Politics and Governance
Open Access Journal | ISSN: 2183-2463
Volume 9, Issue 1 (2021)

Access or Excess? Redefining the Boundaries of Transparency in the EU's Decision-Making

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Politics and Governance, 2021, Volume 9, Issue 1
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Published by Cogitatio Press
Rua Fialho de Almeida 14, 2º Esq.,
1070-129 Lisbon
Portugal

Available online at: www.cogitatiopress.com/politicsandgovernance

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2021, Volume 9, Issue 1, Pages 221–225
DOI: 10.17645/pag.v9i1.4291

Editorial

Editorial: Access or Excess? Redefining the Boundaries of Transparency in the EU's Decision-Making

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Submitted: 21 March 2021 | Published: 31 March 2021

Abstract
Over the last decades, transparency has featured prominently among the European Union's (EU) efforts to democratize and legitimize its governance. This shift toward transparency has taken many forms and, as the contributions to this thematic issue show, these different forms have evolved significantly over time. Yet, initiatives to enhance transparency have often been blamed for limiting the efficiency of the decision-making process or leading to suboptimal policy outcomes. Consequently, the debate has shifted to whether transparency would be excessive in that it would undermine the EU's capacity to deliver through political arrangements. This editorial presents this transparency–efficiency dilemma, which the different contributions to this thematic issue analyse further.

Keywords
democracy; efficiency; European Union; throughput legitimacy; transparency

Issue
This editorial is part of the issue "Access or Excess? Redefining the Boundaries of Transparency in the EU's Decision-Making" edited by Camille Kelbel (Lille Catholic University, France), Axel Marx (University of Leuven, Belgium) and Julien Navarro (Lille Catholic University, France).

1. Introduction

Democracy has been the elephant in the room of the European integration project since its inception. Challengers to the qualification of the European Union (EU) as democratic underline both institutional issues, revolving around the lack of accountability of the institutions, and substantive gaps. As the latter is in particular due to the absence of a *demos* for which remedies are elusive, the EU has overwhelmingly relied on institutional change to address its democratic deficit and foster its democratic ideal. At the same time, the underpinnings of EU democracy have considerably evolved over time, even to the extent of forging ad hoc conceptions of a notion that was thought to be the stronghold of modern polities ('constraining dissensus' and 'throughput legitimacy' being notions which emerged in the wake of the integration project). Over the last decades, a push toward more transparency has featured prominently among the initiatives to enhance the democratic legitimacy of the EU. Commonly defined as allowing citizens to scrutinize all information upon which decisions are made, transparency is at the heart of throughput legitimacy as the only concept that invariably appears in all its definitions (see e.g., Geeraart, 2014; Iusmen & Boswell, 2017; Schmidt, 2013). Step-by-step, different initiatives were hence taken at the supranational level to disclose information and 'open up' the institutions. This "turn towards transparency" (Bianchi & Peters, 2013) has taken many forms and, as the contributions to the thematic issue

show, these different forms have evolved significantly over time.

Yet, initiatives to enhance transparency have been found to further influence the efficiency of the decision-making process or lead to suboptimal policy outcomes. Transparency is indeed sometimes blamed for slowing the decision-making process and even for hampering its success. There are several reasons underlying this argument. First, when transparency is the rule, decision-makers may refrain from changing position in the course of negotiations and become inflexible, notably when they receive a clear (and sometimes binding) negotiating mandate from their principal who may thus blame, or even sanction them if they deviate from it (Elster, 2015). Second, by revealing who the 'winners' and 'losers' of negotiation are, transparency increases the cost of defeat. Those on the losing side may be tempted to block decisions or to adopt strategies to conceal their defeat by joining the majority at the last minute, as observed by Novak (2013) in the case of the EU Council of Ministers. Even when transparency and openness do not necessarily create a hurdle to the success of the decision-making process, the argument goes that it creates a disadvantage for the parties engaged in such a collective decision. To disclose one's preferences or negotiating strategy beforehand is indeed likely to weaken one's position, even though it has also been evidenced that greater transparency contributes to increasing the EU's bargaining leverage in international trade negotiations (Heldt, 2020). Third, political actors acting under public scrutiny are compelled to avoid the familiarity and informality which is deemed to facilitate compromises (Fasone & Lupo, 2015). Last but not least, transparency can fuel increased politicization of policy issues which makes decision-making and implementation more difficult (De Bièvre, Costa, Garcia-Duran, & Eliasson, 2020). In other words, from an output legitimacy perspective, there might be desirable limits to transparency (Alloa, 2017). As such, the transparency–secrecy dilemma has largely come to epitomise the democratic–efficient dilemma. As a consequence, the debate has shifted to whether transparency would be excessive in that it would undermine the EU's almost legendary capacity to deliver through political arrangements. This thematic issue delves into this dilemma.

2. Outline of the Thematic Issue

The EU transparency initiatives are indeed often presented as among the most advanced in the world. Elaborated with the explicit aim to act against the common perception of the supranational political system as being distant, technocratic, undemocratic, and even impenetrable, the push toward more transparency was meant to restore accountability and ultimately public trust. Most of the existing literature on transparency has either explored the measures taken to make information on the legislative process more open, or built on its foreseen negative effect on efficiency (Héritier & Reh, 2012). Some recent studies suggest that major actors are still able to reintroduce informality through the backdoor, controlling whether they dispatch information or not, and circumventing the regulation (Coremans, 2019). This thematic issue builds on this perspective, studying the reaction of institutional actors to the transparency imperatives. The central question addressed by the contributions is: What are the effects of openness and transparency arrangements on the political actors' attitudes and behaviours? As Fung, Graham, and Weil (2007, p. 51) argue, transparency measures aim at steering the behaviour of actors and institutions in ways policy-makers believe will advance the public interest. As such, while some transparency measures may fail to alter behaviours because few actors act on the information generated through the different initiatives, some measures may indeed result in the expected behavioural change. This thematic issue examines the concrete practices of institutions and actors. With different contributions, we hope to provide insight into how and why transparency is 'captured' by institutions and political actors, how it is used, and what potential it has in terms of making the EU more democratic and accountable. To do so, the thematic issue brings together six articles and two commentaries.

The first article by Caby and Frehen (2021) allows us to situate transparency in the wider concern of (throughput) legitimacy, which is nothing less than the *raison d'être* of the notion. As they note, previous conceptualisations of throughput legitimacy invariably include transparency as one of the concept's dimensions. Within the field, transparency is found to be part of a cluster that deals with how principles are translated into actions within various international organisations, very much in line with this thematic issue's assumption that the focus is now on how actors produce legitimacy and seize its principles. EU studies is also confirmed as a primary subfield (in line with Steffek, 2019).

Subsequent articles delve into transparency developments in reference to specific instruments, actors, and fora. A key instrument to enhance transparency is the EU Transparency Register which emerged out of the European Transparency Initiative and which is discussed in the second contribution by Dinan (2021). It aims to make public which organizations and persons engage with the EU institutions in the policy-making process in order to empower media, civil society, and citizens to scrutinize the conduct of EU officials and to see whether decisions have been influenced in any way by specific interests which do not reflect the public interest. This is possibly an important transparency instrument to steer the behaviour of EU officials. In his contribution, Dinan describes and analyses the emergence, development, and use of the transparency register and identifies several shortcomings to the current approach especially with regard to reaching the general public, media, and citizens. Dinan finds that the current approach results in a register that is mostly used by professionals and lobbyists "clus-

tered around the European quarter in Brussels" (Dinan, 2021, p. X) and engaged in European public affairs. As a result, the ability of media and other actors to use the register and hold officials to account is significantly hampered. Dinan offers some insights and recommendations to address these concerns.

Sooner or later, the debate on EU transparency almost invariably stumbles on the trilogues as informal meetings where most inter-institutional negotiations are still secretly concluded nowadays, remote from any oversight, except feedback from the negotiators themselves. The third article by Pennetreau and Laloux (2021) addresses this issue empirically by considering the extent to which European Parliament (EP) rapporteurs are being (un)transparent in their speeches when reporting to the assembly's plenary on the legislative compromise they reach through trilogues negotiations. Their investigation is thus a perfect example of looking at transparency in the process. While the plenary speeches are supposed to make up for the intrinsically untransparent nature of trilogues, they evidence that not only is transparency modest but that its degree depends on both the political affiliation and national culture of the rapporteur rather than on political conflicts within the institution or in the inter-institutional arena. In other words, transparency is not particularly prompted by politicisation and political conflicts. Overall, the EP has hence rather failed to deliver on the transparency promise made by the foreseen compensating mechanisms.

In analysing the effects of openness and transparency on attitudes and behaviours of the actors involved it is also relevant to dig into specific policy areas. The fourth contribution by Marx and Van der Loo (2021) focuses on trade policy, which for the last two decades has been under contestation of citizen and civil society actors for being opaque and secret. As a response, the European Commission has put transparency at the forefront of its trade policy as one of its foundational principles, recognizing the importance of transparency for the legitimacy of trade policy. Their article focuses specifically on the negotiation and implementation of a free-trade agreement. Transparency in the context of free-trade agreements relates to different parts of the trade policy process. On the input side, it enables stakeholders to participate in the development of trade agreements and insert different preferences. On the output side, transparency is relevant for holding the actors involved to account for the implementation of the trade agreement. The article shows that the Commission has gone a long way to make the process of negotiating trade agreements much more transparent and in this way enabling the inclusion of different preferences in the negotiation of trade agreements. They are more sceptical about the progress made with regard to the implementation of trade agreements.

The fifth article by Bodson (2021) turns attention to the role of the judiciary. Indeed, transparency in the EU—as well as at other levels of governance—cannot rely exclusively on the willingness of the decision-makers to be open and, in particular, to provide access to their files. Judicial institutions can and do play a key role in improving the openness of government and, as such, in shaping the democratic architecture of the political system. As highlighted by Bodson's article, this is precisely what was at stake for the EU with the *De Capitani v. European Parliament* and the *ClientEarth v. European Commission* cases, through which the EU Court of Justice ruled in favour of more transparency and openness by imposing the disclosure of internal documents linked to the EU legislative process. However, the capacity of the Court to force transparency is inherently limited as it must act within the remits of the Treaties and the EU primary and secondary laws. What is more, Bodson argues that 'access' as implemented by the Court has to be assessed in light of the risk of the perverse effects of 'excess.' By fixing the borders of transparency, the decisions of the Court may indeed encourage the institutions to shift decision-making away from the formal arenas to informal ones: This is precisely the contrary of what transparency activists wish for.

The final article by Gijsenbergh (2021) focuses on a specific type of actors in the transparency debate, namely whistle-blowers. The progress of transparency may ultimately depend on initiatives of individuals and groups who challenge the institutions to be more open and accountable. This is precisely Gijsenbergh's argument, in his analysis of three whistle-blowers who, over the last 60 years, have had a major impact on how European politicians and officials feel about transparency. By disclosing confidential documents to expose wrongdoings and corruption, these whistle-blowers not only forced transparency upon EU institutions, but also provoked debates about the (il)legitimacy of secrecy and the democratic value of openness. The circumstantiated historical recount of these whistleblowing episodes contributes to demonstrating that recent developments in the EU policy of transparency—notably in the form of the 2019 Directive on the protection of persons who report breaches of Union law—is the culmination of an incremental shift in how democracy is perceived in Europe.

The commentary by Hillebrandt (2021) questions the scope of the 'access' dimension as a fair prerequisite to any consideration on whether transparency comes in excess at the EU level. Asking whether transparency may continue to be reduced to access to documents as the EU has restrictively typified it, Hillebrandt's argument revolves around the changing context that almost naturally facilitates such access. Access to documents is argued to be a mile wide and an inch deep, in that many features of the decision-making process itself remain secluded, that the lay citizen is unlikely to find their way toward such access and the latter is recurrently bypassed, thus echoing the argument about there being a lack of transparency in the process. As such, access to documents as the long-time carrier of the transparency ideal

does not actually come in excess and has become, in part, unfit for purpose.

The last contribution to the thematic issue takes a more cautious and critical approach to the recent developments of the EU in terms of transparency. In his commentary, Rebasti (2021) indeed ponders the implications of the *De Capitani* case, also discussed in the contribution by Bodson, for the broader EU model of representative democracy. Echoing the theme of the difficult balance between transparency and efficiency that runs through the entire thematic issue, he contends that the Court's decision to open up the trilogue negotiations' blackbox leaves many questions unanswered as to the nature of the EU legislative process.

3. Conclusion

The thematic issue shows that the EU has taken a number of initiatives to make its policy-making process more transparent. Whether these efforts are sufficient to increase the legitimacy of the policy-making process and strengthen accountability mechanisms remains an open question. In a landmark study, Fung et al. (2007) found that many reforms and initiatives for more transparency often generate irrelevant and incomprehensible information for stakeholders who cannot act upon the disclosed information. They stressed the importance for transparency measures to focus on the needs of citizens. Conclusions of the articles collected in this thematic issue point in the same direction: Engaging and involving citizens will be of crucial importance in order to strengthen the legitimacy of the EU. Transparency measures can play an important role in this but they should be designed appropriately and target citizens. This reconnecting to citizens is also highlighted in the launch of the Conference on the Future of Europe which will take place in 2021 and 2022.

Acknowledgments

This thematic issue was made possible by the EU's Horizon 2020 Research & Innovation programme—RECONNECT project (Grant Agreement No. 770142).

Conflict of Interests

The authors declare no conflict of interests.

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Politics and Governance (ISSN: 2183–2463)
2021, Volume 9, Issue 1, Pages 226–236
DOI: 10.17645/pag.v9i1.4011

Article

How to Produce and Measure Throughput Legitimacy? Lessons from a Systematic Literature Review

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Submitted: 15 January 2021 | Accepted: 19 February 2021 | Published: 31 March 2021

Abstract
After two decades of research on throughput legitimacy, making sense of the stock of accumulated knowledge remains a challenge. How can relevant publications on throughput legitimacy be collected and analysed? How can the level of throughput legitimacy be measured? Which policy activities contribute to the production of throughput legitimacy? To answer these questions, we designed and implemented an original systematic literature review. We find that the measurement of the level of throughput legitimacy introduces a number of problems that call for the systematic and rigorous use of a more complete set of precise, specific indicators to advance the theory of throughput legitimacy. A number of participatory decision-making activities contribute to the production of throughput legitimacy. Engaging in these activities is not without risk, as variations in throughput legitimacy affect input and output legitimacy. To prevent vicious circles, lessons can be drawn from the literature on collaborative governance and decision-makers' strategies to support effective collaboration between stakeholders.

Keywords
citation network analysis; collaborative governance; legitimacy; quantitative text analysis; systematic literature review; throughput legitimacy

Issue
This article is part of the issue "Access or Excess? Redefining the Boundaries of Transparency in the EU's Decision-Making" edited by Camille Kelbel (Lille Catholic University, France), Axel Marx (University of Leuven, Belgium) and Julien Navarro (Lille Catholic University, France).

1. Introduction

After two decades of research on the concept of throughput legitimacy, making sense of the stock of accumulated knowledge remains a challenge. How can relevant publications on throughput legitimacy be collected and analysed? How can the level of throughput legitimacy be measured? Which policy activities contribute to the production of throughput legitimacy? These are the theoretical and methodological questions we address in this article.

The concept of throughput legitimacy derives from the normative discussion on the democratic deficit of the EU and other international organisations (IOs). Following the 1992 public debate on the Maastricht Treaty, Scharpf (1997, 1999) distinguished two modes of production of democratic legitimacy: 'Input legitimacy' results from policy decisions based on citizens' preferences, and 'output legitimacy' derives from the achievement of policy goals in line with citizens' interests. In the early 2000s, scholars discussed the effects of globalisation and the growing role of IOs and other forms of cooperative governance on the production of democratic legitimacy (Papadopoulos, 2003; Zürn, 1998, 2000). Papadopoulos (2003, pp. 482–484) conceived of the idea of 'throughput legitimacy' as a synonym of procedural fairness: Procedures "that permit citizens to express their views" and that "can enhance the acceptance of decisions, no matter their content." For Zürn (1998, p. 240), through-

put refers to the democratic principles governing the decision-making process.

Throughput legitimacy, as a third mode of production of legitimacy pertaining to the quality of the governance process, gained prominence in the 2010s. For Steffek (2019), this was due to the proceduralist turn in political science—a shift in scholars' attention from the content of decisions to the process and procedures of decision-making. We believe that this was also due to the conceptual work of Risse and Kleine (2007) and Schmidt (2013). The latter provided more operational definitions of throughput legitimacy which facilitated its application by scholars.

A bibliographic search provides a good illustration of the prominence of the concept. In January 2020, we searched the Scopus database and found 98 journal articles and book chapters with the keyword 'throughput legitimacy' in their metadata.

The challenge remains to make sense of this stock of knowledge. A symposium organised in 2017 provided a first opportunity to answer this question. In their introduction, Schmidt and Wood (2019) pointed out that the concept had been applied to nearly all levels of government and all policy sectors. In his literature review, Steffek (2019) focused on the proceduralist underpinnings of throughput legitimacy, its added value compared to input and output legitimacy, and its normative implications rather than on lessons learned from empirical investigations. Another issue was the lack of indications regarding the methodology. One could only assume that his review was not systematic in the sense of Higgins and Green (2011, Section 1.2.2): "A systematic review attempts to collate all empirical evidence that fits prespecified eligibility criteria in order to answer a specific research question. It uses explicit, systematic methods that are selected with a view to minimizing bias, thus providing more reliable findings from which conclusions can be drawn and decisions made." In addition, our bibliographic search pointed out that the years 2018 and 2019 accounted for more than half of the stock of knowledge on throughput legitimacy, with 45 new publications with the keyword in their metadata. This finding calls for an updated literature review. In our view, for all these reasons, the pioneering work of Steffek constitutes a good starting point. It led us to concentrate on empirical investigations of the production of throughput legitimacy in order to draw theoretical and methodological lessons from them using a systematic literature review method. It also provided us with a series of hypotheses. Would we find the literature on throughput legitimacy to be divided into the same clusters? Would we find the same publications to be influential?

The objective of this article is twofold. From a theoretical standpoint, we want to make sense of the stock of accumulated knowledge on throughput legitimacy, and to map what is already known and what is still debated and unknown. This requires identifying how scholars use and operationalise the concept and what their research question, theoretical framework, methods, and empirical work are. From a methodological standpoint, we want to demonstrate the potential of a systematic literature strategy based on a combination of a quantitative text analysis of abstracts (QTA), a citation network analysis (CNA), and a content analysis of the full text of a sample of publications.

Based on these analyses, we argue that the literature on throughput legitimacy evolves around four lines of questioning. Beyond the theoretical, normative discussion on the constitutive principles of throughput legitimacy (1), scholars have developed indicators to measure its level (2). Others have empirically investigated which policy activities contribute to the production of this type of legitimacy (3). Still others have explored the relations between throughput legitimacy and collaborative governance (4). The works of Schmidt and Wood (2019) and Steffek (2019) extensively addressed question 1. In this article, we focus on the last three questions and their answers.

In Section 2 of this article, we describe our methods. In Section 3 we successively present the results of the QTA, the CNA, and the content analysis. Finally, in the conclusion section, we discuss our results and their implications for the research on throughput legitimacy.

2. Methods

In this section, we describe our methods. In our bibliographic search, we used the Scopus database, as it has a number of advantages compared with the Google Scholar and Web of Science (Harzing & Alakangas, 2016). We searched for scientific publications with the keyword 'throughput legitimacy' in their metadata (title, abstract, keywords, references) across all journal articles and book chapters in English. Such an approach falls into the previously defined category of systematic literature review methods. Using a single keyword was possible due to the unique, unambiguous and shared nature of the throughput legitimacy concept. The idiom does not belong to everyday language nor to disciplines other than the social sciences. In political science, the term bears only a single meaning—that of a particular mode of production of political legitimacy—despite discussions on the principles behind it. In January 2020, we found 98 scientific publications with the keyword 'throughput legitimacy' in their metadata (our dataset).

We applied three different data analysis techniques to the dataset (or to sections of it). First, we conducted a QTA of the abstracts of all publications with an abstract in the dataset (83). We applied Reinert's method (1990) using IRaMuTeQ. This software first breaks down a set of texts into 'segments.' Using factor analysis, it then classifies the resulting segments into 'clusters' based on their lexical similarity. Clusters are subsets of texts that result from a factor analysis of 'lemmas.' Such an analysis provides an overall picture of the literature on throughput legitimacy by dividing it into a small number of the-

matic clusters. Using the ranking of a cluster's most frequent terms, one can identify its key concepts, research question, theoretical framework, epistemological stance, methods, and empirical work (Goyal & Howlett, 2018). This is a prerequisite to identify how scholars use and operationalise the concept and to map what is already known and what is still debated and unknown. In addition, the factor analysis allows for the identification of the abstracts that contribute the most to each thematic cluster. We used this function to determine which publications within the dataset would undergo a full-text content analysis.

Second, we performed a CNA on all publications with citations in the dataset (86). To accomplish this, we used the Gephi software. Our 86 publications dealing with the concept of throughput legitimacy referred to 4,229 academic writings. We removed from our list of citations the grey literature and academic writings that were cited by fewer than two of our original 86 publications, as they most likely had little to do with throughput legitimacy. In the network analysis, we focused on three centrality measures. First, the in-degree score of a publication corresponds to its number of citations within the network. Second, the higher the eigenvector centrality score of a publication, the more cited it is by well-cited publications. This measure may be used to determine the most influential publications within a network. Third, the betweenness centrality measures how important a publication is to the shortest citation paths throughout the network. Publications with a high betweenness centrality score are the most likely to combine different theoretical frameworks or methods and to display the most innovative and fruitful findings (Baggio, Brown, & Hellebrandt, 2015). For each of the three centrality measures, we identified the publications with the highest scores—those that would be the subject of a full-text content analysis.

Third, we conducted a full-text content analysis of a sample of publications resulting from the QTA and the CNA. The sample consists of the publications which contribute the most to each cluster and with the most occurrences of throughput legitimacy in their content (Table 2). In addition, we examined the publications with the highest in-degree, eigenvector-centrality, and betweenness-centrality scores (Table 3). The sample amounts to 23 different publications. For the analysis of the sample, we used the NVivo software. Our analysis grid included a number of codes (e.g., the publication's research question, theoretical framework, method, theoretical and methodological lessons). Such a grid allowed for the thorough extraction of answers to our questions.

3. Results

3.1. Quantitative Text Analysis of Abstracts

Applying Reinert's method resulted in the classification of 83 abstracts into three different clusters. In this subsection, we describe each cluster using two rankings: the cluster's most frequent terms (Table 1) and most contributing abstracts (Table 2). On this basis, we identify a series of questions for which answers can be found in the existing stock of knowledge.

According to the ranking of its most frequent terms, Cluster 1 focuses on how network and knowledge management may benefit to the achievement of the objectives of subnational environmental projects through a normative, applied, empirical approach. The cluster primarily addresses networks. Here, scholars investigate the management of the relationships among a wide range of actors. They emphasize those who have a managing role: whether they are in charge of managing the network as a whole or knowledge flows. Links may be formal or informal. They may take place inside networks and/or across their boundaries. The aim of Cluster 1 scholars is to prevent negative relationships and to encourage collaborative relationships that allow for learning. For them, positive relationships are intended to increase the effectiveness of projects and the achievement of project objectives. The projects referred to belong to the domain of environmental policies, with a focus on two countries. Cluster 1 scholars analyse the countries at a subnational level rather than at a national level. From a methodological perspective, scholars use quantitative methods, such as surveys, as well as qualitative methods, such as case studies. Cluster 1 belongs to the subfield of environmental policies according to the ranking of its most contributing abstracts. Most of the latter were published in journals pertaining to environmental policies.

Cluster 2 consists of a theoretical, normative, and exclusive discussion on the content of IOs' production process of throughput legitimacy. The cluster's first theme is legitimacy and its different modes of production in democratic systems. Here, the main research question is that of the content of throughput legitimacy: how IOs produce legitimacy in the eyes of citizens in the context of regulation. Cluster 2 scholars discuss the principles behind the concept. They also debate the activities through which these principles are translated into actions. Cluster 2 represents a primarily theoretical discussion. This debate has a normative component. This accounts for the almost complete absence of methodological and empirical terms. Cluster 2 is located at the intersection of various political science subfields according to the ranking of its most contributing abstracts. Some of them were published in journals from subfields such as public administration, IR, EU studies and political economy. Others belong to mainstream political science journals.

Like Cluster 2, Cluster 3 concentrates on how IOs produce throughput legitimacy. In Cluster 3, however, the focus is more on the sequence of actions and their consequences. In addition, the discussion is less theoretical. It is also more open to other conceptual frameworks. Like Cluster 2, Cluster 3 deals with the production of legitimacy. Other similarities are that the scholars in both

Table 1. Most frequent terms of each cluster.

Cluster	Percentage of categorised segments	Terms
1	37%	Network, water, management, trust, boundary, local, knowledge, performance, strategy, resource, broker, manager, stakeholder, connective, communication, quantitative, outcome, effective, environmental, goal, project, multi, federal, realize, research, structure, base, relationship, span, informal, work, public, organizational, conflict, evolution, numb, natural, river, mediate, grow, creation, basin, impact, role, challenge, arrangement, large, survey, regional, formal, community, integrate, system, learn, collaborative, highly, cross, protection, directive, metric, landscape, transboundary, Norway, collect, area, scarcity, participant, interorganizational, expansion, crucial, bottom, anchorage, create, influence, datum, private, collaboration, Netherlands, council, company, manage, idea, important, case, result, sector, method, evidence, complex, scale, link, field, paper, study, governance, approach, degree, act, year, leadership, range, provide, prospect, face, plan, order, positive, increasingly, literature, condition, medium
2	35%	Legitimacy, input, throughput, output, argue, discourse, democracy, transparency, accountability, analyse, lack, food, inclusiveness, service, procedure, legitimate, critical, consultation, efficacy, deliberative, concept, criterion, importance, normative, theory, IOs, rely, weaken, authorization, openness, bureaucracy, share, citizen, term, good, scholar, norm, generate, highlight, horizontalization, vary, contemporary, agri, substance, reality, emerge, trade, change, off, gap, gain, regulatory, global, institutional, regulation, deliberation, form, democratic, lead, nation, low, draw, evaluation, enhance, stealth, responsiveness, standard, procedural, mean, representative, reach
3	28%	EU, sport, european, issue, commission, crisis, open, supranational, dialogue, investigate, article, perspective, agent, socio, domestic, eurozone, clear, pressure, mistrust, legitimation, esos, review, include, economic, member, conduct, process, deficit, coalition, ownership, cultural, opportunity, hydraulic, fracture, special, player, pathway, union, participatory, development, build, semester, Europe, basis, legislative, current, time, examine, reform, aim, social, international, national, state, government, rule, activity, start, mine, undermine, dilemma, actor, institution, improve, framework, contribution, assess, foster, benefit, significant, move, effort, drive, finding, politics, establish, parliament, identity, threat, reinforce, law, information, bring, scope, peer, omc, legislation, integration, illustrate, house, future, forward, specifically, post, politicization, initiative, force, element, dynamic, advance

clusters investigate the production process of throughput legitimacy and that they rely on the premise of a legitimacy deficit of IOs. Nevertheless, there are differences between the two clusters. First, Cluster 3 scholars concentrate on IOs and their member states, while Cluster 2 scholars focus on IOs and citizens. In Cluster 3, the emphasis is on the activities necessary to produce throughput legitimacy: participation and access to information rather than on the constitutive principles of the concept. Another difference is that throughput legitimacy is attached to other concepts. Dialogue is considered an intermediary step in the production process of throughput legitimacy, while the latter is understood as affecting the producer's identity and power. Finally, a significant dissimilarity is that Cluster 3 is not limited to a theoretical discussion. Cluster 3 scholars focus primarily on the European level. Therefore, EU institutions occupy a prominent place. Scholars concentrate on a series of economic sectors that include sport policies and extractive industries. No reference to a particular method can be found in Cluster 3. Cluster 3 belongs to the subfield of EU studies according to the ranking of its most contributing abstracts. Most of the latter were published in journals pertaining to EU studies.

In his 2019 literature review, Steffek (2019) divided the literature on throughput literature into three clusters according to their subfield (transnational governance research, EU studies, local governance research), which he inferred from their object of study. Applying Reinert's method resulted in a more fine-grained classification of the literature into three thematic clusters—each with its own research questions, theoretical framework, methods, and empirical work. Throughput legitimacy raised a series of research questions in addition to the theoretical, normative principles behind the concept (Cluster 2). Which policy activities contribute to the production of throughput legitimacy (Cluster 3)? How does throughput legitimacy relate to collaboration between policy actors (Cluster 1)? From this, we inferred a methodological question: Which indicators have proven useful for mea-

Table 2. Most contributing abstracts to each cluster.

Cluster	Abstract reference	Journal	Contribution to cluster (Chi2)	Occ. of 'Throughput Legitimacy'
1	Boaventura et al. (2016)	*Journal on Chain and Network Science*	14,0	1
	van Meerkerk, Edelenbos, and Klijn (2015)*	*Environment and Planning C*	12,2	49
	Matti, Lundmark, and Ek (2017)*	*Water Policy*	10,4	2
	van Enst et al. (2017)	*Sustainability*	10,4	1
	Song et al. (2019)	*Global Environmental Change*	9,0	1
	Michels (2016)	*Water Policy*	8,7	1
	Muller (2018)	*Regional Environmental Change*	8,7	1
	Hovik and Hanssen (2016)	*Journal of Environmental Policy and Planning*	6,9	1
	Edelenbos and van Meerkerk (2015)*	*Current Opinion in Environmental Sustainability*	6,9	4
	Eckerd, Bulka, Nahapetian, and Castellow (2019)*	*Critical Policy Studies*	5,2	5
2	Strebel, Kübler, and Marcinkowski (2019)*	*European Journal of Political Research*	17,3	8
	Behringer and Feindt (2019)*	*Politics and Governance*	13,4	22
	Schmidt (2013)*	*Political Studies*	9,5	22
	Klika (2015)	*Politics and Governance*	7,6	10
	Lettanie (2019)	*Journal of Economic Policy Reform*	7,6	7
	Corbett, Yi-Chong, and Weller (2018)*	*Cambridge Review of International Affairs*	7,6	32
	Steffek (2019)*	*Public Administration*	7,6	68
	Schmidt and Wood (2019)*	*Public Administration*	7,6	72
	Boswell and Corbett (2018)	*Political Studies*	7,6	1
	Falleth et al. (2010)	*European Planning Studies*	6,3	5
3	Neville and Weinthal (2016)	*Review of Policy Research*	13,0	1
	Munta (2020)*	*European Politics and Society*	13,0	33
	Yilmaz (2018)	*International Journal of Sport Policy*	13,0	1
	Fromage and van den Brink (2018)	*Journal of European Integration*	13,0	8
	Kratochvíl and Sychra (2019)	*Journal of European Integration*	13,0	4
	Geeraert (2014)*	*Journal of Contemporary European Research*	10,4	24
	Carstensen and Schmidt (2018)*	*Review of International Political Economy*	10,4	24
	Poelzer (2019)*	*Environmental Science and Policy*	4,5	22
	Geeraert and Drieskens (2017)	*Journal of European Integration*	4,4	1
	Curry (2016)*	*Journal of European Social Policy*	4,4	23

Note: * = Papers included in the full-text content analysis.

suring the level of throughput legitimacy? To identify where answers can be found to the last three questions, we used a sample of publications from the three clusters and the CNA.

3.2. Citation Network Analysis

The CNA of all publications with citations in the dataset (86) resulted in a network of 687 publications con-

nected by 1,841 citation links. In this subsection, we present three rankings: the publications with the highest in-degree centrality, eigenvector centrality, and betweenness centrality scores (Table 3). This analysis provides us with a series of leads on where to find answers to our research questions.

First, we examine the most influential publications in the literature on throughput legitimacy. In line with Steffek (2019), we find among them the pioneering reflexion of Scharpf (1997, 1999) on the two modes of production of democratic legitimacy, and the subsequent work of Benz and Papadopoulos (2006) on the application of democratic standards to multilevel governance arrangements. We also find the conceptual work of Risse and Kleine (2007) and Schmidt (2013) on the constitutive principles of throughput legitimacy. Unlike Steffek, our CNA indicates that the reflexion of Greenwood (2007) on the influence of organised civil society interests in the production of legitimacy in the EU counts as one of the most influential publications on throughput legitimacy.

To a certain extent, the ranking of the most influential publications overlaps with one of the most cited publications. The works of Scharpf (1997, 1999), Risse and Kleine (2007), and Schmidt (2013) also fall into this second category. Among the most cited publications on throughput legitimacy, we find two journal articles that were absent from Steffek's work. The first is van Meerkerk et al. (2015) investigation of the relation between the connective management of stakeholders, throughput legitimacy, and network performance in the governance of water projects in the Netherlands. The second is Ansell and Gash's (2008) review on the conditions for success of collaborative governance.

Finally, we examine the most bridging publications in the literature. In this ranking, we again find the works of Schmidt (2013) and van Meerkerk et al. (2015). In line with Steffek, we find the studies of Iusmen and Boswell (2017) and Hartmann and Spit (2016). While the former discusses the limitations of the pursuit of throughput legitimacy by European and British technocratic bodies, the latter points to the growing role of throughput legitimacy in flood risk management at the European level. Although absent from Steffek's work, the qualitative analysis of Fischer and Schläpfer (2017) on the influence of meta-governance strategies at the forum level on the production of joint position papers counts as one of the most bridging publications. The results of our CNA confirm some of Steffek's (2019) findings and the central role of a number of publications in the literature on throughput legitimacy. In addition, such results indicate that a few other publications may prove useful in answering our research questions.

3.3. Full-Text Content Analysis

In this subsection, we describe the results of the content analysis of the full text of a sample of publications resulting from the QTA and the CNA (23). The subsection is organised according to the research questions identified through the QTA: Which indicators have proven useful for measuring the level of throughput legitimacy? Which policy activities contribute to the production of throughput legitimacy? How does throughput legitimacy relate to collaboration between policy actors?

3.3.1. Which Indicators Have Proven Useful for Measuring the Level of Throughput Legitimacy?

Surprisingly, only a small number of scholars (eight) measured the level of throughput legitimacy. Among the ones who did not, some are located in Cluster 2 (or cited by Cluster 2 scholars) and engaged in the theoretical discussion on the constitutive principles and/or the added value of the concept (e.g., Risse & Kleine, 2007; Schmidt & Wood, 2019). Some others are Cluster 1 scholars (or publications cited by them) who developed arguments on collaborative governance (e.g., Ansell & Gash, 2008; Fischer & Schläpfer, 2017). Finally, some publications used throughput legitimacy as a peripheral concept or provided limited information on the operationalisation of the concept (e.g., Eckerd et al., 2019; Hartmann & Spit, 2016). Going back to scholars who measured the level of throughput legitimacy, indicators vary in number—from 2 (Curry, 2016) to 12 (Geeraert, 2014). All of them derive from one (or more) of the constitutive principles behind the concept. However, from one scholar to another, the same indicator may serve two different principles. In an effort to provide a clear and exhaustive analysis of the indicators, we present them according to the concrete features of the decision-making process that they actually measure: the criteria for inclusion, the

Table 3. Publications with the highest centrality scores.

Most cited publications within corpus (Indegree)		Most influential publications (Eigencentrality)		Most bridging publications (Betweenesscentrality)	
Schmidt (2013)	35	Scharpf (1999)	1,00	Schmidt (2013)	1,90E+09
Scharpf (1999)	31	Risse and Kleine (2007)	0,84	van Meerkerk et al. (2015)	1,12E+09
van Meerkerk et al. (2015)	17	Greenwood (2007)	0,66	Iusmen and Boswell (2017)	3,25E+08
Risse and Kleine (2007)	13	Schmidt (2013)	0,64	Hartmann and Spit (2016)	6,58E+07
Ansell and Gash (2008)	12	Benz and Papadopoulos (2006)	0,64	Fischer and Schläpfer (2017)	4,88E+07

capacities and roles of decision-makers and stakeholders, the rules supporting the process, and information use and production.

A first set of indicators concentrates on the criteria for inclusion in the decision-making process (and thus provides information on its inclusiveness). For a process to be inclusive, there should be numerous stakeholders (van Meerkerk et al., 2015) and diverse stakeholders in terms of organisational affiliations and policy preferences (Matti et al., 2017). Some scholars specify the particular actors who should be included: those who are potentially the most affected by the policy under discussion (Geeraert, 2014) and administrative elites who have decision-making power (Matti et al., 2017). For Geeraert (2014), the question of who participates in the decision-making process should be open to discussion (and new actors should be able to join the process at a later stage).

Other indicators focus on the capacities and roles of the decision-makers and stakeholders in the decision-making process. For purposes of inclusiveness and accountability, stakeholders should be granted a seat at the table and the opportunity to present their arguments (which in turn may influence the result of the process; Geeraert, 2014). Stakeholders and decision-makers should have equal capacities in the process (Munta, 2020), especially in the negotiation phase (Geeraert, 2014). For decision-makers to be accountable, they should consider stakeholders' concerns and inputs (Geeraert, 2014; Iusmen & Boswell, 2017; Munta, 2020). Decision-makers should also explain and justify the result of the process to make it transparent (Geeraert, 2014; van Meerkerk et al., 2015). Finally, the managers of the decision-making process should give more or less room for self-organisation to stakeholders at certain times during the process (Geeraert, 2014).

Another series of indicators concentrates on the formal and informal rules that support the capacities and roles of actors in the decision-making process. For some scholars, the process should follow a predefined, explicit mandate and procedure for purposes of efficacy and quality of deliberation (Geeraert, 2014; Matti et al., 2017). However, for others, inclusiveness and quality of deliberation require stakeholders to be able to shape the agenda and participatory mechanisms and thus to be able to change the mandate and procedure (Iusmen & Boswell, 2017). The process should provide room for an open, honest discussion (Curry, 2016; Geeraert, 2014; Poelzer, 2019; van Meerkerk et al., 2015). In other words, deliberation should be governed by a 'democratic ethos' (Geeraert, 2014, p. 315), and actors should demonstrate "an ability to listen, account for, and act upon the interest of others" (Poelzer, 2019, p. 34). Such indicators are used to gauge the extent to which the process complies with a variety of principles: inclusiveness, accountability, efficacy, quality of deliberation.

Finally, the last set of indicators focuses on the information produced and used by decision-makers and stakeholders throughout the decision-making process. Such indicators are mostly used to assess the transparency of the process. Decision-making is deemed transparent when stakeholders have access to the information and supporting materials used throughout the process (Poelzer, 2019; Strebel et al., 2019). This may include information on the policy under discussion (van Meerkerk et al., 2015) or on the rules governing the process (Geeraert, 2014). The information that is used should be explained and justified by the decision-makers (Poelzer, 2019). Stakeholders' informational input should be taken into consideration by decision-makers (Munta, 2020), and, beyond this, information used should be coproduced by decision-makers and stakeholders (Curry, 2016; Munta, 2020).

Most scholars do not explore all dimensions of throughput legitimacy. Iusmen and Boswell (2017), Matti et al. (2017) and Munta (2020) mainly concentrate on the quality of participation. Strebel et al.'s (2019) primary focus is on transparency; Curry (2016) concentrates on openness and transparency; Poelzer (2019) on transparency, accountability and responsiveness; Geeraert (2014) on inclusiveness and openness to civil society, transparency and accountability, and efficacy; and van Meerkerk et al. (2015) on inclusiveness and openness transparency and due deliberation.

In most cases, indicators take the form of a dichotomous variable (a yes/no question whose answer is supported by case study material). Exceptions are van Meerkerk et al. (2015) and Matti et al. (2017), who put stakeholders' perceptions at the centre of the measurement of throughput legitimacy and ask them to express their agreement with items using a Likert scale.

In summary, the measurement of throughput legitimacy introduces a number of problems. First, scholars do not systematically measure throughput legitimacy using indicators. Second, when they do so, they use different, sometimes contradictory, sets of indicators. Third, the indicators vary both in number and in quality. Some scholars measure all dimensions of throughput legitimacy, while others only measure some of them. These problems prevent the comparison of findings across empirical case studies of governance processes and going forward in the theory of democratic legitimacy.

3.3.2. Which Policy Activities Contribute to the Production of Throughput Legitimacy?

In this paragraph, we strive to only use the previous research works: the ones based on an explicit, multidimensional measurement of the level of throughput legitimacy. If not, this is reflected in the formulation and the implications of the findings. Scholars have identified a number of participatory decision-making activities that contribute to the production of throughput legitimacy. Engaging in such activities is not without risks, as their failure is likely to increase the legitimacy deficit. In other words, producing throughput legitimacy is not only a question of which activities to implement but also of how

they should be implemented. A number of lessons can be drawn from the literature on collaborative governance.

Activities that contribute to the production of throughput legitimacy have characteristics in common: They are linked to the decision-making process (thus including governance networks and arrangements) and participatory in the sense that they include actors affected by the policy under discussion (stakeholders). At the national and subnational levels, such activities include roundtables with stakeholders, citizen juries and assemblies, referenda and polls, public hearings and presentations, idea competitions (Hartmann & Spit, 2016), monitoring processes (Eckerd et al., 2019), and policy forums (Fischer & Schläpfer, 2017; e.g., food policy councils [Behringer & Feindt, 2019]). At the supranational level, activities that contribute to the production of throughput legitimacy are mostly part of pre-existing IOs' arrangements (Corbett et al., 2018; Curry, 2016; Geeraert, 2014; Munta, 2020).

Interestingly, Hartmann and Spit's (2016) literature review suggests that different types of activity may maximise compliance with different principles of throughput legitimacy. Co-decision mechanisms (roundtables with stakeholders) may increase public support and consensus for the policy under discussion and maximise the inclusiveness and transparency of the decision-making process. This is also the case for public hearings, which may help inform (and educate) citizens and give them a sense of belonging to the citizenry. When consensus is difficult to reach, mechanisms that allow a majority of citizens to choose between predefined policy solutions (referenda) may help justify a controversial policy. Such activities may best serve the principles of legality and accountability. Citizen juries and idea competitions—which allow the table actors to generate the best ideas—may improve the quality of the final decision, i.e., the quality of the deliberation. Recent research works tend to support Hartmann and Spit's classification. In her case study of European Semester Officers, Munta (2020) demonstrates that their discussions with member state authorities and stakeholders (top-down roundtables oriented towards information exchange) increased ownership and domestic support for European Semester reforms. At the same time, European Semester Officers failed to convey domestic actors' feedback in a way that influenced the EU decision-making process (and improves the quality of deliberation). Thus, the connection between the types of activities implemented and the dimensions of throughput legitimacy maximised should be further explored.

Undertaking activities that contribute to the production of throughput legitimacy is not without risks. As Hartmann and Spit (2016) point out in their review, bringing all actors affected by a certain policy at the table does not automatically solve conflicts. Based on their case studies of the British NHS Citizen initiative and the EC Forum on the Rights of the Child, Iusmen and Boswell (2017) demonstrate that activities may be subject to stakeholders' attempts at disruption, which may result in decision-makers' tighter, more top-down control of discussions and increased scrutiny from participants and external observers. The latter situation is likely to paralyse the whole governance process. To prevent disruption, decision-makers may engage in behind-the-scenes negotiations with stakeholders, which would negate the primary purpose of participatory activities. This echoes Greenwood's (2007) argument that the participation of organised civil society interests in EU governance can be considered a complementing democratic input but also an aggravating democratic deficit problem—favouring the asymmetries of power between stakeholders. It is also in line with Corbett et al.'s (2018) study of six IOs, which states that IOs should maintain the balance between inclusiveness and efficiency when including small states in their decision-making activities as an attempt to increase their throughput legitimacy.

Further, some scholars, including Iusmen and Boswell (2017), contend that tokenistic participatory activities may instead increase cynicism among stakeholders and amplify the legitimacy deficit. Based on a comprehensive, multidimensional measurement of throughput legitimacy (see supra), Geeraert's (2014) case study of the European social dialogue in professional football shows that a decrease in throughput legitimacy has repercussions on input and output legitimacy. Overall, the previous studies confirm Schmidt's (2013) hypothesis that the production (or nonproduction) of throughput legitimacy has an influence on the production of input and output legitimacy (with the exception of Curry [2016], whose analysis rests upon a bidimensional measure of the concept; see supra). Although not in our original sample, Doberstein and Millar's (2014) comparison of homelessness governance networks in two Canadian cities confirms Schmidt's (2013) hypothesis. These authors find that the failure and discrediting of a governance process undermines the overall legitimacy of the institution behind the process. This decrease in throughput legitimacy may in turn diminish input and output legitimacy. Doberstein and Millar (2014) find the reverse to also be true.

In view of these risks, a number of scholars have begun to connect the concept of throughput legitimacy with the literature on collaborative governance. On the topic, Ansell and Gash's (2008) meta-analysis of 137 cases of collaborative governance constitutes a reference in our sample of publications. Ansell and Gash (2008) identified and categorised a number of conditions for the success of governance processes: favourable prior conditions (e.g., balance between resources of stakeholders; a past history of cooperation); conditions that relate to the governance process itself (e.g., facilitative leadership may; clear rules); intermediate outcomes conditions, i.e., conditions that are endogenous to the process and that interact with each other over time (e.g., trust building, commitment to—and ownership of—the process). One limitation in their work is that some conditions

can alternatively support or undermine the quality of collaboration (prior conflict and policy deadlock may create an impetus for collaboration).

Looking beyond conditions for throughput legitimacy, a number of scholars have demonstrated that some governance strategies are associated with increased throughput legitimacy. Their research tests and refines Ansell and Gash's (2008) intermediate outcome conditions and highlights the role of horizontalisation and boundary spanning leadership strategies. Poelzer (2019) demonstrates that horizontal interactions between stakeholders foster throughput legitimacy in the context of mine development in Canada and Sweden. Van Meerkerk et al.'s (2015) survey of participants of 166 Dutch complex water projects confirms that throughput legitimacy mediates the relationship between connective management activities and the performance of network governance. More connective management activities and strategies (for network managers to consider the diversity of stakeholders' perceptions and to encourage them to engage with one another) leads to increased throughput legitimacy. More throughput legitimacy in turn leads to better performance of the governance network (network outcomes integrate inputs from actors with different backgrounds). In this case, throughput legitimacy acts as an intermediary outcome. A similar argument is developed by Edelenbos and van Meerkerk (2015), who find that boundary spanning leadership is needed to turn trust-based informal network spaces into collaborative processes where stakeholders can build integrated solutions (which in turn increases throughput legitimacy). Finally, Fischer and Schläpfer (2017), based on the analysis of 29 Swiss environmental policy forums, point out that effective collaboration between stakeholders does not require conditions but combinations of conditions. They find that the most collaborative and productive policy forums are characterised by a bottom-up logic, participation of public authorities, a small number of relatively homogeneous participants, and majority rule. In other words, meta-governance strategies based on the self-organisation of policy actors and a moderate hierarchy foster effective collaboration and the production of throughput legitimacy. The previous research has paved the way for a better connection between combinations of conditions for the success of meta-governance strategies and the production of throughput legitimacy.

4. Conclusion

The objective of this article was twofold: to demonstrate the potential of a systematic literature strategy based on a combination of a QTA of abstracts, a CNA, and a content analysis of the full text of a sample of publications; to make sense of the stock of accumulated knowledge on throughput legitimacy, and to map what is already known and what is still debated and unknown.

From a methodological standpoint, the combination of a QTA, a CNA, and a content analysis of publications—within a mixed-methods-based systematic literature review strategy—allowed us to make sense of the stock of accumulated knowledge on throughput legitimacy. First, the QTA of abstracts derived from the bibliographic search and metadata extraction resulted in the classification of publications into three thematic clusters, each with its own research question, theoretical framework, methods and most representative publications. This classification proved different from Steffek's (2019). Cluster 2 asks which normative principles are behind the concept of throughput legitimacy. Cluster 3 questions which policy activities contribute to the production of throughput legitimacy. Cluster 1 asks how throughput legitimacy relates to collaboration between policy actors. An additional underlying question was how to measure throughput legitimacy. Second, the CNA resulted in the identification of the most cited, the most influential, and the most bridging publications on throughput legitimacy. The results confirmed some of Steffek's (2019) findings while suggesting that a few other neglected publications may be insightful in the study of throughput legitimacy (e.g., Ansell & Gash, 2008; Fischer & Schläpfer, 2017; Greenwood, 2007; van Meerkerk et al., 2015). Third, the content analysis of the full text of a sample of publications derived from the QTA and the CNA allowed us to provide some answers to the following questions: Which indicators have proven useful for measuring the level of throughput legitimacy? Which policy activities contribute to the production of throughput legitimacy? How does throughput legitimacy relate to collaboration between policy actors? We believe that the latter demonstrated that this mixed-methods-based systematic literature review strategy could be applied to other political science concepts, provided that they are prominent in the literature (i.e., used in numerous publications) and their meaning is unique, unambiguous and shared among scholars (a counter-example is the knowledge utilisation literature where a number of non-shared concepts such as knowledge, scientific expertise, and policy advice coexist; Caby & Ouimet, in press).

From a theoretical standpoint, we found that the measurement of the level of throughput legitimacy comes with a number of problems that prevent the comparison of findings across empirical case studies of governance processes. Scholars did not systematically measure the level of throughput legitimacy using indicators. When they did so, they used different, sometimes contradictory, sets of indicators. Some scholars measured the different dimensions of throughput legitimacy, while others did not. A more systematic and rigorous use of a more complete set of precise, specific indicators is necessary to move forward in the theory of throughput legitimacy. In this regard, indicators of stakeholders' perceptions regarding the governance process may constitute a promising avenue.

Despite these limitations, scholars have identified a number of participatory decision-making activities that contribute to the production of throughput legitimacy.

They include different types of activities that may maximise compliance with different principles of throughput legitimacy. Scholars have found that engaging in such activities is not without risks, as their failure is likely to increase the legitimacy deficit. Overall, their research work confirmed Schmidt's (2013) hypothesis that the production (or nonproduction) of throughput legitimacy influences the production of input and output legitimacy. In view of these risks, a number of scholars have begun to connect the concept of throughput legitimacy with the literature on collaborative governance. They have demonstrated that some strategies and combinations of conditions are associated with increased throughput legitimacy. Further research should explore these connections.

Acknowledgments

This research was supported by the Belgian Fonds de la Recherche Scientifique (FRS-FNRS; PDR T.0062.18 and CDR J.0003.19). The article was presented at the RECONNECT Conference in Lille organised by Camille Kelbel, Julien Navarro, and Giulia Sandri, and at the Public Policy Research Network in London, at the invitation of Claudio Radaelli. The authors thank the conferences organisers and participants for their insightful comments. We thank Axel Marx for his constructive suggestions. Silvia Fierascu also deserves credit for her support for the CNA. We also thank the anonymous reviewers and academic editors.

Conflict of Interests

The authors declare no conflict of interests.

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Politics and Governance (ISSN: 2183–2463)
2021, Volume 9, Issue 1, Pages 237–247
DOI: 10.17645/pag.v9i1.3936

Article

Lobbying Transparency: The Limits of EU Monitory Democracy

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Submitted: 15 December 2020 | Accepted: 25 February 2021 | Published: 31 March 2021

Abstract
This article examines the origins and current operation of the EU's lobbying transparency register and offers a critical review of the drivers and politics associated with lobbying reform in Brussels. The analysis considers the dynamics of political communication in EU institutions and draws on concepts of the fourth estate, the public sphere and monitory democracy to illustrate the particular challenges around lobbying transparency and opening up governance processes to wider scrutiny, and wider participation, at the EU level. This article draws upon interviews, official data and participant observation of some of the deliberations on lobbying transparency dating back to the 2005 ETI. The analysis is brought up to date by examining the data within the Transparency Register itself, both substantively in terms of the kinds of information disclosed and in relation to trends around disclosures and registration, since the register was launched over a decade ago. The article concludes with a critical appraisal of the evolving issue culture relating to lobbying transparency in Brussels as well as recommendations for the development of the Transparency Register itself.

Keywords
accountability; disclosure; lobbying; monitory democracy; political communications; public sphere; transparency

Issue
This article is part of the issue "Access or Excess? Redefining the Boundaries of Transparency in the EU's Decision-Making" edited by Camille Kelbel (Lille Catholic University, France), Axel Marx (University of Leuven, Belgium) and Julien Navarro (Lille Catholic University, France).

1. Introduction

In March 2005, the European Transparency Initiative (ETI) was launched, aimed at addressing concerns about the accountability of EU institutions. One dimension of the ETI was the proposed creation of a register of lobbyists (first called the Register of Interest Representatives, rebranded in 2011 as the Transparency Register) that was intended to shed some light on how influence is brought to bear in EU decision making. One of the concerns expressed in the European Commission's initial Green Paper on the Transparency Initiative centred on a 'lack of information about the lobbyists active at EU level, including the financial resources which they have at their disposal' (European Commission, 2006, p. 6).

The drivers of the ETI were publicly said to be the democratic need for trust and accountability in the EU institutions (themes prominent in public discourse as the EU constitutional referenda was rejected in France and the Netherlands in 2005). The normative assumptions that underpin the register align with an elite pluralist conception of EU public affairs (Coen, 2007). The logic associated with the EU transparency register is that there can only be accountability in public affairs if there is the possibility of wider knowledge about lobbying. A public register opens up contacts between the institutions and outside interests to scrutiny by media, civil society, and indeed the wider lobbying community. The ETI, which rhetorically at least evokes the wider EU public, must also be seen as part of a response to more local criticism from within the Brussels bubble (emanating from some MEPs, Ombudsmen, civil society watchdog groups as well as some national Eurosceptic media) about transparency and accountability deficits at the heart of European politics and governance.

Nevertheless, the ETI came somewhat out of the blue, and reportedly surprised some senior Barroso Commissioners in respect of its reach and ambition.

Prior to the ETI, debate around lobbying influence in Brussels was confined to the pages of the *European Voice*, reflecting a sporadic dialogue between civil society groups, the lobbying consultant associations and a few MEPs and academics. There were differing views about who might wield lobbying influence, with some observers noting growing corporate power in Brussels (Balanyá, Doherty, Hoedeman, Ma'anit, & Wesselius, 2003; van Apeldoorn, 2005) while others suggesting a lobbying free-for-all where civil society organisations (CSOs) are prominent (Greenwood, 2002). Different figures were bandied about to make the case for and against the need for reform. Estimates of the number of lobbyists active in Brussels before the ETI varied greatly:

> There are around 1,400 EU level interest groups formally constituted in law, of which two-thirds are business and one-fifth public interest groups….To these can be added large firms (around 350 are estimated to be active at the EU level), commercial public affairs players, a number of national business interest associations active in engaging EU decision making, and an array of informal network structures…approaching 20,000 interest units which have accepted the need to engage EU politics in some way. (Greenwood, 2002, p. 431)

Included within the estimate of 20,000 interests are national level organisations across Europe with some interest in EU level public affairs. An official estimate produced by the European Parliament identified some 2000 organisations with a presence in downtown Brussels (European Parliament, 2003). Civil society groups suggested some 15,000 active lobbyists in Brussels (Corporate Europe Observatory, 2003, p. 8). The inability to even agree on the broad estimates of the numbers of lobbyists in Brussels was a telling sign of a lack of transparency and intelligibility of EU public affairs (for a detailed discussion of the methodological issues associated with estimating the EU lobbying universe see Berkhout & Lowery, 2008), especially to those outside the Brussels bubble.

2. European Lobbying Transparency: Key Trends, Themes and Tensions

The analysis that follows will focus on the challenges of increasing lobbying transparency in Europe, and the related question of monitory democracy in a European polity that in many senses lacks an organic and engaged *demos*. This relates to the nature of the European public sphere and the difficulties in securing critical publicity, democratic accountability, and reaching wider European public opinion. The argument presented here is that elite lobbying networks in Brussels and their communicative interactions within what might be termed the Brussels bubble can be seen as a significant constituent part of the actually existing European public sphere. This is not widely recognised in literatures on media and political communication in Europe, nor indeed in literatures discussing disclosure and lobbying transparency.

The Commission has long played an active role in developing and financially supporting various policy communities in its orbit. Indeed, in a landmark statement nearly three decades ago the Commission signalled its receptiveness to outside interests:

> The Commission has always been an institution open to outside input. The Commission believes this process to be fundamental to the development of its policies. This dialogue has proved valuable to both the Commission and to interested outside parties. Commission officials acknowledge the need for such outside input and welcome it. (European Commission, 1992)

In the wake of the Single European Act the incentives to lobby Brussels directly increased significantly (see Chari & Kritzinger, 2006). Since the 1990s there has been a burgeoning lobbying sector in Brussels. This crowded and competitive lobbying environment comprises in-house corporate lobbyists, trade and business associations, lobbying consultancies, law firms, think tanks and public relations agencies, as well as civil society networks, individual NGOs and governmental as well as regional representative organisations. In this context outside interests have developed their lobbying strategies to account for the changing terrain in Brussels, and 'have matured into sophisticated interlocutors that often have more awareness of inter institutional differences than the functionaries they lobby' (Coen, 2007, p. 4). Commenting on the expansion of lobbying and advocacy in Brussels, Coen (2007) observes what he terms an elite pluralist arrangement. To achieve good access for direct lobbying of the Commission—the primary focus—large firms were encouraged to develop a broad political profile across a number of issues and to participate in the creation of collective political strategies. Accordingly, the cost of identity building would be discounted against better access to "company specific" issues at a later forum or Committee. As such, 'lobbyist[s] themselves recognised the importance of reputation building as a Brussels lobbying strategy' (Coen, 2007, pp. 7–9). Concerns about reputation and image are not incidental, as they relate to the perceived legitimacy of lobbying and are seen by actors as creating necessary licence to operate and room for manoeuvre in building public affairs coalitions and campaigns that may be needed for lobbying the EU institutions.

The gravitation of different outside interests to Brussels coincided with the Commission's strategic rethink on governance, including how relations with outside interests could best be organised. The White Paper on Governance (2001) addressed lofty concepts like a "citizens' Europe," which in practice would be reflected in increased consultation with civil society and promoting

political participation, as well as the democratisation of expertise and input into planning, regulation and decision making (European Commission, 2001). These themes have run through deliberation and advocacy on lobbying transparency in Brussels ever since. Before the advent of the ETI some influential business organisations were promoting a new system of managing relations between the EU institutions and outside interests, which would effectively debar those organisations and networks funded by the EU institutions from lobbying or having representative status (Greenwood, 2007). This recommendation was widely seen as a direct attack on some of the more critical voices in civil society in Brussels, which had been calling for greater corporate accountability and increased environmental and consumer protections.

However, the question of EU funding and sponsorship of outside organisations does not simply apply to a few high-profile NGOs. Other key stakeholders in the debate around lobbying transparency in Europe are also implicated. Public relations and public affairs agencies are hired by the Commission to execute communication campaigns in various member states, and indeed across the entire EU. These same agencies are also hired by private clients to make representations on their behalf to the Commission. They help draft responses to consultation documents, as well as more precise work drafting specific amendments to legislation. While many non-governmental organizations in Brussels that lobby the Commission on a range of policy issues are also (in part) funded by the Commission, this applies to some of the major think tanks in Brussels as well. Thus, there are multiple commercial and interpersonal connections between political actors that occupy 'premium' communicative space at the centre of decision-making and legislative power in Europe. As such, the ETI proposals to open up some of these connections and contacts to wider public scrutiny unsurprisingly provoked a number of defensive responses from the lobbying industry.

The debate prompted by the launch of the ETI in March 2005 and throughout the official consultation in 2006–2007 quickly brought a number of key issues into focus, centring on who and what should be captured by a lobbying register. The proper disclosure of financial information on lobbying expenditure and information relating to the details of lobbying activity were debated. Law firms and lobbying consultants were initially resistant to disclosure of client information, pleading for some element of client confidentiality to be recognised in the disclosure regime. While it soon became clear that promises of robust self-regulation would be insufficient to assuage the Commission, the lobbying associations continued to fight a rear-guard up to the launch of the register in 2008. A novel feature of the proposed transparency register was the inclusion of think tanks, recognising their significant role in facilitating direct and indirect lobbying in Brussels. In this context indirect lobbying refers to those activities that do not include face-to-face advocacy and interest representation, and may include lobbying research, intelligence gathering, analysis and the production of opinion pieces that shape wider policy discourse. Some of the long-established Brussels-based think tanks (Bruegel, Centre for European Policy Studies, also often contracting with the EU institutions) had privately considered offering some form of self-regulation of their activities to avoid capture in the lobbying register, but that idea failed to gain any traction and was quietly shelved.

But the status of the register itself, and its legal foundations, are significant. A central theme of debate around lobbying transparency in Brussels has been the issue of mandatory versus voluntary disclosure. Transparency advocates have consistently pushed for an all-encompassing mandatory regime, with detailed financial disclosures, to be placed on a statutory footing. The commercial lobbing sector, and some trade associations and in-house lobbyists have resisted detailed financial disclosure and argued for a self-regulatory system. The Transparency Register launched in 2008 reflected a compromise on these positions: financial disclosures were organised within differential bands for consultancies and private companies (whereas NGOs were required to report overall turnover), and lobbyists did not need to specify the focus or goals of their lobbying activity, but instead were invited to disclose policy areas of interest to lobbyists. All this information was disclosed on a voluntary basis as the register does not have a statutory underpinning.

Civil society groups promoting lobbying disclosure produced an analysis of the lobbying register after its first year in operation. The criticisms in the report (ALTER EU, 2009) point to some loop-holes in the Commission's system, with the coverage and reliability of data in the register questioned. Initially less than 1500 organisations registered, as many of Brussels's largest consultancies, law firms, companies and think tanks declined to disclose any lobbying information. It quickly became apparent that the office managing the Register of Interest Representatives had little resource to check the accuracy of filings, meaning that disclosures were published with effectively no oversight.

Friends of the Earth Europe published an analysis of the corporate declarations in the EU lobbying register in advance of the introduction of a joint Commission and Parliament effort to standardise lobbying transparency. The report compared the disclosures of some of the largest transnational corporations in Europe who were also actively lobbying in the US (where the disclosure system is mandatory and data is more granular than that required in Europe). They concluded 'that EU companies are either failing to declare their lobby spend or underestimating it in the register. Were the register mandatory, it would be far easier to see the true scale of lobbying activities in the EU' (Friends of the Earth Europe, 2010, p. 10).

A data scrape of the Lobbying Register from June 2009 reveals a very mixed picture: 5693 organisations

had registered at this point (a slightly higher figure than some of the literature suggests; see Crepaz, Chari, Hogan, & Murphy, 2019, p. 52), with 3404 identifying themselves as in-house lobbyists; 1472 organisations were categorised as NGO/think tanks, yet on closer inspection there were very few think tanks in this sample, and many trade associations and business associations chose to categorise themselves as NGOs. Only 365 consultancies registered. Moreover, 1807 of the organisations in the database claimed not to be active at the European level.

The first iterations of the EU's lobbying register were owned and designed by the Commission. In what might be termed an experimental early phase of European lobbying registration (2008–2011) the regulatory framework was still in formation, with various outside interests seeking to shape the reach and teeth of the regime. As well as the focus on the legal framework (and the potential for associated sanctions) the question of financial information disclosure recurred. Partly this was a result of advocacy from pro-transparency groups, but the comments of Siim Kallas, the Commissioner who then held the portfolio for lobbying related issues, clearly illustrates the core concerns: 'Nobody would pay real money for lobby services without expecting something in return—and that "something" is influence' (Kallas, 2007). Yet the official recognition of the significance of resources devoted to lobbying would not easily translate into disclosure metrics that might be readily understood by scholars, media, watchdogs or interested publics.

While these debates might seem like a minor historical footnote, they nevertheless helped shape the limits and purposes of the lobbying disclosure system in Europe today. The available literature on interest representation in Europe until relatively recently has been populated by sectoral network analyses, narrowly defined case studies, speculative theorisations, normative best practice reviews or synthesis studies that rely on what would appear to be largely aggregated or unreliable data (Berkhout & Lowery, 2008). The literature that now exists on lobbying regulation specifically (Bunea, 2019; Chalmers, 2013; Chari, Hogan, Murphy, & Crepaz, 2019; Crepaz et al., 2019; Greenwood & Dreger, 2013; Holman & Luneberg, 2012) allows for some agreed metrics to foster comparison between different systems. Such work ranks the EU system as a medium-regulated system.

In 2008, a joint working group between the European Parliament and the Commission began preparations for an inter-institutional agreement (IIA) on lobbying regulation, which passed in 2011 giving birth to the Joint Transparency Register. This voluntary scheme required lobbyists to disclose information about their activities, in much the same manner as the trial register had gathered and included publication of client and network relationships relevant to public affairs. However, the system lacked clear sanctions and continued to be hampered by lack of resources to verify disclosures, and widespread avoidance by many significant lobbying organisations (indeed the reticence of major law firms active in public affairs and regulatory advice to participate in the register continues to this day). A concerted civil society campaign to secure mandatory lobbying regulation continued, which sought to expose the shortcomings of the IIA approach favoured by the Commission (ALTER EU, 2014). Other analyses judged the Register more kindly, deeming it a qualified success: 'There are now more than 5500 individual entries….We estimate that around three-quarters of business-related organisations active in engaging EU political institutions are in the Register and around 60 percent of NGOs with a European interest are in the Register' (Greenwood & Dreger, 2013, p. 159). By current disclosure data this assessment looks to have underestimated the lobbying universe, but it does recognise the growing reach of the register. A related concern in public affairs circles in Brussels was the trajectory of transparency measures, with concerns being raised about emerging rules to govern conflicts of interest, revolving doors, the composition of expert input on various advisory and regulatory bodies: 'The latter are still evolving in a process of incremental, though lumpy, development, often following the interjection of civil society watchdogs, sometimes with the support of a European Ombudsman' (Greenwood & Dreger, 2013, p. 141).

A new IIA in 2014 created what was termed a de facto mandatory lobbying register. The Commission was under pressure from the European Parliament (and some external stakeholders) to make the Transparency Register mandatory, but resisted that approach, preferring instead to increase pressure on outside organisations to sign up to the register by adopting and publicising a series of soft sanctions. The key incentive to boost compliance was the Juncker Commission pledge to only meet with registered lobbyists and to publish details of contacts with organisations and individuals in bilateral meetings, including disclosing the topics discussed (European Commission, 2015). These policies promoted a notable spike in registrations (see Figure 1), although the commitment appears not to be consistently applied. In essence, without a legislative underpinning the register will also be vulnerable to non-compliance. The soft power efforts to encourage registration have had some impact, but without a robust and consistently applied applied policy to decline meetings and briefings with outside interests not participating in the transparency scheme the limits of a voluntary approach appear to have been reached. The European Parliament also called on the Commission to submit a legislative proposal to underpin a mandatory lobbying register by the end of 2016. That process appears to have stalled, and both institutions have shown little political appetite to move this forward and deal with the exclusion of the Council from the current arrangements.

A notable aspect of the development and expansion of the current European lobbying transparency system has been the role of civil society in making the case for reform, demonstrating the short-comings of the various

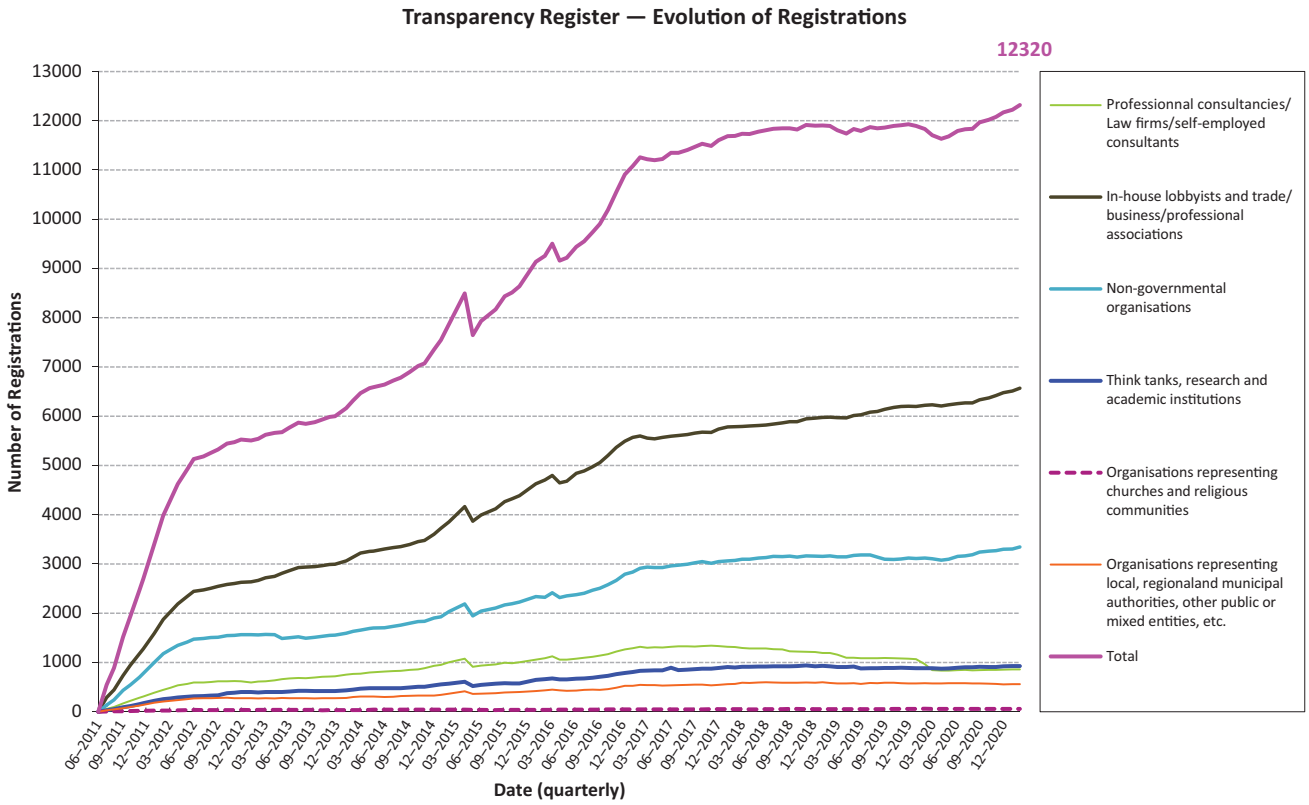

Figure 1. Evolution of transparency registrations. Source: Joint Transparency Register Secretariat (2021).

systems to promote lobbying transparency: 'Acting as norm entrepreneurs that by default politicise their lobbying, they add to the breadth and participatory character of the decision-making process' (Coen & Katsaitis, 2019, p. 281). Scholars have identified gaps in knowledge and information relating to 'under-researched third-party groups that may have an impact on policy outcomes, and [reaffirm] the need to track lobbying footprints at the cycle's earlier stages' (Coen, Lehmann, & Katsaitis, 2020, p. 2) and the continuing lack information around professional lobbying advisors:

> We note that we know surprisingly little about the activity of the third largest group of interests in the EU, professional consultancies…future research that assesses their activity on a per file basis can offer valuable insight into the EU lobbying universe.' (Coen & Katsaitis, 2019, p. 289)

One could add to this list the virtual invisibility of law firms engaged in lobbying, and the lobbying dynamics that may impact of the composition and work of expert groups.

The review of the origins and evolution of the current lobbying disclosure system in Brussels offers an informational baseline. Much of the scholarship on lobbying transparency and interest group activity has focused on the governance dimension, and what information is disclosed, or the informational exchanges between stakeholders. There has been a rather striking general lack of interest or curiosity about how such information can be circulated, communicated and made more widely known via media, networks and platforms (Naurin, 2006, 2007). This missing element is a key factor in assessing the limits of transparency to which we must now turn attention.

3. A European Public Sphere or a Brussels Bubble? The Case of Lobbying

There are strong normative and rationalist ideas that suffuse debate on lobbying transparency. One common line of reasoning is that lobbying transparency makes information publicly available, which aids public understanding of politics, scrutiny of legislative processes and therefore boosts accountability. This logic leans heavily on the media acting as a fourth estate, and also assumes that there is a watching and interested public, or in the European case, publics. It is also a model that is perhaps not easily transposed onto the complicated institutional and decision-making arrangements in Brussels. Another line of argument around lobbying transparency is that it makes the lobbying process more visible to political insiders and that visibility promotes probity and adherence to the rules of the game.

Using the conceptual lens of the public sphere the argument presented here considers how lobbying can be made more transparent and therefore accountable. To do this the discussion first focuses on how the concept of the public sphere is often very media centric. As a corrective to such approaches the Brussels lobbying

scene comprising elite professional networks of communication is discussed. These networks can be considered as part of the European public sphere. They are formally outside of the political institutions but orbit them very closely. The interactions between lobbyists, elected representatives and bureaucrats within these networks are not widely reported on by the news media, and are not easily captured in the Transparency Register, yet these appear to be the very stuff of public affairs and political communication in Brussels and would appear to be virtually unknown to wider European publics.

In respect to the argument around media as fourth estate, the empirical evidence suggests that the media are not much interested in reporting on the European lobbying register. This does not mean that the media are not interested in reporting on lobbying, but that there appears to be little newsworthy in the Transparency Register if coverage of its contents, or acknowledgement of the register as a source for the media, are indicators (see Table 1). This may be a product of the lag in publication of timely information in the register, or indeed the content of the disclosures themselves. A cursory inspection of lobbying disclosures on the Transparency Register would not likely yield front page headlines. Nevertheless, the broad patterns of media coverage of the register are illustrative.

What media coverage there is can be said to be largely Anglophone, largely online, and largely speaking to specialist or niche audiences. The lack of newspaper coverage of the Transparency Register suggests it is not yet perceived as a news-worthy source for media. Of these news items around 20% rely on comments and contextualisation by civil society groups. What is known about media coverage of lobbying is that it is often related to scandals and wrong-doing. The US is perhaps an exception to this, as media coverage of lobbying expenditure is a staple of policy analysis in the quality press and online outlets. This is possible because of a much more robust and granular lobbying disclosure system. So, one of the key limiting factors in media coverage of lobbying in Europe is the nature of the regulatory regime and the information that can be made available to the public through official transparency mechanisms. But the role of the media merits some consideration too, especially as it relates to the unique political space that is Brussels.

There has been considerable scholarly and policy interest in the European public sphere over the last two decades (Eriksen, 2005; Fossum & Schlesinger, 2007; Gil de Zúñiga, 2015; Risse, 2015; Walter, 2017). Much of the academic debate on the creation, or indeed very existence, of a European public sphere is loaded with theoretical and normative assumptions about the desirability and possibility of a common European communicative space as a means to nurturing a shared European identity, thereby bolstering a wider political project of European integration (Baisnee, 2007; Schlesinger, 2003; Schlesinger & Kevin, 2000).

The European public sphere can include mass media, but it must also include specialised media (Baisnee, 2007), dealing with discrete policy issues and serving select audiences, including lobbyists. To really capture the dynamics of EU public affairs the perspective must be wider again. To account for communications rather than simply media, one must focus on other places where such communication occurs. Social media platforms are an obvious starting point and are easily accessible to those not based in Brussels. It is not clear if social media data yet offers a useful or reliable form of data to understand EU level lobbying dynamics. It is being used by scholars to try to map public affairs networks and discourses (Hobbs, Della Bosca, Schlosberg, & Sun, 2020).

Research on the shape and functioning of the European public sphere(s) too often takes media (Gripsrud, 2007) and media coverage of EU affairs as synonymous with the European public sphere (Trenz, 2004). A useful corrective to such approaches is to begin to examine the actual functioning of political communication in Europe from the perspective of issue or interest-based networks (Eriksen, 2005), overlapping

Table 1. Media coverage of European Transparency Register, from 1 January 2011 to 1 December 2020.

	Transparency Register (en)	Registre de transparence (fr)	Transparenz-Register (de)
TOTAL	1619	205	82
Newswires & press releases	747	24	7
Web-based publications	505	27	12
Newspapers	212	43	38
Newsletters	33	18	0
Industry trade press	24	26	2
Legal news	16	0	0
Weblinks	13	3	0
Magazines and journals	12	33	7
News transcripts	2	2	15

Source: Author's search of the Nexis news database (https://advance.lexis.com), by Europe region, for search terms in quotes, all language publications (high similarity duplicates removed). Some categories of publications removed, e.g., aggregate news sources, video, audio, undefined.

communicative communities and networks (Schlesinger, 2003) or sources rather than media (Davis, 2007; Dinan & Miller, 2009). Much of the existing literature reflects a 'tendency to present public spheres as free-floating communicative spaces, abstracted from the colonisation of public-political deliberation by state and corporate actors under conditions of neoliberal hegemony' (Stavinoha, 2020, p. 5).

Shifting the emphasis to communication networks and the sources of political communication, allows actually existing European public spheres to come into focus more clearly. The approach taken here starts by examining the communicative agency of policy actors, particularly elite communicators (those whose business is the business of European public affairs, which would include journalists, lobbyists, and those in expert policy networks, including think tanks), in explaining and understanding the character of political communication and public affairs in the EU. The extent to which lobbyists target mass, or specialist, media or focus more specifically on elite discussion and decision-making fora is an empirical question. In practice it is clear that a model that only considers the public or published forms of political communication in Europe misses large swathes of the actually existing European public sphere, created by the activity of elite communicators acting toward what might be termed "strong publics" (Eriksen & Fossum, 2002), that is the governance networks surrounding the EU institutions.

Baisnee (2007) argues for a new approach to studying political communication in Europe that moves beyond standard research designs based on discourse analyses of media content to a more sophisticated and ethnographically informed understanding of European communicative space:

> Anyone who has spent some time in Brussels knows that an incredible amount of political activity occurs, including almost daily demonstrations, public debates, etc. The fact that they do not appear in national newspapers does not mean that they never happened. (Baisnee, 2007, p. 499)

One can readily appreciate that those interested in that range of political activity not well served by mainstream media will usually be a select demographic, a niche within a niche of political anoraks and those whose job it is to follow and be informed about EU affairs. While elite media do serve their audiences with a digest of news about key legislation and policy-making in Brussels (Corcoran & Fahy, 2009; Schlesinger & Kevin, 2000), this is actually still a very small part of political communication in the European public sphere (Hänska & Bauchowitz, 2019; Hepp et al., 2016). Where else should we look? Schlesinger argues one way to move this debate forward is 'to analyse emergent European communicative spaces' and if this is accepted then logically 'the focus needs to shift to the new, supranational arenas and their constituent publics' (Schlesinger, 2003, p. 11). Baisnee (2007, p. 501) suggests a focus on 'the social groups actively involved in the debates over the EU and EU policies.' The analysis of the European public sphere cannot simply be restricted to news media and must account for the various forms of political communication produced, circulated, contested and consumed by different actors and publics, in different media, fora and networks.

One way to reframe the European public sphere is to compress the space and consider political communication as it exists in the locale of the euro *quartiér* in Brussels. This aligns with work championing the spatial turn in communications studies (Falkheimer & Jansson, 2006) that draws attention to the significance of place and space in communicative activity, though many applications of this work are essentially concerned with mediated communications. We can accept the spatial turn and focus on Brussels as a site of elite communication, populated by a variety of political actors, including news media, both general and specialist, Commission officials and spokespersons, elected representatives, lobbyists, public relations professionals, and think tanks, all of whom routinely interact in the daily business of European political communication, and many of whom are directly concerned with lobbying and public affairs.

Davis' (2007) work on media sources suggests examining 'the micro and less visible forms of communication at these sites, and on the private actions of powerful individuals' (Davis, 2007, p. 10). It also suggests that researching the public sphere can become a question of communications and power rather than simply a question of the role of mass media institutions embedded within power relations. The latter fails to account for the submerged but significant political communications activities of lobbyists, think tanks and policy planning organizations.

The routine business of lobbying and public affairs also includes conferences, workshops, EU affairs training events, breakfast briefings, lunchtime seminars and dinner debates, as well as pseudo-events like book launches, and the activities of cross parliamentary groups, all of which create spaces where political communicators come together to discuss policy, to share information, to hear representations and argument, to lobby and negotiate consensus and dissensus. This is the substance of the actually existing European public sphere in Brussels. How are such networks and their impacts to be made visible? This is a challenge for transparency campaigners, media and indeed scholarship. In the case of the latter much work under the banner of political communication defaults to drawing on mass media and more recently social media as data. There is certainly a need for the use of field methods to complement mass and social media, plus analyses of trade publications, websites and data scraping public registers (e.g., in Europe a transparency mosaic could include the Transparency Register, Commission disclosures of high level lobbying meetings,

the Commission database of expert groups, as well as data from national lobbying registers, and national level FOI disclosures; see Miller & Dinan, 2016), to triangulate as many different sources across the public sphere to offer a more complete account of policy deliberation and discussion.

It appears that this European public sphere is formally open and accessible, if you can pay the often pricey entrance fee, to various commercial conferences and events where the business of EU governance is discussed. The "staging" of the public sphere, through conferences, discussion fora, expert meetings, publicity stunts and other events has become something of a lucrative sideline in Brussels for many communications companies and think tanks. The cost of participation should not be underestimated. Maintaining an active presence in Brussels is a real barrier to entry in terms of the aggregation of memberships fees to political groups and trade associations, think tank networks and attending elite commercial policy conferences has arguably created a new bourgeois public sphere. Part of this cost is captured in the lobbying Transparency Register, where organisations are asked to declare their membership of different networks and coalitions. Another feature of this space is that it is almost exclusively occupied by actors who are committed to the European project and are aligned to free market principles. If you want to have any impact and build effective political coalitions in Brussels you must at least be pro-European—this is tacitly understood as a key feature of the culture by all those participating in the "Brussels bubble" (Laurens, 2018). Examining the communicative action of political actors also illuminates the close interrelationships between the Commission and communicators in its orbit. Many actors work on behalf of, and towards, the institutions—they represent and make representations to the very bodies at the centre of legislative power in Europe.

It is therefore useful to conceptualise this environment in terms of a specialised and politicised communicative space, where a range of political communicators (lobbyists, think tanks, journalists, NGOs, advisers, officials and elected representatives) interact and engage in policy dialogue. This public sphere is dominated by sources somewhat removed from an overseeing or overhearing public and displays some of the disembedded tendencies others have noted in elite communications circuits characterized by 'professionalized communications, cultures and associated elite networks which exclude journalists' (Davis, 2007, p. 174). There is weak external scrutiny and little critical publicity (for a related discussion of publicity in EU affairs and role of civil society see Neyer, 2004, pp. 32–33). This shapes the communicative logic of the Brussels bubble and contributes to what has been characterized as its elite pluralism.

Civil society advocacy has been seen to act as a surrogate for the expression of public opinion in Brussels and elected representatives are more likely to articulate public interest arguments on issues where civil society is active and where the issue has high public salience. 'The involvement of business lobbyists…seems to be a countervailing force within politicization, constraining the prevalence of public interests in EU policy debates' (De Bruycker, 2017, p. 616). Politicians appear to be less likely to articulate public interests on issues with low public salience and where business lobbies are active. It is important to note that there is considerable variety and divergence across civil society in Brussels, and CSOs can be located across the political spectrum from left to right. What they have in common, at least in a normative sense, is:

> CSOs are reaching out from the grass roots to remote Brussels and thus bring people's interests into the decision-making process. As a partner in governance, they are expected to voice the diversity of interests and views and to bring the knowledge and down-to-earth experience of citizens into the policy-making process. In other words, they are expected to contribute both to input and output legitimacy. (Kohler-Koch, 2010, p. 106)

The public are largely excluded from this space, which adds weight to the idea that a lobbying register exists to serve an already super-served public—those professionals clustered around the European quarter in Brussels, and those across Europe virtually engaged in public affairs. There is some evidence to suggest that lobbying registers are most keenly monitored by lobbyists and policy-makers themselves, providing increased transparency for those inside the lobbying milieu (Crepaz, 2020; Rush, 1998). Equally, it could be reasonably claimed that the register has failed to make lobbying transparent to the wider public. This sits at odds with the founding rhetoric of lobbying reform in Brussels, which was to boost trust and participation. Participation and popular mobilisation around issues at the EU level is very rare, a recent exception being widespread opposition to TTIP which featured concerns about official secrecy and the lack of transparency associated with the putative negotiation of that trade deal (Coremans, 2017). The TTIP case 'is reflective of the historically engrained institutional ambivalence towards public political participation in EU affairs' (Stavinoha, 2020, p. 4) and illustrates some limits to the EU institutions appetite for increasing publicity (Naurin, 2007; Neyer, 2004). Moreover, despite being proclaimed as the most transparent trade deal ever, in practice there was the usual secrecy around the negotiations. Interestingly, Stavinoha's (2020) analysis of TTIP was in part only possible by using Freedom of Information requests to access documents that would otherwise not have been published.

For the Commission:

> Transparency is primarily aimed at fostering citizens' trust by allowing them to understand what is being negotiated. For CSOs, transparency is just a stepping-

> stone that should allow citizens (through CSOs) to meaningfully participate in the negotiations, and only this can bring about trust.' (Gheyle & De Ville, 2017, pp. 23–24)

The parallels between the TTIP case and the limits to lobbying transparency are quite striking. The issue of lobbying disclosure in Europe would not have been addressed without pressure from civil society. Many involved in this issue simply see lobbying transparency as a necessary first step to developing a more responsive (to wider public opinion) and accountable European polity. The NGOs and campaign groups in Brussels active on the issue of lobbying transparency can be considered as a surrogate for the missing mass media. Civil society groups interested in good governance and disclosure contribute to monitory democracy (Keane, 2018) and form part of a watchdog media matrix around lobbying. They have used web and social media to publicise concerns about privileged access, conflicts of interest, and corporate capture, which are now part of the public lobbying issue culture in Brussels. In some respects, these campaign groups have made the issue of lobbying more visible and more public than it would otherwise be. Their continued activism on this agenda will be a factor in determining the wider public reach and understanding of European lobbying transparency, whatever new mandatory arrangements are agreed by the institutions.

4. Conclusion

The limits of European lobbying transparency are a factor of the interplay of formal and informal drivers of disclosure: the types of information disclosed in the register and the available sanctions for non-disclosure are of course very significant. However, the existing political opportunity structures and the communicative spaces and networks that orbit Brussels politics, and are connected to national capitals and public spheres, are also important.

It is likely that the evolution of the transparency regime in Brussels will be shaped by a combination of political appetite, imagination and pressure from advocates of transparency and good governance. One of the universal lessons on all lobbying disclosure systems is that many lobbyists are not very enthusiastic about increased regulation. The tensions between public and private interests would suggest that with an issue community chronically or constitutionally incapable of self-regulation political pressure is needed to drive reform. Previous best guesses have been shown to under-estimate the population of lobbying organisations active on the EU level. Without being able to accurately identify what actors are engaged in lobbying there is little prospect of meaningful accountability for them, or for those they interact with. A mandatory system may help address this and create a transparent and more robust disclosure system. However, the stalled inter-institutional process suggests that such a system is not in the offing.

The resources to publish and update a database of lobbying spending and activity, as undertaken by the OpenSecrets project of the Centre for Responsive Politics in the US, is being developed in the EU at present. The LobbyFacts project, which draws on the EU transparency register and data published by the Commission on high level meetings with lobbyists seeks to allow some tracking of lobbying trends and activities in Brussels. Nevertheless, the detail of the data in the LobbyFacts database is comparatively thinner than what is published in OpenSecrets, mainly due to differences in the level of detailed disclosure in Brussels and Washington, with the latter a mandatory system with specific requirements regarding lobbying expenditure disclosure and significant penalties for non-compliance. Therefore, the ability of media to explain EU public affairs and how influence is exerted in Brussels is severely curtailed. The available evidence suggests that watchdog groups are likely to remain key actors in promoting awareness of lobbying transparency and building pressure for reform.

Acknowledgments

The author would like to thank Erik Wesselius (Decoding Corporate Power) and Nils Mulvad (Kass & Mulvad) for access to database of lobbying disclosures downloaded and stored, 2009–2011.

Conflict of Interests

The author declares no conflict of interests.

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Politics and Governance (ISSN: 2183–2463)
2021, Volume 9, Issue 1, Pages 248–260
DOI: 10.17645/pag.v9i1.3823

Article

Talkin' 'bout a Negotiation: (Un)Transparent Rapporteurs' Speeches in the European Parliament

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Submitted: 6 November 2020 | Accepted: 22 January 2021 | Published: 31 March 2021

Abstract
For policies to be legitimate, both the policy process and the underlying reasons must be transparent to the public. In the EU, the lion's share of legislation is nowadays negotiated in informal secluded meeting called trilogues. Therefore, presentation of the trilogues compromise by the rapporteur to the European Parliament (EP) plenary is, arguably, one of the few formal occasions for 'transparency in process,' i.e., public access to the details of actual interactions between policymakers. The aim of this article is thus to examine the extent to which rapporteurs are transparent about trilogue negotiations when presenting legislative compromises to the EP during plenary sessions, and to assess whether the extent of transparency is linked to the extent of conflict between legislative actors and to elements of the political context related to rapporteurs. To this purpose, we coded 176 rapporteur speeches and, on this basis, concluded that these speeches poorly discuss the trilogue negotiations. Interinstitutional negotiations are discussed in only 64% of cases, and even when they are, the extent of information about trilogues is generally small. While we do not find support for an effect of political conflicts, some characteristics linked with rapporteurs are significantly related to transparency in process of their speeches. This is the case for their political affiliation and their national culture of transparence.

Keywords
European Parliament; European Union; plenary debates; rapporteurs; transparency; trilogues

Issue
This article is part of the issue "Access or Excess? Redefining the Boundaries of Transparency in the EU's Decision-Making" edited by Camille Kelbel (Lille Catholic University, France), Axel Marx (University of Leuven, Belgium) and Julien Navarro (Lille Catholic University, France).

1. Introduction

Transparency about the process leading to policy choices vis-à-vis those they concern is crucial for democratic representation and decision-making, including in the EU (Lord, 2013; Stie, 2013). Yet, in the EU, the lion's share of legislation is nowadays negotiated in informal secluded meetings called trilogues. During trilogues, representatives of the co-legislators (i.e., the Council and the European Parliament [EP]) and the Commission negotiate compromises that are then voted on by their institutions. Since trilogues are secluded, the public is de facto excluded from the negotiation process leading to EU legislation. It has thus been argued that decision-makers should at least provide retrospective information on the process that led to the legislative outcome. This information is necessary for citizens to control their representatives and for MEPs to vote on the compromises with sufficient information. Therefore, it is the cornerstone of the accountability of decision-makers to their constituencies, which is a foundation of the legitimacy of the EU legislative process. This is what Jane Mansbridge (2011) calls 'transparency in process,' i.e., public access to the details of the decision-making process, as opposed to

'transparency in rationale,' i.e., mere public access to the reasons for the decision.

In the ordinary legislative procedure of the EU (OLP), the presentation by rapporteurs (i.e., the main EP negotiators) of trilogue compromises to the EP plenary is, arguably, one of the few formal occasions for this 'transparency in process.' However, although the secrecy of the trilogues makes those rapporteurs' presentations particularly relevant to the accountability of the legislative process, few scholars have investigated the extent to which rapporteurs actually discuss the negotiation process in plenary. Hence, despite the crucial role of rapporteurs' speeches, we do not know yet the extent to which rapporteurs are 'transparent in process' when they present the outcomes of trilogues. In this context, this article contributes to filling this gap by (1) examining the transparency of rapporteurs' speeches during plenary meetings regarding trilogue negotiations, and (2) assessing whether the extent of transparency is linked to the extent of conflict—i.e., the extent to which actors disagree about the negotiated file—and rapporteurs characteristics. One can indeed argue that the process is more likely to be transparent in the case of 'hard negotiation,' since they have more concessions to justify. Arguably, the transparency of the process is also particularly important when the legislation is highly contested. Indeed, in this case it is more likely that citizens and other actors in society will want to hold those involved in EU policymaking processes accountable. Similarly, rapporteurs have different constraints and experiences according to their political groups and member states, and these characteristics are likely to influence the speeches they make.

Empirically, the analysis is based on an original dataset consisting of 176 rapporteur speeches. We manually coded each speech to construct a process transparency index assessing the extent to which rapporteurs discuss the negotiations leading to legislative compromise. We employed this index to evaluate the 'transparency in process' of the OLP and test our hypothesis about the effects of conflict. The remainder of the article is structured as follows: The next section addresses the role of rapporteurs' speeches for the transparency of trilogue negotiations, and highlights our contributions to the literature on the OLP. Section 3 develops our hypotheses regarding the factors that are likely to influence the degree of transparency of rapporteurs' speeches. Section 4 describes our data collection and the operationalization of our variables, while Section 5 presents our results. Eventually, Section 6 concludes.

2. Rapporteur Speeches and Transparency in Process

Broadly speaking, transparency relates to the availability of information (Meijer, 2013) and more precisely to "the extent to which an entity reveals relevant information about its own decision processes, procedures, functioning, and performance" (Grimmelikhuijsen, Porumbescu, Hong, & Im, 2013). In other words, the transparency of a decision-making process refers to the extent to which an actor makes information available about how and why decisions are produced to citizens and political representatives (Bovens, 2007; Naurin, 2017). A key dimension is that transparency must enable the external actors to evaluate the process (Warren & Mansbridge, 2013). From this perspective, Mansbridge distinguishes between whether the reasons for the outcomes are provided without detailing the process behind them (transparency in rationale) and whether the decision-making process is shared with the public (transparency in process). Importantly, such information on the process can either be provided in real time or in retrospect (i.e., after the process ended; Naurin, 2017). In the context of EU legislative decision-making, transparency in rationale would mean explaining why a particular piece of legislation is the best to solve a particular issue, while transparency in process would mean legislative institutions explaining how they arrived at the compromise they adopt. The extent to which legislative decision-making in the EU fulfils this second dimension is disputed, to say the least.

In the period since the early 2000s, legislative negotiations in the EU have undergone increasing informalization. The adoption of EU legislation requires that the EP and the Council agree on an identical text, which means that they have to reconcile their respective positions. Nowadays, most inter-institutional negotiations in the EU take place in informal meetings called trilogues (Laloux, 2020). In trilogues, representatives of the Council, the EP, and the European Commission negotiate informal compromises that can then be formally adopted by the two co-legislators. More precisely, the EP is represented by a negotiation team led by the rapporteur (i.e., the MEP in charge of the file) while the Council is represented by the rotating presidency (Roederer-Rynning & Greenwood, 2015). Trilogues are secluded, and the working documents are not made publicly available: This means that outsiders, including non-participating members of the legislative institutions (Brandsma, 2018; Leino, 2017), cannot observe the negotiations.

Hence, most of the substantive debates occur in non-transparent trilogue meetings. Outsiders must therefore rely on trilogue negotiators for information on the proceedings, that is to say, how the content of EU legislation has been designed and negotiated. Yet, few studies have investigated how negotiators report on trilogues even though they are the only source of information on the process leading to compromise. This means that the 'retrospect' transparency in process of the OLP in the EP plenary has not been assessed. Although several scholars have commented on the limited feedback from negotiators, only Brandsma (2018) has empirically studied it. Focusing on the public reports from EP negotiators to their committees during the negotiations, he found that they were generally limited, with negotiators not providing much information on what went on.

To our knowledge, no study has so far examined how trilogue negotiations are addressed in plenary meetings

of the EP. This is surprising since plenaries are considered as the main institutional arena for public communication throughout the EU legislative decision-making process (Lord, 2018; Ripoll Servent, 2018). As stated by Christopher Lord (2013, p. 1067):

> Of all the institutional settings through which [OLPs] meander, only plenary debates of the EP seem likely to meet what Anne Elizabeth Stie [2013, p. 75] defines as a requirement that there should be "at least one open setting where those decisions are tested and critically examined by popularly elected representatives in a manner that is publicly available and accessible.''

Whereas debates occur in other places during the EU legislative procedure, such as in the COREPER or the EP committee, the work in such a forum is often opaque and there is little public record of the debates therein, in contrast to the EP plenary (Lord, 2013; Naurin, 2010). In sum, the EP plenary is the most appropriate arena for public communication about legislative negotiations both externally, vis-à-vis citizens and national parliament and internally for MEPs that did not participate in trilogues.

A consequence of trilogues, however, is that plenary debates in the EP mainly concern issues that have already been negotiated and compromised on. As a result, the debates are not likely to have much impact on the legislation ultimately adopted, and rank-and-file MEPs—those who did not participate in the trilogues—cannot influence the legislation and therefore do not contribute to the process leading to it. The only opportunity the public has for transparency in the legislative process is thus in the hands of negotiators and more particularly rapporteurs. Rapporteurs do not negotiate alone with the Council. They are members of larger teams that also include other MEPs (Ripoll Servent & Panning, 2019). However, rapporteurs are those in charge of explaining and presenting the final compromise negotiated with the Council to the EP plenary, and thereby of justifying it in front of the public, including the course of negotiations (Garssen, 2016; Stie, 2013). Other members of negotiating teams can take the floor as well (usually the shadow rapporteurs) but their time for parole is significantly shorter (EP, 2019). Moreover, in contrast to the rapporteurs who present and justify the compromise, shadow rapporteurs do not speak as negotiators but express the opinions of their political groups.

All this means that rapporteurs are the ones in charge of opening the 'black box' of trilogues, not only to the public but also to their fellow MEPs. In other words, if we understand trilogues as an informal institution (Roederer-Rynning & Greenwood, 2015) rapporteurs' speeches are one of the only opportunities to ensure 'external transparency' therefrom, that is, transparency vis-à-vis those who are not involved in the negotiations and are therefore not members of the institution. However, there are no institutional constraints on what they can or cannot share (Garssen, 2016). Rapporteurs are not compelled to talk about negotiations, which raises the question of the extent to which they do so and thereby contribute to transparency in process of negotiation. If, following Mansbridge (2009), one accepts that transparency in process matters for the OLP, then rapporteurs' speeches are the key moment for transparency in such processes.

Yet, how rapporteurs address trilogue negotiations in plenary meetings remains unknown. Generally speaking, the literature on plenary debates in the EP has mainly focused on identifying lines of conflict between MEPs, but has not addressed the transparency of the decision-making process itself (Laloux & Pennetreau, 2019). In particular, this literature largely has overlooked rapporteurs' speeches, even though they are a potential source of public information on the trilogues process. The only exception is the work of Garssen (2016), which aimed to identify the argumentation scheme at the disposal of rapporteurs when defending their work, and to assess the importance of those speeches. While not linked to trilogues, this work nevertheless showed the relevance of those speeches. As the following debate consists of other MEPs positioning themselves against the rapporteur's argument, the types of argumentation that can be used by proponents and opponents "is for the most part predetermined by the initial presentation made by the rapporteur" (Garssen, 2016, p. 26).

Knowing the extent of rapporteurs' communication about trilogues is normatively important for two reasons. First, transparency in process is crucial for public scrutiny of the legislative procedure. Scrutiny makes it possible to control EU legislators to hold them accountable (Curtin & Leino, 2017). However, in order to facilitate the negotiation process, negotiators are often required not to disseminate working documents, and the various actors involved prefer not to publicly disclose their positions (Reh, 2014). In such cases when visibility is lacking in the process leading to legislation, as in trilogues, accountability requires that decision-makers should at least provide a public account of the process leading to the outcome (Naurin, 2017; Warren & Mansbridge, 2013). In the OLP, trilogue negotiation implies that the 'burden of justification,' or 'narrative accountability' (Reh, 2014)—which arguably falls on the EP plenary—ultimately rests largely on the shoulders of the rapporteurs. A lack of transparency in the process would deprive citizens, national parliaments and other MEPs from 'their right to justification' (Stie, 2013), and thereby hinder them from monitoring the legislative decision-making process (Laloux, 2020; Leino, 2017). This could be problematic for the democratic legitimacy of EU policy-making, which relies inter alia on public scrutiny of the legislative process, and in the resulting accountability of EU legislators to their constituents and national parliaments (Lord, 2013). Similarly, this would also mean that MEPs lack information on the negotiations, and therefore their votes are not sufficiently informed. They vote on a take-it-or-leave-it basis

on legislation that has already seen compromise, and they do so without knowledge of the process leading to the compromise. This lack of information has the potential to be problematic since it is the whole assembly—and not just the trilogue negotiators—that represents EU citizens and thus that brings collective legitimacy to the decision.

Second, since rapporteurs' presentation is important for the subsequent debates (Garssen, 2016), the extent to which they are transparent about trilogues might affect the negotiations process. In other words, if MEPs' interventions are linked to rapporteurs' initial speeches, the extent to which rapporteurs discuss the negotiation process might affect the extent to which this process is further debated by the whole plenary. Rapporteurs' speeches are in this way crucial to the transparency and legitimacy of the European legislative process; the information that they do or do not share influences the way the EP exercises its powers (Brandsma & Hoppe, 2020). In practice, this means that rapporteurs advise fellow MEPs on the need to uphold the EP's positions vis-à-vis the Commission and the Council and/or to accept the position of one or the other of these institutions (Lord, 2018, p. 7). Rapporteurs' communication about what takes place in trilogue negotiations not only constitutes transparency in process vis-à-vis their constituencies and the larger public, it also constitutes transparency among peers. The content of such negotiations is also important for accountability, which relies not only on transparency but also on the right of a forum to question the decisions of their representatives (Bovens, 2007). Therefore, one can argue that transparency about the trilogues process is necessary for substantive debate over legislation, and in turn for the plenary to fulfil its role: This makes rapporteurs' speeches a crucial component of both the transparency and legitimacy of the European legislative process.

3. The Expected Influence of Conflicts: Political Group and Nationality

We expect two kinds of variables to have an effect on the extent to which rapporteurs talk about the negotiation process, the level of conflict of the legislative file and the background of the rapporteurs. First, the degree of conflicts is likely to matter because this makes it more difficult to reach an agreement. By conflict we mean disagreement between legislative actors as to the content of the legislative act. The more divergent the positions of the EP and the Council, the more necessary it is for trilogue negotiators to make concessions to reach a compromise (Laloux & Delreux, 2018). Rapporteurs must therefore account for choices that do not necessarily correspond to the preferences of the EP as a whole, or of certain political groups in particular. Yet, compromises must be approved by their respective institutions before they can be formally adopted as a legislative act. In the EP, a majority in the plenary has to vote for the compromise, so if a negotiated compromise deviates too much from the positions defended by the EP, the rapporteur is confronted with a risk of defection, including within her or his own political group. Such a defection would not be without cost to the negotiators. Particularly, for rapporteurs the failure of an informal compromise would undermine their reputation, credibility and prestige in their committee as well as within their political group (Delreux & Laloux, 2018; Mühlböck & Rittberger, 2015). Rapporteurs thus have an incentive to get their deal accepted, and the more concessions they make during negotiations, the more precarious their position. Moreover, deviating too far from the EP position is likely to entail a reputational cost for the rapporteurs. This could mean that rapporteurs represented poorly the EP during the negotiations because he or she was unable to defend the positions of its principal. As a result, this may diminish his or her reputation as well as the likelihood that she or he will be assigned other important tasks.

In such a situation, it is therefore necessary for the rapporteurs to be clear about the negotiation process to show that they have done their best. In other words, the plenary speech may be used by rapporteurs to justify his or her own actions in the process. One can argue, then, that it is in rapporteurs' interests to be clear about their reasons for deviating from the EP position in the negotiations process in the event that the compromise is deemed unsatisfactory if he or she wants it to be adopted. Indeed, MEPs may be more inclined to vote for a compromise they do not fully support if they know the concessions were necessary and the gains hard-won; that is, if they think the compromise is the best possible deal for the EP. This supposition is in line with Delreux and Laloux (2018), who showed that negotiators try to transmit the pressures from the inter-institutional forum to their institutions to find a deal. Moreover, MEPs arguably would be more convinced of the justice of a given outcome, and therefore to vote for it, if they were confident their side's position was considered seriously, and this requires transparency. Hence, our first hypothesis is:

> H1: The more conflict there is between institutions, the more transparent rapporteurs are about a trilogue negotiation.

We also expect a similar effect of intra-institutional conflicts, that is to say, when MEPs disagree as to the content of the file to be adopted. The rationale is similar: Rapporteurs want to see their compromise adopted, and will use the negotiations to push for that. Indeed, refusing a trilogue compromise is also costly for the institutions, entailing transactional costs and increasing uncertainty regarding the final output (Bressanelli, Koop, & Reh, 2016; Costa, Dehousse, & Trakalova, 2011). Therefore, in those cases, rapporteurs are likely to put more emphasis on the negotiations to show the cost of rejecting the deal for the EP. Moreover, discussing the negotiation might also be a means to put pressure on

other MEPs. The EP might accept the positions of member states it does not fully agree with because it wants to appear 'responsible' by not blocking EU legislation, and because MEPs are sensitive to government pressure via the national parties (Bressanelli & Chelotti, 2016; Ripoll Servent, 2013). Therefore, rapporteurs might use negotiations to convince their colleagues that the compromise reflects the will of the Council, and that voting for it is the way to go. Accordingly, our second hypothesis reads:

> H2: The more internally divided the EP is, the more transparent rapporteurs are about a trilogue negotiation.

Second, besides conflicts, we also expect the elements of the political context related to rapporteurs to affect the degree of transparency in process of their speeches in plenary. Specifically, we expect that the extent to which rapporteurs are 'transparent in the process' will depend on (1) the size of their political group and (2) their national culture of transparency. As regards political affiliation, we expect rapporteurs from the two larger political groups—i.e., EPP and S&D—to be less transparent. The reason is that, because they have a larger share of the vote, these groups are more influential and can therefore be more confident that a majority will support their compromise, so their rapporteurs do not have to work as hard to persuade their fellow MEPs to support their position. This is especially true since those two groups also tend to form a grand coalition and vote together in the plenary, thereby reducing further the need to seek the support of other groups. In contrast, rapporteurs from smaller group do not have this advantage, and therefore might be more willing to justify the negotiation process in order to secure it. Hence our third hypothesis is:

> H3: Rapporteurs from the EPP and S&D are less transparent than rapporteurs from smaller groups.

Finally, we also expect one specific national characteristic of the rapporteurs to influence its culture of transparency and thereby the degree of transparency of rapporteurs' speeches: corruption. Indeed, the level of corruption of the member state might correlate with its culture of transparency. Transparency is widely regarded as a crucial tool in the fight against corruption (Tienhaara, 2020). For instance, Lindstedt and Naurin (2010) suggested that increased transparency of institutions helped to fight corruption under certain conditions. To our knowledge, the question of whether the opposite effect is true has not been a topic of focus in EU studies, yet, arguably more corrupt countries should tend to be less transparent as a matter of protection for corrupt officials. Along this line of reasoning, we can similarly assume that less corrupt entities develop more transparent cultures around conflict and negotiation, which would be reflected in the way their members account for the negotiation process. Our fourth hypothesis is thus:

> H4: The greater the level of corruption in the member state where the rapporteur comes from, the less transparent his or her speeches.

4. Qualitative Analysis of Rapporteurs' Speeches

The rapporteurs' speeches were collected in an automated way using R on the legislative database of the EP. We selected specifically rapporteurs' speeches in plenary sessions, and debating trilogue compromises; due to the nature of these criteria, all the files in our sample had been completed at the time of collection. Moreover, we only selected speeches that were made after the end of negotiations and therefore preceded final plenary vote; this explains the total of 176 coded speeches. Since the speeches were made in different languages, we translated into English using Google Translate to carry out the analysis, following on previous work that has shown this method to provide valid results (de Vries, Schoonvelde, & Schumacher, 2018).

To assess the transparency of rapporteurs' speeches about the trilogue process, we developed a 'process transparency index' based on manually coding speeches. Since theory is scarce about the transparency of rapporteur speeches, we opted for an inductive approach, which is common in cases when mismatches are observed between theory and empirical observations (Timmermans & Tavory, 2012), or when theory is lacking (Jebb, Parrigon, & Woo, 2017). As is usually the case with inductive coding, this process took place in three phases (Charmaz, 2014). During a first investigative phase, both researchers coded 15 speeches in order to identify the elements present in rapporteurs' speeches.

Once the codebook had been inductively established and its categories stabilized, the same 15 speeches were coded a second time by the two coders. Through this process, 12 different categories were included in the codebook. Table 1 displays the categories included in the codebook and Table 2 presents definition and examples

Table 1. Coding categories.

Dynamics of Negotiation (Process)	Positions (Input)	Claims (Output)
Trilogues; Process hard; Process smooth	EP	Integrated
		Dismissed
	Council and European Commission	Integrated
		Dismissed

Table 2. Codebook.

Code Categories	Code Definitions	Example of Coded Segments
Negotiations process: hard	When rapporteurs refer to the negotiation process and, in doing so, assess is as complicated or talk about the events or (positions of) actors that made it more complicated.	"We've had some tough negotiations over the last few months, that's fair to say, and the text we're voting on tomorrow is not perfect.''
Negotiations process: smooth	When rapporteurs refer to the negotiation process and, in doing so, assess is as smooth or talk about the events or (positions of) actors that made it easier.	"We are here today with a good result and we owe that to the pleasant and constructive cooperation.''
Trilogues	When the rapporteurs make explicit reference to the trilogues and what happened there.	"With a trilogue agreement on ETS phase 4 reached in early November, parliament won a delegated act on the Corsia MRV rules.''
Position of the EP	When rapporteurs refer to EP preferences in relation to legislation and/or the specific positions resulting therefrom in the trilogue negotiations.	"Parliament also wanted to have better control on the establishment of the criteria and the procedure for the designation of the registry by using delegated acts.''
Position of others actors	When rapporteurs refer to the Council's or the Commission's preferences in relation to legislation and/or the specific positions resulting therefrom in the trilogue negotiations.	"The Council supported the Commission's proposal at 30% in a non-binding format.''
Integrated claims: EP	When the rapporteurs refer to the EP's gains during the trilogue negotiations, i.e., whether Parliament's preferences that were actually incorporated in the negotiated compromise.	"In parliament, we accepted the structure as proposed by the commission but wanted to provide for additional safeguards, such as for the respect of users' privacy and security, consumer protection and human rights. I am especially glad that we could strengthen the text on safeguarding human rights and the rule of law.''
Dismissed claims: EP	When the rapporteurs refer to the EP's concessions during the trilogue negotiations, i.e., whether Parliament's preferences that were not included in the negotiated compromise.	"We wanted quantified targets, but this has not been achieved at EU level.''
Integrated claims: others actors	When the rapporteurs refer to the Council's or Commission's gains during the trilogue negotiations, i.e., whether Council's or Commission's preferences that were actually incorporated in the negotiated compromise.	"Just as the council came to meet us with the wetlands, we had to compromise on the so-called compensation mechanisms and the reference value for forests.''
Dismissed claims: others actors	When the rapporteurs refer to the Council's or Commission's concessions during the trilogue negotiations, i.e., whether Council's or Commission's preferences that were not included in the negotiated compromise.	"The Council agreed to withdraw the amendments concerning derogations from the Regulation on the protection of personal data (GDPR Regulation) aimed at creating specific derogations for statistics from this Regulation.''

of the coding categories. During the second phase, another 30 speeches were coded in two rounds of 15. After each round, a comparison of the coding was conducted, making it possible to refine the coding criteria and thus ensure better inter-coder reliability. Knowing that our coding had reached a sufficient level of equivalence that the results would not be due to chance, we then entered the third coding phase. Each researcher coded the remaining rapporteur speeches of the sample (and removed those that did not correspond to the selection criteria).

Of course, induction does not mean a complete lack of theoretical background (Wacquant, 2002); our operationalization of transparency in process is based on existing work on transparency. More precisely, we build our categories by adapting the work of Brandsma, Curtin, and Meijer (2008; Brandsma & Schillemans, 2012), who identify three broad dimensions of the decision-making process about which decision-makers must be transparent when accounting for their decision-process: input, process and output.

First, Brandsma argues that, to hold decision-makers accountable, principals must be able to compare between outcomes and preferences. This requires agents to account for the inputs and outputs of negotiations. Information about the initial preferences and positions of the actors involved is necessary to understand the basis for the negotiation, and therefore to assess them. This information corresponds to our 'positions' categories, for the EP and other actors. It is indeed necessary to distinguish between the EP and the other institutions because the rapporteur is first and foremost the negotiator of the EP; she or he is therefore primarily responsible for defending its position against the Council and the Commission, and wild be judged accordingly by the MEPs. Arguably, this makes it more important for rapporteurs to be transparent about the EP's positions and outcomes in front of the EP plenary.

Second, information about the outputs of negotiations is also necessary i.e., what happened to the initial positions. Hence, the question of which institutions' claims were and were not integrated into the final compromise was included among our categories. We make a second distinction here, which is added to the first one: It is important to distinguish between integrated and dismissed claims. Indeed, it is likely easier for rapporteurs to talk only about negotiation successes, while transparency requires talking about the negotiations losses as well.

Eventually, as noted by Brandsma and Schillemans (2012), information about inputs alone are not in themselves sufficient to properly report on negotiations. Procedural issues (the context and sequence of negotiations) are also crucial in determining whether alternative outcomes could have been achieved (Behn, 2001). This means including practical information about the process—trilogues and their dynamics in our case—which is to say, whether the rapporteur could have achieved a different outcome. Table 1 displays the coding strategy and our resulting category.

This coding enabled us to build an index of the transparency of rapporteurs' speeches. The index is composed of the following seven categories: (1) negotiations process (which combines hard and smooth processes and a specific trilogue category), (2) position of the EP, (3) position of others actors, (4) integrated claims—EP, (5) dismissed claims—EP, (6) integrated claims—others, and (7) dismissed claims—others. These categories cover the three dimensions necessary for citizens and MEPs to evaluate the results of the negotiators: Firstly, the positions of the actors and what happened in the compromise, but also practical information on the conduct of the negotiations, so that the EP can assess whether other results could have been achieved. All the categories are presented in detail, including examples in Table 2. On this basis, the process transparency score of each speech is the sum of the categories that compose it: one point for each category. This process transparency score is the dependent variable of our analyses.

Regarding the independent variables, following Cross and Hermansson (2018), we measured inter-institutional conflicts by the length of the negotiations. Our assumption is that, in more conflictual cases, more time is needed to reconcile the positions of the actors. We used the result of the vote in the EP to measure the extent of intra-institutional conflicts. For our third hypothesis, we used a dummy variable taking the value of '1' for EPP and S&D rapporteurs, and '0' for the rapporteurs of the other groups. We measure corruption using the latest report of the Corruption Perceptions Index provided by Transparency International. This index measures the perceived levels of corruption in the public sector of worldwide countries. Scores ranged from 0 (highly corrupt) to 100 (very clean).

Two control variables were included in the model. First, we controlled for the number of words in the speeches, since we assume that the more rapporteurs speak, the more likely they are to address the negotiations. We also control for the scope of a file, measured by the number of Eurovoc descriptors (Van Ballaert, 2017), as it is likely that rapporteurs have to spend more time describing files dealing with many subjects, thus leaving less time to discuss the negotiations in their speeches.

5. Modestly Transparent Speeches, Regardless of Conflicts

In this analytical section, we firstly present a description of our coding results. Then, we explore the data descriptively by examining variation according to the characteristics of the rapporteurs and of the committee. Eventually we test our hypotheses using negative binomial regressions.

Figure 1 displays the distribution of the process transparency index, as well as the occurrence of each category. First, looking at the distribution of the process transparency index of the speeches, a first lesson is that it is left skewed. More than 35% of the rapporteur speeches

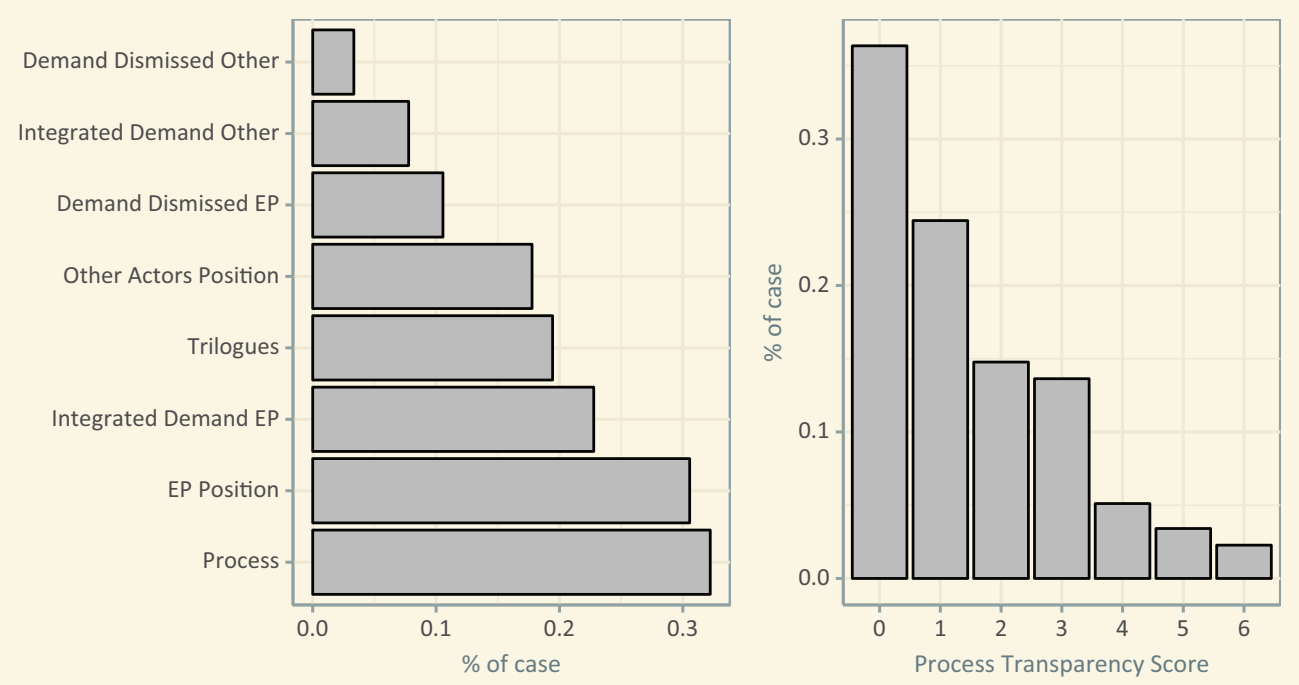

Figure 1. Distribution of the categories and process transparency scores.

do not mention any of our categories relating to the trilogue negotiations (64 out of the 176 speeches), while fewer than 10% of the rapporteurs in our sample mentioned five or six of the categories (respectively nine and six speeches). Another lesson from this observation is that no single speech within the sample discusses all seven categories. Hence, we can conclude that rapporteurs' speeches presenting compromises reached in trilogues are modestly transparent regarding the process that led to them. Of course, some of the information may flow informally from the rapporteur to the parliamentary committee and, via the latter, is disseminated within the political groups. Nevertheless, rapporteurs' speeches during plenary sessions, as provided for in the formalized institutional procedure, do not guarantee access to information on these negotiations. In other words, rapporteurs' speeches are not sufficient to ensure that MEPs are informed about the negotiations process when they vote.

Figure 1 also shows that, when talking about the negotiations, rapporteurs focus more often on the EP (successes), and on describing how negotiations as such generally went. That is to say, they mainly refer to the EP's position during trilogue negotiations with the Council and the Commission (a bit over 30% of speeches), as well as the course of the negotiation process: hard or smooth (a bit over 30% of speeches). In a quarter of the speeches in the sample, the bargaining successes of the EP (integrated claims) is mentioned. Trilogue negotiations are discussed in 20% of the speeches. The only category relating to the actors involved in the negotiations that is regularly mentioned is the bargaining position of other actors (32 speeches, i.e., 18% of cases). In contrast, rapporteurs rarely mention the concessions made by other actors or their success in the negotiations. The demands of other actors that ended up being dismissed in the final compromise are addressed in under 4% of the speeches (six speeches). Similarly, the demands of other actors that were integrated into the compromise are addressed in slightly under 8% of cases (14 speeches). Noteworthy is that rapporteurs do not often talk about the EP's failures during negotiations either—or at least much less than about its successes. The EP's dismissed claims are mentioned in 19 discourses (a bit under 11% of cases).

We turn now to examine the variation in the process transparency index according to the characteristics of the speaker. First, the functioning of the EP is organized around groups. Therefore, one of the questions that arises is whether the degree of transparency of the rapporteurs' speeches varies according to their political affiliation. As can be seen in Figure 2, the average transparency of rapporteurs' speeches according to the different political groups is relatively low but varies by twice. The least transparent group is the EFDD, with an average of 1 on the process transparency index. It is noteworthy that the two main groups in the EP—the Christian Democrats and the Social Democrats—are respectively in the penultimate and antepenultimate positions, with average scores below 1.5. This is in line with our expectation that rapporteurs from those groups have less need to be transparent. The Greens have an average transparency score above 1.5, just behind the ECR—the third most transparent group, with a score close to 2. Finally, with a score between 2 and 2.5, the Liberals have the second-best average transparency score, just behind the

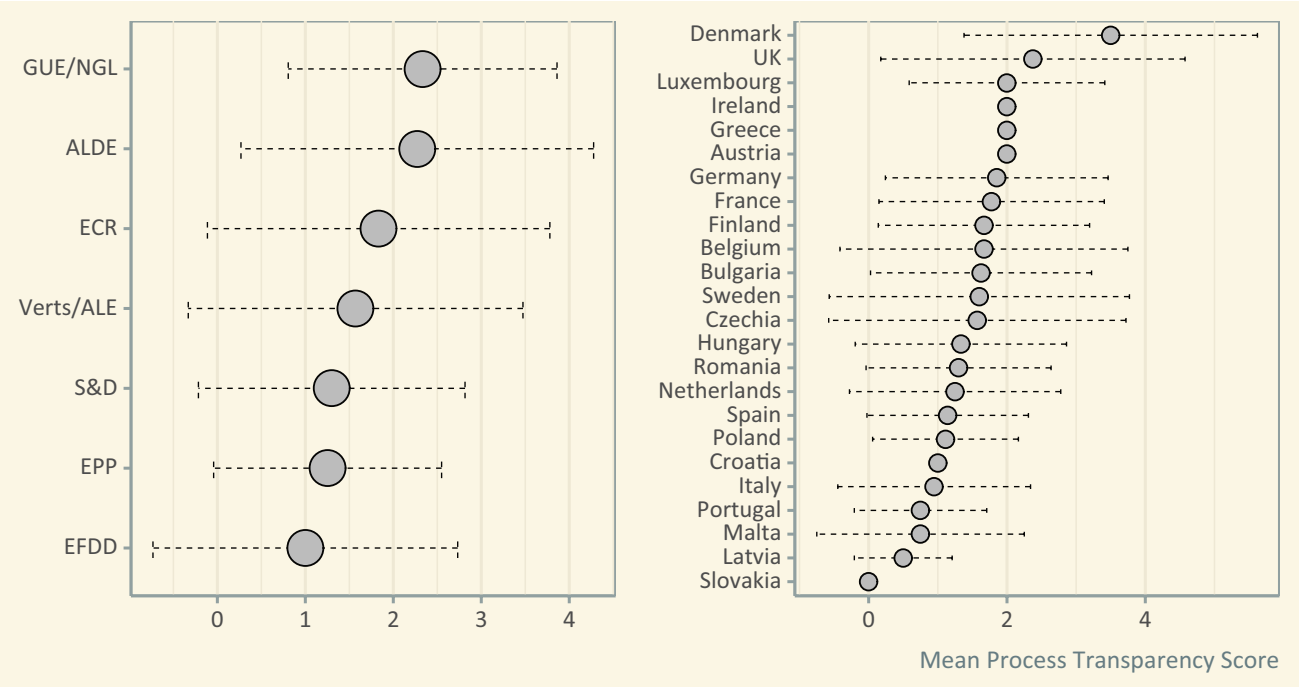

Figure 2. Mean process transparency score per political group and nationality.

left-wing group, which is close to 2.5 on average on the process transparency index.

Second, beyond the political groups, another crucial dimension of the EP, like other parliaments, is the territorial dimension, i.e., the member states as far as MEPs are concerned. Figure 2 also displays the mean process transparency score per country. With an average transparency score of 3.5, Danish MEPs are the most transparent, and are an outlier compared to their peers. They are followed, at a good distance, by the British MEPs—2.5 on average on the transparency index. Next, come 17 Member States whose rapporteurs' speeches range from an average of 2 to 1. Italian rapporteurs are, on average, just below 1, followed by Portuguese, Maltese and Latvian rapporteurs. Finally, the only Slovakian rapporteur of our sample did not provide any information on the trilogues in his speech, and therefore scores 0 on the process transparency index. Hence, there seems to be a slight tendency for the rapporteurs from the countries that joined the EU earlier to produce more transparent speeches. Nevertheless, this tendency is mitigated by the position of Italy as well as, to a lesser extent, the Netherlands (and also by the rapporteurs from Spain and Portugal, if only the CEECs are considered as new Member States).

We also examined variation in the process transparency index according to the public policy areas of the file, as reflected in the structure of parliamentary committees (see Figure 3). Since the EP committees have different working habits and are concerned with policy domains at varying levels of politicization (Laloux & Pennetreau, 2019), it is possible that their internal functioning affects the transparency of their rapporteurs' speeches. Again, the average transparency per parliamentary committee varies but remains generally low. Speeches by rapporteurs from the committee on agriculture are the most transparent, with a score around 2.5. Next comes a group of six committees with a score between 2 and 1.5. This first group shows that the importance of EU competencies does not seem to influence the degree of transparency of rapporteurs according to their parliamentary committees. Indeed, the committee dealing with industrial research and energy issues—an area in which the EU has only limited competence—falls between those relating to agriculture and the internal market, areas in which the EU has extensive competence. A second group of nine committees has speeches with an average score between 1.5 and 1, confirming our observation. Finally, the few speeches made by rapporteurs from the committees on Constitutional Affairs and on Budgetary Control are not transparent at all, with a score below 0.5.

To test our hypotheses, we conducted regression analyses using the score of our process transparency index as the dependent variable. Specifically, since this score is basically a count variable, we conducted event count models, here negative binomial regressions. Table 3 shows that none of our hypotheses regarding conflicts can be supported. Neither of our measures of conflict has a statistically significant effect on transparency. Therefore, we find no support for our assumptions that rapporteurs are more transparent in the most conflictual cases, for neither intra nor interinstitutional conflicts. This result may be explained by the fact that the countervailing dynamic is also going on in some cases. One could as well argue that the greater the conflict, the less likely a

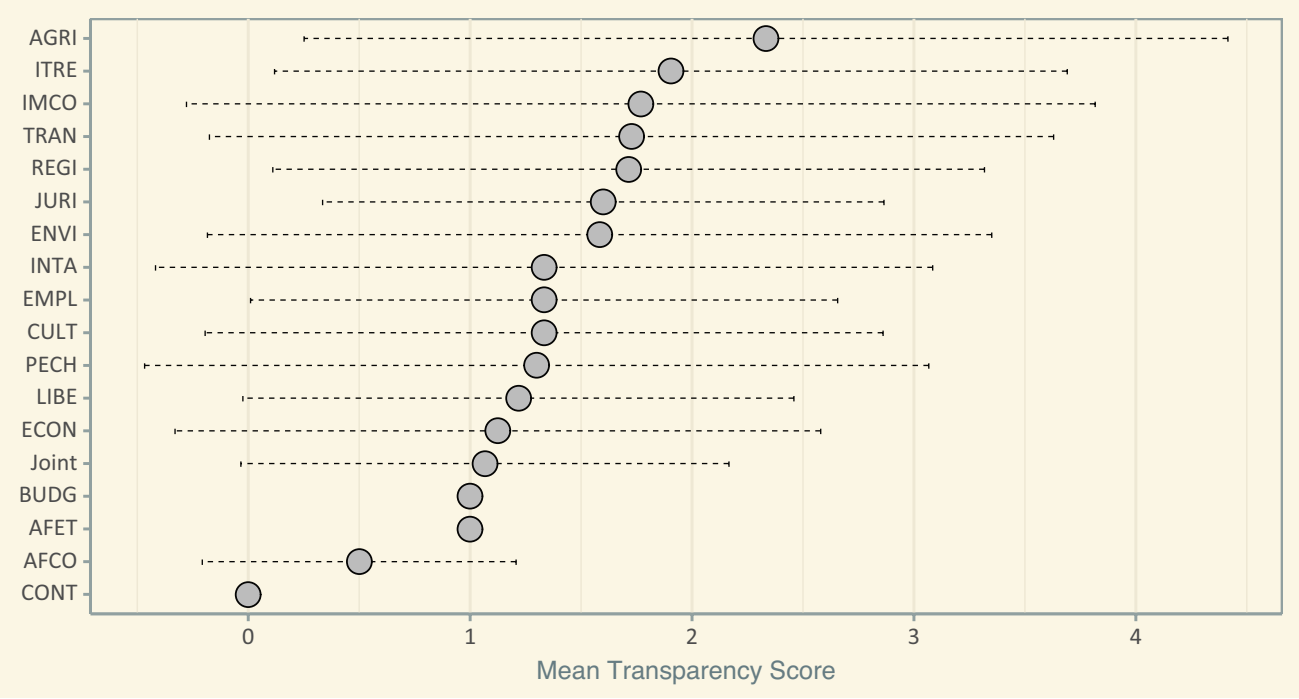

Figure 3. Mean process transparency score per EP committee.

rapporteur would be to go into it in public. Indeed, showing that they have made many concessions could isolate them and put them in a difficult situation in the EP, which would perhaps even cost them votes. If the two hypotheses work concurrently, this would explain the results obtained, i.e., the absence of a meaningful relationship.

In contrast, the hypotheses regarding rapporteur characteristics tell a different story. As we expected, rapporteurs from large member groups tend to be significantly less transparent than those from smaller ones. This supports our hypothesis that they have less need to be transparent since they also have less need to partner with other groups. Similarly, there is a significant negative relationship between corruption and transparency. In other words, rapporteurs from more corrupt countries tend to be less transparent about trilogues. This result could imply that, as we expected, the (dys)functioning of politico-administrative systems influences the culture of transparency and negotiation at the EU level. However, just making information available will not prevent corruption if such conditions for publicity and accountability as education, media circulation, and free and fair elections are weak. Many studies have shown that multiple factors interact (Camaj, 2013; Lindstedt & Naurin, 2010), moreover, policy instruments deployed to promote transparency or fight corruption may have little impact on the perception of these phenomena (Dunlop, Kamkhaji, Radaelli, Taffoni, & Wagemann, 2020). A focus on this specific issue of the relationship between member state corruption and the degree of transparency of the incoming rapporteurs' discourse is therefore necessary to better understand what is going on.

Regarding the control variables, only the number of words has a statistically significant impact on the degree

Table 3. Results of the negative binomial regression.

	Without Control	With Controls
Duration of the procedure (in days/10)	0.003 (0.000)	0.003 (0.000)
% Vote in Plenary	0.3 (0.8)	0.6 (0.8)
Rapporteur of large political group	−0.4** (0.2)	−0.4** (0.2)
Corruption	0.01** (0.01)	0.01** (0.01)
N# of Eurovoc descriptors		−0.1 (0.05)
N# of words in the speech		0.002*** (0.001)
Constant	0.1 (0.6)	−0.5 (0.8)
Observations	176	176
Log Likelihood	283.8	274.5
Akaike Inf. Crit.	575.6	561.0

Notes: * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$.

of transparency of rapporteurs' speeches. Logically, the more a rapporteur speaks, the more likely it is that he or she will mention something related to the negotiations. This also means that we found no evidence that among rapporteurs the scope of a dossier reduces the extent of transparency. As a robustness check, we also conducted OLS and negative binomial regressions, with similar results.

To explore our data, we also conducted a probit regression for all the categories of our index. Whereas the majority did not differ from the main model, interestingly, the length of the procedure was significantly linked to how rapporteurs describe the negotiations. Specifically, the longer a procedure is, the more rapporteurs use the 'hard process' category and, conversely, rapporteurs use more the 'smooth process' category for shorter procedures. This suggests that, at least, rapporteurs report properly to the plenary about the difficulty of the negotiations.

6. Conclusion

The aim of this article has been to examine and explain the extent to which EP rapporteurs are transparent about trilogue negotiations when presenting legislative compromise to the EP plenary. To do so, we assessed the effect of legislative conflicts and rapporteurs' characteristics on this transparency in process. We coded 176 legislative speeches and, on this basis, came to the conclusion that 'transparency in process' is rather poor during EP plenaries. The inter-institutional negotiations are discussed in only 64% of the cases and, when so, the extent of information about them is generally little. In other words, rapporteurs' speeches do not guarantee that MEPs have sufficient information about the negotiation process when they vote on the compromise. This result may be due to organizational constraints on the conduct of the plenary sessions, leaving little time for the rapporteurs. Rapporteurs have to find a balance between information on the legislative provisions, and information on the negotiation process itself. Our results indicate that this balance leans towards the former. Another result is that rapporteurs tend to focus more on the EP's positions and outcomes than on those of the other institutions. This suggest that they knowingly act as agents of the EP when discussing negotiations.

Regarding the factors explaining transparency in process in the plenary, contrary to our expectation, we do not find a significant link between legislative conflicts and transparency in process. However, the hypothesis that transparency in process is linked to the individual characteristics of the rapporteurs is supported. We observe that EPP and S&D rapporteurs are significantly less transparent, which may explain the general findings about low transparency. It might also be a problem since, as these two groups are the largest in the EP and often come together in a grand coalition, many (important) files are dealt with by their members. Another important finding is that corruption reduces transparency. The higher the level of corruption in a member state, the lower the transparency of speeches made by rapporteurs from that country.

From a normative point of view, these are not good results. The legitimacy of EU policymaking is partly based on public scrutiny of the process, which is why trilogues have been criticized for their lack of transparency in process. While this concern could be partially allayed by rapporteurs' public reporting on the negotiations, we did not find evidence that this was the case. Rapporteurs' speeches during EP plenaries do not seem to provide enough information on trilogue negotiations for outsiders to be able to assess how negotiations went. What is more, we did not find evidence that more conflicts result in more transparency, whereas one could argue that the trilogue concessions that conflicts induce require more justification. Hence, these results cast further doubt on the extent to which plenary debates in the EP are able to fulfil their role in providing justification for EU legislation and therefore to legitimize the EU legislative process.

We conclude by stressing that these results beg further research on the transparency of trilogues. So far, existing studies have mainly focused on the availability of working documents, and less on the actual reporting of negotiations by their participants. Potential avenues for future research include consideration of the longitudinal perspective. Going back to the early days of trilogue negotiations would make it possible to observe whether their gradual institutionalization and the importance they have garnered with respect to OLPs have influenced the way rapporteurs report on them. Similarly, a deepening of the analysis through political affiliation could yield other results. Indeed, the political groups in the EP are not always coherent or homogeneous. Analyzing the transparency of speeches based on national political party affiliation might lead to different results. It could also be interesting to test some individual variables, such as the political seniority, former professions, level of education, and even the age or gender of rapporteurs.

Further, the fact that rapporteurs do not speak much about trilogue negotiations in the plenary raises the question of what they talk about when they justify legislative compromise. Further studies could investigate rapporteurs' speeches more generally, not only through the lens of transparency in process, which would enable assessment of how legislations are justified in the EU. More particularly, examining the transparency in rationale of rapporteurs' speeches would make it possible to assess whether this compensates for the lack of transparency in process, and thereby to assess the transparency of rapporteurs' speeches as a whole. Finally, scholars could also investigate the quality of account given in the other institutions participating in trilogues. Such research would improve our understanding of how policy choices are justified in the EU, and thereby make it possible to better assess the democratic legitimacy of such policies.

Acknowledgments

This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement No. 716208). The authors would like to thank Jonathan Mozoon for his valuable research assistance during data collection. The authors wish also to express their gratitude to Cal Le Gall, Camille Kelbel and the three anonymous reviewers for their comments and suggestions that greatly contributed to the improve the article.

Conflict of Interests

The authors declare no conflict of interests.

Supplementary Material

Supplementary material for this article is available online in the format provided by the author (unedited).

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Politics and Governance (ISSN: 2183–2463)
2021, Volume 9, Issue 1, Pages 261–271
DOI: 10.17645/pag.v9i1.3771

Article

Transparency in EU Trade Policy: A Comprehensive Assessment of Current Achievements

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Submitted: 23 October 2020 | Accepted: 30 December 2020 | Published: 31 March 2021

Abstract
The EU trade policy is increasingly confronted with demands for more transparency. This article aims to investigate how transparency takes shape in EU trade policy. First, we operationalize the concept of transparency along two dimensions: a process dimension and an actor dimension. We then apply this framework to analysis of EU Free Trade Agreements (FTAs). After analyzing transparency in relation to FTAs from the perspective of the institutional actors (Commission, Council and Parliament), the different instruments and policies that grant the public actors (civil society and citizens) access to information and documents about EU FTAs are explored by discussing Regulation 1049/2001, which provides for public access to European Parliament, Council and Commission documents, and the role of the European Ombudsman. The article is based on an analysis of official documents, assessments in the academic literature and case-law of the Court of Justice of the European Union. The ultimate aim is to assess current initiatives and identify relevant gaps in the EU's transparency policies. This article argues that the EU has made significant progress in fostering transparency in the negotiation phase of FTAs, but less in the implementation phase.

Keywords
European Commission; European Council; European Parliament; Free Trade Agreements; Ombudsman; regulation; trade policy; transparency

Issue
This article is part of the issue "Access or Excess? Redefining the Boundaries of Transparency in the EU's Decision-Making" edited by Camille Kelbel (Lille Catholic University, France), Axel Marx (University of Leuven, Belgium) and Julien Navarro (Lille Catholic University, France).

1. Introduction

Many policy areas and institutions have been confronted by an increasing demand for transparency and access to information in order to enhance legitimacy and accountability (Peters, 2016, p. 6). Transparency is often seen as "part and parcel of a principle of democratic governance" (Bianchi, 2013, p. 4). This is also recognized in EU law (Delimatsis, 2017) and EU policy-making (Hillebrandt, Curtin, & Meijer, 2014). As a result, measures to enhance transparency are introduced, including in relation to trade policy. The previous European Commission's Trade for All strategy prioritized transparency initiatives, for example by making public draft negotiation texts of Free Trade Agreements (FTAs). Under the new von der Leyen Commission, transparency in the EU's trade policy will be further strengthened: 'Making trade more transparent' is indeed identified as one of the key priorities for the new Commission (von der Leyen, 2019).

This turn towards transparency has received increased attention by researchers focusing on EU trade policy and EU FTAs. First, some researchers focused on

the consequences of increased transparency for EU trade policy with a focus on accountability (Coremans, 2019a), exchange of information and the inclusion of expertise and knowledge in trade policy (Chalmers, 2013), the inclusion of preferences in trade negotiations (Dür & De Bièvre, 2007; Woll, 2009) and possible consequences related to an increase of transaction costs (Coremans, 2019b). Second, researchers have focused on how transparency plays out in trade policy from the perspective of specific institutional actors such as the European Parliament (EP—hereafter; Coremans & Meissner, 2018); Council (Hillebrandt, 2017) and European Commission (Coremans, 2017). Third, researchers focused on specific instruments to enhance transparency such as access to documents legislation (Hillebrandt & Abazi, 2015) and inter-institutional agreements (Rosén & Stie, 2017). Here research focuses on the design of the agreements and an assessment of their potential contribution to enhance transparency. Fourth, researchers have analyzed specific trade agreements. The Transatlantic Trade and Investment Partnership (TTIP) negotiations between the EU and the United States led to an unprecedented level of contestation of EU FTAs by CSOs and MEPs. In addition to concerns about the agreement's potential negative impact on, inter alia, the governments' right to regulate and environmental, consumer and food safety standards, many activists and social groups complained about the 'secrecy' of the negotiations, implying that the EU was negotiating behind closed doors without sufficiently informing the public (Gheyle & De Ville, 2017; Heldt, 2020) and the EP (Meissner, 2016). Finally, recent debates around the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada brought the role of national parliaments in EU member states into the picture as one mechanism to enhance transparency (Wouters & Raube, 2018).

Our contribution builds on these approaches and aims to make three contributions. First, we offer an integrated analysis of the achievements of enhancing transparency in EU trade policy along several dimensions. Previous studies focused on very specific components of transparency in EU trade policy and the making of EU FTAs. Through a comprehensive assessment of transparency measures in EU trade policy, we aim to identify the areas where the most progress has been made and where progress has been lacking. Secondly, we update current developments with regard to institutional transparency by covering the most recent case law of the Court of Justice of the EU (CJEU). Previous contributions on institutional transparency focused on changes introduced by the Lisbon Treaty and were to a degree speculative since they analyzed potential challenges. Several years onward, recent case law allows us to better assess the real challenges related to institutional transparency. Third, the integrated assessment and discussion of recent case law leads us to develop the argument that transparency increased with regard to the negotiations of FTAs but less with regard to their implementation.

Based on existing literature and an in-depth analysis of primary legal documents, we sketch the different pathways in which transparency is operationalized in current EU trade policy. In order to do this, we first develop a framework to analyze transparency in EU trade policy and next, for each component, we present and discuss the main pathways in which transparency is operationalized.

2. Framework for Comprehensive Assessment of Transparency in Trade Policy

In order to provide for a comprehensive analysis of transparency in EU FTAs we develop a framework along two dimensions. Several authors have focused on conceptually disentangling transparency into different dimensions and components (see, e.g., Coremans, 2017). For the purpose of this article we distinguish two dimensions which are especially relevant for analyzing EU trade policy: an actor dimension and a process dimension.

The first dimension, the actor dimension, focuses on the interactions between actors in a policymaking or rule-making process such as the negotiation of trade agreements. In Meijer's (2013, p. 430) approach transparency is defined as "the availability of information about an actor that allows other actors to monitor the workings of performance of the first actor." The actors in the context of the EU are manifold. On the one hand there are the actors which are formally involved in negotiating and implementing trade agreements: the Commission, the Council and the Parliament. On the other hand, there are the actors, or stakeholders, who have a 'stake' or interest in trade policy for multiple reasons. This implies that transparency needs to be created between numerous actors. In this context Ostry (2004; see also Coremans, 2019a) makes a distinction between public and institutional transparency. Institutional transparency focuses on information disclosure between institutional actors. Public transparency, in turn, focuses on the relationship between external stakeholders, or 'the public,' on the one hand and each of the EU institutions (EP, Council and Commission) on the other hand. Such an actor-based distinction is also proposed by Rosén (2018), who focuses on the interactions between the executive and public on the one hand and the executive and EP on the other hand.

In exploring the institutional dimension of transparency in EU trade policy, it is worthwhile to first reiterate some of the key components of the EU trade policy-making process. Indeed, taking into account the EU's internal political structure and how the three main governing institutions (the EP, the Council and the Commission) interact with each other is crucial in assessing transparency. Trade policy is an exclusive EU competence (Article 207 of the TFEU), where the EU as a single entity concludes trade agreements with third countries and has the power to legislate on trade matters, whereas individual member states do not. The EU

FTA-making process involves the interaction and participation of the different EU institutions at different stages. The Commission requests authorization from the Council to negotiate a trade agreement. Such authorization includes 'directives,' which outline the mandate of what the Commission should seek to achieve in the agreement. The Commission then negotiates with the trading partner on behalf of the EU. During this negotiation, the Commission works closely with the Council's trade policy committee (TPC) and keeps the EP fully informed. It must also hold meetings with representatives from CSOs and publishes EU position papers, proposed agreement texts and reports of the negotiations. Under the 2007 Treaty of Lisbon, the EP is a co-legislator on trade and investment alongside the Council. International trade agreements therefore require parliamentary approval before they can enter into force. Once negotiations are complete, the Commission publishes the agreement and proposes the deal to the Council, who then needs decide on its signature. After signature (together with the other contracting parties), both the Council and the EP need to approve the agreement in order to ratify the agreement on behalf of the Union. During and after the negotiations of an agreement, a set of procedures is set in place through which all institutional (three EU institutions) and public (CSO) actors engage in information exchange.

The second dimension, the process dimension, frames trade-policy as a process of negotiation and implementation (Abbott & Snidal, 2009). In this dimension, there is a focus on transparency measures taken in the different stages of negotiating and implementing a trade agreement. This distinction corresponds to the distinction made by Auld and Gulbrandsen (2010) with regard to procedural and outcome transparency and the distinction proposed by Martínez (2013) between documentary, decision-making and operational transparency. In the negotiation of trade agreements there are demands to have access to negotiation mandates and documents on developments in negotiations. Concerning implementation, there are demands for greater transparency in terms of monitoring and fostering compliance with the commitments laid down in a trade agreement.

In sum, for the purpose of this article, we approach transparency as a set of rules and procedures on the provision of relevant information to—and between—institutional and public actors involved in the trade process throughout the entire trade process (from negotiating to implementing FTAs). In the next sections we apply this framework to the different initiatives geared towards enhancing transparency in EU trade policy. We divide the discussion on the actor dimension and within each actor dimension we focus on the process dimension.

3. Institutional Transparency

The discussion relating to transparency in FTA negotiations revolves around the conditions under which the EU institutions (and citizens) have access to negotiating documents. The following section focuses on the conditions, extent, and limits of such access to documents throughout the entire process of EU FTAs for the EP and the Council.

3.1. The EP

Transparency has been reinforced with the strengthening of the EP's right to be informed following the Treaty of Lisbon. The Treaty of Lisbon brought three crucial changes with regard to the role of the EP in the EU's trade policy (Devuyst, 2014; Kleinman, 2011; Krajewski, 2012; Van den Putte, De Ville, & Orbie, 2014). First, under Article 218(6)(a)(v) of the TFEU, the EP obtained the right to give its consent to trade agreements, as this is an area where the ordinary legislative procedure applies (Article 207(2)). Secondly, under Article 218(10), it obtained the right to be 'immediately and fully informed' at all stages of the procedure of negotiating and concluding (trade) agreements. Lastly, the Parliament became co-legislator on trade legislation under the ordinary legislative procedure (Article 207(2)). The first two innovations are closely intertwined. As the EP's consent is required for the conclusion of EU FTAs, it is crucial that the Parliament's position and concerns are known—and addressed—during the negotiations to avoid the agreement being rejected by the Parliament at the final stages of the EU's ratification process. On several occasions, the EP has already demonstrated that it is not afraid to reject international agreements in the final ratification stage, such as in the case of the Anti-Counterfeiting Trade Agreement, the SWIFT Agreement and the 2011 EU–Morocco Fisheries Partnership Agreement.

In order to avoid such scenarios, Article 218(10) of the TFEU states that the EP needs to be "immediately and fully" informed at all stages of the procedure. Significantly, this right to information also applies equally to international agreements for which the Parliament only needs to be consulted or is not involved during the ratification procedure (i.e., agreements relating exclusively to the Common Foreign and Security Policy; Articles 218(6)b and 218(6) of the TFEU; *Parliament v. Council (Mauritius)*, 2014). Moreover, Article 207(3) of the TFEU specifies the information requirement with regard to trade agreements by requiring the Commission to "report regularly to [the Council's TPC] and to the European Parliament on the progress of negotiations.''

In 2010, the EP and Commission concluded an Interinstitutional Framework Agreement (hereafter IFA) that sought to strengthen the new 'special partnership' between Parliament and the Commission in the post-Lisbon institutional framework by, inter alia, improving the flow of information between the two institutions, including in relation to international (trade) agreements (IFA, 2010, Article 1).

Concerning international agreements, this IFA provides that the Commission simultaneously needs to inform the EP and the Council about its intention to propose the start of negotiations, present draft negotiating directives to the EP and to "take due account of European Parliament's comments throughout the negotiations" (IFA, 2016, Annex III). Moreover, the Commission committed itself to keeping the EP regularly informed about the progress of negotiations. In addition, the Commission needs to show whether and how EP's comments were integrated in the texts under negotiation (IFA, 2016, Annex III). In the case of international agreements that require the EP's consent, the Commission also agreed to provide to the EP all relevant information that it also provides to the Council during the negotiations. This includes draft amendments to adopted negotiating directives, draft negotiating texts, agreed articles, the agreed date for initialing the agreement and the text of the agreement to be initialed. This provision of information from the Commission to the EP and Council also includes any relevant documents received from third parties, if these third parties agree with their disclosure. Finally, the Commission granted the EP rights of access to negotiation meetings by, for instance, facilitating conditional participation of MEPs (as observers) in relevant meetings before and after negotiation sessions (IFA, 2016, para. 25).

Hence, the IFA granted the EP unprecedented rights of information and access to meetings of the Commission (Devuyst, 2014; Kleinman, 2011). The Council criticized this IFA between the Commission and EP since it grants the EP access to confidential information. It is therefore no surprise that the duty to inform, codified in Article 218(10) of the TFEU, led to a number of disputes, some of which ended up before the Court of Justice. The EP notably initiated—and ultimately prevailed—in two cases brought against the Council because of the failure of the latter to transmit relevant documents, both concerning agreements on the transfer of pirates with, respectively, Mauritius (*Parliament v. Council (Mauritius)*, 2014) and Tanzania (*Parliament v. Council*, 2016).

In *Parliament v. Council (Mauritius)* (2014), the Court ruled that the Council violated the information requirement under Article 218(10) of the TFEU by informing the EP of a decision on signature over three months after its publication in the Official Journal (*Parliament v. Council (Mauritius)*, 2014, para. 77–78). The Court considered the notification to the EP an essential procedural requirement within the meaning of the second paragraph of Article 263 of the TFEU, the violation of which leads to nullity of the decision (*Parliament v. Council (Mauritius)*, 2014, para. 80). In the Tanzania case, the Court went a step further and clarified that the obligation of Article 218(10) of the TFEU applies to any procedure for concluding an international agreement (so not only, for example, trade agreements, but even agreements relating exclusively to the Common Foreign and Security Policy; *Parliament v. Council*, 2016, para. 68). The Court recalled that "participation by the EP in the legislative process is the reflection, at Union level, of a fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly" (*Commission of the European Communities v. Council of the European Communities*, 1991, para. 20; *European Parliament v. Council of the European Union*, 2012, para. 81; *SA Roquette Frères v. Council of the European Communities*, 1980, para. 33). As regards the procedure for negotiating and concluding international agreements, the Court argued that "the information requirement laid down in Article 218(10) of the TFEU is the expression of that democratic principle, on which the European Union is founded" (*Parliament v. Council (Mauritius)*, 2014, para. 81). In particular, the aim of the information requirement of Article 218(10) of the TFEU is, inter alia:

> To ensure that the [European] Parliament is in a position to exercise democratic control over the European Union's external action and, more specifically, to verify that the choice made of the legal basis for a decision on the conclusion of an agreement was made with due regard to the powers of the [European] Parliament. (*Parliament v. Council (Mauritius)*, 2014, para. 71).

The Court further clarified that Article 218(10) of the TFEU also extends to the stages that precede the conclusion of such an agreement, and covers, in particular, the negotiation phase which includes, inter alia, the authorization to open negotiations, the definition of the negotiating directives, and in some cases, the designation of a special committee, the completion of negotiations, the authorization to sign the agreement where necessary, and the decision on the provisional application (*Parliament v. Council (Mauritius)*, 2014, para. 75).

The Court found that the obligation to inform the EP on the conduct of negotiations rests on the shoulders of the Council (*Parliament v. Council (Mauritius)*, 2014, para. 73). To the extent that this involves the transmission of Council decisions, this is logical. However, it has been questioned whether it is logical to make the Council responsible for informing the EP of the negotiations themselves, as the Council is normally not represented at negotiation sessions (Driessen, 2020). The TPC are themselves debriefed some time (often weeks) after negotiation rounds and are thus not in a position to debrief the EP 'immediately.' In practice it is indeed the Commission rather than the Council that debriefs the EP.

Following these cases, the three institutions agreed to search for solutions on a tripartite basis. In the interinstitutional agreement on better law-making of 2016, they acknowledged the importance of "ensuring that each institution can exercise its rights and fulfil its obligations enshrined in the Treaties as interpreted by the Court of Justice" regarding the negotiation

and conclusion of international agreements (IFA, 2016, p. 1). The agreement on better law-making envisaged special negotiations on improved practical arrangements for cooperation and information sharing in the context of international agreements (IFA, 2016, para. 41). These arrangements are intended to consolidate the information and scrutiny rights of the EP, so as to allow it to ensure the democratic legitimacy of the decisional process in the area of international agreements. However, the negotiations on this delicate issue have stalled.

The analysis above illustrates that academic and policy discussions about the EP's right of information with regard to international (trade) agreements focused so far mainly on the negotiation phase of EU trade agreements, thus on the negotiation component of the process dimension of transparency (as conceptualized in this article). However, there is increasingly attention to the (lack of) involvement of the EP in relation to the implementation of trade agreements by common bodies established by such agreements, thus on the implementation component of the process dimension of transparency (Weiss, 2018). Whereas international agreements concluded by the EU have always set up common bodies to facilitate their own amendment and implementation, the new generation of EU FTAs makes use of such bodies, often in the form of committees. These committees increasingly have extensive competences, including legislative powers to amend the trade agreement, to change the institutional architecture of the agreement, to adopt regulatory decisions or to give binding interpretation to provisions of the agreement. The EP is not involved in decisions taken by the FTA bodies, as representatives of the EP are not represented nor participate in these bodies. Article 218(9) of the TFEU provides that for significant amendments, the Council adopts the position to be taken by the EU in a treaty body based on a proposal by the Commission. For simplified amendments, Article 218(7) of the TFEU provides for a simplified procedure whereby an amendment is agreed to by a negotiator, usually the Commission, acting under authorization by the Council (Weiss, 2018). In both instances, the EP is not involved in the decision-making of the Council decision. Contrary to the Council, the EP is not even consulted by the Commission during the negotiations of such decisions by joint bodies. It is only when the Commission has agreed with the FTA partner the substance of the decision to be adopted in the joint body/committee that the Commission makes a proposal for a Council decision on the position to be taken on behalf the EU in that joint body, which includes the draft decision of the joint body—and which is transmitted to the EP.

Significantly, decisions of such committees and joint bodies may create new rules by way of their legislative and regulatory functions whose adoption internally in the EU would have required the involvement of the EP under, for example, the ordinary legislative procedure. Therefore, the legitimacy of decisions of common bodies established by EU FTAs is questioned (Weiss, 2018), although it can be argued that the legitimacy of committee decisions might ultimately stem from the EP's consent to the agreement, as this implies that the EP agreed to the treaty-body decision-making mandates provided therein.

It is not entirely clear to what extent the information requirement under Article 218(10) of the TFEU obliges the Council to inform the EP of—preparations of—decisions of joint bodies under EU FTAs, as this has not explicitly been addressed by the Court or the IFA. Therefore, it has been argued that the information requirements should be further specified and expanded, for example by modifying the current IFA to give the MEPs observer status in treaty bodies of EU FTAs, similar to the status of observers part of the EU delegation at international conferences, or to guarantee that the EP receives complete and timely information at all stages of the procedure with regard to envisaged treaty-body decisions.

It is also important to note in this regard that whereas the (draft) decisions of such joint FTA bodies are in principle annexed to the Commission proposal for the Article 218(9) of the TFEU Council decision, or are included in the Council's document register after adoption—and are therefore accessible—the FTAs do not explicitly require that such decisions have to be made public after adoption by the joint body. Recent FTAs, however, aim to make such decisions public. For example, the EU–Canada CETA and the EU–Japan FTA do not explicitly oblige their respective Joint Committees to make public its decisions; however, its Rules of Procedure (adopted as decisions of the respective Joint Committees) specify that "the parties to the agreement will ensure that the decisions, recommendations or interpretations adopted by the Joint Committee are made public" (CETA, Article 26.3; CETA Joint Committee, rule 10). The Rules of Procedure also specify that the agenda and a (summary of) the minutes of these meetings can be made public by the Parties, unless one of the Parties submits that these documents have to remain confidential (CETA, Article 26.4; CETA Joint Committee, rule 9).

As noted above, the implementation component of the process dimension of transparency also covers the enforcement of FTAs. Similar to the situation of the implementation of FTAs by joint bodies set up by such agreements, the EP is hardly involved in enforcement procedures. This can be illustrated by the State-to-State dispute settlement mechanisms (DSMs) provided for in the new generation of EU FTAs that deal with disputes concerning the interpretation or application of these agreements. Although such DSMs have become standard practice in EU FTAs (Bercero, 2006), they are hardly being used (European Commission, n.d.). The Commission is representing the Union in these cases (*Council v. Commission (ITLOS)*, 2015) by requesting the DSM consultations and eventually the establishment of the arbitration panel and by representing the Union during the arbitration proceedings. Significantly, there is no

legal obligation on the Commission to inform or consult the Parliament about the (potential) initiation of such DSM procedures, or the legal position taken therein, although it is required to consult the Council. The Court indeed stressed in the Tanzania case (*Parliament v. Council*, 2016) that the information obligation under Article 218(10) of the TFEU implies that the EP must be informed at all the different negotiations stages leading up to the entry into force of the agreement, but it did not mention the implementation or enforcement of EU FTAs (*Parliament v. Council (Mauritius)*, 2014, para. 76). Also, the IFA remains silent on this issue. However, in practice the Commission (usually the Head of Unit on Dispute Settlement) informs a delegation of the INTA Committee every 6 months in camera about DSM proceedings under FTAs.

This does not mean that MEPs (or public actors such as citizens or CSOs) have no access at all to relevant documents about such arbitration proceedings. EU FTAs require that the hearings of the arbitration panel are in principle open to the public and that the parties make their submissions publicly available. However, the arbitration panel can meet in a closed session when the submission and arguments of a party contain confidential business information. However, in this case a non-confidential version of the submission needs to be made public (CETA, Annex 29-A). Also, the final report must be made publicly available (CETA, Article 29.10), but the interim report can be confidential (CETA, Article 29.9). Moreover, DSMs under EU FTAs allow CSOs to submit amicus curiae briefs (CETA Annex 29-A).

The EP's limited role in such DSM proceedings is also visible in the selection procedure of the arbitrators. The list of arbitrators is usually established by the Joint Committee set up by the FTA. On the EU's side, this requires a Council Decision on the position to be taken on behalf of the EU in that Committee, based on Article 218(9) of the TFEU. As noted above, the EP is not involved in this procedure, implying that the EP has, for example, no means to check if the EU's (proposed) arbitrators are meeting the necessary professional requirements (see, for example, CETA Article 29.8(2)).

3.2. The Council

Although the policy and academic discussions on transparency with regard to EU FTAs mainly focus on the right of information of the EP during the negotiation of trade agreements, it is important to note that the Council has also aimed to expand its right to information during the negotiation of international (trade) agreements. Article 218(4) of the TFEU provides that the Council may address directives to the Commission as negotiator and establish a committee which needs to be consulted during the negotiations. With regard to trade agreements, Article 207(4) of the TFEU stipulates that after the Council has authorized the Commission to open negotiations, the Commission needs to conduct these negotiations in consultation with the TPC. The Commission is required to regularly report to the TPC and to the EP on the progress of negotiations.

In the gas emissions case (*Commission v. Council (Gas emissions)*, 2015), which concerned the negotiation of an agreement with Australia on greenhouse gas emissions trading schemes, the CJEU considered the rights and obligations of an Article 218(4) of the TFEU committee. The Court ruled that the Commission is obliged to provide the Article 218(4) of the TFEU committee with:

> All the information necessary for it to monitor the progress of the negotiations, such as, in particular, the general aims announced and the positions taken by the other parties throughout the negotiations. It is only in this way that the special committee is in a position to formulate opinions and advice relating to the negotiations. (*Commission v. Council (Gas emissions)*, 2015, para. 66)

The Commission can even be required to provide such information to the Council (*Commission v. Council (Gas emissions)*, 2015, para. 67). Moreover, the Court even accepted that the Council could impose procedural requirements with regard to information provision and consultation between the established committee and the Commission in the negotiating directives (*Commission v. Council (Gas emissions)*, 2015, para. 78). However, the Court also established limits to the Council's ability to direct the negotiation (Cremona, 2017). In particular, the Court held that neither the Council nor Council Committees have the right to establish detailed negotiating positions that bind the Commission, as this would jeopardize the institutional balance laid down in the Treaties, would go beyond the consultative function given to the committee by Article 218(4) of the TFEU and would be an infringement of the Commission's prerogatives as negotiator (*Commission v. Council (Gas emissions)*, 2015, para. 89–90).

Less attention has been devoted to the Council's right of access to documents in the implementation phase of international trade agreements. As noted above, the Commission is in charge of the negotiation with the FTA partner of decisions of joint committees established by FTAs, and must then make a proposal for a Council decision regarding the position to be adopted on the EU's behalf in such joint bodies (Article 218(9) of the TFEU; Van Elsuwege & Van der Loo, 2019). Only after the adoption of the Article 218(9) of the TFEU decision by the Council, the joint committee can adopt the actual decision. The Commission consults the Council in the TPC about such negotiations before it adopts its proposal for an Article 218(9) of the TFEU Council decision. The Council is therefore in principle informed in a timely manner and consulted with regard to such Article 218(9) of the TFEU decisions, however, it is not always immediately informed about the actual adoption of the decision of

the joint committee (for which the Commission is responsible). As noted above, such decisions are not always made public—although recent EU FTAs make efforts in this regard.

A similar procedure also applies with regard to enforcement of EU FTAs by DSM cases. As confirmed by the Court in *Council v. Commission (ITLOS)* (2015, para. 86), in view of the principle of sincere cooperation, the Commission is required to consult the Council beforehand if it intends to express positions on behalf of the EU before an international Court. The Commission therefore consults the Council in the TPC or in other Council Committees before every step in such arbitration proceedings (e.g., request for consultations or the establishment of a panel). Moreover, representatives of the member states are allowed to be present during the DSM proceedings, but are not allowed to contribute.

In view of the above, it can be concluded that there are sufficient procedures to ensure that the Council is informed in a timely manner or consulted by the Commission, both in relation to the implementation of FTAs and the enforcement of FTAs.

4. Public Transparency

The following section analyzes the access to information and transparency-related instruments and procedures in the EU's FTA policy involving public actors (i.e., civil society and citizens). The most important instruments or procedures that give public actors information about EU trade agreements are the access to documents Regulation 1049/2001 (European Commission, 2019) and the European Ombudsman.

4.1. The Access to Documents Regulation 1049/2001

Access to documents is, in the EU, governed by Regulation 1049/2001 (hereinafter Regulation). This Regulation builds on the principle of 'widest possible access,' and has together with case law of the CJEU, been instrumental in operationalizing the Treaty commitments with regard to the right of citizen access to documents and transparency. Any citizen of the Union, and any natural or legal person residing or having its registered office in a member state, has a general right of access to documents of the institutions (i.e., the EP, Council and the Commission), subject to the principles, conditions and limits defined in the Regulation. According to Article 4 of the Regulation, refusal of access to a document can be allowed only in cases where disclosure could undermine the protection of one of the public (international relations and security) or private (protection of personal data, commercial interests, court proceedings and legal advice) interests listed in that provision. Exceptions to the general principle of public access to documents should, following established case-law, be interpreted and applied narrowly (see *Access Info Europe v. Commission*, 2018a, 2018b; *ClientEarth v. Commission*, 2015). Hence, the Regulation contains a mandatory exception to disclosure of documents which would undermine the protection of the public interest as regards international relations (Article 4(1)(a)) third indent of the regulation) or where disclosure would undermine, inter alia, court proceedings and legal advice, unless there is an overriding public interest in disclosure (Article 4(2)). The Court has acknowledged in several cases the wide margin of discretion held by the EU institutions in this framework (*Access Info Europe v. Commission*, 2018b, para. 40–41; *ClientEarth v. European Commission*, 2018, para. 23–24). The General Court therefore concluded that the exception for the protection of international relations is therefore subject to a limited judicial review of legality that is circumscribed to verifying the compliance with the procedural rules and the duty to state reasons, the accuracy of the statement of facts, and the lack of a manifest error of assessment or a misuse of powers (*ClientEarth v. European Commission*, 2018, para. 23).

Significantly, the Regulation has increasingly been used, including by MEPs, to challenge Council and Commission refusals to grant access to information during negotiations of international (trade) agreements. Two cases brought forward by MEP Sophie In't Veld are important in this context. In a first case, in 2009, In't Veld made a request for access to the opinion of the Council's Legal Service on the Commission's recommendation to the Council to start the SWIFT negotiations (concerning banking data transfers to the United States via the SWIFT network). Both the General Court and the CJEU in appeal argued that the disclosure of the positions taken within the EU institutions concerning the appropriate legal basis for the agreement would not have posed a threat to the EU's international relations interests within the meaning of Article 4(1)a of the Regulation (*Council v. In't Veld*, 2014). On the other hand, both courts clarified the contours of transparency in that they agreed that access can be refused for documents that relate to the specific content of international agreements (this would arguably include draft text and proposals by the EU) and the negotiating directives which relate to the strategic objectives pursued by the EU in the negotiations with a third country (*Council v. In't Veld*, 2014, para. 58).

The second case concerned a Commission decision to refuse access to certain documents relating to the Anti-Counterfeiting Trade Agreement (*In't Veld v. Commission*, 2013). The EP refused to give its consent to the Anti-Counterfeiting Trade Agreement. The EP criticized the Commission for a lack of transparency in the negotiation process. The Commission only disclosed a limited number of documents. Access to most documents was refused with reference to the 'international relations' exception of the Regulation. The case was partially successful for In't Veld. However, the Court also recognized the validity of the argument by the Commission that the public disclosure of negotiating positions and negotiations could compromise the EU's negotiating position

and undermine EU interests. Hence, according to the Court, the negotiation of international agreements could justify "a certain level of discretion to allow mutual trust between negotiators and the development of a free and effective discussion" (*In't Veld v. Commission*, 2013, para. 119). Moreover, since negotiations are conducted by the executive, public participation in the process was "necessarily restricted" (*In't Veld v. Commission*, 2013, para. 120). Finally, it was argued that the disclosure of the EU's position could "reveal, indirectly, [the positions] of other parties to the negotiations" (*In't Veld v. Commission*, 2013, para. 124).

It can be observed that in the area of FTA negotiations most of the requests for documents under the Regulation, including the related case law, deal with the negotiation phase of the process dimension of transparency (European Commission, 2019). The Court even clarified recently that, whilst acknowledging Commission's need for space for deliberation on policy choices, documents drawn up in the context of an impact assessment also fall under the general right to access to documents (Case C-57/16). However, it seems that the Regulation is hardly being used to request documents relating to the implementation phase of EU FTAs. The Regulation could be applied to obtaining documents relating to the positions taken by the EU in joint bodies or committees or documents prepared in the context of DSMs. So far, such an application has not been triggered. As a result, the CJEU has not had the opportunity to clarify the application of the Regulation in relation to documents relating to the implementation of EU FTAs.

4.2. The European Ombudsman and Transparency Cases about EU FTAs

The European Ombudsman has become an important player in the EU's transparency framework. Around one quarter of the inquiries the Ombudsman carries out every year concern the lack of or refusal to provide information. For example, concerns about transparency and access to documents in the EU administration (mainly in relation to the Commission) accounted for the biggest proportion of the Ombudsman's cases (24.6%) in 2018 (European Ombudsman, 2018). These statistics confirm the significant increase in the number of new enquiries observed since 2017, and reflect the growing importance placed by the European Ombudsman on this specific area of activity (European Commission, 2019). Significantly, the European Ombudsman is increasingly dealing with transparency inquiries with regard to the negotiation and conclusion of FTAs, often initiated by NGOs.

One of the most significant inquiries in this area was related, not surprisingly, to the TTIP. In July 2014, the Ombudsman opened an investigation on her own initiative into the transparency of the TTIP negotiations, triggered by concerns about the non-disclosure of key documents and the alleged granting of privileged access to a limited number of stakeholders (European Ombudsman, 2015b). In closing this inquiry, the Ombudsman welcomed the Commission's transparency initiatives launched in the context of the TTIP negotiations, but also noted that they did not go far enough to inform the public. She proposed the establishment of a comprehensive list of TTIP-related documents, including agendas and minutes of meetings with lobbyists (European Ombudsman, 2015a).

In addition, the Ombudsman carried out several other important inquires in which it called for more transparency and access to documents with regard to the negotiation of EU trade agreements, including recently in relation to briefing material ('flash cards') used by the President of the European Commission in a meeting with the President of the United States Donald Trump. Whereas the Ombudsman generally favours stronger transparency with regard to the negotiation of EU trade agreements in line with the case law of the CJEU discussed above (Abazi & Adriaensen, 2017), in several cases she concluded that the non-disclosure of several negotiation documents was correct and justified (European Ombudsman, 2018). It can again be observed that, similar to the application of the Regulation, most of the inquiries conducted by the Ombudsman concerning access to FTA documents relate to the negotiation documents, and not to documents adopted in the context of the implementation of FTAs.

5. Conclusion

Transparency has significantly increased in the EU's trade policy concerning FTAs. The focus has clearly been on the negotiation phase of FTAs and less on the implementation phase. Of the institutional actors involved in the EU FTAs, the Commission played the most important role in this process, but the Council also, more reluctantly, played a role, providing access to the EP and public actors.

With regard to the institutional actors, we can observe that the EP has secured and materialized its right to be informed during the negotiation phase of FTAs. The interinstitutional relations with the other two internal actors have proven to be essential. Whereas the Commission has been increasingly supportive and cooperative with regard to the EP's quest for more access to FTA negotiation documents, the EP's relations with the Council on this issue remain difficult—as evidenced by the stalled negotiations on practical arrangements for cooperation and information sharing in the context of international agreements under the better law-making agreement. Moreover, EP's involvement—and access to documents—remains limited in relation to the implementation of EU FTAs. In particular, in relation to decisions adopted by joint FTA committees, the EP's access to documents—and therefore oversight—is very limited. Considering the increasing importance of such joint bodies in FTAs, it will be crucial that structural interinstitutional procedures are established to keep the

EP sufficiently in the loop. The renegotiation of the IFA and the relaunching of the negotiations with the Council on practical arrangements for cooperation and information sharing in the context of international agreements could open doors in this regard. Also, towards public actors, transparency has been enhanced by increasingly relying on the access to documents regulation and inquiries by the European Ombudsman. It appears that the access to documents regulation and inquiries by the Ombudsman are mainly used to improve transparency in relation to the negotiation dimension of FTAs.

Acknowledgments

Research for this article was conducted in the context of the EU's Horizon 2020 Research & Innovation programme—RECONNECT project (Grant Agreement No. 770142). The authors thank Camille Kelbel and 2 reviewers for comments and feedback.

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Politics and Governance (ISSN: 2183–2463)
2021, Volume 9, Issue 1, Pages 272–280
DOI: 10.17645/pag.v9i1.3969

Article

To What Extent Can the CJEU Contribute to Increasing the EU Legislative Process' Transparency?

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Submitted: 27 December 2020 | Accepted: 16 March 2021 | Published: 31 March 2021

Abstract
Alongside other actors such as the European Ombudsman, the Court of Justice of the European Union (CJEU) plays what looks like, at first sight, a key role in improving the transparency of EU legislative procedures. To take two relatively recent examples, the *De Capitani v. European Parliament* (2018) judgment was perceived as a victory by those in favor of increased transparency of EU legislative procedures at the stage of trilogues, as was the *ClientEarth v. European Commission* (2018) judgment regarding the pre-initiative stage. Both rulings emphasize the need for "allowing citizens to scrutinize all the information which has formed the basis of a legislative act…[as] a precondition for the effective exercise of their democratic rights" (*ClientEarth v. European Commission*, 2018, §84; *De Capitani v. European Parliament*, 2018, §80). Nevertheless, while the CJEU's case law may indeed contribute to improving the legislative process' transparency, its impact on the latter is inherently limited and even bears the potential of having a perverse effect. This article sheds light on the limits of the CJEU's capacity to act in this field and the potential effects of its case law on the EU institutions' attitudes or internal organization.

Keywords
Council of the European Union; Court of Justice of the European Union; European Commission; European Parliament; European Union; legislative procedure; transparency

Issue
This article is part of the issue "Access or Excess? Redefining the Boundaries of Transparency in the EU's Decision-Making" edited by Camille Kelbel (Lille Catholic University, France), Axel Marx (University of Leuven, Belgium) and Julien Navarro (Lille Catholic University, France).

1. Introduction

Many individuals or NGOs active in the field of transparency are confronted with confirmatory decisions of EU institutions rejecting their requests for access to documents. These individuals and NGOs then place a lot of hope in actions for annulment of those decisions brought before the Court of Justice of the European Union (hereafter CJEU), be it in first instance the General Court or in appeal the Court of Justice (Driessen, 2012, pp. 254–260). Alongside other actors such as the European Ombudsman, the CJEU serves what looks like, at first sight, a key role in improving the EU legislative procedures' transparency.

Under EU law, transparency relates to the broader concept of openness. Whereas the Treaties do not provide us with a definition of what the principle of openness entails, the academic literature offers a wide range of diverse understandings, often using, similarly to the CJEU itself, the concepts of openness and transparency interchangeably (Curtin & Mendes, 2011, p. 103). In our opinion, openness of decision-making should be understood as entailing two aspects, namely transparency—defined restrictively as the possibility for any individual to access information (de Fine Licht & Naurin, 2016, p. 217; Wyatt, 2018)—and participation—defined as the actual possibility to participate in the decision-making process (Alemanno, 2014). These two elements are

interlinked in the sense that meaningful participation necessitates fully-fledged transparency. In other words, the former is dependent on the latter. This is particularly salient in the context of the EU legislative process, in which the purpose of transparency of ongoing procedures is about public scrutiny—or accountability to the public—but also allowing, in a timely manner, the participation of any interested citizen while a legislative act is in the making. It is this understanding of openness that the CJEU gives when stating that "allowing citizens to scrutinize all the information which has formed the basis of a legislative act…is a precondition for the effective exercise of their democratic rights" (e.g., *ClientEarth v. European Commission*, 2018, §84; *De Capitani v. European Parliament*, 2018, §80). Even though it offers us such a bold statement, the CJEU's ability to satisfy the expectations of pro-transparency activists is limited for various reasons. Moreover, while some rulings appear at first glance to foster the transparency of the EU legislative process, they can paradoxically lead to the contrary.

This article aims to shed light on these limitations and pitfalls by focusing on the limits of the impact of the judiciary on the legislative process' transparency. First, it gives a short overview of the key provisions of EU law relevant for the debate on the transparency of the legislative process. Second, it highlights three inherent limits—the limits of interpretation, the principles of institutional balance and institutional autonomy, and time—of the CJEU's action on the matter. It does so by drawing on some lessons from the case law, taking the judgments *De Capitani v. European Parliament* (2018) of the General Court and *ClientEarth v. European Commission* (2018) of the Court of Justice as cases of reference for this discussion, given they both draw on previous case law on the transparency of the legislative process (such as the cases *Council v. Access Info Europe*, 2013; *Herbert Smith Freehills v. Council*, 2016; *Sison v. Council*, 2007; *Sweden and Others v. API and Commission*, 2010; and *Sweden and Turco v. Council*, 2008), but also build on the latter on crucial stages of the legislative procedures. Third, this article touches upon the issue of the risk of perverse effect of the CJEU's case law in this field. It concludes by saying that if the CJEU indeed has the capacity to improve the openness of the legislative process, this capacity is more limited than we might think and bears a potential perverse effect. On a final note, it raises some suggestions on how to rebalance the dynamics in place between the judiciary and the legislative branch to increase the capacity of the CJEU to act in this field.

2. Legal Background

According to the Treaties, the functioning of the EU relies on two complementary models of democracy (Curtin & Leino-Sandberg, 2016, p. 4). First, it is founded on the model of representative democracy (Consolidated version of the Treaty on European Union [TEU], 2016, Article 10(1–2)), according to which citizens elect representatives who in turn should be held accountable to the citizens for the decisions they take. Second, it is equally founded on the model of participatory democracy as the Treaties expressly foresee that "[e]very citizen shall have the right to participate in the democratic life of the Union." Thus, "[i]n order to promote good governance and ensure the participation of civil society," EU institutions shall conduct their work and take their decisions "as openly as possible to the citizen" (Consolidated version of the Treaty on the Functioning of the European Union [TFEU], 2016, Article 15(1); TEU, 2016, Article 10(3)). Concretely, EU "institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action" (Marxsen, 2015; Mendes, 2011; TEU, 2016, Article 11(1)). In addition, the Treaties add that each institution "shall ensure that its proceedings are transparent" (TFEU, 2016, Article 15(3)), and both the Treaties and the Charter of Fundamental Rights of the EU recognize the right of any EU citizen, and any natural or legal person residing or having its registered office in a Member State, to access EU institutions' documents, subject to limitations on grounds of public or private interest as fixed under EU secondary law (Charter of Fundamental Rights of the European Union, 2016, Articles 42 and 52; TFEU, 2016, Article 15(3)). It is through these various provisions that the principle of openness, as defined in the introduction, arises.

The central piece of secondary legislation on transparency is *Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding Public Access to European Parliament, Council and Commission Documents* (2001; hereafter Regulation No 1049/2001). This Regulation fixes the conditions governing the right of access to documents and its limits. It poses that the "widest possible access to documents" should be the norm while the denial of access, on the grounds foreseen under Article 4, be the exception (Article 1; Recitals 4 and 11). It also emphasizes that "[o]penness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system" and "contributes to strengthening the principles of democracy" (Recital 2). Despite some attempts to revamp the already 20 year old Regulation, interinstitutional negotiations have not led to any compromise as "Member States are divided in the Council into those thinking reform ought to mean going forward towards increased openness, and those wishing to turn the clock back" (Leino, 2011, p. 1216).

Legislative procedures (TFEU, 2016, Articles 289 and 294) benefit from increased transparency requirements. In particular, the Treaties emphasize that "[t]he European Parliament shall meet in public," as shall the Council when considering, deliberating and voting on a draft legislative act (TFEU, 2016, Article 15(2);

TEU, 2016, Article 16(8)). Hence the Treaties seem to establish a close relationship between legislative procedures and transparency (*Council v. Access Info Europe*, Opinion of Advocate General Cruz Villalón, 2013, §§39–40). However, the Treaties underline that access to documents relating to legislative procedures also suffer from limitations fixed in the above-mentioned Regulation (TFEU, 2016, Article 15(3)). As emphasized in the Regulation, "[w]ider access should be granted to documents in cases where the institutions are acting in their legislative capacity" and "[s]uch documents should be made directly accessible to the greatest possible extent," yet "the effectiveness of the institutions' decision-making process" should be preserved (Articles 2(4) and 12(2), Recital 6). In any case, according to a well-known legal principle, exceptions to the right of access must be interpreted and applied strictly, even more so, as induced from the considerations above and a well-established case law, in a legislative context, in which "the discretion left to the institutions not to disclose documents that are part of the normal legislative process is extremely limited or non-existent" (see e.g., *Council v. Access Info Europe*, 2013, §63; *De Capitani v. European Parliament*, 2018, §40).

3. Three Limits to the CJEU's Contribution

The Treaties give one single yet important mission to the CJEU, namely to "ensure that in the interpretation and application of the Treaties the law is observed" (TEU, 2016, Article 19). This role as central judicial actor of the EU legal order comprises, as in any democratic system, the duty to provide checks and balances against abuse of other branches of power, which constitute an important "judicial influence in the political process" (Alter, 1998, p. 124). Like any other actor though, "courts have political limits," or what Alter (1998, p. 138) describes as "some area of 'acceptable latitude,' beyond which they cannot stray." This 'acceptable latitude' of action in the field of transparency appears limited by three factors: the limits of interpretation, the principles of institutional balance and of institutional autonomy, and the importance of time in this area.

3.1. The Limits of Interpretation

The framing of the above-mentioned role of the CJEU means that its margin of maneuver is inevitably limited by the provisions of EU law at stake and, consequently, the limits to their interpretation. No lawyer would find anything surprising here. Even if, through interpretation, the boundaries of the understanding of provisions may be dynamic, evolve over time, sometimes dramatically, they remain boundaries. It must be borne in mind that the CJEU, built on the model of the French *Conseil d'État*, follows a civil law tradition despite featuring some minor common law procedural characteristics. In interpreting EU law, no matter which method of interpretation it uses (literal/grammatical, historical, systematical, purposive or '*effet utile*'; Grimmel, 2012, p. 532), the Court must strike a delicate balance between "[making] sense of the political compromises embodied in the relevant legislation" and paying what Arnull (2009, p. 1238) calls "[j]udicial respect" for the "essential elements of those compromises." It is crucial for the CJEU to keep, at least, "the appearance of judicial neutrality, which is the basis for parties accepting the legitimacy of [its] decisions" (Alter, 1998, p. 135). It involves paying due respect to the nature and contexts of the case at stake. Any misstep always bears the risk of giving more ground to authors describing the CJEU as "an uncontrolled authority generating law" (Alter, 1998, p. 129).

Beyond the inherent limits of interpretation, the CJEU's involvement in the transparency debate is also limited in the sense that it can only interpret what it is given a chance to interpret. To give one example, so as not to appear as ruling *ultra petita*, the General Court explicitly underlined in the *De Capitani* case that its ruling did not in any way conclude that "direct access to ongoing trilogue work within the meaning of Article 12 of Regulation No 1049/2001" should be ensured, as the case concerned solely the access to the fourth column of documents "on specific request," lodged pursuant to the same Regulation (see below—*De Capitani v. European Parliament*, 2018, §86). The General Court was not offered the possibility to rule beyond this specific context. The mere fact that the General Court underlines what it does *not* say shows its acknowledgment of its limits, and that it feels the necessity to emphasize it. In other words, the CJEU needs to receive cases to judge, and more specifically here, cases that mobilize provisions whose interpretation could constitute an opportunity for improving the transparency of the legislative process. Yet the possibilities for cases to reach the CJEU are very limited due to procedural constraints. Cases on transparency brought by individuals or NGOs are inevitably not numerous as any individual willing to launch an action for annulment of a decision refusing the access to documents must demonstrate an interest in bringing proceedings, comply with the other restrictive conditions set in Article 263 TFEU (2016), act within a limited period and have the legal and financial resources to do so.

As a result, if some sort of judicial activism can take place in this field, its ambition is inherently limited.

When the CJEU states that "allowing citizens to scrutinize all the information which has formed the basis of a legislative act…is a precondition for the effective exercise of their democratic rights" (e.g., *ClientEarth v. European Commission*, 2018, §84; *De Capitani v. European Parliament*, 2018, §80), it can comfortably rely on the primary law and secondary law mentioned above. Yet if such a general consideration by the CJEU is welcome, it does not *per se* lead to any subjective right. The CJEU gets more adventurous when, in the *ClientEarth* case, it asserts that "allowing

divergences between various points of view to be openly debated…also contributes to increasing…citizens' confidence in those institutions" (*ClientEarth v. European Commission*, 2018, §75) and that:

> [B]y increasing the legitimacy of the Commission's decision-making process, transparency ensures the credibility of that institution's action in the minds of citizens and concerned organizations and thus specifically contributes to ensuring that that institution acts in a fully independent manner and exclusively in the general interest. (*ClientEarth v. European Commission*, 2018, §104)

The *ClientEarth* judgment was rendered on appeal of a judgment of the General Court. This ruling concerned the stage preceding the submission by the Commission of draft legislative proposal to the co-legislators. The NGO ClientEarth had sent the Commission two requests for access to specific documents, namely one for the draft impact assessment report regarding access to justice in environmental matters and one for the impact assessment report regarding inspections and surveillance in environmental matters, together with the respective opinions of the Impact Assessment Board. Both requests had been rejected by the Commission. In first instance, the General Court dismissed the actions introduced by ClientEarth for annulment of the decisions of the Commission. ClientEarth, unsurprisingly supported in this endeavor by Finland and Sweden, appealed the judgment of the General Court before the Court of Justice.

To motivate its refusal, the Commission relied on the first subparagraph of Article 4(3) of Regulation No 1049/2001. It argued that "impact assessments were intended to help it in preparing its legislative proposals and that the content of those assessments were used to support the policy choices made in such proposals." Therefore, the disclosure, at this "very early and delicate stage," "would seriously undermine its ongoing decision-making processes" in restricting "its room for maneuver, [reducing] its ability to reach a compromise" (*ClientEarth v. European Commission*, §§15, 17).

To the greatest joy of ClientEarth, the Court of Justice annulled the judgment of the General Court. The Court acknowledged that as "the impact assessment procedure takes place upstream of the legislative procedure *sensu stricto*," the Commission "does [indeed] not itself act in a legislative capacity" at that stage. However, "policy choices made [by the Commission] in its legislative proposals [are] supported by the content of those assessments." The latter contain "information constituting important elements of the EU legislative process, forming part of the basis for the legislative action." As a result:

> [T]he disclosure of those documents is likely to increase the transparency and openness of the legislative process as a whole…and, thus, to enhance the democratic nature of the EU by enabling its citizens to scrutinize that information and to attempt to influence that process. (*ClientEarth v. European Commission*, 2018, §92)

These considerations led the Court to qualify those documents as legislative and, further in the judgment, to reject—contrary to the General Court—the general presumption of confidentiality of those documents (*ClientEarth v. European Commission*, 2018, §§68–70, 85–86, 89–93, 102 et seq.).

If the *ClientEarth* case was crucial in determining by which set of transparency standards the pre-initiative stage of the legislative process is governed, it joins what constitutes the vast majority of the CJEU's case law in the field of transparency: the case law defining the limits of Article 4 ("Exceptions") of Regulation No 1049/2001 (2001). As exceptions, the CJEU must proceed to a restrictive interpretation. In this endeavor, the CJEU must decide which institutions' arguments for confidentiality are acceptable and which are not. The CJEU sometimes goes beyond this binary exercise by giving, through an *obiter dictum*, an indication on how the institutions' arguments should be reframed in the future to be acceptable *de lege lata*. This case law has progressively framed the spectrum of what should or should not be transparent, despite presenting sometimes some obscurities and contradictions (Adamsky, 2009; Maiani, Villeneuve, & Pasquier, 2010, p. 16).

For instance, on what documents can be deemed 'sensitive,' the General Court underlined in the *De Capitani* case that the mere fact that the documents at stake relate to a sensitive field of EU law "cannot per se suffice in demonstrating the *special* sensitivity of the documents" (*De Capitani v. European Parliament*, 2018, §89). To hold otherwise would exempt this whole field of EU law from the transparency requirements. The sensitivity point is even less relevant considering that the documents in that case concerned "a draft regulation, of general scope, binding in all of its elements and directly applicable in all the Member States, which naturally concerns citizens" and affect their rights (*De Capitani v. European Parliament*, 2018, §90). The General Court specified that the reason of sensitivity could only be successful if the information contained in a document is "particularly sensitive to the point of jeopardizing a fundamental interest of the EU or of the Member States if disclosed" (*De Capitani v. European Parliament*, 2018, §97). On the 'risk of external pressure' that would result from making documents publicly available, the General Court insisted in the same case that "co-legislators must be held accountable for their actions to the public" (*De Capitani v. European Parliament*, 2018, §98). One could argue that it is inherent to decision-making to be under external pressures of different kinds. In the *ClientEarth* case, ClientEarth smartly reversed the European Commission's argument by arguing that "openness enhances [the] independence [of the institutions

involved], by placing [them] in a position to better resist any external pressures" (*ClientEarth v. European Commission*, 2018, §64). Yet the General Court acknowledged that the risk of external pressure could constitute a legitimate ground for restricting access to documents if its reality is "established with certainty, and evidence must be adduced to show that there is a reasonably foreseeable risk that the decision to be taken would be substantially affected" (*De Capitani v. European Parliament*, 2018, §99). We see here a concrete example of that delicate balance we referred to above: The General Court keeps the door open to pay judicial respect to the text, but the door is so narrowly ajar that it appears difficult to go through.

3.2. A Delicate Position in View of the Principles of Institutional Balance and of Institutional Autonomy

The limits to the right of access to documents expressly recognized by EU primary and secondary law prevent the CJEU from consecrating an absolute right of access (*ClientEarth v. European Commission*, 2018, §77; *De Capitani v. European Parliament*, 2018, §112), even for legislative documents. In the *De Capitani* case, the General Court acknowledged, as suggested by the three institutions, that the "widest possible access" as provided for in—inter alia—Article 1 of Regulation No 1049/2001, cannot be regarded as equivalent to "absolute access" (*De Capitani v. European Parliament*, 2018, §112). The same consideration by the Court of Justice in the *ClientEarth* case indicated to the European Commission that it can reject a request at the condition to duly justify its decision by motivating why the disclosure would seriously undermine its ongoing decision-making processes, *quod non* in that case (*ClientEarth v. European Commission*, 2018, §§123–124).

This is partly explained by the limits of interpretation we elaborated on above, but also by a more fundamental consideration. As we can see in the case law on Regulation No 1049/2001, the CJEU's margin is thin: Its ruling options are binary in essence, namely to consider that the institution should have given access or not, despite the debate on openness being more complex. It is not only about giving access or not, but rather when and how; in other words, about allowing or not the scrutiny and participation of any interested citizen while a legislative act is in the making. The CJEU recognizes this by highlighting transparency as a precondition for the exercise by EU citizens of their democratic rights. However, the CJEU fails to give full meaning to that exercise and to the substance of those rights, although the elliptical provisions that are Articles 10 and 11 TEU contain the ingredients for a more ambitious agenda. Nevertheless, it cannot be blamed for this failure, as its mandate and institutional position prevent it taking further steps in this field.

The very limit that prevents the CJEU from doing so can surely be found in the principle of separation of powers, or in its sort of substitute in the EU context, which is the principle of institutional balance, and in the principle of institutional autonomy. The judiciary should refrain from *ultra vires* marked interventions into the working of the sacrosanct legislative branch. Looking at the whole debate of determining what is the principle and what should be the exceptions through these lenses gives the debate a particularly sensitive taste, especially when considering the stances taken by the institutions brought before the CJEU by individuals or NGOs.

The *De Capitani* case was particularly telling in this aspect. Mr Emilio De Capitani, a former civil servant of the European Parliament, asked the latter to be granted access to the so-called four-column documents of all ongoing trilogue negotiations. The term trilogue refers to informal tripartite meetings that gather representatives of the Commission, the European Parliament, and the Council, with the aim of finding compromises on—in the present context—legislative files (Giersdorf, 2019). This is where, behind closed doors, the political agreement on a legislative file is sealed. Hence trilogues constitute the "decisive phases of the legislative process" (European Parliament, 2016, §§22, 26) or, in other words, "a substantial phase of the legislative procedure, and not a separate 'space to think"' (European Parliament, 2011, §29).

The four-column document is the central piece of the negotiations. In this document, the first column contains the proposal of the European Commission, the second the position of the European Parliament on the latter and its suggestions for amendments (if any), the third the position of the Council, and the last a tentative compromise or the preliminary positions of the Presidency of the Council in relation to the amendments proposed by the European Parliament. Often, the final text as adopted is a copy-paste of the final version of the fourth column. While this document does not report on all exchanges happening during the negotiations, it gives a clear insight into what position each institution involved defends behind closed doors, and how this position evolves during the negotiations. As Mr De Capitani's request targeted *all* ongoing procedures, the European Parliament rejected it as processing it would create an excessive administrative burden. Mr De Capitani therefore introduced a confirmatory application limiting the scope of the request to ongoing procedures related to specific areas. As a result, the European Parliament gave full access to five of the seven four-column documents it identified, but limited the access to the last two, refusing to disclose the fourth column of those two documents. Mr De Capitani challenged this refusal before the General Court.

The European Parliament invoked the first subparagraph of Article 4(3) of Regulation No 1049/2001 (2001), arguing that the requested disclosure would:

> [A]ctually, specifically and seriously undermine the decision-making process of the institution as well as the inter-institutional decision-making process in

> the context of the ongoing legislative procedure and [that] no overriding public interest which outweighs the public interest in the effectiveness of the legislative procedure had been identified in the present case. (*De Capitani v. European Parliament*, 2018, §6)

It maintained "that the principle of transparency and the higher requirements of democracy do not and cannot constitute in themselves an overriding public interest" (*De Capitani v. European Parliament*, 2018, §8). In support of its position, and in addition to the sensitivity and risk of external pressure points mentioned earlier, the European Parliament put forward two other arguments. First, the disclosure:

> [W]ould make the Presidency of the Council [warier] of sharing information and cooperating with the Parliament negotiating team and, in particular, the rapporteur; moreover, the Parliament negotiating team would be forced, on account of the increased pressure from national authorities and interest groups, to make premature strategic choices…which would 'complicate dramatically the finding of an agreement on a common position'. (*De Capitani v. European Parliament*, 2018, §7)

Second, since the principle according to which 'nothing is agreed until everything is agreed' is "very important for the proper functioning of the legislative procedure," the disclosure "before the end of the negotiations of one element, even if it is itself not sensitive, may have negative consequences on all other parts of a dossier" and "disclosure of positions that have not yet become final risks giving an inaccurate idea of what the positions of the institutions actually are" and therefore "significantly compromise the credibility of the legislative process and of the co-legislators themselves." The European Parliament concluded that "access to the whole of the fourth column should be refused until the text agreed has been approved by the co-legislators." By making these points, the European Parliament calls in short for a time-limited confidentiality of the fourth column, "for a very brief period of time" (*De Capitani v. European Parliament*, 2018, §§7, 43–45, 47, 50). As the European Parliament had given access to five out of the seven identified fourth columns, the European Parliament appeared to show a quite positive attitude towards the publication of the four-column document in principle. Hence the European Parliament insisted, perhaps strategically, on the exceptional nature of its refusal.

The arguments put forward by the European Parliament demonstrated how sensitive the case was and how deep in the intricacies of the legislative procedure, "the closed technocratic machinery of the institutions" (Lea & Cardwell, 2015, p. 79), the General Court was invited to intervene. Despite its delicate position for the reasons exposed above, the General Court understood that allowing such arguments to be successful would inevitably open Pandora's Box. Indeed, those arguments did affect the very essence of the legislative process. The four-column documents "form part of the legislative process" (*De Capitani v. European Parliament*, 2018, §§38, 75, 78, 80, 98). As recalled above, it follows that they should, in principle, be made public, as:

> [I]t is precisely openness in the legislative process that contributes to conferring greater legitimacy on the institutions in the eyes of EU citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. (*De Capitani v. European Parliament*, 2018, §78)

A time-limited non-disclosure of the fourth column as requested by the European Parliament would in essence prevent citizens from exercising their rights at a very crucial point in time. As the General Court importantly notes, transparency requirements cannot be undermined by objectives of protecting the effectiveness and integrity of the legislative process (*De Capitani v. European Parliament*, 2018, §§81, 83). The efficiency of the process is therefore not a successful argument to refuse access to documents.

Yet the judgment of the General Court gives a middle-ground solution in the sense that one could argue that debates should be livestreamed to give full publicity to the exchanges. Indeed, the General Court fell short of saying that trilogue meetings should take place in public. On the contrary, it accepts with deference the necessity to keep the "possibility of a free [in the sense of confidential] exchange of views" (*ClientEarth v. European Commission*, 2018, §106) between the co-legislators, although the Treaties explicitly foresee the publicity of activities of the co-legislators when considering legislative files. Therefore, the General Court preserved a certain margin of maneuver for institutions to reorganize their relations in the framework of legislative procedures. Again, we see here the expression of that delicate balance that the CJEU must strike. It can explain why the European Parliament decided not to appeal the judgment of the General Court, not to risk obtaining a more unfavorable position from the Court of Justice. Such a balanced position of the CJEU is also exemplified by the position of the Court of Justice when, in its *ClientEarth* ruling, it gives a moderate interpretation of Article 11(2) TEU (2016) by saying that "that provision in no way means that the Commission is required to respond, on the merits and in each individual case, to the remarks it may have received following disclosure of a document" (*ClientEarth v. European Commission*, 2018, §106).

3.3. Time Is of the Essence

Another limitation to the CJEU's substantive contribution to improving transparency of the legislative process has to do with a simple yet consequential concept: time.

As both the General Court in the *De Capitani* case and the Court of Justice in the *ClientEarth* case ruled, the appropriate exercise by EU citizens of their democratic right to participate in the legislative process requires that they gain access to the information in a timely manner, at a critical stage of the procedure, namely while the debate is still ongoing, and a decision has not yet been taken.

Since the key political debates surrounding legislative proposals are taking place in trilogue meetings, this is therefore essential to give access *in extenso et omni tempore* at least to the only written source giving a dynamic account of the discussions. The access to this information is required by, on one hand, the model of representative democracy, in which citizens should be able to hold their elected representatives accountable for the positions they take and, on the other hand, to allow the same citizens, in one way or another, to take part directly in an *ongoing* procedure (*De Capitani v. European Parliament*, 2018, §§36, 41). However, in the position it defended in the *De Capitani* case, the European Parliament called, in short, for a time-limited confidentiality of the fourth column, "for a very brief period of time" (*De Capitani v. European Parliament*, 2018, §§7, 43–45, 47, 50). But, as already underlined, a time-limited non-disclosure of the fourth column would in essence prevent citizens from exercising their rights at the very crucial point in time. On the provisional nature of the information contained in those documents, the General Court insisted on the fact that the public "is perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently" (*De Capitani v. European Parliament*, 2018, §102). In the *ClientEarth* case, the Court of Justice emphasized that:

> [T]he possibility for citizens to scrutinize and be made aware of all the information forming the basis for EU legislative action…presupposes not only that those citizens have access to the information at issue…but also that they may have access to that information *in good time*, at a point that enables them effectively to make their views known regarding those choices [before any decision is taken]. (*ClientEarth v. European Commission*, 2018, §84, read in conjunction with §§46–47; emphasis by the author)

To this end, the Court considered—again contrary to the General Court—that:

> Not only acts adopted by the EU legislature, but also, more generally, documents *drawn up or received in the course of procedures for the adoption of acts* which are legally binding in or for the Member States, fall to be described as 'legislative documents' and, consequently, subject to Articles 4 and 9 of that Regulation, must be made directly accessible. (*ClientEarth v. European Commission*, 2018, §85, read in conjunction with §§68–70)

Nevertheless, the length of the procedures before the CJEU renders the latter unable to satisfy the expectations of individuals appearing before it in that participatory aspect. Judges and legislators have "fundamentally different time horizons" (Alter, 1998, p. 122). In both the *De Capitani* and the *ClientEarth* cases, all documents—some in their final instead of intermediary version—at issue had been made available to the public, and decisions taken in the respective (pre)legislative procedures, by the time the courts gave their judgments. In addition, on a procedural note, the necessary interest in bringing proceedings that must be demonstrated by the individual is still subject to debate in the present field, especially in the case of an appeal (see, for instance, the recent judgment in the case *Päivi Leino-Sandberg v. European Parliament* [2021]).

In other words, today's claimants are fighting for tomorrow transparency's activists. This is only true if, and only if, judgments are followed by effective changes of the transparency policies of the institutions concerned. On this note, obtaining a judgment of the CJEU still poses the question of its enforcement; should a judgment of any of the two courts of the CJEU not be respected by an institution, the only remedy available to an individual would be an action for damages under Article 340 TFEU (2016).

4. A Risk of Perverse Effect

Furthermore, the CJEU's action in this field does not only suffer from these three limitations, but also entails the risk of having a perverse effect. Indeed, the mission to interpret the transparency requirements entails a risk for transparency activists, as it is fixing the borders between what should be transparent and what should not. In the cases above-mentioned this was particularly salient when the CJEU qualified what qualified as sensitive information and what did not. Stéphanie Novak's (2014) work on the transparency of the Council highlighted such a potential perverse effect by emphasizing the wide margin of discretion that institutions enjoy in the implementation of transparency rules. Moreover, when it comes to dealing with informal mechanisms such as trilogues, pushing for more transparency inevitably pushes the informality a little further. A judgment like the *De Capitani* ruling can have the negative consequence of showing to the institutions concerned how they should organize elements or discussions they want to stay confidential. Despite a formal procedure being laid down in Article 294 TFEU (2016), the ordinary legislative procedure has become increasingly informal in the last two decades (Reh, Héritier, Bressanelli, & Koop, 2011). The *De Capitani* case epitomizes the difficulty of grasping the substance of informal exchanges for the sake of transparency. It equals the endeavor of trying to make transparent what is inherently—to some extent—passing below the radar. That the General Court says that the fact that a document has "been produced or

received in a formal or informal context has no effect on the interpretation" of the rules on access to documents (*De Capitani v. European Parliament*, 2018, §101) has little effect on the inherent difficulties linked to that phenomenon.

5. Conclusions

Is the CJEU able to contribute to improving the openness of the EU legislative process? If the CJEU indeed has the capacity to do so, its capacity is limited, and its actions can lead to paradoxically reducing the transparency of the legislative process. This article aimed to shed light on the limits to the role that the CJEU can play in the transparency of the legislative process debate.

The four considerations highlighted in this contribution—the limits of interpretation, the principles of institutional balance and institutional autonomy, time, and the risk of perverse consequences that the interpretation exercise entails—impede a broader and more ambitious action of the CJEU in the field of transparency of the legislative process. These issues cannot all be addressed. The fourth issue—the risk of perverse consequences—is inherent to the interpretation exercise. However, the EU legislator could reduce the effects of the three limitations in the context of a revision of Regulation No 1049/2001. It could define a new equilibrium in the dynamics in place between the CJEU and other institutions by providing the public but also the CJEU with provisions increasing the transparency requirements of legislative documents, and delineating the scope of the legislative action, drawing from the case law. However, such a reform, awaited for more than a decade, remains politically sensitive (Curtin & Leino-Sandberg, 2016, p. 5; Driessen, 2012, pp. 269–270). Interestingly, Hillebrandt, Curtin, and Meijer (2014, p. 15) note that "progressive clarification of Regulation No 1049/2001 by the courts has rendered it more difficult for a Council majority to accept this regulation as a starting point." The EU institutional law *aficionados* can still nourish the secret hope that the upcoming Conference on the Future of Europe could constitute a momentum. In any case, a revision of the Treaties is not necessary, as long as the CJEU fully grasps the potential of some of its provisions such as Articles 10 and 11 TEU (2016). Nevertheless, the substantial improvement that a revision of Regulation No 1049/2001 could bring would be to insert a new type of urgent procedure allowing the CJEU to act swiftly when a request is rejected. This would lead to a new institutional balance in the matter, and as such would need to carefully avoid slowing down the legislative procedure, otherwise risking again to damage the principles of institutional balance and institutional autonomy. The obvious question is: Why would the European Parliament and the Council proceed to a revision in that direction as they would be considerably impacted in their legislative work? One could argue that the potential enormous number of requests that could ensue from such a revision, as feared by these institutions, might be overestimated by the latter. On a more positive note, the co-legislators could grasp the political interest of enjoying a greater legitimacy thanks to a stronger transparency apparatus. Yet the insertion of such an urgent procedure might involve amending the Treaties or, at least, the Statute of the CJEU.

Whatever reform could take place, transparency activists should refrain from putting all their hopes in judicial interventions, as only self-regulating exercises by the three institutions concerned seem to lead to concrete and tangible results. As the current President of the CJEU put it, writing about the principle of democracy:

> [I]t is by progressively narrowing the gap between our conception of an ideal form of government and the government which actually rules over us that the former becomes less utopian, as society grows more receptive to the practical reforms implied by those ideals and more of them come to be realized. Ironically, we may never close that gap…since new utopian thoughts have always been the dynamic force through which mankind has moved forward. (Lenaerts, 2013, pp. 314–315)

This might hold true for transparency too.

Conflict of Interests

The author declares no conflict of interests.

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COGITATIO

Politics and Governance (ISSN: 2183–2463)
2021, Volume 9, Issue 1, Pages 281–291
DOI: 10.17645/pag.v9i1.3944

Article

From Neglect to Protection: Attitudes towards Whistleblowers in the European Institutions (1957–2002)

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Submitted: 17 December 2020 | Accepted: 4 March 2021 | Published: 31 March 2021

Abstract
This article analyses how transparency became a buzzword in the European Union (EU) and its predecessors. In order to do so, it examines how the European Parliament (EP), the European Commission, the Court of Justice, and earlier European institutions responded to whistleblowing, between 1957 and 2002. In 2019, the EP agreed to encourage and protect whistleblowers. However, whistleblowing is far from a recent phenomenon. Historical examples include Louis Worms (1957), Stanley Adams (1973), and Paul van Buitenen (1998). Based on policy documents and parliamentary debates, this article studies the attitudes and reactions within European institutions towards whistleblowing. Their responses to unauthorized disclosures show how their views on openness developed from the beginning of European integration. Such cases sparked debate on whether whistleblowers deserved praise for revealing misconduct, or criticism for breaching corporate and political secrecy. In addition, whistleblowing cases urged politicians and officials to discuss how valuable transparency was, and whether the public deserved to be informed. This article adds a historical perspective to the multidisciplinary literature on whistleblowing. Both its focus on the European Coal and Steel Community, European Economic Community, and EU and its focus on changing attitudes towards transparency provide an important contribution to this multidisciplinary field.

Keywords
democracy; EU history; European integration; European institutions; transparency; whistleblowing

Issue
This article is part of the issue "Access or Excess? Redefining the Boundaries of Transparency in the EU's Decision-Making" edited by Camille Kelbel (Lille Catholic University, France), Axel Marx (University of Leuven, Belgium) and Julien Navarro (Lille Catholic University, France).

1. Introduction

In 2019, the European Parliament (EP) and the Council of the European Union adopted minimum standards 'ensuring that whistleblowers are protected effectively' in all Member States of the European Union (EU; Directive of the European Parliament and of the Council of 23 October 2019, 2019, p. 17). Several politicians, activists, and scholars regard this as a momentous turning point. Věra Jourová, Commissioner for Values and Transparency, called this Directive 'a game changer' (European Commission, 2018). Transparency International EU (2019) spoke of 'a historic day for those who wish to expose corruption and wrongdoing.' And according to legal scholar Abazi (2019, p. 93), the EU had now entered 'a new era for protection of whistleblowers.' These reactions raise several questions: Is the current appreciation for whistleblowing really unprecedented? And where does this favourable attitude towards transparency come from?

From the 1990s, scholars of European integration have scrutinized the level of transparency within the EU. Most of them combine an analytical and a normative approach. They analyse how European institutions thought about openness and how they put their views into practice. In addition, these authors offer their own views, discussing whether transparency is a precondition for a healthy democracy, whether the EU is too opaque, and, if so, how this state of affairs should be remedied.

The dominant narrative is that the EU and its predecessors have a poor track record when it comes to open government. Many scholars complain that it took decades before politicians and officials deemed transparency and democracy as sources of legitimacy. In this view, European institutions only opened their doors after the Maastricht Treaty (Sternberg, 2013, pp. 128–152). The appreciation for whistleblowers came even later, in the twenty-first century, according to Abazi (2019, pp. 92–98). In addition to the tardiness of the transparency campaign, critics complain about its ineffectiveness. Curtin and Hillebrandt (2016, pp. 190–191, 201–208) warn that the measures implemented by the EU to improve transparency could be circumvented. For that reason, sceptics question the sincerity of politicians and officials who call for openness (Shore, 2000, pp. 212–219).

Other scholars are less sceptical. They, too, focus on the period from 1992, but stress that the EU has continually done its best to improve its communication. They acknowledge that the measures designed to increase transparency were not perfect, either because they failed to produce full disclosure, or because they were aimed at paternalistically "informing" citizens about the value of European integration. Nevertheless, these scholars applaud the EU for its genuine attempts to open up. Pukallus (2016, p. 153) states that there is 'little doubting the laudable nature of the ambition of an advanced bureaucracy trying to adopt a policy of debate and dialogue, accompanied by a philosophy of transparency.'

Some historians add that the call for the democratization of the European institutions preceded the EU. They claim that European institutions had already started worrying about their democratic legitimacy in the 1950s, but merely defined democracy differently than present-day scholars. These studies focus on debates about representation (van Zon, 2019, pp. 9–11). The question remains whether the call for transparency also originated in the early days of European integration, and whether it was explicitly linked to democracy. According to Keane (2011), citizens worldwide were already demanding a 'monitory democracy' in 1945, claiming the right to scrutinise their governments. However, he has not focused on the European Coal and Steel Community (ECSC), the European Economic Community (EEC), or the EU. Historical research on European transparency is still in its infancy (Engels & Monier, 2020, p. 8). This is even more true of whistleblowing research (Gijsenbergh, 2020, p. 174).

Building on this literature, this article analyses how Members of the EP (MEPs), the European Commission (henceforth the Commission), the Court of Justice (henceforth the Court), and preceding institutions thought about transparency from the start of European integration. In addition, this study examines whether they associated openness with democracy. In order to do so, this article focuses on their responses to whistleblowing. Whistleblowers caused a dilemma: On the one hand, their disclosures of wrongdoing might serve the public interest, but on the other hand their unauthorized breaches of secrecy could be deemed illegitimate. Like many recent historians, I refrain from a normative point of view. Instead, I examine the attitudes, behaviour, arguments, and discourse of politicians and officials of the ECSC, EEC, and EU. Who applauded and who criticized whistleblowers? Did they take protective or disciplinary measures? Which arguments *pro* and *contra* whistleblowing were used? Did the debates revolve around the scandals, the fate of the whistleblowers, or the value of openness (Horn, 2011, p. 104)? And did politicians and officials claim that *the public* had a 'right to know' (Schudson, 2015)? Lastly, when did European institutions adopt the term "whistleblower"? The use of this metaphor, with its positive 'image of regulation and fairness,' reflects when whistleblowing was recognized (Gurman & Mistry, 2020, pp. 11–15). Moreover, this conceptual history reveals whether whistleblowers were explicitly celebrated as a 'democratic icon' (Olesen, 2018, pp. 516–520). The analysis is based on policy documents and parliamentary sources, including minutes of plenary debates and committee meetings, petitions, reports, and judgements of the Court. Quotes from French, German, and Dutch sources have been translated into English by the author.

Three cases have been selected: Louis Worms (1957), Stanley Adams (1973), and Paul van Buitenen (1998). They fall within the definition of 'whistleblower' by Lewis, Brown, and Moberly (2014, p. 4): 'an organizational or institutional "insider" who reveals wrongdoing within or by that organization or institution, to someone else, with the intention or effect that action should then be taken to address it.' Each of these cases were related to European institutions, albeit to a different degree. This is especially true of Van Buitenen, a civil servant of the EU who forced the Santer Commission to resign when he disclosed fraud and a cover-up. Scrap dealer Worms blew the whistle on the High Authority (HA) of the ECSC, by revealing that its bureau in charge of regulating the scrap market had turned a blind eye to a scandal. Adams differs somewhat. When he uncovered wrongdoing in a private company, he saw the EEC as an ally, rather than the culprit. Still, Adams is relevant for this article. Similar to the other two cases, he forced MEPs, the Commission, and the Court to discuss whether they should defend whistleblowers and the free flow of information. By spilling secrets, all three whistleblowers compelled European institutions to express what they really felt about openness. These cases are more insightful than the existing literature, which focuses on transparency campaigns that were initiated, controlled, and sometimes circumvented by these institutions (Meijer, 2014, p. 511).

These cases reveal long-term developments in the attitudes towards transparency. Little is known about whistleblowing during the first 50 years of European integration. During the first decades of this period, Worms, Adams, and Van Buitenen seem to be the only

high-profile whistleblowers involved with European institutions. That is a contrast with the twenty-first century. In the first decade after Van Buitenen's disclosure alone, seven whistleblowing EU operatives received widespread attention (Directorate-General for Internal Policies, 2011, p. 27). Nevertheless, whistleblowing does have deeper roots: Americans already coined the concept in the 1970s, and the practice of whistleblowing is probably even older. Earlier cases in the ECSC, EEC, and EU may have escaped scholarly attention, if the people involved were not called "whistleblowers" at the time. This is all the more reason to examine the development of attitudes within the European institutions towards whistleblowing. For the purpose of this article, Worms, Adams, and Van Buitenen suffice. These major cases represent three waves in the call for transparency: the 1950s/1960s, the 1970s, and the 1990s (Schudson, 2015). After discussing these cases in chronological order, the conclusion elaborates on what my historical approach contributes to the multidisciplinary scholarship on transparency and European integration.

2. Louis Worms (1957–1984)

In its early years, the ECSC struggled with a shortage of scrap metal. In order to guarantee a steady supply of this crucial raw material for the steel industry, the HA and steel manufacturers offered importers financial compensation. They established an equalisation fund, which was managed by the Office Commun des Consommateurs de Ferraille (OCCF). The supervision by the HA over this organisation of scrap dealers and consumers remained limited (Díaz-Morlán & Sáez-García, 2020, pp. 1–10). This system proved susceptible to fraud. Several scrap dealers, steel manufacturers, and civil servants passed domestic scrap for imported scrap, pocketing the compensation. In 1957, the Dutch scrap dealer Louis Worms reported the swindlers to the OCCF and the HA. Frustrated by their slow response, he petitioned the European Parliamentary Assembly and its successor, the European Parliament (for brevity's sake, both institutes will be abbreviated as EP, even though the title "European Parliament" was not adopted until 1962). Worms called the HA and the OCCF 'accomplices' of the fraudsters, accusing them of keeping the scandal under the lid with a toothless investigation. He especially blamed Vice-President Dirk Spierenburg for this 'failure of supranational authority' (Worms, 1958, pp. 4–5; Worms, 1966, pp. 2–3, 7).

These allegations forced the HA and the EP to discuss the matter at length. Prominent MEPs felt that the fraud called for a serious investigation. EP-President Hans Furler stressed that 'the scrap affair shows that the Parliament intends to conduct its monitory tasks' ("Debate," 1960b, p. 997). This was confirmed when Spierenburg had a conflict with his fiercest critic, Marinus van der Goes van Naters. When this Social Democratic MEP rumoured that the Vice-President might be complicit in the fraud, Spierenburg refused to attend committee meetings with him. In response, various party groups condemned Spierenburg for avoiding parliamentary control. EP-Vice-President Leopoldo Rubinacci reminded him to respect the 'parliamentary prerogatives' ("Debate," 1961a, p. 82). In his memoires, Van der Goes van Naters (1980, p. 271) boasted: 'finally there was a real parliamentary debate in the Maison de l'Europe.' This assertive attitude towards the HA was extraordinary, at a time when a culture of consensus demanded a constructive attitude of MEPs (van Zon, 2019, pp. 175–192).

All debates about Worms' disclosures revolved around the way the HA handled the fraud and the scrap market. Most MEPs were not as critical as Worms or Van der Goes van Naters. They believed that Spierenburg was not involved in the affair, and that he had (eventually) done his best to investigate the abuses. However, they were disappointed that the HA had been unaware of the fraud until Worms blew the whistle. Looking back in 1961, they concluded that the HA should have kept the OCCF on a tighter leash. Rapporteur Alain Poher (1961, p. 2) reminded the HA that 'the Common Assembly had already been complaining since 1956 that "laisser-faire" policies were adopted too often.' The rest of the EP concurred and advised the HA to exert more control in future ("Debate," 1961c, p. 173). The HA reached a different conclusion. According to Vice-President Albert Coppé, too much governmental intervention in the economy would only lead to more 'abuse' ("Debate," 1961b, p. 39).

Worms' plight attracted far less attention than the scrap policy of the ECSC. That is remarkable, considering that he suffered dire consequences for signalling the violations. He lost his job as a sales representative for Krupp-Hansa, one of the fraudulent companies. In addition, Worms claimed that his own company was being boycotted by his spiteful peers in the industry. He even feared that he might be liquidated by 'gangsters who wanted to keep me quiet' (Worms, 1980, pp. 20–21).

Nevertheless, Worms did not find many supporters in Brussels and Luxembourg. Both the OCCF and the HA were too affronted to help him. Vice-President Coppé reminded the MEPs of the 'irksome personal character of his accusations,' to explain why 'we did not immediately welcome Mr Worms with open arms' ("Debate," 1961b, p. 60). Spierenburg could not agree more. He never explicitly praised the whistleblower. Instead, he downplayed the importance of his revelations, calling his evidence 'legally inadequate' ("Debate," 1960a, pp. 722–723). Furthermore, he assured the MEPs that 'no evidence whatsoever had been found that Worms had been discriminated against' (Commissie voor de Interne Markt, 1959a, p. 31). According to Van der Goes van Naters (1980, p. 272), Spierenburg even abused his position as Permanent Representative of the Netherlands to the EEC to sabotage Worms' migration to France in 1963. Neither did the Court help Worms. He demanded financial compensation, arguing that the HA should have acted against his boycott.

However, the Court dismissed his claim and forced him to pay the legal fees, exacerbating his debts (*Louis Worms v. High Authority of the European Coal and Steel Community*, 1962).

Therefore, Worms turned to the EP for aid. The MEPs were not deaf to Worms' pleas, but neither did they offer him their full support. His staunchest ally was Van der Goes van Naters, who praised Worms for his 'courageous denunciation' ("Debate," 1961b, p. 54). He was appalled that the whistleblower faced the 'inexorable hatred' of other scrap dealers ("Debate," 1960a, p. 731). He also criticized the HA: 'We deeply regret that the report did not sufficiently recognize the important role that Mr. Worms played in setting in motion and continuing an investigation into the scrap fraud' (van der Goes van Naters, 1961, p. 14). Although Van der Goes van Naters was backed by other Social Democrats, his drive made him a 'loner' in Strasbourg (Mreijen, 2018, p. 230). Most MEPs followed the more moderate line of Poher, leader of the Christian Democrats and rapporteur of two committees on the scrap affair. He acknowledged that the fraud was a serious matter, but refused to 'wallow in sensationalism' ("Debate," 1961a, p. 22). Poher applauded Worms for performing 'a very great service to the Community' (Commissie voor de Interne Markt, 1959b, p. 3) and expressed his 'gratitude' ("Debate," 1961b, p. 31). However, as far as he was concerned, that settled the matter. Poher refused to compensate Worms, because he was not convinced that the scrap dealer had been boycotted. Other MEPs were even less supportive, and left the plenary hall when Worms' fate was being discussed (Worms, 1966, p. 3).

It took over 20 years before the MEPs changed their opinion. Worms' case was put on the agenda again when he sent a new petition to the EP, emboldened by a financial compensation by the Dutch Parliament (Worms, 1980). Social Democratic rapporteur Hellmut Sieglerschmidt (1982, pp. 5–6, 16–18) argued that the EP should follow suit. Considering that Worms had served the Community and had probably been boycotted, he deserved financial redress and a 'moral rehabilitation.' The rest of the MEPs agreed and forced the Commission to compensate Worms, against its express wishes ("Debate," 1983, pp. 294–295, 304–305).

Strikingly, the value of transparency was rarely explicitly invoked. Above all, Worms' supporters applauded him for protecting the economic interests of the duped 'steel manufacturers who contributed to the equalisation fund,' as well as 'the consumers of the Community' (van der Goes van Naters, 1961, p. 1). Poher added another argument in 1959: By reporting the swindlers, Worms had saved 'the Community's reputation' from harm (Sieglerschmidt, 1982, p. 16). Only a few Social Democrats portrayed Worms as a hero of openness. Van der Goes van Naters stressed that 'the public…has the right to be fully informed' ("Debate," 1958, p. 234). For decades, this argument in favour of whistleblowing was rarely used, until Sieglerschmidt repeated it. He defended compensation for Worms as a means 'to encourage people to report such information in future' ("Debate," 1983, p. 294). All this time, even these MEPs never used the term "whistleblower."

Other politicians and officials discussed how the HA and the EP, rather than whistleblowers, should inform the public. Dutch MEPs organised press conferences 'to consolidate the confidence that the peoples of Europe intend to grant our institutions' ("Debate," 1961b, p. 43). However, this form of communication was contested, especially when scandals were openly discussed. Poher preferred the 'serenity' of the parliamentary arena ("Debate," 1961a, p. 23), while Spierenburg lectured: 'it is in this European Parliamentary Assembly that the case must be dealt with publicly, because the High Authority is only accountable for its actions to your Parliamentary Assembly' ("Debate," 1961b, p. 35).

The discourse and arguments used by the European institutions suggest that transparency was not their prime concern. That is understandable, considering the technocratic nature of the ECSC. According to most politicians and officials, the ECSC derived its legitimacy from its ability to solve economic issues. As a result, decision-making was deemed more important than political deliberation (Sternberg, 2013, pp. 30–39). If politicians and officials discussed the role of the public at all, they talked about workers and consumers with socio-economic rights. They did not yet envision informed citizens who would monitor the European institutions (Pukallus, 2016, pp. 39–92).

3. Stanley Adams (1973–1985)

When Stanley Adams became World Product Manager at the pharmaceutical company Hoffmann-La Roche, he learned that this Swiss multinational was guilty of price-fixing. In 1973, Adams informed the Commission of these malpractices, hoping that it would use its new free trade agreement with Switzerland to stop his employer. His disclosure led to Adams' own ruin, because his contact in Brussels inadvertently revealed the identity of the whistleblower to Hoffmann-La Roche. Promptly, the corporation filed serious charges against its former employee: Under Swiss law, breaching trade secrets to a foreign power amounted to espionage and treason. Adams' wife committed suicide, after the Swiss police detained him and told her that he might face 20 years in jail. In 1976, Adams was sentenced to twelve months' imprisonment, suspended for three years. His attempts to start a new life in Italy were frustrated by right-wing politicians, who were antagonised by his criticism of another scandal surrounding Hoffmann-La Roche, in the Italian town of Seveso. They withdrew subsidies for Adams' farm and accused him of defrauding the government. Adams served two months in prison and became almost bankrupt. Unable to support his daughters, he was forced to send them away. They were not reunited until 1981, when Adams fled to Britain (Adams, 1985).

For ten years, Adams' case was a 'cause célèbre' ("Debate," 1975, p. 21). Various MEPs raised the matter until 1985, when the Court ruled that the Commission should compensate Adams. In marked contrast to the debates about the scrap fraud, the whistleblower himself was now the centre of attention, rather than the scandal he uncovered. Several MEPs emphasised Adams' sacrifices in service of the EEC, and urged the Commission to alleviate his suffering. Like Worms, Adams could rely the most on Social Democrats. John Prescott took the lead. He repeatedly emphasised that 'no one faces the personal consequences that Mr Adams himself has faced.' Moreover, he stressed that Adams 'assisted the Commission considerably in providing information.' Therefore, he concluded: 'The least that we can do is to assist him' ("Debate," 1977, pp. 109–110).

Adams' supporters could also be found outside the Social Democratic ranks. Compared to Worms, he enjoyed more widespread assistance. In a historic show of unity, the EP unanimously adopted a resolution in Adams' favour in 1980. It called upon the Commission to offer him financial compensation, and to negotiate with the Swiss and Italian authorities to clear his name. This Parliament-wide consensus was a first in the history of the institute (Adams, 1985, p. 164). All MEPs followed the conclusion of a committee representing all party groups and countries, led by Liberal rapporteur Georges Donnez (1980, pp. 15–16):

> It is clear that the European Community has a particular responsibility to Mr Adams, whose statements enabled practices contrary to the EEC-Switzerland trade agreement and the EEC Treaty to be punished and stopped. Mr Adams has suffered considerable misfortune in his personal and family life as well as substantial financial loss….Therefore the community must act to help Mr Adams.

The Commission, too, showed its gratitude to Adams, but did not go as far as the MEPs. Its Competition Department did, however, eagerly use Adams' information in order to fine Hoffmann-La Roche. Moreover, Vice-President Wilhelm Haferkamp assured the EP 'that we are all aware of the unfortunate and tragic personal side of this case' ("Debate," 1977, p. 111). For that reason, the Commission covered Adams' legal costs, amounting to more than 100,000 Swiss francs. In response to the Donnez report, moreover, the Commission added another 50 million lire. However, it refused to offer a larger financial contribution, and made Adams promise to refrain from further claims. Adams felt forced to accept that stipulation, now that his debts threatened to send him back to prison (Adams, 1985, pp. 167–170). Neither was the Commission willing to ask the Swiss and Italian authorities for amnesty. Vice-President Lorenzo Natali upheld the rule 'not to interfere in the jurisdiction of the judicial authorities of third countries' ("Debate," 1980, pp. 346–347). Furthermore, the Commission did not relent when MEPs continued to plead for more financial and legal help in the following years.

That changed in 1985, a year after Worms was compensated. The Court held the Commission co-responsible for revealing Adams' name to Hoffmann-La Roche. It also blamed Adams himself, because he had 'failed to inform the Commission that it was possible to infer his identity as the informant' from the documents that he had leaked. Therefore, the Court ruled that the Commission and Adams should both pay one half of the damages suffered by the whistleblower (*Stanley George Adams v. Commission of the European Communities*, 1985, p. 3592).

A marked difference with the debates about Worms, was that the importance of transparency was more explicitly addressed during the debates about Adams. Prescott hoped that 'the right of information in this Community about the actions of multinationals will be upheld in the near future' ("Debate," 1979, p. 82). Support for Adams was meant to achieve that goal. Raymond Forni invited the Commission 'to see to it that justice is done to him so that other citizens will not be discouraged but will continue to provide information on the attitude and behaviour of multinational companies within the European Community' ("Debate," 1979, p. 84). Adams (1985, p. 228) himself also hoped that he could serve as an example to 'all those other potential whistle-blowers.'

However, it would go too far to argue that the European institutions now embraced openness as the pillar of the EEC's legitimacy. Unlike Adams, they did not adopt the concept of 'whistleblowing.' Instead, they used more neutral terms. While the Court spoke of 'the Commission's informant' (*Stanley George Adams v. Commission of the European Communities*, 1985, p. 3558), MEP Bodril Kathrine Boserup referred to 'disclosures of confidential information' (as cited in Adams, 1985, p. 205). More importantly, when MEPs and Commissioners underscored the importance of transparency, they did not talk about the right of citizens to scrutinize the European institutions. Rather, they defended the right of European institutions to monitor multinationals. European institutions needed to be informed about malpractices, in order to enforce the rules in the common market. Under the free trade agreement, those rules also applied to Swiss corporations. However, by convicting Adams, the Swiss court implied that the Swiss legal protection of trade secrets took precedence over the trade agreement. Prescott complained that 'the Commission, which has the responsibility to investigate breaches of the regulations under the Rome Treaty and the competitive clauses, is denied essential information' ("Debate," 1976a, p. 262).

The widespread attention and support for Adams can be partly explained by the strong consumer activism in the 1970s, coupled with a growing unease with the power of multinationals. Hoffmann-La Roche had an

especially bad reputation after the Seveso affair. MEP Ludwig Fellermaier praised Adams for his attempt 'to combat practices which are contrary to the rules of competition and detrimental to millions of consumers throughout Europe' ("Debate," 1976b, p. 69). Both MEPs and Commissioners lent an ear to consumer organisations (van de Grift, 2018). Their willingness to listen to these organisations fits within a trend that existed during the 1970s/1980s. European institutions promised to take the expectations of the peoples of the EEC into consideration, in order to downplay their technocratic image. The attempt to involve the public more actively in the decision-making process was epitomised by the direct elections of MEPs from 1979. Inhabitants of the EEC were now styled as "European citizens" with civil rights. Especially their right to participate in the electoral process was stressed. European institutions also gradually informed citizens about the Community's affairs, but the public's right to know did not yet receive as much emphasis as its right to vote (Pukallus, 2016, pp. 93–133; Sternberg, 2013, pp. 46–61, 76–102).

4. Paul van Buitenen (1998–2002)

In the late 1990s, the EU was shaken to its core by a whistleblowing case. Paul van Buitenen, an assistant auditor in the Financial Control Directorate, discovered irregularities in several EU programmes. When his internal reports were ignored, he turned to the Green MEPs in 1998. He accused Commissioner Édith Cresson and other high-ranking officials of fraud and a cover-up. In response, the EP instated a Committee of Wise Men to investigate the matter. This Committee corroborated Van Buitenen's allegations. The entire Commission felt forced to resign, which had never happened before. Once again, MEPs used a whistleblowing case to test their strength with the executive power. And once again, the whistleblower did not escape unscathed. Before leaving office, the Santer Commission temporarily suspended Van Buitenen with deduction of pay. The Prodi Commission followed this course, by reprimanding the whistleblower for a breach of confidentiality. After his suspension, the Human Resources Department did not allow him to return to his old job, claiming that his relations with his former colleagues had been soured. Van Buitenen was transferred to several other EU agencies, where he could no longer exercise his talents or interest in financial auditing. To Van Buitenen, this felt as an unjustified penalty (van Buitenen, 2000, 2004).

The reactions to Van Buitenen's disclosure indicate that many EU politicians and officials shared his distaste of the culture of secrecy within the Commission. First, most MEPs were more agitated by the sanctions against Van Buitenen than by the fraud itself. At first, his revelations hardly caused a stir. The real controversy started when the Commission had disciplined Van Buitenen. Magda Aelvoet, leader of the Greens and the first MEP Van Buitenen had informed about the fraud, pointed out: 'it is not the fact that this case came to light, but the fact that this suspension came to light which called forth a storm of protest' ("Debate," 1999a, p. 12). Now that Van Buitenen had become 'symbolic of the fight against fraud in Europe' ("Debate," 1999c), he was revered as a martyr. A wide variety of MEPs repeatedly urged the Commission to rehabilitate the auditor. His most vocal supporters were the Greens, other left-wing party groups, and Eurosceptics, as well as some Liberals and Christian Democrats. According to Johannes Blokland, for example, 'this whistle-blower deserves the very opposite of a reprimand' ("Debate," 1999d). In contrast to Worms and Adams, Van Buitenen was not immediately backed by Social Democrats. They even watered down a resolution that called for his re-instatement, showing their loyalty to the Social Democratic Commissioners. However, they eventually joined the chorus of Van Buitenen's supporters. Michiel van Hulten declared: 'He has been called a hero of European democracy, with good reason' ("Debate," 2002a).

Second, Van Buitenen's case gave rise to the first protective measures for whistleblowers in the EU. Triggered by his fate, MEPs of various political affiliations frequently requested these measures. Van Hulten saw 'rules to protect whistle-blowers' as 'the key to restoring the confidence of the people of Europe in our institutions' ("Debate," 2000). As new Vice-President in charge of the administrative reform of the EU, Neil Kinnock promised to consider 'legal protection for "whistleblowers"' (European Parliament, 1999). He built upon a recent decision of the Santer Commission, which obligated all officials and servants of the Commission to report illegal activities to their superiors or to the European Anti-Fraud Office (Commission Decision of 2 June 1999, 1999). Kinnock added that external whistleblowing would also be protected, provided that whistleblowers would only turn to the Court of Auditors, the Council of the European Union, the EP, or the European Ombudsman, and would first exhaust all internal reporting channels (Commission of the European Communities, 2000b, p. 47; Commission of the European Communities, 2002).

Third, discursive changes confirm that the value of transparency was increasingly recognized in Brussels and Strasbourg. The term "whisteblowing" was now *en vogue*. Van Buitenen used it frequently in his book *Blowing the whistle* and in his correspondence with MEPs. By calling himself 'a genuine whistleblower,' Van Buitenen (2000, p. 177) hoped to gain their sympathy. Various party groups copied this terminology. In their recurring debates about 'the much-discussed "whistle-blower" question' ("Debate," 1999e), MEPs spoke in glowing terms about insiders who disclosed malpractices. Kinnock, too, often referred to 'the question of whistleblowers' ("Debate," 1999c). The Vice-President appreciated whistleblowing, but sounded more ambivalent than most MEPs. Kinnock told them that he sought 'a fair balance between the right to protection of the whistleblower' and 'the right of those accused

of fraudulent behaviour' to a fair trial (Answer given by Mr Kinnock on behalf of the Commission, 2002). Moreover, Kinnock denied that Van Buitenen (2000, pp. 226–228) was a real whistleblower. Nevertheless, this attempt to delegitimize the auditor confirms that the term "whistleblower" had become an honorific.

In addition, references to "transparency" increased. Kinnock used this term (including the term "transparent") no less than 21 times in his consultative document "Reforming the Commission" (Commission of the European Communities, 2000a). Other Commissioners also assured the EP that 'Democracy and openness are essential principles which the Commission values and seeks to put into practice' ("Debate," 2002b). MEPs also extolled the virtues of transparency. Van Buitenen's case aggravated them, partly because the Santer Commision had withheld information from the EP. Diemut Theato exclaimed: 'We have a right to information ("Debate," 1999b). In addition, MEPs now also underlined that citizens were entitled to information. Olle Schmidt welcomed 'more open and transparent communication within the Commission, between the various institutions and with the public' ("Debate," 1999f). MEPs associated transparency with democratization. Nelly Maes expressed this widespread sentiment: 'The call for more openness and transparency is closely bound up with the call for more democracy that is ringing out loud and clear across Europe, not least in relation to the institutions of the European Community' ("Debate," 1999e).

The appreciation for Van Buitenen and whistleblowing should be understood against the background of a general call for more transparency and democracy within the EU. This trend had started in the early 1990s, in response to growing Euroscepticism. European institutions opened their doors, by simplifying bureaucratic procedures, granting the public access to policy documents, and engaging in dialogue. The hope was that citizens would become more involved, if they were better informed. The new dominant understanding of "European citizenship" entitled citizens to information. In addition to their right to participate in the process of parliamentary scrutiny, citizens also deserved to engage in public deliberation and to hold the authorities to account (Pukallus, 2016, pp. 135–168). European institutions 're-imagined democracy in terms of openness and transparency as opposed to, say, popular participation or parliamentary accountability' (Sternberg, 2013, p. 151). They presented openness 'as a remedy to the so-called "democratic deficit" that is a legacy of the late 1950s' (Kratz, 1999, p. 387).

5. Conclusions

A comparison of the reactions by European institutions to Worms, Adams, and Van Buitenen shows that whistleblowing and transparency have been on the agenda since the beginning of European integration, albeit not always prominently. These high-profile cases followed a general pattern. All three whistleblowers uncovered scandals and cover-ups involving private companies and/or Community officials, and reported these malpractices to European institutions. They also turned to these institutions for help against their vindictive opponents. In response, the EP, the HA, the Commission, and the Court discussed whether they should support whistleblowers, or reprimand them for their unauthorized disclosures. In addition, whistleblowing raised the question of who deserved to be informed: European institutions and/or the public? This means that the EU Directive of 23 October 2019 on the protection of whistleblowers did not come out of the blue. Rather, it should be seen as a new phase in an ongoing debate about openness, starting in the 1950s. This long-time span shows that the attention for transparency has deeper roots than has been assumed by scholars who limit their analysis to the 1990s or the twenty-first century. My historical study of this rich tradition puts the novelty of current events into a long-term perspective (Kaiser, 2009, p. 27).

Nevertheless, the views on transparency in the ECSC, EEC, and EU have changed significantly. Shifts occurred in the attitudes, behaviour, arguments, and discourse of the European institutions. The differences between the three cases outweigh their similarities. In the 1950s/1960s, the EP and the HA rarely recognized the public's right to know. Politicians and officials were more interested in the scrap affair itself than in Worms' predicament, and only a few key MEPs championed his cause. A shift happened in the 1970s/1980s. In this period, European institutions addressed Worms' case again and became concerned about Adams' fate. Adams had more supporters than Worms had had, including all MEPs and the Court. MEPs and Commissioners now emphasised the value of transparency more explicitly, although they meant that they deserved information themselves. Adams even introduced the concept of "whistleblower," although more neutral terms remained common. The call for openness increased in intensity during the 1990s. MEPs of all stripes applauded Van Buitenen for his self-sacrificing disclosure. Furthermore, the Commission set in motion the first whistleblowing protection for EU officials. What's more, "transparency" and "whistleblowing" became buzzwords. For the first time, these concepts were explicitly linked to democracy, based on the idea that citizens deserved to be informed. Shore (2000, p. 6) is too cynical when he deduces from Van Buitenen's case that the European institutions were still characterised by a 'culture of collusion and secrecy.' In comparison to their predecessors in the 1950s/1960s and 1970s/1980s, both Commissioners and MEPs now defended whistleblowing and the value of openness more vocally.

The increasing appreciation for whistleblowing and transparency can be explained by the changing views on the relationship between the ECSC/EEC/EU and the public. Above all, the institutions of the ECSC valued expertise and efficiency as sources of their output legitimacy.

Political participation mattered less to them, let alone the public's right to know. Openness was more valued in the 1970s/1980s, when European institutions required information to monitor multinationals on behalf of consumers. Looking for a counterweight to their technocratic image, European institutions treated the peoples of the EEC as citizens with the right to be heard (mainly through the parliamentary process). However, citizens' right to be informed still received less emphasis. That changed in the 1990s, because politicians and officials hoped that better-informed citizens would become more involved in the European integration process. They now framed transparency as a panacea against Euroscepticism and the EU's perceived lack of democratic legitimacy (Pukallus, 2016; Sternberg, 2013).

Insight into these long-term developments is important for the future of transparency. We cannot take current attitudes towards openness for granted. The notion that citizens have a "right to know" developed only gradually. If we want to make the EU more accountable, we need to ensure that politicians and officials are convinced of the importance of openness. In order to do that, we have to study which political and organizational culture is conducive to transparent politics. Historical research can help, by showing under which circumstances the call for transparency caught on. This article has offered a modest start. Comparative follow-up studies would be welcome. Historians should join hands with legal scholars and social scientists, who study the impact of culture on attitudes towards whistleblowing from a more theoretical perspective (Vandekerckhove, Uys, Rehg, & Brown, 2014).

Historical research is also valuable for the future of the EU. This article examined how the perceptions of transparency among politicians and officials have shifted over time. That is important, because their attitudes and behaviour have shaped—and continue to shape—European integration. Here, too, there is room for further research. Historians could study the public opinion on whistleblowing. Sources abound: Whistleblowers often received letters of support, media attention, and the assistance of advocacy groups. This source material would put the debates within the European institutions in context, by showing whether they ignored, followed, and/or shaped public sentiment. Moreover, these sources could tell us what citizens expected from the ECSC, EEC, and EU, and whether disclosures of scandals caused Euroscepticism. Again, historians should cooperate with other disciplines, which offer theories about the impact of transparency on distrust (Abazi & Tauschinsky, 2015). In short, the history of whistleblowing provides insight into past developments, current views, and future mentalities.

Acknowledgments

I would like to thank the editors and the reviewers for their valuable comments on the manuscript. Furthermore, I would like to express my thanks to Koen van Zon and to the archivists at the Historical Archives of the European Parliament, who assisted me in accessing the sources. Finally, I am grateful to Saskia Bultman (SWYM Editing) for proofreading the manuscript.

Conflict of Interests

The author declares no conflict of interests.

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Politics and Governance (ISSN: 2183–2463)
2021, Volume 9, Issue 1, Pages 292–295
DOI: 10.17645/pag.v9i1.4134

Commentary

EU Transparency as 'Documents': Still Fit for Purpose?

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Submitted: 2 February 2021 | Accepted: 12 February 2021 | Published: 31 March 2021

Abstract
In this thematic issue, the question whether EU decision making might be characterised by an excess of transparency stands central. This contribution addresses an issue that precedes such questions of quantity: that of transparency's qualities, i.e., its specific shape. From an early point in time, transparency in the EU has been equated with the narrow and legalistic notion of 'access to documents.' Although since then, transparency has become associated with a wider range of practices, the Union has not managed to shake off the concept's association with bureaucracy, opacity, and complexity. This remains the case, in spite of the fact that administrations and decision-makers across the world increasingly utilise the possibilities of technological innovation to communicate more directly with their electorates. In this changing communicative context, this commentary considers whether EU transparency as access to documents is still fit for purpose. It does so by exploring access policy from the vantage point of legal developments, administrative practices, political dynamics, and technological innovations. The commentary concludes that while improvements are needed, the access to documents concept endures. However, access to documents needs to be complemented by constructive (rather than predatory) public justification and contestation, to remain viable.

Keywords
access to documents; administrative circumvention; document base; European Union; record keeping; transparency

Issue
This commentary is part of the issue "Access or Excess? Redefining the Boundaries of Transparency in the EU's Decision-Making" edited by Camille Kelbel (Lille Catholic University, France), Axel Marx (University of Leuven, Belgium) and Julien Navarro (Lille Catholic University, France).

1. Introduction

Government transparency is a many-faced metaphor. Ask 10 citizens (or, for that matter, politicians) how they think government should be made more transparent, and you might expect eleven answers. In the EU context however, the notion of transparency was quickly boxed in. As soon as clamours for a more transparent EU emerged in the early 1990s, the Council and Commission, soon followed by the Parliament, agreed to cast transparency in the mould of access to documents (Council & Commission Code of Conduct of 31 December 1993, 1993); European Parliament Decision of 10 July 1997, 1997). This put the Union on a clear institutional path, culminating in a treaty base and dedicated legislation in the form of Regulation 1049/2001 (2001) on access to the institutions' documents.

To be true, other important transparency provisions, most notably related to open legislative meetings and lobbying, followed suit, most recently, with the adoption of an interinstitutional agreement on a lobby register. Nevertheless, access to documents remains the unmistakable frontispiece of the Union's transparency efforts. Under the legal letter of Regulation 1049/2001, "applicants" request documents "held by an institution," subject to exceptions determined within a carefully calibrated application procedure and overseen by the Court of Justice and the Ombudsman. EU transparency thus unmistakably functions foremost "in the humdrum world of administrative laws," experts, and courts (Fenster, 2015, p. 150; see also Hood, 2007, pp. 195–196). As a result, the Union is still perceived as complex and thus opaque.

The neigh-automatic association of 'transparency' with 'documents' in the EU may largely be explained by its ready availability and acceptability as a policy template at the time of adoption. However, it is less obvious in light of the ambitious normative substance it sought to carry. According to political declarations of the time, transparency was supposed to explain the EU better, bring it closer to citizens, and enable them to participate more actively in decision-making processes. In a context where decision-makers and citizens connect directly through new technologies, the question seems warranted whether the EU's strong reliance on transparency as access to documents still fits the bill. This contribution explores this question from the perspective of respectively the law, administrative and political practices, and technological innovations in the EU.

2. EU Access to Documents in a Changing Context

From the outset, the approach to access to documents policy has been decisively *legalistic*. Initially, this was used as a defence mechanism to keep curious journalists out of the door. Over time, it resulted in a greater role for the Court of Justice, which often expanded the interpretation of the access rules. However, the policy's legalistic approach also alienated all but the most dogged EU citizens, or those that possess the requisite legal knowledge or have the financial resources to acquire it. The right of access to documents has been characterised as 'wide but shallow': It covers many forms of information and most entities and instances, but is hard to enforce in a manner that preserves its utility. Courts, for example, cannot apply coercive instruments, such as fines, to compel institutions to comply (Rossi & Vinagre e Silva, 2017). What is more, certain important functional aspects of the decision-making process remain out of the remit of the rules. Importantly, the right of access only applies to documents that already exist. A few limited exceptions aside (such as the duty to publish voting outcomes), institutions are not bound to minimal record-keeping standards. Moreover, lobby inputs directed towards the Union legislator are equally not covered by the access rules.

The above-described legal circumstances spill over into the *administrative* realm. What immediately strikes access requesters is the formalism of the procedure, larded with references to legal doctrine, often to signal limitations in the institutions' access obligations. Applicants may easily experience such formalism as attempts to thwart their access rights. When considering the material aspect of disclosure practices, we see that the online 'interface' for accessing documents creates various hurdles. Dispersed across multiple registers, the institutions' hundreds of thousands of documents can only be retrieved via search forms containing largely imponderable 'legalese' search categories. Open search criteria such as 'word in title' in turn yield document inventories of which only policy experts are in a position to guesstimate the completeness or coherence. One level deeper, the potential of documents as vessels of transparency depends on their quality. In a classical view of the bureaucratic organisation, this should be a good fit, as efficient decision-making requires sound record-keeping for tracking progress, stabilising calibrated compromises, and preserving institutional memory. In reality, document management suffers from inconsistent drafting and registration practices, exclusion of important information from records, and key documents occasionally getting lost (European Court of Auditors, 2016, paras. 71–75; Hillebrandt & Novak, 2016, p. 533).

The latter point chimes with the *political* perspective of access to documents in the EU. Political decision-makers prefer informal decision-making, as manifested by consensus-oriented negotiating norms in both internal and interinstitutional negotiations. Particularly in the Council, characterised by lingering diplomatic norms, publicity of political differences is not considered in the institution's best interest (Andrzejewski, 2020). In this context, implementing public access to documents is like asking the fox the guard the henhouse. Although transparency suppression is subject to court oversight, circumvention methods are manifold and difficult to police. Controversial documents, for example, are routinely disclosed with a large time lag, to allow member states to negotiate compromises before the public is informed (Cross & Bølstad, 2015, p. 219). The fact that the EU decision-making system is hard-wired for consensus-oriented informality means that decision-makers take measures to control the flow and timing of information disclosures, with the purpose of claiming successes and disowning failures. In extreme situations, this leads to leaks or hostile press releases aiming to derail negotiations or paint the EU in a bad light (Bayer, 2019). In such cases, disclosure replaces the bureaucratic logic of access to documents as 'objective reporting' with a political logic of obstruction and virtue signalling.

Finally, access to documents can be considered from a *technological* perspective. In a tangible way, the establishment of online registers amplified access to documents policy compared to pre-Internet days, by reducing the transaction costs of accessing EU documents. In the Council, for example, access applications initially quadrupled and eventually multiplied nine-fold compared to access request directly before implementation of the register. The number of visitors consulting documents directly online is well over a hundred times larger. Digital formats such as data- and meta-datasets further enrich the legal concept of a 'document.' However, another new incarnation, that of digital and portable communication tools, poses more of a problem for access rights. As significant parts of negotiations move to email and apps, essential information risks being excluded from the right of public access (e. g. European Council, 2019). More recent still is the increased role of political communication through social media. Phenomena such as 'Wikileaks world' (Hood, 2011) or 'Trumping transparency' (Birchall, 2018), have not gained ground in the

EU context to the extent seen in the US. Still, social media have gained a toehold when it comes to system-hostile communication, relying on false or deliberately misrepresented information from official sources (particularly certain member state governments). Such political messaging does not fit well within the bureaucratic model of transparency manifest in access to documents policy.

3. Conclusion

Is EU access to documents (still) fit for purpose as a vehicle for transparency? This commentary answers with a cautious and qualified 'yes.' In spite of the various shortcomings highlighted, access to documents in its broad outline remains capable of fulfilling transparency requirements. The definition of a document under EU law is broad enough to capture its latest manifestations unknown at the time of the adoption of Regulation 1049/2001. Moreover, the EU's organisational nature should correspond well to the bureaucratic medium of documents. And while administrations' sprawling nature makes transparency "improbable" in any government context (Fenster, 2015, pp. 161–162), adequate implementation interfaces may go a considerable way in taming complex information, by tying it to manageable cognitive categories such as procedure, chronology, and actors' formal roles. Early technological advances demonstrate that major improvement in unlocking complex information in Internet-based infrastructures is possible. Three decades after its introduction, the essential features of access to documents policy thus remain upright.

This positive assessment however is bracketed by two pivotal observations. First, the formalism and legalism that underpin access to documents policy severely restrict its reach. In practice 'EU transparency is not where the people are.' This debilitating condition is intensified by political norms of consensus-oriented informality, leading EU institutions to develop administrative methods that limit, slow down, or evade document-based transparency. Both the law in place and available technologies are in themselves agnostic instruments that can be used to unveil and to conceal. Shortcomings in the access to documents concept thus lie foremost within the administrative and political sphere, where it is sometimes considered an all-too-intrusive means for demonstrating one's commitment to transparency, and selective communication is thus preferred.

Second, in order to remain viable, the fact-based 'process orientation' of access to documents requires non-document-based complementary communication with a 'rationale orientation.' Public political justification and contestation contextualises official information and brings it to life (Mansbridge, 2009). Mass and social media are well positioned for such communication, being considerably faster, more readily accessible, and less complex in content than access to documents policy. However, in the absence of constructive justification and contestation, predatory political messaging is given the opportunity to fill the vacuum and challenge system-legitimating notions of transparency. Thus, as long as citizens give their European leaders carte blanche to engage in 'access to documents as usual,' particularly the technocrats and populists among them stand to gain.

Acknowledgments

This publication appears in the context of the Academy of Finland-funded project 'Transparency in the EU: from Reaction to Manifesto?' whose funding the author gratefully acknowledges. The author would further like to thank the Academic Editors of this thematic issue for their support, the participants of the RECONNECT conference "Transparency in the EU: mechanisms and practices," held in Lille on 19–20 November 2019 for fruitful exchanges on the subject, and Marlen Heide for insightful comments on an earlier version of this draft.

Conflict of Interests

The author declares no conflict of interests.

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COGITATIO

Politics and Governance (ISSN: 2183–2463)
2021, Volume 9, Issue 1, Pages 296–299
DOI: 10.17645/pag.v9i1.4249

Commentary

Return to *De Capitani*: The EU Legislative Process between Transparency and Effectiveness

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Submitted: 5 March 2021 | Accepted: 19 March 2021 | Published: 31 March 2021

Abstract
Three years after the judgment of the General Court in the *De Capitani* case, we assess whether the findings of the Court have settled for good the debate between transparency and effectiveness in EU law-making or rather opened new questions on legislative transparency in the EU.

Keywords
4 column tables; De Capitani; decision-making effectiveness; European Union; law-making; legislative transparency; Regulation 1049/2001; trilogues

Issue
This commentary is part of the issue "Access or Excess? Redefining the Boundaries of Transparency in the EU's Decision-Making" edited by Camille Kelbel (Lille Catholic University, France), Axel Marx (University of Leuven, Belgium) and Julien Navarro (Lille Catholic University, France).

The landmark judgement of the General Court in the De Capitani (*De Capitani v. European Parliament*, 2018) has provided an important contribution in redefining the boundaries of transparency in EU law-making. According to most commentators, the General Court has clearly opted for 'access' over 'excess' by giving prominence to transparency over effectiveness when it comes to law-making. Three years after the seminal decision, it is useful to return to *De Capitani* to assess whether the judgment has really settled for good the debate and excluded the arguments of effectiveness from the functioning of the EU model of representative democracy.

The arguments developed by the parties in the case are a good illustration of the opposing approaches as to the balance to be found between transparency and effectiveness in EU law-making.

In its written submissions, De Capitani had taken the radical view that efficiency is no objective of the legislative procedure. According to De Capitani, in a democratic legislative procedure defined by openness, citizens´ participation and public pressure can never be considered as undermining the process. As a consequence, there is no margin left for Institutions to refuse access to a legislative document on the basis of Article 4(3) of Regulation 1049/2001 (Regulation of the European Parliament and of the Council of 30 May 2001, 2001, p.43).

The three Institutions aligned in defending the opposite view that a request for access could still be refused on the basis of the need to protect the efficiency of trilogues as a working method. They did so, however, with some nuances.

The European Parliament developed a rather classic defence which stressed the specific nature of trilogues if compared to the formal steps of the legislative process only, to focus on the risks posed by the disclosure of the specific documents at stake.

The Commission and the Council insisted on a 'functionalist' argument focussing on the need to protect the very function of trilogues, which would be undermined by unfettered openness. The Commission pushed this argument to the extreme on the basis of a case law developed in the framework of ongoing administrative proceedings (see in particular joined cases T-424/11 and T-425/11 in *ClientEarth v. European Commission*, 2015) and argued for a general presumption that access to the fourth column of documents relating to ongoing

trilogues would undermine the decision-making process. Such a general presumption would be justified to preserve the integrity of the conduct of the trilogue procedure from the intervention of third parties, in light of the very specific function of tripartite negotiations—that is to explore the possibility of an agreement on a common text between representatives of the co-legislators to be then subject to validation in the official steps of the legislative procedure.

The Council supported the Commission's argument in favour of a general presumption against disclosure. It however further suggested that a distinction should be drawn between formal legislative documents and trilogue documents since they have a mere preparatory character, do not reflect the positions of the legislators and in fact are not even known to them (since it is up to the negotiators to inform back the respective institutions). The higher standard of transparency applicable to formal legislative documents would therefore not be applicable to trilogue tables since the rational for a wider access—namely the need to allow citizens to hold decision-makers into account for their choices—would not apply with the same intensity here.

As it is known, the General Court decided the case in favour of De Capitani. The Court however did not follow the radical approach proposed by the applicant, which would have prevented any refusal to access requests in the framework of legislative proceedings. Such an approach would have manifestly been against the letter of Regulation 1049/2001, which in no way excludes documents relating to legislative procedures from the scope of application of its set of exceptions. The only serious possibility to overcome this unambiguous wording would be to argue the illegality of the relevant provision of the Regulation itself, which however was not attempted by De Capitani, and appears anyhow farfetched in light of the case law of the Court of Justice.

The judgment follows the long-standing case law on legislative transparency which dates back to the *Turco* (*Sweden and Turco v. Council*, 2008) and *Access Info Europe* (*Access Info Europe v. Council*, 2011) judgments. The principles of publicity and transparency are inherent to the EU legislative process and citizens must be in a position to follow in detail the decision-making process within the institutions to be able to exercise their democratic rights. From that point of view, no distinction can be accepted between the various steps of the legislative process and no relevance can be given to the specific nature of trilogue negotiations.

Still, while rejecting the 'functionalist' approach in the form argued by Council and Commission, the General Court did not dismiss altogether the need to take into account the effectiveness of the legislative process. While generally overlooked by the commentators of the judgment, the relevant passages of the judgement provide important qualifications to the overall findings.

First, the Court confirms its previous *Tobacco* case law (*Herbert Smith Freehils LLP v. Commission*, 2016; *Herbert Smith Freehils LLP v. Council*, 2016; *Philip Morris v. Commission*, 2016) and acknowledges that the risk of external pressure can constitute a legitimate ground for restricting access to documents related to the legislative decision-making process. The threshold set by the General Court is admittedly particularly high, since:

> The reality of such external pressure must, however, be established with certainty, and evidence must be adduced to show that there is a reasonably and foreseeable risk that the decision…would be substantially affected owing to that external pressure. (*De Capitani v. European Parliament*, 2018, §99)

In the case of a legislative procedure, this requires to demonstrate that the disclosure of the requested document would lead to "a reaction beyond what could be expected from the public by any member of a legislative body who proposes an amendment to draft legislation" (*De Capitani v. European Parliament*, 2018, §99).

The General Court seems therefore to suggest that a distinction may be drawn between the form of influence that is normally associated to the public debate on a legislative file and other—more invasive and thus pathological—forms of interference which would warrant the protection of the decision making.

Second, the General Court seems to admit that the legislative process requires a 'space to think' that needs to be protected. Even if trilogues are a substantial part of the legislative procedure, "discussions may take place during (trilogue) meetings for the preparation of the (compromise text) between the various participants, so that the possibility of a free exchange of views is not called into question" (*De Capitani v. European Parliament*, 2018, §106).

What this passage implies is that while being part of the legislative process, trilogues remain exempted from other requirements that would normally be associated with the formal steps of the legislative process: the pro-active publication of documents, the publicity of the debates, and the need for a fully-fledged linguistic regime of the documents used for deliberations.

These findings show a certain pragmatism of the General Court in striking a balance between the need for transparency which is proper to the legislative process and the need to preserve the effectiveness of the legislative negotiations. The balance consists in applying to trilogue documents the same enhanced standard of transparency when it comes to access to documents requests, while allowing a certain leniency when it comes to the application of the broader publicity regime proper to law-making.

It is the same pragmatism that had led the Ombudsman to acknowledge the positive role of trilogues and to take a clear position in support of the need to protect a certain level of confidentiality during the discussions, position which attracted much criticism by the supporter of transparency at all costs. As the

Ombudsman had rightly pointed out, without preserving the possibility of a 'space to think' during these inter-institutional exchanges, the core of the negotiations would slide into even more informal formats with greater risks for the transparency of the overall process (European Ombudsman, 2016, see in particular §§5–6, 29–31, 68–69).

However, the pragmatism of the General Court has its shortcomings too. The line between the normal reaction that can be expected from the public and pathological interference in the legislative process is one which is difficult to draw. Let aside the extreme cases where pressure on the co-legislators could take the form of a criminal conduct (e.g., corruption of delegates taking parts in trilogues prompted by the disclosure of a document revealing their positions), it remains extremely difficult to determine at which point a legitimate attempt to influence the decision making becomes an undue interference.

The *Tobacco* case law seems to suggest that a key factor in the assessment is the fact that the document is explicitly requested by someone who has a vested commercial interest in the decision-making process and who intends to use that document to advance such an interest. Many would however argue that lobbying by vested interests is very much part of the public debate around legislation. Moreover, the ingenuity of the applicants in the *Tobacco* cases—who made clear their identities and the objective they pursued—could easily be avoided by asking for access in anonymous form or as a general member of the public.

Second, and perhaps more importantly, the pragmatism of the General Court reveals a conceptual weakness in the reasoning of the judgment. There is in fact a certain contradiction in proclaiming—without qualification—that trilogues are "a decisive stage in the legislative process" and that "trilogue tables form part of the legislative process" (*De Capitani v. European Parliament*, 2018, §§70, 75) and then accepting that the full regime of publicity usually associated with the legislative debates does not apply to trilogue discussions.

This contradiction is the inevitable consequence of a monolithic conception of the legislative process and of the documents that accompany it. The reality is however more complex. Besides the key official milestones and documents that register the expression of the political will by the co-legislators, many other layers of preparatory activities and documents both by political actors and by support services concur in law-making. All these intermediary steps and preparatory documents cannot be considered as having the same nature and be subject to the same openness regime without grinding to a halt the legislative machinery. For instance, the public interest in disclosure cannot be the same in relation to a document which formally expresses the position of the co-legislator and a merely preparatory document reporting the advice of an official to the negotiator (this was indeed the case in *Tobacco*). Only access to the former is essential to allow public scrutiny on the decision makers and to strengthen the democratic participation of citizens to the decision-making process.

The General Court tells us that in this complex landscape of intermediary steps and preparatory documents, trilogues and four column tables play a peculiar role which warrants a specific regime in terms of openness. The fact of not spelling out the criteria that justify such a regime, leaves however open a number of questions. For instance, having regard to the relevance that the Court gives to the possibility of having a free exchange of views and effective negotiations during trilogues, it would not seem appropriate to apply the same standard of assessment on one hand to documents that report the result of the negotiations and on the other to documents that are tabled *before* the trilogues and contain compromise proposals to be discussed during those forthcoming negotiations. Even more, the logic of the judgment would seem to exclude that the same regime of openness apply to *internal* documents that may be drafted for the purpose of forming the institutions' negotiation strategy and identify the area of flexibility and the concessions that could be made during the tripartite negotiations. Disclosure of these internal documents would expose the strategy of the negotiator, create asymmetric negotiating positions and undermine trust, with the effect of compromising the effectiveness of the trilogue setting and shifting the real negotiations in other fora. It would prevent the possibility of that 'free exchange of views' that the General Court does not call into question.

Following the judgement in *De Capitani*, the institutions have decided not to appeal and have taken steps to implement its findings. Documents reporting the outcomes of trilogues are now systematically identified and as a rule given access to upon request. Trilogues documents are made public by default once the negotiations are closed. However, as the remarks above show, the judgment has not definitively settled the difficult balance between transparency and effectiveness in the various articulations of the legislative process. The many questions left open by the General Court have already emerged in the day-to-day handling of access requests (as shown for instance by a recent confirmatory decision adopted by the Council on 16 February 2021 partially refusing access to documents preparing positions for trilogue negotiations; Council of the European Union, 2021) and anticipate a new episode in the debate on legislative transparency (the European Ombudsman has just launched an inquiry on complaint 360/2021/TE brought against the Council's confirmatory decision; European Ombudsman, 2021).

Conflict of Interests

The author was agent for the Council in the *De Capitani* case. The views expressed are solely those of the writer and may not be regarded as stating an official position of the Council of the EU.

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Politics and Governance (ISSN: 2183-2463)

Politics and Governance is an innovative new offering to the world of online publishing in the Political Sciences. An internationally peer-reviewed open access journal, Politics and Governance publishes significant, cutting-edge and multidisciplinary research drawn from all areas of Political Science.

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