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IS THERE A TENSION BETWEEN TRANSPARENCY AND  
EFFICIENCY IN DECISIONS? THE CASE OF THE  
COUNCIL OF THE EUROPEAN UNION

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**MAX WEBER PROGRAMME**

*Is there a Tension between Transparency and Efficiency in Decisions?  
The Case of the Council of the European Union*

**STÉPHANIE NOVAK**

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**Abstract**

Decision makers sometimes refer to the tension between transparency and efficiency in decisions. Yet, this argument is not so obvious, partly because the notion of efficiency is unclear. As a first step in the analysis of this argument, this paper attempts to build an operational definition of efficiency. We focus on the Council of the EU because different transparency rules have been implemented in this institution since the beginning of the 1990s. Still, the actors seem to sidestep these rules and often argue that transparency hampers efficiency in decisions. We rely on about 60 interviews with Council members to describe how the actors sidestep the rules and to research their incentives. We list these incentives and investigate their relationship with efficiency in decisions. Such analysis leads us to distinguish 3 types of efficiency: the ability to make compromises; the productivity in decision making; the ability to implement decisions. These distinctions should help us to carry out case studies on the effects of transparency on these different types of efficiency.

**Keywords**

Transparency, decision making, efficiency, accountability, EU institutions.

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Max Weber Fellow, 2010-2011*



## Introduction

The transparency of an institution refers to the aspects of its activities that are disclosed to the public. Transparency is commonly deemed to guarantee the democratic accountability of an institution. Since the beginning of the 1990s, transparency has become an essential requirement in EU institutions because it is considered the main solution to reducing the democratic deficit. As a consequence of different pressures, little by little, a policy of transparency has been enforced. Transparency is so popular in the EU that politicians cannot oppose it openly. Yet, they often argue that there is a tension between transparency and the efficiency of decision making. This argument might first seem obvious but the notion of efficiency is unclear. In this paper, I attempt to build an operational definition of efficiency that is necessary for future research on the so-called tension between transparency and efficiency. This first investigation is part of a work in progress on the implementation and the effects of the transparency rules on decision makers. The operational definition of efficiency will be used to carry out case-studies in order to assess the impact of transparency on the efficiency of the decision-making process.

I focus on decision making in the Council of the European Union, the main legislative institution in the EU, in which Member States are represented by their ministers. The opacity of this institution is notorious. On the one hand, members of the Council are especially prone to claim that for the sake of efficient intergovernmental negotiations, it is essential to let the Member States' representatives negotiate behind closed doors. On the other hand, the legislative role of the Council explains that external pressures have led to the implementation of transparency rules since 1993. Yet, a few studies on the Council and interviews with Council members suggest that the actors tend to sidestep the transparency rules in the Council. This context makes the Council a relevant institution to research the tension between transparency and efficiency in decisions.

Such research raises a methodological challenge: how to operationalize a research on the tension between efficiency and transparency given that

- the notion of efficiency is unclear. We do not know which phenomena we have to isolate and consider as dependent variables;
- investigating the effects of transparency implies a comparison between what happens behind closed doors and what happens publicly.

The first obstacle has to be acknowledged as part of the research puzzle. To analyze the tension between efficiency and transparency implies to find out what efficiency refers to.

The second obstacle can be overcome. Some recent research has managed to solve this issue (Gosseries sums up different methods adopted by this research<sup>1</sup>). For instance, Ellen Meade and David Stasavage<sup>2</sup> assessed the effects of publicity on the quality of deliberation in the U.S. Federal Reserve's Federal Open Market Committee (FOMC). They relied on verbatim transcripts of the FOMC's meetings. The comparison was possible because in 1993 the FOMC began releasing transcripts of its meetings; before 1993, the transcripts were not published and participants believed that they were destroyed, although in fact they were kept. Meade and Stasavage took advantage of this opportunity to compare the behaviours of participants when they believed that their statements would remain secret and when they knew that their statements would be published.

In the case of the Council, it does not seem fitted to rely on minutes as a primary source. Indeed, according to members of the Council Secretariat during the 1980s and 1990s, the minutes before the implementation of the transparency rules were not reliable because the information was randomly reported in them. That is why in this paper, I propose the results of a preliminary investigation based on semi-structured interviews with:

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<sup>1</sup> "Democracy and Transparency", *Swiss Political Science Review*, 12/3, 2006, p.83-90.

<sup>2</sup> "Two Effects of Transparency on the Quality of Deliberation", *Swiss Political Science Review*, 12/3, 2006, p.123-133.

- Council members present *before and after* the implementation of the transparency rules, and therefore able to deliver their impressions on the changes brought by transparency;
- Council members who were present *either before or after* the implementation of the transparency rules, which also made a comparison possible.

This method allows us to at least partly solve the methodological issue. Furthermore, it should help us to overcome the first obstacle – the lack of a clear definition of efficiency – by offering some light on what the actors refer to when they mention the “efficiency” of the decision-making process. I attempted to get from the interviewees descriptions of their practices in order to assess the impact of transparency on the decision-making process. If they were in the Council both before and after the implementation of the transparency rules, I also asked them whether they perceived any effect of the increased openness of the Council on the decision-making process.

In this paper, I rely on the interviews to consider whether the failure of transparency in the Council can be explained by a search for efficiency. From a methodological point of view, this approach is weak since it allows us to establish only a causal relationship between the failure of transparency and the search for efficiency. To establish that transparency actually diminishes the efficiency of the decision-making process is another story. Yet, I attempt to show that this preliminary investigation into the relationship between the failure of transparency and the search for efficiency allows us to understand better what the obscure notion of “efficiency” refers to and to build an operational definition of efficiency that can be used in future research.

In the first part of the paper, I attempt to describe what transparency refers to in the Council and I argue that the actors sidestep the transparency rules. In the second part, I consider whether the implementation of transparency in the Council fails because the actors aim at making the decisions as efficient as possible, and I attempt to show that this preliminary analysis allows us to define “efficiency”.

### **1. Transparency and its obstacles**

Since the beginning of the 1990s, the openness of the Council has been promoted through different means:

- Votes have been published since 1993 ;
- Sessions of the Council have been partly broadcast on the internet by video streaming since 2006;
- Numerous documents are online (minutes, stages of the co-decision process for the different measures...).

Existing studies show that if transparency consists in the availability of information, it is not a sufficient guarantee of accountability. Accountability depends on publicity, which means that citizens are aware of the available information; if information is available but goes unnoticed, there is transparency without publicity<sup>3</sup>. Yet, in the Council there is another obstacle to accountability: the members of the Council can sidestep the rules of transparency. The case of the Council shows us that it is not sufficient to promulgate rules of transparency in order to produce transparency. In this paper, I use the words "transparency" and "publicity" as synonyms, but if one keeps in mind the distinction mentioned above, my topic is publicity because I attempt to analyze the behavior of representatives who believe that their actions are seen by a public.

In the Council, rules that should generate transparency do not help to reveal the actors' positions for 2 main reasons:

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<sup>3</sup> “The concept of transparency captures the accessibility of information. [...] Publicity on the other hand means that the information is actually spread to and taken in by the principal. [...] There will be no publicity, i.e. no actual exposure of actions 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.”, D. Naurin, « Transparency, Publicity, Accountability – The missing links », *Swiss Political Science Review*, 12/3, 2006, p.90-98. See also D. Curtin, « Transparency, audiences and the evolving role of the EU Council of Ministers », in J.-E. Fossum and P. Schlesinger, (ed.), *The European Union and the Public Sphere. A communicative space in the making ?*, 2007, London, New York : Routledge, p.246-258

- (1) they do not reveal essential stages of the decision-making process;
- (2) the actors can sidestep the rules.

(1) Rules of transparency are not *sufficient* because only the final stage of the decision-making process is public. The elaboration of initiatives by the Commission that is based on pre-consultations with national governments and lobbies (a) and the sessions of the working groups and of the Committee of Permanent Representatives (b) remain undisclosed. Furthermore, the votes are published only when a measure has been adopted; there is no public information about rejected measures (c).

(a) The propositions of the Commission are already compromises that conclude bilateral talks between members of the Commission and representatives of Member States or lobbies; the positions of the different governments during the pre-consultations are not revealed. The practice of pre-consultation by the Commission shows a tension between transparency and compromise<sup>4</sup>. This tension might have increased over the years because the members of the Commission internalized the balance of power that exists between the Council and the Commission: the Commission is now weaker and proposes initiatives that are already compromises with the national governments.

(b) There are several institutional layers in the Council: the working-groups, the Committee of Permanent Representatives (Coreper) of Member States and the Council of Ministers. Most decisions are made by the Permanent Representatives based in Brussels, so that during the plenary sessions of the Council, the ministers only need to officially adopt the propositions negotiated by their representatives. The sessions of the Coreper, during which the decision-making process takes place, are not public. Sessions of the Council are partly public but in practice what is broadcast on the internet is the formal adoption of measures.

(c) There are no public data about non-adopted measures, votes are published only if a measure has been adopted; when the Presidency deems that the qualified majority is not reached on a given measure, it does not present the measure in the Council.

(2) Furthermore, in the stages that must be public, the actors can sidestep the rules of transparency. During the sessions of the Council, when the ministers need to debate because their representatives were not able to solve a political problem in the Coreper, the Presidency can require the interruption of the broadcast. Besides, actors explain that when debates must be public because the Council co-decides with the European Parliament, they can find ways to sidestep publicity. For instance, they negotiate at lunch hour, on the phone or "in the corridors"<sup>5</sup>.

Such escapes seem to be facilitated by some features of the group:

- the same actors negotiate together over a long period and constitute a small group ;
- there is a connivance between the Presidency of the Council and the representatives of the Member States because each semester a different Member State is in charge of the Presidency. Individuals who are in charge of the Presidency have interests in the game because they

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<sup>4</sup> "The Community method hides political conflicts. The monopoly of initiative conferred upon the Commission produces consensus-oriented decision-making. The Commission consults a large set of actors, including governments and [Members of European Parliament], before making its initiative public. When it presents its programme or its proposals to the public, it defines it as a subtle compromise, which embodies the "common interest", and often argues that "there is no other choice".", P. Magnette, « European governance and civic participation: can the EU be politicised ? », *Jean Monnet Working Paper*, 2001-09, NYU School of Law, p.7.

<sup>5</sup> "Real political discussions can and do still occur, although probably now more frequently at the lunch or dinner table than at the plenary negotiating table.", F. Hayes and H. Wallace, *The Council of ministers*, 2006, p.184. Cf. also E. Best, "Transparency and European Governance: Clearly Not a Simple Matter", in *Increasing transparency in the EU?*, Maastricht, European Institute of Public Administration, 2002, p.116; M.E. De Leeuw, "Openness in the legislative process in the European Union", *European Law Review*, 2007, 32(3), p.302; A. Peters, "European Democracy after the 2003 Convention", *European Market Law Review*, vol.41, n°1, 2004., p.67.

preside over the Council only temporarily and will be in the same position as the other participants a few weeks or a few months later.

Apparently, even if ministers represent a Member State that supported increased publicity, they are used to requiring secrecy of debates when they have to make a decision on a controversial topic in their country.

Moreover, although voting results must be publicly stated by the Presidency, the actors can also escape this form of publicity and conceal the positions that they defended behind closed doors. In some Member States, ministers must register a negative vote or an abstention when their MPs oppose an adopted directive. But in most Member States, there is no such obligation. According to the Council's internal rules, what must be public is not the vote in itself, but its results. The published votes are registered after the political agreement reached by the Coreper, and before the official adoption in the Council. When they register their votes on a given measure for publication, the ministers already know that there is a qualified majority in favour of the measure and that it will be adopted. Defeated ministers are used to joining the majority at the last minute because they do not want to be seen as defeated by their peers and by their constituencies; the Commission and the Presidency usually encourage the minority to join the majority. Therefore, there is often a discrepancy between the results of the decision-making process and the published votes<sup>6</sup>.

Even behind closed doors, the Presidency does not use voting procedures. It states orally that there is a qualified majority in favour of a given measure, and if nobody objects, the proposition is sent to the Council of Ministers for its official adoption. When the proposition is publicly adopted in the Council, the Presidency reads the names of the delegations that voted against it or abstained.

The fact that most decisions are made behind closed doors does not imply that the positions of the delegations are clear in the Coreper and concealed only when sessions are public. On the contrary, the absence of vote in the Coreper allows for the concealment of the representatives' positions. The Presidency does not open voting procedures, partly because the defeated delegations might be embarrassed and do not want to be seen as defeated by their peers. Furthermore, delegations are not used to clearly stating their positions during the negotiation process to keep room for manoeuvre. Stating a clear position would diminish their flexibility and their ability to take part in the search for a compromise.

Usually, the delegations do not know exactly the positions of the different delegations when the Presidency orally states the qualified majority. In this context, the Presidency does not use voting procedures because it aims to get as many measures as possible adopted. It orally states the qualified majority as soon as no blocking minority is explicitly constituted. If the Presidency opened a voting procedure on a given measure, delegations that remained silent without really approving the measure might abstain or even vote against it (in the Council, when qualified majority is the official rule, an abstention is the equivalent of a negative vote), and the measure might be rejected. According to representatives who chaired the Coreper, the absence of voting favours the decisional productivity.

Thus there is a double layer of opacity in the Council: delegations' positions are not revealed because ministers fear domestic reactions, and also because behind closed doors, opacity favours diplomatic relationships between the peers and the decisional productivity. One cannot contrast a public stage on which positions are concealed, with a hidden stage on which positions are revealed. Even behind closed doors, positions are concealed<sup>7</sup>.

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<sup>6</sup> See S. Novak, *La prise de décision au Conseil de l'Union européenne*, Paris, Dalloz, 2011.

<sup>7</sup> Since the Council does not vote, it is difficult to argue that the Council complies with the rule of transparency of votes even if ministers are not obliged to be accountable to their MPs; yet, it seems to be Settembri's argument: "*Intelligibility of voting* is fully complied with. Where the Council acts as a legislator, 'the results of votes and explanations of votes by Council members, as well as the statements in the Council minutes and the items in those minutes relating to the adoption of legislative acts, shall be made public' (Rule 9). As the Member States supporting or opposing a legislative decision are listed unambiguously in the minutes of the meeting and these are subsequently put on the Council's website, each national parliament can hold its minister to account with no margin of uncertainty. Whether or not national legislatures effectively exploit this opportunity is certainly an important issue to clarify; however, this falls outside of the brief of this contribution.", P. Settembri, "Transparency and the EU legislator : 'let he who is without sin cast the first stone'", *Journal of Common Market Studies*, vol.43, n°3, 2005., p.649.

When one analyzes how the actors sidestep the transparency rules in the Council, one finds out that the actors use opacity to increase both the decisional productivity and the ability to make compromises. In this context, when interviewees argue that transparency is an obstacle to efficiency, efficiency refers to the decisional productivity<sup>8</sup> and to the ability to negotiate compromises. Still, it is necessary to explain whether the actors sidestep the transparency rules because they aim at these different types of efficiency.

## ***2. Does the objective of efficiency explain why the decision makers escape transparency ?***

Since the actors often argue that efficiency is hampered by publicity, they might escape publicity for the sake of efficiency. I first list the incentives of the actors when they escape transparency. Then, I analyze the links between these incentives and the search for efficiency. Finally, I consider whether this analysis allows us to build an operational definition of efficiency.

1. Actors escape publicity because they do not want to bear political and electoral costs entailed by the positions that they had during the negotiations with the Presidency and the Commission. Most of the time, they do not publicly vote against adopted measures, even if they opposed them behind closed doors, because they expect that a negative vote will be interpreted as a failure by domestic journalists. It can mean two things depending on the salience of the measure: a. if a measure is salient, ministers would rather pretend that the measure was acceptable than be seen to have opposed an unacceptable measure. The Presidency is, for instance, used to granting cosmetic concessions to defeated ministers so that they can justify the fact that they supported a measure in front of domestic journalists<sup>9</sup>; b. but more frequently, ministers do not have to pretend in such a way for two reasons: b.1. most adopted texts are technical and/or secondary and do not arouse media attention; b.2. domestic journalists tend to focus on measures against which their ministers vote; journalists are less attentive to measures that their ministers do not contest.
2. Interviewees sometimes claim that they do not reveal their defeats because a negative vote would jeopardize the implementation in their home country.
3. Delegations avoid debate in open sessions and negotiate during the lunch break because publicity prevents them from being flexible. During public sessions, they cannot make concessions and have to support the national positions. On the contrary, when they have bilateral talks with the Presidency, they have more leeway and can find solutions.
4. The Presidency encourages the minority to join the majority when the Council has to co-decide with the members of the European Parliament (MEPs). Indeed, the Presidency must present the common position of the Council to the MEPs. If some Member States vote against the common position, the MEPs might take advantage of the Council's division<sup>10</sup>.
5. To modify the initiatives of the Commission, the Council must be unanimous (article 250, TEC). This rule partly explains the Presidency's habit of encouraging the minority to keep silent.
6. The Presidency does not use open voting procedures because it might reveal the existence of a blocking minority. The objective of decisional productivity would be less easy to reach.

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<sup>8</sup> Cf. T. Selck, "Explaining the absence of inertia in EU legislative decision-making", *Journal of Common Market Studies*, 2005, 43/5, p.1055-1070.

<sup>9</sup> See two cases analysed in Novak-2011, p.109-111.

<sup>10</sup> According to some specialists, when the Fed presents a unanimous decision to other institutions, it increases its credibility: "Achieving consensus is also thought to be an important goal for the Committee. Internal consensus gives the Fed power and credibility in dealing with external clients, including the President, the Congress, and the public. Indeed, FOMC records rarely show explicit evidence of divisiveness." H. W. Jr. Chappell, R. R. McGregor and T. Vermilyea, "Majority rule, consensus building, and the power of the chairman : Arthur Burns and the FOMC", *Journal of Money, Credit, and Banking*, 2004, 36/3, part 1, p.408.

This list shows how a complex conjunction of interests explains why the actors escape publicity. I hierarchized these reasons according to the type of public that the actors consider when they escape publicity. Incentives 1 to 3 depend on the consideration of the national audience. Yet, incentive 3 also involves the peers in the Council (need for bilateral talks between the Presidency and the delegations). Incentives 4 and 5 rely on inter-institutional relations. In incentive 6, the public is composed of the national delegations themselves – the peers. The distinction of these three types of audience (domestic, peers, other EU institutions) and the fact that both the Presidency and the delegations attempt to escape transparency show how deeply-rooted the tendency to opacity is. There are heterogeneous reasons why the decision makers escape publicity, and the entwined causes explain why opacity is so resistant in the Council.

Yet, what is the relationship between these incentives and the search for efficiency in the decisions?

Incentive 3 – the possibility of making compromises – is classical (the need for unanimity *vis-à-vis* the Commission [incentive 5] is closely related to incentive 3). Existing studies very often invoke this argument that was first offered by Madison<sup>11</sup>. Efficiency is defined as the ability to make compromises. In the case of the Council, this argument is especially convincing because the qualified majority threshold is high (about 70%). Qualified majority leads to the making of compromises because to reach it, the actors have to make concessions. Yet, the necessity of compromise is implied by the objective of decisional productivity. Without this objective, compromises would not be so necessary and transparency would not be such a burden. In this context, qualified majority entails opacity. When actors argue that they need opacity to decide in an efficient way, efficiency refers both to the search for compromises and to decisional productivity but decisional productivity is more fundamental. At this stage, we can deduce the latter fact only from the interviews. Interviewees constantly refer to the necessity of being productive<sup>12</sup>. The reasons why the actors aim at productivity are not clear. There is strong competition between semestrial presidencies, and an objective way to compare their records is to compare the number of measures passed during their semester. This incentive is often quoted but there might be other reasons that need to be investigated. To explain the constant search for efficiency, it would be useful to compare the case of the Council to other institutions in which there is no such search for productivity.

Incentive 2 – the implementation stage would be endangered if a minister voted against a measure – also refers to the efficiency of the decision-making process. One cannot consider this process without the implementation stage because there is no collective decision if the group is not compelled to implement its decision<sup>13</sup>. The efficiency of the decision-making process involves the ability to implement measures. To know whether the actors are right when they expect that a vote against a measure will jeopardize its implementation is another issue. It is difficult to assess this point because we lack data. As far as I know, existing studies on Member States' compliance have not found a correlation between votes against a measure and non implementation in the opposed Member States. The implementation process takes a long time, and many actors are involved: a public vote against a measure may not be such an obstacle to its implementation<sup>14</sup>.

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<sup>11</sup> Cf. De Leeuw-2007, p.302-303 and Peters-2004, p.67

<sup>12</sup> See Novak-2011, p.51-63.

<sup>13</sup> Cf. P. Urfalino, « La décision par consensus apparent », *Revue Européenne des Sciences Sociales*, p. 34-59, 2007.

<sup>14</sup> The plurality of actors involved in the process explains why some specialists of compliance deem irrelevant the hypothesis of a link between opposition in the Council and non-compliance. Yet, G. Falkner explains that she "checked whether *outright opposition during the negotiations alerts EU Commission officials and thus leads to an especially attentive enforcement policy*. This working hypothesis has proven to be of some empirical relevance for our sample even though, again, it is as a trend rather than a causal effect. Our empirical studies have revealed three clear-cut cases where national governments openly rejected a draft Directive either wholly or in part during the EU-level negotiations and subsequently refused to transpose the unwanted measure at the domestic level. In only one of these three cases did the Commission remain inactive in the matter of ensuring domestic compliance (Working Time Directive in Germany). However it has not been possible as yet to substantiate these observations with respect to a larger number of cases.", *Complying with*

It is much more difficult to establish a link between incentives 1 and 4 and the objective of efficiency. In both cases, the ministers escape publicity to present public positions that they deem profitable from the electoral and political points of view. The only way to avoid such use of publicity is parliamentary control, as it exists in Denmark for instance: when the MPs have opposed a given measure, the minister who takes part in the Council debate on the measure must publicly vote against it or abstain. One can argue that the extension of such institutional constraint to all EU members would decrease both the decisional productivity and the ability to make compromises. Therefore, the lack of accountability of ministers could be explained by a search for efficiency. Yet, it seems unlikely that the lack of accountability can be explained only by the search for efficiency. When the political actors sidestep the transparency rules, they also simply avoid to bear the potential political costs entailed by the positions they took in the Council.

Still, even if the escape from transparency cannot be explained by the mere search for efficiency, the analysis of the actors' incentives allows us to distinguish three types of efficiency. Such distinctions make possible future research on the effects of transparency on these different kinds of efficiency.

### **Conclusion**

Because of the conjunction of the failure of transparency in the Council and of the fact that its members often claim that transparency diminishes the efficiency of the decision-making process, I took the analysis of the reasons why the actors overcome the transparency rules as a starting point to investigate the tension between publicity and efficiency. I attempted to show that some incentives of the actors pertain to the efficiency of the decision-making process defined in 3 distinct ways:

- the ability to make compromises;
- the productivity of decision making (number of decisions made in a given period of time);
- the ability to implement the adopted measures.

These incentives are entwined with others that do not pertain to efficiency but to an escape from political responsibility. Unfortunately, it is not possible to assess the weight of each factor among the incentives of the actors when they sidestep the transparency rules.

Yet, the results presented in this paper allow us to think of conducting future case studies:

- on the impact of transparency on the ability to make compromises;
- on the impact of transparency on the productivity of decision making;
- on the impact of transparency on the ability to implement the adopted measures.

Such analyses could help us to clarify the so-called tension between transparency and the efficiency in decisions.

(Contd.) \_\_\_\_\_

*Europe: EU harmonization and soft law in the member states*, Cambridge, U.K., New York, Cambridge University Press, 2005, p.224.



