

Striking a pose: Transparency and position taking in the Council of the European Union

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Abstract. In recent years, transparency (or the lack thereof) has become a central concern of the European Union and its attempts to increase the democratic legitimacy of the legislative decision-making process. The claim regularly made is that increasing transparency increases the potential for holding decision makers to account. This study investigates the manner in which transparency in the decision-making process affects the policy positions taken by negotiators at the outset of negotiations. The findings presented suggest that increasing transparency tends to lead to polarisation of negotiations, with negotiators taking more extreme positions when they know that their positions can be observed by outside parties. The implication of this result is that advocates of transparency should be aware that there is an inherent trade-off between increasing transparency, on the one hand, and increasing the incentives to grandstand during negotiations, on the other.

Keywords: censorship; European Union; decision making; transparency

Introduction

[T]he European project . . . derives its legitimacy from democratic, transparent and efficient institutions. (The Laeken Declaration, December 2001)

The quote above is taken from the Laeken declaration made by the European Council in December 2001. This declaration aimed at setting out the future of the European project, and identifies transparency as one of the key elements from which the European Union (EU) derives its institutional legitimacy. This is due to the fact that transparency is closely linked to the process of holding political leaders to account – a process that lies at the heart of any democratic system. This accountability is designed to check possible abuses of power by those who would govern and ensure that decision makers are responsive to the demands of the public. In order to allow for this type of accountability, it is necessary to have information about the decisions being made by decision makers. The availability of information about how decisions are made in a

political system – also known as ‘transparency’ – is therefore of central concern when assessing the democratic legitimacy of a political system.

The EU has often faced criticism in terms of the democratic legitimacy of the decisions it makes and its responsiveness to public demands. This is thought to be due to the general public’s lack of knowledge as to how their interests are being represented at the EU level, and a democratic deficit in terms of the accountability of representatives in a legislative process that is considered by many to be at best semi-transparent, and at worst quite opaque. As a result, the EU has also been criticised for failing to live up to the normative ideal of democratic politics, in which decisions are representative, made in the open and are subject to public scrutiny (Lodge 1994; Follesdal & Hix 2005; Majone 1998).

Increasing the transparency of the legislative process in the EU is seen as one avenue through which the EU can increase its democratic legitimacy. From a normative perspective, increasing transparency is expected to have a number of positive effects. Transparent political systems have the potential to increase the responsiveness of decision makers to public demands (Héritier 1999), increase the legitimacy of the decisions made (Lodge 1994) and increase the probability that decision makers will be held accountable for decisions that deviate from the public interest (Lindstedt & Naurin 2010; Naurin 2006). Transparency is also thought to increase the chances of publicity (exposure of this information to a larger audience), which in turn is thought to have a civilising effect on negotiators’ behaviour when engaging in negotiations (Bohman 1996; Habermas 1996). The exact meaning of ‘civilising’ in these arguments is sometimes underspecified, but the implication is that it incentivises negotiators to put forward ‘other’ regarding and ‘public’ regarding positions, rather than focusing solely on self interest (Naurin 2007).

The oft-cited argument that transparency has an unambiguous positive effect in legislative negotiations has been criticised by some scholars, who argue that a certain amount of secrecy surrounding legislative negotiations is required in order to ensure that agreements can be reached (Heisenberg 2005; Lewis 2005; Naurin 2005; Wallace 2002). These authors take a more functionalist stance, and argue that the EU is an international organisation with a diverse set of Member States, constituents and interests – all of which have a divergent set of policy demands. This diversity of interests can make it challenging for decision makers with reputational concerns to reach consensus when those they are representing have a different set of policy demands and can observe representatives’ negotiation behaviour (Stasavage 2004, 2007; Meade & Stasavage 2008). The argument presented by these authors is that a certain amount of secrecy allows negotiators to reach compromise solutions as they do not need to posture in negotiations to keep certain interests happy.

A common feature underlying both the positive and negative arguments about the effects of transparency on the legislative process is that it is expected to affect the behaviour of decision makers. The behavioural implications for negotiators of varying the level of legislative transparency in the EU are the central concern of this article. The aim is to assess how the initial policy positions taken by Member State negotiators vary under different levels of legislative transparency. This is an element of the EU decision-making process that has been neglected to date by the literature, and so this article represents an original contribution to our knowledge about bargaining in the Council.

Essentially, the argument put forward in this article is that there is a trade-off inherent in increasing transparency between increasing the potential for accountability, on the one hand, and decreasing negotiators' ability to reach compromise solutions due to their reputational concerns, on the other. This expectation hinges upon negotiators' concern for their reputation, which can lead them to take more extreme positions than they might otherwise have done were bargaining to take place behind closed doors. Where the balance lies between transparency, on the one hand, and the efficiency of negotiations, on the other, is a normative question that requires one to decide the relative importance of transparency and efficiency, and to consider what the appropriate level of each should be. This article aims to investigate the effects of transparency on the behaviour of negotiators and thus contribute empirical evidence to the normative debate surrounding the role of transparency in legislative politics in the EU. In doing so, it introduces the first quantitative measure of the manner in which transparency policy is being applied to the legislative process in the EU. Utilising this measure to explore the effects of transparency on negotiation behaviour should provide an empirical grounding from which the normative debate concerning the role of transparency in the legislative process can proceed.

The article is structured as follows. The next section explores different aspects of transparency and identifies the form of transparency that is considered in the analyses that follow. The section following that examines different theoretical aspects of the role of transparency and censorship in the legislative process, and elucidates why increasing transparency might not always be a positive thing for those with something at stake in negotiations. It does so by considering the link between transparency, negotiator incentives relating to policy outcomes and reputational concerns, and the initial positions that negotiators take during negotiations. Once the role of transparency in the legislative process has been examined, other factors that are expected to influence Member State bargaining positions are discussed in order to control for alternate explanations of negotiator position taking. The research design section then introduces a new dataset that looks at the application of transparency

policy, and how this affects negotiator position taking at the outset of legislative negotiations. Once the research design has been established, the analysis section shall examine how transparency has been applied to a selection of important recent legislative proposals, and examine how Member State negotiators reacted to different levels of transparency and censorship. The final section concludes with a discussion of the implications of the findings presented in the article.

Defining transparency

‘Transparency’ is a broad term, and it can have several different meanings, depending on which aspect of the decision-making process one is referring to. Here we adhere to Mitchell’s definition of transparency as ‘the availability of regime relevant information (Mitchell 1998). Increasing transparency allows observers to attribute outcomes to particular actors. Alt and Lassen (2006) state that transparency ‘makes observers more able to distinguish effort from opportunistic behaviour or stochastic factors’. It does so by ‘providing actors with greater or lesser degrees of certainty about the present and future behaviour of other actors’ (Hall & Taylor 1996). Settembri (2005) argues that there are five distinct aspects of transparency that one should consider when assessing constituents’ ability to monitor legislative negotiations in the EU. These include: physical access to the decision-making process; access to records of said process; the intelligibility of the debates that are under consideration; the intelligibility of the voting results for non-experts in the field; and the clarity of interests that have a stake in these debates. Each of these aspects of transparency plays a role in determining the potential for accountability, and each is important in its own right. Despite this, some of these aspects of transparency are necessary (but not sufficient) conditions that need to be in place before others can be assessed. This article therefore only considers one aspect of legislative transparency as it applies to Council negotiations: the public’s ability to access the records of legislative negotiations.

There are a number of reasons for focusing solely on this aspect of legislative transparency. The first is that the most direct way in which to monitor negotiator behaviour, which is having physical access to the decision-making process, is for the most part impossible when it comes to legislative negotiations in the EU.¹ Most meetings at the working group, COREPER and ministerial level of negotiation in the Council take place with little or no public access granted. This rules out physically accessing meetings in order to monitor negotiators, and leaves analysing the public’s ability to access the legislative records provided by the Council (which corresponds to Settembri’s second

aspect of transparency) as the most direct way in which the public can monitor negotiator behaviour. Furthermore, the public's ability to assess the other aspects of transparency alluded to by Settembri are contingent upon access to these documents, given that one needs to know what was said in the negotiations in order to judge whether transparency policy is applied to the legislative process in the EU in a manner that can allow for the fulfilment of Settembri's remaining aspects of transparency.

How is transparency policy applied to legislative records?

Rules and regulations

The EU itself has not remained deaf to the demands for more transparency in the legislative process. This principle was enshrined in law in 2001 when agreement was reached on Regulation (EC) 1049/2001² regarding public access to European Parliament, Council and Commission documents. This legislation formalised the treaty commitments to openness in the legislative process by setting out the principles that each of the legislative institutions must apply when providing public access to legislative records.³ This regulation set the tone for what was hoped to be a much more open and transparent decision-making process in which national representatives could be held accountable for the positions they take during negotiations, thus increasing the democratic legitimacy of the decision-making process as a whole.

As a result of this effort to increase legislative transparency, the Council provides two distinct forms of legislative records pertaining to the decision-making process. The first type of record published are voting results in which one can see which Member States voted for a piece of legislation, which abstained and which voted against. Theoretically, these records should be very informative for constituents as the voting behaviour of negotiators should reflect the positions they take during negotiations. In practice, however, when votes are taken in the Council very little negative voting behaviour or abstentions are observed (Mattila & Lane 2001; Mattila 2004). This consensus-style voting behaviour tends to mask the true amount of conflict observed in the Council and the heterogeneity of positions taken by Member States during negotiations (Cross 2012). It also suggests that assessing the effects of transparency on the negotiation process using voting records is inappropriate as voting records tend not to reflect negotiator positions and preferences.

The second type of record published by the Council is documents drawn up as a record of events in Council meetings. Van Schendelen (1996) argues that having access to records relating to Council meetings and to its auxiliary bodies is very important in making the legislative process transparent as it is in

these documents that one can find the provisional agenda of meetings, any text adopted by the Council, information notes, reports on the state of discussions, and notes submitted to COREPER or the Council for approval. The Council records of negotiations are released in the form of annotated versions of the draft proposals under negotiation (Council decision 2006/683/EC, Euratom). These annotated draft proposal documents supply a detailed picture of the negotiations process. Despite the wealth of information contained within these documents, their public release is subject to the principles outlined in the transparency regulation discussed above. Examining the availability of these documents thus represents a natural way in which to judge how transparency policy is being applied to Council negotiations.

In spite of the lofty aims enshrined in the transparency legislation, the Council gave itself the ability to refuse requests for documents drawn up by the institutions which relate to matters that have yet to be decided upon, if disclosure of the document could undermine that institution's decision-making process (Regulation (EC) 1049/2001, Article 4.3). This stipulation has the potential to undermine the ability of the public to monitor their representatives during negotiations, and limit their ability to sanction legislators until after legislation has been agreed upon. It is possible for the public to make requests for documents that have not been initially released by the Council. In many cases, this can lead to the release of further information. If such a request is denied, an appeal is possible, and this again can lead to further transparency in some cases. While this might lead to speculation that transparency policy is demand-driven rather than supply-driven, when one consults the annual transparency reports issued by the Council secretariat,⁴ one finds that the total number of documents referenced in the public register as of 2010 was 1,545,754. Only 113,669 documents were requested in this period. Requests thus represent only 13.6 per cent of the total number of potentially available documents that are potentially requestable, suggesting that the application of transparency policy is supply-driven and for the most part determined within the Council.

The effect of transparency and censorship on position taking in the Council

A number of authors have explored the potential effects of legislative transparency on position taking in various decision-making contexts (Levy 2007; Meade & Stasavage 2008; Stasavage 2004, 2007). Stasavage (2004, 2007) has developed a series of game-theoretic models that capture the trade-offs inherent in increasing the transparency of a decision-making process for actors who

face competing incentives regarding how to behave during negotiations. These models revolve around the idea that negotiators are concerned with both the policy outcome agreed upon and the reputation they attain by representing the policy demands of their audience (constituents or superiors) accurately.⁵ The audience's ability to assess whether or not a negotiator is representing their interests in negotiations is predicated upon the information they have about the positions taken by negotiators during negotiations, and the policy outcome observed once a decision has been reached. The amount of information they have about negotiator behaviour *during* negotiations is determined by how transparent the decision-making process is and how much information is available about the positions negotiators take during negotiations. The models distinguish between two different bargaining contexts: one that occurs in an open-door setting and one that occurs in a closed-door setting. It is argued that the type of setting in which bargaining takes place can strongly influence the positions taken by negotiators during negotiations.

The first negotiation setting to consider is that which takes place in the open. Open-door bargaining tends to increase the potential for holding decision makers to account as an audience can monitor how their interests are being represented in negotiations. Stasavage (2007) points out that this very capability to monitor negotiations can lead to negotiators posturing and taking extreme positions in order to impress upon their audience that they are indeed representing their interests. This can lead to negative outcomes as debates become polarised, with negotiators more concerned with their reputation with an audience than with reaching policy agreements. This is especially problematic when negotiators are privy to private information unavailable to an audience about the true value of reaching an agreement, but do not utilise this information due to reputational concerns. Private information could include access to reports unavailable to an audience, or policy expertise gained by having experience in a particular policy area. If negotiators do not utilise private information when bargaining due to reputational concerns, this can lead to suboptimal outcomes for both negotiators and the audience they represent. This is due to the fact that negotiators are incentivised to take extreme positions in order to demonstrate that they are faithfully representing an audience's interests, rather than to utilise their private information. This suggests that taking a more moderate position would lead to a better policy outcome.

In contrast, when bargaining takes place behind closed doors, the amount of information that an audience has about the positions taken by their representatives significantly decreases. This in turn decreases the ability of the audience to assess negotiator behaviour and attribute a positive or negative reputation as they cannot verify how negotiators behaved during negotiations.

This allows negotiators more flexibility in the positions they take, and as a result, they can better utilise their private information about the value of a particular policy decision, and have less incentive to grandstand and adopt extreme positions due to reputational concerns. This should lead to a decrease in the polarisation of policy positions observed in negotiations, and allow for more compromise in the decision-making process.

When one considers the structure of legislative bargaining in the Council of Ministers and the incentives faced by negotiators under varying levels of transparency, it is clear that the predictions made by the Stasavage models are relevant to Council decision making. First, negotiators who are involved in Council negotiations include ministers who are directly accountable to their constituents at election time, and civil servants who are in turn accountable to their ministers. Each type of actor is in a principle-agent relationship with their audience (constituents/superiors, respectively) and can thus be expected to have reputational concerns with regard to their behaviour during negotiations. Second, negotiators are aware of whether a document containing an expressed policy position is to be released at the beginning of a meeting, and can adjust their negotiation behaviour accordingly.⁶ This is important for the causal relationship posited here between legislative transparency and position taking as it establishes that negotiators can control what information about their policy positions is released to the public.⁷ When a high level of transparency is established, this is likely to encourage negotiators to grandstand and put forward more extreme positions to demonstrate their willingness to drive a hard bargain. In contrast, when negotiations take place in a less transparent environment, negotiators have less incentive to take extreme positions as the reputational payoffs for doing so are lessened. Given the theoretical arguments presented in this section, and their applicability to Council decision making, the following hypothesis relating to the effect of transparency on position taking in the Council is expected to hold:

H1: As transparency increases, the extremity of negotiators' initial positions is expected to increase.

Alternative factors affecting the extremity of negotiators' initial positions

While the effect of transparency on negotiator position taking is the focus of this article, this effect alone does not represent a complete data-generating process. As a result, it is equally important to consider the influence of other

factors that might affect the initial policy positions taken by negotiators. The existing literature in this area identifies a number of potentially influential variables that shall now be explored. The first of these relates to the saliency that a negotiator attaches to the issue under negotiation. The concept of 'saliency' is found in many accounts of bargaining, and captures the value that negotiators place on achieving their most preferred outcome, or more specifically, the intensity of negotiator preferences over outcomes (Achen 2006; Hinich & Munger 1997). When actors attach a high degree of saliency to an issue, they are more likely to take an extreme initial position in an attempt to extract concessions from other actors in the negotiations process (Bailer 2011). Of course, if other negotiators realise the position taken by a negotiator is just to extract concessions, this is unlikely to work; however, there is always uncertainty about whether this is the case. As such, negotiators can leverage this uncertainty to take positions that are more extreme than their true preferences when the issue at stake is salient to them. The high salience of the issue increases their willingness to accept the costs associated with being seen as extremist. This leads to the following hypothesis:

H2: As the saliency an actor attaches to an issue increases, the extremity of negotiators' initial positions is expected to increase.

A government's position on the pro-/anti-EU integration dimension is also expected to affect the positions governments take at the outset of negotiations (Hix 1999; Hix & Lord 1997; Marks & Wilson 2000; Mattila 2004). This dimension captures Member State government's attitudes towards the appropriate level of EU integration and the transfer of competencies to the EU level. A Member State government's position on this policy scale is expected to affect negotiator position taking in the Council as anti-EU integration Member States will attempt to block the progress of legislative negotiations and generally be disruptive in an attempt to slow the integration process. It is assumed that disruptive behaviour blocks further integration as the Commission has generally been found to introduce proposals that seek to increase EU integration because it anticipates having a role in implementing and enforcing such legislation (Mattila 2004; Thomson et al. 2006). Disruptive behaviour in the form of extreme position taking thus reduces the chance that legislative proposals introduced by the Commission will be agreed upon. This leads to the following hypothesis:

H3: As a government's position on the pro-/anti-EU integration dimension moves towards the anti-integration end of the policy scale, the extremity of negotiators' initial positions is expected to increase.

The relative size of each Member State in negotiations is also examined to assess whether size affects position taking during negotiations. Relative size is likely to affect negotiator position taking as it relates to their potential to influence negotiations. Larger Member States have more power to push through their positions in terms of material resources, bureaucratic resources and voting power. They are thus more likely to be successful at extracting concessions from other negotiators when they take extreme positions. In contrast, small Member States can easily be ignored as they rarely have the power to force their positions on others. Taking an extreme position is thus less likely to be successful. Previous research has found that larger Member States tend to go it alone more often. They tend to vote against the majority more often than smaller Member States (Hosli et al. 2011; Mattila & Lane 2001), and there is also some evidence that larger Member States tend to take different positions from smaller ones, especially in the years following the 2004 enlargement (Thomson 2011). It is therefore expected that:

H4: Negotiators from larger Member States take more extreme initial policy positions.

The voting procedure associated with a proposal under consideration is also linked to variations in Member State power. It is important to analyse the voting procedure as it relates to whether or not negotiators have veto power in negotiations (Tsebelis 2002). The dataset analysed here includes proposals decided under unanimity and qualified majority voting rules. The voting rule is expected to influence the initial positions of negotiators as it relates to the relevance of strategic considerations under varying levels of voting power. Under unanimity, each Member State has equal veto power over a proposal and thus equal *a priori* power to influence outcomes. The fact that each actor has veto power over the proposal implies that there is little need to take extreme positions as actors can veto any outcome that does not satisfy them. In contrast, under qualified majority voting this veto power is removed, and thus there are strategic incentives to take extreme positions so as to extract concessions from others during bargaining. It is therefore hypothesised that:

H5: Negotiators are expected to take more extreme initial positions under the qualified majority voting rule.

A number of control variables are included as they are commonly found in the literature. A Member State's position on the left–right ideological dimension is included to control for the effect of differences in ideology between

governments. The idea here is that because a government's ideological position is used to distinguish itself from non-government parties at the domestic level, the positions governments take in EU negotiations can be utilised to emphasise these ideological distinctions (Falkner et al. 2005; Falkner & Treib 2008; Bailer 2011). The empirical evidence with regard to the influence of the left-right dimension on EU politics is rather mixed. Some authors, when looking at Member State voting behaviour and the official statements they lodge into Council records find evidence supporting the idea that the left-right dimension influences Council decision making (Hagemann 2008; Hagemann & Hoyland 2008). In contrast, other authors find no support for this hypothesis (Cross 2012; Veen 2011; Zimmer et al. 2005). Government left-right position is therefore controlled for.

The number of controversies in each proposal is also controlled for, as this can be expected to influence the extremity of negotiators' initial positions. This is due to the fact that negotiators can be disruptive across a series of different issues if such behaviour would improve either the policy outcome agreed upon or the reputation they acquire from their constituents. Essentially, more controversial issues provide more opportunities to be disruptive and should therefore be controlled for. Similarly, the level of involvement of the EU in a particular policy area is also controlled for as policy areas in which the EU is particularly active are likely to be subject to more controversy and thus affect position taking in the Council.⁸

Finally, it was decided to exclude the formal role of the European Parliament (EP) from the analysis for the sake of maintaining a parsimonious model. It is not clear how the formal inclusion of the EP in the negotiation process would directly affect individual Member States' positions. The study argues that initial positions are affected by the level of transparency through consideration of the policy outcomes likely to accrue based on negotiator's initial position, and consideration of the reputation gained by the negotiator for taking a particular position under different levels of transparency. The formal inclusion of the EP in the decision-making process should not directly affect either of these considerations. First, Member State negotiators are unaware of the EP position at the outset of negotiations as such a position has not been determined. This should limit the EP's influence over the initial positions of Member State negotiators in terms of concerns over final policy outcomes. Second, it is unclear how a change in the formal status of the EP under codecision would impact upon the reputational concerns of negotiators in the Council. Member State negotiators are assumed to be concerned with the reputation they receive from taking their own position. The EP therefore should not have a direct effect on the reputational concerns of negotiators.

Research design

In order to test the theoretical hypotheses put forward in the previous section, it was necessary to collect a large amount of information about legislative proposals that have been negotiated in the Council. A number of selection criteria were utilised to identify the proposals that are analysed. The first selection criterion held that the proposals under consideration had to have been in some way controversial when they were negotiated, with differences of opinion between negotiators as to how the final policy outcome should look. 'Controversy' here refers to disagreement among negotiators as to what the final piece of legislation should look like, and manifests itself through negotiators taking different positions from one another. Some degree of controversy is required as the article seeks to explore the determinants of differences in negotiator positions, and if all negotiators agree upon the ideal outcome, there are no differences to explain.

In order to ensure a minimal level of political importance, the proposals chosen must have been the subject of some substantive discussion in *Agence Europe* – the main independent news reporting service covering EU affairs. Choosing proposals that were mentioned by *Agence Europe* ensures that the proposals under consideration were of some interest to the readership of this news service, which mostly consists of experts in EU affairs and policy makers with a stake in the legislative agenda (Thomson & Stokman 2006). This avoids the inclusion of proposals that raised little controversy during negotiation.

Proposals were limited to those falling under the codecision and consultation procedures as these are the most common legislative procedures utilised in EU decision making.

Furthermore, the proposal had to have been made by the Commission between the introduction of the Amsterdam Treaty on 1 May 1999 and the introduction of the Lisbon Treaty on 1 December 2009. The reasoning behind this selection criterion is that one must hold the legislative procedures under consideration constant across the proposals, and both the Amsterdam and Lisbon treaties include important changes to these legislative procedures.

The dataset upon which much of the following analysis is based upon has been constructed through an extended series of semi-structured interviews with stakeholders involved in the negotiation of the proposals under consideration.⁹ In these interviews, the stakeholders were first asked to identify the most important controversies that arose during negotiations. They were then asked to identify and place the different initial positions that were taken on these controversies on 100-point policy scales, and then place the actors involved on these policy scales based upon the initial position they

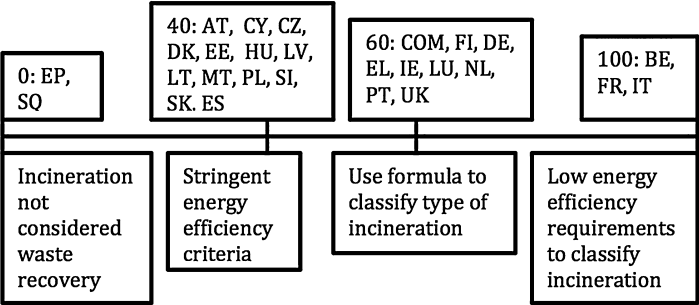


Figure 1. Whether or not incinerating waste can be considered a form of waste recovery.

supported. This approach to analysing the legislative process in the EU is well established, and has provided significant insight into the manner in which negotiations proceed and controversies are resolved.¹⁰

It is useful at this stage to provide an example of this research design in action in order to illustrate the data collection process. Figure 1 represents an issue that was identified by stakeholders as having arisen during the negotiations for a waste disposal proposal introduced in 2005 (COD/0281/2005). The specific issue that arose was whether or not the incineration of waste would be allowed as a method of waste recovery. A number of distinct initial positions were identified as having arisen during negotiations that revolved around the energy efficiency of the incineration process as a classification mechanism for existing incinerators. The most conservative initial position in negotiations was not to classify waste incineration as a type of waste recovery (position 0). This position represented the status quo – the case that would accrue should no agreement be reached in the Council. At the other extreme of the policy scale (position 100), the Italians, Belgians and French argued that incineration should be allowed, and relatively lower energy efficiency standards should be attached to the incineration process. The Commission and a number of Member States were placed between these extreme initial positions at position 60, and advocated utilising a formula to determine which types of incinerators could be classified as waste recovery. This was the agreement settled upon following negotiations. The final initial position of note on this particular issue was taken by the remaining Member States (position 40), who argued for more stringent energy efficiency criteria to apply to the incinerators in order to be considered as waste recovery.

Each issue in the dataset is specified in this manner, which allows one to recreate a detailed spatial model of the negotiations and the issues that arose therein. In total, there are 4,672 negotiator positions nested within 272 distinct controversial issues that are in turn nested within 111 different legislative

proposals. These data are then utilised to calculate the extremity of negotiators' initial positions for each of the issues under consideration. The extremity of a negotiator's initial position is simply the distance between that actor's initial position and the mean of all negotiator positions for each issue in the dataset. This measure has been used extensively in the literature to capture the heterogeneity of actor positions (Bailer 2004, 2011; Arregui & Thomson 2009).

In order to capture the level of censorship and transparency for each proposal in the dataset, the Council records published online were consulted. These records contain references to documents that record Member State policy positions in each meeting that took place for each of the proposals under consideration. When releasing a document, the Council has three options with regard to how it is released. A document can be either fully available in unedited form; partially available, in which the positions of negotiators are recorded, but the identity of the negotiator taking the position has been redacted; or unavailable, where the document has been withheld from publication. The transparency measure is constructed using the type of censorship applied (if any) at the proposal level. The measure is simply the number of documents fully available as a percentage of the total number of documents included in the records for each proposal in the dataset. The distinction between partially available and unavailable records is ignored in this measure, but this reflects the fact that partially available documents do not allow the public to identify the negotiators taking a position and thus allow negotiators to take positions without the possibility of being held accountable. A total of 1,873 distinct documents are included in the analysis.

A series of other predictors of the extremity of Member States positions are also included in the model. The saliency measure was collected during the aforementioned interviews, and is defined as the level of importance each actor attached to their initial position for the issue under negotiation. The saliency measure is constructed as a 100-point scale, with a score of 0 representing issues of no importance, a score of 50 representing issues of average importance and a score of 100 representing issues of the utmost importance to the negotiators involved.

A government's position on the left–right scale and the pro-/anti-EU integration scale were taken from the Benoit and Laver (2006) study, which estimates party positions using expert interviews. The measure utilised here weights the position of each government party on these scales by the number of cabinet seats they hold in government. A Member State's population, used as a proxy to assess Member State size, is taken from Eurostat data. The voting procedure associated with a particular proposal was collected during the interview process, and is coded 1 for qualified majority proposals and 0 for unanimity proposals. The number of issues per proposal is simply the number

Table 1. Summary statistics of dependent and independent variables

Variable	Mean	Standard deviation	Minimum	Maximum
<i>Dependent variable</i>				
Extremity of position	27.92	20.35	0.00	94.12
<i>Independent variables</i>				
Percentage of documents available	84.46	25.53	0.00	100.00
Left-right	10.99	3.11	5.78	16.99
Pro-/anti-integration	7.74	2.90	1.92	17.6
Population	22.56	25.04	0.4	82.54
Saliency	55.61	24.26	0.00	100.00
Legislative procedure	0.81	0.39	0.00	1.00
Number of issues	3.31	1.30	1.00	6.00
Importance of policy area	1.87	0.97	1.00	3.00

Note: N = 4,672.

of distinct controversies that interviewees identified for each proposal in the dataset. The importance of a policy area is measured using Alesina et al.'s (2005) measure, and is coded 1 for policy areas of low importance, 2 for policy areas of medium importance and 3 for policy areas of high importance. Table 1 provides summary statistics for the proposals in the dataset.

Analysis

The first set of analyses presented in Table 2 details how censorship is applied to the proposals in the dataset, divided across the different policy areas dealt with in the Council. It displays the total amount of documents examined for each Council grouping, and breaks these documents down into groups according to whether they were fully available, partially available or not available. The numbers in the table represent the percentage of each category of document. To aid interpretation of the results, a measure of EU involvement in a particular policy area is included to demonstrate the relative importance of the policy sector at the EU level (Alesina et al. 2005).

As can be seen, there is a large amount of variation in the level of transparency observed and in the type of censorship applied across each Council grouping. The Council groupings with the most censorship in the form of unavailable documents include those dealing with fisheries with 40.24 per cent of documents unavailable, economic and financial affairs (ECOFIN) with

Table 2. Percentage of documents available by Council grouping

Variable	N	Available	Partially available	Not available	EU role
Internal market	367	78.75	0.00	21.25	Large
Environment	307	98.04	1.95	0.00	Small
Agriculture	292	80.82	2.74	16.44	Large
Justice and home affairs	202	85.64	9.41	4.95	Small
Transport	164	84.76	3.05	12.20	Small
General	121	88.43	6.61	4.96	Small
Employment	112	70.53	29.46	0.00	Large
Fisheries	82	59.76	0.00	40.24	Large
Culture	67	100.00	0.00	0.00	Small
Ecofin	61	50.82	0.00	49.18	Medium
Health	31	100.00	0.00	0.00	Large
Telecommunications	28	100.00	0.00	0.00	Small
Energy	18	27.78	0.00	72.22	Small
Education	12	100.00	0.00	0.00	Small
Development	6	83.33	0.00	16.67	Small
Industry	3	100.00	0.00	0.00	Small

Note: The estimate of how involved the EU is in a particular policy area is taken from Alesina et al. (2005).

49.18 per cent of all documents unavailable, and energy with 72.22 per cent of all documents unavailable. This seems to be in line with the transparency commitments of the EU as these policy areas are generally regarded as highly sensitive, with the vital interests of Member States under negotiation. For instance, one of the proposals considered under the ECOFIN Council grouping was whether or not to establish a minimum standard rate of value added tax across all Member States. Such an undertaking has significant consequences at the domestic level for constituents and governments alike given the sensitive nature of harmonising tax policy at the EU level, thus one can assume that the vital interests of Member States were in play. This would justify the application of censorship to documents based upon Article 4 of the transparency regulation (Regulation (EC) 1049/2001). Similarly, proposals included under the fisheries Council grouping included one laying down the rules for the provision of structural assistance to the fisheries sector, and another on the organisation of the market for fishery and aquaculture products. These proposals also deal with very sensitive topics for Member States with important fishery sectors in their economy, and thus warrant some form of censorship under the aforementioned transparency regulation.

Partially releasing documents appears to be a much less utilised form of censorship in the Council, given the data presented above. It is most often utilised in the employment Council grouping and also sometime in the general affairs Council and the Justice and Home Affairs Council. This might be due to the fact that redacting Council records is quite a labour intensive process, with each document having to be read and references to Member State identities removed manually. It would also make sense in terms of the Council policy towards appeals of their decision to censor documents. If a member of the public believes the Council's reasoning behind not publishing a document online is not in line with the transparency commitments outlined in Regulation 1049/2001, they can appeal the decision. If upon review the document can be released in redacted form, this is done. This process can only take place when the initial decision not to release the document has been reviewed, and this is likely to cause the number of documents partially available to be lower than the number of documents unavailable. This would go some way to explaining why partially available documents are less often observed than unavailable documents.

In contrast to policy areas subject to a large amount of censorship of records, policy areas including culture, health, telecommunications and education appear to be transparent with each having 100 per cent of documents surveyed available for the proposals in the dataset. It must be acknowledged, however, that the relatively low total number of documents for each of these categories implies a large amount of uncertainty with regard to this finding.

The Council grouping dealing with the environment is interesting as it is subject to a reassuringly high level of transparency, given the EU's commitments to legislative transparency in this policy area. Of the 307 documents analysed, 98.04 per cent were fully available. This is in line with Council decision 2005/370/EC, commonly referred to as the 'Aarhus Convention', which dictates that the public should have full access to the decision-making process when the issues under negotiation are related to the environment. The agreement was designed to improve public access and participation in environmental policy making, and the data presented in Table 2 demonstrates that this commitment is being adhered to.

The data presented in Table 2 also provide descriptive information about the application of transparency policy to the legislative process for the proposals under consideration, but do not consider how this affects negotiator behaviour in the Council. The second set of analyses, presented in Table 3, considers negotiator behaviour by examining the determinants of the extremity of Member State policy positions.

Figure 2 clarifies the substantive size of the significant effects from the fitted model by displaying the adjusted predictions for each variable with

Table 3. Multi-level regression analysis of the extremity of actor positions

	Model 1
<i>Fixed effects</i>	
Percentage of documents available	0.0926* (0.037)
Left–right	0.0891 (0.084)
EU integration attitudes	0.106 (0.093)
Population	0.0302** (0.009)
Saliency	0.215*** (0.012)
Voting procedure	4.700* (2.338)
Number of issues	–0.312 (0.775)
Importance of policy area	2.310* (1.012)
Constant	–1.369 (4.663)
<i>Random effects</i>	
Proposal constant	1.849*** (0.16)
Issue constant	2.373*** (0.06)
Residual constant	2.714*** (0.01)
N	4,672

Note: Multi-level models with random intercepts. Standard errors in parentheses. Member State positions are nested within issues and within proposals. * $p < 0.05$; ** $p < 0.01$; *** $p < 0.001$.

associated confidence intervals at regular intervals as one goes from the minimum to the maximum of each. Continuous variables are held at their means, and the voting procedure variable, which is categorical, is held at zero (representing unanimity voting) when calculating the adjusted predictions.

The results presented in Table 3 lend support to the idea that the level of transparency associated with negotiations affects the level of polarisation of initial policy positions taken. The model illustrates that as the percentage of documents that are fully available increases, actors tend to take more extreme initial positions. Panel 1 of Figure 2 illustrates the substantive size of this effect, showing that when a proposal goes from being completely censored to completely transparent, negotiators' initial positions tend to be 9.26-policy scale point more extreme. This lends support to the idea that increasing transparency leads to negotiators taking more extreme positions so as to impress an audience. This finding also suggests a trade-off between increasing transparency to allow for accountability, on the one hand, and encouraging grand standing by negotiators, on the other.

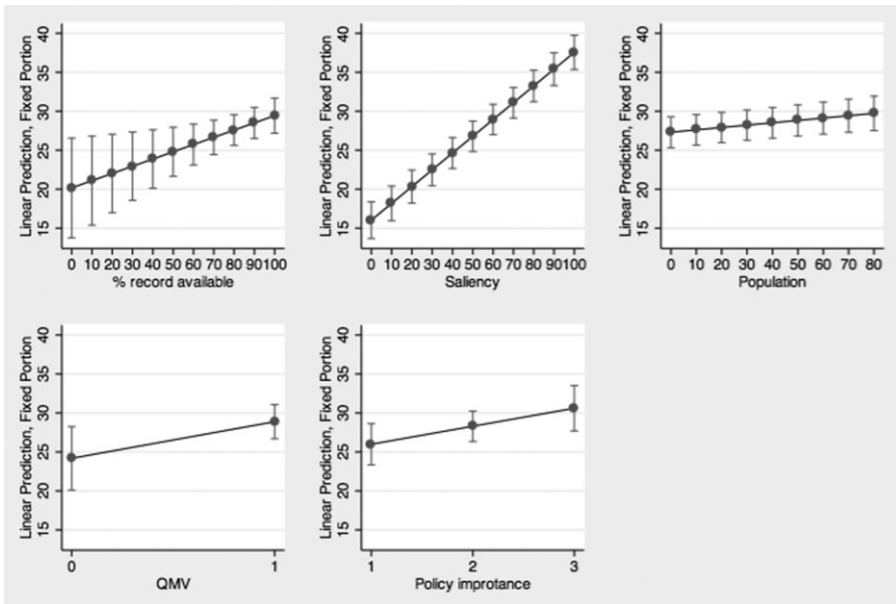


Figure 2. Predicted values of significant variables.

No significant effects are found for a government's pro-/anti-integration position affecting position taking, as well as for the public support for the EU variable included in the analysis. This finding is in line with the findings presented by Cross (2012), Veen (2011) and Zimmer et al. (2005), and suggests that negotiators are not directly influenced by the ideological concerns of both the government being represented and constituents' attitudes towards the EU when negotiating in the Council. This finding could be due to the fact that secondary legislation in the EU is seen to have a rather technical nature, thus making ideological concerns less salient. However, it is somewhat of a concern for those interested in the democratic legitimacy of such decisions, especially as the EU gains competencies in more and more policy areas.

The saliency that a negotiator attaches to the issue under negotiation is found to have the largest effect upon the extremity of his or her initial position, with a negotiator that attaches 100 saliency points to an issue taking an initial position 21.5 policy scale points more extreme than one that attaches 0 saliency points to an issue. This finding is illustrated in the top middle panel of Figure 2, and suggests that indifferent negotiators are happy to go along with compromise policy solutions near the mean, whereas those who attach a great deal of importance to an issue tend to take aggressive negotiation stances that move away from the mean policy position for the issue under consideration.

This evidence fits well with the idea that negotiators can leverage others' uncertainty about their true preferences in order to extract concessions when bargaining, and are more willing to use these tactics when the issue at stake is highly salient.

Of the power-related variables, a Member State's population does have a small but significant effect on position taking in the Council, with Germany, with the largest population, taking an initial position that is 3.02 policy scale points more extreme than Malta, which is the country with the smallest population. This suggests that negotiators from larger Member States tend to be more assertive during negotiations and take more extreme initial bargaining positions in the knowledge that they have the power to affect negotiation outcomes in their favour. The voting procedure also has a significant effect upon the extremity of negotiator initial positions, with negotiators taking initial positions that are 4.7 policy scale points more extreme under the qualified majority voting rule. This is in line with the theoretical expectation that negotiators take more extreme initial positions under the qualified majority voting rule. Negotiators take extreme initial positions because they expect to be accommodated in some manner. In contrast, there is little strategic need to take extreme positions under unanimity as negotiators have veto power over any outcome with which they are unsatisfied.

Finally, of the control variables, the number of controversial issues that arose during negotiations did not affect negotiator position taking, while the importance of a policy area at the EU level did. This suggests that negotiators are aware of the overall importance of a policy area at the EU level, and adjust their behaviour and position taking accordingly.

Conclusion

This article has sought to assess how transparency policy is applied in the EU Council of Ministers, and whether different levels of transparency in the legislative process affects the extremity of negotiators' initial policy positions. The article first outlined the EU's commitments to legislative transparency and the exceptions to this policy that apply when the vital interests of Member States are at stake or when disclosure of information could negatively affect the negotiation process. The first set of analyses presented lent support to the idea that the Council generally applies transparency policy in line with the commitments made in the transparency regulation agreed upon in 2001 as censorship was found to be highest in policy areas that deal with sensitive issues for the proposals in the dataset. Relatively high levels of transparency are observed in highly salient policy areas like agriculture and the internal market

(80.82 and 78.75 per cent of surveyed documents fully available, respectively). The level of transparency observed in the environmental policy domain is directly in line with the commitments made in the Aarhus declaration. These findings are encouraging as they demonstrate that a huge effort is being made to increase transparency and that the transparency rules are being applied appropriately for the most part.

While at face value this increase in transparency might be heralded as a positive thing, the major point of this article was that a more critical perspective is needed. In line with many of the authors mentioned in the introduction, it was argued that increasing transparency has implications for negotiator behaviour. The second set of analyses presented empirically tested the expectations that emerge from Stasavage's (2004, 2007) models regarding the effects of transparency on negotiator behaviour and position taking. It specifically considered how the level of transparency associated with a particular proposal affected the extremity of initial positions taken by Member State negotiators during negotiations. The findings presented demonstrated that the level of transparency does indeed affect the initial positions taken by negotiators, with a high level of transparency being associated with more polarised debates. This polarising effect has implications for the normative argument that legislative transparency is an always desirable characteristic of the decision-making process. Rather than leading to less polarisation as expected by Habermas (1996), Bohman (1996) and other deliberativist scholars, it leads to more polarisation as expected by Stasavage (2007), Sunstein (2002), and Zaller (1992). It also has implications for those concerned with negotiation efficiency and the use of private information by negotiators as this information is less likely to be utilised when negotiations take place in an open-door setting (Meade & Stasavage 2008).

When the European Council stated that the legitimacy of the EU project is derived from having democratic, transparent and efficient institutions, as it did in the Laeken Declaration in 2001, it failed to recognise that there are inherent trade-offs between transparency and negotiation efficiency and that determining the relative importance of each of these characteristics of the legislative process requires a normative debate about their relative merits. This article has aimed to contribute to this debate by providing empirical evidence of how transparency can affect negotiator behaviour during negotiations. It opens the door for further empirical research into this topic, and can inform the debate surrounding the role of transparency in the EU. Engaging in an empirically informed debate about the role of transparency in the EU will allow for a more critical assessment of the merits of increasing legislative transparency, and should thus allow for better policy making to be pursued in this area.

Notes

1. Physical access can also be facilitated through the provision of video records of deliberations. The Council does provide some video coverage of deliberations, but they are only available for the ministerial level and still subject to censorship where deemed appropriate. An example of exactly this type of thing happening can be seen in the archive footage of the ECOFIN meeting on 15 May 2012. At about 31 minutes into the video, the Polish representative asks about the procedure for submitting a Commission declaration into the record. Following some confusion, he turns off his microphone and is told by an unidentified meeting participant to read the declaration with the microphone off. While it seems the unidentified participant suggests this in a joking manner, it is illustrative of the awareness meeting participants have of the public nature of their deliberations and the control they have over what information reaches the public domain. The video is available here: <http://video.consilium.europa.eu/webcast.aspx?ticket=775-979-11264> (15 May 2012, 10:00 CET). A further problem with this type of access in terms of the provision of information is the multilingual nature of these deliberations, which makes it difficult for those without extensive linguistic skills to understand all the statements being made. In this sense, the annotated records translated by the Council secretariat provide more useful information to the public. Finally, audiovisual records are only required to be maintained on the Council website for a month after a meeting takes place (Council Decision 2006/683/EC, Euratom, Article 8.5).
2. This regulation was amended in 2008 to take account of a number of developments including the Lisbon Treaty and the Aarhus Accord. These amendments did not much alter the content of the regulation, but rather clarified a number of issues relating to the application of the regulation in the broader legislative framework.
3. 'Records' here refers to any content relating to the activities of institutions regardless of its medium. It thus includes written submissions, alongside audio, visual and audiovisual recordings (Regulation (EC) 1049/2001, Article 3.1).
4. Available online at: www.consilium.europa.eu/documents/policy-regarding-access-to-council-documents/basic-texts-on-transparency.aspx?lang=en
5. The structure of the model thus parallels arguments relating to policy seeking (Budge & Herman 1978) and office seeking (Riker 1962) in standard accounts of representative motivations.
6. Confirmation of this point was received from the transparency team in the Council secretariat.
7. This ability to control access to negotiation records is enshrined in the Council rules of procedure, which state: 'At the request of a Member State, documents which . . . reflect the individual position of that Member State's delegation in the Council shall not be made available to the public under these provisions' (Regulation (EC) 1049/2001, Annex II, Article 11.6).
8. A series of other control variables were also tested, but were excluded from the final model for the sake of parsimony. These included testing for an effect of the transparency rules change in 2001, and a number of different left-right and power measures.
9. The data collection process and those involved in the effort are described in Thomson et al. (2006, 2012).
10. Important studies in this vein include: Bueno de Mesquita and Stokman (1994), a 2004 special issue of *European Union Politics* (vol. 5.1) and Thomson et al. (2006).

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