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# **Transparency vs efficiency?**

## **A study of negotiations in the Council of the European Union**

Sara Hagemann\* and Fabio Franchino^

### **Abstract**

Recent studies suggest there is a direct trade-off between transparency and efficiency in legislative politics. We challenge this conclusion and present a bargaining model where one particular kind of transparency - the publication of legislative records - works to overcome problems of incomplete information. We also present empirical findings from legislative activities in the Council of the European Union from 1999 to 2014, and from 23 interviews with senior officials in Brussels. Our results show that increased transparency, in the form of publication of legislative records, does not lead to gridlock or prolonged negotiations. On the contrary, recordings of governments' positions help facilitate decision-making as it increases credibility of policy positions. This, in turn, lowers risk of negotiation failure and screens out marginal amendments.

**Keywords:** bargaining; Council of Ministers; European Union; legislative behaviour; transparency.

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## **Introduction**

The literature on transparency and accountability in legislatures has made impressive progress in recent years, both in the study of domestic and international negotiation contexts. A number of important studies have shed light on the consequences of increased transparency in politics for the individual and collective behaviour of elected representatives (cf. Carey, 2008), as well as for negotiation processes and policy outcomes (e.g. Stasavage, 2004). Interesting results have also emerged regarding the effect of transparency in public policy-making for citizens' perceptions (e.g. De Fine Licht, 2014), and for citizens' behaviour and electoral engagement (cf. Fung et al., 2007; Lassen, 2005).

However, this article challenges a prevailing conclusion from recent contributions to the debate: that a direct trade-off exists between transparency and efficiency in policy-making (e.g. Besley and Prat, 2006; Fox, 2007; Meade and Stasavage, 2008; Naurin, 2007; Prat, 2005; Stasavage, 2004, 2007). We argue against this conclusion by presenting a model of government bargaining in the Council of the European Union (hereafter 'the Council'), as well as empirical results from a dataset on Council decision-making from 1999 to 2014. We combine this analysis with in-depth interviews with 23 politicians and senior officials involved in government negotiations in Brussels.

Contrary to a trade-off between transparency and efficiency, our analysis shows how legislative decision processes can benefit from one particular kind of transparency, namely the publication of votes and legislative decision records. We present a bargaining model where negotiators decide whether to accept, amend or reject a proposal in a regime with no public legislative records ('light transparency') compared to a regime where legislative records are made publicly available ('regulated transparency'). Our conclusion is that, in an environment with light transparency, negotiators will have little information about the strength of policy positions of co-negotiators, and hence may misinterpret their proposals for policy change. Such misinterpretations can result in rejection or further amendments of proposals, which may protract negotiations or, in a worst case, lead to bargaining failure. Conversely, environments with high transparency raise the reputational costs of commitments and hence increase credibility of policy signals. This in turn lowers the risk of negotiation failure and increases efficiency of decision processes as it screens out marginal

amendments. We find support for these conclusions in our empirical analysis and further substantiate the findings as our interviewees explain how formal recordings of member states' positions affect the informal 'culture of consensus' which the Council has so famously operated within.

### **Transparency and its consequences**

High levels of transparency in legislative politics are found to improve the relationship between citizens and elected politicians in a number of ways: Better access to information forces politicians to be responsive to their electorates (Alt & Lassen, 2006; Besley and Burgess, 2002; Stasavage, 2004), while voters are also more likely to engage and vote in elections when they feel they can hold politicians to account (Lassen, 2005).

However, recent analyses have made it clear that transparency is not without its draw-backs. One significant finding is that closed-door decision-making may produce better policy by enabling legislators to discuss and make their policy choices without considerations about their individual performances and pressures from the public (e.g. Meade and Stasavage, 2008; Prat, 2005; Stasavage, 2004). For example, Stasavage (2003; 2004) and Ottaviani and Sørensen (2006) specify conditions under which transparency can produce worse public policy outcomes than non-transparency, and result in polarization among representatives. Transparency in legislative decision-making may also reveal information about decision-makers' potential need for external consultation by lobbyists and experts. In the EU context, Naurin (2007) has shown that transparency reforms had a negative effect on representatives in the European Council, the meeting of EU Heads of Government, who feared that the negotiations between lobbyists and politicians would become public. Naurin concludes that publicity led to less efficient negotiations and fruitful side-deals, leading to limited improvements in policies.

In addition to problems of inefficient policy outcomes, Putnam (1988) has taught us that transparency may even pose a problem to negotiators' ability to reach agreement in the first place: Whereas decision-makers may be willing to consider a wide range of options for reaching agreement in a private negotiation setting (i.e. the 'win-set' of policy options in the bargaining space is not empty), public scrutiny may narrow such options and leave negotiators with a more limited range of possible agreement outcomes. In fact, if negotiations with small win-sets are not kept secret,

they can be jeopardized by so called ‘public commitment strategies’ (Fearon, 1994; Schelling, 1960): In order to gain over-proportionally (or avoid that other actors gain over-proportionally) negotiators might commit themselves publicly to a negotiation position. The commitment increases the transaction costs of moving away from this negotiation position. So if more than one negotiator is using this strategy, the likelihood of negotiation failure increases as the additional costs of moving away from the committed position are cutting into the existing win-set. Hence, an increase in these self-induced costs might reduce an existing win-set with a variety of feasible equilibrium outcomes into an empty set where no solution is achievable.

Adding to this literature, Stasavage (2004) investigates the implications of increased transparency in international organisations, and looks into the consequences of public scrutiny of decision-making in the EU Council; i.e. the same institution as in our analysis below. In his analysis, Stasavage presents a two-level model of negotiations between two government representatives where a) members of the public are uncertain about whether representatives share their views and b) representatives have private information about the minimal offer that the public of each side would find acceptable. Representatives are concerned about both policy and their public’s ex-post assessment of the probability that they are unbiased. As long as this reputational concern is sufficiently strong, he shows that transparency ensures representatives take into greater account their public’s preferred outcome, and that transparency increases the likelihood of posturing if the public perceives a risk of bias. ‘Posturing’ refers to assuming an uncompromising position that increases the risk of negotiation failure, and hence falls into the category of public commitment strategies mentioned above.

We do not downplay these and other negative consequences of transparency. Yet, in light of the empirical record and the peculiarities of Council negotiations – regular, fragmented across formations and with a large and diverse set of negotiators around the table - we argue that EU transparency rules have facilitated negotiations *among* government representatives. Rather than the odd and cheap public remark after a Council meeting, the publicity produced by the current transparency regime – in form of making legislative documents publicly available - has increased the reputational costs of reneging, predominantly among negotiators, rather than between negotiators and their public. In the model we present below, we concentrate especially on this particular feature and show how, in the absence of a regulated transparency regime, the risk of failure *increases* if negotiators perceive a heightened risk of pretension by their colleagues, as it may be the case in an enlarged EU. The pinning down of these positions on a public record may make this behaviour less probable. Finally, we show how a regulated transparency regime can even increase decision-

making efficiency by screening out marginal amendments.

### **Transparency in the Council of the EU**

The arguments that high levels of transparency will affect content as well as policy processes are commonly heard in Council circles: EU negotiations are a two-level game where decision-makers need to accommodate national preferences with overall EU policy ambitions for improvements to a wider 'good'. This requires deliberation and flexibility, which may be compromised if all details of negotiations are revealed, the argument goes (e.g. European Court of Justice, Case C-280/11 P 2013; Kleine, 2013).

Nevertheless, recent decisions to release more detailed transcripts from Council meetings show that the ring-fencing of legislative negotiations between the ministers is no longer as strongly defended as in previous years (cf. Hildebrandt et al., 2014; Naurin and Wallace, 2008). The Council, and the EU institutions in general, pride themselves of a detailed and extensive set of transparency policies, with great emphasis on public access to documents (General Secretariat of the Council of the EU, 2006; 2015). However, while accessibility to documents is indeed impressive compared to many national legislatures, in reality governments have many opportunities to 'filter' the information that is released to the public. Cross and Bølstad (2015) show how this has developed during the years 1999-2009: With the implementation of new transparency regulation in 2001 (Regulation (EC) 1049/2001), the Council saw a sharp increase in the release – and in the timeliness of releases – of policy records. Nevertheless, not all legislative records are made publicly available, or may only be partially released, if governments deem it necessary for safe-guarding national interests or the policy process (Article 4). Cross and Bølstad therefore conclude that transparency in the Council has increased significantly since 1999, yet many details are still withheld, especially in legislation adopted in the immediate aftermath of the 2004 and 2007 Central- and Eastern enlargements.

A frequent explanation by senior officials in the Council is that the lack of detail in the public documents merely reflects that EU decision-making is a complicated matter. A Council chairperson has a great responsibility in keeping final negotiations in line with decision rules<sup>1</sup> while taking into account the full list of agenda items and all preparatory work included in documents from the various working groups, the European Commission and the European Parliament. A trend towards greater formalisation of Council meetings, and more detailed recording of member state positions, has been reported as a reaction to this complexity of the negotiation process, in particular as the expansion of membership added to the web of interactions (General Secretariat of the EU Council, 2009; 2015; Hagemann and de Clerk-Sachsse, 2007).

But what are the consequences of this increased use of legislative decision records in

the Council, and should we accept the suggestion from the literature that such increased levels of transparency come at the expense of decision-making efficiency? These are important questions to answer as pressures continue to grow for increased transparency in EU policy-making. The aim of the next section is hence to see the Council negotiations through the lens of a formal bargaining model in order to address the two most contested questions in the literature: a) transparency's effect on negotiators' ability to reach agreements; and b) transparency's effect on the duration of negotiation processes.

The intuition in our model is that governments negotiate in a sequential manner, where one government can introduce an amendment to a proposal, which other governments will then have to consider. The problem for the other governments is that they do not have any possibility of knowing what lies behind the proposed amendment if this is done in a secretive negotiation round (we refer to this as 'light transparency'). Moreover, they do not know what the consequences are if they refuse a proposal that is not in their interest – will it lead to a negotiation failure, or will the proposer give in as they also have an interest in seeing policy adopted? In a second step we hence show how this uncertainty can be overcome by introducing one specific kind of transparency: the decision to publish legislative decision records where governments' positions are recorded (referred to as 'regulated transparency'), and decision-makers hence know that they can be held accountable for their policy positions.

### **Uncertainty in Council negotiations and transparency as costly signal**

Suppose there is a proposal on the negotiating table of the Council<sup>2</sup> and one government (or a coalition of governments)<sup>3</sup> has to decide whether to propose an amendment. This government's support for the proposal is a necessary condition for the adoption of the measure, and the government can be of two types: strong or weak.<sup>4</sup> A strong government will vote against the bill if its amendment is rejected and, therefore, its vote will preclude the adoption of the proposal. A weak government will support the bill even if its amendment is rejected. The group of receiving governments is treated as a unitary collective actor which must decide whether to accept the amendment (for a similar approach see Schneider and Cederman, 1994).

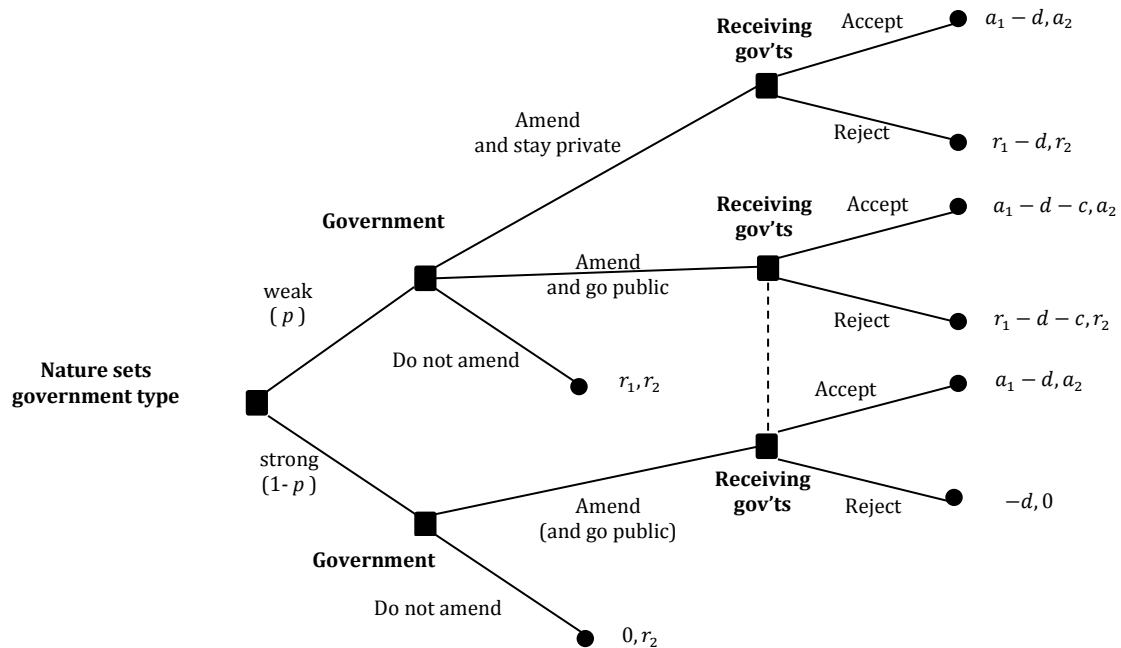
If the amendment is accepted, the payoff is  $a_i$ , where  $i = 1, 2$  are the proposing and receiving governments, respectively. When the receiving governments reject the

amendment from a strong proposer, we have a negotiation failure and payoffs are zero. If instead a weak proposer's amendment is rejected, the payoff is  $r_i$ . Finally, the receiving governments and weak proposer get  $r_i$  also if no amendment is tabled. A strong proposer gets zero in this circumstance. The preference ordering for the receiving governments is  $r_2 > a_2 > 0$ . Rejecting the amendment is better than accepting it, but acceptance is preferred to a negotiation failure. For the proposing government, the preference ordering is  $a_1 > r_1 > 0$ . Acceptance is preferred to rejection, which yields  $r_1$  for the weak type and zero to the strong type.

The proposing government pays a small cost,  $d < a_1 - r_1$ , for drafting and tabling the amendment. It also has the opportunity of making its position public, under different transparency regimes. In a light regime, it can simply communicate its position to the public, with no official documents produced. In a more regulated environment, its position is reported in official legislative records. If the government is strong, this communication is costless, regardless of the transparency regime in force. A weak government may go public in order to try to pass as strong, but it comes with a commonly known reputational cost  $c$ , which is determined by the transparency regime. The reputational cost is related to the fact that a weak government would accept a proposal even if its amendment is rejected.

Let  $p$  denote the commonly known probability that the proposing government is weak. The proposing government decides whether to amend and, if it is the weak type, whether to go public at a cost,  $c$ . If an amendment is tabled, the receiving governments decide whether to accept it, without knowing the actual type of the proposing government and observing only its attitude toward publicity. The sequence of moves is depicted in Figure 1.





**Figure 1.** A game of Council negotiations with uncertainty about the proposer and transparency as costly signal.

We solve the model by backward induction and find the following perfect Bayesian equilibria (these are also sequential equilibria that survive the intuitive and divinity criteria, see the online appendix on model refinements. We disregard knife-edge equilibria where prior and posterior beliefs coincide).

*Light transparency and few weak proposers*

Consider the case where the transparency regime is light. The proposing government can simply issue a public statement but no official document is produced. The reputational cost for going public is small ( $c < a_1 - r_1 - d$ ) and a weak government may decide to go public in order to pretend to be strong. However, for this strategy to succeed and this pooling equilibrium to materialize, the probability of a weak government has to be sufficiently small. Otherwise, the other governments would find it optimal to reject amendments randomly, and then the weak government will not find it optimal to propose amendments. The condition for a pooling equilibrium is  $p < a_2/r_2$ . This threshold increases with the acceptance payoff and diminishes with the rejection payoff of receiving governments. If the amended and the original proposals yield similar payoffs, receiving governments accept amendments even when it is highly likely that they come from a weak proposer. As these payoffs differ, the probability that it comes from a weak proposer must decrease for the amendment to be accepted.

The strategies are

1. Both types of governments propose amendments and the weak proposer goes public.
2. If the receiving governments see an amendment and publicity, they accept the amendment. If they see an amendment without publicity, they reject the amendment.

Given the strategy at point 1, the receiving governments cannot infer anything by the publicity. Thus, their expected payoff from rejecting an amendment is  $r_2 p$ , and their expected payoff for accepting it is  $a_2$ . Since  $p < a_2/r_2$ , it is optimal for the receiving governments to accept the amendment. It is sufficiently likely that the rejection of a randomly chosen amendment will end up in a negotiation failure, because the proponent is strong, that the receiving governments are better off accepting the amendments. Moreover, a weak government can successfully go public and pretend to be strong. Given the strategy of point 2, a weak government gets  $(a_1 - d - c)$  if it proposes an amendment and goes public,  $r_1$  if it does not amend and  $(r_1 - d)$  if it amends and stays private. Not proposing is better than proposing without signalling. Moreover, since  $(c < a_1 - r_1 - d)$ , proposing and signalling is the optimal strategy.

From this equilibrium, we can derive two implications about the likelihood of amendment and the risk of negotiation failure. Both types of proposer always amend<sup>5</sup> and negotiations never fail. A negotiation fails if the receiving governments reject an amendment from a strong proposer. This however never happens because the receiving governments accept any amendment with publicity (and a strong type goes always public). The risk of negotiation failure is therefore nil.

#### *Light transparency and many weak proposers*

Consider now a regime with light transparency ( $c < a_1 - r_1 - d$ ) and a sufficiently high probability of a weak government, that is,  $p > a_2/r_2$ . Pooling cannot last. The probability of a weak government is so high that if both types were proposing amendments and were going public, it would be optimal for the receiving governments to reject always. A weak government would then obtain  $(r_1 - d - c)$  and would be better off not proposing amendments since the payoff is  $r_1$ .

However, it would not be optimal for a weak proposer never to amend as well. In such separating equilibrium (discussed below), the receiving governments accept an amendment with publicity. A weak government would therefore find it optimal to propose an amendment and to go public since it would gain  $(a_1 - d - c)$  rather than  $r_1$ .

This government would then successfully pretend to be strong and the separating equilibrium would collapse. In other words, it is not optimal for the weak government never to amend and go public, nor always to do so. This semi-separating equilibrium then involves mixing strategies as follows:

1. A weak government proposes amendments and goes public with probability  $s$ .
2. The receiving governments reject an amendment, associated with publicity, with probability  $q$  (and always reject amendments without publicity)

A mixed strategy equilibrium requires  $s = \frac{a_2(1-p)}{p(r_2-a_2)}$  and  $q = \frac{a_1-r_1-d-c}{a_1-r_1}$ .

If the receiving governments observe publicity of the proposing government, they recalculate the probability of a weak type, conditioned on publicity. This equals to  $\frac{ps}{1-p+ps}$ . The probability of a strong type, conditioned on publicity, instead is  $\frac{1-p}{1-p+ps}$ . The expected utility from rejecting the amendment is  $\frac{r_2ps}{1-p+ps}$ . The expected utility from accepting the amendment is  $a_2$ . If the receiving governments are to follow a mixed strategy, the expected utilities from rejecting and accepting are identical, that is  $\frac{r_2ps}{1-p+ps} = a_2$ . In other words,  $s = \frac{a_2(1-p)}{p(r_2-a_2)}$ . Next, given the receiving governments' strategy, the expected payoff of proposing amendments and going public for a weak type is  $[a_1 - d - c - q(a_1 - r_1)]$ . If this type is to mix strategy, this expected utility must be equal to  $r_1$ , the payoff for not amending, which is preferred to amending without publicity with a payoff of  $(r_1 - d)$ . Hence,  $q = \frac{a_1-r_1-d-c}{a_1-r_1}$ .

Consider now the implications for the likelihood of amendment and the risk of negotiation failure. Since  $p > a_2/r_2$ ,  $s$  is lower than one. Differently from the pooling equilibrium, a weak government does not always amend and go public. Moreover, the probability  $s$  that this government proposes an amendment decreases if weak types are more likely (if  $p$  increases) and if the receiving government's rejection payoff  $r_2$  increases.

Recall that a negotiation fails if the receiving governments reject an amendment from a strong proposer. In this regime, the risk of negotiation failure is  $[q(1-p)]$ , that is the probability of receiving governments rejecting an amendment times the probability of strong proposers. In equilibrium, the risk of negotiation failure is

$\frac{a_1 - r_1 - d - c}{a_1 - r_1} (1 - p)$ . It increases if strong types are more likely, if the drafting and signalling costs decrease and as the proposer's acceptance payoff increases relative to the rejection payoff. As long as  $p > a_2/r_2$ , failure is more likely as the pool of strong proposers that benefit significantly from an amendment increases.

Since a strong government now faces a positive probability of rejection, its expected utility of proposing amendments is  $[a_1(1 - q) - d]$ . In the equilibrium discussed above with few weak proposers, the payoff from amending is  $(a_1 - d)$ . This means that the belief of many weak proposers produces a negative externality for strong proposers. Their expected utility from amending decreases by  $a_1q$ . Given the equilibrium value of  $q$ , this utility loss increases with the proposer's acceptance payoff and it decreases as the drafting and signalling costs and the proposer's rejection payoff increase. Governments that have high stakes in making sure that their amendments are included in the proposal have therefore an incentive to move away from this regime.

#### *Regulated transparency*

Consider now a more regulated regime where governments do not just simply make their views public, but their positions are reported in official legislative records. These records increase reputational costs and make it harder for weak governments to pretend to be strong. If the reputational cost is high enough, then publicity serves to separate the weak from the strong type of government because it will not be optimal for the former to pay this cost. The receiving governments will correctly infer that the proposing government is strong and they will accept its amendment. The condition for this separating equilibrium is  $c > a_1 - r_1 - d$ .

The strategies are

1. A government proposes and goes public if and only if it is strong (a weak government never goes public).
2. If the receiving governments see an amendment and publicity, they infer that the proposer is strong and they accept the amendment. If they see an amendment without publicity, they infer that the proposer is weak and they reject the amendment.

To verify this equilibrium, given the proposing government's strategy at point 1, the receiving governments correctly infer that publicity indicates strength and lack thereof

indicates weakness. They are better off rejecting an amendment from a weak government because  $r_2 > a_2$ , and accepting an amendment from a strong government because  $a_2 > 0$ . The actions at point 2 are therefore optimal, given the proposing government's behaviour at point 1. Conversely, given this strategy of the receiving governments, a weak government gains  $(a_1 - d - c)$  if it proposes an amendment and goes public,  $(r_1 - d)$  if it amends and stays private and  $r_1$  if it does not amend. Since  $c > a_1 - r_1 - d$  and  $d > 0$ , a weak proposer does not amend. For a strong government, it is always optimal to amend since it gains a payoff of  $(a_1 - d)$  versus nil for not amending.

In this regime, the probability of amendment is  $(1 - p)$  since only the strong proposer amends. Moreover, negotiations never fail. Recall that failure occurs if the receiving governments reject an amendment from a strong proposer. This never happens because the receiving governments accept any amendment with publicity (and a strong type goes always public). Receiving governments would accept an amendment even if the drafting cost is zero (here, the acceptance payoff for a strong government is even higher). The risk of negotiation failure is therefore nil.

*Probability of amendment and risk of negotiation failure*

Table 1 summarizes the results with regard to the probability of amendment<sup>6</sup> and the risk of negotiation failure. The regulated transparency regime displays a lower probability of amendment than the light transparency regime. In a light regime, amendment is less likely if there are many weak proposers because the receiving governments are more likely to reject. In this latter case, the probability of amendment increases if strong types are more likely and if the receiving government's rejection payoff  $r_2$  decreases. Finally, the risk of negotiating failure is higher than zero only in a light regime with many weak proposers.

**Table 1.** Probability of amendment and risk of negotiation failure under different transparency regimes.

Light transparency $c < a_1 - r_1 - d$		Regulated transparency $c > a_1 - r_1 - d$
Few weak proposers $p < a_2/r_2$	Many weak proposers $p > a_2/r_2$	

Probability of amendment	1	$\left(1 + \frac{a_2}{r_2 - a_2}\right) (1 - p)$	$1 - p$
Risk of negotiation failure	0	$\frac{a_1 - r_1 - d - c}{a_1 - r_1} (1 - p)$	0

### Empirical analysis

Applying our conclusions from the model to the Council context we formulate three hypotheses. First, we expect the legislative records to have an effect on the level of information available to negotiators. Reneging on officially recorded positions is more costly. Therefore, this regulated transparency environment is more informative since it facilitates the interpretation of policy signals. In other words, *access to legislative records reduces uncertainty about government positions (H1)*. Second, when negotiators believe that incentives for pretending are heightened as it could be in a larger and more variegated Council, *access to legislative records decreases the risk of negotiation failure (H2)* (compare the third and last column in Table 1). Lastly, *access to legislative records reduces the duration of negotiation processes (H3)* as marginal proposals are screened out from the ‘weak’ government types described above.

These expectations are with reference to the reputational cost  $c$ , determining the transparency regime, and the probability  $p$  of a weak government. They therefore assume constant payoffs. This assumption is acceptable in the broader empirical investigation that follows, but a straightforward implication from relaxing it is that the risk of failure increases with the intensity of conflict among governments.<sup>7</sup> We will show that this consideration illuminates at least one finding.

We investigate our hypotheses by presenting results from an original dataset covering legislative activities in the Council from 1999 to 2014. We also draw on interview material with 23 ministers and senior civil servants from the Council, its secretariat in Brussels and the national representations of the Member States. Our choice of research methods is rooted in the complex policy environment in the Council, and we immediately concede on an issue: During the years covered by our analysis, the Council has almost doubled in size and a number of factors are known to have affected policy-making. Especially the 2004 and 2007 enlargements, the Eurozone crisis and the Lisbon Treaty are likely to have intervening effects on the issues we investigate here. Also changing legislative and administrative priorities for the Commission and

changes to the Council's internal rules of procedure are of importance. Hence, it is difficult to isolate the effect of increased transparency from that of other, simultaneous, changes. For that reason, the analysis that follows is not a *test* of our hypotheses in the traditional sense, but is rather a *probability probe* of the expectations derived from the model in contrast to the arguments made in much of the existing literature: that increased transparency comes at the expense of efficiency in policy-making. We therefore use our quantitative material to get a descriptive and broad picture of developments, combined with an extensive qualitative investigation where we ask the practitioners themselves about their observations regarding the use of public legislative records. This approach has proven extremely informative and particularly useful granted our outset in a formal bargaining model.<sup>8</sup> The mix of research methods also leave us confident in arguing that if any of our suggested effects are observable, they should be even more resilient when considered in combination with possible effects from these other significant developments that have taken place. For example, if governments' ability to reach agreements has not significantly dropped nor negotiations considerably prolonged with the introduction of the above transparency changes, while the Council at the same time has enlarged from 15 to 25-27 member states, then this would lend support to our hypotheses and suggest that the prevailing wisdom from the literature should be reconsidered.

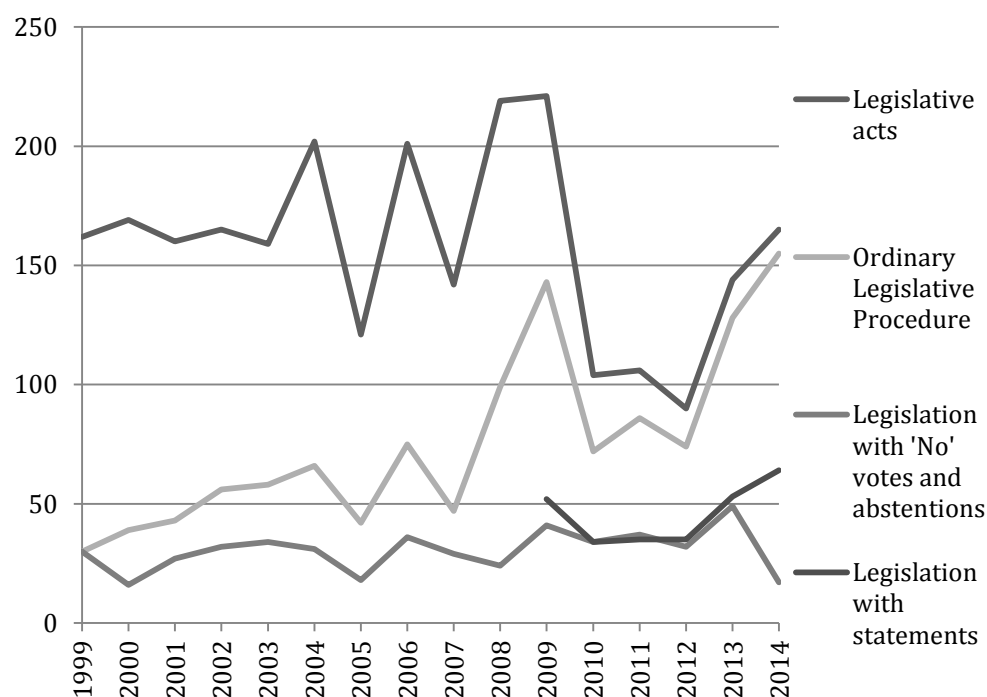
The empirical analysis is divided into two sections, with a first section on 'Probability of agreement' which addresses hypotheses 1 and 2. The second section, 'Duration of negotiations' refers back to hypothesis 3.

### *Probability of agreement*

Three major 'events' are relevant to investigate when we seek evidence for whether or not access to legislative decision records can help overcome problems of asymmetric information and affect governments' ability to come to agreement on policies: 1) Council decision records became electronically available from 1999; 2) in 2001 Regulation 1049/2001 came into effect regarding increased public access to EU records; and 3) the introduction of the Lisbon Treaty in December 2009. The Lisbon Treaty is perceived to increase transparency in the Council through its Article 16.8, which calls for public deliberation and decision records when the Council acts in a legislative capacity (General Secretariat of the Council 2009, Article 5). It is also thought to have put pressure on the Council with regards to the recording of legislative activities due to the increase in policy areas that fall under the OLP, where

the Council decides on legislation in cooperation with the Parliament.

In the first instance we look at the level of legislative activity in the Council. Figure 2 below shows the total amount of legislation adopted each year since 1999. From the figure it is clear that the volume of legislation has fluctuated quite significantly during the past 15 years. Interestingly, it appears as if this fluctuation may be affected by the electoral cycle of the Parliament and Commission as peaks can be detected around 1999, 2004, 2009 and 2014. However, important to our analysis, none of the increases and decreases in the figure appears to correspond with the introduction of new transparency rules. Even Regulation 1049/2001 in December 2001 did not result in a decrease in legislative activity. Instead, significant decreases appear after the 2004 and 2007 enlargements, and with a substantial, longer-lasting decrease again after the introduction of the Lisbon Treaty (December 2009) (perhaps also as a reaction to the prolonged Eurozone crisis).



**Figure 2.** Legislative acts in the EU Council, 1999-2014

Figure 2 also shows that while the total amount of legislation has fluctuated over the years, the percentage adopted under OLP has markedly increased. Again, this is particularly the case just after May 2004, and then again in the years since Lisbon was implemented. Since 2009, close to 80% of legislation has been adopted under this procedure, and in the last two years this has further increased to around 85%.

While the amount of legislation has fluctuated, Figure 2 on the other hand suggests that the percentage of legislation adopted with recorded contestation in the Council has increased. The majority of legislation is still adopted with all Member States in



favour of a given proposal. However, a larger percentage of policies have governments who either vote 'No' or 'Abstain' than previously. In the first 4 years, the percentage of legislation with recorded no votes or abstentions was at an average of about 16%. In the last 4 years, the level has been close to 35%<sup>9</sup>. Nevertheless, when opposition is recorded on a proposal, it is still usually a small number of Member States who are found to be in opposition. Groups are currently on average between three to five countries, while before the enlargement it was only a single or up to three countries in opposition.

The short grey line in Figure 2 further shows how Member States have made use of 'formal statements' in Council decision-making in the last four years. These are policy statements that governments can include in the Council minutes when a proposal has been adopted and voted on. They are used to clarify a position, and range from statements which elaborate on the reasons behind a government's support or opposition in votes, or they may show severe disagreement with a decision although the government may have chosen not to oppose the proposal through voting (Hagemann et al., 2015). Interestingly, Figure 2 therefore shows that, while opposition in voting has increased since enlargement, the use of formal statements is also significant: for example, Member State governments submitted policy statements on 24% of legislation in 2009, while this increased to approximately 38% in 2013 and 2014. Also, as with the votes, the policy statements show that it is increasingly *groups* of Member States, and not just individual countries, who decide to include their positions in the records.

All of this suggests that the Council has indeed undergone significant changes in its legislative activity during the 15-year time period investigated here, when important changes have been introduced to the ways legislative decisions are recorded and made public. At first that could seem to question our hypothesis 2. However, the yearly variation in the data indicates that the drops in policy agreements do not follow from new transparency initiatives (in 1999, 2001 and 2009), but rather seem to be reactions mainly to the 2004 enlargement and the Lisbon Treaty (possibly combined with the economic crisis). This is further clarified in our interviews. When asked about these trends, none of the senior civil servants from the Council secretariat and permanent representations attributed the fluctuations in legislative activity with greater public access to Council records. One interviewee pointed out that '. . . so many important developments happened during those years [. . .] especially enlargement and the Lisbon Treaty's additional powers to the European Parliament explain some of these changes' (Interview 10). Several interviewees also emphasised that the figures depend on the Commission and the political and economic environment. But none of them thought that the policy agenda and the overall figures are affected by decisions to publish legislative records. One person explained that:

‘... a lot of the legislation that is negotiated in the Council is rather technical, but even when decisions are of great importance to the governments, I have never experienced that negotiations broke down due to procedural rules about how things are minuted or recorded. . . . In some cases there may of course be a request [from governments] to withhold information from the records, but there are rules for that . . . I do think that there is more awareness of how governments negotiate and things are recorded, but I don’t think it results in legislation not going through.’ (Interview 4).

However, an important detail became clear when we asked about differences with regards to legislation adopted under the unanimity rule compared to qualified majority decisions (QMV). The high increase in the proportion of legislation adopted under the OLP was entirely attributed to the introduction of the Lisbon Treaty (cf. Figure 2). Yet, when asked about whether public records have made it harder to meet the unanimity rule when required, several interviewees suggested this would depend on the importance of the proposal. Many representatives still make use of the option of ‘constructive abstention’ when it comes to unanimity, it was explained, but if policies are of importance to a government and their position will be publicly recorded, then unanimity may be more difficult to reach. Conversely, recordings of government positions were pointed out to not be problematic under QMV. Governments were said to now be more readily inclined to either vote against, abstain or state their opposition in a statement if they found it ‘useful’ (e.g. Interviews 5; 9; 10; 17; 20). A number of interviewees also suggested that this increase in publicly recorded positions reflect increased contestation in the Council, mainly due to the fact that there are so many more interests to accommodate.

However, when asked the specific question ‘if and how the recording of votes and policy statements impact on meetings’, the interviewees all conclude that the more formal and ‘strict’ format was essential to steer negotiations. Although arguments varied regarding the ways in which making these records available to the public had an effect on specific policy negotiations, all interviewees pointed out that public records – including access to negotiation partners’ positions on previous and current legislation – in general make information more readily available between representatives. One representative explained how formal recordings of legislative agreements result in a more ‘diligent exchange of views’ with ‘a lot of attention to detail as we know that things are written down and we may have to explain [our government’s] position later’. This, in turn, also means that other countries’ representatives are ‘in the same situation, so we are all aware that each of us have to be able to go back home and say what was agreed and what our position has been’ (Interview 9).

In sum, none of our interviewees indicated that the increased public access to legislative decision records - and the gradual increase of information provided in those documents - in general has had a negative effect on governments' ability to agree on policies in the Council. Neither the data nor the interview material supports such assertions, which is what we should have concluded according to much of the recent literature. However, the details provided by the interviewees suggest that we may need to make a distinction between policies adopted by QMV and cases where legislation is adopted by unanimity and is of very high importance to the governments. This relates back to the insights from the literature we discussed in the beginning of the paper, in particular with regards to its conclusions regarding incentives for public pandering and decision-making where no policy win-set is available from the outset: when governments have quite different views, policies are of great salience, each negotiator has a veto, and the public is watching, then recordings in legislative decision records may lead to a stand-off between negotiators which cannot be reconciled. In light of our model, this resembles a situation where the risk of failure increases as the intensity of conflict among governments becomes more severe. However, in the overwhelming majority of cases in the Council this is not the case. More than 85% of legislation is now decided by QMV, it is most cases of a less salient or technical nature, and the interviewees have made it clear that, in general, decision records do not act as a hindrance for governments to come to agreement. They rather appear to facilitate information and decrease uncertainty between decision-makers (*H1*), and enable governments to more readily understand positions of cooperation partners when seeking to reach agreements (*H2*).

#### *Duration of negotiations*

Our hypothesis 3 stated that the duration of negotiation processes will decrease if legislative decision records in the Council are released to the public. This follows from our model since the introduction of legislative records will make it possible to distinguish between 'weak' and 'strong' governments, and to screen out marginal proposals from 'weak' proposers. However, in our empirical investigation there may, again, be a number of interfering factors - such as an inter-institutional agreement to seek adoption of legislation at the first reading stage - which makes it difficult to attribute any shortening of the decision process solely to increased transparency in the legislative records. We therefore pay close attention to such possible confounding factors in what follows.

Official data from the European Parliament (2014) shows that during the years 1999-2014 there has been a significant decrease in the time it takes from the presentation of a policy proposal by the Commission until it is finally adopted in the Council: From 1999 to 2004 the legislative process took on average 24 months, from

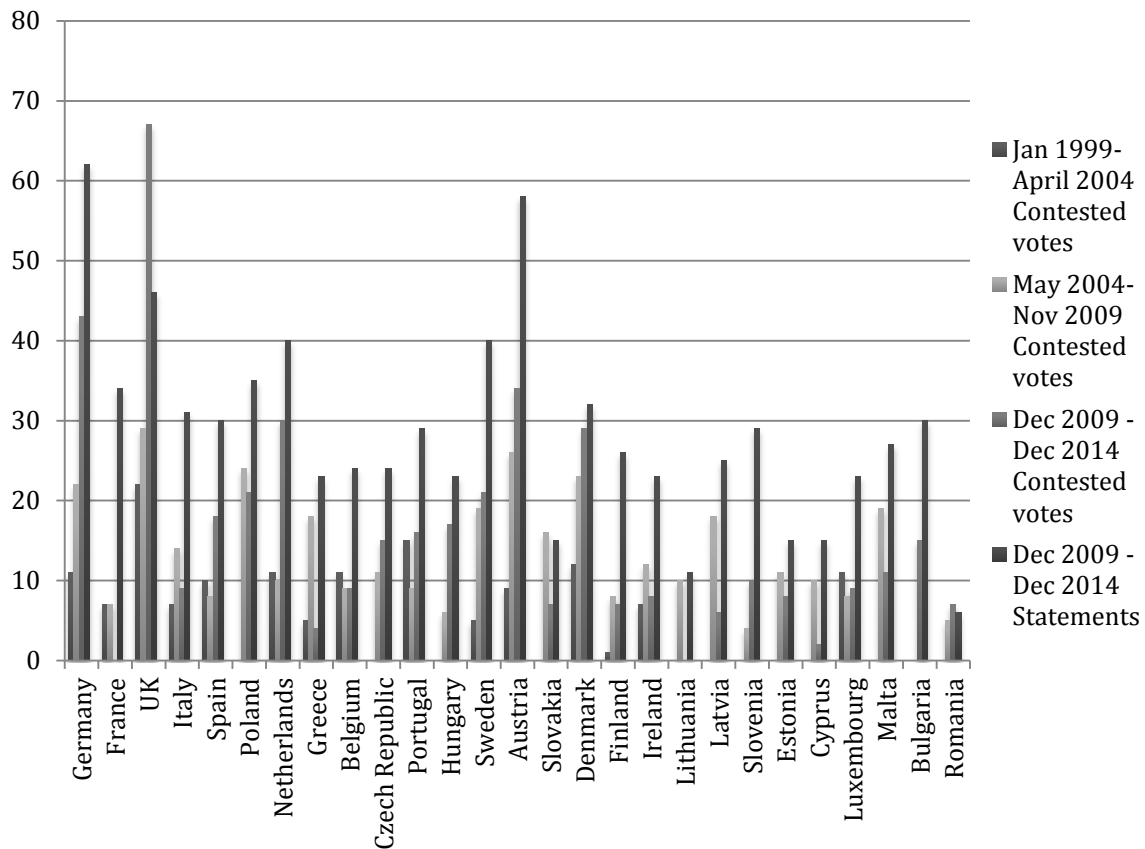
2004 to 2009 it was 22 months, while the process further decreased to 17 months during 2009-2014.<sup>10</sup>

Our interview material makes it clear that it is indeed difficult to attribute this decline directly to the publication of Council decision records. Hence, while we note that the decrease in negotiation time contradicts the premise from the literature that public access to Council decision records would stall – or considerably prolong – policy processes, we need to rely on the insights from the practitioners regarding whether and to what degree we should at all consider the length of policy processes as linked to the public recording of Council members' decisions.

As discussed above, the interviews make it clear that formal recordings of decision-makers' positions have become increasingly important in keeping track of every government's stand point, and also in letting groups of governments find each other on policy proposals where they expect to have similar interests. That in itself seems to be of value in the complex processes. 'Decision records and minutes make it easier to get an overview of specific concerns we need to be aware of, but also how the negotiations are likely to develop. [. . .] we can prepare and know where things stand at a next meeting.' (Interview 20). Still, the representatives in some cases made it clear that there are instances where the public recording of positions also serves the governments' need for 'signalling' to home audiences that they have fought for a specific cause. Like in our theory discussion, we readily concede that such signals to external actors may at times affect decision processes or the governments' ability to reach an agreement. Yet, these cases do not appear to dominate negotiations, and interviewees in several instances stressed the importance of having clear positions and credible information about where everyone stands on individual pieces of legislation, and also in the various policy areas more broadly: 'if our government is on public record that they will support some proposal, then we of course also consider that same position on a similar proposal later on.' (Interview 16).

Figure 3 below elaborates on this point as it highlights the great difference in governments' inclination to oppose or abstain in the Council (labelled together as 'contested votes'). The data is here grouped together into three periods to mark the significant changes brought about with the 2004 enlargement and the Lisbon Treaty (i.e. January 1999-April 2004; May 2004-November 2009; December 2009-December 2014. For the last period, we have also included the number of recorded policy statements per country). Especially UK, Germany, Denmark can be found to either oppose through votes or make their concerns known in the formal statements in all three periods covered by the figure. The Netherlands, Poland and Austria also have relative high numbers of policies where they record their positions vis-a-vis the majority. Other countries - notably France in the last period - do rarely if ever oppose the majority in voting, although they also make use of the statements following the

publication of a vote.



**Figure 3.** Contested votes and policy statements in the EU Council.

The data hence show that even large and powerful countries find themselves ‘out voted’ in the Council. In fact, the data suggest that larger (and Northern) countries are more frequently in the minority when voting than smaller states. A whole literature has devoted itself to explain these findings (cf. Bailer et al., 2014). But important to our analysis are the explanations from our interviews regarding how these patterns have changed over time: As the Council expanded and diversified its members in the 2000s, and as the political agenda has developed since then, the procedures and culture of decision-making have also undergone changes from an explicit ‘consensus’-driven approach, to one where formal decision rules and procedures of meetings are more emphasised (cf. Hagemann and De Clerck-Sachsse 2007; Naurin and Wallace 2008). Today, ‘...there is a great ambition of accommodating everyone’s interests, but we know that when a majority is found, the proposal can be adopted, so we will try to be on board as much as possible’ (Interview 17). In fact, several interviewees explained there’s a ‘pressure to ensure efficiency in the meetings’ and ‘to get on with the agenda’, meaning

that proposals are adopted when the Chair assesses that a sufficient number of countries support a text: ‘... if a country - or small number of our partners – cannot support the text, they are invited to minute their reservations [...] they can record their positions as the proposal is passed’ (Interview 9). The change towards a more ‘rule based’-decision-making may hence explain the increased level of recorded policy positions. It also speaks in favour of our third hypothesis that access to legislative records reduces the duration of negotiation processes. The use of public records appear to be a tool for ensuring more ‘disciplined’ negotiations amongst decision-makers, both with regards to confirmation of policy positions (as they are formally recorded and hence come with a cost) and with regards to more readily adopting policy once a sufficient majority is in place.

## **Conclusion**

Legislative transparency is a contested topic in any political system, and academic research has found mixed results regarding the benefits and drawbacks of making decision- makers’ political records public.

In the EU Council, governments’ decision records have been available to the public for some time. However, these public documents have been far from complete in terms of providing details regarding the policy content of an adopted proposal, as well as regarding individual legislators’ positions on these proposals. Nevertheless, a general trend is noticeable towards including more information in the Council’s public records.

We argue that making EU members’ legislative records public does not come as a direct trade-off with the efficiency of policy processes. While some of the literature has concluded that transparency decreases the efficiency of decision processes, we conclude that the implications require a more nuanced consideration: Our model shows how public access to legislative records can help overcome problems of incomplete information, which in turn can reduce the risk of negotiation failure and increase the efficiency of decision-making.

We have stressed throughout our analysis that a number of other significant changes have happened to the EU policy processes in parallel to increasing the public’s access to legislative decision records. We have therefore had to consider the likely intervening implications of these developments in our empirical observations. Still, we would like to stress that as several of our suggested effects are observable, they should be even more resilient when considered in combination with possible effects from these events. In particular, as governments’ ability to reach agreements has not been

significantly hampered with the introduction of the above transparency changes, while the Council at the same time has enlarged from 15 to 25-27 Member States (during the time period investigated here), this lends support to our hypotheses that making legislative decision records available to the public does not negatively affect governments' ability to reach agreement on policies. We also find support for the other propositions derived from our model that making legislative decision records available to the public helps overcome problems of incomplete information, and can help decrease the length of negotiation processes. Both our data and interview material speak to that effect. Hence, in sum, we find that transparency may have several implications for the policy process, but most importantly we provide evidence that counters the frequently heard argument that transparency comes as a direct expense for efficiency.

## Notes

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1. Unanimity is applied to certain matters affecting the members' fundamental sovereignty whereas other decisions are taken by either a simple or qualified majority (QMV) system. In most cases, the Council votes on issues by a qualified majority rule, meaning that there must be a minimum of 55% of the member states in favour, comprising at least 15 of them, and representing at least 65% of the population (Treaty on European Union, Article 16). It should be noted that 'abstentions' hence have the effect of 'No' votes under the QMV rule as they count against the mobilisation of a majority for adopting a legislative proposal.
2. We focus on negotiations between members of the Council, excluding the interactions with the European Commission and the European Parliament. Nevertheless, the point we make of how transparency reduces uncertainty could be extended to the interactions with the other institutions.
3. Thus, the proposing actor can be a single government in unanimity or a blocking minority coalition of governments in qualified majority voting.
4. The decision-making rule does not provide information about the type of proposing government or coalition. A government proposing an amendment under unanimity can be weak and one proposing an amendment under qualified majority can be strong.
5. If we allow the drafting cost to exceed the threshold ( $a_1 - r_1$ ), we should add the following to point 1 of the equilibrium: a strong government amends if and only if  $d < a_1$ , a weak government amends if and only if  $d < a_1 - r_1$ . If  $d > a_1$ , the drafting cost is too high for any amendment to be tabled. If  $a_1 > d > a_1 - r_1$ , only the strong type amends. This separating equilibrium is based on an implausibly high cost of drafting and it is less interesting because the cost does not vary across types.
6. Let  $k$  and  $j$  be the probabilities that, respectively, a weak and a strong type proposes an amendment under a given regime. The probability of amendment in a regime is  $kp + j(1 - p)$ .
7. All else being equal, as  $(a_1 - r_1)$  increases we are more likely to move to a light transparency scenario and as  $(a_2/r_2)$  decreases we are more likely to face a positive risk of failure (see Table 1).
8. See Laitin (2003) on the use of qualitative and quantitative material in combination with formal models.
9. Except in 2014, where it is clear from the data that the European elections and new Commission have had an effect on the legislative records.
10. Unfortunately the dates for the introduction of legislation to the Council by the European Commission is not covered by our dataset for the years 1999-2004, so we are not able to confirm this conclusion for the first few years based on our own data. However, we can confirm the tendency from 2004 onwards.





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