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The Black Box of European Legislation: The Motivation (or Lack of It) behind Transparency in EU Policymaking

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One of the political ambitions of European Commission President Jean-Claude Juncker and his first vice-president, Frans Timmermans, is to push for more openness in European Union policymaking. However, the improvements they propose are substantially undermined by opaque decision-making procedures and the lack of consistency in EU institutional culture. The open-governance drive is also stymied by fears among the Member States that too much disclosure might diminish effective policymaking there. Yet, if the EU does not understand that it needs to present a unified approach to transparency vis-à-vis its citizens, it will never evolve into a genuine political union.

EU laws and policies affect the domestic legal systems of 28 countries and regulate the business activity of numerous corporations operating across its borders and influencing public policy on issues ranging from carbon emissions, to pharmaceutical law and food safety. To be deemed democratic, such an all-encompassing regulatory machine requires a fare dose of transparency. In spite of the existence of legal safeguards related to access to EU documents or the European Commission's (EC) public consultation policy, the existing EU transparency rules are substantially undermined in practice by complex decision-making procedures, opaque inter-institutional negotiations as well as by a lack of consistency in the EU's culture of transparency. The EU lags by far the United States as regards lobbying disclosure rules. The long-term opacity behind transatlantic trade negotiations (namely TTIP) have further undermined the openness of the EU.

The consequences are at least threefold. First, a lack of transparency results in unequal access to EU decision-makers. Second, EU decisions based on market calculations produce a sense of "policy drift" away from voters' preferences and favour small groups of vested stakeholders. Consequently, the effectiveness of policy outcomes, understood as satisfying the social needs of the public, is very low. Third, policies crafted behind closed doors often lack democratic legitimacy. In all of these aspects the EU finds itself in quite a grim spot: the latest Eurobarometer reveals that while only 37% of Europeans tend to trust the EU, 55% report their voice does not count in Brussels.[1]

[1] "Standard Eurobarometer 82, Autumn 2014," European Commission, http://ec.europa.eu/public_opinion/archives/eb/eb82/eb82_first_en.pdf.

One of the ways to address this problem is the flagship initiative of First Vice-President of the EC Frans Timmermans to set up a mandatory transparency register for lobbyists seeking to influence EU legislation. To this end, the 2015 European Commission work programme foresees signing an inter-institutional agreement with the European Parliament (EP) and Council jointly endorsing the register. While the EP and EC already participate in a voluntary lobbying register, there are tough discussions expected over the next months among the Member States whether the Council should join as well. Yet, the register is only the tip of the iceberg in reforming the EU culture of openness.

Lobbyists, the Usual Suspects

Brussels, where more than 20,000 individuals actively try to exert influence on EU policymaking, is second only to Washington as the largest lobbying centre in the world. Yet, in Brussels lobbyists have the good fortune of operating with fewer constraints than in the U.S. There is no obligation to register before making contact with any EU institution. Although in 2011 the Commission and Parliament set up a joint register, it operates on a voluntary basis and without sanctions on those who do not participate. While it is estimated that at present over 70% of lobbyists active in Brussels have registered, there are still many entities operating outside of public scrutiny. The area with the least compliance are American law firms representing various corporate interests and who have proliferated in number along with progress in the TTIP negotiations. While in the U.S. these lobbyists would need to declare all information related to their clients, their purposes, as well as contacts with policymakers, in Brussels they refuse to make such disclosures and hide behind a confidentiality policy. It is also estimated that more than 30% of private sector interest groups that have lobbied DG Trade on TTIP are not in the register. The lack of proper transparency regulations has created a lobbying paradise for companies seeking benefits under the TTIP negotiations. According to the *New York Times*, American law firms have already managed to achieve much for their clients outside of public scrutiny, such as securing exemptions from environmental regulations and chemical safety tests or easing restrictions on personal data protection.[2] But they aim for much more.

To remedy this problem, on the 27th of January 2015, a renewed and a more comprehensive version of the register was launched jointly by the EC and EP. It now covers a broader scope of activities regarded as lobbying and requires additional information from registrants, such as the amount spent on their lobbying activities, their involvement in EU committees and bodies, as well as the legislative issues they are currently tracking. Yet in spite of these improvements, the register still remains purely voluntary and fails to oblige policymakers to meet only with registered lobbyists. Besides that, some entities exerting influence on the EU, such as independent advisory bodies set up by national governments, are not required to register even under the revised rules. Moreover, as past practice reveals, data entered into the register are often unreliable or misleading.

The European Commission's Blind Spots

The EC, as initiator of legislation, is the engine of EU policymaking and the most attractive target for lobbying activities. Yet, while it appears to be a powerful bureaucratic machine, its administrative capacity of some 17,000 staff is smaller than that of an average EU Member State. For this reason, the EC relies heavily on external expertise and informational resources offered by contracted expert groups, such as various kinds of lobbyists. While feeding external expertise into the legislative process is an intrinsic part of a democratic system, the transparency of this process at the EU level remains questionable.

To give a boost to transparency, in November 2014, Timmermans announced new rules for engagement with lobbyists that requires all Commissioners, their cabinet staff, and heads of Directorates-General (DG) to meet only those who appear on the register. This decision increased the rate of registrations by 10% over the last several months. Additionally, Timmermans required that all contacts between lobbyists and officials covered under the rules be published and made accessible on the EC website. While this approach

[2] E. Lipton, D. Hakim, "Lobbying Bonanza as Firms Try to Influence European Union," *The New York Times*, 18 October 2013.

is definitely significant, it neglects a whole army of lower-level officials at the DGs dealing with specific policy issues.

If contacts with lobbyists are one side of the transparency coin, one of the most essential regulatory tools in the EU legislative process is the *ex-ante* Impact Assessment procedure, which is based on gathering empirical evidence to evaluate the potential economic, social and environmental consequences of proposed legislation. These assessments have usually far-reaching consequences for the contents of a legislative proposal. In conducting them, the EC often outsources the evidence-gathering part of the job to the scientific community and external consulting firms which provide research that is often branded as "independent." Yet, studies have revealed that the assessments are becoming increasingly politicised and manipulated by powerful corporate lobbies, resulting in selective and inadequate presentation of alternative policy options.[3] What is also interesting is that this is often done to push forward a particular DG's own proposal, sometimes with the backing of interested EU Member States.[4]

These weaknesses were identified by the EC's Impact Assessment Board (IAB), whose task is to scrutinise the assessments and issue recommendations for improvements. The reports by the IAB from the years 2009–2013 reveal that around 40% of the EU assessments lack a robust and evidence-based justification of EU action or its added-value. An important part of the report is related to the way stakeholders' views were presented in draft assessments. In the board's view, the EC was not consistent and transparent enough in presenting the different critical opinions throughout the report and in explaining how they were taken into account in drafting legislation. Yet, apart from issuing a critical opinion, the IAB lacks any legal teeth to take action, which makes its real impact negligible. At the same time, the fact that it is entirely composed of high-level EC officials undermines its sense of independence and objectivity. Although in December 2014 Vice-President Timmermans announced reform of the IAB to include two external members, the date for implementation is still unknown.

The Council's Cautious Approach to Transparency

The role of the EU Council in the legislative process is decisive, but so is the opacity of its operations. In practice it is revealed that it sometimes goes to extraordinary lengths to keep its procedures and deliberations hidden from public scrutiny. There are two main loopholes in the Council's transparency policy. The first relates to access to information. Although adhering to EU Regulation 1049/2001 on public access to European institutions, the latest report by Transparency International reveals that the Council fails to disclose approximately 90% of its "restricted" documents, not only to outside stakeholders but also to the EU institutional system.[5] Its failure to grant information to the EP was settled by the European Court of Justice (ECJ).[6] In the same vein, the Council is reluctant to reveal the negotiating positions of the Member States or their voting record. The studies indicate that the probability of both types of censorship increases with the level of controversy in a particular negotiation. More shockingly, the Council appears to be deliberately circumventing the ECJ ruling, which instructed the Council to release the details of individual Member State positions in the documents it discloses.[7] According to the Council's internal rules, the vote does not need to be disclosed but only the result of the vote.

The Council's reluctance to reveal information related to the negotiation process is a classic example of an extended version of Robert Putnam's two-level game based on parallel bargaining at the domestic and international levels.[8] The three-level game played by the Member States in the Council is based on an attempt to simultaneously maximise profits in three inter-related areas: *national interests*, by securing the

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[3] "EU twisting facts to fit political agenda, chief scientist says," *EurActiv*, 27 May 2014, www.euractiv.com/sections/eu-priorities-2020/eu-twisting-facts-fit-political-agenda-chief-scientist-says-302399.

[4] "Impact Assessments in the EU: room for improvement?," House of Lords (UK), 4th Report of Session 2009–10.

[5] "The EU integrity system," Transparency International, April 2014.

[6] *Sweden and Turco v. Council of the European Union, Denmark, Finland, United Kingdom, and Commission of the European Communities*, C-39/05 P and C-52/05 P.

[7] *Access Info Europe vs. Council*, T-233/09.

[8] R.D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-level Games," *International Organization*, vol. 42, no. 3, 1988.

most possible gains for the national governments; *domestic constituencies*, by satisfying the voters at home; and, *EU efficiency*, by achieving fast-track compromise on EU action. In this respect, revealing too much information in the course of the negotiations might affect the public perception of the process and generate failure in any of these dimensions. That is why the decision-making culture of the Council is a strong safeguard for the Member States against disclosing information on their individual positions. It is widely known that in most cases decisions are taken before proposals even reach the Council, in the Committee of Permanent Representatives (i.e., COREPER) and working groups, which are fully obscured from public scrutiny.

The second crucial loophole in the Council's policy is its long-time reluctance to join the EU Transparency Register. Although in 2011, the Council announced it was ready to consider having a role in it, nothing has happened since. According to sources in the Council's General Secretariat, the Council does not see the necessity to endorse it since it claims it cannot be lobbied. Yet, the reality proves otherwise. Unlike the Commission, the Council does not conduct public consultations and assessments but relies on its own experts, who "precook" laws that are later rubber-stamped by ministers at plenary sessions. According to an *EU Observer* source, people in the working groups are often disconnected from the reality on the ground and have little idea of the effect of the adopted laws on businesses, citizens or administration in the Member States.[9] For this reason, Permanent Representatives and their staff are a reasonable target for corporate lobbyists and other types of interest groups operating in Brussels.

Yet, the main opposition towards endorsing the register comes from the Member States themselves. While there is the usual pro-transparency minority (Denmark, Sweden and The Netherlands) who regard the register as a natural feature of open government, the majority of Member States are sceptical of it and point to administrative burdens entailed by the register as well as a supposed lack of tangible benefits. This attitude frustrates Parliament and the Commission. In fact, the aim of the register is to make the life of Council civil servants easier. As much as lobbyists offer expert knowledge, they are very skilful when it comes to obscuring their real purposes when approaching a policymaker. In this context, the register will enable the latter to identify the interlocutor, prepare for the meeting and avoid being manipulated by the information provided. Surprisingly, however, some big players such as Germany take a rather sceptical approach to such logic. One may wonder whether it might be due to fears by powerful automotive or financial industries that their links with national and EU administrations might be over-exposed.

The Parliamentary (un-)Transparent Code of Conduct

Of the three EU law-making institutions, the EP is surely the most "permeable" when it comes to lobbying influence. The demand for external expertise is understandable, taking into account that Parliament Members' (MEPs) voices under the co-decision procedure are equally important as the voices of Council members, but they are usually not experts in a particular policy area under consideration. External assistance proves especially strategic when it comes to writing legislative amendments to complex draft legislative acts. EP committees dealing with particular topics are therefore targets for lobbyists and interest groups seeking to influence the scope of EU proposals. Since there are no open consultations at this stage, MEPs favour competent, pre-digested amendment proposals from the interested parties. It is estimated that outside experts are currently responsible for the initial drafting of a very high proportion of the amendments tabled in EP committees. While the amendments still have to be discussed and agreed among MEPs before they are voted on in the plenary, their multiplicity often results in a lack of time to properly scrutinise their impact. Moreover, as the case of the latest Tobacco Directive showed, many MEPs tend to maintain undisclosed contacts with industry lobbyists along the legislative process. Finally, the famous "cash for influence" scandal revealed that MEPs are also prone to fraudulent influence while in office. In 2011,

[9] H. Mahony, "Tough Battle Expected on EU Law-making Culture," *EU Observer*, 10 February 2015, https://euobserver.com/institutional/127556.

journalists from the *Sunday Times*, posing as lobbyists, exposed four MEPs from different Member States who had agreed to table amendments to change an EU law in return for promised payments.[10]

In this regard, it is rather interesting to notice that while the EP is deemed the most open EU institution with regards to access to documents,[11] the situation changes when it comes to information transparency related to MEPs' financial interests. According to the TI Integrity Watch database, over half of MEPs engage in paid activities outside the EP and are members of various industry-related advisory boards. While their average additional monthly income amounts to only about €700, the highest reach €10,000.[12] Such data raises concerns about potential conflict of interests among elected EU policymakers and demands the utmost transparency. Although a renewed code of conduct for MEPs requiring a full declaration of interests was introduced in January 2012, in practice it is revealed that it is not properly executed or enforced. Due to imprecise terminology, it is difficult to assess whether the activities reported in the declarations entail conflicts of interest or not. Some declarations arrive empty while some are simply illegible. It is surprising that, while lobbyists are required to register via an online integrated registry system, MEPs are merely requried to complete a handwritten form.

The Power of Trialogues

While the Transparency Register appears high on the EC's reform agenda, one very significant yet overlooked black spot in EU policymaking is the so-called trialogue, a driving force of EU legislation. The ultimate aim of these inter-institutional consultations between the EC, EP and the Council is to reach compromise on a legislative proposal at an early phase of the legislative process. It is estimated that after the Lisbon Treaty, around 80% of EU laws were agreed before the first reading, and the trialogues are precisely what is speeding up the process. The problem is that their formula fails to ensure a satisfactory level of transparency. While there are over 20 trialogue meetings each week, their precise timing, agenda and composition is usually unknown. They are held behind closed doors with no public access. As there is no mention of them in the treaties, no regulations or safeguards exist allowing for their control. Sometimes participants take all night to find compromise among the positions of the three EU institutions, but since no formal minutes are taken, access to related documents practically does not exist. It is especially concerning that only a handful of EU staff is involved in the procedure and the deal that emerges from it often bears little resemblance to the documents agreed by the lawmakers at the EP and the Council. Thus, the representative nature of EU policymaking rests on the so-called shadow rapporteurs who take a democratic mandate from their political group for brokering a deal that they later have to "sell" back to their peers. In all of this there is also a concern that the compromise-oriented logic of the trialogues entails watering down some ambitious legislative proposals just to have the law ready and up and running.

Recommendations

The famous "less but better" promise of Juncker within the framework of improved regulation will not be fulfilled by cutting the number of legislative proposals in the EC work programme. Taking into account the strategic importance of the proposed 2015 policy projects, including the Energy Union, Digital Single Market, reform of the Monetary Union, or Capital Markets Union, their design requires a significant dose of public scrutiny. For this to happen, comprehensive and consistent reform of EU transparency rules must occur. While it is fair to call the recent efforts a good start, more must follow.

The EC's priority should be to improve the scientific independence of its Impact Assessments so that the expertise obtained is not a tool in a lobbying game but a means to deliver the most effective policy solutions. The role of the IAB should therefore be strengthened, not only by extending its composition to

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[10] B. Pancevski, "Euro MP in cash-for-amendments sting faces a decade in jail," *The Sunday Times*, 12 August 2012, www.thesundaytimes.co.uk/sto/news/uk_news/article1102092.ece.

[11] "EU Integrity Report 2014," Transparency International, http://www.transparencyinternational.eu/european-union-integrity-system-study/the-euis-report-latest-news.

[12] Integrity Watch, www.integritywatch.eu.

external experts but also by making its decisions binding on the EC and by equipping it with the possibility to scrutinise the independence of externally contracted experts. The UK even opted for a fully independent scrutiny board, but the EC did not agree. Moreover, to ensure truly transparent and comprehensive assessments, there should be robust *ex-post* evaluations of laws after they have been transformed in the legislative process. This is very important because if substantial changes are introduced to a draft during negotiations in the Council and EP, the estimated impact of the final act differs from the *ex-ante* assessment. Such proposals are backed by Germany, The Netherlands and France.

As regards integrity rules, the EC's commitment to disclose information on meetings with lobbyists should be extended to lower-level staff in the DGs dealing with particular sectoral issues. It would be ideal if EU institutions would report all input from lobbyists on draft policies in the form of a legislative footprint. In view of past corruption scandals in the EP, this requirement should especially apply to amendments introduced by Parliament in the course of the legislative process. Assessments of substantial amendments should be introduced, possibly provided by the legal services of the particular EP committees. The EP should also improve monitoring and enforcement mechanisms regarding the conduct of MEPs, including comprehensive verification of declarations of interest and the introduction of stricter sanctions that effectively discourage MEPs from seeking additional income from their publically held posts. Finally, documents created for and used by the trialogues, such as agendas, institutional positions and summaries of outcomes, should not be treated differently from other legislative files and should be published on the EP's website, as most of the trialogues take place in its premises.

As regards relations with lobbyists, Juncker and Timmermans should be decisive and swift with their promise to make the joint Transparency Register mandatory. Contrary to some voices that institutional agreement on it requires reforming the treaties, it should be possible to achieve it through the so-called "flexibility clause" stipulated in Art. 352 TFEU. While such an arrangement requires the unanimous decision of the Council, the latter should endorse the register without delay. The fact that this main player in the legislative chain has not done so yet undermines the credibility of the whole EU. As for the scope of the Council's endorsement of the register, it is hard to imagine that only some parts of it, such as the Secretariat, adhere to it while others remain outside of it. The Council as a whole, together with COREPER and the working groups, should stand behind the register. The argument that it is an intergovernmental body and many of its employees are paid from national budgets does not change the fact that while in Brussels they act as EU co-legislators and should follow the same integrity rules as their counterparts from the EC and the EP.

Although the path dependence of the various administrative cultures means changing national mindsets will be difficult, national governments need to understand that the purpose of the register is not to eradicate lobbying but to legitimise it within the EU institutional system. That is why countries such as Poland and Austria, which established their own lobbying registers at the national level, or the UK, which is about to do this, should lead by example and moderate the discussion in the General Affairs Council in the coming months.