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IS THERE A DEFICIT OF THROUGHPUT LEGITIMACY IN THE EU?

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Concerns about the legitimacy of the European Union have increased over the years, as deepening integration moved responsibility for decision-making from the national level to the supranational in policy area after policy area, including areas at the very heart of national sovereignty, such as money, borders, and security.¹ In light of this increasing authority, questions about the EU’s legitimacy have been debated ever since the 1990s.² But such questions have become more pressing since the cascading series of crises that have hit the EUs in recent years, including the sovereign debt crisis, the refugee crisis, British exit from the European Union (Brexit), and the security crisis, along with the rise of populism.

For a long time, scholars remained divided among those who thought the EU legitimate³ and those who instead argued that the EU suffered from an increasing democratic deficit.⁴ Since the inception of the Eurozone crisis, however, most analysts have found the EU wanting in legitimacy in terms of the policies, politics, and/or processes.⁵ In the language of EU democratic systems theorists, these translate into concerns about the EU’s ‘output’ legitimacy, focused on policy effectiveness and performance; the EU’s ‘input’ legitimacy, centered on citizens’ political participation and governing elites’ responsiveness;⁶ and the EU’s ‘throughput’ legitimacy, involving the quality of the governance processes, including their efficacy, accountability, transparency, inclusiveness and openness to interest consultation.⁷

All three mechanisms are important for legitimacy, but they are not created equal. Notably, whereas political input and policy output may be seen to involve trade-offs in terms of legitimacy—with good policy performance making up for little citizen participation or vice-versa—there is no such positive trade-off for procedural throughput. High quality governance processes cannot make up for flaws in political input or policy

¹ Keohane and Hoffmann 1991; Bickerton 2012

² E.g., Williams 1991; Beetham and Lord 1998

³ Majone 1998; Moravcsik 2002

⁴ E.g., Scharpf 1999; Follesdal 2006; Schmidt 2006; Hix 2008

⁵ Scharpf 2014; Crum and Curtin 2015

⁶ Scharpf 1999

⁷ Schmidt 2013

output, while poor quality governance can throw input and output into question.⁸ The danger, therefore, is when supranational actors assume that simply following the rules of good procedures makes up for a lack of citizen participation in the decisions or even for bad results.

But although throughput legitimacy cannot stand alone, it remains an indispensable component of legitimacy. This is particularly the case for bureaucratic organizations where political input may be far removed from the administrative process, or diffuse, and where policy output is indeterminate, in particular in the short term. What is more, within the rubric of throughput legitimacy, different criteria can come into conflict with one another as well as with input or output legitimacy. Under certain circumstances, for example, transparency, inclusiveness, or openness can serve to undermine procedural accountability and could thereby even negatively affect output performance. Under other circumstances, input, output, and the various criteria of throughput legitimacy may all be mutually reinforcing. So the question is: which circumstances make for potential conflicts in legitimation strategies, which for mutual reinforcement?

This essay focuses on throughput legitimacy, and asks whether the EU suffers from a particular deficit in this area. It begins by conceptualizing the legitimacy of the EU's governing activities in terms of output, input, and throughput mechanisms. It then focuses on throughput legitimacy in order to demonstrate its uses as a concept that covers a range of criteria, including efficacy, accountability, transparency, and inclusiveness and openness. Each of these criteria is defined on its own terms and its distinctiveness delineated also in relationship to other throughput criteria as well as to input and output legitimacy, with illustrations from many different areas of EU governance. It ends with a discussion of the challenges to EU institutional actors' throughput legitimacy in the Eurozone crisis.

The contribution of this elaboration of the nature and scope of 'throughput' legitimacy is three-fold. It provides further clarification of the ways in which procedural legitimacy can be theorized and applied in EU Studies. It shows the value-added of using throughput as a concept that covers disparate but interconnected criteria related to procedural legitimacy, to explore both how its various criteria may complement or counter one another and how throughput legitimacy itself may complement or counter the legitimacy tied to (output) performance and (input) politics. Finally, this contribution provides a cautionary note to scholars of EU governance who have increasingly focused on procedural standards of efficacy, accountability, transparency, inclusiveness and openness as ways of improving democratic legitimacy. The 'democratic' in legitimacy refers mainly to the political. Although effective performance and accountable and accessible procedures are necessary, they are not sufficient.

Conceptualizing Legitimacy in terms of Output, Input, and Throughput

⁸ Schmidt 2013

There are many different theoretical approaches to legitimacy. These generally run the gamut from normative theories that define the expected criteria a democratic political system would need to fulfill to be considered legitimate to empirical theories that evaluate the extent to which a given democratic political system is considered legitimate. The normative approaches tend to be deductive and often derived from philosophical principles concerned with the public good, political equality, justice, fairness, identity, public discourse, and deliberation.⁹ Such approaches normally set up a range of criteria or standards of evaluation by which to assess public action. The empirical approaches tend to be more inductive and derived from pragmatic questions about such things as elite and mass perceptions of economic performance, political responsiveness, and administrative accountability, as evidenced in opinion polls, voting, and public discourse.¹⁰ Empirical investigation focuses on citizens' beliefs about legitimacy and on community-based evaluations of public action as well as on the ways in which institutional authorities' actions are legitimated and contested in ways that shape such beliefs.¹¹

This essay focuses mainly on a set of concepts that are normative in their criteria for legitimacy but serve at the same time as useful categories for empirical investigation—as will be demonstrated throughout the article via empirical illustrations of the EU in terms of its actual policy performance, citizens' political perceptions, and procedural quality. It is useful to note here as an aside that this essay is therefore concerned mainly with legitimacy as defined in terms of a governing body's activities, as opposed to the more foundational Weberian understanding of legitimacy, which refers to public acceptance of a governing body's authority. Here, we focus on the legitimacy of the EU's governing activities on the assumption that the EU has over time slowly acquired legitimacy as a governing authority in policy area after policy. That said, the two definitions are naturally interconnected, in particular since legitimacy is a matter of discursive construction and contestation, such that public perceptions of a governing body's activities can negatively or positively affect perceptions of its authority.¹²

We turn for normative definitions of legitimacy (in terms of governing activities) to the language and concepts most often used in the EU studies literature. This is found in the political systems theory that builds on the terms of David Easton,¹³ as updated and elaborated in particular by Fritz W. Scharpf.¹⁴ and upon which Vivien A. Schmidt subsequently expanded.¹⁵ This approach began by focusing on two legitimizing mechanisms: 'output,' concerned with policy effectiveness and performance, and 'input,' centered on political participation and representation, but more recently has added 'throughput,' focused on the quality of governance processes.

Output and Input Legitimacy

⁹ E.g., Beetham and Lord 1998

¹⁰ E.g., Schmitt and Thomassen 1999; van der Brug and De Vrees 2016

¹¹ Tallberg and Zürn n/a; Kneip and Merkel n/a

¹² For more detail see Schmidt (n/a); and Schmidt 2013

¹³ Easton 1965

¹⁴ Scharpf 1999

¹⁵ Schmidt 2013

Output legitimacy describes acceptance of the coercive powers of government so long as their exercise is seen to serve the common good of the polity and is constrained by the norms of the community.¹⁶ This legitimizing mechanism has a long pedigree, taking us back not just to Lincoln's famous phrase about the need to 'govern *for* the people' but to ancient (e.g., Plato and Aristotle) and modern philosophers (e.g., Hobbes and Locke) whose focus long before modern democracy was on the duties and obligations of rulers to govern wisely and well for the good of their people. But even once democracy as a political system was firmly ensconced, with citizens' political representation (input) the added criterion for legitimacy, output legitimacy retained its importance. This is because citizens' sense of legitimacy, even if now dependent upon expressing their voice (input), remains equally contingent on having their needs and desires fulfilled by governing authorities whose policies solve problems and produce good results that serve not just their individual interests but those of the polity as a whole (output).¹⁷ The good of the people, meaning the 'big' goals of output legitimacy, have always been linked to such things as ensuring peace and security, promoting economic prosperity and social well-being, guaranteeing political stability and social rights, and building common identity and greater democracy.

Input legitimacy represents the exercise of collective self-government so as to ensure government responsiveness to peoples' preferences, as shaped through political debate in a common public space and political competition in institutions that ensure political officials' accountability via general elections.¹⁸ This legitimizing mechanism has an equally long pedigree, taking us back to Athenian democracy or to the Roman republic, although it has its greatest elaboration in the work of John Locke and John Stuart Mill or, in another tradition, Jean-Jacques Rousseau. Hannah Pitkin's classical definition of political representation puts it as: 'acting in the interest of the represented in a manner responsive to them'.¹⁹ Input legitimacy is at the very basis of democratic systems of representation, and contains expectations related to the principles and practices of political participation and representation, such as free elections, citizens' right to vote, freedom of expression and the press, majority rule with respect for minority rights, and much more. But representation can be understood in two mutually reinforcing ways, in keeping with Abraham Lincoln's conceptualizations of 'government *of* the people' and 'government *by* the people'. Government *of* the people assumes that citizens are represented by people like themselves. Government *by* the people presupposes instead that citizens elect public officials who govern in their name while expressing their will.

What expressing the will of the people exactly means, however, has been subject to long-standing debate, in particular in light of the dual nature of the role of representatives. Do elected officials represent 'the people' by following their expressed preferences (one way of interpreting government *by* the people) or by doing what they think is right under the circumstances (a way of interpreting government *of* the people). This is another way of

¹⁶ Scharpf 1999

¹⁷ Scharpf 1999

¹⁸ Scharpf 1999, 2014

¹⁹ Pitkin 1967, p. 209

stating the tension, theorized by Peter Mair,²⁰ between political representatives' desire to be responsive to the citizens at the same time that they also need to govern responsibly.

The first interpretation links representation to the expression of political will, generally through elections. This runs the risk, as Nadia Urbinati points out, of too closely relating political legitimacy to the correspondence between what was promised and what gets decided, and thus eliminates the judgment component of democratic representation.²¹

The second interpretation points instead to how closely tied output legitimacy is to input legitimacy. We can see this not only with regard to the political representative's choice between being responsive (input) or responsible (output) but also citizens' ability to sanction governments that they deem to have failed to perform responsibly (output) and/or in ways that meet their needs, fit with their values, and respond to their wishes, as expressed in the previous election cycle (input).

Throughput Legitimacy

To this mix of legitimizing mechanisms, Schmidt has added a third mechanism, 'throughput,' focused on the quality of the governance processes.²² This expands on Easton's original use of the concept, which was limited to bureaucratic practices in the neglected 'black box' of governance, between the input and the output.²³ Throughput legitimacy covers all the governance processes that go on in that black box, including policy formulation and implementation, policy coordination and evaluation, interest intermediation and consultation, rulemaking and rule adjudication, standard-setting and harmonization, legal assessment and judicial review, and so on. As such, this mechanism encompasses all five criteria generally used to assess procedural quality: the efficacy of the policymaking, the accountability of those engaged in decision-making, the transparency of the information, and the inclusiveness and openness to interest consultation. Such legitimating criteria, grouped under throughput, also have a long history, with efficacy and accountability in particular traceable all the way back to Confucius and forward through Hegel's *Philosophy of Right* and Max Weber's legal-rational authority on to the vast public administration literature focused on these issues. In contrast, inclusiveness and openness are often considered in the context of pluralist theories of interest intermediation, and find greatest support from American democratic theorists such as David Truman and Robert Dahl, and more recently from theorists of 'associative democracy'.²⁴ This is where a fourth preposition can be added to Abraham Lincoln's original three, such that governing *with* the people is seen to make up for the limits of government '*by, of, and for* the people'.²⁵

Underpinning these five evaluative criteria of throughput legitimacy are other requirements, including the 'hard' criterion of legality and the 'soft' criterion of trust. Relevant actors generally need to be perceived to act legally within the rules and to

²⁰ Mair 2013

²¹ Urbinati 2006

²² Schmidt 2013 ; see also, e.g., Zürn 2000; Benz and Papadopoulos 2006; Risse and Kleine 2007

²³ Easton's 1965

²⁴ Cohen and Rogers 1992

²⁵ Schmidt 2006, p. 35, 2013

inspire trust in those with whom they engage, such that they are believed to act with integrity and without bias so as to ensure equal and open access in governance while meeting expected ethical and moral standards as well as legal ones. Fairness, meaning enforcing the rules in such a way as to apply equally and appropriately to all, is also a key component, and another defining attribute of legitimacy.²⁶ As a result, central to throughput legitimacy are expectations about the qualities necessary to policymakers, which can be summarized by such buzzwords as trustworthiness, integrity, fairness, impartiality, and credibility. Competence, of course, is also a requirement, linked to efficacy, as is respecting citizens' democratic prerogatives, for example, by not being oppressive or biased in applying the rules or closed to citizen involvement in the decision-making process.

But however important throughput legitimacy is for governance processes, it is never enough to guarantee any overall sense of legitimacy in citizens, for whom good policy output and/or sufficient political input are essential. Whereas input politics and output policy can be seen to involve trade-offs, in which more of the one may be seen to make up for less of the other (if it is indeed possible to separate the two),²⁷ throughput does not interact with output and input in the same way. While weak citizen input may be seen to be offset by good policy output, and a lot of citizen input may legitimate a policy even if it is ineffective, even the highest quality throughput cannot compensate for either bad policy output or minimal input participation, however efficacious the rules, accountable the actors, or transparent, open, and accessible the process. In contrast, bad throughput—consisting of oppressive, incompetent, corrupt, or biased governance practices—is likely to undermine public perceptions of the legitimacy of EU governance, and it can even skew the politics and taint the policies.²⁸ Finally, within throughput legitimacy, the constituting criteria can also work at cross-purposes. Greater efficacy can endanger accountability or inclusiveness; transparency can reduce accountability or efficacy, and openness and inclusiveness may jeopardize efficacy or accountability.

Throughput legitimacy, in short, should not be considered to be on a par with input and output legitimacy. It is nonetheless a key component of legitimacy, in particular in contexts of supranational governance such as the EU, where input politics is at many stages removed from policymaking, and thus diffuse, while the output policy results may be uncertain for some time, and in any case subject to interpretation.

In the multi-level EU, throughput legitimacy has long been one of the central ways in which EU institutional players have sought to counter claims about the poverty of the EU's input legitimacy and to reinforce claims to its output legitimacy.²⁹ In so doing, such actors have operated under the assumption that good throughput may act as a kind of '*cordon sanitaire*' for the EU, ensuring the trustworthiness of the processes and serving, thereby, as a kind of reinforcement or, better, reassurance, of the legitimacy of EU level

²⁶ Franck 1995

²⁷ See Sternberg 2015

²⁸ Schmidt 2013

²⁹ Héritier 1999

output and attention to input.³⁰ While this focus on throughput has been no doubt beneficial, it has been no substitute for input or output legitimacy. Moreover, when problems with regard to throughput legitimacy have occurred, they have had major negative spillover effects with regard to input and output legitimacy. The most emblematic case of this is the scandal involving the Santer Commission, when charges of nepotism and abusive contracting led to its resignation in 1999. This was not just a major blow to perceptions of the EU Commission's underlying trustworthiness or transparency (throughput). It served to obscure the Santer Commission's notable achievements (output), such as Enlargement, while giving Euroskeptics ammunition for their claims about the EU's democratic deficit (input).³¹

Whatever the problems with throughput legitimacy, however, it has been one of the main ways in which supranational actors have sought to improve legitimacy, even if it is no cure for the problems of input or output legitimacy. In what follows, we therefore look more closely at the different criteria by which it is constituted.

Assessing the EU's Deficits in Throughput Legitimacy

Of the five criteria that make up throughput legitimacy, the first, efficacy, is primarily a technical standard, focused on the efficiency of policymaking. The remaining four constitute normative criteria of evaluation, including standards by which to assess the accountability of the policymakers and the transparency, inclusiveness and openness of the processes. But whether technical or normative, all five criteria are significant for EU throughput legitimacy not only with regard to how they are applied to governance processes but also in terms of how they may complement or contradict one another so as to enhance or reduce overall legitimacy.

Efficacy

Efficacy refers mainly to engaging in decision-making and proceeding with policy implementation in an efficient manner. Buzzwords include such phrases as 'streamlining operations' or modernizing practices. As such, efficacy is more of a technical criterion than a normative one—unlike accountability or transparency—since there are all sorts of administrative guidelines and management studies about what constitutes, say, efficient governance or competent management. But although not a normative standard like the other criteria, efficacy is nonetheless a necessary component of throughput legitimacy, since it has long been linked to considerations of the legitimacy of rulers, as a function of rulers' competence to rule, with incompetence contributing to de-legitimization. And although it could be said that the presence of efficacy does not necessarily legitimate a ruling authority, failures of efficacy are often linked to processes of de-legitimization—as, for example, in Max Weber's third definition of authority as legal-rational.³²

³⁰ Schmidt 2013

³¹ Schmidt 2013

³² Weber 1946

Throughput efficacy has in consequence most often been conflated with output effectiveness. But there is a difference between processes that are carried out with efficacy, i.e., in an efficient and competent manner, and policies that are effective, i.e., that work. Although it is generally likely that efficacy in creating and administering policies will have a positive impact on their effectiveness, even inefficient because long-drawn out decision-making or poorly administered implementation can nonetheless produce good policy outcomes, if the policies themselves prove effective. The inverse is also true, that however efficient the administrative processes, the resulting policies can prove ineffective, with bad results. Efficacy, then, is mainly about processing the job well, meaning proceeding in an efficient manner, whatever the outcomes.

Efficacy has been one of the principal concerns of EU institutional actors, as they have sought to enhance the governance processes through which input politics is transformed into output policies. This has involved seeking to improve the operating efficiency of the EU's many different modes of governance. For example, the co-decision mode (which includes the European Commission, the Council and the EP) has been made to function more efficiently through fast-track legislation via early agreements through inter-institutional meetings (called 'trilogues,' which went from 28% in 1999-2004 to 80% in 2004-2009). But this comes at the expense of transparency and accountability as well as to the detriment of input legitimacy, due to the short-circuiting of parliamentary debate and the exclusion of the views of smaller party groupings.³³

In supranational governance as well, the EU has focused on improvements in efficacy. Periodic proclamations by the Commission that it will seek to cut red tape and streamline operations are instances of this, along with promises to simplify the procedures of the European Semester. Impact assessments have since 2003 been another way of evaluating efficacy while trying to reinforce it by tying it to principles of accountability, transparency, inclusiveness, and openness—even if the Commission has often been more internally inclusive, through coordination across administrative units, than externally so, by bringing in external experts or being open to stakeholders and civil society.³⁴ Moreover, EU Commission failures of oversight with regard to member-state transposition and implementation of EU directives, by allowing inconsistent compliance with the rules by the member-states, also raise problems of throughput efficacy, in particular with regard to whether and when the Commission engages in the different stages of infraction proceedings against the member-states.³⁵

Intergovernmental governance by the Council has also frequently been criticized for its lack of efficacy. The unanimity rule for treaties, which allows any member state to veto any agreement, can lead to delays, dilution or deadlock, along with sub-optimal outcomes. Although there are certainly good reasons related to input legitimacy to keep the unanimity rule (because it ensures that member-states can safeguard national preferences and autonomy), unanimity often frustrates goals and values related to output legitimacy—plus it is highly inefficient in terms of throughput efficacy. The serious

³³ Héritier and Reh 2012

³⁴ Bozzini and Smismans 2016

³⁵ Boerzel 2001; Batory 2016

problems with unanimity became apparent from the mid 2000s, once the Council doubled in size. This was exemplified by the myriad delays on the Lisbon Treaty (following the failure of the Constitutional Treaty subsequent to the French and Dutch referenda), and subsequently the increasing recourse to international agreements outside the treaties, in particular during the Eurozone crisis. These are clear indications that the EU needs to find other ways of reaching binding agreements among the member-states, such as through supermajorities with opt-outs. Such problems with the EU's efficacy naturally also affect its accountability.

Accountability

Accountability is arguably the most important aspect of throughput legitimacy, at least judging by the attention paid to it.³⁶ Accountability is generally defined as rulers giving account of and being held to account for their actions. Both of these entail that rulers have the autonomy and discretion to carry out their duties, which can be used or misused.³⁷

Accountability is most often discussed in terms of the administrative activities of technical actors in non-majoritarian institutions, delegated agencies, and governmental administrations, but it also applies to political actors engaged in the processes of governance. In all cases, it means that actors can be held to account—by technical and political oversight bodies, or other forums—for what they do as they engage in processes of governance. But it also means that actors must give account of their actions in those self-same forums as well as to the public, and be judged accordingly. As such, accountability also requires relevant actors to provide information about their activities, to be open to discussion and deliberation about that information, and to be subject to (potential) rewards or sanctions.³⁸

Such procedural accountability needs to be differentiated from what is often termed 'democratic' or political accountability, which refers to politicians being held accountable by their constituents for their levels of responsiveness to citizens' demands (input legitimacy) and/or their ability to deliver successful policies (output legitimacy).³⁹ In political accountability, the executive power-holder is expected to justify the exercise of power to a public forum, in the understanding that this serves the popular constituency.⁴⁰ This differs from procedural accountability, in which technical or political agents give account to private forums of experts or to public representative forums of how they processed executive decisions and are judged on the integrity and legality of how they executed their duties. As Giandomenico Majone specifies, because 'majoritarian standards' of (input) legitimacy are not appropriate for independent regulators, they require 'accountability'.⁴¹ Although Majone himself places such procedural accountability under the rubric of output legitimacy, in our approach it is a

³⁶ Bovens et al., 2014

³⁷ March and Olsen 1995, 152

³⁸ Bovens et al., 2008

³⁹ E.g., Cashore 2002; Borowiak 2011; Crum and Curtin 2015; Wood 2015

⁴⁰ Bovens 2007, 450; Crum and Curtin 2015

⁴¹ Majone 1998

part of throughput legitimacy.

EU accountability is also about actors ‘giving account’ of their actions, which means being subject to scrutiny by a specific forum, whether constituted by technical actors with special expertise in public administration or by political actors acting in a representative capacity for the citizenry at large, such as EU Commissioners or the ECB by the European Parliament (EP).⁴² Technical actors are generally assumed to give account to specialized accountability forums, consisting of networks of experts who can provide ‘objective’—meaning (social) scientific—assessments of the quality of their (throughput) activities and of the effective (output) performance of the resulting policies.⁴³ But accountability may equally be established by forums made up of political actors, such as parliamentary bodies that ‘take account’ not only of the quality of technical actors’ (throughput) activities and the effectiveness of their resulting (output) policies but also how such policies resonate with citizen values and the common interest. Accountability is not just about rendering accounts to specialized forums, however. It is also about making them public.

The ECB’s accountability, for example, is generally seen to depend on passing scrutiny by the epistemic community of economists, banking experts, and other central bankers. But the ECB also sees itself as accountable to the EP, as the forum in which it is charged to explain its actions and to hear concerns raised by MEPs.⁴⁴ That said, by mandate the ECB does not have to listen, and a more cynical view might suggest that the ECB uses the EP more as platform from which to explain and legitimate its actions to a wider audience. The Commission, in comparison, has become much more accountable to the EP over time, in particular ever since the Commission President has come represent the majority in the EP—although its various administrative units (directorate generals) are also subject to technical accountability forums.

The EP itself, as a result, has slowly grown in importance as an accountability forum, although it remains relatively weak. The EP’s enhanced throughput legitimacy with regard to oversight, it is important to note, only partially serves to counterbalance its long-term lack of political input when it comes to Council’s intergovernmental decision-making and the Commission’s supranational policymaking, along with comitology.⁴⁵ The EP continues to have little influence over initiation of legislation, no connection to comitology, and little (albeit growing) connection to national parliaments.⁴⁶ Moreover, trade-offs among throughput legitimacy criteria are also in play. While any increase in the EP’s oversight role over other EU actors would certainly in principle make decision-making more accountable, it could at the same time undermine efficacy by inserting (input) politics into the process, in particular were there to be more conflicts with the Council. In the end, it could even undermine accountability, given the tension between the European parliamentary groupings and national parties resulting from EP party

⁴² Bovens et al. 2010, p. 38

⁴³ Seabrooke 2014

⁴⁴ Braun 2017

⁴⁵ Lord 2004; Bovens et al. 2010

⁴⁶ H eritier et al., 2015

aggregation.⁴⁷

Finally, public accountability also demands that EU actors render accounts to the general public. This serves to build public understanding and trust in their work, to reinforce their authority, to achieve ‘credible commitments,’ and to ensure that the public would accept the policy as appropriate and justified.⁴⁸ In consequence, they have recognized the need to develop communicative strategies on a daily basis in this ‘mediatized’ age.⁴⁹ As a result of this, the media can also be seen to function as a kind of public ‘accountability forum,’ with agencies giving account to the media even as the media give account of those agencies’ regulatory activities to the public.⁵⁰ This arguably works best for technical agencies speaking on specialized issues—such as when Margot Wallstrom announces a state aid ruling that sanctions Ireland’s special tax regime for Apple. But it may not work as well for the EU Commission on general questions because there is no EU wide media to which to give public account, while national media may take nationally colored views. But this is also where transparency comes in.

Transparency

Transparency has long been seen as an accompaniment not only to (throughput) accountability but also to political (input) legitimacy, as a key component of any free society, related to citizens’ rights to know and governments’ obligation to share information about all aspects of public life. It sits at the very heart of how citizens hold their public officials accountable, and thus is closely linked to accountability. In transnational democracy, moreover, transparency can equally be seen as a component of citizen empowerment,⁵¹ with the goal of improving public services or reducing corruption and clientelism. But transparency can also have a regulatory function, by serving to tame undue private power, with public officials mandating public disclosures about private companies’ products and practices such that citizens have the requisite information to press for corporate social responsibility and performance.⁵² In the EU, both senses of transparency are operative, since EU officials seek to make their own actions and publications more transparent while demanding the same of all entities that do business in the EU.

In the EU, transparency generally refers to the availability of provisions ensuring that citizens and political representatives have access to information about governance processes and that decisions as well as decision-making processes in formal institutions are public.⁵³ This is to enable the public to monitor the processes, with wide access to documents by any feasible and accessible means, with few exceptions.⁵⁴ In practice, this means checking on how well the public can examine the integrity and accountability of

⁴⁷ Rose and Borz 2013

⁴⁸ Cashore 2002; Schillemans 2011; Wood 2015

⁴⁹ Hajer 2012

⁵⁰ Bovens 2007; Maggetti 2012

⁵¹ Smith 2012

⁵² Kosack and Fung 2014

⁵³ H eritier 2003

⁵⁴ Hillebrandt et al 2014

the EU actor itself as well as the functioning of inter-institutional oversight relations.⁵⁵

The Commission has attempted to ensure general transparency by providing increasing access to the mountains of EU documents and materials for the media and interest groups as well as to the general public through the internet and the development of e-government—although the massive volume of EU-generated information has also led to information overload and thus, perversely, less transparency.⁵⁶ Access to information, however much, does not ensure that citizens will automatically gain insight and knowledge about the proceedings. And more information is not always better, since it is easier to lose any sense of what is important and what is not.

Even though transparency has been an increasing focus of EU actors more generally, there are many instances of a lack of transparency. For example, the European Stability Mechanism (ESM), which acts as a lender of last resort in conjunction with the ECB, argues that if it made the reasons for its investment decisions public, the markets would be the greatest beneficiaries, to the disadvantage of the member-state receiving ESM support.⁵⁷ In this case, considerations of output legitimacy—meaning good performance—appear to win out over the search for throughput legitimacy via transparency.

Transparency can also clash with efficacy, in particular in negotiation settings.⁵⁸ In Council meetings, for example, secrecy—meaning the lack of transparency—has been linked to greater efficacy, since it helps member-state officials clinch agreements that would not be possible if national publics knew about their officials' specific compromises, and enables fruitful side-deals.⁵⁹ Conversely, where more public debate is mandated in the co-decision process, negotiations often end up taking place over lunch or in the corridors, to the detriment of accountability as well as transparency, whether in the Council or the EP.⁶⁰

For legitimation, then, much depends upon the reasons for the secrecy, and whether it is necessary in order to ensure against worse consequences, or instead to hide problematic decisions. In the Eurozone crisis, as Christian Kreuder-Sonnen argues, there is a difference between secrecy as crisis management in a 'reactive/defensive mode' and secrecy as crisis exploitation in an 'active/offensive mode,' where those in authority benefit from opacity to gain executive discretion and adopt policies that would have otherwise not have been possible.⁶¹ An example of defensive crisis management could be seen in the ECB's moving closer to acting as a lender of last resort, to 'save the euro'.⁶² An example of crisis exploitation is best illustrated by the Eurogroup in the various Greek bailout negotiations, where the ability of Eurogroup finance ministers to

⁵⁵ E.g., Braun 2017, Ban and Seabrooke 2017

⁵⁶ Héritier 2003

⁵⁷ Ban and Seabrooke 2017

⁵⁸ E.g., Stasavage 2004

⁵⁹ Naurin 2007

⁶⁰ Novak 2013

⁶¹ Kreuder-Sonnen 2017b

⁶² Braun 2017

act in secrecy enabled ‘creditor’ country ministers to wrest much more out of Greece than they would have been able had they had to make their positions public.⁶³ As an added factor, the opaqueness of the Eurogroup’s decision-making on Greece, when they act in their capacity as the board of governors of the ESM, also reduces their accountability, since as an informal body they give accounts of their actions to no one.⁶⁴

Inclusiveness and Openness

Transparency as well as accountability can also be linked to the final criterion of throughput legitimacy, concerning governance processes’ openness and inclusiveness. Openness means that the political and technical actors involved in creating and/or implementing policies are willing to engage with any and all of those members of the public—mainly organized in groups of citizens—desirous of having a say with regard to the policies in which they are most interested. Inclusiveness means that they are open to all such groups, and bring them in in such a way as to ensure balance in their representation.

Admittedly, it may sometimes be difficult to distinguish between citizen activities that serve the function of political representation (input) versus ones that serve a function of procedural ‘representation’ (throughput). The former is related to the expression of political preferences and judged on the basis of whether interest groups adequately and appropriately represent the interests of the citizens for whom they claim to speak. The latter is related to accessibility, and judged on the basis of whether interest groups are adequately and fairly represented in policymaking, with every effort made to provide for a diversity of opinion. There is little question that the expression of political preferences by interest groups through, say, letter-writing campaigns or lobbying in order to put issues on the political agenda and/or to influence the electoral process, involves input legitimacy, just as do social movements’ protests in the street. In the legislative process, however, the differentiation between input and throughput related activity is less clearly demarcated, since both may be involved in any given set of actions. Interest group participation in policy formulation, implementation, and rulemaking may on the one hand appear as political input-related activity, for example, when interest groups represent their constituencies’ interests through testimony in committee meetings and hearings. But such participation may on the other hand be seen as more generally part of procedural throughput-related activity, when interest groups and experts are invited to attend closed meetings to help in the policy formulation or rule-making processes, not just because of their ideas or the interests they represent but because of how they serve to balance the ideas and interests being represented. It is easier to distinguish throughput-related activities from input-related ones where experts or members of interest groups are involved in standard-setting committees and comitology, or invited to be part of evaluative administrative processes or accountability forums. In these venues, participants are clearly brought in for their expertise and technical knowledge, to help refine policies or to provide balance in views, as opposed to serving to represent any possible political interests.

⁶³ Kreuder-Sonnen 2017b

⁶⁴ Ban and Seabrooke 2017

Problems with regard to inclusiveness and openness come from the nature of intermediation, whether understood in terms of political or procedural representation. These include unequal access, differentials in power and influence, corruption related to the trading of favors, client politics, lack of accountability and the dangers of agency ‘capture’ by special interests—as famously elaborated for US pluralist processes of intermediation by James Q. Wilson.⁶⁵

The EU has its own version of pluralism.⁶⁶ In the EU, governance *with* the people through pluralist-type consultation comes mainly through co-decision-making, and was initially focused mainly on the technical agents of the Commission. This has changed with the increasing powers of the EP in co-decision, as lobbying MEPs has been a veritable growth industry.⁶⁷ Moreover, rather than competition among interests, following the norm of the US, the Commission has fostered cooperation, with the rules of the game demanding that participants gain and maintain credibility as trusted actors providing accurate technical information.⁶⁸

The EU has deliberately encouraged such pluralism as a way of counterbalancing the paucity of governance *by* or *of* the people through political participation and citizen representation. The Commission in particular has done much to attempt to right the balance in access and influence among organized interests representing business versus those representing unions or public interest organizations,⁶⁹ sometimes even being instrumental in bringing in underrepresented interest groups (e.g., of women and consumers) at the EU level. But be this as it may, access and inclusiveness remain debatable,⁷⁰ in particular given the difficulties of transnational mobilization.⁷¹ Much has yet to be done to strengthen and redesign the existing elements of participatory democracy, as anchored in the constitutional framework of the Union.⁷²

Ensuring inclusiveness and openness also has spillover effects on other aspects of throughput legitimacy. For one, ensuring greater openness to interest participation serves to improve transparency mainly through the provision of more information on rules and procedures as well as through procedural requirements for active participation by a broad range of stakeholders in regulatory decision-making.⁷³ Inclusiveness and openness also improve accountability, by promoting deliberative procedures that are designed to ensure that citizens’ community power is adequately channeled in societal and administrative decision-making.⁷⁴

Eurozone economic governance during the crisis has posed special problems with regard

⁶⁵ Wilson 1980; see also Bianculli et al. 2014

⁶⁶ Schmidt 2006, Ch. 3

⁶⁷ E.g., Coen and Richardson 2009

⁶⁸ Coen 2008; Coen and Richardson 2009

⁶⁹ Greenwood 2007; Pianta 2013

⁷⁰ Kröger 2008

⁷¹ Della Porta 2009

⁷² Kamlage and Nanz 2017

⁷³ Sabel and Zeitlin 2010: 18–20

⁷⁴ Bekkers and Edwards, 2007, p. 53

to openness and inclusiveness, in particular for organized labor in light of the European Semester, which empowered the European Commission to prescribe labor market policies and sanction non-complying governments. This resulted in a situation in which the EU, rather than dealing with the conflicts between business and labor at the supranational level through inclusive negotiation, “nationalizes social conflicts” through country-specific recommendations, corrective action plans, and sanctions that pushed wage deflation and labor market deregulation.⁷⁵ In other words, in the Euro regime, national ‘authoritarian’ imposition in cases of countries in conditionality programs replaced EU level inclusiveness with regard to labor. But this is only one of the many problems for throughput legitimacy in the context of the Eurozone crisis.

Challenges to EU Institutional Actors’ Throughput Legitimacy in the Eurozone Crisis

Throughput legitimacy has become particularly salient during the sovereign debt crisis because of the focus by European leaders on Eurozone ‘governing by rules and ruling by numbers.’⁷⁶ The initial actions taken, involving reinforcing rules-based, numbers-targeting governance, raised legitimacy problems not only in throughput terms—regarding its efficacy, accountability, transparency, inclusiveness and openness—but also in terms of how these negatively affected output performance and input responsiveness. The subsequent response to the deterioration of output policy performance and the increase in the volatility of national input politics, which involved the reinterpretation of the rules ‘by stealth,’ added additional problems of throughput legitimacy.⁷⁷

The Council has come in for criticism as a result of its intergovernmental monopoly on decision-making, dominated by Germany and other ‘creditor’ countries. That criticism focuses on the inefficacy of EU governance, largely because of the Council’s incompetence in crisis management along with its lack of transparency as well as its perceived bias against ‘debtor’ countries.⁷⁸ The Commission has also been under attack, whether for its inflexibility in the European Semester between 2010 and 2012, especially by Southern European countries, and subsequently for its failure to enforce the rules more rigorously, in particular by Northern European countries.⁷⁹ Arguably most in question have been the institutions constituting the Troika (IMF, ECB, Commission, and the ESM), which have been faulted for their lack of accountability and transparency.⁸⁰ As Christian Joerges has argued, at the height of the crisis, such institutions were about as far from representative democracy as one can go, and more like authoritarian imposition when it came to decisions about the deficit reductions and structural reforms required for countries in trouble in exchange for bailout funds.⁸¹

⁷⁵ Erne 2015

⁷⁶ For a more detailed discussion, see Schmidt 2016

⁷⁷ Schmidt 2016

⁷⁸ E.g., Fabbrini 2013; Matthijs and Blyth 2015

⁷⁹ Schmidt 2015, 2016

⁸⁰ Ban and Seabrooke 2017

⁸¹ Joerges 2014; see also Kreuder-Sonnen 2017a

When EU institutional actors slowly and incrementally began reinterpreting the rules ‘by stealth,’ that is, passing over in silence or even denying publicly that they were in fact adjusting the rules, they certainly improved output policy performance. But they at the same time split the input politics, in particular between North and South, while they raised major questions for the throughput processes. Transparency was undermined by key actors hiding the fact that they were reinterpreting the rules and with it accountability to the ‘principals,’ i.e., the Council, even if efficacy may have benefited by the increasing discretion of EU actors in applying the rules flexibly. The lack of clear guidelines for administrative discretion and flexibility, moreover, raise questions of both accountability as well as transparency, while the absence of political actors ‘taking account’ of technical actors’ decisions raised questions for its input legitimacy. Finally, all of this jeopardized the values of trust and legality that underpin the throughput governance processes, without which EU actors have great difficulty moving forward.

In the process of reinterpreting the rules of Eurozone governance, EU actors could be seen as having created a new ‘governance framework,’⁸² by supplementing, if not supplanting, the formal rules by informal rules. This however should not be seen as the same as ‘informal governance,’ in which making exceptions to the rules is part of a process of negotiated agreement that actually reinforces the legitimacy of the formal governance processes (throughput), the impact of the rules (output), along with their responsiveness to citizens (input). Informal governance in the case of Single Market regulations, for example, is when individual member-states are occasionally given exemptions after Council-led investigation and agreement that the political fallout from domestic groups’ objections could jeopardize consensual EU level politics or national political stability.⁸³ In the Eurozone crisis, by contrast, governance is not so much about making exceptions to the rules as creating exceptional rules, while denying it.⁸⁴

The problem for EU actors in the Eurozone crisis has been that the complexity of decision-making processes, the formal rigidity of the rules, and the divisions among key players have ensured that admitting that they were actually reinterpreting the rules has been difficult if not impossible where they have feared legal challenges or worried that political deals may unravel. Both technical and political actors have in fact had very good reasons for not admitting publicly their reinterpretation of the rules by stealth. In addition to the political splits among member-states for or against austerity policies was the volatility of the markets as well as their schizophrenia between 2010 and 2012, as they seemed to expect austerity and growth at the same time,⁸⁵ the uncertain reactions from different segments of the public within as well as between countries; and the threat of potential legal challenges (the referral of the ECB’s Outright Monetary Transactions (OMT) program to the German Constitutional Court being a case in point).

⁸² Alcidi et al., 2014

⁸³ See Kleine 2013

⁸⁴ Another way of thinking about such reinterpretation comes from Italian constitutional theory, where the ‘*costituzione materiale*,’ or the constitution in practice, is accepted as malleable and legitimately reinterpreted through practice because the veto points and players make it impossible to revise the constitution. See Mortati 1940

⁸⁵ See Olivier Blanchard on this: <http://blog-imfdirect.imf.org/2011/12/21/2011-in-review-four-hard-truths/>

The problems with throughput legitimacy regarding the reinterpretation of the rules can also cast suspicion on output policy performance and throw input responsiveness into question. Reinterpretation by stealth could make EU technical agents appear incompetent—or ideologically bullheaded—because they appear to be sticking to rules that don't work, thereby tainting public perceptions of the output policy performance. Moreover, by obfuscating on the reinterpretations, EU political agents tend to skew the politics, making them appear less responsive than they actually are. Worse, it leaves their actions open to critique by the political extremes—who claim to ‘tell the truth’ while politicians lie, don't care, or care only about their own clientelist and/or class interests.⁸⁶ But even without the populist take on this, the general public can get the wrong impression, given the disingenuous discourse of political and technical elites. Legitimacy, after all, is about perceptions of policy effects as much as it is about actual effects.

Finally, in a system in which the focus on ‘governing by rules and ruling by numbers’ has created an increasingly rigid system of packs, pacts, and compacts, any exercise in political or administrative discretion demands rules for stretching or breaking the rules—or at the very least agreement on who has the authority to make or break those rules.⁸⁷

This raises two questions: First, how does one legitimate such reinterpretations ‘by stealth,’ that is, by not admitting—or even denying—to the public what one is doing behind closed doors? Second, how does one go about legitimating the reinterpretation of the legally binding rules if there are no rules for bending or breaking those rules? Put another way, who judges the scientific validity or normative appropriateness of the reinterpretations?

The answer to the first question—how to legitimate such reinterpretations to the public—remains elusive so long as EU institutional actors do not admit what they have been doing, that is, reinterpreting the rules ‘by stealth.’ This was particularly problematic in the time period from 2010 to 2015, during the Barroso. Subsequently, the Juncker Commission began admitting to its flexibility, even setting out rules for flexibility, which improved perceptions of throughput legitimacy. Moreover, as time has progressed, and as such reinterpretations have become increasingly contested, EU actors have more and more had to ‘give accounts’ publicly of their actions—such as the ECB with regard to quantitative easing and the Commission involving its derogations for France and Italy. This is one route to greater legitimacy, even if such public accounting has involved EU actors trying to hide the truth of what they are doing. Telling the truth—although more optimal in terms of accountability and transparency—remains problematic for output and input legitimacy, given member-states’ divergent interests and assessments of what needs or ought to be done.

The answer to the second question, how to go about legitimating rules reinterpretation, is embedded in EU institutional actors’ own definitions of legitimacy as well as in the institutional settings in which they operate. Conceptualizations not just of efficacy but

⁸⁶ Mudde 2017

⁸⁷ Thanks to André Sapir for this comment, made in the wrap-up session of the Conference on “Europe in a Post Crisis World,” Center for European Studies, Harvard University (Oct. 31-Nov. 1, 2013).

even more importantly of accountability (political as much as bureaucratic) need to be embedded in institutional understandings of what constitutes ‘democratic’ norms and standards for evaluation, in particular in an ‘unsettled polity’ like the EU, where principal-agent theories of compliance and control cannot account for the complexity of organizational relations.⁸⁸ To understand how EU institutional actors build legitimacy for their reinterpretations therefore requires looking at those actors’ own very different institutional configurations and frameworks for legitimation. And it entails recognizing that different sets of EU actors build their authority to change the rules on different bases following different pathways to legitimacy.

Conclusion

This essay set out to show that the concept of throughput legitimacy is a useful and necessary accompaniment to output and input legitimacy, but not a substitute. It focuses on the quality of policymaking, in order to reinforce peoples’ trust that the rules are being following fairly, in the spirit as much as the letter of the law, in ways that are responsive to citizens’ input demands while ensuring the best possible policy outputs. Perceptions of illegality or unfairness, which lead to a loss of trust serve to endanger the EU’s throughput legitimacy and, in turn, its input and/or output legitimacy. But good governance (throughput) cannot make up for failures to respond to citizens’ expressed demands (input) or to produce effective outcomes (output). The overall question with regard to the EU’s throughput legitimacy, in the end, is whether it ensures the seamless flow of input to output as part of a governing system that acts both responsively (input) and responsibly in ways that produce good outcomes (output) efficaciously via accountable and transparent processes that are also inclusive and open (throughput). In short, the answer to the question: does the EU have a throughput deficit is inextricably tied to the question of whether it has an input and/or output deficit. Since the Eurozone crisis, we probably have to answer ‘yes’ to all three deficits. This raises the question of whether the EU is itself democratically legitimate—but the answer to that requires another much longer essay.

⁸⁸ Olsen 2013

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