead to (perceived) transparency. The
first is the distinction between transparency and pub-
licity. The second is the distinction between two types
of transparency—transparency in process and trans-
parency 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 distin-
guishing between the concepts of transparency and pub-
licity (and accountability) (Lindstedt & Naurin, 2010; Nau-
rin, 2006). The concept of transparency captures avail-
ability of information. It refers to the degree to which
information is made available about how and why deci-
sions are produced within a certain institution. A trans-
parent institution is one where it is possible for people in-
side and outside to acquire the information they need to
form opinions about actions and processes within this in-
stitution. The information is there for those who are will-
ing 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 be-
ing 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 ques-
tion is, if the available information about these actions
is left unattended.

Jane Mansbridge has proposed the distinction be-
tween transparency in process and transparency in ra-
tionale as two main forms of transparency (Mansbridge,
2009; for an empirical application of the concepts, see
De Fine Licht, Naurin, Esaissson, & Gilljam, 2014). Trans-
parency 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 deci-
sion has been made. The latter is applied by some cen-
tral 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 broad-
casting 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 rea-
sons on which it was based. Such information is nor-
mally 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), parlia-
mentary 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 parlia-
mentary system depends on whether there is a coher-
ent majority government in place or not), while the ple-
nary takes care of the vote and the public debate. The
behavioural logic that applies in committees prescribes fo-
cus on common ground, compromises and agreements.
The logic of plenary debates is the opposite—to clarify
differences between parties and positions. While com-
mittee meetings are integrative, plenary debates are ad-
versarial. Committee meetings focus on problem-solving
and concrete technical details, plenary debates on prin-
ciples 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 major-
ity and minority parties defend their positions and em-
phasise weaknesses of the other side, when they work
well, produce both transparency in rationale and public-
ity. They make the technical details of committee meet-
ings understandable to a broader audience by highlight-
ing the political content of these technical details, and
by drawing attention to alternatives and broader princi-
plies 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 nego-
tiations. 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 abun-
dance. 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 meet-
ings. The search for common ground among diverse in-
terests is part of the Council’s DNA. The Council also
has considerable transparency in process (although it
varies between different policy areas, with foreign pol-
icy clearly on the darker side) (Hillebrandt, 2017). Agen-
das 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 for-
mats), something which hardly happens in parliamen-
tary 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-
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.

References


Table 1. The transparency and legitimacy puzzle.

<table>
<thead>
<tr>
<th>Pieces of the puzzle</th>
<th>Meaning</th>
<th>National democratic legislature</th>
<th>Council of the EU</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transparency</td>
<td>Availability of information</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>— in process</td>
<td>Pre-decision activities</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>— in rationale</td>
<td>Substance and justifications of decision</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Publicity</td>
<td>Spread and reception of information</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Committee</td>
<td>Negotiations</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Plenary</td>
<td>Justification and debate</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>


**About the Author**

Daniel Naurin is Professor of Political Science at PluriCourts, University of Oslo, and at the Department of Political Science, University of Gothenburg. His research focuses mainly on judicial politics, intergovernmental negotiations, transparency, and interest group politics, often with empirical data from the European Union. His most recent work has been published in *Comparative Political Studies (2017), International Organization (2016), European Journal of Political Research (2015)* and *Journal of European Public Policy (2015)*.