



The Procedural Legacy of Two Years of COVID-19 Pandemic: How the Temporary Modification of the Council's Rules of Procedure Became Permanent

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4.1 INTRODUCTION

The outbreak of the COVID-19 pandemic resulted in travel bans across several EU Member States, preventing the ministers from convening at Council meetings. Consequently, the Council was compelled to establish internal working methods to sustain its operations. From the very beginning of the crisis, the use of the ordinary written procedure was the

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cornerstone of the daily work within the Council.¹ Under this procedure, the General Secretariat of the Council requires Member State delegations to express in writing whether they agree to adopt, object to, or abstain from a specific Council act. In 2020, no less than 82% of the Council's acts were adopted following this procedure. As the pandemic appeared to be receding from the European continent, Russia waged a war of aggression against Ukraine in February 2022. This meant that the French presidency had to deal with another crisis, unprecedented in its nature and gravity, and which also had a strong impact on the use of the written procedure within the Council.

The study of the written procedure has been somewhat overlooked in academic legal literature. This chapter aims to bridge this knowledge gap, shedding light on this alternative method for the Council to adopt legal acts. We will illustrate how modifying the majority rules required for the written procedure was intended to expedite decisions during extraordinary circumstances. We will then explain how the Council codified the temporary lower majority rules, which subsequently became an integral part of the Council's rules of procedure. In accomplishing this, we shine a light on what might be termed the transformative institutional power of crises.

In the first section, we describe the adaptations to the Council's working methods made necessary by the pandemic. The second section evaluates these changes with a focus on the implications for democratic principles and transparency within the Council's operations. We demonstrate that the frequent use of the written procedure during times of crisis enhances the Council's decision-making efficiency, albeit at the expense of principles of democracy and transparency.

¹ There are two sorts of written procedure foreseen in the Council's Rules of procedure, namely the ordinary written procedure and the simplified written procedure (known as the "silence procedure"). The latter implies that a Member State is supposed to accept the Council act submitted if it does not express a response by the time a set deadline expires. As we do not deal with this procedure, we use the terms "ordinary written procedure" and "written procedure" as synonyms in this chapter.

4.2 SETTING THE SCENE

The outbreak of the COVID-19 crisis (4.2.1) triggered the need for transformed working methods of the Council (4.2.2). The two-year pandemic left then imprint on the Council's rules of procedure (4.2.3).

4.2.1 *The Outbreak of a Global Pandemic*

While the pandemic was spreading throughout Europe, Belgium officially went into lockdown on 18 March 2020, as did the European Union institutions. At that time, teleworking (which was already strongly recommended) became compulsory. Furthermore, some Member States were closing their borders. The gravity of this situation cannot be overstated: for an entity like the EU, where freedom of movement is its *raison d'être*, the imposition of travel bans was not taken lightly. Consequently, in an unprecedented turn of events, members of the EU institutions found themselves unable to convene in person for the first time in their history. Their working methods, which are based on consensus-seeking dialogue and on constant bilateral and multilateral contacts, were not fit for purpose in the new circumstances brought about by the pandemic.

In contrast to national governments where ministers do not have to cross borders to assemble, Council meetings require them to leave their countries and travel to Brussels or Luxembourg (art.16(2) TEU). When this became unfeasible, one might surmise that the Council could have convened and voted via videoconference. However, according to article 11(4) of the Council's Rules of Procedure (hereafter: CRP), the Council can only vote in the physical presence of a majority of its members, i.e., 14 ministers from different Member States. Consequently, even though an absent minister could delegate their vote to another minister (art. 239 TFEU), the prevailing public health conditions were such that this quorum hindered efficient and fluid decision-making during the Council's meetings.

As a result, during a period when swift decisions were critical due to the extraordinary crisis that the EU and its citizens were facing, one of its core institutions was immobilized, unable to make any decisions. This posed a major challenge for the European management of the pandemic in the initial weeks of March 2020. Therefore, a change in the Council's working methods became necessary. This issue was first discussed at COREPER on 18 March 2020, coincidentally, the very same

day the Belgian authorities officially announced the lockdown. However, the debate did not proceed without opposition (Bodson, 2020). The unprecedented magnitude of the crisis, the uncertain future confronting the EU Member States, and a general lack of preparedness made reaching an agreement a formidable task. To help the COREPER choose the solution most appropriate to ensure the continuity of the Council's decision-making during these exceptional times, the General Secretariat of the Council (GSC) drafted a position paper proposing three options (Council, 2020a).

The first option involved that ministers unable to attend official Council meetings in person but participating via videoconference would be counted as part of the quorum. This would have enabled them to attend vote and to keep the Council's working methods during the pandemic as similar to usual practice as possible. The change that this option triggered did not go so far as to lower the necessary quorum—that would have required a treaty-change. As noted by the General Secretariat, the system of dividing the agenda into A- and B-items, based on whether they require further discussion or not, would have been retained (art. 3(8) and (9) CRP). Similarly, it would have allowed for the preservation of the Council agenda's division into two main parts dealing with legislative acts and non-legislative acts respectively (art. 16(8) TEU), upholding the rules governing transparency within the Council.

The second option, which was ultimately chosen, aimed to reduce the majority requirements stipulated in article 12(1) CRP for employing the ordinary written procedure at COREPER level. Under this procedure, the General Secretariat of the Council inquires in writing whether the Member States' delegations agree to adopt the act in question, object to it, or abstain. The act is adopted as soon as the number of affirmative responses received matches the number of votes required, following the voting rules applicable to its adoption (Council, 2022a: 91). The written procedure can only be prompted on grounds of urgency, e.g., when “failure to adopt a Council act by a specific date would create a legal vacuum”, or when “an act must be adopted by a certain deadline but a Council meeting has not been scheduled and cannot be arranged in good time” (Council, 2022a: 89). Furthermore, the Commission has to agree with the use of that procedure if it brings the act in question before the Council.

According to the CRP in force at the time, unanimity was required to decide to use the written procedure. The General Secretariat of the

Council thus suggested that the COREPER would make such a decision following the voting rule applicable for the adoption of the Council act in question. In other words, at the COREPER level, the decision to use the written procedure would have required a qualified majority for acts to be adopted under this majority rule, while unanimity would remain necessary when deciding to use the written procedure for acts requiring a unanimous vote for their adoption. The same parallelism was valid for acts that could be adopted following a simple majority: the approval by 14 Member States at the COREPER level would be enough to decide that the adoption of that act would proceed through the written procedure. By contrast, as was the case before, unanimity was still required to decide to use the written procedure at the Council level. The rules governing Commission approval and requirement of urgency remained unchanged.

The third and last option submitted by the Secretariat General of the Council consisted in a mix of the two previous ones. Ministers virtually attending a Council meeting would have been taken into account for the quorum requirements, while the majority necessary to trigger the written procedure would have been lowered, both at the ministerial and COREPER level. Contrary to the second option, which only concerned the COREPER, the lesser requirements necessary to switch to the written procedure would have thus applied to the Council as well (Council, 2020a: 2 and 17).

4.2.2 *The Need for Crisis-Proof Council Working Methods*

After a three-day negotiation, COREPER finally reached an agreement in favor of the second option on 23 March 2020 and adopted Council Decision (EU) 2020/430 as a one-month temporary derogation from the Council's Rules of Procedure in view of the travel difficulties caused by the COVID-19 pandemic. No in-person Council meetings were foreseen for one month. Only informal meetings through videoconferencing were organized depending on the needs. As a result, the number of Council decisions adopted through the written procedure increased significantly at the time (see hereafter, Figs. 4.1 and 4.2).

Choosing the second option meant that Member States preferred an intensified use of the written procedure rather than allowing voting at virtual meetings. This can seem odd as it pushes the Council's decision-making further away from its usual working methods. The written procedure implies that no meeting is needed in the first place. Email

exchanges between Member State delegations and the General Secretariat of the Council were sufficient to engage Member States and adopt the Council's decisions. As counterintuitive as this may be, several reasons can explain why this choice finally turned out to be the least bad option.

First, one should remember how challenging virtual gatherings of ministers were at the outbreak of the COVID-19 pandemic. Difficulties with Wi-Fi connections, unsecured internet channels, and a lack of translation were common occurrences (Koenig & Nguyen, 2020: 4). In addition to this, one cannot expect ministers to “virtually” participate in a whole day of Council meetings, as this is normally the case when in-person Council meetings are organized. Third, the General Secretariat of the Council could not control who among the Member States delegations attended the Council meetings (art. 5(3) CRP). They soon became very crowded as a whole range of civil servants and political advisers were listening to discussions that they ordinarily could not access. Fourth, there was no overwhelming enthusiasm to design an optimal alternative to the usual Council working methods: the idea was not to create something so efficient that it would spare ministers from gathering in person in Brussels in the future. Lastly, the choice to intensify the use of the written procedure instead of gathering ministers online reminds us that voting during Council meetings is only the tip of the iceberg. The role and influence of ministers in the EU decision-making process has been declining over the years (Häge, 2008). Diplomats, experts, and civil servants do the biggest share of the work daily in Brussels. Although the pandemic made the work of civil servants and diplomats more complicated, it did not prevent them from negotiating and reaching agreements. While the Council's working groups mainly met online through videoconferencing, the COREPER continued to hold in-person meetings in Brussels.

4.2.3 *Back to Normal? The Follow-Up to the COVID-19 Pandemic*

The Council decision of 23 March 2020 was further extended twelve times,² leading the provisional derogation from article 12(1) of the CRP

² For example, Council Decision (EU) 2020/556 of 21 April 2020; Council Decision (EU) 2020/702 of 20 May 2020; Council Decision (EU) 2020/970 of 3 July 2020; Council Decision (EU) 2020/1253 of 4 September 2020; Council Decision (EU) 2020/1659 of 6 November 2020; Council Decision (EU) 2021/26 of 12 January 2021; Council Decision (EU) 2021/454 of 12 March 2021; Council Decision (EU) 2021/825

to be in force until late June 2022. At that time, the Council was gradually gathering back in Brussels and so did the Council's working groups. The last Council meeting through videoconference occurred during the French Presidency on 3 May 2022.

Despite some exceptions, life was back to normal. One could thus expect that the usual working methods within the Council would soon resume. As the reason that had triggered the change in the Council Rules of procedure vanished, there was no longer any need for a more frequent use of the written procedure. Ministers can now discuss and vote during Council meetings as they always did, and written procedure could once again be a means of last resort, convenient only in exceptional circumstances as it was always meant to be. However, things do not always go as expected. After repeatedly stating, decision after decision, that the simplified majority rules for triggering the written procedure were “temporary [...] in view of the travel difficulties caused by the COVID-19 pandemic in the Union”, the Council finally decided to make them permanent. Accordingly, decision 2022/1242 amending the Council's Rules of Procedure modified article 12(1) of the CRP. It now states that “acts of the Council on an urgent matter may be adopted by a written vote where the Council unanimously decides to use that procedure or where COREPER decides to use that procedure in accordance with the voting rule applicable for the adoption of the Council acts concerned. In special circumstances, the President may also propose the use of that procedure; in such a case, written votes may be used where all members of the Council agree to that procedure”.

The Council was so satisfied with the solution it found to tackle the COVID-19 crisis that it decided to perpetuate it in anticipation of probable future crises. During the debates at COREPER, the Russian war of aggression against Ukraine was seen as the reason why the rules lowering the majority requirement to use the written procedure should be part of the permanent Council's emergency kit. As expressed in recitals 3 and 4 of decision 2022/1242, the high probability of situations requiring urgent action occurring in the future meant perpetuating the successful experience developed during the COVID-19 pandemic.

of 20 May 2021; Council Decision (EU) 2021/1142 of 12 July 2021; Council Decision (EU) 2021/1725 of 24 September 2021; Council Decision (EU) 2021/2098 of 25 November 2021; Council Decision (EU) 2022/321 of 24 February 2022.

However, not every Member State shared this viewpoint. Facing opposition from some delegations at COREPER level, the French presidency decided not to submit its proposal to the Council and to leave the incoming Czech presidency to deal with it. At the General Affairs Council of July 2022, Member States supported the decision, but the Netherlands, Portugal, and Ireland made a statement in which they expressed doubts about lowering the majority requirements definitively. In their view, having an unanimity requirement for switching to the ordinary written procedure was an important safeguard to ensure “among others national coordination, public transparency and the involvement of national parliaments in accordance with the practices of Member States”. To address their remark, an emphasis on these requirements was added in recital 5 of the Council decision. These countries also expressed concerns about the permanent asymmetry created between the Council and the COREPER—but this criticism remains unanswered. In the following section, we investigate these claims further. More specifically, we assess what could be the future consequences of the new simplified majority rules and what this reveals about the long-term impact of the COVID-19 crisis on the Council’s decisional features.

4.3 LESSONS LEARNED FROM THE COVID-19 CRISIS: AN ASSESSMENT OF THE NEW ORDINARY WRITTEN PROCEDURE

In this section, we assess, from a constitutional perspective, the ordinary written procedure as an alternative to the adoption of Council acts at Council meetings. The principles of effectiveness, democratic accountability, and transparency are used as benchmarks. Taken together, these three principles form the core of EU democratic legitimacy.

4.3.1 *Effectiveness: Securing the Continuity of the EU Decision-Making Process*

Under art. 13 TEU, the institutional framework of the EU “shall ensure the consistency, effectiveness and continuity of its policies and actions”.³ While the principles of consistency and continuity were already mentioned in the Treaty of Maastricht, the idea that the EU institutions are bound to be efficient when exercising their competencies was only introduced in the Treaty of Lisbon (Loewenthal, 2019: 128).

Effectiveness, understood as the ability to meet objectives, is a specific requirement of democracy. Designated as “output legitimacy”, it is also an integral part of the EU’s democratic governance (Scharpf, 1999). Therefore, the institutions, Council included, must seek “a high degree of effectiveness in achieving the goals that citizens collectively care about”. Otherwise, “democracy would be an empty ritual” (Scharpf, 1997: 19). Other authors even stress that the democratic legitimacy of the EU would be better assessed through its effectiveness rather than through parliamentary involvement, i.e., input legitimacy (Majone, 1998; Moravcik, 2002; Menon & Weatherhill, 2007).

When a crisis such as the COVID-19 pandemic breaks out and threatens dramatic consequences on European citizens’ health, mobility, social, and financial stability, they can expect that the EU reacts effectively. Ensuring the effectiveness of the Council’s decision-making process was the very reason for deciding the change in procedure in the first place (recital 3 of Council decision n° 2020/430). As shown in Fig. 4.1, as soon as the CRP was amended to ease the use of the ordinary written procedure in March 2020, there was a very significant increase in the total number of written procedures.

The comparison between the number of Council decisions adopted under the written procedure and those adopted under the regular procedure shows that the solution designed to cope with the COVID-19 pandemic was impactful. There is no sudden drop in the number of Council decisions adopted during the periods of lock-downs and travel bans. Figure 4.2 hereunder shows that from April 2020 to April 2021,

³ Other provisions of the Treaty on the European Union refer to the effectiveness of EU actions and policies. See art. 15(6)(b) as regard with the European Council and articles 24(3) and 26(2) TEU as regard with the Common Foreign and Security Policy (CFSP). In the same vein, see art. 3 of the Declaration on Article 16(9) TEU concerning the European Council decision on the exercise of the Presidency of the Council.

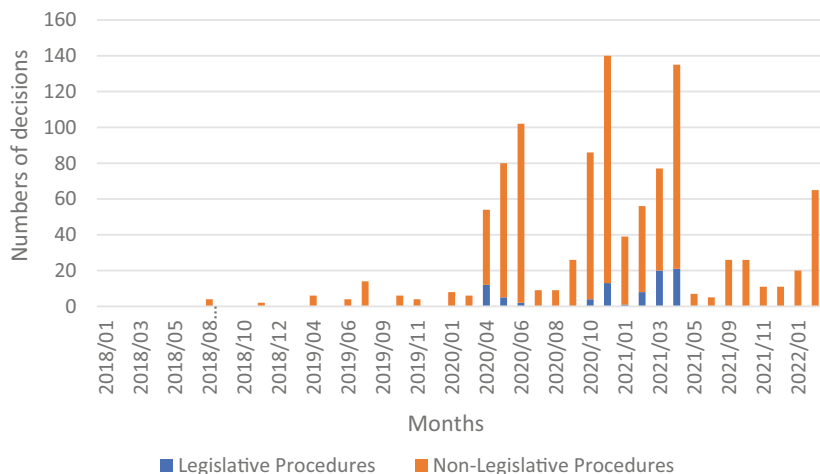


Fig. 4.1 Council decisions adopted by written procedure

the Council worked mainly through the written procedure, which makes sense since ministers could not vote during (informal) virtual Council meetings. From May 2021 to January 2022, the situation was flipped as the Council adopted most decisions under the normal procedure. During that period, a temporary reprieve from the pandemic led to more frequent formal Council meetings. This tends to show that Member States did not misuse the written procedure and preferred to adopt acts at Council meetings when possible.

The written procedure was used for both legislative and non-legislative acts. At the same time, a decrease in the number of legislative acts adopted in 2020 (44) can be observed compared to 2019 (109 legislative acts) and 2021 (135 legislative acts). As emphasized by Intel and von Ondarza (2021), the cyclical nature of the European legislative process can better explain these results than the pandemic. In fact, the second year of the legislature is not one when most legislative agreements are concluded. On the contrary, that is when the Commission traditionally presents its proposals and begins negotiating. However, if we compare the number of legislative proposals adopted in 2020 with those adopted in 2015 (i.e., the second year of the previous legislative cycle), we observe that 65 legislative acts were adopted in 2015, and only 44 in 2020. Arguably, the

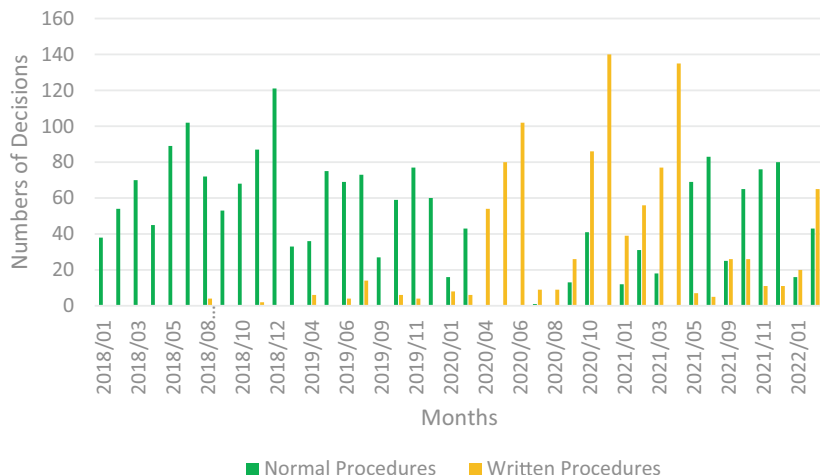


Fig. 4.2 Comparison of normal procedure/written procedure⁴

COVID-19 pandemic caused a nearly one-third decrease in the number of legislative acts adopted. Thirty-six of them were adopted under the written procedure in 2020, while only seven were adopted that way in 2015. Overall, if we include non-legislative acts, the Council used the written procedure 72 times in 2015 for 618 Council acts adopted that year, against 520 times in 2020 for 634 Council acts.

In conclusion, the Council managed to deliver efficient decision-making throughout the COVID-19 crisis thanks to the ordinary written procedure. This shows that the procedural change made to the Council's working methods met its objective and ensured the continuity of its activities, despite the months-long lock-downs. When the Council meetings resumed, the normal procedures were favored once more, while the written procedure remained more frequently used than it was before the pandemic.

⁴ Based on our own calculation from figures published in the monthly summaries of Council acts, accessible on <https://www.consilium.europa.eu/en/documents-publications/public-register/monthly-summaries/?year=2015> (last consultation: June 2023).

4.3.2 *Democratic Accountability: Bringing the EU Closer to its Citizens*

Assessing the democratic accountability of the EU is one of the most disputed issues in the literature. However, it is quite clear that the EU *must* be democratically accountable to its constituencies. In a multilevel governance system such as the EU, this can take place before both the European Parliament and national parliaments (art. 10(2) TEU). In other words, besides the democratic role played by the European Parliament as the only directly elected EU institution, national (or even regional) parliaments also have a role to play in defending their constituencies at the EU level. This is the idea behind the so-called EU *démocracy* (Nicolaidis, 2012) or EU multilevel parliamentary field (Crum & Fossum, 2009).

As an EU institution, the Council contributes to the EU's democratic legitimacy in its own way (BVerfG 89, 155). Because ministers gathering in the Council are not collectively accountable, the scrutiny exercised by national parliaments on every single minister is vital to the democratic credentials of the institution (Roland, 2016) and is guaranteed through the cumulative application of art. 12 TEU and national constitutional law (Besselink, 2017: 25–35). This means that the intensity and modalities of parliamentary control vary from one Member State to the other (Hefffler & Rozenberg, 2015). However, in every Member State, the democratic legitimacy of national positions defended at the EU level is ensured through ministerial accountability before the national parliament (Griglio, 2022). Albeit imperfect, national parliaments' oversight of national governments is key to the democratic accountability of the Council (Vandenbosch, 2024). It has no counterpart at the EU level.

In that respect, a more frequent use of the ordinary written procedure comes at a democratic cost. We found three ways in which the written procedure limits the democratic credentials of the Council compared to the normal procedure. First, although the written procedure does not affect the role of the European Parliament since it comes into play at another stage of the decision-making, the same cannot be said for national parliaments. Their role is closely related to the Council (Jancic, 2017: 15). Neither the Treaty of Lisbon nor the CRP provides specific rules for national parliamentary involvement in the context of the written procedure. The usual system of information and involvement thus applies, including direct notification from the Commission when it submits a new legislative proposal (protocol n° 1, annexed to the Treaty of Lisbon).

We lack information on how national governments inform their parliaments when they are about to vote on a Council act following the written procedure. Theoretically, national rules could provide tools for parliaments to scrutinize the written procedure. We believe that this is unlikely to be the case in practice, although further research is necessary to corroborate this supposition. Debates about EU policies in national parliaments are usually triggered by the Council's agenda (Rozenberg & Hefftlar, 2015). Therefore, if a topic is not discussed during a Council meeting, it is unlikely that national parliaments will be involved. Consequently, when the COREPER decides to use the written procedure to adopt a Council act, this act will certainly not elicit parliamentary attention.

Second, the new rules for deciding to use the written procedure create a permanent asymmetry between the Council and the COREPER, likely to perpetuate the shift in decision-making power from the former to the latter that occurred during the pandemic (Barigazzi, 2021; Bendjballah & Kreiling, 2021). As the Council can only decide to use the written procedure unanimously, whereas the COREPER can do it in accordance with the voting rule applicable for the adoption of the Council act in question, it is likely that the decision to opt for the written procedure will be taken at the COREPER level. However, the COREPER is an internal auxiliary body, mainly responsible for preparing and ensuring the implementation of the Council's work.⁵ The power of decision is supposed to rest in the Council.⁶

When the COREPER makes the decision to use the written procedure that is not subsequently endorsed at a Council meeting, this increases the gap between the EU citizens and the decisions takers. Seen through the lens of the principal-agent theory (Strøm, 2003; see also Schramm and Wessels in chapter 6 of this book), this raises questions about how much the chain of delegation can be stretched in a democratic regime (Bergman, 2000; Papadopoulos, 2014). Ministers shoulder a direct political responsibility for their choice in the Council decision-making process,

⁵ See judgment of 19 March 1996, *Commission v Council*, C-25/94, EU:C:1996:114, §§ 25–26 and judgment of 20 November 2018, *Antartic MPAs*, C-626/15 and C-659/16, EU:C:2018:925, §§ 60–61.

⁶ See art. 16(7) TEU, art. 240(1) TEU and art. 19 RPC, but also Judgment of 19 March 1996, *Commission v Council*, C-25/94, EU:C:1996:114, §§ 25–26, and judgment of 20 November 2018, *Commission v. Council*, Case C-626/15 and C-659/16, ECLI:EU:C:2018:925, §§ 60–61.

diplomats sitting in the COREPER do not. Moreover, either on the technical or the ministerial level, members of the Council represent their states and are authorized to commit them, following the instructions they receive (Edjaharian, 2013: 656). Therefore, we do not see any particular reason why unanimity is required when ministers make the decision to switch to a written procedure, whereas, in most cases, a qualified majority of Member States is enough when the COREPER makes this decision. The discrepancy created between the Council and the COREPER at the expense of the former lacks consistency. This amounts to requiring different majority rules within the same institution to make the same decision.

Third, the EU's democratic legitimacy can also be assessed through the lens of deliberation. Broadly speaking, deliberative democracy emphasizes procedures that allow for "mutual understanding, publicly expressed reason, and broadened political inclusion" (Brown, 2009). A political decision can be qualified as democratic if it is the result of such procedures. Among the rich literature on this question, the logic of communicative action developed by Habermas holds particular significance. It involves a strong procedural component and the objective of reaching consensus through "a systematic process wherein actors tell the truth, justify their positions extensively, and are willing to yield to the force of the better argument" (Bächtiger et al., 2010: 32–63). Deliberative democracy as a normative project is frequently seen as a powerful driver of the EU decision-making system (Eriksen & Fossum, 2000; Neyer, 2006). Deliberation is understood to be a core value in the working methods of the Council to reach collective policy responses beyond national interests (Puetter, 2012).

Against this metric, the written procedure scores poorly. The conditions for deliberation are simply not met. As expressed by Eriksen and Fossum, "deliberation and not voting is the foundation of democracy" (2018: 848). Yet, under the ordinary written procedure, the only channel for Member State delegations to express their view is the adoption of a unilateral declaration. At best, this declaration can be shared at the Council or COREPER meeting where the decision on the use of the written procedure is adopted. At worst, the General Secretariat of the Council only mentions it in the closing note that it issues once the procedure is over (Council, 2022a: 91). However, a competing hypothesis could also be defended. One can imagine that prior to the final vote through the written procedure, extensive debates and deliberations took

place at the working group, COREPER or even ministerial level. In that case, the ordinary procedure serves as a final stage to formally close the negotiations. Empirical research on the recourse to the written procedure should be conducted to assess this contrasting view. In both cases, however, the written procedure raises concerns in terms of transparency as expressed in the following section.

4.3.3 The Principles of Transparency and Publicity: Enabling Citizens to Participate in the Decision-Making Process

The decision-making process within the Council must be as transparent and open as possible to allow scrutiny from parliaments but also more broadly from civil society and citizens themselves. The Lisbon Treaty makes a strong link between the principle of transparency, as enshrined in art. 15 TFEU on the one hand, and the democratic legitimacy of the EU, on the other.

The Council's duty of transparency is one of varying degrees (Edjaharian, 2013: 664). As a co-legislator, it has a heavier duty of transparency when legislative acts are at stake. In that case, Council deliberations, the results of votes, explanations as well as statements must be made public (art. 16(8) TEU, 15(2) TFEU, 5(1) and 7 CRP). Practically, each Council meeting is divided into two parts. The first deals with legislative acts and is video-streamed. Interested citizens can follow the debates and have a better idea of the interests at stake. The second part deals with non-legislative activities and is not public. Beyond legislative files, the Council can still be required to ensure publicity, for example when it debates an important proposal for a legally binding act for the first time (art. 8(1) CRP). The Presidency can also decide whether the ensuing meetings should be public.

However, debates on Council decisions frequently escape publicity. Transparency requirements mainly affect the upper-most level of the Council system, the working parties and the COREPER being largely spared by the rules governing openness and publicity. Most times, negotiations are conducted behind closed doors and the agreed decision is then formally adopted without debate under A-point (Dann, 2018, 542). Overall, transparency within the Council has been frequently the object of sharp criticism.

During the COVID-19 pandemic, maintaining the EU institutions' standards of transparency was of utmost importance "not despite the

crisis, but precisely because of the crisis” (Ombudsman, 2020). However, legislative deliberations were barely made public during the first months of the pandemic. Despite the General Secretariat of the Council initially inviting the Council to adopt a document with the conditions and practical arrangements for videoconferencing Council meetings, this did not occur in practice (Council, 2020b: 8). Consequently, from March to July 2020, no official Council agenda was published, meetings were not web-streamed and documents related to the topics under discussion were not necessarily made public. The Ombudsman decision’s in the strategic inquiry into the transparency of decision-making by the Council during the COVID-19 crisis concluded that the Council’s practice at the time breached art. 15(2) TEU (Ombudsman, 2021: 6). From July onwards, the Council changed its working methods and adopted the so-called modalities on the convening, preparation, and organization of informal videoconferences of ministers during the COVID-19 crisis (Council, 2020c). After assessing the new rules, the Ombudsman found that they ensure “at least comparable transparency as apply to formal Council procedure”, while expressing concerns over the fact that not every document supposed to be released under the rules was made publicly available. For example, some agendas for informal ministerial videoconferences were missing (Ombudsman, 2021: 7).

Arguably, this conclusion is not valid for the permanent change in the voting rules for using the written procedure as it results from Council decision n° 2022/1242. As we know, the written procedure does not allow for debates between ministers at Council meetings—except potentially on the decision to use this procedure in the first place. Consequently, a whole range of policy issues might escape discussion in the Council, including when they concern legislative files. During the pandemic, informal Council meetings through videoconferences tamed this side effect since they allowed ministers to discuss the Council decisions under negotiation. They were then endorsed through a written procedure decided by the COREPER. As emphasized in the recitals of every Council decision on a temporary derogation from the Council’s Rules of Procedure, “the Council act concerned should, where possible and relevant, be subject to prior political discussion by ministers, for example by informal videoconference”. This reference to ministerial discussions during the informal Council meetings was not included in the initial proposal from the General Secretariat of the Council but was added

later through an amendment. This shows that it was a point of interest for Member States.

By contrast, Council decision n° 2022/1242 no longer included this call for prior political discussions in the Council—be they informal. Furthermore, the reference to the exceptional and temporary nature of the change in the majority rules due to the COVID crisis was dropped.⁷ Therefore, the safety net initially designed to smooth the lower majority rules disappeared. Aware of this, the Netherlands, Portugal, and Ireland published a declaration recalling that “it is therefore important that recourse to the adoption of acts of the Council through a written procedure is limited to circumstances which require urgent action, and that a maximum level of public transparency in the Council’s decision-making is ensured” (Council, 2022b). Like the other Member States, they still supported the change in the majority rules for the use of the written procedure. Thus, judicial review remains the means of last resort to ensure that the Council does not misuse the written procedure. Beyond the majority requirements, the European Court of Justice can always annul the Council act adopted under the written procedure, for example if it considers that the urgency requirement is not met.⁸

The right to access documents is another illustration of the principle of transparency. As a general rule, any citizen of the Union can access the documents of the Council, a right subject to narrowly interpreted conditions and limits (see art. 1 Regulation n° 1049/2001 regarding public access to European Parliament, Council, and Commission documents).

When a Council act is adopted through the written procedure, one can assume that there is an increase in the number of documents produced. In addition to the emails expressing the votes of Member States, every statement and opinion is put down in writing. Furthermore, the General Secretariat of the Council concludes the procedure

⁷ Compare the recitals of the first Council decision of 23 March 2020, with those of the Council decision of June 2022. See also Statement by Hungary, Poland and Slovenia: “This decision shall in no way be regarded as an amendment to the Council’s Rules of Procedure or a precedent invoked for any future procedural decision within the Council. The Council shall return to its normal decision making practice as soon as the circumstances allow that”, *Summary Record of the Permanent Representatives Committee—20 and 22 April 2020*, 7709/20, p. 2, available on <https://data.consilium.europa.eu/doc/document/ST-7709-2020-INIT/en/pdf> (last consultation: September 2022).

⁸ Judgment of 23 February 1988, *United Kingdom a. Council*, C-68/86, EU:C:1988:85.

by issuing a closing note which mentions the results of the procedure and every unilateral statement. Paradoxically the increased volume of documentation produced under the written procedure may thus open new avenues for public scrutiny of the work of the Council, at least compared to the traditional decision-making at technical level where the Council working groups gather in person and do not produce any minutes of their meetings (only agendas are issued and publicly available).

However, this is without considering that the Council marks some documents with an informal WK label. These documents do not have a separate entry in the Council public register. Therefore, they are visible only when they are compiled in an ST document, which happens about once a month. As stated in the Ombudsman decision on transparency in the Council during the COVID-19 crisis, this practice dramatically reduces the opportunity for transparency of the written procedure (Ombudsman, 2021: 10). Building on its previous recommendations, the Ombudsman suggested that the Council list in its public register “all types of documents at the time they are issued, regardless of their designation and whether it is possible to access the document (or parts thereof) or not”. In its answer, the Council simply took note of this recommendation and reassured the Ombudsman vaguely: “internal reflection on this complex issue is already ongoing”. Unfortunately, “any final decision can only be envisaged after further detailed examination”. Nothing has been heard from the General Secretariat of the Council since then.

4.4 CONCLUSION: MUCH ADO ABOUT NOTHING?

Throughout the 2019–2024 legislature, the management of the COVID-19 crisis was a top priority on the agenda of no less than four presidencies of the Council. After the Croatian presidency faced the first consequences of this worldwide pandemic of dramatic proportions, Germany had to deal with the depth of the crisis. While European citizens’ basic freedoms were still severely restricted, Portugal and then Slovenia led the Council efforts towards the crisis exit and subsequent recovery. In that period, the EU adopted several key measures (including the establishment of the Recovery and Resilience Facility) to address the COVID-19 pandemic and mitigate its impacts.

The COVID-19 pandemic dramatically exposed how much the EU needs crisis-proof procedures that include efficient tools and can be triggered in urgent circumstances. However, a legal framework such as this

should not come at the cost of a high-quality decision-making process, respectful of core principles such as democracy and transparency. The system designed during the COVID-19 pandemic, which mixed lower majority requirements at the COREPER level to use the ordinary written procedure and informal online Council meetings, proved efficient and ensured institutional continuity of the Council decision-making under the exceptional circumstances caused by the pandemic. Furthermore, together with the conditions and practical arrangements for videoconferencing during Council meetings, it allowed the Council to fulfill the applicable transparency requirements (Ombudsman, 2021: 11). However, the meaning of the lower majority to use the ordinary written procedure changed as they became permanent. As the new majority required at the COREPER level to switch to the ordinary written procedure was perpetuated, the global health crisis turned out to be another layer in the sedimentary process that has been shaping the Council since its beginning. Because the Council's rules of procedure now make it easier to use the written procedure, one can argue that Council decisions will be adopted that way more frequently in the future. That means that the Council can make decisions more quickly but in a manner that is less transparent and democratic than when decisions are adopted during a Council meeting. Furthermore, we cannot understand the rationale behind the decoupling in majority requirements between the Council and the COREPER.

The purpose of this chapter was to comment this novelty in the majority rules, document the circumstances under which it happened, and warn against its potential misuse. Further empirical research should be conducted to identify when the written procedure is used and what its consequences are on the Council's decision-making process. More specifically, a comparison of the use of the written procedure before and after the COVID-19 Crisis would shed light on the impact of lower and differentiated majority requirements at the COREPER level. If the written procedure is used only in cases of emergency as it is supposed to be according to art. 12 CRP, the COVID-19 pandemic will have helped improve the effectiveness of the Council's working methods when unexpected circumstances arise, which is more often the case now than ever. On the contrary, an intensified use of the written procedure at the expense of proper deliberations during Council meetings would be a step backward in the struggle for more open Council decision-making. At a time

when citizens and the Court of Justice of the EU alike stress how important transparency and openness is for the democratic legitimacy of the EU, this would damage the credibility of the Union as a whole.

REFERENCES

- Bächtiger, A., Niemeyer, S., Neblo, M., Steenbergen, M. R., & Steiner, J. J. (2010). Disentangling Diversity in Deliberative Democracy: Competing Theories, Their Empirical Blind Spots and Complementarities. *Journal of Political Philosophy*, 18, 32–63.
- Barigazzi, J. (2021). How ambassadors took over the EU—Inside the ‘engine room’ that kept the European Union running through the pandemic—and gained power as a result”, *Politico*, (consulted on 23/07/2022 www.politico.eu/article/eu-ambassadors-coreper-power-center/).
- Bendjaballah, S., & Kreiling, V. (2021). COVID-19: The EU legislative process proves resilient and adaptable but democracy has suffered. *European Policy Analysis*, 1–15.
- Bergman, T. (2000). The European Union as the next step of delegation and accountability. *European Journal of Political Research*, 37(3), 415–429.
- Besselink, L. (2017). EU Constitutionalism and National Parliaments Insiders or Outsiders? In D. Jancic (Ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis Resilience or Resignation* (pp. 25–35). OUP.
- Bodson, B. (2020). EU Institutions’ Operational Resilience in the Time of COVID-19. *L’europe En Formation*, 2020(1), 53–73.
- Brown, G. (2009). Deliberative democracy In I. McLean and A. McMillan (Eds.), *The Concise Oxford Dictionary on Politics*, 3rd ed., Oxford, OUP.
- Council. (2020a). Exceptional measures on the continuation of decision making in the Council, *General Secretariat of the Council of the European Union*, 19 March 2020, 6934/20.
- Council. (2020b). Exceptional measures on the holding of Council meetings, *General Secretariat of the Council of the European Union*, 17 Mars 2020, 6873/20.
- Council. (2020c). Note to the Permanent Representatives Committee, Modalities on the convening, preparation and organisation of informal videoconferences of ministers during the COVID-19 crisis. *Presidency of the Council of the European Union*, 29 June 2020, 9188/20.
- Council. (2022a). Comments on the Council’s Rules of Procedure, *General Secretariat of the Council of the European Union*, 2022, available at <https://www.consilium.europa.eu/en/documents-publications/publications/council-rules-procedure-comments/>

- Council. (2022b). Council Decision amending the Council's Rules of Procedure—Statement by the Netherlands, Portugal and Ireland, *Permanent Representatives Committee (Part 2)*, 13 July 2022, 11271/22 ADD1.
- Crum, B., & Fossum, J. E. (2009). The Multilevel Parliamentary Field: A Framework for Theorizing Representative Democracy in the EU. *European Political Science Review*, 1(2), 249–271.
- Dann, P. (2018). The Council, In R. Schütze and T. Tridimas, *Oxford Principles of European Union Law*. The European Union Legal Order, Oxford, OUP, 518–548.
- Edjaharian, V. (2013). Article 16 [The Council] In H.-J. Blanke and S. Mangiameli. *The Treaty on European Union*, Berlin and Heidelberg, Springer, 645–680.
- Eriksen, E., & Fossum, C. (2000). Post-national integration. In E. Eriksen & J. Fossum (Eds.), *Democracy in the European Union Integration through deliberation?* (pp. 1–28). Routledge.
- Eriksen, E., & Fossum, J.-E., (2018). Deliberation Constrained: An Increasingly Segmented European Union, A. Bächtiger, J. Dryzek, J. Mansbridge and M. Warren (Eds.), *The Oxford Handbook of Deliberative Democracy*, (pp. 842–855). OUP.
- Griglio, E. (2022). *Parliamentary Oversight of the Executives—Tools and procedures in Europe* (pp. 191–196). Hart Publishing.
- Häge, F. M. (2008). Who Decides in the Council of the European Union? *Journal of Common Market Studies*, 46(3), 533–558.
- Hefffler, C., & Rozenberg, O. (2015). Introduction In C. Hefffler and O. Rozenberg (Eds.), *The Palgrave Handbook of National Parliaments and the European Union* (pp. 1–39). Palgrave Macmillan.
- Jancic, D. (2017). The Legacy of an Evolving Polity Democracy, National Identity and the Good Functioning of the EU. In D. Jancic (Ed.), *National Parliaments After the Lisbon Treaty and the Euro Crisis Resilience or Resignation* (pp. 1–21). OUP.
- Joerges, C. (2002). Deliberative supranationalism—two defences. *European Law Journal*, 8(1), 133–151.
- Koenig, N., & Nguyen, T. (2020). Five takeaways from the German Corona Presidency, *Policy Brief*, Hertie School—Jacques Delors Center.
- Loewenthal, P.-J. (2019). Articles 13–18. In M. Kellerbauer, M. Klamert, & J. Tomkin (Eds.), *The EU Treaties and the Charter of Fundamental Rights* (pp. 126–171). Oxford University Press.
- Majone, G. (1998). Europe's 'Democratic Deficit': The Question of Standards. *European Law Journal*, 4(1), 5–28.
- Menon, A., & Weatherill, S. (2007). Democratic Politics in a Globalising World: Supranationalism and Legitimacy in the European Union. *LSE Legal Studies Working Paper n° 13/2007*.

- Mintel, J., & von Ondarza, N. (2021). Consensus per video? Decision-making in the Council of the EU during the COVID-19 Pandemic. *Working Paper Stiftung Wissenschaft und Politik*.
- Moravcsik, A. (2002). In Defence of the “Democratic Deficit”: Reassessing the Legitimacy of the European Union. *Journal of Common Market Studies*, 40(4), 603–634.
- Neyer, J. (2006). The Deliberative Turn in Integration Theory. *Journal of European Public Policy*, 13(5), 779–791.
- Nicolaidis, K. (2012). The Idea of European Democracy. *Philosophical Foundations of European Union Law*, 247–274.
- Ombudsman. (2020). Letter of the European Ombudsman to the President of the European Council concerning transparency of the EU COVID-19 crisis response, 20 April 2020, available here: <https://www.ombudsman.europa.eu/en/correspondence/en/127056>
- Ombudsman. (2021). Decision in strategic inquiry OI/4/2020/TE on the transparency of decision making by the Council of the EU during the COVID-19 crisis, 24 March 2021, available at <https://www.ombudsman.europa.eu/en/decision/en/139715>
- Papadopoulos, Y. (2014). Accountability and Multi-Level Governance. In M. Bovens, R. Godin et T. Schillemans (Eds.), *The Oxford Handbook of Public Accountability* (pp. 273–288). OUP.
- Puetter, U. (2012). Europe’s Deliberative Intergovernmentalism: The Role of the Council and European Council in EU economic governance. *Journal of European Public Policy*, 19(2), 161–178.
- Rozenberg, O., & Heffler, C. (2015). Introduction In C. Heffler, C. Neuhold, O. Rozenberg and J. Smith (Eds.), *The Palgrave Handbook of National Parliaments and the European Union* (pp. 27–38). Palgrave Macmillan
- Roland, S. (2016). Un déficit démocratique peut en cacher un autre: la responsabilité politique du Conseil européen et du Conseil en question. In C. Geslot, P.-Y. Monjal et J. Rossetto (Eds.), *La responsabilité politique des gouvernements des Etats membres de l’Union du fait de leur action européenne* (pp. 219–239). Bruylant et Larcier.
- Scharpf, F. W. (1997). Economic Integration, Democracy and the Welfare State. *Journal of European Public Policy*, 4(1), 18–36.
- Scharpf, F. W. (1999). *Governing in Europe: Effective and Democratic?* Oxford University Press.
- Sprungk, C. (2013). A New Type of Representative Democracy? Reconsidering the Role of National Parliaments in the European Union. *Journal of European Integration*, 35(5), 547–563.

- Strøm, K. (2003). Parliamentary Democracy and Delegation. *Delegation and Accountability in Parliamentary Democracies* (pp. 55–106). OUP.
- Vandenbosch, S. (2024—forthcoming). Vers une procédure démocratique de conclusion des traités? Étude des effets de l'eupéanisation du treaty-making power sur les démocraties parlementaires néerlandaise et belge, Bruxelles, Larcier.