TRANSPARENCY AS ORGANIZED HYPOCRISY? THE CASE OF THE EU LEGISLATIVE PROCESS.

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ABSTRACT

Since the 1990s, several rules have been adopted to increase the transparency of the EU legislative process. However, studies of the Council sometimes suggest that these measures have a contradictory effect in making legislators hide their decision-making processes. This paper takes this claim seriously and asks whether transparency rules are decoupled from the acts and decisions of the legislative actors. In other words, it asks whether the EU legislative process can be considered as a case of organized hypocrisy. The paper examines the implementation of the different transparency rules on the basis of 67 semi-structured interviews and document analysis. The empirical study shows a relative failure of transparency rules, partly because the legislative actors enjoy a high degree of discretion in the enforcement of rules. However, the organized-hypocrisy theory does not fully explain the failure of transparency because it underestimates the complexity of rule implementation. Contrary to what organized-hypocrisy theory would imply, the actors do implement the rules but exploit their ambiguities to their own advantage.

First draft.

INTRODUCTION

Since the beginning of the 1990s, the European Union has adopted a number of measures to make information on the legislative process and, more precisely, the positions taken by member states, more public. Due to pressures from the European Parliament (EP) and the civil society, the Council of the European Union, which has a reputation of being an opaque institution, has progressively begun to publicize more information on its activities. However, some studies would suggest that these measures have a contradictory effect in making legislators hide their decision-making processes. This paper investigates the impact of transparency rules on the practice of the EU legislative actors. "Transparency" has become a buzzword of late, with more and more organizations forced to show that they are, in fact, transparent. In the EU context, this context has become especially popular because of the institutions' permanent search for more democratic legitimacy. While the actors of the EU legislative process cannot publicly say "no" to transparency, it is often the case that the actors within them do not necessarily consider transparency desirable or even compatible with their practices. However, the relationship between the EU official rules of transparency and the actors'decisional practices has not been theorized in depth partly because such research raises methodological issues.

This paper takes seriously the claim according to which transparency rules lead the actors to withdraw behind closed doors. Even if such claim is not rare, it has never been checked empirically. For this reason, the paper asks whether the organized-hypocrisy theory can explain the implementation of transparency rules in the Council. According to Brunsson (2006), organized hypocrisy arises when an organization adopts an official stance to gain public legitimacy while its acts and decisions remain disconnected from this official stance. In our case, it means that the legislative actors might *ignore* the transparency rules. In such situation, transparency rules remain decoupled from the legislative actors' practices and therefore do not increase public information.

On the basis of an empirical study, the paper argues that the transparency rules have more complex effects on the actors' behaviors than claimed by the organized-hypocrisy theory. Actually, the actors manage to sidestep the rules, but their acts and decisions are not decoupled from these rules, contrary to what the organized-hypocrisy theory suggests. This paper claims that the actors strategically implement the rules by converting them to new goals that are more beneficial to them (Mahoney and Thelen 2010). The main implication of this finding is that transparency rules can fail to increase accountability. In this context, this research is in line with a body of recent studies investigating the links between transparency and accountability (Hood 2010; Tan 2012).

The first section reviews explanations of transparency in EU institutions. The second section presents the methodology and data. The third section analyzes the implementation of the transparency rules and their effects on the legislative process of the European Union. The fourth section discusses the relative failure of transparency rules and argues that more than ignoring the transparency rules, the actors tend to convert them.

EXPLANATIONS OF TRANSPARENCY OF THE EU LEGISLATIVE PROCESS

This paper defines transparency as the availability of information about an actor allowing other actors to monitor her actions and decisions (Meijer 2013: 430). Most existing studies of

transparency in EU institutions focus on its evolution as a legal concept while empirical studies of the implementation of transparency rules are rather rare.

Acknowledgement of a legal progress

Since the beginning of the 1990s, the evolution of transparency rules in EU institutions has been dramatic. The rejection of the Maastricht Treaty by the Danish people partly triggered this evolution, while the development of the Internet further accelerated this institutional change. The legal provisions mandating transparency are mainly formulated in Regulation 1049/2001 and in Article 15 of the Treaty on the Functioning of the European Union (TFEU 2012). Scholars have focused on the origins (Bjurulf and Elgström 2004) and the evolution of transparency rules (Deckmyn and Thomson 1998; Deckmyn 2002; De Leeuw 2007; Hillebrandt, Curtin and Meijer 2013). The most dramatic evolution has taken place in the Council of the European Union. Under pressures from the EP, four member states (Netherlands, Sweden, Denmark and Austria), and civil society, the Council has been compelled to deliver more and more information on its activities (Brunmayr 1998). Since December 1993, votes must be made public. Since 1999, a public register gathers all "non-sensitive" documents. Since 2006, the Council meets in public when deliberating or voting on legislative acts that it must codecide with the EP. Public sessions are broadcast by videostreaming on the Internet. Furthermore, existing studies acknowledge that an "active" policy of transparency has replaced "passive" transparency (Curtin 2007): while transparency initially meant the right of citizens to request documents, the Council must now publish information on its website. Still, scholars have also pointed out the shortcomings of the transparency rules when it comes to the Council's executive role and EU security policies (Curtin 2007 and 2011).

The empirical approach to transparency: Implementation and Effects of the Rules

There has been little empirical research on the implementation and effects of transparency rules on the European legislative process. This shortcoming is partly due to methodological hurdles, since such investigation requires comparing what happens behind closed doors with the outcomes of public sessions (Gosseries 2006). A few recent studies of diverse institutional settings have overcome these hurdles (Naurin 2007; Meade and Stasavage 2006; Tan 2012). Like these studies, this paper assumes that analysis of transparency rules should be complemented with research of their effects because, like any policy, transparency policies can fail. In the case of the EU legislative process, we still have to assess whether transparency rules have achieved their main objective (defined in Article 15 of the TFEU, 2012): to inform citizens of the positions taken by their representatives in the legislative process.

The fact that transparency can have unexpected effects on the actors' behaviours has been noted in a recent study (Cross 2013): as suggested by Elster (), the actors tend to adopt grandstanding stances in a public context, which can lead to a polarization of positions.

Another possible effect of transparency has been noted in studies of the Council: they sometimes point to the fact that publicity leads actors to withdraw being closed doors. According to Fiona Hayes: "[t]he nagging feeling persists that the transparency provisions, far from shining a spotlight on decision-making in the Council, have instead had the effect of moving the real

negotiations out of the range of the cameras and microphones" (Hayes-Renshaw 2012: 90 quoted by Huber and Shackleton 2013: 1051-1052; see also Best 2002 and Stasavage 2005: 16-17). In his study of journalists' access to the Council, Laursen also refers to this phenomenon (2012: 14). One can say that this argument has attained the status of a conventional wisdom (Davis 1998: 126; Westlake 1998: 142-143).

Such interpretation of the effects of transparency rules seems very much similar to a decoupling (Meyer and Rowan 1977) of transparency norms and actors' acts and decisions, or, in other words, to a situation of organized hypocrisy. The suspicion of a decoupling between the official rules of transparency and actors' practices emerged from the start of the transparency policy. For instance, in 1994, John Carvel, a journalist from *The Guardian*, sent a complaint to the European Court of Justice because the General Secretariat of the Council had not granted him access to some documents. He explained a few years later:

> In fact what was happening was that a substantial majority of Member States took the view that any document revealing a specific national point of view should automatically be withheld. Instead of examining such material on a case-by-case basis to see what might be disclosed, they were effectively inventing a new category of document to which access MUST not be granted. (...) In speech after speech, the national leaders went banging on about the virtues of transparency, but they were subverting the one initiative which might have opened a tiny window on the process of secret legislation. I thought this was hypocritical. And that is why I took the trouble to go to the European Court. (Carvel 1998: 60. See also Guggenbühl: 20)

Situations of organized hypocrisy emerge when an organization adopts official norms to gain public legitimacy even as actors within those organizations follow other rules when they act and decide because they aim primarily at efficiency. This concept was forged by Nils Brunsson (2006) and was first applied by sociologists of organizations before inspiring international relations scholars (Krasner 1999; Lipson 2007; Weaver 2008; Bukovansky 2010). However, the concept has not been applied to the study of transparency policies. Since EU institutions are torn between external pressures toward more transparency and the search for efficiency, the organized-hypocrisy theory is especially relevant in analyzing the implementation and the effects of transparency norms.

However, we lack empirical research on this issue. The paper will ask whether the transparency of the EU legislative process can be considered a case of "organized hypocrisy." Furthermore, supporters of this conventional wisdom usually refer to the Council. Yet most legislation is currently codecided by the Council and the EP. It is necessary to test this conventional account by taking into account the entire legislative process and not only the activities of the Council. Given, also, that EP sessions are public, one might expect that the increased power of the EP has triggered better and wider information on the legislative process.

DATA AND METHODOLOGY.

The empirical research relies on three types of data.

It first relies on the legal texts on transparency in EU institutions: Regulation n° 1049/2001; Article 16.8 of the Treaty (2012) and Article 15 of the TFEU (2012); the Rules of Procedure of the Council (Council 2009: Articles 7 to 10) and of the EP (EP 2013: 103 and 104).

Secondly, it uses documents on the legislative process published by the Council and the EP: Council minutes; the agendas of Council meetings and those of its preparatory bodies (Committee of Permanent Representatives (Coreper) Part 1 and Part 2; Special Committee for Agriculture (SCA)); Council sessions publicly broadcast by videostreaming on the Council website; and the EP Legislative Observatory[1].

Thirdly, it relies on *sixty-seven semi-structured interviews* conducted between 2006 and 2012 with members of the Secretariat of the Council, members of the Secretariat of the Commission and representatives of the member states in the Council. The Council of the European Union is divided into ten sectors (Agriculture, Environment, etc.) but the main preparatory committee, the Coreper, is not sectorized and deals with measures across sectors. Members of this Committee were interviewed. In addition, interviews were conducted in three sectors: Environment; Agriculture; and Justice and Home Affairs, because the level of publicity variates across these sectors. Three categories of interviews can be distinguished.

First, *fifty-six interviews* dealt with *decisional practices in the Council*. This dataset provides us with information on the effects of increased publicity in the Council. *Nine interviews* were conducted with members of the Secretariat of the Council, national representatives in the Council or members of the Commission who were active *before 1994* (that is, at a time when no information on the activity of the Council was publicly available) *and after this date*, which means that they witnessed the implementation of the first transparency rules. *Fourty-seven* interviewees were members of the General Secretariat of the Council, national representatives in the Council or members of the Commission *at the time of the interview*. *Five of them* were taking part in the Council negotiations as national representative or EU official *even before 1994*. *Seven* of them were active in the *Agriculture sector* and *nine* of them in the *Environment sector*.

Second, the Lisbon Treaty (that came into force in late 2009) having introduced codecision in two sectors, Agriculture, and Justice and Home Affairs, while these two councils once worked entirely behind closed doors, their sessions are now partly public. For this reason, in 2012, five interviews were conducted with members of the *Agriculture Council* and of the *Justice and Home Affairs Council* who witnessed this institutional reform.

Lastly, in 2012, six interviews *on the evolution of transparency rules and their recent modifications* were conducted with persons who were members of the Directorate General-F for "Communication and Transparency" (hereafter, DGF) at the General Secretariat of the Council either at the time of the interview or in the past.

The main hurdle that transparency research has to overcome is methodological: how to compare actors' practices behind closed doors with their practices in public settings? The interviewees were selected in order to make this comparison possible.

Firstly, Council practices prior to 1994 (the year in which the Council started publishing its voting results) were compared with its practices after 1994. The interviewees were:

- Council members present *before* and *after* the implementation of the transparency rules, and therefore able to convey their impressions on the changes brought by transparency;
- Council members who were present *either* before *or* after the implementation of the transparency rules, which also made a comparison possible.
- DGF members who contributed to the elaboration of the transparency rules since the beginning of the 1990s.

A second comparison was possible through interviews with members of the Agriculture

[1] http://www.europarl.europa.eu/oeil/home/home.do

Council and of the Justice and Home Affairs Council. We interviewed them on the effects of codecision after the Lisbon Treaty, avoiding asking them how publicization of sessions influenced or changed their practices. Thanks to this strategy, it was possible to determine whether the interviewees referred to transparency without being prompted. In those cases in which, approximately forty minutes into the interview, the actors had not referred to transparency, we directly interviewed them on the topic.

One could easily argue that the interview method is unsuited to a research on the Council because diplomats are not keen to talk about their activities and fear to betray the secret contents of negotiations. This criticism is unconvincing for four reasons.

Firstly, the national representatives were rarely interviewed on their positions in specific negotiations. Rather, interviews focused on negotiation practices *in general.* Apparently, representatives did not expect to be interviewed on this topic, since they are usually interviewed on specific negotiations, which had the advantage of "reassuring" them and perhaps leading them to talk more freely.

Secondly, different types of actors were interviewed in addition to national representatives. Within the Council, legislative proposals are first debated by working groups, then by the Coreper or the SCA, and finally by the Council of Ministers. In addition, when the codecision procedure is legally stipulated, texts are debated in the framework of "informal trialogues" and "conciliation committees". These trialogues and committees include the Council presidency (held by a different member state each semester), a "rapporteur" representing the EP and a representative of the Commission. At each level in the Council (working group, Coreper or SCA, and the Council of Ministers itself), meetings are attended by the presidency, representatives of each member state and a representative of the Commission (the EP is not represented during these meetings). The sample of interviewees included actors holding different posts at all of the different levels. Furthermore, interviewed were conducted with civil servants who had been in their posts for decades and were able to deliver general descriptions of the evolution of practices.

Thirdly, overlooking the interview method seriously diminishes the possibility of obtaining information on Council activities. Even if published documents are numerous, relying solely on these sources is obviously not a workable strategy for a study of transparency. Furthermore, the legislative process is characterized by several unwritten rules (Helmke and Levitsky 2004). The interview format alone allows us to identify such rules.

Finally, in order to assess the effects of publicity, we first considered comparing the public Council minutes with minutes of the sessions held before 1994 (a similar method is used by Meade and Stasavage 2006). We examined the Council and Coreper minutes for the period prior to 1987-1992. However, several interviews with members of the Legal Service of the Council Secretariat before 1994 revealed that EU civil servants reported just a small fraction of information in the minutes and that these minutes did not accurately reflect the debates. For this reason, the comparison was not possible prior to 1994. It might be possible if recordings of the Council sessions were available. But in these circumstances, the only adequate method for obtaining information on the practices of Council members before 1994 was the interview method.

RESULTS

This section accounts for the implementation of the transparency rules in the Council. Then, it analyzes the consequences of codecision on actors' practices and accountability.

The implementation of transparency rules in the Council of the European Union

Publicity of written documents

Numerous documents are published on the Council website. However, two hurdles limit the information made available to citizens. Firstly, some documents are categorized as sensitive by the Secretariat and are not made available for this reason (Carvel 1998; Curtin 2011). Secondly, the content of public documents is insufficient. Existing studies have accounted for the first hurdle. We will focus on the second one.

Most legislative decisions are unofficially taken in the preparatory committees (Coreper and SCA, see Council 2009, Article 19). However, the minutes of their sessions are not published. Since only ministers have the right to vote, they usually publicly ratify measures on which committees have already reached an agreement behind closed doors. When no agreement can be reached at the committee level, the presidency of the committee usually sends the debated measure to the Council of Ministers. However, in such cases, ministers tend to work behind closed doors and the public minutes do not report their debates verbatim. Members of the Secretariat generally avoid publicizing ministers' individual positions, unless asked to do so by the ministers themselves (Council 2009: Article 13). Therefore, the hurdles to transparency are, apparently, the *looseness* of the rules, since they do not compel the Secretariat to produce verbatim reports of Council debates; and their *incompleteness*, since they do not lift the veil on the main decisional stages, that is the Coreper, the SCA and the working groups.

One could argue that publication of the Committees' verbatim minutes would ensure greater information on the positions taken by national representatives. However, the legislative process is based on negotiations. During committee sessions, national representatives tend to formulate ambiguous positions in order to keep some room for maneuver during the negotiation process – and more specifically, in order to extract concessions from the presidency and/or the Commission. Furthermore, the presidency does not systematically ask each delegation its position. It usually asks, "Who has problems with the proposed measure?". In the diplomatic setting of committees, this method tends to deter unsatisfied delegations from taking the floor because they do not want to be seen as marginalized (Novak 2011). Because delegations often stake out ambiguous positions during the plenary sessions, the presidency has to meet with them bilaterally in order to understand their position. Given that negotiations mostly depend on these bilateral meetings, the committee minutes would not offer much information on delegations' real positions or on the reasons why they took them. Simply lifting the veil on committees' activities is not enough to guarantee better information on actors' positions. The decisional practices themselves would have to change.

One might object that ministers' positions are made public thanks to two rules. First, when codecision between the Council and the EP is the legally stipulated decision-making procedure, Council debates must be public. Secondly, the vote must also be public (Treaty 2012, Article 16.8). However, these two rules fail to guarantee accurate information on the ministers' positions.

Publicity of sessions

First of all, legislative debates are usually not debates at all: instead, each minister reads a pre-written text. Ministers tend to state flexible or imprecise positions because they take the floor under the shadow of negotiations that will take place behind closed doors in committees and working-groups. Transparency rules do not allow us to know which positions delegations took in working groups and in committees.

However, this is not the only hurdle to transparency. In the Agriculture Council, which meets more often and legislates more than other sectoral councils, a higher proportion of decisions are made directly by ministers. But even when sessions are public, ministers avoid the gaze of the cameras in order to establish *compromises*. A representative at the Agriculture Council notes:

> We don't know the real reasons behind compromises. It is unimaginable that this type of decision making could be done in front of the camera. You do go around the table in public, but you don't say everything. And then there are the trilateral and bilateral talks, and so you keep ministers locked in for the entire night – this is the conclave method. There is no interest in making this public because (…) it will necessitate seeking compromises even as the reasons behind them aren't rational. These things depend on the circumstances. Everyone must abandon their original convictions. (October 2012).

For instance, on September 23, 2013, the Agriculture Council held a public session on reforming the Common Agricultural Policy. The presidency interrupted the session for a lunch break. After the break, it reopened the public session and stated that the ministers had reached a compromise through informal exchanges. The presidency summed up the compromise without indicating which delegations received concessions and which delegations gave up some demands.

According to interviews conducted in 2007 and 2008, members of the Agriculture Council and of the Justice and Home Affairs Council dreaded the effects of increased openness of plenary sessions after the Lisbon Treaty. Their main argument was that publicity diminishes the efficiency of the legislative process. However, according to several interviews conducted after the transparency reform, "transparency has not changed anything". A member of the Secretariat even compared the public sessions to the "Potemkin villages" (November 2012). Interestingly, interviews with persons who were at the Council in 1993-1994 revealed the same sequence: anxiety prior to the disclosure of the votes was followed by the claim that publicity actually "did not change anything". This phenomenon is not particularly surprising given that negotiations still take place behind closed doors.

Publication of votes

Since 1994, Council votes have been made public. The publicity of votes is a notably ambitious transparency rule since prior to it, no information on the Council sessions had been made public. Since 2006, when the Council codecides with the EP, votes must be broadcast on the Internet.

The publication of votes has had a constraining effect on actors' voting behaviour when national parliaments exercise control over their ministers' votes. In Denmark, if a majority of

Members of Parliament oppose an adopted measure, the minister will have to be loyal to her parliament and publicly vote against the measure (interview, October 2007). However, given that control by national parliaments is not well developed in the EU (Hayes-Renshaw, Van Aken and Wallace 2006), nothing can prevent deals between national representatives in preparatory committees. A minister might publicly oppose an adopted measure while supporting it behind closed doors (interviews, December 2007).

Furthermore, several hurdles limit the effectiveness of the publication of votes.

Firstly, voting results are published only if a measure is adopted. We do not have any data on the rejected acts (Hayes-Renshaw, Van Aken and Wallace 2006), even though neither the Treaty nor the Council Rules of Procedure specify that votes on rejected acts should not be published. And only insiders are aware of the fact that votes on rejected acts are not published. One could argue that such votes are not published because when the presidency deems that a measure is not supported by enough participants, it does not ask the delegations to vote. However, we accessed internal reports of the European Commission showing that in a few cases, a blocking minority did vote against a measure. There were only four or five cases per year, but by opting not to publishing these votes, the Council actually *infringed* the rule.

Secondly, voting results are published even if in practice, the presidency rarely opens voting procedures. The presidency and the Secretariat usually collect the voting intentions of the member states through bilateral talks with the different delegations. On the basis of these bilateral exchanges, during committee sessions, the presidency orally notes that a qualified majority has been reached and that a measure can be adopted (Novak 2011).

According to the Treaty (article 16.8), "The Council shall meet in public when it deliberates and votes on a draft legislative act." But according to the Treaty Council's rules of procedure (article 9), "the results of votes (…) shall be made public". This interpretation of the Treaty, substituting the "results of the vote" for the "vote" itself, has immense consequences in terms of transparency. For one thing, it allows Council members to keep acting as they did when votes were not published: individual countries do not have their votes announced, the chair just says a majority has been reached. Furthermore, the Council Secretariat has to face a contradictory situation: most decisions are made behind closed doors by national representatives who do not vote explicitly, even while votes must be public. Before the Council session during which a given measure has to be adopted, the Secretariat calls on the different permanent representations so as to learn of their positions and prepares a voting sheet. During the public Council sessions, these voting results are displayed on a big screen while the Presidency states that the measure shall be adopted.

The first problem raised by this practice is the following: anyone who reads the Treaty without being aware of the Council's practices would think that the ministers vote by raising hands or by roll-call. The second problem is that public votes do not necessarily reflect the positions taken by national representatives behind closed doors. According to an unwritten rule, when the presidency of the Coreper or of the SCA has already stated that a measure can be adopted, ministers cannot decide to oppose if they have not previously informed the presidency during negotiations. This unwritten rule aims to avoid the situation of a public session in which a measure is unexpectedly rejected before ministers who have come to Brussels expressly to adopt that measure. In this context, ministers tend to join the qualified majority when they see that they cannot block a measure anymore. Except for the few member states in which ministers receive strict parliamentary mandates, the general tendency is to join the qualified majority even if one is

not satisfied with a measure (see Novak 2011). A representative at the Agriculture Council sums up this habit: "It's difficult for minister to vote against [a measure] or abstain because they don't like to be marginalized" (October 2012).

The publication of votes does not help to bind ministers' voting behaviour because of the conjunction of an organizational feature (votes are registered after the announcement of a qualified majority behind closed doors) and of a lack of control by the national parliaments over their representatives. Only the control by an external actor, such as a national parliament, would guarantee that the publication of votes binds ministers' voting behaviour.

The Codecision

Against this account, one might object that the EP's growing participation has increased the transparency of the EU legislative process. Both plenary and committee sessions take place in public. However, several recent studies of the codecision show that legislative actors have developed practices that stimulate the efficiency of the decisional process at the expense of transparency (Huber and Shackleton 2013; Burns and al, 2013). While the extension of codecision was supposed to increase the democratic legitimacy of decisions, it has triggered the following paradox: although the EP has campaigned for increased transparency within the Council, the Members of the EP have actually adopted the diplomatic habits and negotiating practices of the Council, which has blurred distinctions between the positions of the different actors (Huber and Shackleton 2013: 1041). Existing studies of the codecision have shown that the procedure has failed to reduce the democratic deficit, although to our knowledge, they have not put forward this paradox.

Statistics show that the EP and the Council pass a growing proportion of measures by means of "early agreements": in order to accelerate the legislative process, representatives of each institution involved in the legislative process (Commission, EP and Council) meet in the framework of "informal trialogues" and negotiate until they reach a compromise. Hence, the Council's notorious habit of seeking consensus has spread to the entire legislative process, while this method obscures different actors' positions and deters the minority from voicing its disagreement (Novak 2011; Burns 2013).

Interviews have revealed a third cause of opacity. In principle, the EP represents the citizens and is organized along ideological lines while in the Council, the interests of the member states are defended by their permanent representatives and ministers. However, members of Permanent Representations of member states sometimes approach their co-national members of the EP and attempt to convince them to introduce amendments corresponding to the position defended by their country in the Council. This strategy is, of course, more profitable in the cases of big member states, since they are represented by higher numbers of members of the EP. Strangely enough, this practice did not seem to shock interviewees, even though it conflicts with the principle of representation laid out in the Treaty and renders the legislative process even more opaque.

DISCUSSION

The empirical investigation reveals a partial failure of transparency rules, partly due to the fact that no external actor systematically controls their enforcement. This section discusses the organized-hypocrisy theory. It argues that it does not fully account for the effects of the

transparency rules because it underestimates the complexity of the implementation of rules. The legislative actors implement the rules but they exploit their ambiguities and convert them to their own benefit.

Publicity as a Potemkin Village?

At first sight, the disconnection between the official transparency norms and the actors' practices seem to be a case of organized hypocrisy. According to Brunsson, when institutional norms fail to correspond to those demanded in order to obtain efficient action, it can be expected that organizations, insofar as efficiency is important, will enact two systems, procedures and ideologies – one for coordinating actions and the other for its external image. These different arrangements should not conflict; they should be mutually independent and separated.

Actually, interviewees used to negotiating in the Council often claimed that secrecy is necessary to efficient negotiations. To what extent can transparency of the EU legislative process be considered as a situation of organized hypocrisy?

On the one hand, since the beginning of the 1990s, the development of regulations and official speech on transparency – what could constitute the "external image" of the legislative process in Brunsson's words – has been impressive. One department of the Council Secretariat, the Directorate General-F, is explicitly in charge of "communication and transparency" and the pages of the Council's website devoted to transparency have expanded over the years. Moreover, a "Transparency Register" was launched in 2012 by the Commission and the EP, to which interest groups can register if they wish to do so.

On the other hand, when one looks at actors' actual practices, they seem to be decoupled from this norm of transparency for several reasons. First of all, the main stages of the decision process take place behind closed doors (in working groups, the Coreper and the SCA, informal trialogues and conciliation committees) and are not subject to any transparency obligation. Documents published on the Council website offer information on Council sessions but not on debates in the working groups and preparatory committees even if these debates arguably accomplish the bulk of legislative work – a situation of which drafters of the transparency rules are unavoidably aware. Moreover, the Council "minutes" do not report sessions verbatim and do not mention member states' positions. Finally, the empowerment of the EP, supposed to increase transparency in the decisional process, has resulted in increased opacity of actors' positions, since measures are negotiated behind closed doors by representatives of the EP, the Council and the Commission.

Most Council members strongly believe that acting behind closed doors is necessary to ensure an efficient process. This belief collides with the fact that institutions are constrained such that displays of transparency are necessary in order to increase their legitimacy. In this context, transparency rules tend to be decoupled from actors' practices. By way of a defence during the Carvel case, the Council publicly declared:

> The Council normally works through a process of negotiation and compromise, in the course of which its members freely express their national preoccupation and positions. If agreement is to be reached, they will frequently be called upon to move from those positions, perhaps to the extent of abandoning their national instructions on a particular point or points. This process, vital to the adoption of Community legislation, would be compromised if delegations were constantly

> mindful of the fact that the positions they were taking, as recorded in Council minutes, could at any time be made public through the granting of access to these documents, independently of a positive Council decision. (Statement of Defence of the Council of the European Union in Case T. 194/94, Bxl, 13 July 1994, quoted by Stasavage 2005: 14; see also Curtin 1998: 116).

In a recent study, Laursen shows that the Council's philosophy has not changed in this respect: Council press officers claim that they cannot deliver detailed information on the positions of the member states in preparatory committees because it might weaken the presidency when it negotiates with a third party or another institution such as the EP (2012: 9). In addition, Council members generally assume that journalists are attracted by conflictual situations, which they report more easily than consensual situation. For this reason, press officers are instructed not to reveal the positions of the member states in the committees (ibid.:10).

In this context, one could argue that publicization of some parts of Council sessions and of EP sessions and committees combined with the possibility of working behind closed doors in preparatory committees, informal trialogues and conciliation committees, allow actors to comply with both transparency norms and the imperative of efficient action.

A critique of the organized-hypocrisy theory

However, the organized-hypocrisy interpretation should be qualified because it relies on a condition that the case of the EU legislative process does not meet: organized hypocrisy involves the absence of interaction between an organization's "external image" (the transparency norm in the present case) and its acts and decisions. But this parallelism amounts to underestimating the inherent complexity of implementing rules: even when actors seem to ignore rules, it does not mean that the existence of rules has no influence on their actions, nor does it mean that actors will not interpret and implement the rules in a way that is beneficial to them. In the case of the EU legislative process, the increased publicity of sessions has had an influence on the decisional process itself.

Firstly, when an external actor monitors the implementation of transparency rules, these rules have a binding effect on the legislative actors behaviour, as shown by the case of countries in which MPs mandate their ministers. Secondly, one might argue that in those cases in which MPs do not mandate their ministers, actors can act and decide without taking into account the transparency rules. However, legislative actors cannot ignore the publication of votes in the way that would be suggested by the OH theory. First, even when they not subject to a tight control by their MPs, ministers tend to publicly oppose adopted measures in order to send a signal at home (Hayes-Renshaw, Van Aken and Wallace 2006) when they expect greater domestic benefits from public opposition than costs. Secondly, when they choose not to reflect their opposition behind closed doors by a public negative vote because they believe that journalists would interpret a negative vote as a failure (Novak 2013; Laursen), they use the public vote to signal that they won the negotations. In those cases, the actors do not act and decide independently of the transparency rules, but they "convert" the rule, to resume a concept introduced by Mahoney and Thelen (2010: 18): They implement the rules but exploit their ambiguities to redirect them toward more beneficial effects. According to Mahoney and Thelen, actors are likely to convert rules when they have weak veto possibilities while still enjoying a high level of discretion in the enforcement of rules (Mahoney and Thelen 2010:19). In the Council of the EU, these two

conditions are met: actors cannot prevent the implementation of the transparency rules, but there is no guardian who would impose a strict implementation of said rules, since the Council is an intergovernmental organization most of whose members are not systematically controlled by national parliaments.

Interviews reveal that the different actors in the legislative process make strategic use of transparency rules over the course of negotiations. In some cases, actors tend to convert transparency rules as they use publicity to put pressure on their opponents. For instance, in order to speed up negotiations over the Climate Change Package, the Commission encouraged the French presidency to push debates onto the public stage (interview November 2007). According to several members of the Environment Council, the presidency uses publicity as an asset because ministers are reluctant to publicly oppose measures widely considered progressive.

National representatives in the Council also sometimes adopt this strategy. For instance, in 2011-2012, the Council and the EP debated a reform of the Most Deprived Persons Programme. This programme allowed for the redistribution of agricultural surpluses to food banks. When this programme was first designed, European agriculture was still producing surpluses but as overproduction ended, the programme began to be funded by the Common Agricultural Policy (CAP) budget. The German government asked for a reform of this programme on the grounds that its original rationale was now distorted. Several member states allied with Germany and built a blocking coalition. The French government, on the hand, asked for an extension of this programme because the French food bank had worked out a yearly plan assuming reliance on the CAP budget. This issue became a hot topic in France and the reform unpopular. After lengthy discussion with the German minister, the French minister convinced her not to oppose the extension of this programme. Apparently, among other strategic weapons, French negotiators used the fact that Germany was publicly seen as indifferent to the cause of the most deprived persons to convince the German minister to agree to extend the programme (interviews, October 2012).

Interviews allowed us to collect several cases in which actors strategically exploit publicity that offer interesting opportunities for future more in-depth case studies. Overall, these cases tend to show that a clear disconnect between official norms and practices is not likely to often occur Brunsson's claim notwithstanding (2006: xiii). The concept of "conversion" allows us to account for the effects of transparency rules in a richer and more nuanced way. Even if actors seem to act and decide independently of the rules adopted to increase the public legitimacy of their organization because they deem them incompatible with efficient action, such rules are likely to act at least as "shadows" on actors' practices. Even if OH is a fascinating and insightful theory, we believe that the case of transparency of the EU legislative process shows some limits of its applications in the fact that it overlooks that the mere existence of rules has an impact on practices even if they are apparently not followed.

CONCLUSION

The empirical investigation shows how complex the implementation of transparency is and how diverse and unexpected its effects are. In spite of the promotion of transparency in EU institutions, the legislative process remains opaque because actors enjoy a high level of discretion as to the implementation of transparency rules *and* because the crucial stages of the process are not subject to transparency rules. Still, it is inaccurate to argue that the actors merely

evade or ignore the transparency rules. One could assume that official transparency in EU institutions acts much as do human rights conventions, analysed by Hafner-Burton and Tsutsui. According to Hafner, after signing such conventions, governments can cover themselves and violate human rights because no external mechanism ensures the enforcement of these conventions (Hafner-Burton and Tsutsui 2005: 1395-1398, 1402). Mutatis mutandis, transparency rules could be considered as a form of window-dressing, the official transparency of the legislative process providing the actors with more freedom to act than the absence of official transparency, which unavoidably gives rise to suspicion. However, such interpretations of transparency rules, the realist conventional wisdom and the organized-hypocrisy theory – which, in a way, all amount to claiming that transparency "does not change anything" and that public sessions and documents are "Potemkin villages" – are inaccurate in the case of the EU legislative process. The concept of "conversion" (Mahoney and Thelen 2010) offers a fuller and more nuanced explanation of the effects of the transparency rules. In terms of accountability, the problem is obvious: except for the few cases in which transparency ensures the accountability of the actors, transparency does not guarantee more or better information on the positions of actors and is, on the contrary, exploited by those same actors. Transparency rules would increase accountability only if an external actor (such as national parliaments) effectively monitored their enforcement.

However, the analysis of decisional practices also indicates that such control is not a panacea. Transparency rules generally rely on the assumption that behind closed doors, actors openly state their positions during plenary sessions and that decisions are made on this basis. But negotiations in the Council and between different institutional actors (Commission, EP and Council) are mostly based on bilateral and trilateral exchanges. Actors themselves are not fully informed of participants' positions because negotiations imply ambiguity and asymmetrical information. In this context, one can wonder how realistic is the demand for more transparency in the EU legislative process. This paper shows that to improve the accountability of the EU legislative process, one must change actors' practices rather than reforming the transparency rules. The ensuing questions are the extent to which one can really expect this to happen, and the problematic tension between transparency and efficiency in decisions.

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