Living transparency
Hillebrandt, M.Z.

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Today there is a broad consensus that the Council of the European Union needs transparency in order to function democratically. Twenty-five years after the introduction of a transparency policy, different sides however still disagree about the extent to which opacity has been overcome. Those praising 'advancing transparency' consider that Council transparency increased considerably and by now approximates democratic standards. A more critical account observes a 'captured transparency', highlighting the many remaining obstacles that transparency in the Council has to overcome before it can be effective.

This study provides a detailed and multi-disciplinary exploration of the question how the 'living policy' of transparency has fared in the Council. It compares the development of transparency in three of the Council’s policy formations: Environment, Economic and Financial Affairs, and Foreign Affairs. The analysis paints a picture of an increasingly fragmented reality of transparency in different policy areas, both with regard to the rules governing access and their interpretation and implementation. Moreover, the Council’s current access to documents policy is marked by several shortcomings that suggest a negligent attitude towards democratic issues. However, the study also shows that change, when brought about in a manner that is both realistic and has eye for its normative purposes, can allow transparency to fulﬁl its democratic promise.

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Living Transparency
The development of access to documents in the Council of the EU and its democratic implications

Maarten Hillebrandt
Colofon

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Living Transparency
The development of access to documents in the Council of the EU and its democratic implications

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Voor papa en mama
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When one spends more than four years investigating a single phenomenon, this brings about certain changes of character. I too come out of the dissertation process transformed. For one, I developed the remarkable –and rather narrowly useful– skill of instantly spotting the word 'transparency' on a page. Somewhat more profoundly, I became sensitised to the many-layered phenomenon of transparency, and what it means to the people, institutions and societies that are confronted with it. I learned how to investigate this phenomenon in an academic manner and how to offer an original perspective on it in front of academic audiences. Starting out with such a project, I did not oversee the consequences that the choice to pursue a PhD entails. Only in retrospect do I discern the distance I covered over the past years, and how right I was in making the choice to come to Amsterdam to pursue this PhD project on Council transparency.

It is not for nothing in this respect that the German academy speaks of Doktormutter and Doktorvater. In many ways, the role of the supervisor in the supervisee’s professional life can be viewed as that of a parent. They put you in this academic world, and, although they cannot predict how it will go for you, they wish you well and stand by your side to help you to the best of their ability to grow up as a responsible and independent researcher. I consider myself fortunate to have gone through this process with Deirdre Curtin and Joana Mendes as my two Doktormütter and Albert Meijer as my Doktorvater. Deirdre and Albert, you saw PhD material in me long before I saw it myself. You provided the space and evoked the enthusiasm that led me to give it a shot, and thereafter offered me the means to get started. Joana, in you I found a patient and thoughtful mentor that accompanied me along my first steps into the wonderful and (to me at least) sometimes idiosyncratic world of legal scholarship. Your constant trust as supervisors in my abilities as a researcher played a central role in the successful completion of the project, opened new roads and helped me to grow as a scholar. I warmly thank you for your involvement.

A dissertation project relies on the cooperation, goodwill, and time investment of a considerable number of people and organisations standing at a relative distance from the researcher to be brought to a good end. This makes me all the more thankful for their help. I thank the interview respondents for their time and willingness to explain the intricacies of their work. My analyses were further calibrated by the input of various practitioners willing to comment on it. In particular, I would like to mention here Jacob Thomsen, Ronny Patz, Yannick Bendel Andreas Pavlou, Kees Groenendijk and Ralph Hallo. The Prins Bernhard Cultuurfonds, the University of Amsterdam Alumni Fund, and ACCESS Europe played a pivotal role by opening important avenues in the research project with their generous funding. I thank them for their confidence and assistance in the application process. By inviting me in their midst, the Meijers Committee challenged me to think more closely about the societal impact and shortcomings of EU transparency, and to write about these in ways
that might bring about tangible improvements – a wonderful learning school and opportunity for any social scientist.

Where would a PhD be without his colleagues? At every point of the journey, I was reminded of just how important companionship among fellow PhDs and other young colleagues is. ACELG, ACIL and other PhDs that I befriended, thank you for being the vibrant community that you are. I would like to highlight a number of direct colleagues who played an especially important role in my PhD project. Bettina Leufgen, Stephan Grimmelikhuijsen and Gijs Jan Brandsma at the Utrecht School of Governance first lit the flame of interest in EU transparency and made good discussion partners on a variety of fronts. Eljalill Tauschinsky convinced me to overcome the social sciences – law barrier by joining ACELG in Amsterdam. There, I found a fellow transparency fanatic in the ever-enterprising Vigjilenca Abazi and benefitted greatly from Chris Koedooder’s wide knowledge of European law and politics and above all his precision in conveying this knowledge when proofreading a text or discussing a point. Yet without doubt my time at the UvA law faculty was most strongly defined by the countless hours spent with my two office mates Emma and Nik. Emma, your constant good mood in spite of my occasional missionary preaches to convince you of the need for some more of that ‘governance sh*t’, your artful ways of relativising our niche desk jobs in the face of your office mates’ constant discussions about politics, and your stoic responses to our race-to-the-bottom for bad word jokes were all an ever-present and much-needed stabilising factor throughout. Nik, during our first lunch, I remember you taking issue with one of my points, turning it inside out into an argument that you’d obviously thought about longer than I had. I thereafter got to know you as a very involved and motivating colleague and friend, unrelentingly thorough, and never afraid to call it as you saw it. I could not have wished for better office mates and I wish us all flying careers, early professorships, and meaningful scholarship as agreed.

After over four years in Amsterdam, I learned that a department floats or sinks with its support staff. Betty and Willem form the backbone of the secretariat, helping out with one thousand small but indispensable things, and always open for a chat and a joke. Angela ‘had my back’ on multiple occasions, sometimes giving me the feeling she took my project even more seriously than I did myself. She checked, reminded, arranged, mediated and solved, mostly quietly in the background, always making sure things worked out as well as they could.

During my PhD project I was lucky enough to spend two research visits abroad. At the University of Lausanne I was gracefully hosted by Yannis Papadopoulos and LAGAPE. Yannis introduced me to the various possibilities at the centre and offered useful feedback and discussion. Further generous time, interest and intellectual investment were granted by Martino Magetti, Sandrine Baume, Martial Pasquier and Francesco Maiani, as well as the centre’s PhD community, of whom Eduardo Guascino, Thenia Vayonaki, Johanna Schnabel, Ewoud Lauwerier and Tereza Cahlicova deserve special mention. Gothenburg University attracted my attention for its dual research cores in EU politics and transparency contained in CERGU and beyond. There, I explored the neighbourhood’s plenty lunch locales with my host Daniel Naurin while discussing the progress on my dissertation, as well as with Guri
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Life as a PhD researcher offers great opportunities for the creation of all manner of intellectual friendships. Over several coffees, Erna Ruijer made a thoughtful and pleasant sparring partner to our mutual benefit. Gianluca Sgueo proved an ever-resourceful and original thinker with whom I stayed in touch long after his short visit to Amsterdam. The intellectual style of Stéphanie Novak turned out to be so compatible with my own that it led to regular correspondence and two co-authored papers. Uwe Puetter and Sergio Fabbrini took an interest in our cooperation and helped it along in a number of academic sessions. With Marlen Heide I share, besides an interest in the anthropology of the miraculous world of transparency research, an appreciation for Czesław Miłosz, the history of Eastern European communism, and Italian-Swiss coffee. Her PhD supervisor, Jean-Patrick Villeneuve met me more often than he would have perhaps predicted at the outset, but always welcomed me over and took an interest in my project. Samuli Mietinnen and Laurens Ankersmit allowed me to indulge in the procedural intricacies of sometimes very significant and pressing requests for access to the EU’s documents. Päivi Leino acted as the Machter of the Scandinavian side of my network, always connecting issues and people and full of ideas. When I proved to be unable to travel to Helsinki to meet her PhD student Liisa Leppävirta, they simply came over to Amsterdam. I still hold hopes that the visit to Finland will materialise one day in the near future! Whether from a distance or up close, as the case may be, I fully intend to continue following all of these colourful, inspiring and original thinkers and their pursuits into my further career.

Towards the end of my PhD trajectory, stable and constant factors began to shift, as I looked ahead for future opportunities and my time in Amsterdam eventually came to an end. Michael Huber, lead investigator in my current research project at the University of Bielefeld, was of great help simply through his hands-off policy of giving me time and space to finish the dissertation manuscript into the first months of my new job. Yedan Li, Justus Heck and Vera Linke took a further load of my shoulders by introducing me to the mores of my new home town and its sociology faculty, helping me get settled in and feel at home. And since having picked them to stand by my side on the defence day, I have been very happy with my choice for Lotte Krünen and Levien van Zon as my paranimfjen. A post-Christmas dinner and an action-packed weekend in Bielefeld later, I deeply appreciate their interest and support in this last phase of the journey!

For friends that are less directly attuned to either transparency or the EU, my PhD project came most often in the form of my absence. Sometimes I was absent from meetings, as I was too busy meeting the umpteenth deadline; sometimes from important occasions as I was abroad on a research visit or attending an academic event. But most often, my absence was in spirit, as I was thinking about the next steps dictated by my project. Thanks for your understanding and your suitable mix of distraction from, and interest in the research project.
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Bielefeld, February 2017
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Abbreviations

AIE Access Info Europe
BIC Bureau d'informations classifiées
CFI Court of First Instance (after December 2009: GC)
CFR Charter of Fundamental Rights of the European Union
CFSP Common Foreign and Security Policy
CJEU Court of Justice of the European Union (before 2010: ECJ)
Coreper Comité des représentants permanents
Coreu Correspondence Européenne (digital document network)
CSDP Common Security and Defence Policy
DG Directorate-General
EBA European Banking Authority
EC European Communities
ECB European Central Bank
ECJ European Court of Justice (after December 2009: CJEU)
Ecofin Economic and Financial Affairs Council
EEA European Economic Area
EEC European Economic Community
EFC Economic and Financial Committee
EF SF European Financial Stability Facility
EFTA European Free Trade Association
EMI European Monetary Institute
EMU Economic and Monetary Union
ENGO Environmental Non-Governmental Organisation
EnvCo Environment Council
EP European Parliament
EPC Economic Policy Committee
ESM European Stability Mechanism
EU European Union
EUCI EU classified information
EWG Eurogroup Working Group
FA Foreign Affairs
FAC Foreign Affairs Council
FOI Freedom of Information
GAC General Affairs Council
GC General Court (before 2010: CFI)
HR High Representative
HSG Heads of State or Government
IGC Intergovernmental Conference
IIA Interinstitutional agreement
JHA Justice and Home Affairs
MD Meeting document ((informal document type)
MEP Member of the European Parliament
MIP Macroeconomic Imbalance Procedure
NPM New Public Management
OMC Open Method of Coordination
Orcon Originator consent
<table>
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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>PoCo</td>
<td>Political Committee</td>
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<tr>
<td>PSC</td>
<td>Political Security Committee</td>
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<tr>
<td>QMV</td>
<td>Qualified Majority Voting</td>
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<tr>
<td>Relex</td>
<td>Relations Extérieures (Council preparatory body)</td>
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<tr>
<td>SCA</td>
<td>Special Committee on Agriculture</td>
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<tr>
<td>SEA</td>
<td>Single European Act</td>
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<tr>
<td>SG</td>
<td>Secretary-General</td>
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<tr>
<td>SGP</td>
<td>Stability and Growth Pact</td>
</tr>
<tr>
<td>SI</td>
<td>Security of information</td>
</tr>
<tr>
<td>Sitcen</td>
<td>Situation centre</td>
</tr>
<tr>
<td>SJF</td>
<td>Svenska Journalistförbundet (Swedish Journalist Association)</td>
</tr>
<tr>
<td>SN</td>
<td>Sans numéro (informal document type)</td>
</tr>
<tr>
<td>SRM</td>
<td>Single Resolution Mechanism</td>
</tr>
<tr>
<td>SSM</td>
<td>Single Supervisory Mechanism</td>
</tr>
<tr>
<td>SUI</td>
<td>Sensitive unclassified information</td>
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<tr>
<td>TEC</td>
<td>Treaty establishing the European Community</td>
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<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
</tr>
<tr>
<td>TFTP</td>
<td>Terrorist Finance Tracking Programme</td>
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<td>TPC</td>
<td>Trade Policy Committee</td>
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<tr>
<td>TSCG</td>
<td>Treaty on Stability, Coordination and Governance</td>
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<tr>
<td>TTIP</td>
<td>Transatlantic Trade and Investment Partnership</td>
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<tr>
<td>UN ECE</td>
<td>United Nations Economic Commission for Europe</td>
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<td>WEU</td>
<td>Western European Union</td>
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<tr>
<td>WOB</td>
<td>Wet Openbaarheid van Bestuur (Dutch FOI act)</td>
</tr>
<tr>
<td>WPE</td>
<td>Working Party on the Environment</td>
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<tr>
<td>WPIEI</td>
<td>Working Party on International Environmental Issues</td>
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<td>WPI</td>
<td>Working Party on Information</td>
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Chapter 1
The Democratic Promise of Transparency

I think that we can say very objectively that we have made big progress since the Maastricht Treaty. Transparency today is certainly a key principle for the Council.¹

As the habit of convening unofficial Council meetings in chateau-like surroundings amply demonstrates, members of this institution apparently value the intimacy of informal consultations.²

1.1 Transparency: Harbinger of European democracy?

Citizens and politicians, scholars and practitioners across the continent today continue to argue intensely over the future of the European Union yet virtually all seem to agree that the EU should become more transparent.³ The Council, the institution in which the member states’ ministers meet to decide on the EU’s policies, in particular is the target of frequent calls in this direction. This recent statement by the EU Director of the NGO Transparency International, upon the completion of a report on Council transparency, is illustrative:

In Ancient Greece the quality of reasoning and debate were indivisible from their public aspect and the participation of all citizens. Judged by this standard, the Council falls very short indeed.⁴

These words chime with those of a Member of the European Parliament (MEP), who, in an op-ed, argued that the key to restoring citizens’ trust in European government was to provide greater transparency. She, too, singled out the Council, remarking that it habitually struggled to put the transparency-related judgments of the European Court of Justice into practice.⁵ The call for greater transparency is not particularly new: three generations of European Ombudsmen, including the incumbent, have repeatedly called on the Council to provide

¹ Brunmayr (2004), p. 133
² Aus (2008), p. 101
⁴ Transparency International (2014)
⁵ In ’t Veld (2014)
greater openness of its decision making. And the chorus calling for greater transparency includes a wide array of different voices – including the ministers and Council officials themselves. For example, in the Laeken Declaration on the Future of the European Union, the Heads of State and Government (HSG) of the member states agreed that

The Union needs to become more democratic, more transparent and more efficient. It also has to resolve [the challenge of] how to bring citizens […] closer to the European design and the European institutions.

Even regarding the reasons for transparency, the different parties do not seem that far apart – as becomes apparent when we compare the following justifications by a legal officer in the Council secretariat, with that by a civil liberties advocate and long-time critic of Council decision making:

[1] Transparency […] serves as a check on the European institutions and as a means for the population to participate in the political debate at the European level.

[2] Open, transparent and accountable decision-making is the essence of any democratic system. […] The need for the full establishment of freedom of information in the EU … is a prerequisite of a democratic society allowing people to inform themselves […]

With such overwhelming agreement on the need for greater transparency in order to ensure the democratic ‘good’ that it is expected to deliver, we may well wonder why the transparency question is still on the table. The answer lies in a profound disagreement about how much progress on transparency the Council has actually achieved since it first gave attention to the issue in 1992. This is evidenced by the opening quotes of this chapter, which offer two radically different assessments of the state of Council transparency, one by a senior official in the Council secretariat and the other by a Council researcher. While the former sketches an image of a decision-making system that has been brought out of the shadow, into the light, the latter sees informal dealings in dark (though luxurious) backrooms as the institution’s predominant trait.

Behind the (essentially empirical) question of how Council transparency has developed lies the larger issue of its normative purpose. How much and what type of transparency are actually required for citizens and the Council to interact in a democratic system? Here, too, opinions are divided. Whereas the Council has generally argued that the increase in transparency of its decision making has kept pace with the expansion of its activities, doubt has been cast on this narrative. “There are several theories about ‘openness’ and the Council of Ministers”, the above-quoted civil liberties advocate continues,

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6 European Ombudsman (2001); EUObserver (2013); Politico (2016)
7 European Council (2001b), point II, italics added
8 Driessen (2009), p. 5
9 Bunyan (2002), introduction
Some would argue the gradualist (and paternalistic) approach. [...] This argument suggests that at each stage the balance between secrecy and openness was just about right. But has change happened because of the ‘enlightened’ views of EU governments who realise that the legitimacy of their actions depend on openness and transparency? [...] Certainly the Council of Ministers has been extremely reluctant to even acknowledge changes in their practice on access to documents have come about through challenges from outsiders.\(^{10}\)

The mounting call for more transparency did not just fall out of the sky. It coincided with a tremendous increase in Council activity in virtually all areas, even those in which the EU has no clear competence.\(^{11}\) Today, the Council is at the centre of European decision making, exercising often decisive leverage over the other European institutions.\(^{12}\) Its decisions, both legislative and, ever-more often, non-legislative, have a larger impact than at any point in the past, reaching deep into the everyday lives of more than half a billion European citizens. Nearly twenty-five years after the first step was taken to breathe life into the idea of transparent decision making, the question of how the Council’s efforts have fared is thus warranted. Is the development of Council transparency best characterised as a stepwise process by which Council critics were proven wrong and the blinds were raised one at a time? Or is it better viewed as mere political window-dressing while the real decisions continue to be taken in backrooms, far from the sunlight?

1.2 Council transparency: A story with two sides

Transparency, when translated into policy, can develop in many directions. At different places and times, it might advance and become a powerful force. Alternatively, it might be kept on the back burner, professed merely in name, or even be actively thwarted. In order to capture this dynamic character, it is useful to think of transparency as a ‘living’ phenomenon. Given the right conditions, transparency can expand and become a strong policy. When conditions are less favourable, its growth will be stunted or even nipped in the bud. Moreover, the development of living things is not only described by their growth, but also by the many specific character traits that they acquire over time. Thus, transparency policy might have developed an even-handed character, changing little irrespective of the company in which it finds itself. Or, on the contrary, it might also have proven to be rather malleable and accommodating, a policy with ‘many faces’.\(^{13}\)

How then is the ‘life path’ of Council transparency best described? Different observers have different takes on this question. Optimists discern an irresistible upward trend of transparency. They concede that the Council was once a notoriously opaque institution,

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\(^{10}\) Bunyan (2002), introduction

\(^{11}\) Puetter (2014), pp. 4-5; Curtin (2009), pp. 85-6


\(^{13}\) On a cautionary note, the metaphor of ‘living transparency’ is not intended to ascribe autonomous agency to transparency, which is of course a phenomenon without a will or preferences of its own.
but argue that in pivotal moments, the ministers have proved to be responsive to legitimate concerns. This has allowed important progress to be made over time. Whether the Council, when prompted, responded enthusiastically or as a result of public pressure is immaterial to the eventual result: the legal anchoring of more transparent decision making. Those who are more critical of EU decision making distrust the Council’s rhetoric and motives. Should citizens not have been able to reasonably expect the Council to practice a sufficient degree of transparency of its own accord rather than through external pressure? And what opaque Council practices are lurking behind the facade of formal rules? In short, where optimists believe in incremental development that breathes further life into the idea of transparency and advances its potential to strengthen democracy, sceptics argue that the Council’s commitment to transparency and its democratic ideal is neither serious nor evident and therefore, rather lifeless. Transparency is claimed to strengthen democracy in the Council; yet the reality might not match the rhetoric.

Both views are represented in the academic literature on government transparency, and European transparency more specifically. In this literature, two competing accounts of the development and nature of transparency in the Council context are advanced, each with their own explanation. The first account tells a story of gradual but definite progress towards more transparency.14 Starting out as an opaque institution building on the social norms of diplomacy, the Council began to make inexorable strides towards greater transparency from 1992. This progress was partially induced by forces outside of the Council, but it also received a sympathetic reception and active endorsement from at least some of the Council’s members.

While the Council as a whole may have been lukewarm about the transparency policy, its continuing and irreversible advancement was secured through a combination of factors in and around the institutional context, notably mounting protest among European citizens against opaque decision making, sustained advocacy by a small number of member states, and declining dissemination costs due to technological progress.15 Normatively, an increase in transparency is associated with a democratisation trend at the European level in general and in the Council specifically. The Council is seen to increasingly uphold levels of transparency that behave a fully legitimate democratic decision-making body.16 The Council’s growing attention to the issue of transparency also aligns with a perceived global ‘transparency wave’ of freedom of information laws that were put in place from 1990 onwards.17 This account presents Council transparency as a strong and growing part of a phenomenon that is larger than itself. The dynamism presupposed here by the metaphor of living transparency lies in its historical trajectory of advance.

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14 Bauer (2004); Maiani et al. (2011)
16 Settembri (2005), pp. 649-50
17 Peters (2013); Michener (2011); Meijer (2015)
The Democratic Promise of Transparency

The story of progress and democratisation is perhaps most clearly embodied in Advocate General Cruz Villalón’s opinion in the 2013 Access Info Europe appeal case. In this case, the Council contested an earlier court decision which obliged it to grant the NGO Access Info Europe immediate access to documents in an ongoing legislative procedure. The Council did so by arguing that its internal legislative negotiations were of an exceptional nature which made it necessary to deny full and immediate access to documents. The AG rejected this argument head-on, using an openly democratic line of reasoning:

Inconvenient though transparency may be, it must be said that it has never been claimed that democracy made legislation ‘easier’, if easy is taken to mean ‘hidden from public scrutiny’.

The Court of Justice subsequently confirmed the AG’s finding that no exceptions applied which were capable of justifying the non-disclosure of the requested documents. The case was hailed as exemplary with regard to the democratic rationale underlying the increasingly successful development of Council transparency.

This account of the progressive advancement of Council transparency is contrasted by a more critical story. The critics, wary of Council rhetoric, call into question the narrative of the ever-increasing development of transparency. Instead, they point at the rather partial nature of the transparency advance in a Council that operates in an increasingly fragmented manner. Transparency’s incompleteness appears to point at the Council’s unwillingness to open up less convenient venues, and its opaque and ‘asymmetrical’ institutional architecture seems to afford decision makers plenty of opportunity to create obstacles. Rather than a procedurally regular and predictable decision-making forum, the Council is described as an “institutional chameleon”. The Council’s gradual accumulation of non-legislative activities and new ‘modes of governance’ allegedly contributes further to this idiosyncrasy. As a consequence, “how different parts of the Council interact with one another to produce policy remains opaque”. Transparency’s advance in the Council’s decision-making machinery may thus be superficial and stunted, distracting us from its fundamentally undemocratic nature. This account in turn highlights transparency’s potential multiplicity of forms. Here, the dynamism presupposed by the metaphor of living transparency refers to sectoral fragmentation and resistance.

Like the optimistic account, the sceptics’ perspective on the Council’s rhetorical representation of its transparency highlights the pivotal role played by dominant organisational actors, preferences and resources as discussed in the wider transparency

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18 Case C-280/11 P, Council v Access Info Europe, 17 October 2013. This case is further discussed in Chapter 6.
19 Advocate-General’s Opinion in case C-280/11P, Council v Access Info Europe, 16 May 2013
20 Abazi and Hillebrandt (2015)
21 Curtin (2014); Novak (2013); Puetter (2014)
22 Wallace (2002)
23 Cross and Bolstad (2015), p. 237
literature, which together may be described as ‘institutional factors’. However, they argue that these factors are generally antagonistic towards transparency, thwarting its implementation.\footnote{Pasquier and Villeneuve (2007); Meijer (2013); Roberts (2006)}

An illustration of the perspective that transparency is obstructed and resisted comes from a Eurogroup meeting that took place in July 2015, at the height of the Greek financial crisis. When the incumbent Greek finance minister Varoufakis tried (unsuccessfully) to prevent the Eurogroup from issuing a communiqué without Greece’s consent, he was apparently told by Council lawyers that the Eurogroup “does not exist in law” and was therefore free to issue any communiqué it desired. Varoufakis later reflected on this episode in an interview:

So, [w]hat we have is a non-existent group [of EU ministers] that has the greatest power to determine the lives of Europeans. It’s not answerable to anyone, given it doesn’t exist in law; no minutes are kept; and it’s confidential. No citizen ever knows what is said within . . . \footnote{New Statesman (2015)}

The words of former finance minister Varoufakis stand in sharp contrast to those of Advocate General Cruz Villalón. In Varoufakis’ account, we do not find a Council that is forced to revise its transparency policy with reference to the principle of democracy, but the Council’s informal incarnation, the Eurogroup, that relies on technical legal reasoning to resist what it considers the undue pressures of transparency. Not only do the outcomes in terms of transparency appear to be rather different; also other pivotal factors, such as the policy areas to which both examples pertain and the manner in which decisions are reached in these areas, differ markedly. Whereas Access Info Europe concerned the revision of the EU’s access to documents law conducted by Council preparatory bodies and the European Parliament, the Eurogroup meeting dealt with the terms of a bailout for Greece, negotiated among national finance ministers and economic technocrats. Institutional factors such as the actors involved and their priorities had most probably a decisive impact on the extent of transparency in the decision-making process.

In summary, we are offered two quite different accounts of how transparency in the Council developed along its life path: one discerning an unstoppable process by which Council decision making was brought into the sunlight; the other arguing that the Council’s actual functioning continues to be shrouded in darkness. Which of these accounts best reflects the way in which transparency has developed in the Council? Both posit a credible claim. How we characterise the development of the Council’s transparency policy over time may depend on our vantage point, since the Council and its surroundings consist of multiple actors with quite divergent interests with regard to the transparency question. Still, it remains unclear what the Council’s ‘play of shadows and light’ really amounts to, and importantly, what the democratic implications are.

This brings up questions at two levels. First, at an empirical-theoretical level, we may begin by asking whether significant internal differences in the development of Council
transparency can, in fact, be satisfactorily demonstrated. Current evidence is anecdotal and often comes from interested parties with a stake in painting a certain picture of the polarising subject of Council transparency. When rigorous comparative analysis of the handling of transparency does indeed demonstrate significant differences between different areas of Council decision making, we may wonder what causes them. Although differences in transparency between different parts of the Council may be real, that does not immediately imply that they are structurally skewed by certain actors’ positive or negative attitudes, or other non-trivial ‘biases’. However, when such biases do exist, we should like to know in what manner they affect the ability of the public to be informed about Council decision-making processes and thereby ultimately, to exercise its democratic rights. In other words, to what extent, and in what manner, is the advance of transparency affected by variable factors in the institutional context?

This leads to a second question at the normative level, which is to what extent the development of transparency is congruent with the policy’s ambition of enhancing the Council’s democratic legitimacy. The Council has been explicit about this underlying objective of the transparency policy from the outset and on various subsequent occasions. At the same time, high-minded rhetorical statements are more easily made than the achievement of concrete progress on the ground. It may therefore be asked to what extent the Council’s present-day transparency policy lives up to its own promise of “strengthening the principles of democracy”. 

It is these questions that this dissertation is concerned with.

1.3 Contribution of this dissertation

This dissertation investigates the manner in which the Council’s transparency policy has developed since its inception, and analyses the extent to which the result is desirable from the perspective of EU democracy. The central research question is:

*How have institutional factors influenced the development of a transparency policy in the Council of the EU since its inception in 1992, and how should this policy be evaluated against its objective of strengthening democracy in the Council?*

This research question contains two components: one empirical-theoretical, and one normative. Taken together, these components address the debate about the development of Council transparency both as a policy existing in reality and as a value existing as a self-professed ideal. The manner in which the Council initiated and developed its transparency policy in practice is a matter worthy of attention primarily because of its normative implications. In other words, transparency policies are rarely of interest for their own sake but rather for the ‘public good’ that they are supposed to provide. Normative values in turn

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26 European Parliament and Council (2001b), recital 2
27 Heald (2006); Meijer (2015); Van Bijsterveld (2004); Tomkins (2004)
may be laudable, but they must also be viewed realistically as applying to real-life institutional contexts. In other words, sufficient transparency is necessary but one should not expect it to miraculously guarantee democracy on its own.\textsuperscript{28}

This dissertation connects the empirical-theoretical and normative components in two steps. It explores the dynamics underlying the development of the Council’s transparency policy in order to reveal transparency-enhancing and transparency-constraining mechanisms that are present in the policy’s institutional context. It subsequently evaluates the actual policy that the Council put in place against an independent normative framework. Attention is given to possible constraints and obstacles, both justified and not justified. The basic idea is that transparency and democracy are values that only come to life in the real-world setting of institutions.\textsuperscript{29} As we will see later on in this study, for reasons that differ according to policy area, the Council occasionally struggles to institutionalise the normative value of transparency, which leads to processes of idiosyncratic rule-making, -interpretation, and implementation.

The idea of addressing government transparency from both an empirical and a normative perspective is not new. In the literature on European integration, authors have problematised in increasingly forceful terms the EU member states’ tendency, in certain policy areas, to rely on non-legislative decision-making modes. This tendency is strongly associated with a lack of transparency, which undermines the possibility for citizens and parliaments to scrutinise the exercise of European executive power. This results in the weakening of Council decision making from the perspective of accountability, participation and (European) democracy.\textsuperscript{30}

However, the account of these authors on Council transparency is insufficient for three reasons. First, concepts and their presupposed causal mechanisms are not sufficiently elaborated. Second, there is no systematic and comparative analysis of transparency, either between policy areas or over time. Third a precise normative framework that is fit for evaluative purposes is missing. It is in relation to these gaps that this dissertation wants to make a contribution.

Several scholars identify a connection between non-transparency and what is referred to as ‘executive dominance in Council decision making’.\textsuperscript{31} However, this literature generally takes executive governance as its focal point, addressing non-transparency as a symptom of a larger outcome, and authors remain largely implicit on the way in which these two phenomena interact. As a consequence, important work remains to be done with regard to the systematic identification of factors and causal mechanisms that may explain how a transparency policy plays out. This study approaches transparency policy in an innovative way, as a layered concept consisting of three dimensions: formal rules, implementation

\textsuperscript{28} Curtin and Meijer (2006); Hüller (2007); De Fine Licht (2011); Grimmelikhuijsen (2012)
\textsuperscript{29} Bjurulf and Elgström (2004); Pasquier and Villeneuve (2007); Worthy and Grimmelikhuijsen (2012); Rosanvallon (2012)
\textsuperscript{30} Lodge (1994); Curtin and Meijers (1995); Puettter (2014); Curtin (2014)
\textsuperscript{31} Curtin (2014); also Joerges and Weimer (2013); Papadopoulos (2013), pp. 104-5, Curtin et al. (2010), pp. 932-3
practices, and informal norms. It argues that the interactions between these dimensions reflect the rich and complex institutional Council context in which transparency is introduced. This context consists of several elements: dominant actors and the administrative-cultural and sector-specific preferences and resources that they bring with them, and occasionally, exogenous factors that shake up the existing equilibrium. For example, a new actor may be introduced or the balance of resources altered. It describes the totality of these elements as ‘institutional factors’. The mechanisms by which these institutional factors interact usually develop over a longer period of time. In order to get a good grasp of Council transparency, this study analyses the process of its development over a period of nearly twenty-five years.

The evidence of obstacle-ridden and stunted transparency measures is moreover rather fragmented. The limited Council-critical literature on transparency evolution has so far provided only a partial (and often incidental) account of actual transparency-constraining mechanisms. Yet the same holds true for adherents to the view of a progressive advancement of Council transparency where the evidence generally rests on general and often equally anecdotal accounts. These approaches do not undermine the important circumstantial evidence that can be found in support of the thesis that transparency has in fact been on the rise over the past twenty-five years. The step, in 2001, from internal access rules to a fully-fledged access law, the implementation in 1999 of an online document register, and the steadily growing annual numbers of directly accessible documents all suggest important improvements. Without a deeper understanding of the context in which these developments take place and a sense of the ‘fragments that make the average’, the significance of such improvements may remain ambiguous. In order to contextualise the evidence in support of both perspectives, this study considers the development of Council transparency in different Council policy areas and over time, applying a structured comparative design that relies on various (new) data sources.

Finally, although critics have identified relevant shortcomings in the Council’s transparency policy, they generally do so without embedding their critique in an exhaustive, detailed and concrete normative framework. The introduction of measures to create greater transparency presupposes certain underlying objectives against which the relative success of these measures can be evaluated. To this end, the self-professed objective of the Council transparency policy to strengthen democracy can be taken as the normative starting point. Evaluating the success of transparency in strengthening democracy is admittedly a difficult task due to the Council’s idiosyncratic and complex internal structure. It requires the

32 Cross and Bolstad (2015); Curtin (2014); Novak (2013)
34 Hillebrandt et al. (2014)
35 Curtin and Meijers (1995); Brinkhorst (1999); Bunyan (2002); Heliskoski and Leino (2006); Novak (2013)
36 This is not to say that the issue has not been addressed at all. A number of authors have addressed the democratic rationale for EU transparency in eclectic ways with varying degrees of abstraction, see e.g. Hüller (2007); Settembri (2005); Héritier (2003).
evaluator to take into account variations in the constitutional nature of Council activity, which particularly play out between Council policy areas that are underpinned by different modes of governance.\textsuperscript{37} This study provides a detailed normative discussion of the supportive role of transparency for democracy in the Council that builds on the dual literatures of European constitutional law and democratic theory.

In order to situate the central research question into the existing discussion, an analytical approach is required that is well-suited to the complex causal interactions that underpin the development of Council transparency, that pays attention to structural differences across Council policy areas that are likely to influence these interactions, and that, finally, is sensitive to the normative consequences of constitutional difference in the Council’s various areas of activity. A longitudinal within-case and cross-case comparative analysis of three policy areas with very different constitutional bases is best suited to these criteria. The nature of this study is exploratory: it sets out to examine, refine, and contrast the relative merit of the account of advancing transparency and its Council-sceptic counter-narrative, rather than to test central causal relations in these accounts on the basis of large quantitative data sets.

This dissertation seeks to make a contribution with regard to each of these points. Theoretically, it puts forward a novel and layered definition of government transparency that contributes to a better understanding of its institutional development. It offers new insights in the research areas of general transparency theory and EU/Council theory, by identifying the central conditions that lead to the advance or interruption of policies that enhance transparent government decision making and by examining the interaction between transparency and the Council’s various modes of governance. Methodologically, the dissertation offers a multidisciplinary design, combining analytical approaches from the domains of law and the social sciences. It relies on multiple data sources from both domains, many of which, including transcripts from 68 interviews and a quantitative data set of 348 access appeal decisions, were specifically collected and analysed. Finally, normatively, it critically evaluates the Council’s relation to transparency in light of its much-discussed democratic deficit, and complements these insights with a number of concrete recommendations for the transparency policy’s improvements in view of its objective of strengthening the Council’s democratic legitimacy.

1.4 Seeing Council transparency through an institutional lens
As the previous section shows, this study takes the perspective that transparency must be viewed as a living policy that is shaped by its institutional context. The institution that forms the context of this study, the Council, stands at the forefront of European decision making. Virtually all political issues, irrespective of their origin and nature, pass through it at some point.\textsuperscript{38} The Council’s growing role is also reflected in the scope of its decisions. On various

\textsuperscript{37} Craig and De Búrca (2008), pp. 136-8
\textsuperscript{38} Puetter (2014), p. 148
occasions since 1992, the formal functions and powers of the Council have been expanded in treaty and institutional reform, to the point that “there is virtually no area of political or social life that is potentially not within its remit”. 39 Meanwhile, the Council’s administrative capacity has kept pace with its growing role in day-to-day European policy making. According to recent figures, the Council secretariat’s staff numbers 3,020 persons, who facilitate roughly 2,848 meeting days in working party sessions. In both cases, this amounts to an increase of roughly one third compared to early 1990s figures. 40

When the Council’s internal processes are viewed from up-close, a picture arises of a ‘hybrid’ decision-making body that combines various traits. It represents both national and European interests 41 and carries out both legislative and non-legislative tasks. 42 At times, it speaks with a single voice on behalf of the Council, at other times, with the many voices of the member states and policy areas it comprises. 43 As a largely intergovernmental body that takes part in supranational decision-making processes, it balances between diplomacy, technocracy and democracy. 44 As has been noted in previous scholarly work, the Council’s myriad of ambitions and simultaneous processes potentially lead to fragmentation, making its role and functioning both complex and elusive. 45

It is in this context that the emergence and subsequent development of transparency took place. 46 After it was kick-started in this direction by a political declaration attached to the Maastricht Treaty, the Council gradually built a transparency policy around a public right of access to documents that was concretised in various measures (Table 1.1). While virtually every step along the way was in the direction of greater access to documents, the advance of transparency experienced a backlash when the so-called ‘Solana Decision’ of July 2000 excluded certain categories of documents from the scope of the Council’s access rules.

The milestones shown in Table 1.1 certainly reveal a relatively consistent trend where the Council gradually moved in the direction of greater transparency. However, they offer a rather partial image. This becomes apparent when we apply the layered definition of transparency policy that was introduced in the previous section, consisting of formal rules, implementation practices, and informal norms. On closer inspection, what becomes clear is that most of the Council’s transparency milestones consist of the adoption of formal rules, of which only the ‘Solana Decision’ proved retrogressive. The potential impact of those internal procedural rules that may have only indirectly, but potentially impacted on the formal rules in place is less obvious. The cumulative impact of twenty years of case law concerning contested

39 Curtin (2009), p. 6; also Hayes-Renshaw and Wallace (2006), pp. 7-13
40 See respectively Council (2016a), pp. 62-3 for the staffing situation (benchmark years: 1994 and 2015) as well as Häge (2016, underlying data obtained from the author) and (2008), p. 33 for number of meeting days (benchmark years: 1992 and 2014). It must be noted that such increases are part of a longer-term trend that started decades before the Maastricht Treaty.
41 Van Middelaar (2009)
42 Curtin (2009), pp. 85-7
43 Hayes-Renshaw and Wallace (2006), pp. 4-7
44 Verhoeven (2005), p. 161; Bickerton et al. (2015), p. 39
46 Hillebrandt et al. (2014), p. 10
requests for access to documents in the Council’s various areas of policy making remains likewise invisible in this stylised account. At the level of implementation, the overview in Table 1.1 shows the progress made through the introduction of the online register in 1999 and direct access to documents in the subsequent year. Again, while these events clearly could not be omitted from a list of transparency milestones, they do not really inform us of multi-annual trends in access to documents that were achieved in practice. This omission means that the impact of practical implemental steps, changes in the formal rules, and pivotal court judgments on access to documents in practice are left unaddressed. Furthermore, a focus on the formal consolidation of transparency policy wholly overlooks the informal norms that may have developed in response to the formal transparency rules. This is problematic, as the tendency of transparency provisions to come up against various informal obstacles is well-described in the transparency literature.\(^{47}\) In short, a failure to include rule interpretation, implementation trends, and informal norms in the analysis of the development of Council transparency policy leads to an account that has important biases. After all, it is in these aspects, rather than with regard to the framework of formal rules, that transparency really reveals itself as a living policy.

What, then, might the Council’s cross-sectoral biases towards transparency look like? Traditionally, a first organising principle for sector-specific decision-making arrangements has been the original ‘pillar system’. Between 1993 (Maastricht Treaty) and 2009 (Lisbon Treaty), policy making was divided into three ‘pillars’. These pillars divided policy areas up into three categories with distinct decision-making procedures. The first of these was the so-called ‘Community’ pillar. Most policy areas, including after 1999 (Amsterdam Treaty), the

\(^{47}\) Roberts (2006a); Pasquier and Villeneuve (2007); also Helmke and Levitsky (2004)
transparency policy, ended up in this pillar. In line with the ‘Community method’, it was characterised by predominantly legislation-based decision making between the Council and the EP, a right of initiative for the Commission and judicial review by the ECJ and, within the Council, voting by ‘qualified majority’ (QMV). This combination of actors and arrangements likely benefitted the advance of transparency. For example, the fact that the adoption of the EU’s first access to documents law required the Council to negotiate with the EP and to vote by QMV has been identified as having led to a significantly more transparency-friendly outcome. These mechanisms were not present in the second and third pillar, respectively dealing with the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA). Decision making in those contexts was much more secluded, with a near-exclusive role for the Council, excluding both co-decision with the EP and adjudicatory powers for the ECJ. It may reasonably be expected that the relatively secluded policy areas under the second and third pillar developed ways of dealing with transparency obligations that were different from those under the first pillar. Although the pillar system was formally abolished by the Lisbon Treaty, the CFSP’s decision-making structure has remained largely separated.

A second organising principle has been that between legislative and non-legislative decision making. In 1992, the Council was the EC’s sole legislator adopting laws in a limited number of areas. After the entry into force of the Maastricht Treaty (November 1993), both the number of legislative competences and co-legislative powers for the EP expanded significantly. By 1999, the EP had attained a co-legislative role in around 20 per cent of all adopted legislation, and this figure continued to rise to 91 per cent in 2012. The notable increase in the average time spent on a legislative dossier during this same period indicates a growth in the complexity of legislative processes that may at least partially be ascribed to the EP’s strengthened co-legislative role. This allegedly led to a search for ways to render the decision-making process more efficient; efficiency being understood as decisional speed.

The above account gives rise to an apparent paradox: while the increased involvement of the EP is generally identified as a transparency-enhancing factor, it also increases the perceived sensitivity of Council negotiations. The latter is clearly a transparency-constraining

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48 Bickerton et al. (2015a), p. 3. After 2009, the ECJ was renamed CJEU. Throughout, I apply the courts’ formal name at the time of the event.
49 Bjurulf and Elgström (2004), p. 264
50 Chalmers et al. (2010), p. 46
51 Curtin (2009), pp. 3, 85-7
52 The Maastricht Treaty introduced the European Union (EU) with a limited number of policy areas, next to the European Communities (EC). It was not until the Lisbon Treaty that the EC were formally abolished and all European decision making was brought under the EU.
53 Häge (2011), pp. 467-8
54 Based on data compiled from Toshkov (2014); Costa (2011), p. 67; Boussaguet et al. (2011), p. 195; Council register
57 Bjurulf and Elgström (2004); Harden (2009)
factor.\textsuperscript{58} On the other hand, a minority of Council policy areas are dominated by non-legislative decision-making processes. It has been argued that Council activity has expanded most in these areas.\textsuperscript{59} This is, for example, evidenced by the proliferation of senior committees often charged with sector-specific tasks, the number of which has risen from 10 to 17 since the Maastricht Treaty, nearly half of which deal exclusively with non-legislative issues.\textsuperscript{60} Similarly, between 1995 and 2014, a significant part of the Council's junior working parties spent by far the largest portion of meeting time discussing non-legislative matters.\textsuperscript{61}

The manner in which they did so was increasingly fragmentary, with sector-specific actors implementing idiosyncratic decision-making procedures to serve particular sectoral interests.\textsuperscript{62}

The exclusionary decision-making style of some of these policy areas may have provided sufficient opportunities to create obstacles to the further implementation of transparency.

While the above overview is far from exhaustive, it demonstrates the added value of viewing transparency as a living policy consisting of various dimensions and developing in a complex and variegated institutional context, which sensitises us to potential anomalies and internal contradictions about the way in which transparency developed in real life. Two central organising principles for the structuring of decision-making processes in different policy areas stand out in this context, namely the pillar structure that was formally in place between 1993 and 2009, and the distinction between legislative and non-legislative decision making. In the coming chapters, I will elaborate on how these organising principles affected the development of transparency policy in different policy areas, both in a normative and in an empirical sense.

\section*{1.5 Outline of the book}

The structure of the book is as follows. \textit{Part I} lays the groundwork for the empirical research. In chapter 2, the study's central concepts are introduced. A distinction is made between transparency’s empirical manifestation (as a ‘policy’) and its normative manifestation (as an ‘ideal’). Transparency as a policy is addressed as the explanandum of this study. It contains all the typical features of public policy: formal rules that prescribe its content, implementation that translates these rules into practices, and informal norms that emerge in response to both formal rules and implementation practices. Transparency as an ideal, in turn, relates to various adjacent public values that form clusters around key normative objectives. This study takes one such cluster, that of democratic values, as the normative reference point. Will formation, participation, and accountability are identified as transparency’s adjacent values in this cluster. The study takes access to documents as a proxy for transparency more generally. Institutional factors are introduced as the explanans of access to documents policy

\footnotesize{\textsuperscript{58} Häge and Naurin (2013), p. 956; Brandsma (2015)

\textsuperscript{59} Bickerton et al. (2015b), pp. 9-10

\textsuperscript{60} Council (2016b), pp. 4-5; Bickerton et al. (2015c), p. 704

\textsuperscript{61} Häge (2016), p. 9. In 2016, the number of working parties stood at 138, see Council (2016b).

\textsuperscript{62} Puetter (2014), pp. 53-4; Christiansen and Vanhoonacker (2008), pp. 766-7; Wallace (2002)}
development. They are broken down into four categories: actors, preferences, resources, and exogenous factors.

In chapters 3 and 4, theoretical frameworks are developed for the normative and the empirical components of the study respectively. Chapter 3 considers more closely the normative underpinnings of the Council’s access to documents policy, which it concludes are foremost of a democratic nature. The chapter distinguishes two prevalent perspectives on EU democracy. Depending on the nature and intensity of the relation between citizens and governments that they foresee, it distinguishes between a ‘narrow’ and a ‘broad’ democratic perspective, and develops the minimal standards of access to Council documents that accompanies each. In chapter 4, two views existing in the transparency literature are contrasted: the postulate of the ‘advancing transparency effect’ and the postulate of the ‘captive transparency effect’. Whereas the former posits the expectation that the Council as a whole developed towards greater transparency, the latter rather holds that in specific policy areas, the advance of transparency was interrupted or halted altogether. After an elaboration of their theoretical premises, which are grounded in institutional theory, these two accounts are adapted to the Council context, giving rise to competing expectations.

Part II deals with the empirical analysis. Chapter 5 opens this part by setting out the study’s research design. A longitudinal, cross-case comparative analysis is chosen for its capacity to capture key elements in the study’s central question: policy change over time and between different policy areas of the Council. Three Council formations are selected in this regard: the Environment Council, the Economic and Financial Council and the Foreign Affairs Council. These Council formations cover policy areas that are likely to result in a strong variation in institutional factors due to different constitutional underpinnings. The policy-tracing method is introduced as a suitable approach for exploratory, causal mechanism-seeking investigation. The study relies on a variety of data sources, including 68 semi-structured interviews with officials and external stakeholders, 23 access to documents judgments and new statistical data collected from the Council register among others.

Thereafter, a general overview of the development of access to documents in the Council between 1992 and 2014 is given in chapter 6. This overview is complemented by case studies of access to documents developments in specific policy areas in chapters 7 to 9. Chapter 7 considers the development of access to documents in the Environment Council. Chapter 8 addresses the development of access to documents in the Economic and Financial Council. Finally, chapter 9 looks at the development of access to documents in the Foreign Affairs Council. Each of these chapters uncovers new insights concerning the manner in which the respective policy areas received and shaped the Council’s access to documents policy.

The last part of the book, Part III, offers an interpretation of the empirical findings. In chapter 10, the findings of the individual case studies developed in chapters 7-9 are compared with each other and with the general account developed in chapter 6. The chapter presents various indications of significant cross-case divergence in the development of access to documents, and lays bare the institutional factors that contributed to such divergence. Finally,
Chapter 1

Chapter 11 concludes by answering the two components of the central research question. It discusses how the research findings contribute to the respective literatures on government transparency and EU integration and makes recommendations for improvement of the Council’s access to documents policy.
PART I
CONCEPTS AND THEORY
Chapter 2
Between Dream and Deed

2.1 An unresolved debate
Twenty-five years after the beginning of the ‘transparency wave’, the concept of transparency still regularly elicits strong reactions. While adherents praise it for bringing government ‘into the sunlight’, critics vilify it for ‘making government impossible’. However, having become popularised in a multitude of contexts, the concept of transparency easily gives rise to misunderstandings. In this chapter I argue that a fundamental gap in the transparency debate remains due to the disconnected manner in which normative and empirical aspects tend to be addressed. A clear conceptual distinction between transparency as a value and as a policy is proposed to clarify the debate (this section). On the one hand, transparency has been understood as a value, deemed to strengthen democracy (section 2.2). On the other hand, it has been understood as a policy that develops along different dimensions (section 2.3). This does not mean that normative and empirical approaches to transparency have nothing to say to one another. On the contrary: empirical insights may enrich normative debates, bringing about a state of ‘normative realism’ that improves our thinking about, and acting upon transparency as a living policy (section 2.4).

The term ‘transparency’ has firmly nested in today’s language. Everyone knows it and many use it, yet few have a precise conception of its meaning. Among academics and practitioners, transparency stands out as a concept that is at once respected and criticised, undertheorised and overstretched. Any study of transparency must therefore clarify what it includes in, or excludes from, the concept.

In this study, I understand transparency as a relational phenomenon that necessarily consists of an observer, something that is observed, and a means of observation. One speaks of government transparency when the subject of observation is a public authority, as is the case...

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1 The title is a translation of a famous line from the poem Het Huwelijk (the Marriage, 1910) by the Belgian poet Willem Elsschot (1882-1960): “…want tussen droom en daad/ staan wetten in de weg en praktische bezwaren.” [“…because between dream and deed / stand laws that obstruct and practical objections.”] C.f. Aarts and Van Etten (1999)
2 Respectively the viewpoints of US President Barack Obama (cited in (Etzioni, 2010) and scholar Francis Fukuyama (2014)
3 Neyer (2012), pp. 26-7
4 Oliver (2008), p. 2
in this study, whereas the term transparency is generally reserved for public access without distinction, rather than privileged access for specific institutional actors such as parliamentarians. The means of observation signify the manner in which transparency is created. I understand these refer to a policy that regulates the application of transparency. It is furthermore clear that such a policy is premised on a normative concept of what government-citizen interaction should look like. Building on these observations, I define transparency as both the policy and the value of providing the public with opportunities to monitor public authorities’ activities.

Although the controversy surrounding openness of government has a history that goes back to the age of the enlightenment, the term transparency in its present-day meaning emerged relatively recently. The wide dissemination of transparency policies is even more novel: legislating transparency only became a global trend in the 1990s. Of today’s national freedom of information (FOI) laws, it is estimated that over 75 per cent were adopted since 1990. The burgeoning interest in transparency has led commentators to refer to it as a modern-day “charm”, a “quasi-religious” term, and a “societal multivitamin”.

In political terms, transparency is thus perceived as an overwhelmingly positive value: voters demand it and leaders want to be associated with it. At the policy level however, the debate has been more critical. Scholars point at the various potential perverse effects of transparency policies, such as encouraging disproportionate ‘blame games’ against policy makers or grandstanding by politicians. As Heremans argues, “whereas the “theoretical case” for maximum transparency with the widest possible access to documents is clear, the “practical case” based on the true impact and effects of such wide access rights is more blurry”.

When arguments concerning the desirability of transparency are dissected, it becomes apparent that the transparency debate takes place on two interconnected yet separate planes: whereas some see transparency as the expression of a value (a ‘dream’), for others, it connotes an institutionally embedded policy (a ‘deed’). Although the two are clearly interrelated, the values debate often occurs at an abstract, idealised level, while the policy debate is dominated by arguments of perverse effects for institutions. Transparency

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5 Transparency can refer to many contexts: corporate secrets, monetary policies, or academic publishing. This research focuses exclusively on government transparency in the specific context of the Council of the EU.


7 Namely, in the 1960s, see Michener and Bersch (2011). The term became popularised in the 1990s, see Meijer et al. (2012), p. 16.


9 Respectively De Moor-Van Vugt (2001); Hood (2006a); Scholtes (2007)

10 Scholtes (2012), p. 15


13 De Graaf and Paanakker (2015); Birkinshaw (2006), pp. 191-4
advocates may for example rank governments in highly decontextualised ‘transparency scoreboards’ that take full transparency as the normative ideal. Policy makers on the other hand frequently invoke the mantra ‘open access, empty archives’, ignoring its –from a democratic perspective– highly problematic normative implications.¹⁴

In this study, I draw a conceptual distinction between transparency as a value and transparency as a policy. Transparency as a value concerns a debate in which normative arguments in favour of (or against) transparency are presented. Such arguments build upon an ideal transparency situation in which its virtue is maximally realised. As people disagree on the question of what constitutes such an ideal situation, a contribution to this debate must necessarily be normative. Advocates may for example claim that citizens have a ‘right’ to know what policy makers decide on their behalf, or that it is ‘immoral’ for governments to operate non-transparently. Transparency as a policy relates to the situation that emerges once governments attempt to realise the value of transparency in real life. Like any policy, transparency policy emerges in an institutional context that translates it into rules and developing practices to implement those rules. Both transparency practices and rules can thus be seen as transparency’s empirical manifestations.¹⁵

Besides formal rules and practices a further category of ‘informal norms’ is discerned. These norms represent the ‘unwritten rules of the game’ which exercise considerable influence on the way an institution engages with formal rules and behaves in practice.¹⁶ Table 2.1 presents the distinction between transparency as a value and transparency as a policy.

Table 2.1: Transparency as a value and transparency as a policy

<table>
<thead>
<tr>
<th>Description</th>
<th>Transparency as a value</th>
<th>Transparency as a policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nature of claim</td>
<td>Normative: ‘as it ought to be’</td>
<td>Empirical-theoretical: ‘as it is’</td>
</tr>
<tr>
<td>Form</td>
<td>Moral, ideal, virtue</td>
<td>Formal rules, practices, informal norms</td>
</tr>
<tr>
<td>Examples</td>
<td>‘Right to know’, ‘good governance’</td>
<td>‘Access to documents’, ‘public register’</td>
</tr>
</tbody>
</table>

The conceptualisation of transparency as consisting on a normative and empirical plane propounded by this study deviates from existing understandings in the literature on governance and policy implementation. Both of these literatures tend to emphasise the normative orientation of rules which is seen as a benchmark by which implementation can be evaluated either normatively (‘have the rules brought what they promised?’) or empirically (‘have the rules been seen through at the level of implementation?’).¹⁷ This study acknowledges the usefulness and validity of this approach but does not view rules and

¹⁴ Flinn and Jones (2009)
¹⁵ It may be observed that the distinction between empiricism and normativity does not divide legal studies and the social sciences, but rather cuts across these two disciplines.
¹⁶ Helms and Levitsky (2004)
¹⁷ Busuioc (2010); Pressman and Wildavsky (1984)
practices as the leading distinction in the transparency debate. There is reason to view formal rules as foremost empirical phenomena: they are the outcome of real-world discussions that entail concrete choices concerning the inclusion and exclusion of rights and that thus reproduce power relations. This also makes formal rules problematic as a benchmark, as they do not necessarily provide normatively desirable instructions. Furthermore, an evaluation of the practical functioning of rule frameworks also requires that rules are in fact in place, and that they are sufficiently clear and instructive. As the transparency literature however shows, this cannot be presupposed a priori in the area of transparency, where policies are sometimes relatively rules-light and may leave wide space for divergent interpretations and discretionary action.\(^\text{18}\) For this reason, the study of transparency rather benefits from a more dynamic understanding of the interactions between formal rules and practices that is complemented by the role fulfilled by informal norms.\(^\text{19}\)

Transparency is thus both a value and a policy. But how do these two understandings relate to each other, and can they be reconciled? A classic Belgian poem suggests that this may be problematic, “because between dream and deed / stand laws that obstruct and practical objections”.\(^\text{20}\) realising values through policies is inherently precarious. That this fundamental tension between ‘dream and deed’ is often ignored in the transparency debate becomes apparent from the caricatures that both sides of the debate have at one time painted of each other. In a rather paternalistic description, transparency advocates have been portrayed as “nutty NGOs that […] need to grow up”, while the Council of the EU in turn has, with the necessary pathos, been placed on a par with the “Communist dictatorships of North Korea and Cuba” in terms of secrecy.\(^\text{21}\)

Although these are of course less diplomatic exponents of the respective transparency debates, the sentiment underlying them is more broadly shared. Transparency is frequently understood in a normative (positive) way that pays little heed to empirical circumstances, other than to denounce those that obstruct its ‘dream’ of opening the government’s windows to the public.\(^\text{22}\) Sceptics on the other hand often slide into a normative fallacy by basing themselves on (hypothetical) empirical examples of perverse effects to argue that (more) transparency in government settings is not desirable, largely ignoring the moral overtones of their argument.\(^\text{23}\)

Both approaches deliver unsatisfactory outcomes. A growing number of research groups from various disciplinary backgrounds are recognising the problematic relation between normative and empirical approaches to transparency. This has led to a more principled separation of the two, and a growth in predominantly critical explanatory studies.\(^\text{24}\)

\(^{18}\) Michener (2015); Curtin (2012a); Pasquier and Villeneuve (2007)

\(^{19}\) See further below section 2.3

\(^{20}\) In Aarts and Van Etten (1999), pp. 157-8

\(^{21}\) Wobbing Europe 2012b; Times 2005b

\(^{22}\) Den Boer (1998)

\(^{23}\) See by analogy Neyer (2012), pp. 19-20

\(^{24}\) Meijer (2012), pp. 4-5; Michener (2015), p. 78
Recent empirical work, for example, looks at the role of transparency in policy discourses,\textsuperscript{25} the effects of transparency on trust,\textsuperscript{26} or FOI implementation dynamics.\textsuperscript{27} In this study I seek to build on these efforts, and to take them further by connecting the empirical-theoretical explanation of the development of transparency policy to its normative evaluation. Such efforts at connecting the empirical to the normative are deemed to strengthen both sides of the divide, thereby enhancing the study’s ‘normative realism’.\textsuperscript{28} After all, a strict division between transparency as a value and as a policy, while conceptually imaginable, does not exist in reality, where values require substantiation in order to be realised, and policies are put in place to further specific moral objectives. Below, transparency as a value and as a policy are discussed in turn.

2.2 Transparency as a value: Map or mask?

A first way to perceive transparency is as a value. Government transparency in turn can be assigned to the subcategory of ‘public values’. Public values have been defined as “[the normative] ideals to be followed in the public sector”, or “those ends deemed worth pursuing”.\textsuperscript{29} Scholars are virtually unanimous in the view that public policy inevitably is, and should be, guided by values.\textsuperscript{30} Transparency however is but one in a “cacophony” of public values.\textsuperscript{31} Defining and delimiting values is an inherently slippery activity, and once identified, different people may still understand them differently.\textsuperscript{32} A number of authors thus propose clustering values into different substantive categories. This allows for a perspective in which values resurface in different clusters, in each case fulfilling cluster-specific functions.\textsuperscript{33}

An inventory of the literature shows that transparency is connected to a multitude of other values. Most accounts, including those applying in the EU context, also perceive a specific ‘democratic cluster’, in which transparency is a central value.\textsuperscript{34} By establishing transparency in a democratic cluster of synergistic values, its value becomes more crystallised and its potential manifestations more limited.\textsuperscript{35} Locating transparency in a cluster of values

\textsuperscript{25} Scholtes (2012); Frissen (2016)
\textsuperscript{26} Grimmelikhuijsen (2012); De Fine Licht (2014)
\textsuperscript{27} Michener (2011, 2015); Meijer (2013); Pasquier and Villeneuve (2007)
\textsuperscript{28} Neyer (2012), p. 19 and further
\textsuperscript{29} Respectively, Martinsen and Beck Jørgensen (2010), p. 744; Williams (2009), p. 559
\textsuperscript{30} Martinsen and Beck Jørgensen (2010), p. 744
\textsuperscript{31} Smulders et al. (2014), section 2
\textsuperscript{32} This is underlined by the vastly differing inventories that authors have come up with. For example, Smulders et al. (2014) find 10 central public values, but also cite Van der Wal whose list comprises 30 such values. Beck Jørgensen and Bozeman (2007, pp. 358-61 and 370-1), in a meta-analysis of relevant literature, come up with a list of 72 values, 8 of which are described as “nodal values” – values at which many other values intersect. They identify ‘openness’ as one such nodal value.
\textsuperscript{33} Beck Jørgensen and Bozeman (2007), p. 359; Smulders et al. (2014)
\textsuperscript{35} Kernaghan (2003), p. 711; Buijze (2013), p. 35
arguably renders the distinction between the intrinsic and the instrumental irrelevant. It is both incommensurable and necessary for the realisation of adjacent values.

As a note of caution, I must add that it would be equally valid to regard transparency in the context of other value clusters. Other scholarly work, for example, has considered the value of transparency in the light of the search for effective and innovative policy-making informed by New Public Management (NPM), or the fight against corruption as stipulated by the good governance movement. Such contexts would result in different expectations and different evaluative standards. The normative context in which transparency is regarded thus depends on the purpose of evaluation. In this study, transparency is regarded as part of a cluster of democratic values, in line with its overarching objective as propounded by the EU.

Before the contribution of transparency to democracy can be evaluated, it must be conceptually elaborated in a normative framework. This involves an examination of the normative interactions between transparency and other democratic values and is the object of chapter 3. Ahead of this exercise, it is already possible to situate transparency in a field of adjacent public values. The incommensurability of values means that they cannot be offset against each other. It would, for example, be absurd to claim that a 20 per cent loss of integrity is acceptable if this realises a 10 per cent increase in equality. At an abstract level, all values are worth pursuing. At the same time, the compatibility of any two specific values varies. In a democratic context, transparency is frequently observed as a trade off against the values of secrecy and effectiveness, while it is expected to facilitate values such as the formation of popular will, accountability, and participation.

Transparency is seen as antithetical to secrecy. Withholding relevant information creates opacity, which makes it “hard to discover who takes the decisions, what they are, and who gains and who loses”. A closer analysis reveals a more complex situation in which the space between transparency and secrecy is best conceptualised as a continuum. Secrecy is typically deep when outsiders have no grasp of the information that they are being denied, and cannot estimate its content or magnitude. In a democratic value cluster, secrecy is seen as a derogation from the norm of transparency which therefore requires due justification.

Transparency is also contrasted with the value of decisional efficiency. Three variations of this argument are possible. First, transparency may lead to risk avoidance or grandstanding, as governments are incentivised to reach decisions “in ways which protect [them] against criticism, instead of […] weaving the future for the better”. To avoid this situation, decision
makers often plead for a ‘space to think’ to freely debate policy options away from public pressure. Second, transparency during negotiations is argued to weaken decision makers’ positions. “A football coach also does not share his formation and tactic ahead of the game”. Third, a factor that may be particularly at play in settings such as the Council, where decision makers represent different constituencies, relates to the implementation of decisions. Where voting takes place in the open, this “can make it harder for those in the outvoted minority to deliver national compliance with the relevant new legislation”. While the purported trade-off of transparency and efficiency is commonly referred to, it remains subject to debate. Authors have questioned its evidence base, suggested that it may be more appropriate to speak of a clash between transparency and decisiveness, and argued that the trade-off argument constitutes “an escape from political responsibility”. From a legal standpoint, the relevance of the trade-off in a constitutional democratic system has been questioned.

Within the democratic value cluster, transparency also has synergistic value relations. First, democracy presupposes citizens’ will formation in the political sphere. Citizens make up their mind on issues of political objectives and means, and assess the government’s performance on these issues. By making policy positions and performance of government and its individual members available, transparency enhances the quality of will formation processes. Second, participation constitutes the value by which non-institutional actors are afforded the ability to take part in decision making. An important role is reserved for transparency in this respect: where transparency provides outsiders with information about government (‘vision’), participation grants opportunities for interaction (‘voice’). Finally, political accountability requires decision makers to explain and justify their conduct. Since politically elected or delegated decision makers are ultimately accountable to the public, their account-rendering must necessarily be public as well. Transparency is the indispensable ‘vehicle’ that allows politicians to do so. In each of these value relations, the required type and amount of transparency is obviously dependent on the precise democratic arrangements. That said, it must also be concluded that neither of the listed democratic values can function without transparency.

As public values offer a road map in the conduct of democratic decision making, governments tend to explicitly recognise and codify them. That does not mean however that they also abide by these values. In the best scenario, democratic decision making is mapped

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43 Hillebrandt and Novak (2016)
44 De Groot (2016), p. 754
45 Hayes-Renshaw and Wallace (2006), pp. 342-3
46 Respectively Hagemann and Franchino (2016); comment by professor Leo Huberts, VU symposium on public values, Amsterdam 17 September 2013; Novak (2011), p. 7
47 Leino (2014), pp. 20-1; Harlow (1999), pp. 293-4
50 Curtin and Mendes (2011); Meijer et al. (2012), p. 11
51 Fox (2007), pp. 668-9
52 See Chapter 3
out in a thoughtful framework of values in which normative considerations are well-developed and actually put into practice. More commonly perhaps, they represent virtuous intentions that might get snowed under in the heat of action (mixed metaphor intended). In the worst case, values are cynically worn as a mask, merely practised because it ‘cannot be avoided’ or to create goodwill. It cannot therefore be presupposed that government value statements are necessarily coherent, exhaustive, or even sincere. A careful reconstruction of the normative framework that informs a government’s transparency policy may help to reveal gaps or shortcomings.

In this section, I considered transparency as a value. While it is commonly agreed that public decision making should be imbued by values, the quest to define their precise meaning is elusive. In this study, transparency is seen as part of a cluster of democratic values. These values are: will formation, participation, and accountability. When thoughtfully embedded in a normative framework, the value of transparency can simultaneously contribute to the attainment of various democratic values.

2.3 Transparency as a policy: Rules, practices, informal norms

Next to a value, one may also perceive transparency as a policy with concrete empirical characteristics. Transparency policies generally consist of a wide array of instruments. This is also the case for the EU, whose transparency policy ranges from arrangements for open meetings to provisions for ‘open data’ disclosure. In this study, I focus on the rules and practices that give substance to access to documents, and the bearing that they have on democracy. Three reasons can be given for the choice of access to documents as a proxy for transparency policy at large. The first reason is conceptual. Access to documents is frequently identified as the backbone of government transparency. In important respects, it overlaps with other components. For example, most information vital to a democracy, such as the publication of votes, will be recorded in documents. For the moment, (digital) documents remain the dominant medium in decision-making processes. The second reason is historical: previous research suggests that all components of EU transparency have developed in the context of changes to access to documents. Hence, an understanding of access to documents may therefore enhance an understanding of all other instruments as well. The third reason is

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53 Hillebrandt and Novak (2016), p. 529
54 Martinsen and Beck Jørgensen (2010), p. 744
55 See European Commission (2016)
56 In this regard, this study focuses on the first of three ‘types’ of transparency recipients as characterised by Buijze: the citoyen, the homo economicus, and the homo dignus. Buijze characterises the citoyen as follows: “He is a political creature, in the sense that he is part of the ‘polis’ […] The citoyen is not an individual; he is, together with his fellow citoyens, a collective. […] [T]he democratic citoyen is an autonomous creature operating in the public sphere.” (Buijze (2013), p. 79).
58 E.g. Bauer (2004). The argument here is not that all instruments of EU transparency necessarily developed simultaneously or in parallel, but rather that the policy assumptions (functions and potential risks) underlying them were similar to the extent that they can be said to reinforce each other.
methodological: government transparency covers a rather wide range of scattered components, including open meetings, information policies, or output indicators. By limiting this study to access to documents, it becomes more clear and focused, as it is the component of transparency policy that is most developed both legally and in an administrative sense. Like transparency policy at large, access to documents policy breaks down into three dimensions: formal rules, practices and informal norms (see Table 2.1 above). I explore each dimension in turn.

The first dimension of access to documents policy consists of formal rules. These form the ‘bedrock’ upon which the policy is based. Most regulatory frameworks for access to documents share a number of similar characteristics. They generally contain a delimitation in scope. Delimiting factors are the definition of a document (e.g., whether emails, drafts or internal documents are excluded), transparency’s subject (i.e., which bodies, organisational layers or actors are covered), and the required characteristics of the rights-bearer (e.g., citizens or residents). Frequently, the right of access to documents is construed in a way that transparency is the default state. Exceptions require justification based on a reason that is specifically enumerated in the exception clause. The required standard of justification can vary; while for some categories, non-disclosure is mandatory, in other categories, the given justification needs to pass one or more further thresholds before it can be withheld. Exception grounds can be broadly formulated, giving rise to a large area of discretion, in which case often only a small number of exceptions are prescribed. By contrast, exceptions can also be narrowly formulated; in such cases, the list of exceptions is generally longer. More sophisticated frameworks also provide for the possibility of partial access, or disclosure at a later point within a clearly prescribed timeframe.

Beyond delineating and formulating exceptions to access rights, the regulatory framework usually also stipulates procedures for disclosure. An important distinction can be made here between (pro)active and passive disclosure. Passive disclosure means that documents are released upon request. It forms the most common category. Disclosed documents are frequently placed on an online public register. Finally, the right of access to documents often comes with a review procedure. The applicant can then appeal against an access refusal, either through an administrative or judicial process. In the former case, the initial access refusal is reconsidered either by an internal or a specialised external organ which may issue binding decisions or recommendations for the future. In the latter case, the court is asked to rule on the legality of the access refusal.

Access to documents rules can be adopted at various levels. They are often enshrined in secondary law (legislation), adopted by legislative bodies. In some cases, such legislation is foreseen in primary law (constitutions or treaties), in which case transparency rights are given a (quasi-) constitutional nature. In the EU context, the inclusion of a right of transparency in the European Treaties is a precondition for the adoption of secondary law (the principle of conferral). Finally, rules can also be enacted as tertiary law, through non-legislative decisions

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59 Pasquier and Villeneuve (2012), p. 166
60 IGC (2007a), article 5(2)
such as rules of procedure or other internally adopted rules. This may be done in lieu of, pending, or as an elaboration of secondary law.

The procedures set out in formal rules cannot be fully grasped without a sense of the legal context within which they develop. In the EU (including the Council) context, it is noted that most controversy about the formal rules has centred on the exception grounds written into the successive access to documents rules.\(^61\) These conflicts of interpretation eventually led to a strong juridification of the formal rules.\(^62\) In line with legal convention, I consider the jurisprudence on access to documents as an elaboration—and therefore an integral part—of the formal rules.\(^63\) Second, a long-standing matter of debate has been the purported constitutional status of the principle of transparency in European law.\(^64\) The right of access to information is increasingly often cast in a constitutional light that is deduced from its (apparent) objectives. Transparency’s administrative and political tasks of ensuring effective and legitimate government, it is assumed, require a right of public scrutiny and control for citizens.\(^65\) The question remains however whether, and with what consequence, such ‘overt’ functions may be read into the existing information requirements. While the recognition of a linkage between a ‘right to know’ and democracy has increasingly gained currency, the precise legal implications of this linkage are as yet underdeveloped. The degree of recognition of transparency as a constitutional right under European law therefore remains ambiguous.\(^66\)

After formal rules enter into force, their substance is implemented in practice. Transparency practices form the ‘interface’ that outsiders experience when they seek access to documents. The task of implementing transparency rules is generally placed in the hands of a body’s administration. Although political decision makers typically retain some degree of control over implementation, it can nevertheless be said that the way in which a policy operates is strongly conditioned by specific administrative choices.\(^67\) Administrative practices largely determine how transparency rules are implemented in their specificities, such as how disclosure portals are designed, whether exceptions grounds are interpreted loosely or strictly and which personal or sectoral attitudes of civil servants affect decisional outcomes. In short, administrative practices breathe life into a transparency policy. They consist of both stable, procedural requirements and non-procedural cultural, substantive, or policy considerations that manage to creep into implementation dynamics.\(^68\)

The grip that formal rules have over practices can be mitigated by informal norms. Over time, a consensus has begun to emerge among scholars of empirical processes in the EU that

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\(^{61}\) Prechal and De Leeuw (2007); Lodge (2003); Adamski (2009)
\(^{62}\) E.g. Curtin (2012a); Heremans (2011); Adamski (2009); Heliskoski and Leino (2006)
\(^{63}\) E.g. Craig and De Búrca (2008), p. 538 and further
\(^{65}\) O’Neill (1998); Vesterdorf (1999), pp. 911-3
\(^{66}\) Curtin and Hillebrandt (2016); see also Chapter 6
\(^{67}\) Pasquier and Villeneuve (2007); Feldman (2005), pp. 279-80. Note that, once in place, implementation regimes to a considerable extent also bind political decision makers.
\(^{68}\) Feldman (2005); Pressman and Wildavsky (1984)
“formal rules are inadequate, if not entirely misleading, descriptions of the game.” While the formal rules generally form the central source of principles and policies, in applying these formal rules, routines emerge that have a rule-altering capacity of themselves. Informal norms come to form an unwritten ‘behavioural script’ that is widely recognised among decision makers and thus exercises considerable influence on the way formal transparency rules are interpreted. Different reasons exist why government bodies develop informal norms, and they can take various forms. They may, for example, develop where formal rule frameworks are absent or relatively thin, or operate alongside well-established formal rules. Consequently, some informal norms can strengthen or supplement formal rules, while others may undermine or even replace them. The latter may be the case when decision makers decide not to apply formal rules under specific circumstances, or to proceed in ways that directly go against the formal rules. In such instances, an informal norm poses a clear and direct challenge to formally established legal rules, by effectively settings them (partially) aside.

The conceptualisation of informal norms that I build upon in this study is derived from a pivotal article published by Helmke and Levitsky, in which they bring attention to the fact that “many “rules of the game” that structure political life are informal – created, communicated, and enforced outside of officially sanctioned channels”. They identify four principal types of informal norms depending on their interaction with the formal rules in place (Table 2.2). In the first two types, informal norms converge with formal rules, in the sense of filling any remaining gaps in effective formal rules, or developing benevolent strategies to strengthen ineffective formal rules. The second two types of informal norms diverge from the formal rules. Institutions undermine the strength of formal rules by accommodating them with alternative institutional interests, or by ignoring them outright and replacing them with a set of competing informal norms.

<table>
<thead>
<tr>
<th>Table 2.2: Convergent and divergent types of informal norms</th>
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<tbody>
<tr>
<td><strong>Convergent</strong> (rule-strengthening)</td>
</tr>
<tr>
<td>Strong formal rules</td>
</tr>
<tr>
<td>Complementary rules</td>
</tr>
<tr>
<td>‘filling in remaining gaps’</td>
</tr>
<tr>
<td>Weak formal rules</td>
</tr>
<tr>
<td>Rule-strengthening strategies</td>
</tr>
<tr>
<td>‘gentleman’s agreements’</td>
</tr>
<tr>
<td>Divergent (rule-weakening)</td>
</tr>
<tr>
<td>Strong formal rules</td>
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<tr>
<td>Institutional accommodation</td>
</tr>
<tr>
<td>‘contradicting the spirit’</td>
</tr>
<tr>
<td>Weak formal rules</td>
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<tr>
<td>Competing</td>
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<tr>
<td>‘violation by replacement’</td>
</tr>
</tbody>
</table>

Source: adapted from Helmke and Levitsky (2004), p. 728

69 Kleine (2014), p. 304
70 Puetter (2006), p. 31
71 Kleine (2014), pp. 306-7; Helmke, and Levitsky (2004); Christiansen and Neuhold (2013), pp. 1197-8
Naturally, not all behaviour that occurs in the context of institutions constitutes an informal norm, and the concept of informal norms can be delimited in a number of ways. Thus, informal norms demonstrate a rule-like character and give rise to relatively robust behavioural expectations among actors in a policy context. Reh, in a study of EU negotiations, further observes the uncodified, restrictive, secluded, indefinite and (near-)fully implicit nature of informal norms. She further points out that as informal norms by definition can only lead to ‘indefinite’ outcomes, they require formal arenas for conclusive action.

The preceding discussion has made it clear that the various dimensions of access to documents policy closely interact. For example, while implementation practices are based on the formal rules, shortcomings in these rules or effects that are deemed undesirable give rise to the development of informal norms. Taken together however, these dimensions are also affected by the institutional context in which they emerge. The institutional factors that influence them may differ per dimension, as different procedures apply or different actors are involved. A theoretical framework that accounts for the development process of the Council’s access to documents policy is developed in chapter 4.

2.4 Conclusion: Connecting dream and deed

In this chapter, I have sought to conceptualise transparency in a manner that allows for its empirical-theoretical and normative study in the Council context. As I showed, the debate between transparency’s idealistic proponents and its pragmatic sceptics goes back at least to the age of the enlightenment. While the proponents have tended to understand transparency normatively, as a ‘dream’ that must be pursued to uphold democracy, the sceptics have approached it empirically, as a ‘deed’ that comes at a price and is difficult, if not impossible, to realise. The disconnect in these understandings of transparency (as either primarily a value or a policy) continues to form a gap in the literature that gives rise to considerable miscommunication. It is however clear that the two perspectives cannot stand alone: while transparency as a policy tells us how transparency develops in the real world, transparency as a value provides us with the reasons for pursuing it in the first place. Coupling these two perspectives can therefore lead to a kind of ‘normative realism’ that enriches and disciplines both perspectives. The approach taken in this dissertation is therefore to empirically explain the development of transparency policy, and then to normatively evaluate the result in the light of its value for democracy.

Transparency policies take on many forms. This study looks at one of its clearest, most developed manifestations in the Council context: that of access to documents. Understood as a value, access to documents policy is located in a cluster of democratic values. How it is intended to function within this democratic context is determined by an underlying normative framework. In the following chapter, I outline what such a framework

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73 Helmke and Leviisky (2004), p. 727; see also Christiansen and Neuhold (2013), p. 1197
74 Reh (2014), pp. 825-6
75 Neyer (2012)
in the might look like in the Council context. Understood as a policy, access to documents policy breaks down into formal rules, practices, and informal norms. Each of these three dimensions interact with one another. Taken together, they are the outcome of a long-drawn process of institutional change. What such an institutional change process may look like in theory is the subject of chapter 4.
Chapter 3
Transparency for Democracy:
A Normative Framework

3.1 Transparency: The way out of the democratic deficit?
From its very inception in the context of the EU, transparency as a value has been propagated for various reasons. In accordance with one of the more common—as well as extensive—normative claims, transparency is needed because it strengthens democracy in the Council. The familiar argument runs that transparency stands in a direct supportive relation to democracy, and that democracy is therefore incomplete without transparency. Strengthening democracy can therefore be considered a central normative objective of transparency. In an ideal situation, this leads to what can be termed ‘transparency for democracy’.

The idea of transparency for democracy underlies much of the normatively oriented EU transparency literature and institutional rhetoric. Even though the European institutions regularly sing its praise, the precise relation between transparency and democracy remains subject to contestation. This is problematic. Given the competing understandings of the manner in which transparency should contribute to a democratic Council, it is difficult to establish whether the amalgam of transparency rules and practices actually contributes to strengthening democracy or is simply a rhetorical exercise. In other words, one needs to know what normative compass one should use in order to read the map of Council transparency.

In this chapter, I consider more closely what such a normative compass might look like (this section). The provisions on democratic principles enshrined in the European Treaties form a starting point in this regard (section 3.2). Transparency is seen to strengthen democracy via three processes: those of will formation, participation, and accountability (section 3.3). When applied to the Council’s access to documents policy, this results in two sets of minimal standards of access that depend on one’s adherence to either a narrow (institutions-oriented) or broad (citizens-oriented) perspective on democracy in the Council (section 3.5).

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1 Parts of this chapter rely on ideas developed in a conference paper and a working paper (respectively Hillebrandt 2013 and 2014).
3.1.1 The royal road to democracy

From the outset, proponents of EU transparency have recurrently emphasised its linkage to democracy. The broad logic underlying this linkage is easy to see: in a democracy, citizens, united in a community, decide on their own fate, and this process of collective decision making is not possible if vital information concerning public decision making is not out in the open to be freely discussed. Thus conceived, the EU’s reason for transparency is evidently informed by democratic idealism.

Indeed, many normative statements made by various EU institutions over the years uphold the common conception that transparency stands in a supportive relation to democracy. Yet for all the rhetorical enthusiasm about transparency as a way out of the democratic deficit, the precise manner in which transparency strengthens democracy remains unclear. Envisaging a straight-forward link between transparency and democracy is further complicated by the fact that democracy is a highly contested idea, which has given rise to various models emphasising different elements. Moreover, models of democracy have traditionally been projected on national, or local political levels with clear territorial claims. Before the ways in which transparency is required for a functioning democracy can be established, it is therefore necessary to clarify what we mean when we refer to democracy in the context of the EU.

As has frequently been pointed out, nation-based conceptions of democracy that are applied too literally to the EU are bound to be partial and contestable. The principles underlying democracy must therefore be captured in a manner that allows for their application in divergent situations. Although this requires a certain amount of inventiveness it is not impossible to achieve. The idea of democracy is not inextricably bound to national institutions with which it is so readily associated. In fact, democratic concerns may arise in all settings in which political power is wielded in a structural manner.

A good starting point is found in the term ‘democracy’, which in its original, ancient Greek meaning, refers to ‘people rule’ (δημος meaning people, and κρατια, rule). This term opens up a plethora of questions: who are the ‘people’ referred to, and what does their ‘rule’

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2 Buijze (2013), p. 83
4 IGC (1992b); IGC (1997b), article 1; European Council (2001b), pp. 4-5; European Parliament, Council and Commission (2001), recital 2; Commission (2001), pp. 4, 10-1
5 This point has been argued more broadly by Williams (2009), p. 561, who states that “when we look at those values most often expressed [by the EU] as ‘fundamental’ or ‘foundational’ […] they appear ambiguous”.
6 Held (2006); see also Jensen (2009), p. 2: “The point to be made […] is that the deficit is defined according to which democratic ideal is chosen.” Williams (2009, p. 575) further points out that the “vague and ambiguous relationship EU law has with [the concept of democracy]” has limited the guidance of the European courts in its clarification.
7 Scharpf (1998), pp. 1, 6; Zweifel (2002), pp. 813-4
10 Mouffe (2000)
mean? In what manner do they relate to the activity of ruling? One possible take on these questions is offered by Abraham Lincoln, who in his Gettysburg address famously described democracy as “government of the people, for the people, and by the people.” In Lincoln’s account, the people’s ‘rule’ is vested in government, which acts as its representative. But his words also concede that in the real world, the people and the government are two separate entities, and that democracy can only be ensured through the ties that bind the two together. Read in this manner, government of the people can be taken to mean government that represents the people’s sovereign will which binds everyone. Government for the people means that the government serves the people’s collective interest. Finally, government by the people upholds the idea that somehow the people govern themselves by being able to participate in one way or the other. A government can be said to be democratic by this understanding if it is bound by processes that ensure it acts “in accordance with the will of the people”.

The problem of the potential citizen-government disconnect also raises a further question of viability. How, after all, can citizens ascertain that a government is indeed ‘of them’ and continues to operate ‘for and by them’? A long-standing solution to this problem has been that government must take place in the open. The reason for this is two-directional: through transparency, citizens are at once able to verify that their government acts in accordance with fundamental democratic principles and to exercise their own democratic rights.

At the same time one can assume that government does not have to carry out all its activities, at all times, in the open in order to merit the label ‘democratic’. “Would it”, one commentator asks, “be undemocratic […] not to telese Council of Minister meetings or publish the minutes of the European Central Bank”? The often imprecise calls for more transparency have failed to sufficiently address such democratic questions. It appears that defining democracy in broad terms is not enough in order to establish how much, and what kind of transparency is required. For that, the idea of democracy needs to be supported by a theory of legitimacy. It is when European scholars began to develop theories of democratic legitimacy that some diagnosed a ‘democratic deficit’.

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11 Held (2006), pp. 1-3
12 Abraham Lincoln (1863), closing words of his Gettysburg Address, delivered on 19 November 1863. Similar words had already been used decades earlier by US senator Daniel Webster in his ‘second speech on Foote’s resolution’ of 26 January 1830, cf. Webster (2001), p. 17.
13 Scharpf (1998), p. 2
14 Buijze (2013), p. 95
15 Naurin (2004), p. 11
16 Bellamy (2010); Follesdal and Hix (2006); Scharpf (1998); Curtin and Meijer (2006); Curtin (2007); Lodge (1994)
3.1.2 Transparency and the ‘democratic deficit’

In a democratic system those who govern claim to do so (1) in name of the people, (2) in their common interest, and (3) with their involvement. Scharpf refers to these respective claims as ‘polity’, ‘output’ and ‘input’ legitimacy.\(^\text{17}\) Each of these needs to be substantiated before the Council’s decision making can be considered democratically compelling. At the same time, claims to legitimacy may contain gaps related to the decision-making process’ transparency.

First, which people does the community consist of? In the case of the EU, collectives can be discerned at two levels. At one level, member states represent their national citizens in the Council. At another level, the community of European citizens is represented by the European Parliament. This duality of communities has given rise to some controversy. Some have argued that a sovereign community (a ‘polis’) cannot exist without a sense of shared belonging and mutual solidarity among the people who constitute this community (the ‘demos’).\(^\text{18}\) The EU’s degree of transparency most likely has no influence on societal perceptions of the demos question. At the same time, the duality of communities also forms a constitutional fait accompli: the EU introduced a European citizenship that is explicitly coupled to a system of European representative democracy under the Lisbon Treaty.\(^\text{19}\) The Council thus participates in European-level decision making, the democratic underpinnings of which are both national and European. For as long as this continues to be the case, it can be plausibly argued that Council decision making must thus comply not only with national, but also with European minimal standards of transparency in order to function democratically.\(^\text{20}\)

Second, the Council purports to act in the common interest, by creating decisional outputs that are beneficial to those on whose behalf it acts. Once we have accepted that the Council acts as a European institution representing member states in a European decision-making system, we may conclude that the Council aims to realise interests that are shared by the citizens of the participating member states. Moreover, where interests transcend national borders to the point that they have converged fully, they may turn into common European interests. Yet, the Council members’ accountability to national constituencies makes it hard for them to reach decisions on the basis of simple majorities, diffusing the Council’s ability to deliver effective and coherent solutions. Historically, the Council has sought to remedy this problem by taking decisions in a consensual manner, which ensures that any policy it adopts (presumably) enjoys broad support. This method also has its limitations, as it constrains the Council’s range of possible outputs. As long as the Council delivers policies that visibly leave

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\(^{17}\) Scharpf (1998)


\(^{19}\) See below section 3.2. In this light, Buijze (2013, pp. 118-9) speaks of “the theoretical collective of Europeans who together pursue the common European good”.

\(^{20}\) Curtin (2007); Habermas (2012). This is not to argue that a weak sense of a shared belonging and concomitant solidarity are unproblematic, and may not undermine the EU’s social legitimacy, see also Schmitter (2003), pp. 79, 83.
all of its national constituencies better off than before, this is not a problem. However, under the pressure of integration and accompanying convergence, it becomes increasingly difficult for the Council to accommodate national interests that are in the minority, particularly where such minorities are small.\textsuperscript{21} It has been suggested that the pressures on output legitimacy may be overcome by straight-talking politicians who are honest about the limits of national autonomy.\textsuperscript{22} Nonetheless, it is easy to see an interest among the Council’s members to stretch the limits of opacity in the face of diminishing decisional returns.\textsuperscript{23} Moreover, a decision-making system where only decisional outputs are accessible to the public will generally be regarded as failing the test of democratic accountability.\textsuperscript{24}

Third, the Council’s democratic legitimacy as a European institution hinges at least in part on citizens’ ability to be involved in its decision making.\textsuperscript{25} This means that citizens should have the opportunity to provide inputs that instruct those deciding what their wishes are, as well as the means deemed (in)appropriate.\textsuperscript{26} The people are “entitled to go their own way, even at the expense of making mistakes”.\textsuperscript{27} The democratic community of citizens absorbs information relating to political decision making on the basis of which it forms its own will.\textsuperscript{28} In a democratic community, processes of will formation do not remain without consequence. They facilitate an assessment of the incumbent political leaders’ capacity to represent the community’s interests, as well as deliberation on the appropriate future course of action.\textsuperscript{29} The (de)selection of representatives for a new term of government signifies the decisive outcome of this dual process.\textsuperscript{30} The proper functioning of democratic inputs relies heavily on the visibility of the actions of representatives. Without sufficient information, opportunities for citizen involvement diminish and the notion of self-rule becomes without meaning. Government for but not by the people constitutes an act of “democracy without democracy”.\textsuperscript{31}

Although the democratic legitimacy of the EU currently hinges foremost on an elections-based input model and the amount and type of transparency that this entails, this democratic model is not without its critics. Their critique generally centres on the fact that elections are characterised by a strong national bias, which leads to a situation in which citizens receive insufficient information cues concerning interests that transcend national borders and may require European-level policies. Elections for the EP, which is supposed to represent European interests, are dominated by national parties who widely treat them as

\textsuperscript{21} Scharpf (1998), pp. 7-10
\textsuperscript{22} Scharpf (1998), pp. 11-4; Jensen (2009), pp. 1-2
\textsuperscript{23} Curtin and Meijer (2006), pp. 117-8
\textsuperscript{24} Curtin et al. (2010), pp. 936-8
\textsuperscript{25} Namely, in the normative terms of article 10(3) TEU
\textsuperscript{26} Mansbridge (2009)
\textsuperscript{27} Bellamy (2010), pp. 3-4
\textsuperscript{28} Curtin (2007); Follesdal and Hix (2006), p. 547; Naurin (2004), p. 169; Eriksen and Fossum (2002, p. 405) also refer to these as “weak publics”.
\textsuperscript{29} Follesdal and Hix (2006), p. 534
\textsuperscript{31} Bellamy (2010); Buijze (2013), p. 88; Héritier (2003), p. 819
“second-order national contests”\textsuperscript{32} The Council, in turn, is composed of members of national governments that are elected through national political contestation. This dual role gives national elections (which address a wider segment of issues that to just EU policy making, some of which are experienced as more urgent) a fragmented character. This means that the outcome of national elections remains ambiguous with regard to Council politics. Representatives of national parliaments are moreover only able to each hold their own Council representative to account, which further contributes to fragmentation.\textsuperscript{33} As current opportunities for input may be deemed too weak, it has been argued that the mechanism of will formation should be conceived as a mechanism reaching beyond periodical elections. It should include a greater visibility of decision-making processes as well more opportunities for citizens to participate in such processes.\textsuperscript{34}

In summary, transparency plays a central role in the democratic relation between citizens and their representatives in the Council. In democratic politics, open decision making is generally proposed as the default mode to ensure that governments exercise citizens’ sovereign power in a democratic manner. Such transparency is also required of the European institutions, even when Europeans do not form a ‘demos’. After all, the EU forms a de facto democratic political community that reaches decisions on behalf of the collective. While transparency of the Council’s decisional outputs is a necessary condition for democratic legitimacy, it is not a sufficient condition. In order to be sufficient, citizens also need to have access to the various inputs into the decision-making process. However, the national elections, which citizens can use to punish or reward their ministers on the basis of information about their inputs into Council decision making, are frequently seen as a rather blunt instrument for guaranteeing democratic legitimacy. The constitutional democratic framework of the EU attempts to formulate an answer to this criticism.

3.2 Democracy in the EU

European constitutional texts form a natural starting point for a normative consideration of the role of transparency in the EU’s democratic system. To an important extent, they formalise and elaborate the principle of democracy at the European level.\textsuperscript{35} Over various occasions, the member states of the EU have revisited and further specified the meaning and functioning of the principle of European democracy. The Lisbon Treaty for the first time brought this constitutional blueprint together under a separate Title II, the “Provisions on democratic principles”, which addressed the concept of democracy with an unprecedented degree of detail and ambition. The current constitutional situation that has historically emerged usefully informs a normative framework of transparency for democracy.

\textsuperscript{32} Follesdal and Hix (2006), p. 536
\textsuperscript{33} Hayes-Renshaw and Wallace (2006), p. 343
\textsuperscript{34} Mendes (2011a); Eriksen and Fossum (2002), pp. 405-6, 420; Bellamy and Castiglione (2013), pp. 119-20; Hüller (2007), p. 576
\textsuperscript{35} Von Bogdandy (2012); Mendes (2016)
3.2.1 The ‘democratic deficit’: What role for citizens?

For a long time, democracy formed a somewhat “counter-intuitive principle” at the European level. As a consequence, thinking about European democracy in constitutional terms only really took off in the 1990s. In 1992 the technocracy-based ‘permissive consensus’ of European integration was dealt a considerable blow after the Danish no-vote and French near no-vote in referendums on the Maastricht Treaty. As a result, the European Treaties slowly began to reflect a more explicitly democracy-oriented discourse. For the first time, the member states collectively affirmed their adherence to the principle of democracy, reflected in a commitment to make decisions as close to the citizen as possible, the establishment of European citizenship, and finally, the first steps towards an access to documents policy.

The member states were however reluctant to include references to sources other than to national democracy. This reluctance soon came under fire. A similar fate befell the *sui generis* theorem, which holds that the EU, as neither a traditional international organisation nor a fully-fledged state, is a governing form that defies all conventional categorisation. As early as 1994, Hix argued that “politics in the EC is not inherently different to the practice of government in any democratic system”. Andersen and Burns in turn observed in 1996 that in the EU, “the direct ‘influence of the people’ through formal representative democracy has a marginal place”. The absence of democracy as a constitutional principle of the EU was partially repaired in the Amsterdam TEU, which listed it as one of the Union’s founding principles “common to the Member States”. The principle of democracy thus became a founding principle of the EU but, confusingly, remained linked to the democratic traditions of its member states. At any rate, as one observer pointed out, “what democracy means in fact has not been defined [by the Amsterdam Treaty]”.

The lack of a clear concept of democracy at European level allowed the ‘indirect reading’ to linger, resulting in calls for a larger role for national parliaments. However, while national parliaments clearly play an important role, building democracy exclusively on them leaves two fundamental issues unaddressed. First, while national parliaments are answerable only to national electorates, Council members take decisions at the European level, not just as national executives but also as EU legislators. Secondly, envisaging national parliaments as the exclusive beacons of the Council’s democratic legitimacy results in an idiosyncratic reading of the concept of European democracy, as not only the EU member states, but also the Union itself constitutionally underwrites the principle of democracy. A further

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36 Mendes (2016), p. 155; also Weiler (1999), pp. 238-9
37 Respectively IGC (1992a), fifth recital, articles A and B/8, and IGC (1992b)
38 Cited in Zweifel (2002), p. 813
39 Andersen and Burns (1994), pp. 227, 244
40 IGC (1997a), article F.1, italics added
41 Pernice (1999), p. 739
42 This argument continues to be used after the Lisbon Treaty, see Curtin (2013).
substantiation of the EU’s principle of democracy was thus required, and provided, by the Lisbon Treaty.43

3.2.2 Democratic principles for the EU

The “Provisions on democratic principles” contained in the TEU may be taken as the EU’s formal democratic blueprint.44 A closer look at the four articles contained in this title may therefore usefully serve the construction of a normative framework that directs the idea of transparency for democracy.

Title II refers to both a representative and a participatory model of democracy.45 Both models approach the question of democratic legitimacy in a distinct manner. Article 10(1) TEU states that “[t]he functioning of the Union shall be founded on representative democracy”. Representative democracy can be defined as “that institutional arrangement for arriving at political decisions by means of a competitive struggle for the people’s vote”.46 The required formal interfaces between citizens and representatives are limited to periodical elections in which representatives are chosen, after which citizens defer their right to fully-fledged democratic participation until the next elections.47 Representation, in this respect, must be understood as entrusted leadership, rather than leadership that closely reflects the wishes of the population.48

The representative ideal of democracy is apparent in a number of provisions, such as the establishment of a European citizenship that complements national citizenship (article 9), and the representation of European citizens through the EP, and of member states through the Council (article 10(2)). In most legislative instances, these two institutions act through a bi-cameral structure akin to a federal system.49 In other instances, the EP has (limited) powers of oversight over Council decision making.50 In addition to the democratic representation realised through these bodies, national parliaments are also formally included in decision making at the European level through the granting of specific rights of oversight (article 12).51 In European democracy, citizens are able to hold their representatives to account in an indirect manner through elections for the national parliament and directly through the elections for the European parliament (article 10(2)). Public debate is considered to play a

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43 What is often referred to as the Lisbon Treaty actually consists of two co-referential treaties: the Treaty on European Union (TEU), and the Treaty on the Functioning of the European Union (TFEU). Title II forms part of the TEU, see articles 9-12.
44 Cf. Mendes (2016), pp. 156-8
45 Von Bogdandy (2012); Mendes (2016)
46 Schumpeter (1942), p. 269
47 Held (2006), p. 125
48 A further pivotal feature of this process is that every citizen may stand candidate for a representative position.
49 Mühlböck (2013); Hagemann and Høyland (2010)
50 Examples are information rights in the Common Foreign and Security Policy (CFSP) (TEU, Lisbon version, article 36), and in the negotiation of international agreements (TFEU, article 218(10)).
51 Although the division of labour between these two bodies is not always clear, see Kröger and Friedrich (2013), pp. 179-81.
pivotal role in elections, as it contributes to “European political awareness” (article 10(4)) by providing cues on the policy options preferred by (candidate) decision makers.\(^\text{52}\)

Next to a representative democratic model, the TEU also puts forward a (complementary) participatory model of democracy. Citizens are guaranteed a “right to participate in the democratic life of the Union” (article 10(3)). Article 11 further speaks of “appropriate means” to involve “citizens” and “representative associations”, by maintaining “an open, transparent and regular dialogue with representative associations and civil society”. The precise value of article 11 is as of yet unclear; while its mandatory wording highlights the centrality of citizen participation, it also lacks clarity as to how this should happen. Yet in spite of its lack of elaboration, a democratic reading of article 11 is hard to avoid given its inclusion under Title II.\(^\text{53}\)

Normative theories of participatory democracy can be of use in further elaborating the concept of participation. Such theories connect democratic participation to the idea that citizens must have meaningful opportunities to be more closely involved in decision-making processes.\(^\text{54}\) It is generally conceived as a complement to representative democracy, offering a way to counter public alienation and a sense of disenfranchisement that emerges out of the large-scale electoral politics of the EU. Participation is seen as a way to strengthen the capacity of citizens to be involved, next to the relatively poorly attended European elections.\(^\text{55}\) It offers citizens formal opportunities to voice their opinion, and to engage in a dialogue with their representatives.\(^\text{56}\) As of yet, the participatory provisions in Title II are clearly in need of further clarification.\(^\text{57}\) However, they harbour a constitutional potential of “[changing] the relationship between citizens and government and to develop new forms of decision making addressing the mounting call for accountability”.\(^\text{58}\)

Not all participatory measures are founded in democracy. Some may lead to uneven access, or even to ‘capture’. This may be the case when civil society organizations with dubious representative credentials come to dominate decision making.\(^\text{59}\) Such criticism leaves participatory theorists vulnerable to the claim that broad citizens’ participation is inherently incompatible with representative democracy. To be sure, both models perceive the question of democratic legitimacy differently.\(^\text{60}\) At the same time, both adhere to the idea that “ultimately power is vested in the people”.\(^\text{61}\) In spite of their differences, both models are not

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\(^\text{52}\) Binzer Hobolt (2007), pp. 151-82


\(^\text{54}\) Mendes (2016), p. 171 a.f.

\(^\text{55}\) Héritier (2003), p. 819

\(^\text{56}\) Alemanno (2014), p. 86; Papadopoulos (2013), p. 141 and further

\(^\text{57}\) With the exception of two more concrete participatory provisions: Commission consultations (TEU, Lisbon version, article 11(3)) and the European Citizens’ Initiative (TEU, Lisbon version, article 11(4))

\(^\text{58}\) Alemanno (2014), p. 90; Chalmers et al. (2010), pp. 135-6


\(^\text{60}\) Jensen (2009)

CHAPTER 3

fundamentally incompatible. Indeed, the common understanding of participation in Title II is that it complements the legitimacy of the EU’s representative decision making.62

As became apparent from this discussion, the two models of democracy propounded by the TEU, representative and participatory, each foresee a democratic infrastructure that in some manner connects citizens to their representatives.63 This infrastructure includes representation based on periodic elections, public debate to facilitate citizens in their choice of representatives and some modicum of citizen participation in the process of governing. This account of European democracy gives rise to three processes: will formation, participation, and accountability.64 In the follow section, I turn to the role of transparency in each of these ‘democratic processes’ according to both models of European democracy.65

3.3 Defining transparency for democracy

European democracy today thus rests on two formally recognised forms of democratic legitimation: a representative, and a participatory one. The question is what normative implications this has for the Council’s transparency policy. As I will show, below the de minimis standard of information provision of the representative model, transparency policy cannot strengthen the Council’s democratic functioning. In order to live up to a participatory idea of democracy, transparency provisions would have to go beyond this standard to meet additional criteria.

Transparency supports the democratic processes already identified, namely those of will formation, participation, and accountability. In each instance, transparency serves as a prerequisite without which these processes cannot operate.

Transparency is firstly necessary for the community of citizens to constitute its will concerning the public good. More concretely, this entails that citizens must evaluate the performance of their representatives and the decisions that they make (as well as the civil servants on their behalf).66,67 The underlying premise is that in democratic societies, citizens need to have access to certain information in order to participate competently. The nature and intensity of participation depends on the type of democracy - either representative or

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62 Mendes (2016), p. 173
63 It must be noted however that the TEU article 11 speaks of ‘citizens’ rather than ‘European citizens’ or ‘the people’ and therefore cannot be considered as constitutive of a European polity in the same way that TEU article 10 is constitutive of representative Union democracy.
64 Buijze (2013), pp. 48, 566-7
65 Naturally, the normative role of transparency for democracy is elaborated in the preambles of the applicable legislation, Regulation 1049/01 on access to documents (EP and Council 2001b). The normative framework developed in this chapter, however, is pre-empirical. Regulation 1049/01, which constitutes the foundation of the Council’s access to documents policy, is consequently the subject of the empirical chapters, particularly Chapter 6. Cf. Chapter 2, section 3
67 Besides forming an opinion on incumbent representatives, the community must also make up its mind on the views and promises of new candidates for representative positions.
participatory. In either type, minimal information should be available regarding the goals that the EU should pursue how these goals will be attained, as well as critical perspectives on the quality of Council representatives.68 Particularly in the case of decision-making processes, where the Council has a monopoly on most of the information, exceptions are particularly hard to justify.69 Ideally, the Council and its representatives should provide regular information streams about decisional inputs, enabling citizens to form their opinion based on the available information on Council decision making as well as politicians’ perspectives on that information.70 Both the procedural facts and the various opinions about these facts must moreover be trusted to offer a truthful and relatively accurate representation of the political situation, allowing for a public debate on the basis of which a community forms its will.71 For purposes of will formation, the publication of adopted decisions is thus not enough. Transparency must also be offered concerning both the concrete policy alternatives that are on the table and the issues on which representatives disagree. What these cues should entail depends on what citizens (are deemed to) find important. What citizens (are deemed to) find important in turn is clearly related to the role that the political foresees for them.

Transparency is secondly indispensable for citizens to be able to participate in the democratic process. The term participation is generally interpreted as “the possibility for non-institutional actors to take part in decision-making”.72 In governmental settings beyond the nation state such as in the EU, (citizen) participation has gradually gained in popularity as a compensatory form of legitimation in circumstances where democratic structures “stand on somewhat shaky normative grounds”.73 Conceptual work in the field of open government points to the important role of transparency as a facilitator of participation.74 Where transparency provides outsiders with information (or “vision”), participation grants opportunities for interaction (“voice”).75 Participation stands in a largely unresolved relation to democracy as it means various things to different people.76 This also has consequences for the expected standard of transparency in relation to participation. If the only form of participation expected of citizens is that they elect representatives every four years, this clearly presupposes a more limited degree of transparency than if formal procedures envisage participation on a more regular basis. Notwithstanding these differences in conception, all forms of participation can be said to require a transparency base that is sufficiently inclusive (for example, by communicating in all the EU’s languages) and clear about the procedure

68 Buijze (2013); Manin (1997); Neyer (2003)
69 Buijze (2013), p. 279
71 Buijze (2013), p. 279
72 Mendes (2011b), p. 1849
73 Mendes (2011a), pp. 114, 116
74 Buijze (2013), p. 118. Depending on the perspective assumed, transparency can be both a precondition for and an outcome of participation. In this study, I am only concerned with the former option.
75 Curtin and Mendes (2011); Meijer et al. (2012), p. 11
76 Held (2006), pp. 209-16
(including the arrangement’s expected outcome and how one can participate), provided in a timely manner, and offering sufficient feedback on the way in which participation was utilised.

Transparency is thirdly required to provide the information on the basis of which citizens can hold their representatives in the Council to account. Following Bovens’ definition of accountability,\(^77\) transparency can be understood as a subcomponent of accountability. As such, transparency forms an indispensable precondition for its functioning. Transparency serves, as it were, as the ‘vehicle’ that allows representatives to render account to the public.\(^78\) This means that clarity must exist on the purpose of accountability. A clear framework needs to be in place that determines to whom politicians must explain and justify their actions (parliaments or citizens), what aspects of their actions they need to account for (broad policy considerations or specific decisions) and how the accountability relation is to be understood. This can be hard (through elections or censure) or soft (through continual dialogue and reason-giving).\(^79\) The appropriate accountability framework clearly depends on the type of decision making at hand. In some cases, Council members act as legislators, accountable to both their national parliaments (as the executive in a national democratic context) and European citizens (as the legislature in a European democratic context).\(^80\) As the public requires information to hold the legislature to account, formal inputs in the decision-making process must be disclosed in order to establish critical points of disagreement.\(^81\)

The Council also acts as an executive body.\(^82\) Executive action may be based on coordination or on cooperation. Where no formal treaty competence exists, such as in the area of employment policy or health care, member states may nevertheless coordinate their policies. In other areas, such as the Common Foreign and Security Policy, formal competence for executive action reaches as far as member states are willing to go in their cooperation. In either case executive action can have effects at both the national and EU level. For example, through a political decision to ban trade of certain goods with Russia, member states manifest themselves as a European executive; however, individual foreign ministers are responsible to their national parliaments for supporting this decision and for potential adverse economic consequences thereof. In accordance with the traditional constitutional perspective, parliaments are thus to hold the Council accountable for executive power wielded at their level. Citizens, in turn, require the widest possible information in their dual capacity of national and European voters.\(^83\)

\(^79\) Fox (2007), p. 669
\(^80\) Manin (1997), pp. 170-5
\(^81\) Cross (2013), pp. 294-6
\(^82\) See Curtin (2009), pp. 3, 85-7, who defines executive power as power that is non-legislative in nature.
\(^83\) Curtin (2009), pp. 271-6; Alemanno (2014), p. 88
A number of exceptional circumstances may apply requiring lesser or greater transparency. Less transparency may be accepted where policies require secrecy to be effective. An example are undercover military operations. Where the ‘necessary secrecy’ of executive power comes into direct conflict with accountability, executive power must be bound through clear delimitation of the secret in time (through ‘expiry dates’ for secrets) and in scope (through transparency about the fact that secrets are kept, and limits on what may be kept secret), flanked by ‘closed circuit’ oversight by “trusted” parliamentarians. The decision to which extent exceptions to executive transparency are permitted is primarily the legislator’s prerogative. Greater transparency may be warranted where executive decision making has unusually long-lasting and/or far-reaching societal consequences. This may be the case, for example, where executive authorities engage in negotiations for international agreements with “quasi-legislative” effects. In such cases, wider ex ante and ex durante disclosure may be required to facilitate public debate.

Finally, while transparency fulfils the role of a democratic system’s ‘information currency’, it requires publicity to become operative. Whereas transparency refers to the disclosure of government information, publicity refers to the reception of that information by an external public. Like any currency, transparency requires users to be meaningful. The Council can make available all the information that it wants; yet without publicity, it becomes meaningless. Only when “almost everybody knows […] and almost everybody knows that everybody knows”, can one speak of information flows that are truly public.

The Council is largely dependent on receptive audiences and information mediators (notably national and European news media) to generate publicity. It also has a role to play in creating the preconditions for the realisation of such publicity. The likelihood of publicity may be low when information is difficult to relate to, presented as complex and technocratic, and devoid of political controversy. Inversely, publicity is likely to increase when relevant, clearly and meaningfully structured information is provided in an easily accessible manner. This implies that information should be sufficiently comprehensive and understandably presented, both in content and form. Transparency in the context of democracy does not mean that all documents are posted in bulk without distinction of content, nor that raw decision making data are ‘spinned’ and summarised on pr-savvy websites. Instead, transparency yields most probably the best results when provided in a format that is intuitive in its use and which contextualises the provided information. The most appropriate format is

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84 Thompson (1999), p. 185
86 Abazi (2015), pp. 58-9; Buijze (2013), pp. 89-91
88 Naurin (2006), p. 91
89 Hüller (2007), p. 567
90 Eriksen and Fossum (2002), pp. 405, 411
a structured online document register\textsuperscript{92} which provides information “as simple as possible, but no simpler”\textsuperscript{93}. Once these preconditions are met, transparency’s role in the democratic system can be evaluated.

From this explanation of the functioning of Council transparency, a multi-dimensional picture emerges (Figure 3.1). What becomes clear above all is that transparency takes many shapes, and fulfils various –sometimes overlapping– functions. It is equally apparent that transparency cannot be expected to play an unconditionally supportive role for democracy. Not all forms of transparency will strengthen democracy. In order for that to be the case, processes of will formation, participation, and accountability need to be embedded in a clear perspective on democracy. This perspective may take a narrow representative form or a broad form that includes participatory provisions. What is evident is that the choice of democratic standards affects concrete choices for the Council’s access to documents policy in important ways. After all, the logic underlying the two democratic perspectives foresees a different role for citizens and therefore requires democratic institutions to ensure different degrees of minimal public access to information.

3.4 Access to documents: A question of standards

I now turn to the normative consequences of transparency for democracy for the Council’s specific access to documents policy. In particular, I explore the minimal requirements in terms of public access to documents in the Council that follow from the multiple functions of transparency for democracy. This exercise is however not as straight-forward as it seems.

\textsuperscript{92} Pasquier and Villeneuve (2012), pp. 167-9

\textsuperscript{93} Based on the maxim postulated, in another context, by Albert Einstein.
As I argued above, the role of transparency, and consequently of access to documents, will differ depending on whether one adopts a narrow or a broad perspective on democracy. The narrow perspective largely limits citizens’ role in the democratic process to elections and as a result requires lower (constant) levels of transparency than broad democracy. A European narrow democratic perspective requires the Council, when legislating, to do so in a fully transparent manner. When engaging in non-legislative, executive activities, it should keep both national parliaments and the EP sufficiently informed, where possible through the public transmission of documents. A broad perspective of democracy in turn, presupposes further-going and continuous transparency streams that empower European citizens in their participatory role.

Needless to say, the normative evaluation of Council transparency policy would be easier if the constitutional model on the basis of which the Council operates as a democratic body were fully settled. However, as the concept of EU democracy remains contested, I consider the normative implications for transparency of both perspectives. The normative criteria for document-based transparency of each perspective are thus discussed in turn with regard to the three processes of will formation, participation, and accountability.

In the narrow perspective, Council information streams are generally directed towards national audiences. Will formation generally occurs within national borders and only minimal coordination between national audiences is facilitated. Council representatives instead provide national narratives that cast European decision making in the light of national interests. Member states would therefore generally be expected to offer their policy positions and accounts of disagreements in their national language(s) and to refrain from making strongly adversarial public statements. No hard and fast standard exists in terms of documents conducive to will formation, since it is broadly conceived as a negative right (the individual’s right to speak her mind freely rather than the public’s right to know politicians’ honest opinion). Will formation is perceived as an instrument for (electoral) accountability, and as such it is understood as the ‘aggregation of votes’ as representatives compete at set times to win the majority support of the national electorate.

Participation, from the narrow perspective of representative democracy, is limited to the role of citizens at election time. Such elections are generally already relatively inclusive, and address the entire citizenry that is eligible to vote. In order to participate competently in elections, citizens must be able to rely on the disclosure of decisional outputs and information cues provided by Council representatives in the periods between elections (see also next paragraph). No particular feedback is required on how participatory inputs were used, as the participation of citizens in elections is naturally translated into the establishment of a new government that has the support of a (parliamentary) majority.

Finally, the narrow perspective’s strong emphasis on electoral accountability entails that all vital decisional information must be fully available at least ex post. This information includes the content of the decisions that were taken (both in legislative and non-legislative

94 See e.g. Curtin (2013) for a critical perspective
95 Kröger and Friedrich (2013), p. 176
instances), whether representatives supported these decisions or not (at least in legislative procedures), and for what reasons. *Ex post* accountability may be complemented by limited *ex durante* accountability. In terms of transparency this entails that all documents exchanged in the context of legislative formal sessions of the Council would be expected to be directly and fully disclosed. Where non-legislative decision making is concerned, transparency is required for the dual purpose of national parliamentary oversight and citizens’ capacity to inform themselves of their representatives’ politics. The intensity and form of such *ex durante* oversight however is for the national parliament or the European legislator to decide. The extent of transparency in this context must be understood as a ‘race to the top’. As parliamentary prerogatives of information should not be overruled, whichever parliament sets the highest standard of public oversight determines what information enters the public domain.

A broad perspective on European democracy capitalises on the legitimacy that Council representatives derive from their interaction with citizens, national and European. Forms of transparency are thus expected to be continuous and comprehensive. Will formation is viewed from a republican perspective, according to which the public good, rather than the outcome of an opinion poll in which votes are added up, is ‘discovered’ dialogically, through a process of deliberation. According to this perspective, the pooling of objectives, policies and representation reveals political questions that need to be debated and discussed at the European level. Rather than focusing narrowly on their (national) electoral mandate, representatives continually address these European overtones of Council decision making. National deliberative processes clearly feed into one another. A degree of integration of audiences is therefore necessary to facilitate the interaction between deliberative audiences, and thereby, to improve the coherence of will formation. Will formation is in the broad perspective part of a constant process; information cues on important matters are expected *ex durante*. Particularly in matters where the legitimacy of decision making is not self-evident, the community requires “mechanisms to encourage leaders to consult the ruled regularly and accord them equal concern and respect”. This entails in part that Council members openly communicate their position and engage with the positions of their peers to the widest possible extent. Document-based communications, furthermore, should address both their own national constituency and EU citizens in other member states and hence be published in one or several of the EU’s more widely spoken languages. As with the narrow perspective, the broad perspective further requires legislative debates to be held in public and documented in full, while in executive procedures the EP should have access to a document base that it deems sufficient for successful oversight. Typically, such information would include the widest possible *ex durante* access to documents concerning expenditure, international relations, and the daily exercise of EU executive power.

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97 Bellamy and Castiglione (2013), pp. 213-4
98 Scharpf (1998); Neyer (2003), pp. 688-90
99 Bellamy and Castiglione (2013), p. 208, italics added
Access to documents in a broad perspective serves citizen participation in a more holistic manner than mere electoral participation. The latter does not constitute ‘interaction’ in the common understanding of the term. Instead, decisional legitimacy is sought beyond representation so that citizens can be directly involved. In decision-making settings where representative democratic structures “stand on somewhat shaky normative grounds”, such as the Council of the EU, participation can act as a compensatory form of legitimation.\textsuperscript{100} When processes of citizen input become formalised, such as is the case with the provisions of article 11 of the TEU, the required level of transparency changes drastically.\textsuperscript{101} In order for citizens to be able to participate meaningfully, the participatory procedure must be at the centre of democratic decision making. This means that documents vital to the participatory process as well as information on important aspects of the policy at hand are made public in order to guarantee broad inclusiveness, and that the impact of such participation is made visible in a certain amount of detail. Notwithstanding these considerations, formal participatory measures in the Council are, within the current treaty framework, difficult to foresee.\textsuperscript{102}

Finally, in terms of accountability, the broad perspective emphasises the role of informal processes that emerge from interaction. This is achieved through what Rosanvallon has described as the “institutionalisation of distrust”.\textsuperscript{103} Transparency plays an important role in a critical “counter-democracy”. It allows multiple informal actors to act as the “policeman on patrol” to monitor decision makers by scrutinising information and informing formal accountability actors when necessary.\textsuperscript{104} This process is essential in a democracy as it allows the citizens to judge “the propriety and effectiveness of the conduct of the government”\textsuperscript{105} as well as to participate in counter-democratic pressure when it deems this necessary. Informal measures of accountability therefore include comprehensive \textit{ex durante} information streams, including input in legislative debates, proceedings of these debates, votes cast, and motivation of these votes. In executive matters, the Council would be expected to provide access to documents akin to that required for the mechanism of will formation. This includes regular document-based information to the EP as well as to national parliaments in accordance with national rules. It is up to the parliaments to decide on the expected scope of information rights and, to the widest possible extent, to explain policy in public sessions.

In summary, a close analysis of the role of transparency in the three democratic processes of will formation, participation, and accountability, reveals a number of criteria for public access to documents. These criteria will differ depending on whether a narrow or a broad perspectives of democracy is adhered to. The debate concerning the EU’s democratic model however is still far from settled. Consequently, Table 3.1 details the design criteria for access to documents according to both perspectives.

\textsuperscript{100} Mendes (2011a), p. 114, 116
\textsuperscript{101} Mendes (2011a), p. 114
\textsuperscript{102} Nascent institutionalised participation is more apparent in the Commission, see Mendes (2011c) and Magnette (2003)
\textsuperscript{103} Rosanvallon (2012a), pp. 82-3
\textsuperscript{104} Meijer (2014), pp. 512-3
\textsuperscript{105} Bovens (2009), p. 955
3.5 Conclusion: A normative compass

In conclusion, does it make sense to talk of transparency for democracy? The answer is a conditional yes. All favour democratic and transparent Council decision making. However, there is considerably less agreement on what this entails in practice. This leads to a considerable amount of confusion concerning the normative consequences of the Council’s access to documents policy. The confusion is deepened by the fact that the EU cannot be readily equated with democracy at the national level. It is “neither […] a state nor […] an international organization”.106

In order to bring clarity in this normative debate, I have considered the EU’s own constitutional democratic principles in the light of a theory of democratic legitimacy. Within the current framework of the Lisbon Treaty, there are two complementary democratic perspectives: one representative, and one participatory. While transparency can be seen to contribute to the democratic processes of will formation, participation, and accountability, the manner in which it does so depends on the democratic perspective assumed. The representative democratic perspective is premised on a decisively narrower concept of legitimacy; consequently, it requires a lower standard of access to documents. At the same time, strong arguments exist for adopting a broader, participation-based perspective on democratic legitimacy. These include the perceived distance of Council decision making and the two-level nature of its inputs and outputs. What has in any event become clear is that the Council no longer acts as a ‘permanent intergovernmental conference’ that derives its legitimacy from national democratic procedures alone. Instead, when the Council acts as a legislator, Council representatives assume the role of European legislator, with concomitant requirements of transparency.

The Council transparency debate would undoubtedly benefit from a further clarification of the constitutional nature of EU participatory democracy. It would allow the Council to base subsequent choices of procedure on clear premises. For the moment, however, the concept of EU democracy itself remains contested. This leads to a division between adherents to a narrow and a broad perspective of democracy. Each of these perspectives contains different evaluative standards for the required levels of transparency. In this study, I evaluate the compatibility of the Council’s access to documents policy with the design criteria inherent in the narrow perspective of EU democracy as developed in Table 3.1. I choose this evaluative standard as it constitutes the de minimis criteria below which transparency ceases to support the processes of will formation, participation, and accountability which are required for the Council’s democratic functioning. However, in looking at the current policy’s weaknesses and potential alternatives, I also consider the case for an access to documents policy that supports a broader perspective on EU democracy, which addresses some of the elements in the European representative democratic system that limit its legitimacy-generating capacity.

106 Neyer (2012), p. 38
Table 3.1: Design criteria for the Council’s access to documents policy

<table>
<thead>
<tr>
<th>Mechanism</th>
<th>Narrow perspective</th>
<th>Broad perspective</th>
</tr>
</thead>
<tbody>
<tr>
<td>Will formation</td>
<td><strong>Focus</strong></td>
<td>(national) electorate-based, ex post facto information cues</td>
</tr>
<tr>
<td></td>
<td><strong>Types of documents</strong></td>
<td>Legislative: agendas, minutes, broad non-adversarial policy positions (ex durante), decisional outcomes, votes and explanation of votes (ex post)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Executive: decisional outcomes, general motivation of outcomes</td>
</tr>
<tr>
<td>Participation</td>
<td><strong>Focus</strong></td>
<td>Basic information to participate competently in elections, supplemented by freedom to collect and disseminate information</td>
</tr>
<tr>
<td></td>
<td><strong>Types of documents</strong></td>
<td>Legislative &amp; Executive: document base identical to requirements of will formation.</td>
</tr>
<tr>
<td>Accountability</td>
<td><strong>Focus</strong></td>
<td>Information required for formal accountability at election time, supplemented by (privileged) information for parliamentary oversight</td>
</tr>
<tr>
<td></td>
<td><strong>Types of documents</strong></td>
<td>Legislative: agendas, minutes (ex durante), decisional outcomes, votes and explanation of votes (ex post)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Executive: decisional outcomes, general motivation of outcomes</td>
</tr>
</tbody>
</table>

The narrow and the broad perspective together cover the EU’s current spectrum of normative standards that meaningfully connect transparency to democracy. How it has developed in reality is another, empirical question. The theoretical-empirical framework underpinning this question is the subject of the next chapter.
Chapter 4
Council Transparency Policy:
An Explanatory Framework

4.1 The Council’s transparency account and its critics
This chapter deals with transparency as an empirical phenomenon. Public decision-making bodies (in our case, the Council) set out to develop a transparency policy (in our case, access to documents). This leads to the development of specific rules, practices and informal norms over time.¹ The question is what theoretical account fits best with the empirical development of the Council’s access to documents policy.

Concerning the precise way in which access to documents developed as a living policy, two versions have been put forward. A first version, propounded by the Council and others, has it that the Council’s transparency policy, since its advent twenty-five years ago, has made irresistible progress. This account aligns with a widely observed ‘advancing transparency effect’, which is characterised by a global wave of transparency policies that are ever-increasing, irresistible and irreversible. The cause of this rise in transparency is found in a number of factors ranging from changing citizen-government relations to the reduced costs of disclosure due to advances in the area of information technologies.

From the early days, the applicability of the ‘advancing transparency effect’ to the Council context has been challenged by a second, competing version of the facts. Sceptical observers hold, on the basis of anecdotal counter-evidence, that the development of access to documents policy has rather been the subject of a ‘captured transparency effect’. They argue that access to documents policy has been shaped by largely sector-specific competing factors, leading to its ‘captured’ development, which means that access to documents policy has been inherently fragmented.

In this chapter, I consider these two contrasting accounts in their substance. I introduce historical institutionalism as a theoretical approach to gauge and compare the relative merits of both accounts (this section). I then elaborate this theoretical framework by reference to two bodies of literature: the literature on the development dynamics of transparency policies (section 4.2) and the literature on the institutional functioning of the Council (section 4.3). This leads to the development of an analytical framework, consisting of

¹ See Chapter 2, section 3
CHAPTER 4

four categories of institutional factors, that is applied to the Council context. These are the
dominant policy actors, their institutional preferences and resources and finally, factors exogenous to
the policy process. This analytical framework is then used to substantiate the study’s two
central expectations (i.e., the ‘advancing transparency effect’ and the ‘captive transparency
effect’) which guide the subsequent empirical exploration in chapters 6-9 (section 4.4). Section 4.5 concludes.

The creation of a more transparent Council as a deliberate policy first emerged around
twenty-five years ago. The traditional view of the European institution composed of
ministers of the EU’s member states was one of a secretive body which functioned on the
basis of norms of diplomacy and intergovernmentalism. However, the inauguration of a
transparency policy in 1992 apparently altered this situation considerably. The common
account put forward by the Council to explain this development is that the institution
underwent a gradual transformation during which transparency increasingly gained currency.
A decade after the initial introduction of transparency in the Council, the institution
confidently claimed that the image of opacity and secrecy “no longer corresponds to reality”.

The Council’s account certainly seems plausible when one considers its step-by-step
adoption of a plethora of policy instruments intended to create greater transparency.
Successive measures ranged from the publication of votes cast by members of the EU’s
legislature (ministers and MEPs) to the organisation of public debates on societally relevant
matters, legislative or non-legislative, and from the online provision of general information
on the policy process to the introduction of various registers. Yet of all transparency
instruments, the most comprehensive so far has been public access to documents. Here, too,
important steps were taken. While the Council started out offering paper copies of
documents on request at a set fee per page, today a large proportion of Council documents
are directly searchable and accessible through an online register. Indeed, the Council is said to
have brought about an “…‘inexorable rise’ of documentary transparency”. While some
Council actors embraced this new reality with more enthusiasm than others, today all agree
that transparency is here to stay.

The apparent upward trend of transparency in the Council does not exist in isolation.
During the same time period, a ‘transparency wave’ swept through all manner of public
decision-making bodies across the globe. So-called freedom of information (FOI) laws were
adopted at an “unprecedented pace”. Scholars speak of a “‘transparency turn’ in global
governance”. In contrast to the fate of the Roman empire, we appear to be witnessing the
“rise and rise of transparency”.

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2 Moser (2001), pp. 5-6
3 Bauer (2004), p. 367
4 Maiani et al. (2011), p. 4
5 Laursen (2013); Heremans (2011)
7 Michener (2011), p. 145
8 Peters (2013), p. 534
Underlying the assertion of a ‘transparency wave’ lies the idea that policies designed to create government transparency have a spiral-like character: they set in motion a process by which the initial, limited transparency accumulates more transparency. This cumulative process is driven by a number of factors. Part of the explanation lies in the strong normative imperative of transparency. Common wisdom has it that politicians who have nothing to hide should have nothing to fear from public scrutiny. Consequently, “no right-thinking politician, administrator, policy wonk, or academic could be against it”, at least publicly. Indeed, the idea of government transparency is a simple, powerful and captivating one, characteristics that have lent the idea of transparency an increasingly compelling force.

However, it is not just at the ideational level that transparency has commanding qualities. It also mobilises external parties interested in opening up this decision-making body and may lead to unexpected advocacy coalitions among these parties. As technological possibilities increase and costs decline, practical arguments against transparency are removed. In addition, avenues open up enabling external actors to force transparency through leaks or self-collected data. In turn, decision makers may see themselves forced to respond. Transparency rules can also have a proliferating effect, by breaking down cases in which unjustified secrecy functions as the de facto norm. This leads to an accumulation of situations where the presumption shifts to transparency. Particularly where transparency is elevated to the constitutional level such rules, once in place, become firmly entrenched and hard to roll back. Decision makers themselves, even when in a majority, may be unable to resist the advance of transparency for long.

This account may be referred to as the ‘advancing transparency effect’. In this perspective, the introduction of transparency leads to more transparency in a process that is difficult to stop and hard to reverse. With slight exaggeration, one might say transparency is ever-increasing, irresistible, and irreversible: where a ‘transparency logic’ gains in strength, it sets in motion a chain of interlocking events, leading to a path dependence in its own right. As transparency subverts the traditional order, its introduction must be viewed as a critical juncture that “makes for [a] sudden [bend] in the path of history”. Each step down the path further locks the decision-making body that is the object of transparency. Events early on in the process are particularly important on the path set in motion, “as they trigger subsequent development not by reproducing a given pattern, but by setting in motion a chain of tightly linked reactions and counterreactions”. It is for this reason that the account of

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10 Chapter 2, also Hood (2006a), pp. 3-5
11 Fenster in De Fine Licht (2014), p. 15
12 Scholtes (2012); Frissen (2016)
13 Meijer (2013), pp. 431-2
14 Bertot et al. (2010), pp. 265-6
15 As a keynote speaker at the Transparency Camp EU unconference (Amsterdam, 1 June 2016) told his audience of civil society advocates: “You have time on your side.” See also Michener (2011), pp. 150-7, for various accounts of fast- and slow-moving transparency advances.
16 Mahoney (2000), pp. 526-35
18 Mahoney (2000), pp. 526-7
advancing Council transparency lays specific emphasis on the electoral backlash that occurred after the signing of the Maastricht Treaty in 1992, which forced the EU member states to honour their earlier rhetorical promise of greater openness.  

From the early days, the optimistic account of ever-advancing Council transparency has been challenged by sceptical observers. The substance of the (Council-)sceptics’ critique focuses on three aspects. The first consists of the general observation that a distinction must be made between rhetoric and reality. It is pointed out that transparency “is more often preached than practised”. The idea of transparency is easily invoked, but its translation into policy often lags behind. Indeed, even when decision makers are under transparency obligations, “[a]ctors whose influence is threatened by a new policy do not cease to resist its impositions after its formal adaptation”. Given the widely observed resistance of public bodies that are the object of transparency policies, it would be surprising if the traditionally secretive Council ‘conceded terrain’ without a fight. Second, various isolated examples are recorded of potentially problematic situations in which the Council may have taken less visible counter-measures to avoid transparency. In other cases, its opposition to transparency is well-publicised. This begs the question of what factors drive such transparency obstruction, and whether these factors show certain structural patterns. Third, research over the past decade and a half has demonstrated a high level of institutional differentiation and innovation in Council decision-making processes. Council scholars have observed the emergence of policy-specific decision-making modes. The complex and -to outsiders- opaque interplay of different parts of the Council within these policy areas means that the way in which the Council absorbs horizontal policies such as that of access to documents in real life remains difficult a priori.

The three reasons for scepticism of the ‘advancing transparency effect’ form part of an account that may be described as the ‘captive transparency effect’. It offers an alternative version of the development of Council transparency policy that is more fragmented and which centres on the often large differences between the Council’s different policy areas. As policy areas may be more or less compatible with the logic of transparency, the extent and manner of resistance against the advance of the Council’s access to documents policy is likely to differ -possibly significantly- from one policy area to the next. This idea requires further unpacking. What exactly is it about these policy areas that could cause them to interrupt the development of transparency policy? In the case of the Council, differences in decision-making modes have been identified as exercising a considerable influence on specific policy areas’ conduct of business. They determine the extent and manner of involvement of other

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19 Bauer (2004), pp. 368-9; Hillebrandt et al. (2014), pp. 10; see further Chapter 6, section 2
20 Curtin (2014); Puettter (2014); Novak (2013)
21 Hood (2006a)
23 Bunyan (2002); Access Info Europe (2011); Aus (2008), pp. 100-1
24 Abazi and Hillebrandt (2015), pp. 838-42

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European institutions or specific administrative elite actors.\textsuperscript{27} Internal Council actors that are empowered by these sector-dependent arrangements are likely to introduce specific understandings of the decision-making process and the role of transparency therein.\textsuperscript{28} For example, a sectoral committee could adopt internal working methods that shield the decision-making process from undue interference on the premise that this would undermine its ability to effectively create policy. Both these working methods and their commonly agreed justification, even when not legally binding, may then create a sector-specific norm of confidentiality. The committee’s chair might sanction offenders, or specify the norm further by allowing for the disclosure of certain pieces of decisional information while withholding others.\textsuperscript{29} As Council decision makers are the de facto ‘owners’ of decisional information and the primary agents in their policy area’s organisational structure, this offers them ample opportunities to ‘interrupt’ the duty of transparency, even when it is legally binding.

While both the ‘advancing transparency effect’ and the ‘captive transparency effect’ accounts offer an array of explanations in support of their claims about the development of Council transparency, these explanations lack theoretical grounding. A central difference between the two accounts of the Council’s transparency policy lies in the underlying drivers of development. Whereas the ‘advancing transparency effect’ predicts these to be uniform throughout the Council, the ‘captive transparency effect’ claims that these effects are rather fragmented by policy area.

It is here that historical institutionalism provides a useful entry point, offering an explanatory framework that may theoretically embed both accounts.\textsuperscript{30}

On the one hand, the advent of transparency in an institutional context may be cast in the light of the global ‘transparency wave’ of the 1990s.\textsuperscript{31} As I showed above, this account describes the development of transparency as a process of change that is mainly induced by factors exogenous to the Council’s decision-making process, such as shifting public opinion and technological developments. These exogenous factors, in turn, structurally altered the internal decision-making process in favour of transparency.\textsuperscript{32} Yet the transparency literature is also cautious of the success stories of the ‘transparency wave’, showing how institutions pay mere lip service to the idea of transparency, cut corners in its introduction, or turn to outright obstruction.\textsuperscript{33}

On the other hand, the development of transparency may be cast in the light of internal Council processes. Such an account emphasises the stability induced by policy areas’ accommodation of the new transparency obligations in a manner that causes the least friction with their usual \textit{modus operandi}.\textsuperscript{34} In this literature, the institutional willingness of the Council

\textsuperscript{27} Johansson (2015); Lewis (2000)\
\textsuperscript{28} H. Wallace (2005), p. 60-1\
\textsuperscript{29} E.g., Häge (2016), p. 5; Puetter (2006), p. 31 ; Lewis (2000), p. 999\
\textsuperscript{30} Ruijer and Meijer (2016), pp. 2-3; Meijer (2013), p. 432; Bjurulf and Elgström (2004), pp. 251-2\
\textsuperscript{32} Bauer (2004); Bjurulf and Elgström (2004)\
\textsuperscript{33} Hood (2006a); Mitchell (1998); Pasquier and Villeneuve (2007)\
\textsuperscript{34} Hall and Taylor (1996), p. 8; Streeck and Thelen (2005), p. 7; March and Olsen (1989), p. 57
appears to be rather more contingent on sector-specific interests. In the following two sections, I theoretically elaborate the ‘advancing transparency effect’ thesis and the ‘captive transparency effect’ thesis by first exploring their general institutional underpinnings in the transparency literature and then applying it to the Council context. This leads to the introduction of an explanatory framework that unpacks the competing presuppositions of both accounts of the developing transparency policy and that is tailored to the specific Council context.

4.2 The institutional development of transparency policies

An emerging literature on the development of transparency policies in various decision-making settings sets out to identify the institutional dynamics that shape these policies.35 Up until now, most of the literature on transparency has focussed on isolated puzzles such as the empirical effects of transparency,36 its place in political theory,37 or its development in specific legal contexts.38 Less attention has been paid to the dynamics underlying the development of transparency from an institutional perspective.39 Yet it is precisely this institutional development dynamic of transparency policies that explains (variations in) the shape they take, and which is therefore at the centre of this theoretical account.

Increasingly, however, the study of the drivers underlying the development of transparency policies has become a research focus in its own right.40 Authors have focussed on different aspects that help explain the (limited) development of transparency policies and their specificities and idiosyncrasies. Some accounts place transparency’s advance in a broad historical perspective, by linking it to the administrative logic inherent in New Public Management (NPM), the efforts of international organisations to strengthen national government institutions, or the changing possibilities and expectations emerging from the digital ‘information society’.41 This ‘grand narrative’ approach has been complemented by research that considers the impact of specific aspects of public bodies, such as (national) administrative or political culture,42 the constellation of actors involved in transparency policy making,43 and the influence of civil society pressure.44 These previous studies demonstrate the pivotal impact of the institutional context in which transparency policies are introduced: “there is no universal ‘one size fits all’ solution” for a successful transparency policy.45

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35 The literature here referred to deals specifically with government transparency, see also Chapter 2, section 1.
36 E.g., De Fine Licht (2014); Grimmelikhuijsen (2012); Meade and Stasavage (2006)
37 E.g., Baume (2012); Bodei (2011); Hood (2006a)
38 E.g., Cottier (2014); Sharma (2012); Kranenborg and Voermans (2004)
40 E.g., Michener (2015); Meijer (2013); Pasquier and Villeneuve (2007); Roberts (2006a)
42 Worthy and Grimmelikhuijsen (2012); Ruijer and Meijer (2016), pp. 2-3
43 Cross and Bolstad (2015); Hillebrandt et al. (2014)
44 Michener (2009), p. 157
Transparency is still frequently operationalised as a point on a scale: public bodies either have more or less of it.\textsuperscript{46} This approach is logical and appropriate for explaining instances of (non-)disclosure of information, yet in the broader context of transparency policy it also entails a risk of reductionism. Aspects such as the exception grounds that legislators include in transparency laws or specific arrangements that those implementing transparency come up with contain unmistakably context-related characteristics that cannot be readily understood one-dimensionally. The development of transparency policies is instead both constrained and shaped by complex institutional processes, which are particularly conducive to the application of institutional theoretical explanatory models.\textsuperscript{47} Indeed, much theoretical work in the area of government transparency takes as a starting point that ‘institutions matter’, as they “structur[e] collective behavior and generat[e] distinctive outcomes”.\textsuperscript{48}

Based on insights from previous research, I propose a framework that distinguishes between four categories of institutional factors: actors, preferences, resources, and finally, exogenous factors. Below, I will briefly detail each category, and its theorised impact. As becomes apparent, the existing literature does not offer a single answer to the question of what institutional factors matter, and how they are decisive in determining outcomes in terms of policy change and stability. Hence, I identify for each category how institutional dynamics might support either of the two explanatory accounts described above, in order to specify their central expectations in a theoretically embedded way.\textsuperscript{49}

\textbf{4.2.1 Actors with preferences}

A central point frequently raised in the literature is that the reasons or interests that drive actors to advocate a transparency policy have a considerable influence on its subsequent development.\textsuperscript{50} The term ‘actor’ is here understood broadly, to include both individual roles and groups inside a public body (decision makers and administrators), and outside of it. Actors further breaks down into outsiders that are institutionally linked to the public body that is the object of the transparency policy (e.g., a parliament, an ombudsman, or a court of auditors) on the one hand, and stakeholders without a formal role in the policy process (e.g., NGOs, news media, or lobbyists) on the other.

A policy context’s dominant actors hold particular preferences with regard to the issue of transparency. This study considers such preferences at an aggregate level, as a characteristic that is shared between groups of individuals. Sometimes, such shared preferences are culturally determined, as is the case with specific administrative or political preferences and attitudes, or policy area-specific understandings of transparency developed over a long time.\textsuperscript{51} They may also be calculus-based, meaning that actors are more likely to

\textsuperscript{46} E.g., Grimmelikhuijsen and Welch (2012), pp. 566-7; Cross (2013), p. 304
\textsuperscript{47} Meijer (2013), pp. 430-1; Zahariadis (2013), pp. 812-5
\textsuperscript{49} See above section 4.1
\textsuperscript{50} Scholtes (2012); Hillebrandt et al. (2013)
oppose disclosure of information that they consider to be sensitive or potentially damaging. In their assessment of damage, actors take into consideration the effect of disclosure on such objectives as the avoidance of (internal or external) punishment and the attainment of policy goals.

Preferences may moreover be either relatively homogenous, or heterogeneous among actors. Where preferences converge sharply in favour of transparency, this may lead to strong support for formal transparency rules. Where they converge against transparency, this may lead to rules delimiting its reach, or informal norms that seek to achieve the same. On the other hand, the development of transparency policies is expected to be more dynamic where preferences diverge sharply. For example, when a particular transparency viewpoint forms a minority inside a (part of a) public body, inside actors might be more receptive to the formation of coalitions with outside actors. Coalitions form around a shared perception of the issue salience of transparency, and programmes of advocacy coalitions may be relatively sophisticated.

On the basis of these general dynamics, the following expectations concerning the impact of actors and their preferences can be formulated. First, in institutional contexts where outside actors are strongly represented it is likely harder for insiders to resist transparency advances, particularly where the former are able to form coalitions with media outlets or inside actors. By contrast, transparency resistance is likely to be more entrenched where institutional contexts create more inside positions or bodies with a stake in securing high policy output. Second, the strength of cultural attachment and of perceived (positive or negative) returns determines the salience of transparency policy for any given actor. For example, the advance of transparency is more likely to be strongly resisted when a committee believes that it undermines the possibility of continuing with ‘business as usual’. Third, when preferences of inside actors diverge strongly, this leads to a more dynamic policy process offering opportunities for outside actors to advocate their preferences more effectively.

4.2.2 Resources

In order to advocate their preferences with maximal effect, actors can mobilise different resources. A distinction can be made in this regard between political, legal, administrative and material resources. These resources are unevenly distributed among involved actors on the basis of their specific roles.

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52 Cross (2014), p. 271; for this distinction see Hall and Taylor (1996), p. 7 and further
53 Cross (2014), p. 273; Novak (2013), p. 1095; Aspinwall and Schneider (2001), p. 12. Here, it is worth recalling that the term actors not only encompasses persons but also groups.
54 Grimmelikhuijsen and Kasymova (2015), p. 390
55 Grimmelikhuijsen (2012), pp. 69-75
58 Meijer (2013), pp. 431-2
A ‘hard’ resource in political terms consists of sufficient votes to pass or block a decision concerning individual disclosures or new disclosure rules.\(^5^9\) When these votes cannot be garnered, or when it is deemed imprudent to invoke them, actors may resort to softer political resources. A chairing role, political seniority, or wide public support all influence the political agenda, even where a view is in the minority. For example, a newspaper may successfully mobilise public opinion against a proposed transparency policy by arguing that it is insufficient to tackle corruption.\(^6^0\) By contrast, a chair can effectively block change by keeping the issue of transparency off the agenda,\(^6^1\) or steer for the adoption—with the support of a transparency-adverse majority—of purely symbolic transparency measures laid down in highly general legislation, to be implemented by a poorly equipped bureaucracy.\(^6^2\)

Actors may draw resources in judicial terms from their institutional position within the legal framework. Certain actors may have privileged standing before a court, while existing rules and legal precedents can enable or constrain a particular legal argument. For example, an applicant who was refused access could invoke an international treaty containing disclosure norms in court, in order to strengthen her case against a national public authority.\(^6^3\) However, she might be prevented from doing so if a court determines that she does not have standing.\(^6^4\) In certain circumstances, judicial resources may be complemented by informal institutional conventions (such as between a government and its parliament), or extra-legal administrative procedures (such as citizens’ access to an ombudsman) which reduces actors’ reliance on access to the courts. Particularly in situations where formal disclosure rules contain poorly specified procedural norms, the latter may provide an effective route for access applicants to seek redress.\(^6^5\)

Public bodies also have a whole range of administrative resources at their disposal. As transparency rules are generally self-implementing schemes, public bodies or their administrations may adopt complementary administrative rules that complicate citizens’ right of access (e.g., introducing fees for document requests), interpret the rules exceedingly strictly, or subvert a policy with a whole range of informal methods of resistance.\(^6^6\) In many cases, administrative staff develops obstruction strategies to protect their political principals.\(^6^7\) On the other hand, senior civil servants may also play an important role as policy entrepreneurs advancing the development of transparency. Senior administrators are often well-connected, expert and with a time-horizon that is longer than that of most politicians and are thus well-situated to see policy opportunities when they arise.\(^6^8\)

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\(^5^9\) Michener (2015), p. 78  
\(^6^0\) Michener (2015), p. 94  
\(^6^1\) Bachrach and Baratz (1962); Princen (2009), pp. 154-6  
\(^6^2\) Grimmelikhuijsen and Welch (2012); Roberts (2006a), pp. 116-7; Curtin and Meijer (2006), p. 120  
\(^6^3\) Mitchell (1998)  
\(^6^4\) Feldman (2005), pp. 288-90  
\(^6^5\) OECD (2005), p. 44  
\(^6^6\) Roberts (2006a), p. 109 and further; Pasquier and Villeneuve (2007); OECD (2005), p. 48  
\(^6^7\) Roberts (2006a), pp. 114-5  
\(^6^8\) Kingdon (2003), pp. 33-4, 180
Finally, in *material terms*, actors must be able to invest the time, money and expertise that are necessary to effectively advocate their position. For example, an NGO must possess sufficient funds to run a public campaign for transparency or to litigate against a refusal to disclosure documents. The relative weight of these material factors may however be alleviated by non-material resources such as strong convictions, a long-term perspective, and resource pooling among several actors. On the whole however, it may be assumed that public bodies themselves can mobilise more resources as they have larger budgets and access to more up-to-date information.

This gives rise to the following expectations concerning the impact of resources on the development of transparency policy. First, deployable resources go beyond the political, to encompass judicial, administrative, and material aspects. These resources are unevenly distributed among actors, and generally it may be assumed that inside actors can command more resources than outside actors. Second, non-political resources may stand in different relation to political resources. Whereas administrative resources are likely to strengthen the position of the political majority, judicial resources are generally viewed as a counter-majoritarian check on political power. Material resources are most dependent on coalition structures, where the Council majority controls the status quo, yet oppositional forces may be able to mobilise considerable expertise and publicity against this status quo. Third, the stability of resources varies vastly from one instance to another. For example, an actor may use her time in a fixed-term chairmanship to merely keep the issue of transparency off the agenda while a court case might activate her to intervene to avoid the development of unfavourable case law likely to remain in place for a long time.

4.2.3 Exogenous factors

The particular constellation of actors, preferences and resources go a long way to determine the development of transparency policy. However, transparency policy developments cannot be explained by these factors alone. While they are capable of revealing certain power constellations underlying policies, various case studies show that transparency policies are not necessarily stable or subject to change that can be entirely predicted on the basis of the institutional factors in place. Institutional factors tend to overemphasise the stability or institutional predictability of (changes in) transparency policy. This begs the question of how actors, preferences, and resources may themselves change over time, leading to the dynamic development of transparency policy. The key lies in exogenous factors that have the capacity to (permanently) rearrange the previous equilibrium of institutional factors.

Public policies operate within a dynamic societal, technological and institutional context that is in constant flux. While most exogenous factors will occur without any notable impact on transparency policy, some come sufficiently close to the policy’s institutional context to alter it.

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69 See e.g. case studies developed in Meijer (2015); Michener (2011), pp. 150-7; Roberts (2005)
70 Hall and Taylor (1996), pp. 9-10
71 March and Olsen (1989), pp. 56-64; Meijer (2013), p. 436
Exogenous factors may take on many forms. They can appear as diffuse trends that nevertheless exert a long-term influence. For example, the emergence of the ‘information society’ appears to have a lasting effect on citizens’ expectations and has led them to expect more frequent and complete provision of government information.\(^{72}\) Exogenous factors can also appear as ‘focussing events’: sudden, highly visible and disruptive occurrences that “[draw] attention to issues that may have been relatively dormant”.\(^{73}\) This can put considerable pressure on a public body to take steps towards greater transparency, often in specific policy areas, even when it is antagonistic to change.\(^{74}\)

Exogenous factors may also change policy actors’ perceptions of problems and priorities, leading them to revise their position. Events such as democratic elections or the establishment of a new NGO may also alter the very actor constellation itself, rearranging majority/minority balances. Finally, exogenous change can also impact on the resources that actors have at their disposal to advocate change, for example by altering voting rules or creating new communication technologies. Examples of exogenous changes known to have altered policy debates about transparency abound. The 11 September 2001 terrorist attacks under the Bush jr. administration,\(^{75}\) the role of Information and Communication Technologies (ICTs) in promoting awareness about the existence of transparency among citizens,\(^{76}\) and the incorporation of FOI requirements imposed on governments by international monetary institutions,\(^{77}\) are respective examples of exogenous societal, technological, and institutional factors that each impacted on the development of transparency, either in specific policy areas or across an institution.

The above discussion leads to an analytical framework in which the development of government transparency is explained by a dynamic institutional process:

- a relatively stable policy process marked by the interaction between actors both inside and outside of a public body through the confrontation between diverging preferences and resources;
- exogenous factors, societal, technological, or institutional in nature, which take shape in trends or events and which lead this policy process to change over time.

In this section I have proposed, on the basis of empirical studies in a wide range of settings, a framework of institutional factors that affect the development a policy of government transparency, and demonstrated how these factors may contribute to an expectation either of general and ‘advancing’ or of sector-specific and ‘captive’ transparency. While this exercise is clearly relevant to our understanding of transparency policies, it constitutes only the first step of an explanatory framework. The next step is a sense of how the dynamics of such factors

\(^{72}\) Bovens (2003)
\(^{73}\) Birkland (2005), p. 118
\(^{75}\) Ruijer (2013), pp. 121-2; Roberts (2006b), p. 19
\(^{76}\) Bertot et al. (2010), p. 267; Cuillier and Piotrowski (2009); Bovens (2003); Meijer (2009), pp. 258-60
\(^{77}\) Roberts (2006b), p. 110
play out in a specific context. In the following section, I analyse the institutional arrangements in the Council that are likely to be most influential on the factors of the explanatory framework identified above.

4.3 The Council: Obstacle for transparency?

A sizeable body of literature on the functioning of the Council has emerged over the past years that can inform us on this question how institutional factors in Council decision making influence the development of its transparency policy. This literature suggests that an important aspect of fragmentation is manifested in the Council’s approach to policy making in different areas, which in turn likely influences the extent to which the advance of access to documents is successful. The relative ‘sensitivity’ of policy areas is reflected in their different decision making modes. This is evident from such factors as the applicable voting rule and the range of possible decisional outputs as well as the different types and roles of actors present in various policy areas. This suggests that the Council after 1992 formed a dynamic context of increasing institutional differentiation between policy areas. As policy-specific arrangements have been observed to lead to uneven outcomes in terms of the policy solutions that the Council comes up with, the development of access to documents policy – essentially an institutional, horizontal policy – may also have been affected by differentiation from one policy area to the next. I discuss those Council arrangements below that are expected to have structured the distribution of institutional factors the most. Following the general analytical framework put forward in section 4.2, these are divided into actor-related, preference-related and resource-related explanatory factors. A further impact comes from institutional factors exogenous to the Council’s policy process. I discuss each in turn, reflecting systematically on their possible impact on the development of transparency policy.

4.3.1 Council actors and transparency preferences: Increasing fragmentation

Council decision-making processes include various actors both inside and outside the institution. Their impact on the development of transparency policy is twofold. On the one hand, particular actors are charged with specific aspects of the horizontal transparency policy, both in the drafting of rules and in organisational arrangements required for their

79 Key publications include Puettter (2014); Häge (2013); Curtin (2009), pp. 81-91; Naurin and Wallace (2008); Hayes-Renshaw and Wallace (2006); Westlake and Galloway (2004)
83 The discussion is limited to those Council arrangements and institutional factors that are expected to exercise a clear influence on the development of access to documents policy. However, a rich body of research exists that considers wider aspects of Council decision making, cf. footnote 79 above.
84 See framework developed in section 4.2
implementation. On the other hand, actors across the various sectors of Council decision making who are confronted with these rules and arrangements respond to them.

When Council transparency rules are drafted, they go through a succession of bodies with specific prerogatives to decide on the precise wording of these rules. Central internal actors in this process are the rotating Council Presidency and the Committee of Permanent Representatives (Coreper). The Council Presidency rotates between member states on a half-yearly basis. It chairs most Council meetings and plays a cardinal role in ensuring the smooth conduct of business and avoiding decisional deadlock. The Coreper divides its tasks over two formations (Coreper II and I), headed by respectively the national EU ambassadors and their deputies. This body has been described as the ‘central hinge’ between the national and the European levels in Council decision making as the ambassadors endeavour to accommodate member states’ concerns through integrative bargaining on the basis of reciprocity. A central dividing line in the Council’s decision making is that between legislative and non-legislative activity. In certain cases, the Council may adopt internal transparency rules laid down in non-legislative texts such as a Decision on the rules of procedure. Where transparency rules are laid down in legislation, the Council’s internal actors interact with two other European institutions: the Commission and the European Parliament (EP). A central characteristic of the Commission is its (almost) exclusive right to propose legislative acts. As such, it is able to set the agenda in subsequent negotiations between the Council and the EP. The EP, in turn, is the Council’s co-legislator in the ordinary legislative procedure. Over time, the EP’s co-legislative powers have extended to an expanding number of areas, including the institutional matter of transparency.

The organisational arrangement of the day-to-day implementation of the Council’s transparency policy largely falls upon the Council’s General Secretariat and the Working Party on Information (WPI). The secretariat, whose primary task is to facilitate the Coreper and the Presidency in ensuring the “smooth running of the Council machinery”, is charged with handling incoming requests for access to documents. When applicants appeal against an initial refusal decision, their appeal is handled by the WPI, which consists mostly of information officers from the member states’ delegations. The WPI, assisted by the secretariat’s unit charged with transparency affairs and the legal service, then reaches a final decision, which applicants can contest before the European Ombudsman or the Court of Justice of the European Union (CJEU).

The actors involved in the horizontal transparency policy are complemented by actors in the Council’s various policy areas. Although these actors are only indirectly involved in the

85 Tallberg (2008), p. 201; Chalmers et al. (2010), pp. 74-5
86 Council (2016c)
87 Lemp and Alten Schmidt (2008), pp. 511, 520
88 See Chapter 3, section 3
89 IGC (2007a), article 17(2); Schütze (2012), p. 30
91 Häge (2011), pp. 467-8
92 Hereinafter, ‘secretariat’ or ‘Council secretariat’.
93 Christiansen and Vanhoonacker (2008), pp. 757-8

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transparency policy, the manner in which they ‘receive’ the transparency policy nonetheless impacts upon its functioning in different policy areas. The policy-specific preferences of sectoral actors may in the first place be felt in the day-to-day implementation of access to documents requests pertaining to their area. However, they also influence broader aspects such as sector-specific interpretations of the horizontal transparency rules or informal norms that develop around the formal rules.94 It has been noted that Council decision making is increasingly fragmented, driving a wedge between the Council’s coordinating and sectoral actors.95 For example, the erosion of the Presidency’s chairing prerogative in the areas of foreign affairs policy and economic governance96 has meant that both its substantive and procedural control have become more limited.97 The Coreper has also seen its central role undermined. Traditionally, it has acted as the gatekeeper of all dossiers before they reach the ministerial level, and the circumvention of this role is only permitted by “considerations of urgency”.98 However, this vertical link has increasingly given way to parallel structures. Over time, an increasing number of the 138 junior working parties that serve the Council’s various policy areas have come to report to one of the 17 special or senior committees, many of which have their own working methods and bypass the Coreper to report directly to the ministerial level.99 Finally, the secretariat’s image as an impartial and modest broker has increasingly become challenged by what has been described as the ‘new secretariat’: the addition of staff, often seconded from the member states, who have been more deeply involved in the frontline of the policy process.100 In various instances, the secretariat has become displaced by alternative administrative structures operating either inside or outside the Council.101 These new developments have led to the emergence of a rank of “elite [secretariat] officials” who move beyond the traditional role of civil servants to provide “entrepreneurial leadership” in Council negotiations.102 As has been noted, increased sectoral work division leads to an equivalent expert-based division of labour, and a stronger association among officials with the professional norms and priorities of their task unit. Indeed, rich qualitative evidence indicates that such differentiation has been underway during the past decade and a half.103

The fragmentation of Council decision making appears to have coincided with an increasing resort to non-legislative decision-making and informal policy coordination on issues “that lay beyond agreed areas of competence and joint action”.104 The involvement of

94 See Chapter 2, section 3
95 E.g., Puetter (2014), pp. 3-4; Christiansen and Vanhoonacker (2008), pp. 762; Wallace (2002), p. 334
96 Council (2006b)
97 Puetter (2014), p. 212
100 Christiansen and Vanhoonacker (2008), p. 764
102 Lewis (2003), p. 1003
103 Puetter (2014), pp. 189-90; Curtin (2009), p. 108; Christiansen and Vanhoonacker (2008), 766-7; Lewis (2003), p. 1013. However, see Häge (2008), p. 245 who argues that the evidence provided for socialisation is often highly selective.

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the EP and the CJEU in these fields has tended to be rigorously circumscribed.\textsuperscript{105} Less straight-forward is the involvement of non-institutional outside actors such as NGOs, lobbyists, or third states, which appears to be determined by factors such as national-level access points and adaptability to European (including Council) governance structures.\textsuperscript{106}

It thus becomes clear that the Council’s transparency policy is not only shaped by the traditional coordinating actors such as the Presidency, the Coreper, the WPI and the secretariat’s Transparency Unit, but rather ‘comes to life’ in an increasingly fragmented context of actors operating in specific policy areas. By interpreting, implementing, and accommodating the transparency rules in light of the priorities in their policy area, these actors may have added to, or replaced the Council’s general (cultural and calculus-based) preferences with regard to the issue of transparency. The precise actor constellation, moreover, appears to be affected by the sector-specific preponderance of either legislative or non-legislative decision making.

\subsection*{4.3.2 Resources of Council insiders and outsiders}

The diversification of sectoral actors over time has also had an impact on the distribution of resources available for shaping the Council’s transparency policy. Beginning with political resources, the erosion of the Presidency’s chairing role offers opportunities for a wider diversity of chairs to set sector-specific transparency norms. Those norms can relate to the internal procedures of specific bodies (for example, related to proactive document disclosure or informal document exchanges) and their handling of formal requests for access to documents. Internal voting rules, which vary across policy areas and procedures, may play a central role in this regard. Over time, a shift has taken place from unanimity to qualified majority voting (QMV) in the first pillar.\textsuperscript{107} It has been argued that the application of QMV strengthens the role of smaller member states vis-à-vis larger member states, potentially benefitting those member states in favour of wider transparency.\textsuperscript{108} In matters of internal organisation however (such as the adoption of its rules of procedure), the Council has tended to vote by simple majority.\textsuperscript{109} Whereas this voting rule lowers the threshold of adoption compared to QMV or unanimity, this does not necessarily benefit the member states favouring wider transparency, whose political clout may lie in their ability to block transparency-unfavourable internal rules. Finally, particular bodies may decide on the basis of consensus. As has been pointed out, in practice, this benefits strong Council majorities. Consensus frequently means the absence of explicit opposition as member states will tend to avoid forming part of a dissenting minority.\textsuperscript{110} It may be tentatively expected that voting rules matter for the development of Council transparency policy. Where they include veto players,

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\textsuperscript{105} Curtin (2009), pp. 260-70  \\
\textsuperscript{106} Saurugger (2009)  \\
\textsuperscript{107} Hayes-Renshaw and Wallace (2006), p. 11. In the CFSP, unanimity has remained the main voting rule until today, complemented by QMV in a very limited number of cases.  \\
\textsuperscript{108} Naurin and Wallace (2008), p. 14  \\
\textsuperscript{109} IGC (2007c), article 240(3)  \\
\textsuperscript{110} Novak (2013), p. 1094
\end{footnotesize}
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voting rules are more likely to uphold a status quo than where no veto players exist. A procedure under QMV or simple majority voting still remains unclear concerning the direction of change. External actors are likely to play an important role. For example, where pressure groups succeed in mobilising public opinion, this increases the political costs for member states of supporting sectoral secrecy. Similarly, where the EP is involved as a co-legislator, this is likely to shift political resources towards the advancement of transparency.111

Judicial resources also play a role in the development of transparency, particularly with regard to the rules and their interpretation. Here, an important asset is the right of member states to bring cases or intervene in matters affecting the institutions, which enables them to defend or criticise specific legal interpretations of the transparency rules.112 The EP and the Commission have similar standing and may exercise it in particular where Council decisions may upset the institutional balance. In the case of non-institutional outsiders, access to judicial review is limited to directly and individually concerned parties, meaning that NGOs or other civil society actors can generally only litigate against a Council decision to refuse their access to requested documents.113 An exception to the horizontal rules on judicial review is in the context of the Common Foreign and Security Policy (CFSP), where only a very limited role is granted in the Treaties to the CJEU. In settling conflicts over the interpretation of the transparency rules, a central objective of the courts is to ensure that European law is interpreted and applied uniformly.114 The courts have considerable potential influence in clarifying legal uncertainty and setting the parameters of access to documents policy, particularly in the face of a divided legislature.115

A number of administrative resources also affect the Council’s transparency policy. Where special administrative roles are created for the implementation of transparency, officials may use their discretion to use transparency-enhancing measures such as the organisation of internal information sessions and trainings, as well as the creation of a clear infrastructure for dealing with access requests, declassification, and related matters. By contrast, sector-specific elite actors will likely use their discretionary powers to shield their policy area’s decision-making process from undue pressure. The growing fragmentation of administrative actors in the Council may provide greater opportunities for the development of idiosyncratic administrative norms for document management, or deviating procedural arrangements regarding public access to documents. Fragmentation may also decrease the secretariat’s coordinating units ability to impose their transparency preferences on all bodies and hierarchical levels of the Council. As a consequence, sectoral arrangements are then likely to attain a growing influence on a sector-specific development of transparency policy.

111 Bjurulf and Elgström (2004), p. 264
112 IGC (2007c), article 263, second indent
113 IGC (2007c), article 263, fourth indent
114 Chalmers et al. (2010), p. 160
115 Curtin (2012a), pp. 120-1
Finally, with regard to material resources, it may be expected that the creation of new actors with formal roles lends them greater means to enforce their transparency preferences. Furthermore, material resources are likely to expand where specific policy areas of decision-making bodies consider this necessary on the basis of a risk calculus, for example for the creation of a physical infrastructure for the protection of secret documents. In general, the expectation of decision-making bodies’ superior material resources vis-à-vis outside actors is likely to apply equally to the Council.

4.3.3 Institutional factors exogenous to the Council’s policy process

As formal powers to adopt, implement and interpret Council rules on transparency reside exclusively with the member states, the Council secretariat, the EP and the CJEU, any explanation of the development of transparency must primarily centre on the preferences and resources of these actors. The Council’s policy-making functions are further shaped by a number of institutional factors that are entirely exogenous to the Council’s policy process, but which exercise a direct influence on meso-level policy processes such as that of access to documents. These are the periodic direction-giving inputs of the European Council and successive treaty revisions agreed by the Intergovernmental Conference (IGC).

The European Council is composed of the Heads of State or Government (HSG) of the member states and fulfils a leading role in setting the EU’s strategy on the most important political issues. In spite of its explicit exclusion from the legislative process, the European Council has on occasions interfered quite directly in the Council’s functioning. On subjects of particular political sensitivity, it may agree “how the Council should decide”. Such decisions can impact directly on matters involving transparency, for example by setting out a time path for particular decisions to be reached. Alternatively, they can have an indirect effect, for example by privileging particular (informal) internal bodies over others with serious implications for the transparency of the decision-making process.

Council transparency policy may also be affected by changes to the Treaties as concluded by an Intergovernmental Conference (IGC). Although formally, the decision to convene an IGC is for the Council Presidency to take, it is de facto taken by the hierarchically superior European Council. Before the decision to convene IGCs was codified in the Treaties, the European Council took the lead in this decision. In IGCs, member states conduct diplomatic negotiations to agree revisions to the EU’s existing Treaties. Between 1992 and 2014, four IGCs were held at irregular intervals. Given that the Treaties set the

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116 Hillebrandt et al. (2014), p. 7
119 Puetter (2014), p. 76
120 IGC (2007a), article 48(4); Puetter (2014), p. 75
122 Namely in 1996-7 (Amsterdam Treaty), 2000 (Nice Treaty), 2004 (Constitutional Treaty) and 2007 (Lisbon Treaty). The IGC adopting the Constitutional Treaty followed only after a European Convention
EU’s fundamental rules, akin to constitutions at the national level, this rate suggests that the European Treaties are considerably less rigid than national constitutions.\textsuperscript{123} New treaty provisions may alter the Council’s range of preferences, by offering (or mandating) the framework for subsequent specific transparency provisions. Finally, IGC are also needed as part of the conclusion of treaties for the accession of new member states. Between 1992 and 2014, the Council grew significantly from 12 members to 28 members in four rounds of accessions.\textsuperscript{124} Most notable of these was the 2004 ‘big bang enlargement’, which greatly increased preference heterogeneity among Council members, including on the issue of transparency.\textsuperscript{125}

Besides the institutional exogenous factors, Council transparency may of course also be affected by other types of exogenous factors. As these are less systemic, they are also harder to predict. However, one societal and one technological factor stands out. These are respectively the waning public trust in the EU,\textsuperscript{126} and in the Council in particular, and the advance of ICT,\textsuperscript{127} both of which are expected to lead to more transparency. The possibility that exogenous factors may exist with a strongly sector-specific impact must not be excluded.

In summary, the potential impact of exogenous factors on the Council’s access to documents policy is considerable. As their occurrence was beyond the reach of the Council, it is likely that these factors did not always reflect the priorities or preferences of internal Council actors, adding a certain amount of unpredictability to their impact.

The discussion of relevant institutional factors in and around the Council leads to the identification of a number of differences over time and across policy areas (Table 4.1). While certain horizontal factors lend support to the expectation of an ‘advancing transparency effect’, the progressive sectoral fragmentation of others rather adds to the expectation of a ‘captive transparency effect’. The presence of special sectoral actors with their own preferences and resources to realise these preferences adds to the suggestion that, in spite of the presence of a central access to documents framework, Council transparency may in fact have been ‘received’, interpreted and implemented differently in different policy areas and over time. In the following section, I elaborate on how the Council’s institutional factors relate to the respective expectations of ‘advancing transparency’ versus ‘captive transparency’.

\begin{footnotesize}
\begin{enumerate}
\item Craig and De Búrca (2008), p. 25; Curtin (2009), pp. 13-6
\item Namely in 1995 (3 new member states), 2004 (10 new member states), 2007 (2 new member states) and 2013 (1 new member state)
\item Cross and Bolstad (2015), p. 221; Naurin and Wallace (2008), p. 7
\item Although comparable longitudinal figures of trust in the EU are lacking, other figures give an indication. Thus, while support for Community membership was 65 per cent in 1992, continued support to stay inside the EU stood at 56 per cent in 2014 (Eurobarometer 1992, p.17). Armingeon and Ceka (2014, pp. 83-4) found that while trust in the EU remained relatively constant between the mid-1990s and mid-2000s, it has declined sharply over the last decade.
\item Curtin and Meijer (2006), pp. 114-5
\end{enumerate}
\end{footnotesize}
Table 4.1: Institutional factors in Council transparency policy: Shifting impacts

<table>
<thead>
<tr>
<th></th>
<th>Arrangement</th>
<th>Difference over time</th>
<th>Difference across policy areas</th>
</tr>
</thead>
</table>
| **Actors** | - Increasing competition coordinating bodies (Presidency, Coreper, secretariat)  
              - Growing involvement of EP as co-legislator | - Reliance on parallel hierarchies: new senior bodies with permanent chairs and separate administrative structures  
              - Exclusion of CJEU in area of CFSP | |
| **Preferences** | - National administrative cultural preferences (unchanged) | - Diversity of calculus-based approach to transparency informed by policy-specific cultural preferences | |
| **Resources** | - Political: new chairs, increase in QMV  
              - Legal: special standing institutional actors, limited standing non-institutional outsiders (unchanged)  
              - Administrative: increase in administrative elite actors  
              - Material: Increase in permanent staff sectoral bodies | - Differentiation of political, administrative and material resources due to fragmentation Council decision-making process | |
| **Exogenous factors** | - Increasing interference European Council  
                           - Periodical reform European Treaties and conclusion accession treaties through IGC  
                           - Decreasing public trust in EU  
                           - Advance of ICTs | - Mainly horizontal effects, sectoral effects possible | |

4.4 Advancing versus captive transparency

In the previous sections, I reviewed two bodies of literature: those on the development of government transparency policies and on the Council’s institutional arrangements.\(^{128}\) This led to two contrasting accounts of the development of transparency policies: the ‘advancing transparency effect’ and the ‘captive transparency effect’. In order to establish the relative explanatory power of either account, an explanatory framework was presented based on institutional theory. This framework was then applied in the institutional context in the Council, which led to the identification of both institutional factors that support the expectation of a horizontal transparency advance and others that lead to an expectation of a transparency development characterised by sector-specific institutional obstacles. In this section, I elaborate both expectations.

According to the ‘advancing transparency effect’ thesis, the development of transparency policies tends to be kick-started and amplified by exogenous factors: transparency provisions in response to external pressures lead to further calls for transparency in a process that is increasingly difficult for Council insiders to control. According to the ‘captive transparency effect’ thesis, the development of transparency policies is a direct result of the (sector-specific) institutional context in which they are

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\(^{128}\) Respectively sections 4.2 and 4.3
Table 4.2: Transparency development: Contrasting explanations

<table>
<thead>
<tr>
<th>Institutional factor</th>
<th>Advancing transparency effect: Transparency increased in all policy areas</th>
<th>Captive transparency effect: Transparency increased in a fragmented manner</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Actors</strong></td>
<td>Increasingly inclusive decision making leads to more monitoring by outside actors and more transparency coalitions between inside and outside actors.</td>
<td>Insiders act in a secluded manner, at some distance from the outside and with limited opportunities for monitoring.</td>
</tr>
<tr>
<td><strong>Preferences</strong></td>
<td>Access to documents policy induces learning behaviour among inside actors, causing a revision of transparency-averse preferences.</td>
<td>(National) culture and sector-specific preferences of inside actors predominate across the board.</td>
</tr>
<tr>
<td><strong>Resources</strong></td>
<td>Information derived from access to documents as well as litigation undermine inside actors' possibilities for maintaining confidentiality.</td>
<td>Inside actors rely on political and administrative resources to ensure that institutional arrangements remain intact.</td>
</tr>
<tr>
<td><strong>Exogenous</strong></td>
<td>Events or trends that occur over time strengthen access to documents policy by rearranging actors, preferences, or resources involved.</td>
<td>Events or trends that occur over time either strengthen policy-specific preferences regarding the development of access to documents policy, or have no impact on the development of access to documents policy.</td>
</tr>
</tbody>
</table>

introduced, and therefore rather more variable. Furthermore, as the Council literature suggests, the arrangement of institutional factors appears to have been dynamic over time. Thus, significant differences between policy areas already existed at the time the access to documents policy was introduced in the Council, and/or such differences changed over time, causing cross-sectoral differences in access to documents policy to decrease or increase.

The exploration of the literature leads to two contrasting explanatory frameworks (Table 4.2). The first framework, that of the ‘advancing transparency effect’, lays a strong emphasis on the transformative power of access to documents policy, by which barriers between insiders and outsiders are undermined, outsiders gain more resources to influence policy, and transparency-averse preferences of insiders are gradually revised. In this framework, the capacity of exogenous events (e.g. scandals) or trends (e.g. the advance of IT) to rearrange institutional factors plays a central role. The second framework, that of the ‘captive transparency effect’, emphasises the relatively stronger position of inside actors compared to outside actors, allowing them to effectively shape the development of access to documents policy to their preferences. Exogenous events or trends play a more marginal role in this framework. Below, I discuss each (exploratory) theoretical account in turn.

**4.4.1 Advancing transparency effect**

In the ‘advancing transparency effect’ thesis, the institutional factors that drive the expansion of access to documents policy override sector-specific influences. An advancing transparency effect is caused by various interacting factors. External actors actively monitor the Council’s developing access to documents policy, leading them to gain in influence. For varying reasons, outsiders both from other European institutions and civil society have a stake in
wider access to Council documents. This introduces new preferences and pressures into the policy process, causing learning behaviour and/or a revision of existing dominant preferences. Moreover, outside actors gain new information resources from the disclosure of relevant information that was previously unavailable, undermining the privileged position of Council insiders. For example, litigation on the interpretation of access to documents rules constrains the privileges of transparency-adverse actors, ‘skewing’ subsequent policy developments in the direction of the pro-transparency camp. Exogenous factors play a prominent role in the ‘advancing transparency effect’ thesis. Societal, technological, and institutional events or trends are taken as opportunities to revise dominant institutional arrangements by both minorities within the Council and outsiders.

Advancing transparency can manifest itself in different ways. According to a generic story of its advance, access to documents emerged and expanded over time across the board. This entails an assumption that transparency-favourable actor, preference, and resource constellations applied in the same way across the Council, and that exogenous events or trends created transparency-enhancing conditions for the Council as a whole. A more detailed version of this story acknowledges that access to documents policy had to overcome initial sector-specific obstacles but still holds that it developed toward uniform horizontal expansion. When the starting conditions of access to documents policy are specified, it may be recognised that initial resistances or obstacles, as well as the starting position of insider actors were likely stronger in some policy areas than in others. However in line with the overarching expectation of advancing transparency, such sectoral obstacles are expected to have decreased significantly over time, leading to a gradual ‘mainstreaming’ of the Council’s access to documents policy.

4.4.2 Captive transparency effect

In the ‘captured transparency effect’ thesis, sector-specific inside actors and their preferences and resources are dominant in shaping the specific development of access to documents policy. The living policy assumes, as it were, the colour of its institutional surroundings. A number of institutional factors are particularly influential in this account. With reference to actor interaction, it is assumed that decision making occurs in a relatively secluded manner. Even when outsiders advocate greater transparency, inside actors from the member states and the secretariat dominate the policy process. The preferences that these actors hold are particularly based on cultural and policy-related considerations. Institutional closure also means that Council actors have the most resources to advocate their preferences, while the resources of outsiders remain relatively ineffective. Finally, two versions exist about the influence of the exogenous factors. According to the first, sector-specific events or trends lead to a strengthening of policy-specific preferences regarding transparency. According to the second, the impact of exogenous factors remains marginal, either because, societal, technological, or institutional events or trends remain unrelated from the developing access to documents policy, or because their relation is insufficiently recognised and publicised.
Overall, captured transparency assumes a traditional ‘policy battle’ with a high degree of institutional closure.

The captured transparency effect thesis describes differences between policy areas with varying degrees of precision. Policy areas may be viewed as static contexts, in which case access to documents policy appears simply to be more compatible with some policy areas than with others, causing its ‘captured’ absorption. Even when institutional reform alters the actor or resource constellation, their perception of the ‘proper’ amount of access to documents in a given policy area is expected not to change much over time. When policy areas are however conceptualised as dynamic contexts, captured transparency attains an amplifying effect: policy areas increasingly ‘encapsulate’ access to documents policy, result either in a roll-back, in which these actors try to minimise the interference of access to documents in their daily operation, or in selective application of access to documents to attain secondary policy objectives. In either case, access to documents policy becomes ever-more fragmented and idiosyncratic.

Two final aspects must be mentioned with respect to these theoretical accounts. First, it must be pointed out that while both accounts are ideal-typical, it cannot a priori be assumed that empirical observations within the Council match strictly with the expected processes described here. This study therefore expressly takes both accounts as a starting point in order to identify the best-fitting explanation of empirically observed phenomena. Second, whereas this theoretical framework at a conceptual level could be taken to include the notion of a uniform, ‘one-size-fits-all’ development in access to documents policy, in reality, such a situation is highly unlikely to occur. Differences that seem trivial are likely to surface, for example between areas where high-stakes decisions are taken on the basis of highly sensitive intelligence and areas in which relatively uncontroversial technical standards are agreed on. In this study, I acknowledge the existence of such trivial difference. However, I steer away from the uncritical acceptance of claims of trivialness that are put forward by policy actors.  

In this section, the two competing accounts of the development of transparency policy detailed earlier on in this chapter, the ‘advancing transparency effect’ and the ‘captured transparency effect’, were applied to and specified in the context of the Council. For each, a number of theoretically informed expectations related to the influence of institutional factors were formulated.

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129 See also Chapter 5, section 2.2
4.5 Conclusion: Uniformity and fragmentation

In this chapter, I have presented a theoretical framework concerning the development of access to documents policy in the Council. In doing so, I have drawn from two autonomous bodies of literature. First, I discussed the transparency literature in order to establish recurrent factors that influence the development of transparency as a policy. Second, I discussed the Council literature in order to establish central institutional arrangements that are likely to have influenced the access to documents policy process.

Looking at the transparency literature, it is noted that previous research conducted in different policy contexts reveals certain recurrent dynamics. These can be formulated as an analytical framework consisting of different institutional factors that underlie the development of transparency policies. Various actors interact to make their preference regarding transparency policy prevail, using the various institutional resources at their disposition. These interactions are in turn influenced by exogenous events and trends which take place outside of the transparency policy context.

The Council literature in turn paints a picture of high institutional complexity marked by change over time. Various actors, sometimes with sector-specific roles, introduce a diversity of preferences and resources into the Council’s policy process. Over the years, internal arrangements have been shifting, which suggests that a degree of institutional fragmentation may have taken place.

Building on (historical) institutionalism, these two literatures lead to two potential accounts with competing underlying assumptions concerning the influence of actors, preferences, resources, and exogenous factors over time on the access to documents policy in the Council. The ‘advancing transparency effect’ thesis emphasises the relative empowerment of outside actors, a ‘transparency-skew’ in the available resources, and exogenous events and trends that put further pressure on the policy process, with relatively limited attention to inside actors and preferences. The ‘captured transparency effect’ thesis, in turn, emphasises the dominance of inside actors and sector-specific preferences and resources, with a relatively less-developed conception of exogenous factors. A further aspect is the extent to which the theoretical accounts accommodate longitudinal change in the institutional context of policy areas into their explanations of change. In a generic account, cross-sectoral differences in access to documents policy are viewed as static over time. When they are specified further, both accounts expect an amplifying effect to come into effect (namely, cross-sectoral convergence according to the ‘advancing transparency effect’, and cross-sectoral divergence according to the ‘captured transparency effect’). The two competing expectations of the Council’s access to documents policy between 1992 and 2014 form the basis of this study’s empirical exploration.130 This part of the study begins with the formulation of a research design.

130 Chapters 6-9
PART II
EMPIRICAL ANALYSIS
Chapter 5
Research Design

5.1 Approach: Case studies
In this part of the study, I set out to conduct the empirical analysis that follows from the central research question and theoretical framework. I empirically explore the capacity of respectively the ‘advancing transparency effect’ thesis and the ‘captured transparency effect’ thesis to explain the historical development of access to documents policy in the Council of the EU. This exercise begins with an appropriate research design. In view of the research objectives of this study, a study of different cases (policy areas) is put forward that combines within-case and cross-case analysis. Thereafter, I discuss the selection of cases, which consists of three Council formations with very divergent institutional characteristics. Various different types of sources are used for the analysis, including both qualitative and quantitative and pre-existing and self-collected data, which are analysed using both legal and social scientific methods. The analysis is structured according to the process tracing method, which analyses developments over time and across the selected cases. The chapter begins by setting out the study’s approach of within-case and comparative case studies (this section). It then continues with a discussion of what constitutes a case in the current study, and a justification of the case selection (section 5.2). Thereafter, the various data sources are presented, as well as the method of their selection and analysis (section 5.3). The case studies are explored and compared through process tracing. This analytical method is elaborated in section 5.4. Section 5.5 concludes.

As became clear in the preceding chapters, the study’s objectives are first, to explore the Council’s developing access to documents policy by contrasting the ‘advancing transparency effect’ thesis of Council-wide (uniform) development with the ‘captured transparency effect’ thesis of sector-specific (fragmented) development, and second, to evaluate the policy’s objective of strengthening European democracy. In light of these research objectives, a choice is made for a longitudinal within-case and comparative case study design comprising three Council policy formations: the Environment Council, the Economic and Financial Council, and the Foreign Affairs Council (hereinafter referred to as ‘EnvCo’, ‘Ecofin Council’, and ‘FAC’).
The case study method is well-suited to exploratory research “starting at a relatively low level of theory-building.”\(^1\) Due to the limited number of objects of study (a case study design can centre on as little as one case), case studies allow for a close analysis which yields rich insights into a given phenomenon. Theoretical depth is particularly enhanced where a case study takes a long-term perspective.\(^2\) In the light of the central research question, which considers the Council’s access to documents policy through the lens of change rather than as a static phenomenon, a longitudinal orientation spanning over two decades forms an important element of the research design.\(^3\)

The research design’s reliance on case study analysis consists of three stages. In the first stage (chapter 6), the general contours of the Council’s developing access to documents policy are traced, offering a general explanatory account.\(^4\) On the basis of this account, several outstanding issues are formulated concerning this explanation’s generalisability to all of the Council’s policy formations. These issues are explored in the second stage (chapters 7-9). Within-case analysis of three Council formations is conducted in order to lay bare the causal mechanisms that explain developments over time in these cases’ access to documents policy. In the third stage (chapter 10), within-case findings are compared across cases. This is done in order to explore causal mechanisms in the development of access to documents policy that are generalisable across the Council.

In order to facilitate the deliberate search for diversity, the selection of the three cases for comparison is based on their broad similarity with regard to all but a limited number of pivotal characteristics: those that might be expected to lead to the differentiated development of access to documents policy.\(^5\) The selected cases’ similarity lies in the fact that they are all platforms of (EU-level) Council decision making under the supervision of national ministers and their ministries. The cases’ difference lies in the internal institutional architecture within which such decisions are reached.\(^6\)

In the previous chapter, it became clear that the theoretical perspectives currently available are insufficiently detailed in their account of access to documents policy developments. Although two competing expectations were coined, neither offers sufficiently precise and/or generalisable causal mechanisms capable of explaining the relative advance of access to documents across the Council. Moreover, up until now the actual extent of diversity in the Council’s access to documents policy has not been subject of systematic analysis.\(^7\) The research is thus partly theory-modifying, in the sense that it specifies the conditions under

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\(^1\) Berg-Schlosser (2012), p. 32; also George and Bennett (2005), p. 21; Rohlfing (2012), p. 42
\(^2\) Beach and Pedersen (2013), p. 55
\(^3\) Beach and Pedersen (2013), pp. 55-6; Sabatier (1991), p. 149
\(^4\) Beach and Pedersen (2013), pp. 18-21; George and Bennett (2005), pp. 210-2
\(^5\) Berg-Schlosser (2012), pp. 34-7
\(^6\) See above Chapter 4, section 3
\(^7\) Bjurulf and Elgström (2004); and Hillebrandt et al. (2014) have offered explanations for the development of Council transparency policy, yet both accounts set out to explain an unusual case rather than to develop theory in a systematic manner, covering a very specific episode (negotiations on a legislative dossier) and a very broad terrain (Council transparency over a period of 20 years) respectively. This leaves open the question to what extent these mechanisms hold up in specific cases, i.e. policy formations. Cf. Beach and Pedersen (2013), pp. 18-21
which the two competing accounts apply, and partly theory-building in the sense that it goes in search of additional evidence to elaborate these theoretical accounts. For both of these objectives, the focus lies on identifying the central (constellations of) institutional factors in the access to documents policy, and exploring the role that these factors play in causal mechanisms that lead to specific policy outcomes. An innovative aspect in this respect is that theory is constructed in a multidisciplinary manner, on the basis of a social scientific policy analysis that is informed by a legal analysis of the framework of rules and their interpretation before the courts.

5.2 Case selection
Before proceeding with a discussion of the data sources and method of analysis, a selection of cases must be made. This is done on the basis of intentional, rather than random case selection. A case in this context is defined as a Council formation. From a population of similar cases (Council formations, representing one type of public decision-making platform), three cases are selected that are very different with regard to a number of characteristics that are expected to be influential in the development of transparency policy. The selection is carried out a priori on the basis of desk research using formal constitutional characteristics as selection criteria.

5.2.1 Case delineation
Before turning to the selection of cases, the question of case definition and delineation must be addressed. In their monograph on case study research, George and Bennett refer to the case study method as “the detailed examination of an aspect of a historical episode to develop or test historical explanations that may be generalizable to other events”. Such an aspect of a historical episode forms “an instance of a class of events”. Beach and Pedersen point out that the first step of case study analysis is to clarify “what [...] the phenomenon [under investigation is] a case of”. In the present study, the development of transparency policies in public decision-making bodies may be considered the ‘class of events’ or population, while Council decision making in the post-Maastricht era forms its historical situatedness. It is not however directly apparent what should constitute a case in this context. As Van der Heijden convincingly argues, the “seemingly obvious question” of “casing” warrants careful attention in order to guarantee an optimal research design.

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8 Rohlfing (2012), pp. 41-2; Beach and Pedersen (2013), p. 1; George and Bennett (2005), p. 10
9 Beach and Pedersen (2013), p. 23
10 Goertz and Mahoney (2012), p. 181-7
12 George and Bennett (2005), pp. 5, 17. Note that the reference to historical explanation does not form part of other definitions of case studies. E.g. Rohlfing (2012, p. 27) speaks of “the empirical analysis of a small sample of bounded phenomena that are instances of a population of similar phenomena”.
13 Beach and Pedersen (2013), p. 54
14 The Council’s transparency policy began in 1992 with a political declaration attached to the Maastricht Treaty (IGC, 1992b).
Although no hard and fast rules exist, and the availability of cases is often limited, the choice for a particular type of case should reflect the type of explanation that is derived from the theoretical framework.\textsuperscript{15}

Considering the nature of the research question, which concerns the development of transparency in a single institution, the Council, the selection and longitudinal analysis of specific policy areas appears to be the most fruitful approach. A Council policy area can be defined as a platform that brings together specialist member state representatives on a continual basis and according to specified arrangements, and which responds to a coherent field of issues through the creation of policy. In line with the postulated expectation of a ‘captured transparency effect’,\textsuperscript{16} this case perspective operates from the premise “that the style of policy making and the nature of policy conflicts will vary significantly from sector to sector”.\textsuperscript{17}

In delineating the policy areas, this study takes a pragmatic approach, requiring policy areas to (1) be experienced as such by actors in the field, (2) allow for both exhaustive within-case and cross-case comparable analysis of the postulated theoretical expectations. The selection of formal Council formations as cases meets both requirements, as they are well-delineated, organisationally distinct, and characterised by relative continuity during the period under consideration (1992-2014). Change in the access to documents policy will be taken as the explanandum. As became clear in chapter 2, access to documents may be suitably taken as a proxy for Council transparency policy as whole.\textsuperscript{18}

\subsection*{5.2.2 Case selection}

Having delineated the type of case that this study will analyse, what remains is the actual selection of cases. As the literature points out, no golden rule exists with regard to the number of cases to be selected. While comparison naturally implies a minimum of two cases, a maximum is harder to set, and the researcher is forced to choose between “knowing more about less and knowing less about more”.\textsuperscript{19} The expected in-depth and data-rich nature of the within-case and cross-case analyses as well as the long time period covered by the current study justifies the number of cases to be limited to three.

The three policy areas are selected on the basis of analytical fit. The design of the study is geared towards exploring the development of Council access to documents policy in policy areas that vary strongly with regard to pivotal characteristics of the institutional contexts. In line with this objective, the case selection is carried out on the basis of Mill’s method of difference.\textsuperscript{20} According to this case selection method, a causal link between a given input and outcome can be best demonstrated by selecting cases that are similar in all input characteristics except those that are expected to cause the outcome. When the

\begin{footnotesize}
\begin{enumerate}
\item Van der Heijden (2012), p. 43 and further
\item See Chapter 4
\item Freeman (1985) in Van der Heijden (2012), p. 43
\item See Chapter 2, section 3
\item Gerring (2007), p. 348
\item Van der Heijden (2012), p. 37
\end{enumerate}
\end{footnotesize}
outcomes differ across cases in the expected direction, and when a causal chain can be shown to exist which explains this outcome, this strengthens the suggestion that causality indeed exists.\textsuperscript{21}

Intentional (as opposed to random) selection of cases comes with three (potential) caveats. A first, general shortcoming concerns the limited information basis of the case selection. As the determination of relevant institutional factors constitutes the substance of this study and of itself, the a priori selection of cases on the basis of desk research is necessarily tentative and based on formal criteria which may overstate or understate actual cross-case variation. This shortcoming however does not affect the validity of the findings but rather limits the study’s explanatory strength. In light of the study’s exploratory nature, this is considered a justified trade-off. Second, while the ‘ceteris paribus’ assumption forms a central precondition for the ‘pure’ application of the method of difference, an important ‘polluting’ element in the comparability of policy areas is formed by differences in the decisional sensitivity with which they deal, and which likely also affects the outcome in terms of access to documents. Put differently, it would come as no surprise if we were to find that a larger proportion of environmental policy documents than defence policy documents is routinely made public. The risk of finding ‘trivial’ explanations for differences can be partially controlled for through close within-case analysis and longitudinal comparison. A third caveat concerns a stronger version of the ‘trivialness’ critique. As the literature points out, Mill’s method of difference is mainly designed to eliminate false explanations of outcomes, rather than to establish definitive explanations. As a consequence, proposed explanations that emerge out of the cross-case comparison “can [at best] be regarded as possibly associated […] with the case outcome”.\textsuperscript{22}

In this respect, although the study endeavours to make plausible the presence of causality through demonstrating smoking guns and notable covariance, it must ultimately be viewed as exploratory and theory-building.

Table 5.1 provides an overview of all Council formations. Taken together, ten formations were counted in 2014 (the last year covered by the study), down from 21 in 1992 (the first year covered by the study).\textsuperscript{23} As several Council formations were merged over time, the current low number of ten formations is taken as the basis for the case selection in order to ensure continuity across time.

Three ‘constitutional’ criteria are taken as the basis for selection.\textsuperscript{24} The first criterion concerns the Council formation’s previous pillar within the pillar system as established by the Maastricht Treaty. This criterion is included as it is expected to reflect the Council members’ protectiveness of decision making, with Council formations operating predominantly under the ‘Community pillar’ (pillar I) being the most receptive to outside influence, and those under the second and third pillar operating in a more secluded manner.

\begin{footnote}{21} George and Bennett (2005), p. 153 and further \end{footnote}

\begin{footnote}{22} George and Bennett (2005), p. 155 \end{footnote}

\begin{footnote}{23} Westlake and Galloway (2004), p. 10; Council (2015a) \end{footnote}

\begin{footnote}{24} The term ‘constitutional’ is used narrowly here to refer to formal fundamental characteristics laid down in the successive European Treaties. \end{footnote}
### Table 5.1: Case selection: Central constitutional characteristics per Council formation

<table>
<thead>
<tr>
<th>Case</th>
<th>Pillar **</th>
<th>Predominant Competence #</th>
<th>Extent of EP legislative powers? ##</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Maastricht</td>
<td>Lisbon</td>
<td></td>
</tr>
<tr>
<td>(a) Agriculture and Fisheries*</td>
<td>I</td>
<td>S</td>
<td>◁</td>
</tr>
<tr>
<td>(b) Competitiveness</td>
<td>I</td>
<td>S</td>
<td>◁</td>
</tr>
<tr>
<td>(c) Economic and Financial Affairs</td>
<td>I</td>
<td>C</td>
<td>◁</td>
</tr>
<tr>
<td>(d) Environment</td>
<td>I</td>
<td>S</td>
<td>◁</td>
</tr>
<tr>
<td>(e) EPSCO</td>
<td>I</td>
<td>C</td>
<td>◁</td>
</tr>
<tr>
<td>(f) Education, Youth, Culture and Sport</td>
<td>I</td>
<td>C</td>
<td>◁</td>
</tr>
<tr>
<td>(g) Foreign Affairs</td>
<td>I/II</td>
<td>S</td>
<td>◁</td>
</tr>
<tr>
<td>(h) General Affairs</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>(i) Justice and Home Affairs</td>
<td>III</td>
<td>S</td>
<td>◁</td>
</tr>
<tr>
<td>(j) Transport, Telecommunication and Energy</td>
<td>I</td>
<td>S</td>
<td>●</td>
</tr>
</tbody>
</table>

**Sources:** Consilium (2015); TEU/TEC (Maastricht version); TFEU articles 3-6; Häge (2008), p. 29; Pollack (2000), p. 522

* Current titles of Council formations, represented in alphabetical order. Previous titles and merged formations are provided between squared brackets where these have changed: Agriculture and Fisheries [Agriculture/Fisheries]; Competitiveness (Internal Market, Industry, Research and Space) [Industry/Internal Market/Research]; EPSCO= Employment, Social Policy, Health & Consumer Affairs [Labour and Social Affairs/Health and Consumer Affairs]; Economic and Financial Affairs; Education, Youth, Culture and Sport [Education, Youth and Culture]; Environment; Foreign Affairs [External Relations/Development]; General Affairs [General Affairs/Budget]; Justice and Home Affairs; Transport, Telecommunications and Energy [Telecommunications/Transport/Energy/Information Society].

** The Pillar System was abolished as of December 2009 with the Lisbon Treaty.

# The explicit demarcation of competences was only introduced in the TFEU (articles 3-6). E= Exclusive; S= Shared; C= Coordinating/Supplementary.

## As the legislative powers of the EP expanded steadily over time, they are indicated at two time points in time (the 1993 Maastricht and 2009 Lisbon Treaties). ○= no powers; ◁= consultative/cooperation powers in less than half of subareas; ◁= consultative/cooperation powers in more than half of subareas/co-legislative powers in less than half of subareas; ◁= co-legislative powers in more than half of all subareas; ●= full co-legislative powers.

The second criterion deals with the type of competence under which Council formations operate. A distinction is drawn between shared, exclusive and coordinating/supplementary EU competences.25 While a number of Council formations include policy subareas with EU-exclusive competences, in no formation did such subareas predominate.26

25 Schütze (2012), pp. 75-6
26 Chalmers et al. (2010), p. 207
Table 5.2: Central characteristics of the selected Council formations

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>Shorthand: EnvCo</td>
<td>Ecofin Council</td>
<td>FAC</td>
</tr>
<tr>
<td>Constitutional characteristics</td>
<td>‘Communitised’ decision-making mode with stably strong formal EP involvement</td>
<td>‘Hybrid’ decision-making mode, formal and growing EP involvement in half of decision making</td>
</tr>
<tr>
<td>Central activity type</td>
<td>Predominantly focussed on legislation</td>
<td>Focussed on both legislation and non-legislation</td>
</tr>
</tbody>
</table>

Regarding shared competences, the expectation is that as stakeholders are involved at both the national and the European level, this will affect the amount of pressure on Council decision makers. Coordinating/supplementary powers make up a ‘wildcard’ category: while collective problems put pressure on the Council to pursue an integrationist logic, member states or their constituents might also be wary that Council coordination encroaches upon national policy prerogatives. This could lead Council members to either assume a transparency-favouring attitude in order to demonstrate strong position-taking to their constituents, or a secretive attitude to negotiate ‘unpopular but necessary’ integrationist policy solutions.

The third criterion deals with whether decision making in the Council formations in question included legislative powers for the EP. Parliamentary involvement is generally considered to have a transparency-enhancing effect. The EP’s influence in turn is presumed to be largest where it acts as a veto player. Thus a scale is created by which EP influence is graded from no involvement at all to full involvement, taking into consideration (former) types of EP prerogatives (consultative/cooperation/co-legislation) and the number of policy subareas covered by these prerogatives.

In the categorisation of Council formations, it must be pointed out that all Council formations were largely dynamic, rather than static, with regard to these three characteristics. For example, the pillar system was abandoned by the Lisbon Treaty, while the EP’s co-legislative role advanced over time in most Council formations. Furthermore, as Council formations frequently consist of a number of subareas, they may be hybrid as regards their constitutional set-up. A selection is sought that includes, with regard to expected transparency-favouring characteristics: (1) one case that scores stably high over time, (2) one case that is relatively changeable over time, and (3) one case that scores stably low over time.

On the basis of these criteria, three cases are abandoned for a lack of fit (a, b, i), and four more for practical reasons (c, f and j are less suitable due to their fragmented character, while h falls outside classificatory categories due to its internal-managerial character).
Consequently, the EnvCo, Ecofin Council and FAC are selected as best-fitting cases. Their basic characteristics are outlined in Table 5.2.27

Among the selected cases, the EnvCo may be characterised as the most, and the FAC as the least 'communitised' case, while the Ecofin Council represents a 'middle case', developing along a path of more hybrid decision making. For example, the EnvCo already dealt with strong parliamentary involvement at the time of the Maastricht Treaty, whereas a central subarea of the FAC, the Common Foreign and Security Policy (CFSP),28 continued to operate under a special constitutional regime even after the Lisbon Treaty abolished the pillar system. Finally, the Ecofin Council is characterised by the gradual introduction of the EMU which became fully operational as of 1999 and was reformed in the aftermath of the 2009 Eurozone crisis. Each of the three cases, moreover, represents a politically sensitive area of decision making that may teach us important normative lessons about the Council’s functioning as a whole within a democratic framework.

This section considered the delineation and criteria for the selection of cases. For practical and theoretical reasons, a case was identified as a Council formation, while Council formations were selected on the basis of analytical fit in accordance with Mill’s method of difference. Three leading ‘constitutional’ criteria were followed in this respect: the Council formation’s predominant ‘pillar’ under the Maastricht Treaty, main competence under the Lisbon Treaty, and the extent involvement of the EP under both treaties. On the basis of these criteria, three most different cases were selected: the Environment Council, the Economic and Financial Council, and the Foreign Affairs Council.

5.3 Data sources

In order to obtain a detailed perspective of the development process of access to documents in the Council, this study relies on a variety of data sources that can be clustered into four categories: rule-setting and policy documents, judicial proceedings, interview data, and quantitative data. Below, each category and its suitability for answering the central research question is discussed.

5.3.1 Rule-setting and policy documents

Various policy documents related to access to Council documents formed a central source of information in this study. A distinction is made between rule-setting documents and policy documents. Rule-setting documents are of an explicitly prescriptive nature and operate in the framework of the law. For this study, an exhaustive search was conducted for all rule-setting documents which were, either de jure or de facto, intended or likely to affect the public’s right of access to documents during the period after 1992 (the year in which such a right was

27 The typifications of the selected cases were validated by experts in the respective fields (see also below section 5.3.3). In addition, quick-scans were carried out for each of these cases to confirm the presence of sufficient material for an analysis of the explanandum.
28 See Chapter 9
first foreseen). These documents were relied upon to map developments in the Council’s access to documents policy in a multidisciplinary fashion, assuming both an internal legal and an external empirical perspective. Rule-setting documents could either originate (partially) outside of the Council (treaty provisions, international agreements, secondary law, inter-institutional agreements) or inside of it (Council decisions, codes of conduct, internal guidelines). Furthermore, they could be applicable to the Council as a whole or to specific parts, such as a single policy area or (internal) decision-making group. A total of 53 rule-setting documents were analysed.

An important shortcoming of the focus on rule-setting documents is the fact that their legal or practical standing is not always clear. For example, non-binding soft law may provide an authoritative framework for decision-making processes without surfacing in the case law, while formally adopted legislation may be systematically not applied. An attempt is made to address these (potential) hiatuses by taking a broad understanding of the concept of formal rules, and by highlighting potentially anomalous or problematic rule-applications in the analysis when they surface.

Policy documents cover a wide range of uses and functions, but can generally be described as those documents that pertain to a policy process but are not part of its eventual decisional outcome. These documents were primarily included to provide an insight into the factors underlying changes in the access to documents policy, but also to enhance an understanding of this policy. Policy documents originate from both public authorities and civil society, and range from declarations, conclusions and resolutions to reports, meeting documents, and advocacy briefs. A total number of 117 policy documents were analysed (71 from EU institutions, 27 from member states, 19 others). Although efforts were made to ensure a diversity of policy positions, an important limit of the reliance on policy documents is the fact that for reasons of availability and the researcher’s limited knowledge of the EU’s official languages, the collected documents necessarily constitute a skewed subset of all existing policy documents. A full overview of documents included is provided in Appendix 1.

5.3.2 Judicial proceedings

Due to their quasi-independent standing within Council access to documents policy and orientation towards internal legal reasoning, data related to actions before the Court of Justice of the European Union between 1994 and 2014 were considered as a separate category. In the first place, such data provided detailed information about the legal interpretation of access to documents rules, and thereby, constitute a central part of the transparency policy’s (legal) development. In some instances however, the facts of the case were also relied upon to reconstruct the role that certain institutional factors played in the access rules’ implementation in practice.

A number of considerations determined which case law was included. All case law had to pertain (at least partially) to aspects of access to documents rules applicable at the time

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29 See Appendix 1, Point I
30 See Appendix 1, Points II, III, and IV
of the action. Furthermore, as the selection of jurisprudence sought to include those access to
documents cases which had the strongest impact on Council policy, all access cases related to
the case studies were included, while a further wide selection of pivotal cases with Council-
wide reverberations were also considered. This led to the inclusion of 24 court judgments to
which the Council was a party (15 CFI/GC and 9 ECJ/CJEU —of which 8 appeal cases—,31
comprising 96% of total access cases against the Council), as well as 4 court orders and 7 AG
opinions and certain pivotal cases against the Commission.32 Insights from the legal literature
were relied on in the selection of court judgments. Moreover, the total set of court cases to
which the Council was a party was relied upon for quantitative analysis (see below section
5.3.4). In the qualitative (inter-legal) analysis of judicial proceedings, there is always a risk of
drawing idiosyncratic, partial, or highly context-specific conclusions. Efforts were therefore
made to ensure that the findings of the case analysis were placed in their correct context, and
to view them, where appropriate, in conjunction with wider trends in the courts’ case law (see
also below 5.3.4). A full overview of judicial proceedings included for qualitative analysis is
provided in Appendix 2.

5.3.3 Interview data
An important source of information was formed by 68 interviews with expert in and around
the Council. These interviews served multiple purposes. They were used to identify the
development of (anomalous) implementation practices and informal norms, as well as to
determine the relevant (combinations of) institutional factors from which explanatory
mechanisms could be derived. Care was taken to ensure a good spread in respondents along
various salient indicators.33 Sufficient respondents were sought with a general overview of
Council transparency (24), as well as specific expertise for each case study (respectively 15 for
the EnvCo, 13 for the Ecofin Council and 16 for the FAC). These figures include, for each
case study, an initial ‘helicopter interview’ with an expert possessing a broad overview of the
institutional context of the policy area, both in terms of substance and institutional changes
over time.

In terms of the institutional background, a division was made between Council
insiders and Council outsiders. 43 or roughly two thirds of respondents were Council
insiders, of which 22 represented a member state and 21 were administrative staff. These
respondents were included for their knowledge of the role of documents and access requests
in the internal decision-making process. Of the 25 Council outsiders, 14 came from other
European institutions (EP, Commission, European Ombudsman, EEAS or EDPS) and 11
from civil society (NGOs, other stakeholders or academics). These respondents were
included for their experience with seeking access to documents or advocating a particular
position with regard to the Council’s access policy.

31 The names of the courts were changed under the Lisbon Treaty (IGC 2007a). Throughout this study, I
adhere to the courts’ name at the time of the event in order to ensure historical veracity.
32 See Appendix 2
33 Van der Velde et al. (2007), p. 102
As the geographical position, size and administrative culture of member states represented in the set of respondents were likely to influence the interview data, care was taken to include a wide variety of member states in the selection of member state representatives and respondents more generally. This led to the inclusion of 12 nationalities among the 22 respondents representing a member state, and 17 nationalities among the full set of respondents.

Finally, as the empirical analysis covered a period of more than two decades, efforts were made to ensure that the selection of respondents included first-hand accounts of the case studies for the entire period. Although the respondent set reveals a skew towards the present-day period due to natural staff turnover and associated difficulties in reaching former staff members, these efforts were relatively successful. For years for which no first-hand account was available, the analysis relied instead on the ‘helicopter respondents’ and other data sources. The longitudinal spread of respondents per category is shown in Figure 5.1.

The majority of respondents were approached through a semi-personalised invitation letter followed by a phone call, although in a limited number of cases, respondents were approached via email. 13 of the included interviews were conducted between January 2011 and March 2012 as part of research for a self-standing journal article. The remainder of the interviews took place between April 2014 and January 2015. The vast majority of respondents (50) were interviewed in their office in Brussels. A smaller number were interviewed by telephone (9) or in other cities (8), while one respondent answered questions via email correspondence. In 4 instances, interviews were conducted with more respondents at the same time (thrice 2 respondents, once 3 respondents), although efforts were made to avoid such situations. In order to further reduce biased responses, the respondents interviewed in 2014-5 were offered anonymity. Permission was further requested to digitally record the interview, which was refused by a limited number of respondents (8).

Interviews generally lasted between an hour and an hour and a half, and were semi-structured in order to allow for follow-up questions on subject matters in which respondents had a special expertise. An interview protocol was drawn up that covered the whole range of topics regarding the explanandum (changes in access to documents rules, implementation, or informal norms) and explanans (institutional factors of particular importance in explaining policy changes). After three interviews, the protocol was adjusted to connect better with the respondents’ experiential world. Questions covered both ‘objective’ (factual) and

34 See Chapter 4
35 The nationalities of respondents were as follows. Among respondents representing a member state: Netherlands (4), Sweden (3), Finland, France, Germany, Spain, UK (each 2), Austria, Hungary, Italy, Poland, Slovenia (each 1). Among all respondents: Netherlands (13), Germany (8), Finland, UK (each 6), Italy (5), Belgium, Spain, Sweden (each 4), Austria, France (each 3), Denmark, Hungary, Poland, Portugal, Slovenia (each 2), Estonia, Ireland (each 1).
36 Hillebrandt et al. (2014), see also Chapter 6
37 Van der Velde et al. (2007), pp. 103-4
38 As a large majority of respondents made use of this option, a subsequent decision was taken to anonymise all respondents.
39 Van der Velde et al. (2007), p. 58
‘subjective’ (interpretive) accounts. An example of the former could be the types of document routinely drafted in a given policy area. An example of the latter could be preferences regarding transparency identified among the respondent him/herself or among his/her colleagues.

All interviews were transcribed and coded using the Atlas TI qualitative coding software. Quotes were categorised into concepts and subconcepts of the explanandum or explanans as well as longitudinally. The operationalisation of these concepts occurred ahead of the interviews. Typical potential pitfalls of qualitative analysis on the basis of coding include ambiguities in the operationalisation of central concepts and the treatment of subjective or defective statements as objective realities. Attempts were made to limit these risks. Bilateral consultations with three researchers active in similar research fields at various research institutes were held which led to a number of adjustments in the operationalisation of concepts. Furthermore, in various instances, the validity of statements could be verified through triangulation between respondents as well as between interview data and other data sources. Full details concerning the interviews are provided in Appendix 3.

5.3.4 Quantitative data

A final data source consisted of various quantitative data sets, which were used to enhance the comparability of change in the access to documents policy over time and between case studies. Some quantitative data were directly available, requiring merely to be compiled. This was the case with key figures of the Council’s access policy provided in the Council’s annual reports on the implementation of access to documents.\footnote{Bi-annual reports before the entry into force of Regulation 1049/01. See also Appendix 4} Inter alia, these annual reports included volumes of requested and (from 2000 onwards) registered documents and details on...
access rates at the initial and the confirmatory (administrative appeal) stage. Nevertheless, Council formation-specific or sector-specific disclosure data were not recorded in these reports. In order to get an estimate of such case-specific figures, a proxy was created on the basis of annual document figures counted on the register. Documents pertaining to specific policy areas were identified on the basis of distribution codes attached to documents. Such distribution codes signal any document’s group of recipients. For example, documents carrying the distribution code ‘Relex’ will be received by members of the Working Party on External Relations, which falls under the jurisdiction of the Foreign Affairs Council.

The proxy approach to estimating document registration has certain shortcomings. Because documents are often circulated among varying constellations of decision makers, they are consequently registered under several distribution codes at once. When counting documents under several codes, this creates a problem of counting overlap and makes it impossible to establish definitive document figures for any specific Council formation. Moreover, the number of distribution codes differs significantly from one Council formation to another. While some Council formation, such as the EnvCo apply as little as 2 codes, others, such as the FAC, work with over 10 codes. In the latter case, several codes contained negligible amounts of documents. In the case of the Ecofin Council and the FAC, it was therefore decided to identify the most important codes for each policy subarea with the help of the Council secretariat, and to rely on these codes as a proxy for these Council formations as a whole. Even when assuming that the extent of data skew remained relatively constant over time, allowing for reliable within-case longitudinal comparison, direct cross-case comparison was not possible due to the aforementioned divergent application of distribution codes. For this reason, the collected data on document volumes could not validly be compared in absolute terms. Instead, the analysis focussed on a proportionate comparison of figures. This means that percentual fluctuations over time were taken as the basis of both within-case and cross-case analysis.

Another source of quantitative data came from a data set of confirmatory application decisions compiled for this study. To this end, all publicly available decisions for the years 1994-2002 as well as 2007-8 and 2013-4 were collected from the public register. Annual estimates of the remaining decisions were made on the basis of figures reported in annual reports, and access requests were filed for these remaining decisions. This led to the collection of 348 confirmatory application decisions comprising a sample size of 97.5% for the selected years. 104 or 29.8% of these decisions related to one of the three case studies. The decisions were coded along the following variables: policy area covered by the request (only for document requests pertaining to the case studies), decision outcome (full/partial/no access granted), legal grounds of the decision, member state countervotes, member state abstentions, and member states’ motivation of votes. The coded data were then compiled

41 The online public register itself came into operation per 1999 and initially only cited documents without offering direct access. Documents registered in 1999 were retroactively made directly accessible to the widest possible extent given the rules then in place as well as technical constraints (Council Secretariat, 2015).
### Table 5.3: Data sources and most important purpose

<table>
<thead>
<tr>
<th>Data type</th>
<th>Changes in access to documents policy (explanandum)</th>
<th>Explanatory model of institutional factors (explanans)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rule-setting documents</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Policy documents</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Judicial proceedings</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Interview data</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Quantitative data</td>
<td>x</td>
<td></td>
</tr>
</tbody>
</table>

into per-annum and per-period\(^{42}\) figures for each of the case studies and for the Council as a whole.

Finally, all access to documents court cases to which the Council was a party were used as a data set for quantitative analysis beside the traditional legal (qualitative) analysis.\(^{43}\) This data set comprised 25 court judgments (16 CFI/GC, 9 ECJ/CJEU, of which 8 appeal cases), which were coded along the following variables: applicant, defendant, interveners, policy area covered by the request, decision-making mode type covered by the request (legislative/non-legislative), legal ground of the contested Council decision, outcome of the court case (no/partial/full annulment Council decision). However, given the small sample size, this quantitative data set was merely used for illustrative purposes. In general, a risk inherent in the reliance on quantitative data is their context-independent, atheoretical application, the possibility of reporting errors where data have been internally compiled by institutions, or the over-generalisation of data with a ‘small N’. Quantitative data are therefore presented with appropriate caution, and where possible, placed in a wider context.

In summary, this research relies on four categories of data: rule-setting and policy documents, judicial proceedings, interview data, and quantitative data. The central categories of data and their most important purpose (contribution towards analysis of explanandum or explanans) are shown in Table 5.3. The following section turns to the method of analysis, which follows a three-stage case study design.

### 5.4 Method of analysis: Process tracing and cross-case comparison

The empirical analysis in this study seeks to identify the interplay of institutional factors that shaped the development access to documents policy across the Council. More specifically, the approach followed is to take the ‘advancing transparency effect’ thesis as the starting point, and to specify (the limits of) its applicability to different Council formation, with the ‘captured transparency effect’ thesis as a theoretical counterpoint. The theoretical approach is connected to the study’s central research question in three stages. First, a Council-wide

\(^{42}\) See below section 5.4

\(^{43}\) See above section 5.3.2
An explanatory account is offered for the general contours of the Council’s developing access to documents policy. The guiding empirical questions at this stage are:

1. What are the key developments in the Council’s access to documents policy before and after the adoption of Regulation 1049/01, and which changes and continuities are discernable between these two periods?
2. How does the interplay of institutional factors explain these developments, and did these central institution factors change from the first to the second period?

Second, separate case study analyses are conducted to explore to what extent this general account applies within each of the respective Council formations. The empirical analysis at the second stage is guided by the following questions that remain outstanding after the analysis conducted at the first stage:

1. Did sector-specific differences in the role and mix of actors affect the development of access to documents policy, and if so, how?
2. Did actors have sector-specific preferences that touch upon transparency, and if so, how did they affect the perceived salience of and preferences related to the Council’s access to documents policy?
3. Did sector-specific arrangements exist that influenced the distribution of resources, and if so, how did these arrangements affect the influence on the Council’s access to documents policy wielded by actors both inside the Council and outside of it?
4. Did exogenous events or trends occur that had a sector-specific impact on the development of the Council’s access to documents policy, and if so, how did they affect the sector-specific actor constellation, preferences, or resources?
5. Did the sector-specific interplay of institutional factors explaining the development of access to documents policy change from the first to the second period?

At both the first and the second stage, the data are analysed using the process-tracing method. This method serves to obtain a system-oriented understanding of the development of access to documents in the Council, by laying bare the manner in which the explanans (institutional factors) leads to specific change in the explanandum (development of the access to documents policy). Third, the within-case findings are compared across cases in order to distinguish between general and sector-specific patterns. The analysis at the third stage is guided by the following questions:

1. To what extent was the development of access to documents policy similar or different across the three case studies?
2. To what extent was the development of access to documents policy in the three case studies similar to or different from the general account?

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44 George and Bennett (2005), pp. 210-2; Beach and Pedersen (2013), pp. 18-21
45 Beach and Pedersen (2013), p. 6
46 Beach and Pedersen (2013); Goertz and Mahoney (2012), ch. 8; George and Bennett (2005), ch. 10; Rohlfing (2012), ch. 6
3. **To what extent do sector-specific institutional factors replace the generally identified institutional factors as an explanation of the development of access to documents policy across the Council?**

4. **To what extent do the theoretical explanations provided by the ‘advancing transparency effect’ thesis and the ‘captured transparency effect’ thesis fit with cross-case findings?**

For the purpose of the chosen research design, a longitudinal perspective of a decade or more is appropriate, as a longer time period enhances our understanding of the way in which recurrent policy dynamics (similarities over time) interact with changing policy dynamics (differences over time). This study covers a 23-year period, starting with the Council’s first formal step towards a transparency policy (1992) until shortly after the election of the eighth European Parliament (end of 2014). The choice is made to break this period down into two episodes. The entry into force of Regulation 1049/01 regarding public access to European Parliament, Council and Commission documents (December 2001) serves as the cut-off point. This results in a first period running from 1992 until December 2001, and a second period running from December 2001 until the end of 2014.

The entry into force of Regulation 1049/01 is generally considered a watershed moment in the development of access to documents in the Council. As such, it is likely to have altered the framework of the access to documents policy across all of the Council’s policy areas, potentially affecting the factors playing into the ‘captured transparency effect’. This periodisation is therefore not only applied to enhance the readability and sense of historical situatedness of the analysis, but also to facilitate a comparison policy development between the two periods.

This study sets out from the presupposition that the outcomes produced by case studies are the product of vastly complex interactions between multiple (institutional) factors. This assumption, common to both institutional theory and the case study design, has been characterised as the “‘small N – many variables’ dilemma”; in other words, a limited number of cases permeated by complex causal chains. Consequently, a variable-driven quantitative approach presents a less attractive research method: its validity is dependent on a high number of cases, while its search for causality is by design reduced to only a small number of causal relations. In the present context, the explanatory power of quantitative studies would be significantly circumscribed.

By contrast, the method of within-case and cross-case analysis is better capable of theorising the chain of events that connects the independent (X) and dependent (Y) variable. Instead of searching for causality (causally driven covariance between the independent and the dependent variables commonly denoted as X → Y), case studies go in...
search of causal mechanisms (the underlying mechanism by which \( X \) leads to \( Y \)). \(^{53}\) Such mechanisms are made up of “parts composed of entities engaging in activities” that link a cause to a certain outcome. \(^{54}\) The empirically observed presence or absence of such entities and activities, as well as the fluctuations in patterns can be taken as evidence that confirms or falsifies the presence of an anticipated causal mechanism. \(^{55}\)

In the empirical reconstruction of causal mechanisms that process tracing entails, the constellation and interaction of explanatory factors plays a central role. In this study, ‘institutional factors’ are identified as the explanatory building blocks, \(^{56}\) and they are understood not as variables but “in set-theoretical terms”. \(^{57}\) Whereas variables generally describe causal relations between two discrete factors that are expressed in terms of variance, institutional factors function as ‘sets’, in the sense that several factors conspire to produce a particular outcome. Such factors are identified as part of a causal mechanism when they are necessary and/or sufficient for the outcome to occur. In this study, the search for causal mechanisms is conducted through a detailed reconstruction of policy events and trends within a case study. In the identification of significant explanatory factors, the probability of certain occurrences based on previous knowledge and parallel case observations plays an important role, while in the reconstruction of causal chains, a detailed chronology of policy sequences is central. \(^{58}\)

In spite of the express ambition of process tracing to uncover constellations of explanatory factors, it must be acknowledged that their necessity or sufficiency cannot always be satisfactorily demonstrated. \(^{59}\) The iterative and exploratory nature of this study means that in certain places, the analysis may offer only a possible causal mechanism at play. As was highlighted above, an important objective of the study consists of eliminating false explanations of outcomes. \(^{60}\) Nevertheless, the analysis is conducted with the express ambition of detecting the basic dynamics of access to documents development applicable to the (Council-wide) meso-level. Furthermore, the chosen form of presentation of the analysis – that of a theorised historical account – serves to provide the greatest possible verifiability and to facilitate future refinement of theoretical claims made. In order to further enhance the validity of claims, efforts are made to triangulate observations. This is achieved in several ways. Crucial information is verified through other respondents or data sources, and the analysis is multi-method in the sense that available sources are analysed using not only qualitative, but also where appropriate, (descriptive) quantitative analysis. Moreover, a multidisciplinary approach is employed, by which policy processes are analysed on the basis of social scientific methods, and legal materials such as legislation and jurisprudence are also

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\(^{53}\) Beach and Pedersen (2013), p. 23

\(^{54}\) Rohlfing (2012), p. 151; Beach and Pedersen (2013), p. 50

\(^{55}\) Beach and Pedersen (2013), pp. 47-8

\(^{56}\) See Chapter 2

\(^{57}\) Beach and Pedersen (2013), p. 45

\(^{58}\) Beach and Pedersen (2013), p. 83, 128; Rohlfing (2012), p. 183; George and Bennett (2005), pp. 213-6

\(^{59}\) George and Bennett (2005): 25-7; Beach and Pedersen (2013), p. 47

\(^{60}\) See section 5.2.2
interacted through legal analysis. An important advantage of multi-method and multi-disciplinary approaches is that they offer a holistic perspective on the phenomenon under consideration.

Subsequent to the empirical research, the findings are evaluated on the basis of the de minimis criteria contained in the normative framework that was developed in chapter 3. In this evaluation, the recent state of affairs in the Council’s access to documents policy is taken as a starting point. The normative framework also leads to a number of recommendations for improvement. These recommendations were submitted to two persons representing civil society groups, and on the basis of their comments, additional adjustments were made.

The analysis in the study takes place in a research design consisting of three stages: in the first two of these, a process-tracing analysis is carried out to identify the central institutional factors and the causal chain by which they influenced respectively the general development access to documents policy, and its development in the policy areas of the three case studies. In the third stage, experiences between the three case studies and the general account are compared in order to distinguish between general and sector-specific developments. The process-tracing analysis is both multi-method, combining quantitative and qualitative elements, and multi-disciplinary, employing both social scientific and legal analytical approaches. The empirical findings are subsequently evaluated in accordance with a normative framework that was developed to this end, which leads to a number of recommendations for improvement.

5.5 Conclusion
In this chapter, I elaborated the choice for the case-study design. I identified Council formations as suitable case units for the exploration of a possible ‘captured transparency effect’. Three such formations with widely differing (constitutionally arranged) institutional contexts were selected: the Environment Council, the Economic and Financial Council, and the Foreign Affairs Council. The empirical analysis for this study takes place in three stages: a general, case-oriented analysis, three within-case analyses, and finally, a cross-case comparative analysis. In the first two stages, the process-tracing method is applied, whereas in the third stage a structured comparison of the individual cases is conducted. The analysis relies on four categories of data sources: rule-setting and policy documents, judicial proceedings, interview data, and quantitative data. The results of the empirical analysis are presented in the following chapters of this study.

63 Namely, Access Info Europe and the Brussels office of Transparency International
Chapter 6
Access to Documents in the Council:
Trends and Puzzles

It is not an exaggeration to say that enormous progress has been made since the issues of transparency and openness first appeared on the agenda. ... Today, ... the widest possible access to documents is no longer an abstract concept, but has become a day-to-day reality for the institutions and, above all, for the citizens of the European Union.¹

6.1 Introduction
Over the past two decades, much has already become known about the Council’s access to documents policy.² In this chapter, I build on existing research in order to trace the contours of the development of access to documents in the Council between 1992 and 2014. The aim of this chapter is to provide a general account of the institutional dynamics that apply to the Council as an institution and irrespective of specific policy areas. Central are the guiding questions for the first stage of the empirical research that were formulated in the previous chapter.³ This Council-wide approach makes up the first step in the construction of a theory of the development of Council access to documents policy that is followed by the subsequent case study chapters (7-9).

The analysis in this chapter sets out to describe and explain the main trends in the development of the general formal rules governing access to documents in the Council, and their implementation in practice.⁴ An explanation of change is sought in the constellation of actors and their specific preferences and the (institutionally circumscribed) resources that allowed them to advocate their position regarding the issue of access to documents. Attention is furthermore paid to exogenous trends and events that influenced this constellation by introducing new institutional, societal, or technological factors.⁵

¹ Bauer (2004), p. 387
² Recent publications include Cross and Bolstad (2015); Abazi and Hillebrandt (2015); Cross (2014); Hillebrandt et al. (2014); Laursen (2013); Novak (2013); Curtin (2012a), and Leino (2011)
³ See above Chapter 5, section 4
⁴ In doing so, this chapter builds on a previous publication by the author and colleagues (Hillebrandt et al. 2014).
⁵ Chapter 4, section 2
The overview presented in this chapter suggests that the above-cited former senior Council official might not far off the mark. Indeed, the findings at a general level broadly align with the ‘advancing transparency effect’ thesis as presented in chapter 4. The evidence demonstrates a general increase in access to documents along various indicators from 1992 onward, which began to slow down (yet continued) after 2007. This increase was predominantly caused by a small but vocal minority of pro-transparency Council member states in conjunction with the European Parliament (EP) and the EU courts (CJEU). Nevertheless, the general level and rule-focused orientation of this account leaves open certain important outstanding questions. These relate both to the extent of congruence of the findings with the ‘advancing transparency effect’ thesis, and to the general presence of the institutional conditions that explain the “inexorable rise” of document-based transparency put forward in this chapter. These questions form the prelude to the subsequent case study chapters, in which I explore the extent to which the development of access to documents policy in specific sectors is explained by general or sector-specific institutional factors.

6.2 1992-2001: From declaration to legislation

In the period before the Maastricht Treaty, the Council did not have an access to documents policy. It subsequently adopted an internal decision on access to documents (Decision 731/93), which in the following years was significantly developed and expanded both in terms of its interpretation (e.g. the specification of its scope and exceptions) and its implementation (e.g. through an online document register that became operational in 1999). These developments came about in three ways: through revision or specification of the rules, through political declarations, and through the case law. The advance of access to documents was halted and even somewhat reversed when the Council in 2000 adopted relatively transparency-unfriendly document classification rules. Already in 2001, these rules were again revised, and the EU’s first legislative act on access to documents was adopted.

Change in the access to documents policy was primarily driven by competing transparency preferences which were vested in member states’ national administrative cultures. Member states mainly sought to advance their policy preferences through the formation of coalitions and through their role in the Presidency. Significant exogenous factors were the accession in 1995 of the strongly pro-transparency countries Sweden and Finland, as well as the 1996-1997 Intergovernmental Conference (IGC) which enshrined certain transparency principles at treaty level. Finally, both the EU courts and the EP managed to leave their mark on the Council’s access policy, respectively by taking the first

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6 Chapter 4, section 1
7 Before December 2009, the CJEU was named the ECJ. Throughout, I apply the courts’ formal name at the time of the event.
8 Maiani et al. (2011), pp. 4-7
9 These case studies cover respectively the Environment Council (Chapter 7), the Economic and Financial Affairs Council (Chapter 8) and the Foreign Affairs Council (Chapter 9).
steps in developing legal doctrine on the exceptions to the right of access across the board as well as by constituting a powerful counterforce in the co-legislative negotiation process.

6.2.1 Early days

As with many new policy issues, transparency in the Council started from scratch and had to be ‘kick-started’. Before 1992, public access to documents barely featured as a policy consideration on the Council agenda. The Council’s decision making, voting outcomes, and sometimes even decisions remained fully hidden from public view. One notable exception was the regulation governing public access to the EEC and Euratom archives. This regulation however only dealt with the disclosure of documents after a thirty year period. On two occasions, the EP attempted to place the issue on the Council’s agenda with resolutions calling for “legislation on openness of government”. However, these resolutions were ignored by the Council which was not obliged to respond to them. Instead, the Council mainly operated in secrecy and at some distance from the public. This is characteristic of international organisations where diplomatic norms prevail. The EU member states’ desire to maintain unity, moreover, had strong roots in the EU’s post-war founding myth of ‘never again’.

The Council was clearly not used to ordinary citizens demanding information. Nor were most of its members: out the Community’s then twelve member states, only three had freedom of information acts (FOIAs) older than ten years, while five had no such laws at all. To some observers, Council decision making seemed a “benevolent conspiracy by the [European] elites”.

The first steps towards change were taken during the 1991 IGC. The Dutch Presidency was familiar with FOI legislator at the national level and considered transparency at European level a high priority. It was supported in this stance by Denmark. At an early stage in the IGC negotiations, the Dutch government introduced a proposal for an FOI regulation. Due to a lack of support however, this plan was reduced to a hortatory declaration attached to the Maastricht Treaty. As Declaration 17 provided the first official statement of the EU’s member state governments on the matter of transparency, it is worth reproducing in full:

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10 Council (1983); Council (1958)
13 LA Times (1996)
14 Respondents #3, #4, #5; Schwaiger (2003), p. 133; Bauer (2004), p. 368
16 Carvel in Moser (2001), p. 5
18 Van Poelgeest (1993)
19 Respondent #1
The Conference considers that transparency of the decision-making process strengthens the
democratic nature of the institutions and the public's confidence in the administration. The
Conference accordingly recommends that the Commission submit to the Council no later
than 1993 a report on measures designed to improve public access to the information
available to the institutions.

Some commentators directly dismissed the declaration as a hollow act of political rhetoric.\textsuperscript{20}
Widespread discontent was also palpable among national electorates. This culminated in the
Treaty’s rejection by referendum by the Danish voters, who had become “fed-up with the
secrecy of the Commission and of the Council”.\textsuperscript{21} Overnight, the issue of transparency shot
to “the top of the agenda”.\textsuperscript{22}

The incoming UK Presidency was however reluctant to introduce far-reaching
decisional transparency.\textsuperscript{23} The intuitive reaction on the part of many member states moreover
was to put the onus on the Commission.\textsuperscript{24} The two European Council meetings held during
the UK Presidency therefore made only limited headway. The most important concession
was the decision to henceforth publish all Council votes on legislative acts and explanations
of these votes.\textsuperscript{25}

It was not until the Commission presented the report requested by Declaration 17
that the European Council came back to the question of access to information. The report
held that “there is a strong case for developing further the access to documents at
Community level”,\textsuperscript{26} a position that was taken over by the incumbent Danish Presidency.\textsuperscript{27} A
few months later, the Council and the Commission adopted a code of conduct on access to
documents.\textsuperscript{28} The code of conduct set out certain principles such as the application of the
widest possible access, an appeal procedure to contest initial refusals of access, and maximum
response times of a month for both stages of the access application, to be specified in both
institutions’ internal rules. The Council first incorporated access provisions in its rules of
procedure which were subsequently operationalised in Decision 731/93 on access to Council
documents, adopted on 20 December 1993.\textsuperscript{29}

Decision 731/93 received a mixed response from the Council’s members. From an
early point, the United Kingdom and Germany had expressed their reluctance concerning the
establishment of access rights in a legally binding act, while France was opposed to the
inclusion of an appeal procedure.\textsuperscript{30} The Netherlands and Denmark in turn were dissatisfied

\textsuperscript{20} Lodge (1994), p. 366
\textsuperscript{21} Brinkhorst (1999), p. 132
\textsuperscript{22} Monde Économie (2000)
\textsuperscript{23} UK Delegation (1992); Van Poelgeest (1993), p. 126
\textsuperscript{24} Lodge (1994), pp. 347-8; Peterson (1995)
\textsuperscript{25} European Council (1992a), European Council (1992b)
\textsuperscript{26} European Commission (1993), p. 3
\textsuperscript{27} European Council (1993)
\textsuperscript{28} Council and European Commission (1993)
\textsuperscript{29} Council (1993a), Council (1993b)
\textsuperscript{30} Netherlands Foreign Ministry (1993)
with the Council’s half-hearted attitude.\textsuperscript{31} Although the pro-transparency coalition secured the inclusion of an appeal procedure into the access rules, the Dutch government nevertheless criticised the Decision’s “restrictive, for leaders safe, arrangement”.\textsuperscript{32} After securing the inclusion of a provision on the evaluation of the access rules after two years, Denmark gave up its resistance.\textsuperscript{33} The Dutch government voted against, and soon brought a court action for the annulment of the access rules, arguing that a treaty basis intended for the arrangement of the internal organisation of the Council provided an insufficient ground for access to documents rules with a clear external effect.\textsuperscript{34} In a judgment of April 1995, the court brushed these objections aside, ruling that nothing prevented internal rules from having legal effects towards third parties. Instead, in light of Declaration 17 and subsequent calls from the European Council,

\[\text{…so long as the Community legislature has not adopted general rules on the right of public access to documents [...] the institutions must take measures [...] by virtue of their power of internal organization...}\textsuperscript{35}

The court thus removed the last obstacle towards the acceptance of Decision 731/93 as the new legal status quo concerning access to documents in the Council.\textsuperscript{36}

\textbf{6.2.2 Opening the Pandora’s box}

With Decision 731/93 inescapably in place as the Council’s legal instrument for access to documents, the pro-transparency member states began to focus their attention on its widest possible interpretation and implementation. They turned to the provisions in the access decision that governed its scope and exceptions. Some of these provisions, such as its exclusive applicability to documents produced by the Council (known as the so-called ‘authorship rule’) and documents already existing at the time of disclosure,\textsuperscript{37} remained in place until the decision’s replacement by Regulation 1049/01 in 2001. Early interventions by the Netherlands and Sweden further led to the inclusion of no-prejudice clauses regarding respectively national parliamentary information rights and public access regimes at the national level.\textsuperscript{38}

Other provisions were adjusted over time by subsequent political declarations, internally adopted rules, or court judgments. For example, the doctrine of partial access which established that the right of access pertained to the information contained in the document, rather than the document itself, followed from the \textit{Hautala} judgment. In this case,

\begin{itemize}
\item \textsuperscript{31} Dutch Parliament (1993)
\item \textsuperscript{32} Netherlands Foreign Ministry (1994a)
\item \textsuperscript{33} Netherlands Foreign Ministry (1994a)
\item \textsuperscript{34} Curtin and Meijers (1995), pp. 429-31
\item \textsuperscript{35} Case C-58/94, \textit{Netherlands v Council}, 30 April 1995, paras 37-40
\item \textsuperscript{36} Netherlands Foreign Ministry (1994a); Tomkins (2000), pp. 225-6; Vesterdorf (1999), pp. 914-5
\item \textsuperscript{37} Council (1993b), articles 1(2) and 2; Vesterdorf (1999), pp. 918-20
\item \textsuperscript{38} Council (1994); Netherlands Foreign Ministry (1994a); Sweden (1993); Sweden (2002), point 1.2
\end{itemize}
the court held that, in accordance with the principle of proportionality, access could only be refused to those parts of documents covered by an exception ground.\textsuperscript{39}

In 1995, Denmark initiated political negotiations to change publication of legislative votes from a simple majority decision into a non-negotiable default practice.\textsuperscript{40} Although the proposal found broad support, a compromise statement was eventually issued with the Council declaring that it had never kept the outcome of legislative votes confidential and did not intend to do so in the future.\textsuperscript{41} A few months later, another compromise was struck on the general disclosure of those parts of the Council’s minutes related to legislative affairs. In spite of misgivings by the Council’s legal service,\textsuperscript{42} the Council began to allow the disclosure of individual member state statements on the basis of a simple majority vote.\textsuperscript{43} It resolved to disclose legislative minutes on a case by case basis.\textsuperscript{44} Sweden, in an apparent desire to lead by example, communicated to the Council Secretary-General its unconditional and permanent permission to disclose its statements.\textsuperscript{45} The compromise agreements on access to legislative minutes, statements, votes and explanations of votes were subsequently codified in the Amsterdam Treaty.\textsuperscript{46}

Another area in which the right of access was firmly established was in documents relating to the second and third pillar (respectively, the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA)). In 1998, following a complaint filed by the NGO Statewatch, the European Ombudsman found that the public right of access applied to all Council documents, including by definition third pillar documents.\textsuperscript{47} The same matter also came before the court in \textit{Svenska Journalistförbundet}.\textsuperscript{48} Shortly after Sweden’s accession to the EU, the Swedish Journalist Association (SJF), had applied for the same twenty JHA-related documents both with the Swedish authorities and with the Council secretariat.\textsuperscript{49} Whereas the Swedish authorities refused access to two of the requested documents, the Council refused access to eighteen of them, exposing a vast discrepancy in the effects of both access regimes.\textsuperscript{50} When SJF contested this wide refusal before the CFI, both the French and the UK governments challenged the case’s admissibility. The French government argued that, in the absence of rules governing access to third-pillar documents, no such right of access could be presumed to exist.\textsuperscript{51} The UK government in turn held that while the access right under Decision 731/93 did extend to this area, the court had no jurisdiction over the

\textsuperscript{39} Case T-14/98 Hautala v Council (‘Hautala I’), 19 July 1999, upheld upon appeal in case C-353/99P Council v Hautala (‘Hautala II’), 6 December 2001
\textsuperscript{40} Council (1993a), article 7(5), also article 5(1)); Council (1995b)
\textsuperscript{41} Council (1995c); Netherlands Foreign Ministry (1995a)
\textsuperscript{42} Council (1995b); Netherlands Foreign Ministry (1995b)
\textsuperscript{43} Council (1995d), section A, points 2 and 4
\textsuperscript{44} Council (1995d), section B, point 1
\textsuperscript{45} Sweden (1995)
\textsuperscript{46} Amsterdam TEC article 207(3)
\textsuperscript{47} Council (1993b), article 1(2); European Ombudsman (1998); cf. Harden (2001), p. 179
\textsuperscript{48} Case T-174/95 Svenska Journalistförbundet v Council, 17 June 1998
\textsuperscript{49} Travers (2000), p. 197 and further
\textsuperscript{50} Curtin and Meijer (2006), p. 113
\textsuperscript{51} Svenska Journalistförbundet, para 70

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implementation of this right. The CFI however made short shrift of both arguments, finding that Decision 731/93 applied to all Council documents, and that it had full jurisdiction on all questions pertaining to this decision. The issue was later reiterated in Hautala for documents under the second pillar. This case law progressively asserted a ‘normalised’ situation under which no policy areas were a priori excluded from the scope of Decision 731/93.

The right of access also expanded through a restrictive interpretation of the exception grounds in Decision 731/93. Legal scholarship was quick to identify this aspect in the access decision as the main source of controversy. Article 4 of the access decision distinguished between five mandatory and one discretionary exception grounds. Significant mandatory exceptions included the protection of the public interest and the “protection of confidentiality [...] as requested by the legislation of the Member State which supplied any of [the] information [contained in the document]”. The discretionary exception, which came to be known as the ‘space to think’ clause, was the most controversial, protecting the “confidentiality of the Council’s proceedings”.

According to Decision 731/93, the ruling whether an exception ground applied to a requested document was made by the Council secretariat at an initial stage. This decision could be appealed by means of a ‘confirmatory application’ decided by member state officials in the Working Party on Information (WPI). Realising that trust had to be won, the secretariat was initially rather restrictive in its assessments, refusing access to over half of the requested documents. Two developments at the end of 1995 somewhat altered this defensive attitude. First, a special unit was set up within the secretariat’s directorate-general (DG) F to deal with document requests; it soon grew from 16 to 26 administrators. Second, the easing of the access rules in 1995 meant that legislative documents were more readily disclosed. Decisions on disclosure were, as with any internal procedural issue, taken by simple majority vote.

In the implementation of Decision 731/93, the ‘space to think’ exception was very frequently invoked at both procedural stages. At just under 50 per cent, it was the most often invoked refusal ground between 1994 and 2001. In two landmark court cases the court outlined the main criteria for judicial review of this exception. In another judgment, the court distinguished this standard of review from mandatory exception grounds.

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52 Svenska Journalistförbundet, paras 71-2
53 Svenska Journalistförbundet, paras 81, 85
54 Hautala I, para 42; see further Chapter 9
56 See Appendix 5
57 Council (1993b), article 4(1)
58 Council (1993b), article 4(2)
59 Council (1993b), article 5. This general arrangement has remained in place since; however, see Chapter 9.
60 Respondent #12
61 Respondent #12; Council (2014c), 1995 and 2000 figures
62 Netherlands Foreign Ministry (1994b); Netherlands Coordination Committee (1994)
The first judgment related to the exception grounds in Decision 731/93 was *Carvel and Guardian v Council*, and was decided in October 1995. John Carvel, a journalist working for The Guardian, had requested access to a number of Council meeting documents. The Council refused to grant access on the basis of the ‘space to think’ clause, following which Carvel decided to bring court proceedings. The Danish and Dutch governments intervened in his support, as did the EP. The CFI interpreted the applicable exception ground to mean that the Council was obliged to balance the confidentiality of its proceedings against Mr Carvel’s interests in disclosure. The judgment represented a leap forward for future applicants’ powers of enforcing a restrictive construction of exception grounds before the court.

In *Svenska Journalistförbundet*, the CFI reiterated this position and developed a review test to establish the Council’s compliance with its self-created access rules. It found that, in light of the access decision’s overarching objective of providing the widest possible access to documents, the Council

...must establish, for each document that is requested, whether there is a reasonably foreseeable and not purely hypothetical risk that disclosure would undermine one of the protected public interests.

In the case of the ‘space to think’ exception under article 4(2), the Council should moreover strike a “genuine balance” between the interests of the applicant in disclosure and its own interests in confidentiality. The CFI’s clarification gave way to a three-stage test: first, the Council must establish, whether the document comes under the protected interest; second, whether there is a reasonably foreseeable and not purely hypothetical risk that the protected interest is undermined by disclosure; and third, in the case of the ‘space to think’ exception, whether the interest in confidentiality outweighs the applicant’s interest in disclosure. The test, which has remained in place since, significantly constrained the Council’s discretion in invoking the ‘space to think’ clause.

The third judgment is *Hautala I*. By contrast to the previous two cases, this case concerned an access refusal on the basis of a mandatory exception ground, and is thus instructive on the difference between the application of mandatory and discretionary exception grounds. Heidi Hautala, a Finnish MEP, sought to challenge the Council’s refusal to grant access to a report related to European arms trade. The court found that the

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64 Carvel (1994); Guardian (1994)
65 *Carvel and Guardian v Council*, paras 65, 73
67 *Svenska Journalistförbundet*
68 *Svenska Journalistförbundet*, para 112
69 *Svenska Journalistförbundet*, para 113
70 *Hautala I*
71 Namely, article 4(1), first indent (the protection the public interest, in this case particularly with regard to international relations)
document, coming under the mandatory exception ground, allowed the Council wide discretion in determining a risk caused by disclosure.\(^\text{72}\) Consequently, the court offered its first articulation of a ‘limited review’ containing four elements: compliance with the procedural requirements, proper reason-giving, and avoidance of a manifest error of assessment of the facts and of abuse of powers.\(^\text{73}\)

Although the CFI in Hautala eventually annulled the Council’s decision to refuse access for reasons of proportionality, its judgment indicated judicial deference towards mandatory exceptions grounds that involved the Council’s non-legislative prerogatives.\(^\text{74}\) In this sense, the court’s bifurcation between mandatory and discretionary exceptions built upon the distinction between legislative and non-legislative documents established by the Amsterdam TEC which had entered into force only two months earlier.\(^\text{75}\) Overall however, the case law delivered outcomes that were particularly favourable to the pro-transparency member states, by taking an expansive stance on matters of the decision’s scope, and showing only a limited degree of leniency regarding the application of exceptions.\(^\text{76}\)

Transparency-critical member states soon sought to ensure that rules were adopted on the classification of documents. Decision 731/93 remained vague on their legality. It merely stated that the access decision should apply “with due regard for provisions governing the protection of classified information”, without however defining ‘classified information’ or operationalising ‘due regard’.\(^\text{77}\) While some form of document classification was likely already practised during the early 1990s, no specific classification rules existed beyond those applying to Euratom.\(^\text{78}\) This changed when the Secretary-General (SG) adopted Decision 24/95 for the protection of classified information applicable to the Council secretariat.\(^\text{79}\) The balance between access to documents and classification was to be struck without prejudice to the right of access.\(^\text{80}\) Although classified documents were thus not a priori excluded from the scope of Decision 731/93, their protected status meant that it would be difficult for the public to even know of their existence.\(^\text{81}\)

The emergence of an online public register of Council documents in the late 1990s started a tug-of-war on the position of classified documents relative to the rules on public access.\(^\text{82}\) During the 1998 UK Presidency it was decided that the register would include references of all Council documents, except for those that were classified.\(^\text{83}\) Already during the next year that practice was revised. After a positive report on initial progress made with the Council register, the Finnish Presidency took steps to offer the public direct access to

\(^{72}\) Hautala I, para 71

\(^{73}\) Hautala I, para 72

\(^{74}\) Abazi and Hillebrandt (2015)

\(^{75}\) IGC (1997b), article 207(3)

\(^{76}\) De Leeuw (2007), pp. 301-2

\(^{77}\) Council (1993b), article 8

\(^{78}\) Council (1958)

\(^{79}\) Council (1995a); cf. Düro (2009), p. 21

\(^{80}\) Council (1996a), para 3.4

\(^{81}\) Düro (2009), p. 21

\(^{82}\) Council (1996b); Council (1998a); Council (1998b); Curtin and Meijer (2006), p. 113

\(^{83}\) Council (1998c)
certain types of legislative documents, as well as to include references to classified documents.\textsuperscript{84}

The Decision brokered by the Finns did not however last long. In the summer of 2000, a major classification overhaul took place. The SG, in close cooperation with the incoming French Presidency, adopted a decision reforming the protection of classified information applicable to the Council secretariat.\textsuperscript{85} The resultant Secretary-General Decision, which quickly became known as the ‘Solana Decision’ after its initiator, reconceptualised the interaction between access to documents and classified information, replacing Decisions 24/95 and 23/00.\textsuperscript{86} When the changes were introduced into a consolidated version of Decision 731/93, the consequences for public access to documents became fully apparent. The three highest levels of classification were now excluded from the scope of public access rights. The newly included originator consent (‘orcon’) requirement meant that even certain unclassified documents required third parties’ permission before public access could be granted.\textsuperscript{87}

The ‘Solana Decision’ met with vociferous criticism among a coalition of pro-transparency member states, MEPs, and NGOs, although to little avail.\textsuperscript{88} As the UK government pointed out, the Council had no obligation to consult with the EP on the internal matter of access to documents,\textsuperscript{89} while the pro-transparency member states had lost the simple-majority vote. In November 2000, the Netherlands, supported by Sweden and Finland, brought a case against the revised access decision. A month later, the EP also began proceedings.\textsuperscript{90} These concerted steps to reverse the narrowing of the access rules came in the context of negotiations on a fully fledged access to documents law that was to replace Decision 731/93. By coupling these two issues, the pro-transparency member states, together with the EP, successfully sought to once again reverse the legal situation created by the ‘Solana Decision’. Months after this decision’s adoption, classified documents were brought back under the scope of public access to documents.\textsuperscript{91} Eventually, both the Netherlands and the EP withdrew their court cases as part of a deal.\textsuperscript{92}

\textit{6.2.3 Negotiations on Regulation 1049/01}

The first years of the Council’s access to documents policy revealed a clear division among the Council’s member states. On the one hand, there were those member states pushing for an expansion of the access policy. This group built upon the conviction that extensive transparency in Council decision making formed a core constitutional value.\textsuperscript{93} The group

\textsuperscript{84} Council (1999a); Council (1999b); Council (1999c)
\textsuperscript{85} Respondent #31; Bunyan (2002), section 6
\textsuperscript{86} Council (2000a), especially articles 2(1)(a), 3(1), 4(1); Bauer (2004), pp. 370-1. See further Chapter 9
\textsuperscript{87} Council (2000b) articles 1 and 2(3)
\textsuperscript{88} Respondent #25; Bunyan (2002)
\textsuperscript{89} UK (2000a)
\textsuperscript{90} Bunyan (2002), section 7
\textsuperscript{91} Council (2001a), article 4
\textsuperscript{92} Rosén (2015), p. 391; Bauer (2004), pp. 370-1. See further Chapter 9
\textsuperscript{93} Öberg (1998)
initially consisted of only Denmark and the Netherlands but gained momentum when Finland and Sweden joined the EU in 1995. The Nordics “rather naturally talked to each other”, and along with the Netherlands they soon formed ‘the Gang of Four’, an advocacy coalition that closely coordinated its actions.\(^{94}\) On the other hand, a less coordinated group of member states existed that were above all opposed to any radical change in the Council’s modus operandi. They had certain more outspoken proponents, including France and, to a lesser extent, the UK.\(^ {95}\) The strong involvement of these member states is well-documented, for example in litigation, statements, and Presidency entrepreneurship.\(^ {96}\)

The transparency negotiations that took place around the 1996-1997 Amsterdam IGC was clearly influenced by the growing clout of the Council pro-transparency coalition. An important breakthrough in this regard came when the UK Labour party rose to power. After Blair assumed office as prime minister in May 1997, the UK government relaxed its stance on EU transparency, giving the pro-transparency coalition greater leeway during the IGC and subsequently.\(^ {97}\) Together with the new member states Sweden and Finland, the UK’s change of leadership provided the exogenous factors that made the difference between ‘Maastricht’ and ‘Amsterdam’.\(^ {98}\) As a result, transparency was given a legal basis in the treaty. Article 255 TEC provided that the right of access to documents was to be laid down in secondary law, to be adopted in co-decision with the EP within two years.\(^ {99}\) It furthermore enshrined the principle that decision making should take place “as openly as possible”, particularly when the Council legislates (article 1 and article 207(3) respectively).

The Amsterdam Treaty for the first time included transparency as a principle of European law and codified the progress made through political compromises and case law. However, as the strong polarisation over issues such as the ‘Solana Decision’ revealed, it was only an intermediate step that did not signal a clear outcome on the question of the future access to documents law. The pro-transparency coalition generally favoured an access law with a broad scope, direct access throughout the decision-making process and with only few exceptions that were to be interpreted restrictively. Council members such as France and the United Kingdom tended to see transparency more as a form of communication, leaving ample room for the Council to determine which documents were (not) to be made available on the basis of an array of broadly construed exceptions, and with the least possible interference to the decision-making process.\(^ {100}\) Consequently, as the Amsterdam Treaty entered into force some observers noted that the adoption of a European FOI law remained “improbable”.\(^ {101}\)

\(^{94}\) Respondent #6, also #3, #4, #5
\(^{95}\) Respondent #2; Davis (1999), section II
\(^{96}\) See Appendix 6
\(^{97}\) Respondents #1, #9
\(^{98}\) Respondent #7
\(^{99}\) IGC (1997b), article 255
\(^{100}\) Grønbech-Jensen (1998), p. 198; Davis (1999)
\(^{101}\) Öberg (1999), p. 327; also O’Neill (1998), pp. 430-1
The ‘Solana Decision’ was also quickly cast in the light of the ongoing negotiations for the ‘Article 255 Regulation’. The pro-transparency coalition realised that its objective of a generous access law had not yet been achieved.\textsuperscript{102} The Swedish government in particular felt that the French move had struck a blow at its negotiation agenda for the upcoming Presidency:

\begin{quote}
We were very upset about that. We saw it as […] a way of making the Swedish effort during the Presidency much more difficult. […] They didn't admit that this was their idea […] We just had to swallow that and realise that it made the starting point for our Presidency more difficult.\textsuperscript{103}
\end{quote}

When Sweden assumed the Presidency the negotiations entered their last months before the formal deadline. The pro-transparency coalition occupied a relatively powerful position: Sweden held the Presidency, while the EP, the media and civil society were on its side, pressing members states to honour their treaty commitment.\textsuperscript{104} During the negotiations, both Sweden and the Netherlands repeatedly noted that proposals were severely criticised by the Mediterranean countries and Germany, whilst being lauded by the Nordic countries and the Netherlands.\textsuperscript{105} In the final months, several rounds of interinstitutional negotiations were held between the Swedish ambassador and the chairman of the LIBE committee which was responsible for the dossier on behalf of the EP, flanked by a tight schedule of WPI meetings.\textsuperscript{106} In May 2001, the Swedes presented both the EP and critical Member States with a ‘hard deal’.\textsuperscript{107} Regulation 1049/2001 was passed weeks after its official deadline, on 30 May 2001.

Compared to Decision 731/93, Regulation 1049/01 introduced a number of major innovations. First, the three institutions were brought under the scope of the same rules. The ‘authorship rule’ to include all documents held (rather than drafted) by them was dropped.\textsuperscript{108} The exception grounds rearranged into three paragraphs, changing a number of exceptions from mandatory to discretionary. Special arrangements were made for third parties and member states whose documents were requested.\textsuperscript{109} Yet the wording of the member state prerogative, even in the implementing rules of procedure, was so ambiguous that it “seemed destined to pose interpretative challenges for the Court”.\textsuperscript{110} Finally, the new access regime

\textsuperscript{102} Respondents #30, #31
\textsuperscript{103} Respondent #31
\textsuperscript{104} Respondent #9
\textsuperscript{105} Respondent #25; Sweden Justice Ministry (2001); Netherlands Foreign Ministry (2001a)
\textsuperscript{106} Respondents #9, #25, #30, #31
\textsuperscript{107} Bjurulf and Elgström (2004)
\textsuperscript{108} EP and Council (2001b), article 2(3))
\textsuperscript{109} See Appendix 5
\textsuperscript{110} Heremans (2011), p. 75; EP and Council (2001b), article 4; Council (2001d), Annex III, article 2(1)(b). Declaration 35 attached to the Amsterdam Treaty (the origin of this arrangement) was equally ambiguous about member state documents. It read: “The Conference agrees that the principles and conditions referred to in Article [255] of the Treaty establishing the European Community will allow a Member State
enshrined the new status quo concerning classified documents, balancing between their inclusion under the access procedure in Regulation 1049/01 and full respect for the originator control principle.\textsuperscript{111} On 3 December 2001 the Council’s new access regime entered into force.

6.3 2001-2014: From consolidation to entrenchment

Upon the entry into force of Regulation 1049/01 in December 2001, the central and flanking legal instruments were in place; over the coming decade and a half they would largely remain the same. Proponents of expanding Council transparency began to focus their efforts on the consolidation of the access policy. This occurred at the level of implementation, where the Council took steps to facilitate an ever-increasing interest in the right of access to documents among the general public, and at the level of interpretation, given the notable increase in court cases. Particularly as a result of judicial review, the Council was forced to make important concessions. By the time the Commission took the first steps towards a revision of Regulation 1049/01 in 2007, the situation had become quite entrenched. A Council majority marked by ‘transparency fatigue’ was met by a proportionately small but vocal Council minority, supported by the EP. This minority was vehemently opposed to the ‘rolling back’ of any of the access to documents provisions that had gradually become entrenched in case law and procedures. In spite of this political deadlock, the courts continued to interpret access to documents rules in an expansive fashion.

6.3.1 Changes under the radar

The entry into force of Regulation 1049/01 was welcomed by many as an important step towards more democratically legitimate Council decision making. Different than Decision 731/93, it contained clear references to the democratic function that the regulation was expected to fulfil, as evidenced by its second recital:

\textit{Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.}\textsuperscript{112}

The Regulation’s overt references to democracy and human rights coincided with the EU’s proclamation in December 2000 of the Charter of Fundamental Rights (CFR), which contained a provision highly similar to article 255 of the Amsterdam TEC.\textsuperscript{113} This suggested

\begin{flushright}
to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement.”
\end{flushright}

\begin{flushright}
\textsuperscript{111} EP and Council (2001b), article 9
\end{flushright}

\begin{flushright}
\textsuperscript{112} EP and Council (2001b), italics added
\end{flushright}

\begin{flushright}
\textsuperscript{113} EU (2000), article 42
\end{flushright}
to some commentators the possible emergence of a legal, or even constitutional principle of transparency.\textsuperscript{114} Throughout the next decade, European institutions continued to issue such normative statements.\textsuperscript{115} However, due to their expressly hortatory nature, the precise intentions and possibly constitutional effects of such declarations have so far remained unclear.\textsuperscript{116} Sweden, a proponent of the constitutional reading, was content with the result achieved in the access regulation’s negotiations. Nevertheless, it also made it clear that it did not consider the race over:

\begin{quote}
[The adoption of Regulation 1049/01] does not mean that Sweden’s efforts in enhancing the transparency of institutions thus can be stopped. Sweden will continue to further improve the rules and practices regarding disclosure of the Union.\textsuperscript{117}
\end{quote}

The next priority of the pro-transparency camp became the institutionalisation of the new access law. Moreover, after the highly politicised negotiations, a strong consensus existed within the Council to depoliticise the matter and let it further develop in practice. This enabled a series of uncontroversial steps of consolidation.\textsuperscript{118} The secretariat’s Transparency Unit drafted general instructions to help civil servants make decisions in requests for access and began to provide periodical staff trainings on the subject.\textsuperscript{119} Furthermore, a high-level interinstitutional committee was set up to deal with the interinstitutional dimensions of the access policy, and it was decided that the institutions would take all necessary steps to expand the scope of Regulation 1049/01 to cover all other EU institutions, bodies, agencies, or similar bodies.\textsuperscript{120}

These different measures definitely facilitated the public’s access to documents, as the remarkable increase in access to documents across the board shows. A few examples suffice. Compared to 1999, the annual number of documents placed on the public register in 2014 increased by nearly 150 per cent.\textsuperscript{121} Direct access (either in full or in part) increased even more spectacularly from 0 per cent in 1999 to 89.4 per cent in 2014. Contrary to what might be expected, this increase was not due to Regulation 1049/01 itself, but was the result of a flanking provision adopted earlier in the year, which contained a list of legislative documents to be directly disclosed.\textsuperscript{122} Equally notably, the 2004 ‘big bang’ enlargement, which was anticipated by some as leading to a strong decline in efficiency, did not significant affect proactive disclosure.\textsuperscript{123}

\textsuperscript{114} E.g. Van Bijsterveld (2004); O’Neill (1998); Öberg (1998); Tomkins (2000)
\textsuperscript{115} European Council (2001); European Council (2006); IGC (2007c), article 15(3)
\textsuperscript{116} Alemanno (2014)
\textsuperscript{117} Sweden (2002)
\textsuperscript{118} Interview #7
\textsuperscript{119} Netherlands Foreign Ministry (2001b); Respondents #12, #13
\textsuperscript{120} EP, Council and European Commission (2001); Council (2001b)
\textsuperscript{121} Namely, from circa 85,000 (1999) to 197,361 (2014). See Appendix 4 for these and all further unreferenced statistical data in this section.
\textsuperscript{122} Council (2001d), , article 12(2); also Council (1999c); Council (2000c)
\textsuperscript{123} Cross and Bolstad (2015), pp. 228-34; Cross (2014), pp. 282-3
Meanwhile, after an initial large increase upon the advent of Regulation 1049/01, the number of access applications quickly stabilised, and a significantly larger proportion of documents were now disclosed upon request.\textsuperscript{124} At the same time, after \textit{Hautala II} (December 2001),\textsuperscript{125} partial access went up from 0 to almost 80 per cent of the requested documents in 2014. This increase only really took off after the Coreper reached an informal agreement (July 2002) to provide regular access to documents produced in the course of a legislative procedure while suppressing the identity of the member states that made contributions.\textsuperscript{126} In the following year, partial access in initial applications jumped from 10.6 to 71.5 per cent. It is of course debatable whether the Coreper’s ‘gentlemen’s agreement’ enhanced the right of access to documents.

Another quasi-formal coping mechanism was formed by the ‘limite’ document status. In March 2006, the Council issued its first internal memorandum in which it distinguished between unmarked, classified, and ‘limite’ documents. ‘Limite’ documents were for internal use only, and were not to be shared with “any other person, the media, or the general public without authorisation.”\textsuperscript{127} According to the guidelines, ‘limite’ documents came under the obligation of professional secrecy.\textsuperscript{128} However, they were also governed by the provisions of Regulation 1049/01.\textsuperscript{129} This implied that request for access to ‘limite’ documents were to be treated like any other requests for (unclassified) documents. However, the interaction of the limite label with the Council’s duty to proactively disclose certain types of legislative documents as set out in its rules of procedure has remained problematic and unclear.\textsuperscript{130} Moreover, the duty of professional secrecy which underpins the ‘limite’ rules is likely to have fomented an administrative culture of over-protectiveness (‘better safe than sorry’) and provided refuge for transparency resistance among the secretariat staff.\textsuperscript{131}

\textbf{6.3.2 Entrenchment and judicialisation}

The ever-further development of Regulation 1049/01 eventually led to a degree of ‘transparency fatigue’ among the Council majority.\textsuperscript{132} Increasingly, the Council was divided into two camps of member states that differed rigorously on the matter of access to documents. This was not only evident in the sharply increased frequency with which the pro-transparency coalition issued statements against the Council’s confirmatory application decisions, but also in these member states’ tendency to intervene in court cases.\textsuperscript{133} The support of new member states such as Estonia and Slovenia for the pro-transparency camp

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{124} From 2,394 initial and 43 confirmatory applications (2002) to respectively 2,445 and 40 (2014)
\item \textsuperscript{125} See above section 6.2.2
\item \textsuperscript{126} Council (2002a); Council (2002c), point 22
\item \textsuperscript{127} Council (2006), points 2 and 3
\item \textsuperscript{128} Council (2011a), cover note, point 1; guidelines, point 1; IGC (2007c), article 339; Council (2009), article 6(1)
\item \textsuperscript{129} Council (2011a), guidelines, point 5
\item \textsuperscript{130} Commissie Meijers (2015), point 2; cf. section 6.3.2 below
\item \textsuperscript{131} Laursen (2013), pp. 778-83
\item \textsuperscript{132} Respondent 1
\item \textsuperscript{133} See Appendix 6 for an overview of the dominant member states
\end{itemize}
\end{footnotesize}
made little difference for the daily implementation of access to documents: after the 2004 enlargement, the voting power of the advocacy coalition had proportionately declined to well below a blocking minority. This also diminished the opportunities that the Presidency provided in terms of policy entrepreneurship. After 2001, all Presidency attempts to politically advance the issue of access to documents failed.\footnote{Respondents #7, #12; Wobbing Europe (2008); Wobbing Europe (2012)}

It was in this context of declining support that the first steps were taken towards the revision of Regulation 1049/01. The decision to explore avenues for legislative reform followed a recommendation in this direction by the Commission in a 2004 report. The EP subsequently adopted a resolution calling on the Commission to take steps on legislative reform.\footnote{European Commission (2004); EP (2006); Harden (2009), p. 244; Maiani et al. (2011), pp. 19-20} The Commission began this process with a consultation round among the Council’s members which confirmed their widely divergent positions. The subsequent process revealed the extent of entrenchment among the legislative parties. In March 2009, the EP in an informal vote approved rapporteur Cashman’s report recommending several significant amendments to the proposal tabled by the Commission in 2008.\footnote{European Commission (2008); EP (2009)} This was considered inadmissible by the Council on procedural grounds,\footnote{Council (2009)} an opinion that was echoed by the Commission after the EP formally adopted a revised report in December 2011.\footnote{Wobbing Europe (2011)} Attempts by the 2009 Swedish Presidency to open a dialogue with the EP met with an unwilling rapporteur.\footnote{Respondent #7}

Having been a mere onlooker to the revision process for several years, the Council reluctantly restarted negotiations in February 2012 on a common position. Member state preferences continued to largely follow previously established patterns, although they were now more polarised. Transparency-critical Council members began more actively to advocate a model of transparency as communication rather than as a matter of legal rights, similar to how the transparency policy was formulated in the pre-Amsterdam years. Sweden in turn insisted that the revision should “lead to increased openness and nothing else”\footnote{Sweden (2008)} The pro-transparency coalition found continued and vocal support from an active supranational coalition including the European Ombudsman and civil society, strengthening its position.\footnote{Respondents #6, #16, #17, #18} In the negotiations, it relied increasingly on the EP’s pivotal role in bringing about change to the access regulation through use of its co-legislative, ‘hard’ power, as evidenced by then-Swedish minister of justice, Beatrice Ask:

Immediately and strongly.\footnote{Cited in Wobbing Europe (2012)}
Well over eight years after the Commission’s presentation of a revision draft, the legislative development of access to documents in (and beyond) the Council continue to be in deadlock. With the revision being characterised as a “toxic dossier”, this is likely to remain the case for the foreseeable future. At the same time, the process of judicialisation that began around the same time as the legislative revision procedure continues unabated, further advancing and entrenching the right of access to documents. The many remaining legal ambiguities in the general phrasing of Regulation 1049/01 have heralded a period of relatively intensive litigation, enhancing in this area the phenomenon of “judge-made law”.

Of the 11 most recent cases delivered since 2007 to which the Council was a party, it lost 8 at least in part. Beyond the possibility of intervening or themselves contesting a decision before the court, the Council and its member states have little control over this developing case law. Unsurprisingly, in some cases, they disputed the outcomes.

This was the case when, in July 2008, the ECJ delivered its judgment in the Turco II appeal. Maurizio Turco, an Italian MEP, sued the Council when it refused him access to legal advice provided by the Council’s legal service. The ECJ set aside the CFI’s judgment by ruling that, in principle, legal advice to the Council submitted by its own legal service should be public, an outcome that was a thorn in the side to France and the UK. The ECJ further found that reasons of democratic control could form an ‘overriding public interest’ as defined in Regulation 1049/01, articles 4(2) and (3):

…[A]n overriding public interest is constituted by the fact that disclosure of documents […] increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act.

A narrowing of the regulation’s exceptions also took place regarding member state documents submitted to the institutions, initially in an action against the Commission. In Sweden v Commission (2007), Sweden challenged the CFI’s interpretation of Regulation 1049/01, article 4(5), according to which member states enjoyed “boundless’ discretion” to refuse access to their own documents. The ECJ found that the disagreement between the recipient institution and the member state in question over the possibility of disclosure did not amount to an unconditional veto on the member states’ side. Instead, it held that

143 Maiani et al. (2011), p. 31; Hillebrandt et al. (2014), p. 20
144 Respondent #37
145 Curtin (2012a). The proviso must be made that the EU courts have no influence on the cases that are brought to them and the intensity of litigation thus cannot be attributed to any preference on their side.
146 See Abazi and Hillebrandt (2015), p. 838
147 Joined cases C-39/05P and C-52/05P, Sweden and Turco v Council (‘Turco II’), 1 July 2008
149 Turco II, para 67
150 Case C-64/05 P, Sweden v Commission, 18 December 2007
151 Heremans (2011), p. 73
152 Sweden v Commission, para 75
refusal to disclose a document should be justified by the member state within the exception grounds set out in Regulation 1049/01, allowing it to be subject to a potential administrative appeal or court action. A related matter emerged in Germany v Commission (2012). In this case, the CFI upheld the Commission’s assertion that Germany could not rely on the ‘international relations’ exception to justify non-disclosure of documents relating to its dealings with the EU. Ultimate responsibility for the approval of the applicable exceptions was vested with the institutions, which meant that they had to review a member state’s reason for refusal.

Another controversial case related to member state inputs was Access Info Europe (AIE). AIE, a transparency advocacy organisation, requested access to legislative documents containing member state positions. When the Council, in line with its Coreper agreement, granted only partial access to the document, blanking out the names of the member states, AIE challenged this decision before the court, which it won both at first instance (2011) and upon appeal (2013).

In a strongly worded judgment, the GC developed a constitutional argument regarding transparency of legislative documents:

If citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information. [...] It is in the nature of democratic debate that a proposal for amendment of a draft regulation, of general scope, binding in all of its elements and directly applicable in all the Member States, can be subject to both positive and negative comments on the part of the public and media.

The CJEU upheld the GC’s reasoning, adding that, since the documents concerned a legislative decision-making procedure, “reference to any criterion whatsoever” would not render a reliance on article 4(3) (the ‘space to think’ clause) capable of justifying the non-disclosure of the document. The argument of a decision-making procedure’s constitutional significance was also invoked in In’t Veld I (2012). In this case, which concerned an advice from the Council’s legal service on the legal base to be used for an international agreement, the GC broadly followed the argument first developed in Turco II.

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153 Sweden v Commission, para 83-9
154 Case T-59/09, Germany v Commission, 14 February 2012
155 Germany v Commission, para 66
156 Germany v Commission, para 47
158 See above section 6.3.1
159 Access Info Europe I, paras 69, 78
160 Access Info Europe I, paras 33, 63
161 Case T-529/09, In’t Veld v Council (In’t Veld I), 25 April 2012, upheld upon appeal in case C-350/12P, Council v In’t Veld (In’t Veld II), 2 July 2014. See further Chapter 9
162 In’t Veld II, paras 47 and 83-92
The outcome of this spate of cases caused widespread discontent in the Council. A notably high number of member states and institutions intervened. Certain cases moreover gave rise to informal settlements in the Coreper. For example, Sweden and Germany caused controversy over how the scope of Regulation 1049/01, article 4(5) would play out against ‘ordinary’ institutional documents in the Council context, and a subsequent agreement thus settled which documents submitted to the Council were to considered ‘ordinary’ Council documents, and which were ‘article 4(5) documents’. However, the separation in practice has not always been clear, and has caused a certain amount of friction with the Council secretariat. In relation to AIE, the Council did not seem intent on paying heed to the spirit of the judgment. Shortly after the judgment, the Council agreed to continue to record names of member states only where this would be “deemed appropriate”.

6.4 Analysis: General trends and outstanding questions

The empirical analysis conducted in this chapter forms the first stage in the study’s research design. Central were the questions what the key developments in the Council’s access to documents policy were, how these developments are explained by the interplay of institutional factors, and whether both developments and institutional factors were stable or changeable over time. The Council-wide analysis shows that, between 1992 and 2014, the Council developed an intricate and expanding access to documents policy. Starting from a situation of no formal provisions before 1992, pro-transparency member states succeeded in bringing about considerable change in the direction of more openness, expanding the provisions and limiting the exceptions under Decision 731/93. They secured thereafter a more generous and treaty-based legislative act governing access to documents in Regulation 1049/01, and subsequently pushed for a maximally expansive implementation. By 2007, as the Commission prepared a proposal for a recast of the access to documents law, ‘transparency fatigue’ among a majority of member states led to a protracted revision process that is still ongoing at the time of writing. In spite of the political deadlock, the EU courts have continued in recent years to interpret the existing legislation in an expansive manner.

The main institutional factors underlying these changes in the period before and after the entry into force of Regulation 1049/01 offer an initial picture of the main trends in the development of the Council’s access to documents policy. The observed interactions of actors and the preferences and resources they hold, as well as the exogenous factors that are central in altering the parameters of these interactions largely align with the assertion of an ‘advancing transparency effect’. At the same time, the analysis leaves important puzzles unaddressed. First, due to its generality, the account does not satisfactorily explain specific anomalies, such as the ‘Solana Decision’ or informal Coreper agreements. Second, the

163 See Appendix 6
164 Netherlands Foreign Ministry (2015)
165 Council (2014a); Council (2014b)
166 See Chapter 5, section 4
broadly cast scope of the analysis (namely on the Council as a whole) brings up questions of accuracy in relation to experiences across Council formations.

6.4.1 General trends

Several aspects of the development of the Council’s access to documents policy between 1992 and 2014 appear to confirm the presence of an ‘advancing transparency effect’. Whether along the lines of the making, the interpretation, or the implementation of access rules, the policy continued to advance over time, irresistible even in the face of majority opposition and irreversible once in place. The policy’s continuous development was facilitated by a combination of exogenous events, pressure by outside actors, and persistent internal advocacy.

In the early years of the Council’s access to documents policy, the pro-transparency coalition, though vocal and knowledgeable on the subject, represented a marginal viewpoint. It only got the wind in its sails after the 1992 Danish referendum rejected the Maastricht Treaty. The marginal viewpoint turned into a respectable minority viewpoint when two more strongly transparency-favouring countries, Sweden and Finland, joined the EU in 1995. This enabled the pro-transparency coalition to advocate the gradual formalisation of access to documents policy, and to successfully lobby for its inclusion in the Amsterdam Treaty. This, in turn, introduced a legislative process that turned the hitherto powerless EP into a new veto-player taking a strong stand in favour of transparency. By the time of the ‘big bang enlargement’ of 2004, which critically decreased the pro-transparency coalition’s voice in the Council, the central rules guaranteeing a wide access right were already in place. Important in this respect, and central throughout, was the role of the Court of Justice which, both at first instance and in appeal cases, took numerous small steps to secure a broad interpretation of the right of access.

The constellation of preferences held by the various actors remained relatively stable. Throughout the years, the pro-transparency coalition advanced a coordinated position in favour of access rules with a wide scope of application characterised by few, narrowly interpreted exceptions. Drawing from a range of democratic, national constitutional, and practical implemental arguments, they addressed the matter of access to documents in an incremental manner. Steps propagated included issues such as the online document register and access to member state inputs and legal advice the Council. This had the effect of proceduralising and expanding the implementation framework of the access rules, particularly in the period after the entry into force of Regulation 1049/01. In the meanwhile, the most vocal among the member states’ transparency-critical majority began to experience the expanding access policy as a threat to some of the central parameters in the Council’s modus operandi. This was particularly notable in those member states’ answers to the Commission 2007 questionnaire in preparation of a recast proposal, as well as in the high number of member states that intervened when in 2011 the Council appealed against the GC’s Access Info Europe ruling.
Along with the pro-transparency coalition’s proportionate decrease in relation to the enlarged Council (from 4 out of 15 in 1995 to 6 out of 28 in 2014) came waning pro-transparency voting power. Although the ‘Gang of Four’, at the time of the EU-15, never formally secured a blocking minority, the shifting position of the UK from 1997, as well as the middle ground taken by member states such as Ireland and Austria, created a sufficient impression that a progressive blocking minority could be found, which would provide impetus for a more far-reaching access law than might otherwise have been the case. A ‘shadow of the vote’ favouring the expansion of transparency disappeared altogether after the 2004 enlargement. ‘Day-to-day’ voting on confirmatory applications had always taken place on the basis of simple majority, meaning that the coalition could never exercise a decisive influence in that regard. A continuous (and, occasionally, obstructive) impact on the access procedure came from the Council secretariat, which handled all replies at the initial stage and drafted replies at the confirmatory stage. Similarly, the legal service vetted all outgoing confirmatory application decisions. The public pressure exercised throughout by pro-transparency NGOs and the pro-transparency member states in the news media, campaigns, and speeches provided a certain countervailing force. This helped to prevent a rolling back of the transparency rules in a European institution that was widely perceived as deeply opaque.

Important exogenous factors fed into the policy debate on access to documents in the Council. The two IGCs of the 1990s which followed each other in quick succession provided important opportunities for respectively catalysing (Maastricht, 1992) and entrenching (Amsterdam, 1997) the progress made in the area of access to documents. The recent accession of Sweden and Finland into the EU, and the change of heart of the new UK government ahead of the 1996-1997 negotiations swept fresh wind through the transparency dossier, which was aided by the new technological possibilities of the internet. Finally, the fact that Council’s access rules actually did spark an (often dissatisfied) response also had an impact. In all but a handful of years, litigants brought the court actions against the Council that allowed for the judicial development of public access. A summary of the findings is shown in Table 6.1.

6.4.2 Outstanding questions
In spite of the considerable amount of knowledge that supports the above account on the development of access to documents in the Council, the account still reveals certain important shortcomings. The policy-tracing exercise of general access to documents trends has its blind spots precisely because of what it is and does: general, and focussed on the development of access to documents as an isolated set of formal rules and practices. The general nature of the account forms an ‘average’ that hides the influence of factors that are specific to only parts of the Council. Access to documents, after all, was largely shaped as a ‘living policy’, in the Council’s various policy-specific formations with transparency as ‘yet
Table 6.1: Institutional factors explaining the development of access to documents in the Council

<table>
<thead>
<tr>
<th>Stable factors</th>
<th>Changing factors</th>
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<tbody>
<tr>
<td><strong>Actors</strong></td>
<td></td>
</tr>
<tr>
<td>- Strong role CFI and ECJ</td>
<td>- Growing role pro-transparency coalition (after 1995)</td>
</tr>
<tr>
<td>- Strong role secretariat and legal service</td>
<td>- Waning role pro-transparency coalition (after 2004)</td>
</tr>
<tr>
<td>- Minority pro-transparency coalition</td>
<td>- Increased role EP (after 1999)</td>
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<tr>
<td><strong>Preferences</strong></td>
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<tr>
<td>- Minority of member states with transparency-friendly national administrative culture, favouring wide scope and few exceptions (after 1991)</td>
<td>- Increasing protest among transparency-critical member states (after 2008)</td>
</tr>
<tr>
<td><strong>Resources</strong></td>
<td></td>
</tr>
<tr>
<td>- Pro-transparency coalition and NGOs: seeking publicity to pressurise Council majority</td>
<td>- Waning role Presidency (after 2006)</td>
</tr>
<tr>
<td>- Secretariat and legal service: initial replies in applications, drafting and vetting confirmatory applications</td>
<td>- Waning pro-transparency voting power (after 2004)</td>
</tr>
<tr>
<td>- String of court cases brought against the Council by access applicants (in all years except for 1996 and 2006-8)</td>
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<tr>
<td><strong>Exogenous factors</strong></td>
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<td>-</td>
<td>- Danish referendum on Maastricht Treaty (1992)</td>
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<td>-</td>
<td>- Member state accessions (1995, 2004)</td>
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<td>-</td>
<td>- Change of government in the UK (1997)</td>
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<td>-</td>
<td>- Emergence of IT (after 1998)</td>
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</table>

another task'. The general level at which conclusion are drawn brings up the question of the precision and accuracy of the findings: has the manner in which access to documents policy was received and in which it was shaped, been similar throughout the entire Council, or do particular Council formations rather respond to divergent development dynamics?

The institutional factors identified explain the overall direction of access to documents and suggest that important policy-specific deviations from the general access to documents development path may indeed exist. For example, the constitutionally proscribed involvement of institutionally outside actors such the EP and the Court of Justice, which the model identifies as transparency-enhancing, is not equal across all policy areas.\textsuperscript{167} Certain areas are moreover characterised by the overt involvement of specific actors or Council bodies that do not feature in the general account. Similarly, the composition, attention and access of non-institutional outsider groups such as NGOs and lobbyists are likely to lead to a varying impact with regard to the issue of access to documents.\textsuperscript{168}

\textsuperscript{167} See Chapters 8 and 9
\textsuperscript{168} See particularly Chapter 7
**Table 6.2: Council access to documents developments: Open questions**

<table>
<thead>
<tr>
<th>Actors</th>
<th>General account</th>
<th>Outstanding questions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>- EP and court identified as transparency-enhancing actors</td>
<td>- Role and mix of institutional outsiders differs per policy area</td>
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<tr>
<td></td>
<td>- Civil society pressure from NGOs and lobbyists</td>
<td>- Access of non-institutional outsiders may be differential</td>
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<tr>
<td>Preferences</td>
<td>- Vocal pro-transparency minority versus diffuse transparency-critical majority</td>
<td>- Not certain that transparency preferences are similar in all policy areas</td>
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<td></td>
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<td>- Salience and awareness of transparency rules may differ across policy areas due to socialisation</td>
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<td></td>
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<td>- Policy-specific preferences may affect organisational structure</td>
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<tr>
<td>Resources</td>
<td>- Influence through Presidency and voting arrangements</td>
<td>- Policy-specific organisational arrangements may affect political and administrative resources</td>
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<td>- Administrative control secretariat and legal service</td>
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<td>Exogenous factors</td>
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Regarding preferences, the emphasis in the general account on the Council does not strongly stress access to non-legislative documents. It focuses more on access to legislative documents, in which most changes appear to have taken place. Certain Council formations nevertheless are characterised by very limited legislative activity. \(^{169}\) Neither is it immediately clear under the existing general account how cross-sectoral differences affect access to documents policy, either directly or indirectly, through diverging policy preferences or organisational arrangements. It can, for example, be imagined that member states’ position on transparency, as well as the attitude towards document classification differs according to policy area. \(^{170}\) Moreover, the general account of ever-increasing transparency only addresses the development of informal norms that interfere with the formal right of access, such as the Coreper arrangements following changes in the formal rules or after certain unfavourable court judgments, in passing. It is entirely unable to account for the informality that emerges from policy-specific socialisation patterns. \(^{171}\) Socialisation and preferred organisational arrangements are likely to affect both rule-awareness and the resources that the various actors inside and outside of the Council have which will enable or constrain an expansive interpretation of the general access rules.

Finally, although the general account identifies general exogenous factors that impacted on the development of access to documents, it leaves the potential impact of other, policy-specific exogenous factors out of the equation. For example, while measures taken in the aftermath of 9/11 may not have directly affected transparency in the sphere of environmental

\(^{169}\) See particularly Chapter 9  
\(^{170}\) See Chapters 7, 8, and 9  
\(^{171}\) See particularly Chapter 8
policy, they may well have had an impact on Council attitudes in the CFSP. Similarly, the Euro crisis that erupted in 2007 is likely to have had a very isolated impact on economic, financial and monetary policy transparency.\footnote{172} An overview of these open questions, which guide the second stage of this study (the case studies), is provided in Table 6.2.\footnote{173}

### 6.5 Conclusion

In this chapter, I provided an overview of the general development of the Council’s access to documents policy, and the institutional factors that best explain this development. The longitudinal analysis revealed an —institutionally rather counter-intuitive—\footnote{174} ‘inexorable rise’ of document-based transparency that spans over two decades. Access to documents increased along various indicators from 1992 onward, and the policy’s advance only slowed down (yet continued) after 2007. I also offered an analysis of the central institutional factors that account for this development. The advance of access to documents is predominantly explained by the large role played by a small but vocal minority of pro-transparency Council member states in conjunction with the transparency-favouring EP. Moreover, the EU courts proved by and large willing to interpret the access to documents rule framework in an expansive manner, an assessment that aligns broadly with the ‘advancing transparency effect’ thesis.\footnote{175} This account however leaves a number of questions open. These relate in to the general nature of the account and its focus on the development of the formal rules and their implementation, which is likely to overlook the preferences and resources of transparency-critical member states with regard to such issues as non-legislative documents and informal decision making, as well as the presence or absence of pivotal actors in specific policy areas. At the same time, the growing counterweight of the transparency-critical Council majority, as well as the adoption of the ‘Solana Decision’ suggest that such anomalies were indeed at play.

These omissions suggest that the congruence of the findings with the ‘advancing transparency effect’ thesis, and a general, “inexorable rise” of document-based transparency put forward in this chapter must be considered tentative and must be further specified in the context of experiences across the Council. Rather than in the Council’s secretariat’s Transparency Unit or the Working Party of Information which spent most time designing the access to documents policy, in large part its interpretation and implementation took place ‘on the ground’, in the Council’s multiple preparatory bodies spread out over its various policy formations. For these bodies, characterised by their own institutional context of actors, preferences and resources, access to documents represents ‘yet another task’, and it is here that ‘living transparency’ must be sought. In the following chapters, I will do just that by comparing the development of access to documents in the Environment Council, the Economic and Financial Council and in the Foreign Affairs Council.

\footnote{172}{See Chapters 8 and 9}
\footnote{173}{Explicit empirical for this second stage were also formulated in Chapter 5, section 4.}
\footnote{174}{Hillebrandt et al. (2014)}
\footnote{175}{Chapter 4, section 1}
Chapter 7
Access to Documents in the Environment Council: The Decline of Corporatism

Indeed, those countries with more progressive environmental policy goals were also more progressive with regard to transparency.1

7.1 Introduction

In this chapter, I consider the case of access to documents in the Environment Council (hereinafter, EnvCo). In the selection of most different cases, the EnvCo was included on the basis of its broad adherence to the ‘community method’ and involvement of a wide array of outside actors. The preponderance of legislative decision making and the presence of multiple external actors, whether inside or outside of the European institutions, leads to the expectation that environmental policy in the Council would be conducive to the development of strong implementation practices and informal norms in support of the general access to documents rules.

The reality of access to documents policy in the EnvCo reveals a more nuanced picture. Firstly, as suggested by the above quote, a certain intrinsic linkage appeared to exist between environmental issues and transparency. This means that from an early stage, access to information was identified by environmental policy makers in the EU and beyond as a sector-specific policy objective. As a consequence, both the EU and its member states, encouraged by environmental advocacy organisations, soon signed up to a far-reaching international UN Convention. Over time, this lex specialis came to form an important aspect of access to EnvCo documents. At the same time, the corporatist structure of environmental decision making meant that the largest environmental groups enjoyed a privileged status on the basis of which relatively wide informal access. This meant that these groups barely used the formal access regime. Secondly, the EnvCo’s relation to access to documents also overlapped largely with the more generally observed Council attitude, meaning that its legislative process increasingly embraced efficiency-enhancing features that tended to undermine the functioning of the access to documents rules. This in turn undermined the corporatist relation between member state governments and privileged actors. This led

1 Respondent #68
environmental groups to the formal access rules while simultaneously it increased the incidence of document leaking. In sum, EnvCo access policy was shaped by an interesting, and changing, interaction between the formal access to documents framework and its implementation on the one hand, and informal norms on the other.

The chapter proceeds as follows. Section 7.2 sketches the institutional context of access to EnvCo documents by describing the most relevant institutional characteristics of EnvCo decision making between 1992 and 2014. The subsequent analysis of the EnvCo’s developing access to documents policy is broken into two time periods, with section 7.3 covering the years before and under the first access to documents decision (Decision 731/93, 1992-2001), and section 7.4 covering the years under the legislative act that replaced it (Regulation 1049/01, December 2001-2014). For each period, a process-tracing analysis is applied to explore which institutional factors best explain the most important developments in access to documents policy within this Council formation. Section 7.5 synthesises the findings by comparing explanatory factors across time, and placing the within-case empirical analysis of developments in the general theoretical framework that was set out in chapter 4. Section 7.6 concludes.

7.2 Institutional context

The Environment Council (EnvCo) has historically emerged as an intrinsic part of the ‘community method’. Its institutional architecture as it is today began to develop in the late 1980s, when decisions concerning the environment were given a separate treaty basis under the Single European Act (SEA). The 1993 Maastricht Treaty extended qualified majority voting (QMV) to most decisions concerning environmental policy. The 1999 Amsterdam Treaty, in turn, extended the EP’s co-decisional powers to all but a few subareas of environmental policy making. By the time the Lisbon Treaty entered into force (2009), the main characteristics of the ‘community method’ were in place, meaning this treaty brought little further innovation in the area of the environment.

The EnvCo’s traditional output has centred on regulation to be applied at the member state level. Particularly in the 1990s, the EnvCo was “a directives factory”. Yet even in recent years, legislative activity has been high. Respondents consistently estimated that they spent between 70-85 per cent of their time on legislation, though the rate of legislative output

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2 The division into two historical periods is made in order to enhance readability and facilitate comparison over time, see also Chapter 5, section 4.
3 I follow Bickerton et al. (2015a), p. 3, in describing the community method by a number of essential characteristics: (1) the Commission’s right to initiate legislation, (2) co-legislative functions for the Council and the EP, and (3) policy implementation by the Commission and/or the member states, with adjudicatory powers for the Court of Justice.
4 IGC (1992c), articles 130(r) and (s); IGC (1997b), articles 174-5; Lenschow (2005), p. 311; Respondents #28, #67
5 Respondents #52, #59, #60; Lenschow 2005, p. 309
6 Respondent #68, also #28, Häge 2008, p. 159
7 Respondents #54, #59, #61

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seems to have slowed down somewhat, and the EnvCo now focuses more on the revision of laws that are already in place.8

Legislative dossiers introduce a specific interinstitutional dynamic. The legislative process begins with a proposal of the Commission, after which the Council and the EP negotiate over possible amendments to this proposal. Over the last decade, such negotiations have begun to regularly occur on the basis of so-called ‘trilogues’, with the Council and the EP negotiating informally, and the Commission acting as a mediator with the right to withdraw the proposal if it considers the negotiated draft too far removed from its original proposal.9 This places the Commission at the centre of the legislative procedure, and it has been claimed that on average, 80 per cent of the final legislative document is already contained in the Commission proposal. Moreover, it is held that aspects of a draft law that disappear during Council negotiations often resurface in the EP.10 The relatively strong position of both the Commission and the EP might lead the Council to present a closed front to these institutions in order to strengthen its negotiating position.

EU environmental policy-makers show a strong preference for evidence-based decision-making.11 Legislation is routinely drafted with the input of standing committees of national experts, and increasingly also on the basis of impact assessments and technical studies.12 As a consequence, many Council members have traditionally been open to the input of a wide variety of stakeholders.13 Moreover, the EnvCo has been outward-looking with respect to international regulatory forums. To this end, one of its two working parties, the Working Party on International Environmental Issues (WPIEI), is entirely devoted to this area, and it was estimated in 2005 that over a third of all the EU’s environmental measures originate in international agreements—a figure that is not likely to have gone down since.14 These characteristics together mean that the EnvCo has traditionally acted in a field of multiple influential actors, both (European) institutional and non-institutional.

Having set out the EnvCo’s developing institutional architecture, I will now turn to transparency developments and their explanation before and after the entry into force of Regulation 1049/01.

7.3 1992-2001: A presumption of informal transparency

During the period before Regulation 1049/01 entered into force, the idea of transparency was already well-integrated into the Environment Council’s decision-making process. Throughout this period, the general framework of Decision 731/93 was applied in manner leading to relatively high levels of disclosure. Furthermore, additional rules on access to

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8 Respondents #52, #59, #67
9 IGC (1997b), article 250(2); now IGC (2007c), article 293(2); Costa et al. (2011), p. 3; Respondent #51
10 Respondents #28, #51
11 Respondent #68
12 Respondents #51, #52, #67
13 Respondent #51, #65
environmental information were in the making that would come to act as complementary lex specialis. At the same time, and in spite of the well-functioning access regime, access in the EnvCo was predominantly achieved through an informal corporatist system. Many member states had consultation structures in place that strengthened or even replaced the formal framework, and which often provided quite extensive privileged access for stakeholder groups such as environmental NGOs (ENGOs).

7.3.1 Environmental policy making: An inclusive regime

Even before the 1992 Maastricht Treaty brought the issue of transparency into the limelight, the members of the Environment Council had already demonstrated an openness towards the idea of information disclosure. Although a positive predisposition towards greater transparency might in the first place be expected among the Council’s most environmentally progressive member states, support clearly went beyond these countries. This is attested by Directive 313/90, adopted in 1990 on the basis of a unanimous decision, which introduced provisions concerning public access to environmental information at the national level. The directive was initiated in the late 1980s, when Bram van der Lek MEP presented a draft legislative act. The Commission subsequently took on his initiative, which led to the adoption by the Council of Directive 313/90. Both Van der Lek and his political assistant John Hontelez had close ties with the Dutch environmental movement. Hontelez would later become the Secretary-General of the European Environmental Bureau (EEB), an ENGO. National ENGOs subsequently monitored national transposition and implementation of the directive.

To a remarkable extent, the framing and wording of Directive 313/90 foreshadowed the content of subsequent Council-wide access to documents rules, beginning with Decision 731/93 which was adopted almost three and a half years later in December 1993. For example, similar to Directive 313/90’s definition of the concept of ‘environmental information’ as “any available information in written, visual, aural or data-base form” on the state of various environmental indicators, as well as activities that might adversely or positively affect these indicators (article 2), Decision 731/93 also defined a ‘Council document’ relatively widely as “any written text, whatever its medium, containing existing data and held by the Council” (article 1).

Although the adoption of an access to environmental information law in 1990 illustrates member states’ early awareness of the issue of transparency in the EnvCo, the law was not applicable at the European level, and consequently Decision 731/93 became the first legal framework for access to EnvCo documents. It was not until June 1998 that additional lex specialis emerged that would come to bind the European institutions including the Council, in the form of the United Nations Convention on access to information, public participation.

15 Respondent #67
16 Bugdahn (2008), p. 597
17 Respondent #66
18 Respondent #28
19 Respondent #28; compare Council (1990) and Council (1993b), see also Appendix 5
Access to Documents in the Environment Council

and access to justice in environmental matters (known as the ‘Aarhus Convention’). This convention originated in the early 1990s, when the issue of public access to environmental information was first raised in the UN’s 1992 Rio Declaration on Environment and Development. Thereafter, the United Nations Economic Commission for Europe (UN ECE) established a working group to explore the possibilities and eventually, to begin the convention’s negotiation. The EU’s member states participated both separately in their own capacity and united in the EnvCo. The latter delegated the Commission to participate on behalf of the EU.20

The NGO community, which traditionally occupied a privileged position in environmental policy, enjoyed strong leverage in the Aarhus negotiations. Exceptionally, a group of environmental NGOs (ENGOS) were even allowed to participate. “Normally they are not present at the negotiations, normally they can talk to the ministers and politicians before the negotiations. But in the context of the Aarhus conventions they were there”.21 The institutional setting of the UN felt to some as a ‘back door’ through which they could further exert their influence:

My experience with negotiating the Aarhus conventions was that it was thanks to having another forum […] that we were able to go a lot further than we would otherwise have been able to go. Or faster anyway. Maybe it would have happened also, but it would have taken a lot longer.22

The important role of the ENGOs notwithstanding, the scope and exception grounds laid down in the Aarhus Convention were extremely similar to those in Directive 313/90.23 The apparent strength of the ENGO community therefore lay particularly in ensuring that these previously established national parameters were maintained at the Convention level.

In the general account of access to documents developments an important role was ascribed to parliaments both European and national. In the Aarhus negotiations however, their role was not particularly large.24 This was due to a lack of formal involvement, interest, expertise, or a mixture of these factors. The involvement of the EP grew after the Amsterdam Treaty gave it full co-legislative powers in the area of environmental policy, but remained limited even for some time thereafter.25 National parliamentary oversight depended on the know-how that MPs with former knowledge at the European level brought with them. The Dutch parliament forms a case in point. During this time, its members began to demand wider public and privileged access to documents, demanding to be informed about the preparatory phase ahead of legislative procedures. It debated media-sensitive environmental issues behind closed doors.26

20 Respondent #28, #68; UN (1992), principle 10
21 Respondent #67, also Wates (2005), p. 10
22 Respondent #28, also #66, #67
23 See Appendix 5
24 Respondents #28, #66
25 Respondent #67
26 Respondent #68
The timing of the negotiation and conclusion of the Aarhus Convention coincided with the 1996 EU Intergovernmental Conference where member states were discussing the question of access to documents in general.\(^\text{27}\) When signing the Convention, the EU therefore attached a statement of interpretation in anticipation of the access to documents regulation foreseen by the Amsterdam Treaty (later adopted as Regulation 1049/01).\(^\text{28}\) This had the effect of connecting the general issue of transparency with that of access to environmental information, sparking off an arduous debate about the proper way to give effect to the EU’s obligations under the Aarhus Convention.\(^\text{29}\) One ENGO representative recalls their quest to effect a spillover from the Aarhus rules to the general access regulation:

> Why should an environmental request be treated differently than [...] consumer information [...]? So that was our argument: these are good rules for us but they should be general.\(^\text{30}\)

The Commission however took the initiative of separating both legislative dossiers, a step which was reluctantly accepted by the ENGO community:

> [I]t’s a war, and there are many battles. The first battle was to get the general rules as strong as possible. What was next, the battle over the regulation on Aarhus [...] Too bad for all those other policy areas.\(^\text{31}\)

The spillover effect of the Aarhus Convention into the general transparency therefore remained limited. This becomes apparent when the exception grounds of both frameworks are compared.\(^\text{32}\) While the exceptions applicable to environmental information were largely mimicked over time, concerted efforts among ENGOs to arrange their general applicability through Regulation 1049/01 were mostly unsuccessful. The comparatively wide scope of the European environmental access legislation\(^\text{33}\) was mainly due to the limited leeway that the EU had after signing the Aarhus Convention:

> When the EU began to develop a regime for itself on access to documents, they had these existing [environmental] legal instruments as blueprints or a model. But in [the area of environmental policy] it went beyond that. The Commission signed the Aarhus convention. They were signed up!\(^\text{34}\)

The Aarhus Convention clearly had the ambition of becoming a strong international legal regime and consequently, signing up to it was more than an empty political act.\(^\text{35}\) The

\(^{27}\) Respondents #67, #68

\(^{28}\) Council (2000d), see also section 7.4.1

\(^{29}\) Respondents #11, 68; Council (2000d)

\(^{30}\) Respondent #28

\(^{31}\) Respondent #28

\(^{32}\) See Appendix 5

\(^{33}\) See also section 7.4.1 below

\(^{34}\) Respondent #28

\(^{35}\) Oliver (2013), p. 1433
signatory parties justified it with fundamental rights argumentation as necessary “[i]n order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being” (article 1). It divided environmental information into three rather broad categories: (a) the state of elements of the environment, (b) factors likely to affect these elements and analyses of these factors, and (c) the state of human health inasmuch as it may be affected by the former two categories (article 2(3)).

Comparing the development of access rules from Directive 313/90 through Decision 731/93 to the Aarhus Convention, a clear similarity in some of the key features of these regimes may be discerned. Each of the three legal texts was only applicable to already existing information (or documents in the case of Decision 731/93), did not require applicants to motivate their request, and foresaw in an (administrative or judicial) appeal procedure. Furthermore, all laws contained a separate article listing exceptions to the right of access, and these articles converged on all but two exception grounds. The exception grounds in the Aarhus Convention closely mimicked those under Directive 313/90, in some instances to the point of being copied verbatim. Although certain exception grounds in the Aarhus Convention were markedly more restrictive than those under the earlier directive, the wider disclosure obligations resulting from this related exclusively to information held by third (private) parties, rather than the signatories themselves. For example, the Aarhus Convention introduced mandatory disclosure of industry emissions and restricted the right to privacy of the individual to cases “where such confidentiality is provided for in national [or European Community] law” (article 4(4) (d) and (f)).

Overall, the Aarhus Convention thus applied a standard of transparency to the EU rather similar to the one Directive 313/90 had previously applied to the member states. However as the Convention needed to be ratified and transposed in order to become effective (article 19(1)), it was not until 2003 and 2006 that EU laws were adopted to align respectively member state and EU practices with the Convention obligations (Directive 4/03 and Regulation 1367/06). Consequently, throughout the pre-Regulation 1049/01 period, access to Environment Council documents was only covered by Decision 731/01.

### 7.3.2 The prevalence of informal transparency

From the outset, the access to documents regime in the EnvCo appears to have been carried out faithfully. This is in large part due to the fact informal behaviour designed to weaken the access rules in place simply appears not to have been very prevalent in the EnvCo:

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36 See Appendix 5
37 See section 7.4 below
38 The internal rules on classification also applied horizontally, although they appear to have had a very limited impact. See section 7.3.2 below and Chapter 6, section 2.3 for a discussion of the development of EU classification rules.
If they [would] want to get around a rule, there is always a way to do it. It’s not my experience however that they’ve made a great project out of doing so, I really don’t think so. […] I actually believe that they play by the rules, in large part.\textsuperscript{39}

At the same time, when considering the disclosure regime, it appears that reliance on the formal access structures remained underutilised. Requests for documents seldom made it to the administrative appeal level. Indeed, for the first period between 1994 and December 2001, only a disproportionately low number of 4 confirmatory applications were identified as related to EnvCo decision making, amounting to less than 2 per cent of the total number of confirmatory applications in this period.\textsuperscript{40} It is likely due to this low number of appeals that in the pre-Regulation 1049/01 period,\textsuperscript{41} no access to environmental documents cases were brought against the Council.\textsuperscript{42} Proactive disclosure fared somewhat better. During the first years of the access register (1999 through 2001), the amount of registered documents went up slightly, accompanied by a strong increase in direct access to documents (from 43.9 per cent in 1999 to 73.1 per cent in 2001). These developments formed part of an upward proactive disclosure trend that continued in the years thereafter (see Appendix 4). In terms of documents automatically disclosed, the EnvCo closely followed Decision 23/2000 on proactive disclosure by disclosing only agendas and minutes of meetings at the ministerial level as well as Coreper I agendas (which included environmental dossiers), but not those of the lower working party level.\textsuperscript{43} Available agendas were often rather summary:

When you look at […] some of these meetings, point one was ‘agree on the minutes of the previous meeting’, point two, ‘continue the negotiations’. The actual items on the agenda [gave] you no information.\textsuperscript{44}

Nevertheless, a consistent practice from the start was to cite numbers of documents underlying agenda items. The role played in practice by classified documents is somewhat harder to trace; however, only a very small number of such documents were listed on the register. Judging by the descriptor, all of these documents related to negotiations in international forums. The limited occurrence of document classification was confirmed by a former ENGO lobbyist: “By the time you get through the regime of exceptions you don’t necessarily need to go to secrecy/classification”.\textsuperscript{45}

\textsuperscript{39} Respondent #28
\textsuperscript{40} See Appendix 4
\textsuperscript{41} Before applicants could/can bring a court case against an access refusal, they were/are required to file a confirmatory application, see Council (1993b), article 7(3) and EP and Council (2001b), article 8(1) and (3).
\textsuperscript{42} The large majority of access to environmental documents cases brought between 1994 and 2014 involved the Commission rather than the Council. Moreover, with one exception (case T-105/95, \textit{WWF v Commission}), all of these cases were brought after the entry into force of Regulation 1049/01.
\textsuperscript{43} Council (1999c); see also chapter 6, section 2.2
\textsuperscript{44} Respondent #28
\textsuperscript{45} Respondent #28
A situation thus existed by which a relatively well-functioning formal access regime remained largely abandoned by potential access applicants. This seeming paradox is best explained by the corporatist negotiation structure along national lines that underpinned EnvCo decision making, in which national-level ENGOs were well-represented. Environmental policy making during the 1990s was characterised by a divide in perceived salience among two minorities of member states. On the one hand, there were the north-western member states where the environment was politically important, and where the issue had already been on the agenda for some time. On the other, there were the southern member states where the environment had low salience. Throughout the 1990s, the progressive EnvCo members formed a comfortable blocking minority, holding 51.8 per cent of the votes required for a qualified majority, and were largely able to set the decisional agenda.46 “[T]he initiative did not come from the lowest common denominator but from the more progressive countries”.47 The progressive bloc was strengthened further by the accession in 1995 of Sweden and Finland, increasing its share of the vote to 56.5 per cent of a qualified majority.48

In the environmentally progressive countries, national environmental NGOs (ENGOs) were well-established and relatively influential. From an early point, these ENGOs responded constructively to the Europeanisation of environmental policy, often by establishing a close working relationship with their national governments.49 While these ENGOs strongly advocated wider access to environmental information, they themselves largely relied on the informal alternative to the formal access framework. On the one hand, this arrangement was built upon a desire to include environmental interests in a corporatist system of policy formation:

[T]he environment does not have a voice of its own. […] That was more or less the reason […] why the norm [of consultation] weighed more heavily in environmental policy.50

On the other hand, interactions between the progressive member states and the environmental community were strengthened by an awareness of overlapping preferences:

People in the departments sometimes realise that we do incredibly useful work, we have an eye for detail, and we can publicly say things that they would like to, but cannot say.51

The progressive Council members routinely formed their national environmental policy stance through an extensive system of consultation that included various ministries, as well as ENGOs and stakeholders from the business community. Various member states designated a central ENGO with the preferential status of ‘civil society coordinator’, and supplied them
with subsidies and policy information to this end.\textsuperscript{52} Information provision mainly occurred through the sharing of meeting summaries drafted by the member states. Such summaries would generally be accurate, as “afterwards all would be published [or leaked] anyway, so one could not play games with a summary”.\textsuperscript{53} In cases where the conferral of document-based information was too sensitive, such as in international negotiations, ENGOs and affected companies would frequently be briefed and consulted orally.\textsuperscript{54}

Occasionally, member states also simply shared Council documents with stakeholders. Although documents frequently already carried the label ‘limite’, the understanding that such documents were not be shared with outsiders was mainly an implicit agreement not premised on any ‘formal’ internal rule.\textsuperscript{55} “[Because] there were no rules yet, the member states behaved a bit as they pleased. […] We] had a small tradition of not making a big fuss about that, we already shared a lot”.\textsuperscript{56} Others shared whatever was not labelled ‘limite’. Although the Commission occasionally requested Council members not to share preparatory documents, the fact that it did not apply a consistent policy itself endorsed a relaxed attitude towards document sharing:\textsuperscript{57}

So when we were given a document by the Commission, I would not go and ask them: am I allowed to share this or not?\textsuperscript{58}

National ENGOs were sometimes offered the choice of participating as a privileged partner in national policy formation, or at the European level without such privilege. Particularly where developments in the Council were concerned, the chance of obtaining access to documents at the national level was deemed much higher.\textsuperscript{59} North-western European member states would thus come to the negotiating table with a position that struck the balance between the various interests of their national stakeholders, and after meetings, they debriefed these stakeholders.\textsuperscript{50} In the southern member states, this system was far less developed. There, representatives seldom received instructions, which however allowed them to silently accept ‘unpopular but necessary’ Council policies without having to defend themselves.\textsuperscript{61}

Some of the corporatist arrangements of national governments were also introduced at the European level. For example, pending the legal implementation of the Aarhus Convention, the 1997 Dutch Presidency invited the EEB’s Secretary-General to participate in its half-yearly informal Environment Council as a representative of the environmental

\textsuperscript{52} Respondents #66, #67, #68
\textsuperscript{53} Respondent #68
\textsuperscript{54} Respondent #68
\textsuperscript{55} See also Chapter 6, section 3.1
\textsuperscript{56} Respondent #68
\textsuperscript{57} Respondents #66, #67, #68
\textsuperscript{58} Respondent #68
\textsuperscript{59} Respondents #28; #68
\textsuperscript{60} Respondent #67
\textsuperscript{61} Respondents #66, #68
movement and the only actor from outside of the EU institutions. This unusual step was taken with the high-level approval of the Dutch environment minister and the responsible Commissioner. The arrangement was thereafter maintained, providing the EEB with a unique venue and direct access to the various member states’ environment ministers whom, until the mid-2000s, were often themselves involved in the negotiation of legislative details.

However, the corporatist system also came at a price. External parties at the receiving end were at the mercy of the national governments which exercised full discretion over the timing and extent of document disclosures, a position that these governments used strategically. Moreover, information would generally be partially or orally presented, or paraphrased in summary documents:

My recollection was that we would ask for documents and if it was also of interest to that particular member state to have us be well-informed, then they would share the document, or the idea. If not, not.

Furthermore, what documents external parties received were provided on a privileged basis, with the understanding that they should not be shared widely. In spite of these limitations, the formal access procedure could not compete with either the extent or the timing of information conveyed through their informal and privileged relationships. Moreover, ENGOs by and large respected the government’s claim to a ‘space to think’ as a ‘part of the game’.

Finally the formal access regime was also considered by some to suffer from the corporatist system. What was seen by some as a complementary norm of document sharing, was viewed by others as a competing norm of leaking. The distinguishing line between sharing and leaking remained ambiguous. While one respondent argued that leaking was always a present factor, others denied its prevalence, and even relevance:

You can leak a document any day of the week, regardless of what the rules are.

[During] the 1990s […] if you were generally in favour of proposals, leaking was not an instrument at all.

The underlying norm rather seemed to be a desire for strategic disclosure to a limited audience, with a purpose of either advancing a specific position in an ongoing decision-making procedure:

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62 Respondents #66, #68  
63 Respondent #68  
64 Respondents #66, #67  
65 Respondent #28  
66 Respondents #66, #68  
67 Respondents #66, #68  
68 Respondent #28  
69 Respondent #28  
70 Respondent #68
[When I would see that] a blocking minority was slowly emerging, [...] I had to activate the environmental movement. But in such an instance I wouldn’t go leak to the press – I would forward it to [national environmental NGO].

In summary, during the period before Regulation 1049/01, decision making in the EnvCo was characterised by a high degree of quasi-informal transparency between mostly nationally based ENGOs and separate Council members. This system was highly uneven, with better organised consultation networks in the environmentally more progressive north-western member states and was based on at least a minimal sense of mutual trust and shared preferences. Both progressive governments and ENGOs held a generally positive attitude towards EU environmental policy making, and agreed on the need for greater transparency in this area. This working consensus was particularly high during the ‘golden years’: between 1995, when then progressive bloc was at its largest, and until briefly after 1999, a period in which ENGOs were relatively well-informed and influential. Even as the Environment Council showed itself to be relatively receptive to the further development of a comprehensive formal regime of access to information, the Council and particularly its individual members still tended to provide regular access through a corporatist system of information dissemination. Rather than granting access through the formal access procedure, most transparency thus occurred through informal and privileged channels of communication. Both developments are shown in Table 7.1.


<table>
<thead>
<tr>
<th>Development</th>
<th>Formal rules</th>
<th>Implementation</th>
<th>Informal norms</th>
</tr>
</thead>
<tbody>
<tr>
<td>From 1994, a high and increasing level of transparency</td>
<td>Access to documents on basis of access Decision 731/93, with further expansive lex specialis in the making (Aarhus Convention)</td>
<td>From 1994: high (partial) access rates in confirmatory applications. From 1999: Steadily improving proactive disclosure practice with increases both in real and relative terms</td>
<td>High willingness to inform non-institutional stakeholders</td>
</tr>
<tr>
<td>Relative abandonment of the formal access to documents framework in favour of informal access</td>
<td>No court cases against the Environment Council</td>
<td>Low request rates both at initial and confirmatory stage</td>
<td>Informal norm of sharing information about legislative decision making with selected stakeholders, rather than leaking to the public at large</td>
</tr>
</tbody>
</table>

71 Respondent #68
72 Respondents #66, #68

132
7.4. 2002–2014: Efficiency-driven decision making

After Regulation 1049/01 entered into force, the formal access framework became more developed. The adoption of Regulation 1376/06 in 2006 meant that the Aarhus Convention was now implemented in EU law. The formal route to access also became more frequently used. At the same time, the Council sought to regulate document sharing by formalising its rules concerning the protection of professional secrecy, leading to an increase in the incidence of document leaking. Both trends were underpinned by the proliferation of new actors in and around the Council which undermined personal, trust-based information relations and increased incentives to strategically leak documents to the press. As a consequence, the Commission and Parliament became increasingly attractive venues for ENGOs seeking formal or informal access.

7.4.1 Increasing reliance on the formal access route

In the 1990s, a large part of environmental decision making had centred around legislation; this remained the case after Regulation 1049/01 entered into force.\(^73\) The Council’s modus operandi in this area also remained largely similar to the 1990s: attachés based in Brussels delegations represented their member state’s position in WPE negotiations, with the Presidency taking up the role of the ‘neutral facilitator’.\(^74\) The degree to which attachés were bound by instructions from their capital city would vary:

[Some] have very strict positions that are approved by the [national] parliament, like Sweden. Italian attaches just go ahead, […] their culture is to do their thing, irrespective of what government happens to be in office.\(^75\)

However, on the whole, the national policy position would generally be determined by experts in the responsible ministry, with the delegation receiving instructions, and not being in a position to endorse an outcome without consultation with the capital city.\(^76\) The corporatist method thus remained prevalent for national policy formation:\(^77\)

What each individual government will do, […] it will filter the comment into a single [position]. That means the big multinationals, that means the green NGOs, that means the different government departments, it means the citizens, it means […] all walk of life – the small business, the big business. […] And they do that 28 times. 27, because the Presidency doesn’t really do that a lot.\(^78\)

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\(^73\) Häge (2008), p. 159
\(^74\) Respondents #58, #59, #60
\(^75\) Respondent #65
\(^76\) Respondents #51, #52, #58
\(^77\) Respondent #11, #54, #55, #67
\(^78\) Respondent #55
[T]hey know, and I know, that [...] our position is made in [capital city], not here. They needn't convince me, they need to convince our experts at the ministries.  

Throughout the legislative negotiation, many delegations continued to keep interested parties and stakeholders informed about ongoing Council discussions. The idea would be to find additional ways of communicating one’s position and the state of play in the decision-making process while avoiding breaches of the formal rules of professional secrecy, for example through sharing ‘limite’ document.  

“They know, and I know, that our position is made in [capital city], not here. They needn’t convince me, they need to convince our experts at the ministries.”  

The idea would be to find additional ways of communicating one’s position and the state of play in the decision-making process while avoiding breaches of the formal rules of professional secrecy, for example through sharing ‘limite’ document. “[This is] something we know and something we accept. It’s no secret. It’s nothing about war and peace, [it’s] environmental issues. But I think it makes the process more transparent for everyone”. The half-yearly informal reception that was instituted in 1997 continued during the years after, although it became “a quite boring event, as only few ministers, mostly civil servants participate in the discussions”.

Likeminded member states, such as the Nordics, British, Dutch and Germans, would regularly compare and coordinate their positions. In other instances member states would act in concert, in legislative negotiations or elsewhere. Especially after the 2004 enlargement, loose policy groups began to form, presumably to improve the organisation of policy formation. Nevertheless, collective action remained limited to occasional policy alignment and the publication of broad policy papers, leaving member states as the EnvCo’s central actors. Moreover, the progressive minority countries, now absorbed by the Green Growth Group, became less pronounced in their advocacy of an ambitious environmental agenda. In their national consultation policies, they used specific ‘rules of engagement’ to avoid antagonising other Council members. For example, they would prefer briefing outsiders orally in sufficiently open-ended terms:

You would not say, ‘I say this, they say that’. [...] Maybe, that there are other member states with a different opinion. Something like that.

If somebody asks or if I need to tell about what’s happening in the negotiations, then I rather speak to them [...] in a less detailed way. I’ll describe what’s happening, what is the thrust of the negotiations.

In spite of these shifts in Council coalitions, the implementation of the Aarhus Convention was seen through as planned, illustrating the broad commitment to this instrument among

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79 Respondent #52  
80 Respondents #54, #61  
81 Respondent #52  
82 Respondent #65  
83 Respondents #52, #58, #61  
84 See Appendix 6  
85 Respondents #11, #53, #59, #60, #67  
86 Respondent #66  
87 Respondent #61  
88 Respondent #54
the member states. In 2006, this resulted in the adoption of Regulation 1367/06 on the provisions of the Aarhus Convention (known for short as the ‘Aarhus Regulation’). The new lex specialis impacted considerably on the general right of access to documents, and was described as “the only act generally modifying the application of Regulation 1049/2001 over a broad policy field, and for all institutions and bodies of the European Union”. Regulation 1367/06 is a hybrid act in the sense that while it does contain an operationalisation of its own scope (setting out in detail what ‘environmental information’ encompasses), it applies the access procedure set out in Regulation 1049/01. This arrangement has its origin in the legislative history of the two access regulations. When the Aarhus Convention was signed, the European Community attached a statement of interpretation in which it held that:

[T]he Community […] declares that the Community Institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention.

It has been argued that this annexed statement, together with Regulation 1049/2001 article 2(6) (a no-prejudice clause for parallel international transparency obligations), should “suffice to ensure conformity of Regulation 1049/2001 with the requirements of the Aarhus Convention”. However, for two reasons, further operationalisation of the rights granted by the Aarhus Convention formed more than just a symbolic act adding no further legal substance.

First, the Aarhus Convention required the signatory parties to ratify its provisions by implementing them, which Regulation 1049/2001 only does partially. This has had important reverberations for the Aarhus Regulation’s legal scope. The Aarhus Convention’s scope of application includes all institutions and bodies, which is wider than the then legal basis for Regulation 1049/01, article 255, which only covered access to the three main institutions. The EU began to address this issue in 2007, but has not fully resolved it until today. In terms of material scope, the Convention’s definition of ‘environmental information’ goes beyond that of ‘documents’ under Regulation 1049/01. This is largely due to its theme-oriented, rather than institution-oriented focus (i.e., documents containing relevant

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89 UN ECE (1998), article 3(1); Respondent #67
90 EP and Council (2006b)
91 Driessen (2008), p. 162, see also Respondent #67
92 EP and Council (2006), article 2(d)
93 Council (2006d)
94 Driessen (2008), p. 163
95 Hedemann-Robins (2006), pp. 401-2
96 Council (2005), p. 8. With the 2007 Lisbon Treaty (IGC (2007c), article 15(3)), the public’s right of access to documents was broadened to align with the Aarhus Convention. However, the EU’s formal compliance with this treaty article depends on the ongoing revision of the legal act that operationalises it: Regulation 1049/01. See also Chapter 6, section 3.2
parameters related to the environment instead of documents held by the Council). As one respondent explained:

It is framed very broadly. [...] It's not just about how many particles are in the air, but also: what does the government do about it? Do you have plans, and what will those plans achieve? And how realistic is that estimate, how much money will go into it, and how strong are the measures? All those things fall under [the Aarhus Convention].

To ensure the EU’s active compliance with its duty under the Aarhus Convention, Regulation 1367/06 therefore included a near-verbatim copy of the former’s definition of environmental information and expanded it with the inclusion of information on “emissions, discharges and other releases into the environment”, “waste, including radioactive waste”, or “the contamination of the food chain”. Furthermore, it went beyond the criteria of the Aarhus Convention by including a right of access to legislative documents.

A second reason why Regulation 1049/01 cannot cover the EU’s obligations under the Aarhus Convention is that its exception grounds to the right of access do not appear to meet the standards of review set out in the Convention. Notwithstanding the relative similarity between the exception grounds under both legal regimes, this creates an ongoing legal problem that the European legislator has failed to address. The Aarhus Convention requires that signatory parties apply its exceptions as de minimis standards, restrictively, and taking into account the public interest (e.g. article 3(5) and 4(4). This conflicts with article 4(1) of Regulation 1049/01 which foresees in a number of exceptions that exclude a public interest test. Moreover, some of these exceptions, such as “military matters”, “the financial, monetary or economic policy of the Community or a Member State” (4(1)(a), respectively second and fourth indent), and legal advice (article 4(2)) are not included in the Aarhus Convention. In other cases, such as in relation to personal data (article 4(1)(b)) and inspections, investigations and audits (article 4(2), the exceptions under Regulation 1049/01 are more broadly formulated than the Aarhus Convention appears to allow for.

The Aarhus Regulation also enumerates a number of categories of environment information “to be made available and disseminated” (article 4(2)), in a manner that is “up-to-

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97 At 154 words, the definition offered by the Aarhus Convention is also considerably more detailed than that in Regulation 1049/01 (41 words). Compare UN ECE (1998), article 2(3) and EP and Council (2001b), article 3(a).
98 Respondent #65
99 Oliver (2013), pp. 1434-5; Berthier and Krämer (2014), p. 15. It may be noted here that these additions do not widen the public’s access to documents of EU bodies, but rather refer to private or autonomous organisations or industries that are agents of pollution.
100 The Aarhus Convention explicitly excluded this possibility, see UN ECE (1998), article 2(2)(d), also Oliver (2013), p. 1440.
101 Berthier and Krämer (2014), p. 17-8
102 Oliver (2013), p. 1434
103 Berthier and Krämer (2014), p. 20
date, accurate and comparable” (article 5(2)). However, like Regulation 1049/01, it stops short of requiring the Council to *produce* specific documents.\(^\text{104}\)

As the legal avenues for gaining access to environmental access continued to expand, so did proactive disclosure of EnvCo documents. Between 2002 and 2014, the number of annually registered documents more than doubled. Meanwhile, the access rate of these documents remained above the 80 per cent mark in all but one year, and even above 90 per cent in the peak years between 2005 and 2008.\(^\text{105}\) This was reflected in the quality of the register as a source of information. For example, a clear increase was noted in the number of disclosed Presidency proposals in the area of environmental policy (8 in 1999; 12 in 2002; 74 in 2014). These developments occurred as the ENGO community began to show an increasing presence at the European level from around the turn of the century. For example, in 2001, the eight largest ENGOs presented themselves as the Green 8 (G8 for short, G10 as of 2005),\(^\text{106}\) while in 2008 ClientEarth, an NGO specialised in environmental law, was founded. Both groups presented themselves as strong proponents of environmental transparency; ClientEarth has set up the EU Aarhus Centre to this end.\(^\text{107}\)

Beyond direct and indirect pressuring, ENGOs also increasingly sought to monitor and challenge the access regime.\(^\text{108}\) The EEB, for example, filed several requests for public access to documents to encourage an attitude of openness among the institutions and familiarity with the access framework among its own staff.\(^\text{109}\) Access to documents through the formal regime only really caught their attention after the Aarhus Regulation was concluded:

> We were used to seeking to obtain documents through informal channels. Simply using the law is something that we have only started doing over the past five, seven years.\(^\text{110}\)

The growing reliance on the access procedure was notable both in the number of initial and confirmatory applications for documents. The latter doubled from an average of 0.5 per year between 1994-2001 to 1 per year between 2002-2014, although this figure still remained below the Council average of 2.9. However, not once were mandatory exception grounds invoked, while all appeals led to either full (40 per cent) or partial (60 per cent) access to the

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\(^\text{104}\) Hedemann-Robins (2006), p. 403. Under Regulation 1367/06, the only obligation to produce specific documents is laid down in article 4(4). This provisions requires the Commission to produce a report on the state of the environment “at regular intervals not exceeding four years”. Regulation 1049/01 contains no concrete obligation to produce documents. Its article 12(2) stipulates that “legislative documents” should, subject to exceptions and classification, be made directly accessible, without setting minimum standards on which categories of documents this includes. The court has argued this point slightly more expansively, though equally evasively, in *WWF EPP v Council*, see Chapter 9, section 4.1.

\(^\text{105}\) See Appendix 4

\(^\text{106}\) Respondent #65, #67

\(^\text{107}\) G10 (2015); Respondent #11

\(^\text{108}\) Respondents #11, #60, #67

\(^\text{109}\) Respondents #65, #66

\(^\text{110}\) Respondent #65, also #68
requested document, a considerably more transparent track record than the Council average (mandatory grounds in 52.7 per cent and full or partial access in 59 of cases).

Even as reliance on the formal access route to environmental documents increased, the case law continued to have a negligible effect on access to EnvCo documents. After the entry into force of Regulation 1049/01, the access to environmental documents case law to which the Council was a party remained limited to only one case.\(^\text{111}\) In *WWF EPP v Council*,\(^\text{112}\) an ENGO unsuccessfully sought to broaden the reach of access to environmental policy documents by arguing that the Aarhus Convention also applied to documents it had requested from the Art. 133 Committee (a body formally falling within the Foreign Affairs Council’s decision making structure).\(^\text{113}\) These documents concerned talks between the EU and certain developing countries dealing inter alia with steps to “enhance mutual support between environment and development”.\(^\text{114}\) WWF argued that:

> The right of access to documents, construed as a right of access to information, is particularly relevant in the field of protection of the environment under the Aarhus Convention […], which was signed by the Community.\(^\text{115}\)

The Court however did not address the issue, as the Aarhus Convention was not yet in force at the time of the access request.\(^\text{116}\)

### 7.4.2 Tightening control, increasing breaches

Many of the informal norms that occurred during the pre-Regulation 1049/01 period persisted in the years thereafter. However, due to a changing institutional situation in EnvCo decision making, increasing efforts were made to constrain them. As a result, a tug-of-war emerged between the officially sanctioned maintenance of professional secrecy on the one hand, and extremely frequent leaking on the other, while external stakeholders increasingly resorted to other European institutions to seek access to information and decision making.

After the 2004 EU enlargement, which vastly increased the number of voting actors in the Council, and introduced several eastern European member states with different policy preferences and less strongly developed cordial relations with the environmental community, the Council sought to revise its informal norm of privileged document-sharing, particularly with regard to documents labelled ‘limite’.\(^\text{117}\) In accordance with the new internal guidelines, ‘limite’ documents were now formally not to be shared with “any other person, the media, or

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\(^\text{111}\) While a sizeable case law did develop around Regulation 1367/06, the rest of these cases were all brought against the Commission, with no direct consequences for access to Council documents. Cf. Berthier and Krämer (2014)


\(^\text{113}\) See Chapter 9, section for a full discussion of this case

\(^\text{114}\) *WWF EPP*, para 11

\(^\text{115}\) *WWF EPP*, para 67

\(^\text{116}\) *WWF EPP*, para 79

\(^\text{117}\) See also Chapter 6, section 3.1
the general public without authorisation”. Although this development was horizontal, in the sense that it applied to all policy areas of the Council, it clearly affected access in the EnvCo’s, given its traditionally extensive reliance on ‘limite’ documents. One respondent, for example, estimated as a rule of thumb that “all documents are limite”, while another claimed that the secretariat would not routinely disclose them at any point, during or after the decision-making procedure.

The Council also took other measures to prevent unwarranted disclosure. For example, where the communication of decision-making documents was deemed too sensitive, such as during climate conferences where the member states mandated the Council Presidency to speak on their behalf, draft positions would not be circulated, but rather be projected on the wall using a beamer. In certain legislative dossiers, draft amendments proposed by the Presidency would also be disseminated in an informal manner without being registered. Another important factor in which the transparency of legislative procedures would be delimited is through the trilogue meetings. Council presidencies, seeking tangible successes, traditionally tried to maximise their legislative output. In order to guarantee continued efficiency within an increasingly complex negotiating setting, the Council and the EP began to regularly resort to closed-circuit trilogue negotiations between the Council, represented by the acting Presidency at Coreper level, and the EP, represented by a rapporteur. This is indicated by the steady increase in the number of legislative acts adopted at first reading. Around the turn of the century, the figure stood at 17 per cent; by 2009, it had gone up to 80 per cent. While this trend applied across the Council, it has had clear effects on the public availability of EnvCo documents as well.

Under the EnvCo’s trilogue procedure, the Presidency would negotiate with the EP on behalf of the Council, on the basis of a mandate, determined by the deputy ambassadors in Coreper I, that was updated ahead of each round of negotiations. In order to preserve the unity of the Council position, these mandates were labelled ‘limite’ to restrict their circulation.

The Council was always very afraid that the Parliament might find out how it worked, they were much more worried about that than about the NGOs.

The trilogue dynamic has meant that the member state capitals have become less directly involved in the setting of the mandate: national experts are not allowed in the Coreper

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118 Council (2006), points 2 and 3
119 See Chapter 6, section 3.1
120 Respondents #61, #55
121 Respondent #65
122 Respondent #58
123 Respondent #67; Häge (2008), p. 20
124 Respondent #67, Costa et al. (2011), p. 20
125 Respondent #28
126 Respondents #52, #61
127 Respondent #66
meeting, and ministers are less informed of the details of the Council compromise. It has also led to an increasingly disciplined informal decision making structure. Presidencies, searching for a compromise that carries broad approval, would regularly collect input from the member states while avoiding the issuance of formal intermediate papers. The Council would only adopt a formal common position on the Commission proposal when trilogue negotiations fail. This streamlined procedure, including the increased involvement of the Coreper, made it more difficult for stakeholders to gain informal access to EnvCo documents.

The Council’s clampdown on the informal sharing of documents was considered by member states as the norm in Council decision making and therefore never came up as a subject of discussion. Most respondents representing member states, moreover, argued that they would not share ‘limite’ documents outside of their national administration. However, rather than challenge the tightened culture of professional secrecy, certain member states simply continued to share information with stakeholders:

The fact that certain countries have a more transparent culture manifests itself in more leaking. They feel that it is permissible.

The limited enforcement of professional secrecy has consequently been accepted as a ‘fact of life’. Only occasionally has it been brought to attention, as was for example the case in 2013, when the Council’s Secretary-General circulated a note to bring the issue to the member states’ attention:

There have been a number of recent instances where Council documents marked as ‘Limite’ have been passed to and its [sic] published in the press. It is recalled that any unauthorised disclosure of such documents is contrary to the obligations imposed on the Union Institutions and its Member States […]. Council members have a duty to ensure that the requirements approved by the Council on handling LIMITE documents are respected.

The increase in the number of member states, together with a vibrant civil society were seen as important contributing factors to the frequency of leaks. Moreover, both the new member states and the ENGO community into the 2000s brought about a qualitative change in the interaction between the Council and civil society, in that it undermined the progressive

128 Respondents #54, #67
129 Respondents #55, #60
130 Respondent #67; Häge (2008), p. 21
131 Respondent #65
132 Respondent #61
133 Respondents #54, #67
134 Respondent #65
135 Respondents #55, #59
136 Council (2013)
137 Respondent #61

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policy consensus of the ‘golden years’. The eastern enlargement brought on board a number of member states that were less progressive in the area of environment, and had a weak culture of ENGO consultation.

Both the growth of the Council with a concomitant diversification of preferences and the further Europeanisation of environmental civil society led to increased antagonism and a decline in the importance of corporatist information networks. As a consequence, interaction between the EnvCo and the ENGOs was less trust-based, and the latter began to diversify its activities:

They do it by various ways. They go directly, by meeting with the Commission, meeting with the Presidency, sending letters to member states and so on. […] But also they do it indirectly by creating public debate or public visibility of the issue and their positions on the issue by using social media, all those types. Then politicians have to see these issues in a context of public concern. That’s a very indirect way but sometimes very effective.

The route of publicity seeking was facilitated by the lowest common denominator aspect of leaking: among a strongly divided Council of 28, there would very frequently be a member state with an interest in leaking. Leaks would take place at least once in every legislative procedure. Respondents however clearly distinguished between leaks to interested parties such as ENGOs and the industry on the one hand, and to the press on the other. Whereas the former category was deemed ‘normal’ and ‘inevitable’, the latter was characterised as ‘malicious’ and ‘derailing’. A recurrent example that was given of the latter were the leaks during the legislative negotiations on a car emissions scheme, and the failed negotiations around the Copenhagen climate summit. However, it was not always possible to uphold this distinction. This is shown by one Brussels-based environmental media outlet, Ends Europe, which even began to specialise in the dissemination of sensitive policy information, offering its own document observatory and regularly presenting inside news on the basis of leaked information.

The increased number and diversity of Council members also meant that ENGOs could less efficiently lobby this institution. While previously Council documents were considered a central resource for those seeking to influence legislative outcomes, in recent years their importance has declined, as the Commission became “the determining factor” in the priorities and pace of legislative activity. The Commission also began to hold more regular pre-legislative consultations, increasing stakeholders’ possibility of influencing
decision making ‘upstream’. The earlier involvement of stakeholders has also led them to approach member states differently, by presenting their concerns even before the start of Council negotiations, and simultaneously lobbying the EP, which emerged as an influential institution that is considered more open to outside influencing. These factors account for the growing focus of ENGOs on the Commission and the EP at the expense of the Council.

In summary, the development of access to documents in the Environment Council largely followed the path set out pre-Regulation 1049/01: the – in relatively terms – already rather wide access framework was further expanded with the entry into force of Regulation 1367/06 and an increasingly generous implementation practice that was more often relied upon. On the other hand, the formalisation of guidelines under the obligation of professional secrecy (primarily ‘limite’ documents) partially illegalised the existing practice of informal document sharing. As a consequence, unwarranted disclosure, either to stakeholders or to the press, went up, while ENGOs, increasingly active at the European level, began to diversify their activities by increasingly focussing on the Commission and the EP. Developments are summarised in Table 7.2.

**Table 7.2: Access to documents policy in the Environment Council, developments December 2001-2014**

<table>
<thead>
<tr>
<th>Development</th>
<th>Indicator</th>
<th>Formal rules</th>
<th>Implementation</th>
<th>Informal norms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limited but increasing reliance on the formal access to documents framework</td>
<td>Aarhus Regulation (1367/06)</td>
<td>Further improvement proactive disclosure practice, increasing reliance on passive transparency</td>
<td>Unequal relations and constraints informal contact between member states and stakeholders</td>
<td></td>
</tr>
<tr>
<td>Formalisation of the protection of professional secrecy accompanied by an increase in unwarranted disclosure</td>
<td>Internal guidelines on handling ‘limite’ documents</td>
<td>Very limited proactive disclosure of ‘limite’ documents</td>
<td>Continuation of norm of informal information sharing with selected stakeholders</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Reliance on exception grounds formulated under Regulation 1049/01 rather than the Aarhus Convention</td>
<td></td>
<td>Emergence of leaks to the press/public at large</td>
<td></td>
</tr>
</tbody>
</table>

146 Respondents #11, #58, #67; e.g., Commission (2000), pp. 8-12
147 Respondents #59, #54
148 Respondents #53, #58, #65, #66
149 Respondents #11, #65, #66; Bugdahn (2008), p. 595
7.5 Analysis: Change and continuity over time

In light of the guiding empirical questions, how must the dynamics underlying the development of Environment Council transparency be characterised? The initial impression that this case provides is the presence of robust support for transparency measures that went beyond the general trend in the Council. The evidence to support this assertion is readily available. Relatively open from the outset, the EnvCo embraced each successive development in the general access framework. By comparison, the EnvCo provided generous access to documents in formal requests. It also foresaw in increasing proactive document disclosure, both in real and relative terms, after the public register emerged in 1999. The EnvCo even went beyond the strictly necessary by signing up to the Aarhus Convention in 1998, and implementing its content in the 2006 Aarhus Regulation (Regulation 1367/06).

In bringing about these developments, both the expected transparency actors and the availability of resources to affect change were broadly in place. A strong community of outsiders (ENGOs and other stakeholders) monitored access to EnvCo documents, with the possibility of court review, even when not used, always in the background. In terms of preferences, a large minority group of environmentally progressive member states set the tone in decision making, resulting in a broad consensus on the topic of public access to environmental information. The influence of policy entrepreneurship by the EnvCo Presidency, on the contrary, played a negligible role in this respect. This is evidenced by the fact that the various access to documents/information laws specific to the environment were adopted under presidencies with widely differing policy positions and priorities (1990: Ireland; 2003: Greece; 2006: Finland), while their content remained relatively stable.

Finally, two exogenous factors favouring transparency clearly fed into the policy debate: the accession of Sweden and Finland in 1995, which strengthened the position of the progressive minority coalition, and the signing of the UN-sponsored Aarhus Convention in 1998, which altered the constitutional context by committing the EU to a wider degree of environmental transparency (although, naturally, the Convention was signed by all the EU’s member states, as well as the EU itself).

Nevertheless, these transparency-favouring do not offer a complete picture of the development of EnvCo transparency. While the formal conditions for access to documents were favourable by comparison, as mentioned above, the access regime remained vastly underutilised. Instead, the predominantly nationally based ENGOs were generally linked into an information and consultation networks maintained by governments at the national level. Given the relative interest convergence between ENGOs and several progressively oriented north-western European member states, this informal corporatist network functioned well for both sides: it ensured that ENGOs were relatively well-informed and able to exercise a satisfactory degree of influence on national policies, while member states held control over the extent of disclosure and

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150 Chapter 5, section 4
151 Respondents #55, #60
152 In the case of the Aarhus Regulation, the Council reached a common position in December 2004, under the Dutch presidency (Council 2005, p. 4). The period between the adoption of the common position and the adoption of Regulation 1367/06 on 6 September 2006 was mainly spent discussing provisions concerning access to justice in environmental matters, rather than access to information. See Crossen and Niessen (2007), pp. 337-9
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maintained primacy in the Council negotiation process. It also limited the role of the European courts, to the extent that they were rarely presented with an environment-specific access case (the first—and only—environment-related access ruling to which the Council was a party arose only in 2006).

For a long time, this turned the formal access rules into a ‘great policy that no-one needs’. This changed however after the entry into force of Regulation 1049/01, as the system of corporatist stakeholder involvement along national lines began to work less effectively. This was due to a three (interrelated) developments in the role and involvement of the EP, the Council members, and the environmental stakeholder community.

First, the growing influence of the EP on the development of EnvCo transparency turned out to be ambiguous for the advance of access to documents. Shortly after 1999, when it attained near-total co-legislative rights, it began to cooperate with the Council in closed-circuit trilogue negotiations with the aim of adopting a larger number of legislative acts at first reading. Such negotiations gradually became the norm in co-legislative activity, including EnvCo decision making. In the year after the Council increased from 15 to 25 members, the proportion of legislative acts adopted at first reading increased from 36 per cent to 69 per cent. The documents pertaining to the trilogue negotiations that formed the basis of this early adoption were inaccessible to the public, and remained so even after the adoption of the legislative act. The Council also adjusted its internal decision making structure to this new reality, by formalising the confidential status of the much-used ‘limite’ document label, in order to prevent information from leaking, at an early stage, to the EP. This significantly diminished Council members’ space to share documents on the decision-making process with external actors. Rather than enhancing public access to EnvCo decision making information or documents, the EP’s involvement is thus likely to have decreased it. On the other hand, the EP itself gradually became a more popular venue for stakeholder document and information collection.

The general effort to enhance the efficiency of decision making was also related to a second major exogenous institutional event that took place in 2004: the ‘big bang’ enlargement of the EU. The enlargement from 15 to 25 Council members had direct and indirect effects on the norm of informal information sharing. In a direct sense, the increase in the number of voting Council member diminished the returns of lobbying individual member states, leading ENGOs to focus more on the Commission and the EP. It also diversified the policy positions of member states, dampening the impact of the progressive consensus of the 1990s, and its accompanying commitment to transparency. As a consequence, a decreased proportion of member states embraced the norm of informal information sharing. Another effect of the 2004 EU enlargement is that it altered the constellation of policy preferences among member states, away from the progressive consensus on environmental issues and informal transparency that had previously existed inside the EnvCo. Whereas previously, a large part of EnvCo members tacitly supported wide transparency of environmental information and decision making, with broad inclusion of the ENGO community, this tradition was virtually absent among the eastern European member states. This fact, as well as the increasing contradiction in policy preferences between a considerably larger number of member states further fomented the culture of ‘strategic leaking’ to increasingly less circumscribed groups of outsiders (e.g., the press instead of specific ENGOs).
Third and finally, changes occurred in the role of the environmental stakeholder community as an ‘actor’. Though constantly present in Council policy making, the ENGO community gradually changed its structure and methods. It became increasingly active at the European level and diversified its influencing strategies. Attaining less timely, complete, or relevant information through national government channels, the information-finding efforts of ENGOs became more coordinated and centred upon multiple institutional venues at both national and European decisional levels. ENGOs at the European level also came to focus increasingly on the formal access regime. While this effort predominantly targeted the Commission (an indication of which is provided by the various access cases against the Commission), this also increasingly affected the number of environment-related access requests to the Council. By 2014, the corporatist system that had previously underpinned information flows in the EnvCo had become partially redundant, with no obvious transparency strategy in place that could fully replace it. The regime of formal access to documents could not fully replace the system of corporatist consultations. Under conditions of increased diversity and conflict, document leaking therefore appears to have increased over time. Table 7.3 summarises the factors that are most important in explaining the development of the Environment Council’s access to documents policy.

Table 7.3: Explanatory factors in the development of access to documents in the Environment Council

<table>
<thead>
<tr>
<th>Stable factors</th>
<th>Changing factors</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Actors</strong></td>
<td></td>
</tr>
<tr>
<td>- Limited influence courts</td>
<td>- Increased presence ENGOs at European level (circa 2001)</td>
</tr>
<tr>
<td>- Strong ENGO community</td>
<td>- Drive towards more efficiency in Council decision making: insistence on professional secrecy and more trilogues (circa 2004)</td>
</tr>
<tr>
<td><strong>Preferences</strong></td>
<td></td>
</tr>
<tr>
<td>- Corporatist stakeholder system with informal information provision at national level in several member states</td>
<td>- Cooperative effort ENGOs at multi-level and multi-venue policy monitoring (circa 2001)</td>
</tr>
<tr>
<td>- Waning informal access to member state governments (after 2004)</td>
<td></td>
</tr>
<tr>
<td><strong>Resources</strong></td>
<td></td>
</tr>
<tr>
<td>- Waning informal access to member state governments (after 2004)</td>
<td>- Aarhus Convention (1998)</td>
</tr>
</tbody>
</table>

7.6 Conclusion: No longer a corporatist system

To a large extent, the development of access to documents policy in the Environment Council was marked by this formation’s corporatist legacy. Environmental NGOs (ENGOs), often nationally based, were closely involved in the policy process, and were informally provided with information by Council members at the national level. This understanding of transparency existed alongside the formal access to documents framework without conflict, which is illustrated by the broad formal access that was offered and the fact that the policy continued to advance. The negotiations on the Aarhus Convention offered the ENGO community the opportunity to advocate wider access to environmental information in a
separate legal framework. Their efforts were rather successful: aided by the accession in 1995 of Finland and Sweden, the new access regime found relatively broadly support the Council. In practice however, the informal, nationally based corporatist norm of information provision remained the regular route for information flows, leaving the formal route for access to EnvCo documents underutilised. As a consequence, only one access to environmental documents case was brought against the Council, meaning that the role for the EU courts to shape the interpretation of access to documents in this area was very limited. Similarly limited was the role played by Presidency activism. Instead, a steady line of successive legal steps in access to environmental information were taken under Presidencies with highly diverse positions on the issue of transparency.

What did have an impact was the growing involvement of the EP in environmental decision making. This impact went however in a direction opposite to what might be expected. As the role of EP as a co-legislator in environmental policy expanded, the legislative institutions increasingly resorted to confidential trilogue negotiations. The 2004 EU enlargement strengthened this tendency. It led to a stronger insistence on professional secrecy within the Council, as is illustrated by the formalised treatment and proliferation of ‘limite’ documents. As a consequence, seeking information on EnvCo decision making through informal channels had become increasingly difficult, undermining the corporatist system. Although by this time, the EnvCo is governed by the most elaborate formal transparency framework in the entire Council, it would be unconvincing to argue that the formal access to documents rules fully replaced the former corporatist system.

The decline of corporatism has instead marked a kind of halfway house in terms of access to documents: the EnvCo no longer functions as a fully-fledged corporatist decision making system, yet the formal access framework does not succeed in replacing it. While informal information provision continues to exist as a channel of information provision between member states and outside stakeholders, like the formal access rules, it is more difficult than before for outside stakeholders to gain timely access to accurate information concerning ongoing legislative processes. The formal access rules only provide a route to already existing documents, without requiring the EnvCo to regularly draft certain types of legislative documents, such as minutes, or proposals for legislative amendments. Under the formal access framework, in many cases outsiders’ possibility for access is thus reduced to the question whether the requested information exists in a Council document or not. Informal information channels by contrast offer more dialogical opportunities, for outsiders to explain what information they are interested in, and for insiders to give off signals or to mobilise civil society. As a consequence, the rules of the professional secrecy of Council proceedings are widely experienced as a straightjacket, leading to extremely frequent yet unsanctioned document leaks. By 2014, closed-circuit EnvCo decision was rendered largely a fiction; a fiction nevertheless that was upheld under the formal access to documents rules.

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153 See also Chapter 6, section 3.1
Chapter 8
Access to Documents in the Ecofin Council: The Elusiveness of Informality

Well, what the Council secretariat produces, and what enters the discussion line, is indeed always a Council document. Unless it is not a Council document.¹

8.1 Introduction
In this chapter, I consider the case of access to documents policy in the Economic and Financial Affairs Council (hereinafter, Ecofin Council). In the selection of cases, the Ecofin Council was included as a potential ‘middle ground case’: it combines a hybrid decision-making structure that is part supranational, part intergovernmental with the production of both legislative and non-legislative output. It involves a limited number of technocratic institutions, most importantly the Commission and the ECB, although recently the EP has become more involved. From the Maastricht Treaty through to the recent economic and financial crisis, the Ecofin’s decision making architecture underwent considerable institutional transformation.

The strong dynamism in this policy area, whether it concerns constitutional, political, or societal exogenous factors, leads to the expectation that its access to documents policy, too, would have undergone considerable transformation. However, this is not apparent at first sight. Access to Ecofin documents, both in a passive and proactive form, show a relatively consistent advance over time. Still, this lack dynamism is only illusory. In fact, a set of informal decision-making forums, rules, and practices were developed over time that created elusive effects on access to Ecofin documents. This elusiveness lies in the fact that informality is generally hard to capture or to measure in conventional senses, such as in case law developments or document publication rates. As the somewhat Kafkaesque opening quote of this chapter demonstrates, informality blurs the lines between formal rules and informal norms, implementation and evasion, and procedure and idiosyncrasy.² In the case of the Ecofin Council, such informality comes on top of an ever-more complex governance

¹ Respondent #50
structure, giving way to complex discussions over the appropriate balance between confidentiality and transparency.

The chapter proceeds as follows. Section 8.2 sketches the institutional context of access to Ecofin Council documents by describing the most relevant institutional characteristics of Ecofin Council decision making between 1992 and 2014. The subsequent analysis of the Ecofin Council’s developing access to documents policy is broken into two time periods, with section 8.3 covering the years before and under the first access to documents decision (Decision 731/93, 1992-2001), and section 8.4 covering the years under the legislative act that replaced it (Regulation 1049/01, December 2001-2014). For each period, a process-tracing analysis is applied to explore which institutional factors best explain the most important developments in access to documents policy within this Council formation. Section 8.5 synthesises the findings by comparing explanatory factors across time, and placing the within-case empirical analysis of developments into the general theoretical framework that was set out in chapter 4. Section 8.6 concludes.

8.2 How the Ecofin Council works
The development of access to documents in the Ecofin Council between 1992 and 2014 is strongly marked by the “high-stakes experiment” of economic and monetary integration epitomised by the common currency, the euro. The Economic and Monetary Union (EMU), which gradually unfolded alongside the area of financial policy, had important consequences for the decision-making architecture in this Council constellation. On the one hand, financial (and to a lesser extent, tax) policy was predominantly geared towards the adoption of Council legislation with a central role for the Commission as initiator. On the other, Ecofin Council decision making in the context of the EMU concerned itself with the coordination of national economic policies within the parameters of a few pieces of European-level framework legislation for Eurozone member states.

The advent of the EMU saw the establishment of several new bodies, procedures, and arrangements. Most important of those in the context of this case study are the informal club of Eurozone finance ministers, the Eurogroup (1997), the Economic Financial Committee (EFC) composed of member state representatives, national central bankers and the Commission (1999), and the Eurozone composition of the EFC, the Eurogroup Working Group (EWG, 2001). Together, these institutions formed a governance network of decision making that mixed national and EU-level competences on the basis of “objectified guidelines

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3 Leino and Salminen (2015), p. 10; Bradley (2012); Hodson (2010)
4 Leino and Salminen (2013a), pp. 461-2
5 The division into two historical periods is made in order to enhance readability and facilitate comparison over time, see also Chapter 5, section 4.
6 Hodson (2010), p. 158; also Respondents #24, #29
7 Crum (2013), p. 619
8 IGC (1992c), article 109c(2) and (4)
and technocratic procedures”.

9 Procedurally, the modus operandi of these insulated ‘satellite’ bodies was distinct from that of the Council.10 They did not fulfil legislative tasks or adopt formal policy; they took decisions on the basis of deliberation and consensus rather than QMV or unanimity.11 Over time, few changes occurred in this decision-making architecture.12 Instead, the Ecofin Council and its ‘satellite’ bodies took to the consolidation and fine-tuning of their internal processes, including those of document handling and circulation.13

In the long term, the gradual institutionalisation of the ‘satellite’ bodies had the effect of altering the balance in Ecofin Council decision making. This is, for example, indicated by the vastly increased frequency of their meetings.14 This development gradually eroded the influence of the rotating Presidency in favour of the ‘satellite’ bodies’ chairs, of the Council secretariat in favour of the EFC/EWG secretariat, and of the Ecofin Council’s Working Party of Financial Counsellors in favour of the EFC.15 The Lisbon Treaty even went as far as ‘formalising’ the informality of the Eurogroup in a separate Protocol attached to the Treaties, effectively implying that its documents were out of the public’s reach.16 The Lisbon Treaty simultaneously introduced, for the first time, a limited number of decision making powers for the EP including, significantly, a co-legislative role in the cornerstone area of multilateral economic surveillance.17

Real change however came when the global financial crisis spilled over to the EU in 2007. The decision-making bodies pertaining to EMU, together with the Euro Summit of Heads of State and Government quickly asserted control over the management of the crisis, and a large package of measures, both legislative and non-legislative, were adopted. These included instruments for increased surveillance and correction in the economic and budgetary sphere, the management of Eurozone banks, and lending facilities for Eurozone members in financial need.18 The resultant institutional innovation was criticised for increasing complexity and divergence from the traditional community method, at the expense of “the simplicity, and thus the transparency, of European debates”.19

Having set out the Ecofin Council’s developing institutional architecture, I will now turn to its access to documents developments and their explanation before and after the entry into force of Regulation 1049/01.

9 Crum (2013), p. 622
10 This chapter does not cover the access to documents policies of the ECB nor the ESFS or the ESM which operate at some distance from the Council’s access policy. The former is discussed in a forthcoming article by Curtin.
11 Council (1998), article 4; Respondent #43; Puetter (2006)
12 Respondent #24
13 Puetter (2006), pp. 15, 110
14 Respondents #24, #50; Puetter (2006), p. 86
15 Respondents #42, #44, #46
16 Protocol 14 attached to IGC (2007b)
17 IGC (2007c), article 121(6)
18 Respectively, the so-called Six-Pack (2011) and Two-Pack (2013); the Treaty on Stability, Coordination and Governance (TSCG), better known as the ‘Fiscal Compact’ under international law (2012); the SRM and SSM or ‘Banking Union’ (2013); and the EFSF/ESM, established respectively under Luxembourgish law and international law (2010/2011). See further section 8.4.3 below
8.3 1992-2001: Towards insulated informal governance

The decision making of the Ecofin Council has traditionally been connected to a number of expert and advisory bodies operating at some distance from politics and public. However, the advent of the Economic and Monetary Union (EMU) and the gradual build-up of an informal economic governance architecture amplified this tendency. From 1998 onward, several new ‘satellite’ bodies connected to the Ecofin Council were set up, rendering institutional decision making boundaries increasingly fluid. These bodies were not covered by the Council’s access to documents rules. Meanwhile, the document management of such new bodies as the Eurogroup, the Economic and Financial Council (EFC), and the Eurogroup Working Group (EWG), but also of the informal Ecofin Council meetings that began to be regularly held, was based on the dual principles of informality and confidentiality. While this modus operandi was legally defensible under Decision 731/93, arguably the legitimacy of its justification was questionable.

8.3.1 A document trail transcending institutional borders

At the time that the options for a Council access to documents policy were first explored, economic and financial affairs were far from a new policy area. Indeed, an institutional architecture that included an Ecofin Council flanked by a number of technocratic advisory bodies was already in place. However, the Maastricht Treaty introduced important institutional changes by enshrining the trajectory towards an EMU. These changes rendered decision-making boundaries increasingly fluid, in the sense that member states came to formulate economic policy in a growing number of bodies external to but integrated in the Ecofin Council. At the same time, the right of access to documents remained rigidly tied to the Council, creating a growing dissonance.

The institutional landscape of the EMU radically overhauled traditional Council decision-making methods. In order to give shape to the Stability and Growth Pact (SGP), which entered into force between 1 July 1998 and 1 January 1999, existing bodies were charged with new tasks while new bodies with unusual working methods acquired a central role in the decision-making process. For the Ecofin Council, this meant concretely that the establishment of the ECB presented the Ecofin Council with a strong EU-level counter player charged with monetary policy. In the area of economic policy discussions and decision making, an informal Eurogroup (then still referred to as ‘Euro 11 Group’) was founded around December 1997 and held its first meeting in June 1998. The Eurogroup, comprising a subsection of the Ecofin ministers of those member states that had met the so-called convergence criteria and that were about to adopt the euro as a single currency, began to form a sort of ‘shadow’ Council configuration.

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20 See section 8.2 above
21 Respondent #24
22 Respondent #43, #45
Beyond the Eurogroup, the Monetary Committee, which had existed since the 1950s, was replaced by the EFC as of January 1999. While the latter succeeded the former on all organisational aspects, including membership and archiving, the focus of decision making in the EFC now shifted to the politically sensitive and constitutionally decentralised issue of economic policy coordination on the basis of the SGP. To add further to the complexity, the EFC secretariat fell functionally under the Commission, although it operated outside of its structures and prepared both Ecofin and Eurogroup meetings, while the EFC’s members elected a president for a two-year term from their midst. This anomaly had historical reasons, as the former Monetary Committee had been placed under the Commission by the Rome Treaty. The institutional divide between Eurozone and non-Eurozone affairs was further reinforced when, in March 2001, a separate EWG was established, which was supported by a special unit within the EFC secretariat set up for this purpose.

The introduction of the EMU thus brought about the proliferation what might be called ‘satellites’: relatively insulated ‘fringe bodies’ consisting of member states delegates who engage in policy activity that is functionally integrated into Ecofin Council decision making, but not formally a part of it. The establishment of these bodies also introduced a set of new specific rules affecting the public’s right of access to their documents. The statutes of the EFC, for example, declared the proceedings of the Committee and its “alternates, sub-committees or working parties” confidential, a rule that was strictly implemented:

As a rule, we try to be confidential in everything that we do. If you start to be selective, and say, this is an [confidential] agenda item and this is not, people get sloppy. There is the general presumption that all proceedings are confidential.

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23 IGC (1957), article 105(2). Besides the Monetary Committee, the Council and Commission were provided with macroeconomic advice by the Economic Policy Committee (EPC), founded in 1974 (Counci, 1974).
24 Respondents #24, #42, #45; Puetter (2014), p. 193
25 Council (1998), articles 5 and 12
26 Respondents #42, #48, #49
27 Respondents #43, #49; Puetter (2006), p. 110
28 I borrow the term ‘satellite’ bodies from Curtin, who operationalises it as “‘fringe bodies’, extra-governmental organizations, independent non-majoritarian institutions, and quasi-autonomous non-governmental organizations that form ‘a significant and administratively dense component of modern governance structures’” (2009, p. 135). As may be noted, my operationalisation for the purposes of this case study is rather narrower.
29 Here, a disclaimer must be made. Strictly speaking, these rules did not pertain to Council activity. Though consisting of delegates from the member states, were not included in, or related ambiguously to, the formal definition of the Council. Moreover, in most instances that part of their internal organisation which related to documents did not possess a formal status from a legal procedural perspective, being adopted on the basis of ‘working methods’, ‘guidelines’, or ‘best practices’ rather than on legislation or rules of procedure.
30 Council (1998), article 11. In this regard, the EFC followed the line of its predecessor the Monetary Committee, which likewise “operated in an ambience of secrecy” (Verdun 1999, p. 2).
31 Respondent #43, Council (1998), article 11
In the case of the Eurogroup, while the confidentiality of its proceedings was not formally laid down, it was fundamental to its self-understanding of informality and insulation.\(^{32}\) The same was the case for the EWG, which acted as a preparatory body of the Eurogroup.\(^{33}\) The accumulation of Ecofin decision-making bodies, and its relation to the public right of access to documents under Decision 731/93 is shown in Figure 8.1.

Under Decision 93/731, access to documents was applied according to the so-called ‘authorship rule’ which meant that it only applied to documents drafted by the Council. As a consequence, the question of the interaction between the confidentiality provision in the EFC statutes and this decision was pre-empted by the question of the EFC’s institutional relation vis-à-vis the Council. Although this question arose in the Pitsiorlas saga, this case law left the issue concerning the relation between the Council and the EFC unaddressed.\(^{34}\)

In Pitsiorlas I,\(^{35}\) Mr Pitsiorlas, a doctoral candidate, challenged the Council’s and the ECB’s refusal to grant him access to the Basle/Nyborg Agreement on the reinforcement of the European Monetary System (EMS), which he argued had been endorsed by the informal

\(^{32}\) Monetary Committee (1998); Puetter (2006), p. 3

\(^{33}\) Puetter (2006), p. 110

\(^{34}\) The Pitsiorlas case law covered three court rulings, see here and below, section 4.1.

\(^{35}\) Case T-3/00, Pitsiorlas v Council and ECB, 14 February 2001 (Pitsiorlas I). Besides this case, another access to documents case in the area of financial and economic policy was brought against the Commission before Regulation 1049/01 entered into force (case T-178/99, Elder and Elder v Commission). In this case, the CFI decided that there was no longer a need to adjudicate as the Commission changed its stance during the proceedings.
Ecofin Council of September 1987 in Nyborg, Denmark. In its initial response to his access request, the Council secretariat had stated that it was unable to identify a document corresponding to his request. Consequently, the secretariat referred the applicant to the ECB, which it considered would be more likely to be in possession of the document. Upon a subsequent confirmatory application, the Council Secretariat confirmed that the Ecofin Council had in fact never endorsed said decision, as the EMS fell outside of community law. Instead, the only decision in this context was taken by the Committee of the Governors of the central banks of the member states of the European Economic Community (EEC) (“Committee of the Governors”), to which the applicant was consequently referred. The applicant filed an access request to the Committee of the Governors which was denied, and an appeal, which was likewise turned down. When he thereafter brought an action against the Council and the ECB to contest the outcome of his access requests, the Council argued that this action should be considered inadmissible as it was brought later than the established time limit of two months after the issuance of the contested decision. Mr Pitsiorlas on the other hand argued that his belated application was due to “deceit on the part of the institutions in question in that he was encouraged not to challenge the Council decision straightaway but to wait for that of the ECB”. The court found that “a normally diligent individual could have been left in no doubt either as to the finality of [the Council's decision], nor as to the time-limit for bringing proceedings”, and consequently accepted the Council’s plea of inadmissibility.

From a legal access to documents perspective, Pitsiorlas I brought little doctrinal innovation. It upheld procedurally foreseen deadlines and did not discuss the ‘authorship rule’. However, in a number of respects, the facts of the case are telling of access to documents requests in economic and financial policy. The decision underlying the requested document pertained to two decision-making bodies, the Committee of the Governors and the Ecofin Council (albeit in an informal setting), and a middling expert body, the Monetary Committee, creating a complex decision-making structure. Furthermore, between the time of the decision and the time of the access application, the institutional architecture in this area had already changed, meaning that the Committee of Governors had been brought under the procedural rules of the ECB (which itself largely succeeded the EMI), while the Monetary Committee had been replaced by the EFC. The latter body’s involvement remained wholly unaddressed in this court order.

Pitsiorlas I thus left space for the EFC to hold its meetings in full confidentiality, just as had been the case with its predecessor, the Monetary Committee. Yet the fact that the EFC now actively discussed a wide range of economic issues both in plenary among the

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36 Pitsiorlas I, para 3
37 Pitsiorlas I, para 7
38 Pitsiorlas I, paras 6, 9
39 Pitsiorlas I, para 17
40 Pitsiorlas I, para 18
41 Pitsiorlas I, para 23
42 See section 8.2 above
member states’ deputy finance ministers\textsuperscript{43} as well as in various constellations of ‘alternates’ charged with subareas, in closer cooperation with the Council than before, suggested a desire on the Council’s side to remove economic policy matters from its decisional agenda, leaving the area of fiscal and financial legislation as the Ecofin Council’s remaining remit.\textsuperscript{44} Such total separation however could and did not take place: given its potentially sensitive nature, economic policy remained an area that required coordination and agreement at the ministerial level, also beyond the Eurogroup.\textsuperscript{45} Moreover, even the non-legislative decision making typical of the EFC occasionally required output in the form of conclusions, which only the Council could adopt.\textsuperscript{46} In preparation of such conclusions, draft texts would be largely pre-discussed in the EFC, after which they were submitted to the Council to iron out the final details.\textsuperscript{47} Thus, the Ecofin Council retained the ‘traditional’ mode of operation, where texts were often negotiated by Brussels-based experts at working party level, to then move up to Coreper and finally reach the ministers. However, in the area of economic policy, this model was now pre-empted by the parallel world of economic governance based on full confidentiality and coordinated directly by the capital cities.\textsuperscript{48} In providing the Ecofin Council with recommendations concerning the SGP or structural economic reforms, the EFC and EPC would act de facto as its preparatory bodies.\textsuperscript{49}

This bifurcation is largely confirmed by the access to documents implementation figures in this areas, which mostly did not deviate much from the Council average.\textsuperscript{50} With 11 confirmatory applications identified as pertaining to economic and financial policy, administrative appeals remained close to the average (5.4 per cent of the Council total). Almost three quarters of these were filed in the final years of the period here under consideration, an increase that was fully attributable to access requests in the area of financial policy. Of all confirmatory applications, 44.4 per cent invoked a mandatory exception ground, a considerably lower figure than the Council average of 84.2 per cent. However, this did not result in wider access than the Council average (respectively 45 and 59 per cent). This led to very frequent protest among the transparency-prone member states. Member states voted against or abstain in 82 per cent of Ecofin-related confirmatory application decisions, a far higher figure than the Council average (55 per cent).

The document register, which went online in 1999, likewise reflected the modus operandi of the Ecofin Council.\textsuperscript{51} From the outset, many Ecofin documents were placed on the register. Three broad categories of subject matters could be distinguished among the

\textsuperscript{43} Member states delegate officials with differing status to EFC meetings. These may be junior government members (e.g. state secretaries) or senior officials without a political mandate but a high position in the ministerial hierarchy.

\textsuperscript{44} Respondents #47, #45

\textsuperscript{45} Hodson (2010)

\textsuperscript{46} Respondent #45

\textsuperscript{47} Respondents #29, #43, #45

\textsuperscript{48} Respondents #24, #29, #43

\textsuperscript{49} Respondents #45, #50

\textsuperscript{50} For details concerning the data, see Appendix 4.

\textsuperscript{51} See Appendix 4
registered documents. A first category consisted of documents related to (mainly legislative) fiscal policy and financial sector decision making; these made up just under two-thirds of all registered documents. A second category concerned the general or hybrid subject matters of ‘Ecofin’, ‘EEA’ and ‘EFTA’ policy,\(^{52}\) which formed around a third of the total. Finally, around 5 per cent of documents on the register fell within the category of clearly macro-economic or monetary subject matters. During the first three years of the register (1999-2001), the number of registered documents rose mildly (circa 18 per cent). During the same period, the number of those documents that could be directly accessed increased steeply, by over 31 percentage points to 68.8 per cent in 2001.\(^{53}\) No clear trend could be discerned in the access rates per category; instead, access rates of the different labels varied considerably, even within each category. For example, access to financial policy-related documents labelled ‘Tax questions’ remained consistently and notably above the Ecofin average while, within the same category, access to documents concerning ‘General financial questions’ remained notably under it.

In terms of relevant document types, the Ecofin Council gradually improved its performance, publishing ministerial-level meeting minutes including summary outlines of member state positions from the beginning, and agendas including references to underlying documents as of 2001. Agendas and minutes of lower-level bodies however were neither registered nor published. In line with the wider Council norm of the time, neither the much-used ‘limite’ documents\(^ {54}\) or classified documents were placed on the register.

8.3.2 Ecofin document management: Mere ‘sloppiness’ or bad faith?

The bifurcation –caused by the advancing EMU– between an Ecofin Council which implemented the access to documents rules relatively satisfactorily and its various secretive ‘satellite’ bodies which were not even bound by these rules raises the question of intention. On the one hand, these bodies were clearly set up to create zones of confidentiality. On the other, as Pitsiorlas attests, a lack of transparency also resulted from mere poor document management. In reality, both elements were present, and they were connected through the member states’ desire to operate the ‘satellite’ bodies in an atmosphere of far-reaching informality.

Clearly, a central norm of EMU decision making was the resort to various informal or specialist ‘satellite’ bodies and sessions in order to discuss policy matters under extensive confidentiality. This norm was characteristic of economic and monetary policy from the outset, but increased during the second half of the 1990s. Within the Ecofin Council, the EMU created a paradoxical situation. On the one hand, it was considered that the unmistakable integration of monetary and financial policy required greater visibility and public debate. On the other hand, the ministers also experienced a need for insulated,

\(^{52}\) EEA and EFTA are two European free trade areas.

\(^{53}\) Before the end of 2000, documents on the register could not be accessed directly. Many documents from 1999-2000 however were made available retroactively.

\(^{54}\) Respondent #29, also #45
informal discussions in the face of the unfolding EMU. In spite of efforts to enhance public debate, such as 1999 European Council conclusions initiated by the Finnish Presidency which sought to strengthen Ecofin transparency by foreseeing in a bi-annual public debate concerning the Presidency’s work programme, the balance tilted towards the latter.

Several examples of insulated meeting forums can be mentioned. One were the informal Ecofin meetings that began to be held in the late 1990s at least twice a year, and which covered “the whole Ecofin agenda”.55 These meetings, held in small settings (a minister plus two aides), took place up to five times per semester, and expressly forbade the drafting of a formal agenda, Council preparatory documents or formal meeting outcomes. They were considered not to be “Council sessions”.56 Another was the Eurogroup, which was justified as a forum established to discuss newly developed sensitive policy issues emerging out of EMU.57 An early internal set of guidelines drafted by the Monetary Committee as an “‗aide mémoire‘ for the Euro-11 Chairman”58 confirms this reading. The document reminded the chairperson that the body’s operational structure should be “informal and light” and “transparent and open”.59 The latter clearly related to the group’s internal dialogue rather than to access for the public. For example, to facilitate more direct discussion, interpretation during the meetings was limited to three languages.60 A later document made a number of further recommendations for improvements of ‘Euro 11’ meetings. These included the circulation of an informal summarising ‘letter of the president’ after each meeting, in lieu of formal conclusions which “would be in contradiction to the informality of the Group”.61 Finally, through the formal rule of confidentiality of EFC and EPC meetings, the member states created another large pocket for information exchanges beyond the public’s reach. Documents in the EFC and EPC were produced under the assumption that they were by default confidential and excluded from a right of access.62 This was the case in practice, as the Council took the view that these bodies were functionally separate with regard to access to documents questions.

At an administrative, and occasionally a political level, the new reality of the Eurogroup and the EFC required the creation of parallel organisational structures, with tasks divided between separate Council and EFC secretariats and, in the case of the Eurogroup, a two different rotating presidencies when the acting Council Presidency was not among the (future) euro members.63 Among the tasks of the EFC secretariat were assisting the acting Presidency in drafting, filing and circulating EFC documents.64 The EFC secretariat handled

55 European Council (1999), point E; Puutter (2006), p. 84
56 European Council (1999), annex III, points E and K
57 European Council (1997), point 44
58 This name was used before the Eurozone ministers settled on the name ‘Eurogroup’, see Puutter (2006), p. 65.
59 Monetary Committee (1998), point vi
60 Monetary Committee (1998), point v
61 EFC (1999), point 2.3
62 Respondents #24, #45, #48, #49, #50
63 Monetary Committee (1998), point 1; Respondent #43, #45
64 EFC (1999), point 3.2
its own somewhat idiosyncratic systems for document management, classification and circulation:\textsuperscript{65} 

I think that the Council Secretariat has a very elaborate and well-established and very well-followed method of storage. […] The EFC Secretariat not so.\textsuperscript{66} 

The practice in the EFC secretariat is to send out everything by email. […] They sometimes label it ‘restricted’, or ‘confidential’. It is, let’s say, invented by them.\textsuperscript{67} 

The idiosyncratic documents handling accompanying the ‘satellite’ bodies’ informal decision-making mode largely coincided with the IT revolution. The shift to email and broadband connection around the turn of the century was widely recognised as facilitating these bodies’ increasing pace of decision making.\textsuperscript{68} However, their far-reaching informality also meant that digital security was not incorporated in the bodies’ system of document management. The security risks appeared to be chronically underestimated: 

[I]n my world, nobody is preoccupied about [security risks] because it has never gone wrong. […] I foresee a great risk that at some point, it will go wrong. […] But at the same time, the way we are working with the structure and systems as they now exist, there are not many alternatives.\textsuperscript{69} 

Initially, the evolving complexity institutional architecture of Ecofin decision making created confusion among administrators concerning practical issues such as document handling and the application of the ‘authorship rule’ in Decision 731/93. Furthermore, as becomes clear from \textit{Pitsiourlas I}, it also created a degree of opacity with regard to the access request procedure. Thus, at first it was not directly apparent even to the Council itself in what way it had been involved in the making of the decision. Moreover, with several decision making bodies involved, it took the applicant some time to establish which body involved in this decision had been designated with the record keeping responsibility, leading him to miss the deadline for a confirmatory application against the Council. The fact that the EFC was functionally integrated in the Council but fell administratively outside of it,\textsuperscript{70} while its secretariat formed a part of, but operated at arm’s length from the Commission, likely explains why applicants such as Mr Pitsiourlas and others overlooked the possibility of making an application under the Commission’s access rules. The low request figures for EFC documents may have related precisely to such institutional intricacies.\textsuperscript{71} More generally, the confidentiality and insulation of the Ecofin Council’s new ‘satellite’ bodies may in themselves 

\textsuperscript{65} Respondents #42, #50 
\textsuperscript{66} Respondent #43, also #48 
\textsuperscript{67} Respondent #42 
\textsuperscript{68} Respondents #29, #43, #45, #47 
\textsuperscript{69} Respondent #45, also #43, #47 
\textsuperscript{70} Häge (2008), p. 23 
\textsuperscript{71} Respondents #42, #43.
have created the invisibility which limited outsiders’ attempts to gain access to their
documents via the formal route.72

At an administrative level, the new situation created both institutional friction and a
certain vacuum in terms of allocation of responsibility. This brought about a considerable
degree of readjustment in the day-to-day business of the Ecofin Council:

Well, a big change of course [was] with the advent of the Eurogroup. […] [A]ll of a sudden
you had the EFC and the Eurogroup. […] [I]t became a bit confusing here in the Council
[…] What the hell is the Eurogroup?73

The respective requirements of informality and confidentiality pertaining to EFC and
particularly Eurogroup documents meant that the Council secretariat avoided handling or
registering them formally.74 For documents produced within the Ecofin Council, registration
was also rendered more complex. As economic policy making transcended the Council’s
institutional borders, this created holes in the register. The searchability of documents was
further complicated by the fact that, differently from other areas of Council policy making,
Ecofin documents were categorised into poorly delineated subject matters rather than on the
basis of the responsible decision-making body. For example, while during the years 1999-
2001 no documents were registered under the label of ‘European Central Bank’, this merely
indicates that ECB-related issues were difficult to separate from other policy concerns.
Consequently, in several instances they were assigned to the ‘EMU’, or the even wider
‘Ecofin’ label. Other ECB-related documents still did not end up on the register because they
were discussed in the EFC, Eurogroup, and from 2001, EWG meetings.

The ‘authorship rule’ thus effectively decapacitated Decision 731/93 with regard to the
content of informal Ecofin Council meetings, just as EPC, EFC, EWG, and Eurogroup
meetings remained beyond its remit. The issue of access to documents within the sphere of
economic governance appeared to be of very low salience.75 In response, the argument was
generally made that discussion in the Eurogroup were too sensitive to be made public.
However, as Puetter argued a decade ago, this is not fully evident:

While ministers insist that the issues discussed during the sessions require confidentiality
because they can lead to disruptions in financial markets or undermine the effectiveness of
decisions, the most critical observers deny that there is any justification for secrecy with
regard to the content of discussions.76

A similar argument has been raised for the EFC, which dealt with issues such as the effects of
monetary policy and exchange rate alignment. This interpretation was likewise not immune to

72 See also Puetter (2006, pp. 9-11) for a similar argument regarding the early (lack of) visibility of the
Eurogroup.
73 Respondent #43
74 Respondents #42, #46
75 Respondents #42, #48
76 Puetter (2006), p. 171
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discussion, as the function of the EFC changed considerably compared to the Monetary Committee that it succeeded, steering expressly into more economic policy-related waters.\(^7\) The absence of accountability arrangements during the first years, as well as the fact that the Eurogroup operated, until the 2009 Lisbon Treaty, as a wholly informal body add further to the impression of transparency circumvention.\(^8\)

In summary, the analysis of access to documents policy developments in the Ecofin Council between 1992 and December 2001 reveals two central trends. First, access to documents in this area was underpinned by an incongruent situation. Whereas Ecofin decision making increasingly took place in a rather fluid manner revealing the liquidity of boundaries between the Council and a number of adjacent ‘satellite’ bodies, the access to documents boundaries on the contrary were hard when it came to distinguishing between the two. This was due to the ‘authorship rule’ in Decision 731/93, as well as the interpretation by the Council that excluded these bodies from its self-definition. Second, document management of Ecofin Council and ‘satellite’ records appears to have been informal and incomplete. This became apparent in Pitsiorlas I, where the Council was unsure of the existence of certain documents and their (potential) whereabouts. Both developments are shown in Table 8.1.

<table>
<thead>
<tr>
<th>Development</th>
<th>Indicator</th>
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<tr>
<td>- Fluid decision-making boundaries but hard access to documents boundaries between Ecofin Council and ‘satellite’ bodies</td>
<td>- Interpretation of ‘authorship rule’ in Decision 731/93 that excluded these bodies; no court ruling on the matter</td>
</tr>
<tr>
<td>- Informal and incomplete document management of Ecofin Council and ‘satellite’ records</td>
<td>- Rule of confidentiality for Monetary Committee/EFC</td>
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\(^7\) Cf. Puetter (2014), pp. 192-3

\(^8\) Puetter (2006), p. 171; Puetter (2014), p. 158. While nothing prevents member governments from informing their parliament about ongoing policy developments, in practice the complex landscape of decision-making bodies and organisations has meant that national parliamentary information rights have diverged widely, and come under severe “EU pressure to conduct these debates in secret”, see Leino and Salminen (2013a), pp. 461-2, also Deutsche Bundestag (2013).
8.4 2001–2014: The informal method as a transparency ‘black hole’?

Under Regulation 1049/01, which entered into force in December 2001, the functioning of the formal access to documents regime improved considerably. Whether in terms of proactive disclosure, passive transparency, or judicial remedies, the trend was towards the advancement of access to documents, although the reliance on ‘limite’ documents and informal trilogue negotiations formed notable exceptions to this advancement. Meanwhile, access to documents of the Ecofin Council’s ‘satellite’ bodies developed in the opposite direction, towards the ‘formalisation of informality’, which entailed the further entrenchment of confidential and insulated decision making. The Ecofin Council thus saw an increasingly visible bifurcation between an increasingly transparent Ecofin Council and ever-more formalised informality in the ‘satellite’ bodies orbiting around it, allowed the access to documents regime to gradually improve in the former, while the latter stayed ‘under the radar’. As the crisis erupted, this division of labour became challenged. Decision-making activity in the ‘satellite’ bodies proliferated, and became involved in the EMU’s sudden demand for new legislative instruments, creating what increasingly seemed a ‘black hole’ that began to appropriate much of the Ecofin Council’s most salient decision making. Yet under mounting political and societal pressures, document leaking also began to rise. Currently, it is as of yet unclear to what extent the growing role of informality and confidentiality was a feature of the crisis, or has become an enduring characteristic of post-crisis Ecofin Council decision making.79

8.4.1 Advancing legislative transparency

After Regulation 1049/01 came into force, indicators of public access to Ecofin documents began to improve markedly which was largely a consequence of improving access to legislative documents. Both the number of Ecofin Council documents registered and the rate of direct access increased significantly.80 Compared to 2002, the annual number of documents registered in 2014 marked a 165 per cent increase, while direct access to these documents rose to a stable 82 per cent on average.81 In spite of the growing influence and routine involvement of the Ecofin Council’s ‘satellite’ bodies, their presence was barely reflected in documents to which access was granted. Indeed, most of the increase occurred in documents pertaining to the legislative areas of fiscal and financial policy. With an average rate of direct access of 86.5 per cent between 2002 and 2014, these documents were consistently more accessible than the Ecofin average.

Chances of gaining access to documents through the passive route also clearly improved. While the number of confirmatory applications in the Ecofin Council (8, representing 5.5 per cent of the Council total) and the reliance on mandatory exception grounds (50 per cent of cases) both remained roughly similar to the previous period, de facto (partial) access to documents went up substantially to 75 per cent, a rate that was higher than 79 Algemene Rekenkamer (2015), p. 39; Leino and Salminen (2013b), p. 868
80 Appendix 4; Respondent #42
81 Figures cited in this paragraph are elaborated in Appendix 4.
the Council average (59 per cent). Outside interest in access also increased, judging by the near-doubling of the number of initial applications (up to nearly 10 per cent of all Council requests).

Part of the explanation of the improving access rate likely lies in the fact that the pro-transparency member states continued to actively monitor the legal justification of non-disclosures, frequently voting against non-disclosure decisions. Indeed, during the second period, member states were considerably more likely to countervote, abstain, or make a statement in Ecofin confirmatory application decisions (62.5 per cent) than the Council average (46 per cent). Interestingly, member states began for the first time to motivate their votes through statements. This instrument was used disproportionately frequently: 15 per cent of all statements attached to Council appeal decisions were made in the Ecofin Council. In line with the general trend, particularly the Scandinavian member states and Estonia were active proponents of wider access.

The limited case law that followed from applications for access to Ecofin documents also contributed to better access to justice, albeit of a limited scale: only one applicant in this period challenged the Ecofin Council. This happened in Pitsioulas II and III, following Mr Pitsioulas’ appeal against the CFI’s decision of inadmissibility in case T-03/00. Advocate General Tizzano argued in his opinion that the CFI had erred in law in its construction of the concept of ‘excusable error’ that had formed the basis of Mr Pitsioulas’ defence of admissibility. The ECJ went along with this line of reasoning in its judgment in Pitsioulas II. It noted that full cognisance of the finality of a decision does not necessarily exclude the possibility of excusable error, where such error ‘…arises from confusion caused by the actual conduct of the institution concerned and [where] the applicant acted in good faith and exercised all the diligence required of a normally well-informed person’. It found that both of these criteria had been fulfilled. Indeed, the ECJ also noted that the ECB Governing Council had further added to the confusion by informing the applicant that “the Basle/Nyborg Agreement [was] not, strictly speaking, a single document […], but [existed] only in the form of reports and minutes prepared both by the Governing Council and the

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82 After the entry into force of Regulation 1049/01, four transparency cases related to economic and financial policy were brought, two of which involved the Council as a party (Case C-193/01, Pitsioulas v Council and ECB, 15 May 2003 (‘Pitsioulas II’) and Joined cases T-03/00 and T-337/04, Pitsioulas v Council and ECB, 27 November 2007 (‘Pitsioulas III’)). The other two cases were both brought against the ECB (T-436/09, Dufour v ECB and T-590/10, Thesing and Bloomberg v ECB). In the former case, the ECB's decision to refuse access to specific data contained in one of its databases on the basis that it did not constitute a ‘document’ as specified in its decision on access to documents (2004/258/EC) was overturned. In the latter case, a request for access to documents related to the Greek financial crisis was dismissed in its entirety on the basis of a narrow review of the application of the exception ground related to economic policy under the same access decision.
83 See section 8.3.1 above.
84 AG (2002).
85 Case C-193/01, Pitsioulas v Council and ECB, 15 May 2003 (‘Pitsioulas II’).
86 Pitsioulas II, para 25.
87 Pitsioulas II, para 26.
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Monetary Committee [later replaced by the Economic and Financial Committee].

The ECJ thus annulled the decision of inadmissibility and referred the case back to the CFI.

After the proceedings of case T-03/00 were reinitiated, Mr Pitsiorlas brought a further action for damages against the Council and the ECB, which was joined to the initial case. Only several years later, in November 2007, the CFI delivered its judgment in Pitsiorlas III, annulling the ECB Governing Council’s decision refusing access to its documents while dismissing all other pleas, including those for damages. Significantly, the court did not rule on the applicant’s claim that the Monetary Committee could not be “classed as a third party in relation the Council” because of its specific functions. The applicant’s allegation that his inability to raise this objection constituted a breach of the fundamental principle of transparency was construed by the court as “…to a large extent [based] on the […] argument …] that the Council, in concertation with the ECB, is guilty of misleading conduct in relation to the applicant”. However, it found no evidence of such deceit. Instead, it accepted the ECB’s account that the documents drafted by the Monetary Committee had coincidentally ended up in its archives after they were transferred, as part of the EMI’s archives from Basle to Frankfurt. The court found that it was therefore “conceivable and understandable that [the Council] could have overlooked [the document’s] existence”. Under these circumstances, it considered “the dispute between the parties as regards the position that the documents of the Monetary Committee properly belong with the Council […] irrelevant”. In the remainder of the judgment, the court annulled the ECB’s decision to refuse access to the requested documents, finding that the ECB Governing Council had failed to offer “any reason capable of refuting the applicant’s arguments”.

The court thus safeguarded the substance of the applicant’s right of access to documents on procedural grounds. At the same time, the court left important questions concerning the status of Monetary Committee documents in relation to the Council and the degree of record keeping that access applicants may reasonably expect unanswered. As a consequence, the insulated and informal nature of Ecofin ‘satellite’ bodies remained largely unquestioned.

On the whole, access to legislative documents in the Ecofin Council thus saw a general improvement. However, the public’s improving ability to follow legislative proceedings also had its caveats, meaning that specific categories of sensitive documents were routinely kept off the register. For example, the Ecofin Council stayed close to its rules of procedure by publishing, beyond ministerial-level agendas and minutes, only a negligible number of comparable documents at working party level. The underlying norm was a desire

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88 Pitsiorlas II, para 3
89 Joined cases T-03/00 and T-337/04, Pitsiorlas v Council and ECB, 27 November 2007 (‘Pitsiorlas III’)
90 Pitsiorlas III, para 101
91 Pitsiorlas III, para 110
92 Pitsiorlas III, para 144
93 Pitsiorlas III, para 122, also paras 134 and 146
94 Pitsiorlas III, para 147
95 Pitsiorlas III, paras 277, 279
96 Council (2001d), article 11

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to protect the internal decision-making process by avoiding the singling-out of specific member states during ongoing legislative negotiations. Thus, documents known to become public

…are always drafted in a way that reflects some kind of collective […]. You don’t hang out individual member states to dry. That is one principle that there is consensus about.\(^97\)

As in the pre-Regulation 1049/01 period, Ecofin documents labelled ‘limite’ remained virtually absent from the register. A growing number of these ‘limite’ documents pertained to so-called ‘trilogues’. As in other policy areas, in the ordinary legislative procedure the Ecofin Council relied ever-more often on these informal confidential negotiations with the EP in order to pass legislation in the first reading.\(^98\) The acting Presidency negotiated on behalf of the Ecofin Council in order to maintain a unified front towards the EP. A large part of documents pertaining to this process would only be disclosed after a decision has been reached.\(^99\) The Ecofin Council’s attempts to maintain confidentiality however were undermined by a wide tendency among member states to leak sensitive documents, or to ‘spin’ information from meetings. In the legislative process, such leaking was considered a strategic ‘part of the game’.\(^100\)

8.4.2 The formalisation of informality

While the general trend in legislative decision making was towards greater transparency, of course the Ecofin Council engaged in more than just legislative negotiations. The reason why Ecofin documents were nevertheless more accessible than the Council average is in large part explained by the fact that the ‘satellite’ bodies used parallel document management systems that operated largely ‘under the radar’. As I showed above,\(^101\) several Ecofin Council ‘satellite’ bodies that based their decision making on a principle of formal or informal confidentiality were already in place at the time that Regulation 1049/01 entered into force. Informal and insulated decision making continued unabated under Regulation 1049/01. However, paradoxically, the procedural operation of the ‘satellite’ bodies now began to attain increasingly ‘formal’ aspects. Indeed, the fact that decision making was informal and insulated should not be taken to imply that it was unstructured, either in a substantive or organisational sense. On the contrary, the various informal ‘satellite’ bodies carried out well-delineated tasks\(^102\) and were subjected to ever-more elaborate organisational structures.\(^103\)

\(^97\) Respondent #29
\(^98\) Respondent #47
\(^99\) Respondents #29, #44
\(^100\) Respondents #29, #45, #46
\(^101\) Sections 8.3.1 and 8.3.2
\(^102\) E.g. IGC (1997b), article 114; EFC secretariat (2004), section 1; Respondents #48, #49
\(^103\) Cf. EFC secretariat (2002); Council (2003); EPC secretariat (2003)
In the EFC, the coordination is based on legal acts and not on political understanding.\(^{104}\)

[With] the rising influence of the Eurogroup [...] meetings have become [procedurally] less informal.\(^{105}\)

This trend, which may be described as the ‘formalisation of informality’, occurred at a time when the ‘authorship rule’ for access to documents had just been revoked by Regulation 1049/01, which covered all documents held by the Council, as oppose to documents drafted by the Council.\(^{106}\) As a result, the formal legal case for the total exclusion of EFC and EPC documents from the access rules became less apparent. This was further underlined by a joint declaration, adopted by the legislative institutions, that sought to bring all agencies, bodies and institutions under the scope of the access rules.\(^{107}\) For the EPC, which was set up on the basis of a Council decision, this could be done automatically. The EFC however, being a treaty-based body, was only requested to voluntarily adjust its internal rules accordingly. To the author’s knowledge, no memorandum of understanding was subsequently adopted by which the EFC bound itself to apply Regulation 1049/01 to its documents. This is all the more salient, as the precise position of the EFC in the interinstitutional balance remained unclear.\(^{108}\)

As a consequence of the legislator’s drive to integrate all institutions, bodies and agencies into the access framework, the ‘satellite’ bodies thus had to take further steps to justify legally (or procedurally de facto) their secrecy. In part, they did so by further embedding the decisional norm of informality. Part of this effort was achieved by limiting the circulation of the growing numbers of documents. This was, among other efforts, achieved by the appointment of longer-term chairs for the various bodies,\(^{109}\) which operated as facilitators of informal coordination between the member states’ capital city-based decision makers. The EFC had already operated under a permanent two-year president since its establishment. Contrary to the EFC secretariat which was based in the Commission, this president fell institutionally under the Council.\(^{110}\) The Eurogroup in turn departed from the rotating Presidency in September 2004, to elect a two-year president from among their midst, which was later lengthened to two and a half years.\(^{111}\) The EWG followed suit in 2005, although its two-year chairmanship was formalised only considerably later, in October 2011. The acting EFC president was at that time elected as EWG chair.\(^{112}\)

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\(^{104}\) Respondent #43, also #24

\(^{105}\) Respondent #48, also #49

\(^{106}\) EP and Council (2001b), article 2(3)

\(^{107}\) EP, Council and Commission (2001)

\(^{108}\) On this point, see IGC (2007c), article 134(2), fifth indent and the EFC’s statutes (Council 2012) which are adopted by the Council, but state that the Commission finances the EFC and supplies its secretary and secretariat staff (article 13). See also section 8.4.1 above

\(^{109}\) Puetter (2006), pp. 81-3

\(^{110}\) Council (1998), annex, article 5; Respondents #45, #24

\(^{111}\) Puetter (2006), p. 82; Protocol 14 attached to IGC (2007b), article 2

\(^{112}\) EFC secretariat (2005), point 2; Puetter (2014), p. 195
A second form by which the various informal bodies and sessions limited their information flows was through restrictions on the numbers of participants, in a response to growing meeting sizes caused by the 2004 enlargement. Thus, the EFC introduced a restricted format of its sessions to bring the numbers down from roughly 130 to 70 participants, while the Eurogroup began to hold restricted sessions next to its already small (less than 50) full composition. Finally, the Ecofin ministers have come to reserve their sensitive agenda items for the restricted informal breakfast (two delegates per member state) rather than to discuss these in the non-legislative part of a formal Council meeting (attended by circa 300 officials).

Restricting the format of meetings happens at the initiative of the applicable chair and is seen as an indispensable element for reaching conclusions:

Basically, you have lots of people, and it is a very national thing. With so many people in the room, you will never have a real debate about something serious.

The various bodies also laid out their internal procedures in various documents with more or less legal significance. The EFC, for example, revised its statutes ahead of the 2004 EU enlargement in order “to preserve the elements which have contributed to the Committee’s efficiency”. On this occasion it reaffirmed its commitment to the confidentiality of its proceedings without any reference to Regulation 1049/01. A later document establishing ‘working methods’ elaborated on the limited role of documents in the proceedings of the committee. For example, explicit votes were not taken, and “[o]n compromise proposals offered by the President, silence implies assent”. Documents, which included the six-month work plan, agendas, summary minutes and written inputs of members, were circulated by email, with the EFC secretariat being responsible for “quick and confidential contacts with all members of the Committee and their alternates” as well as the confidentiality of meetings.

The EPC, in its working methods, reaffirmed its commitment to “informality, efficiency and professionalism”. This set of “good meeting practices” made it “less necessary [sic] to adopt formal Rules of Procedure”. While the working methods did not mention the issue of confidentiality explicitly, a later document implied its applicability by referring to a need on the EPC’s side “to take full account of the confidential character of the Eurogroup” to which it submitted inputs.

Months after the entry into force of Regulation 1049/01, the Eurogroup also revisited its working methods. The new guidelines consolidated a series of ‘best practices’ around

113 Council (2003), annex, article 4; EFC secretariat (2008), p. 2.ii; Respondents #42, #43, #45. This reduction of officials’ access to EMU documents spilled over to national administrations. Respondents #44, #46, #47, #48, #49, #50, #64
114 Respondents #42, #50
115 Respondent #42
116 Council (2003), respectively preamble 6 and article 12
117 EFC secretariat (2009), point 8
118 EFC secretariat (2009), points 12, 13
119 EPC (2003), p. 1
120 EPC (2005)
procedural matters developed in earlier informal papers drafted by the EFC, its predecessor
the Monetary Committee, and the EWG. It stipulated that meetings were to take place on
the basis of a “sufficiently detailed agenda”. This agenda was not to be published, in order to
preserve the confidentiality of the internal discussions. Members were also recommended to
“strive for verbal discipline outside of the Group”, letting the president address the press on
its behalf. The group held on to its informal ‘president’s letter’ instead of formal minutes.

The working methods of the Eurogroup were thereafter revised twice (in 2004 and 2008).
Earlier procedural documentation provisions were reaffirmed and regular input of the EWG
through “short discussion papers […] focussing on key policy issues”, terms of reference”
or “common understandings” was explicitly included.

As of July 2005, an oral debriefing of the Eurogroup meeting to the non-Euro
member states during the informal Ecofin breakfast meeting was formally agreed upon.
Though written and unwritten feedbacks from Eurogroup meetings were formal in the sense
that their existence was confirmed in internal guidelines, they were informal in the sense that
they were not handled according to formal procedures and could consequently not be
requested by the public. This paradoxical situation was even formally consolidated when, in
2009, the Lisbon Treaty created a situation of ‘formal informality’ for the Eurogroup, stating
“The Ministers of the Member States whose currency is the euro shall meet informally”.
In part, this statement was intended to underline the Eurogroup’s somewhat obscurantist
interpretation that its proceedings did not formally exist and consequently could not be
requested under the access regulation. The Eurogroup took exceptional care in this regard
not to create any precedent, by keeping its documents off the Council public register (even in
inaccessible form), while a majority of its members were reluctant to employ even flanking
measures such as holding regular press conference. This routine secrecy however came
under increasing criticism as the Eurogroup and other ‘satellite’ bodies, under the pressures
of the 2007 financial and sovereign debt crisis, became ever-more central to the Ecofin
Council’s crisis management.

8.4.3 Ecofin transparency during the crisis
In 2007, a global financial crisis erupted, which was soon followed by a European economic
and Eurozone sovereign debt crisis. The urgency and potential of destabilising European
economies forced the EU’s finance ministers, particularly those of the Eurozone, to respond
resolutely. As such, the crisis response had a number of immediate consequences for access

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121 EFC secretariat (2002), p. 1
122 EFC secretariat (2002), v-vii; Respondents #24, #50
123 EFC secretariat (2004), iv
124 EFC secretariat (2008), iv
125 EFC secretariat (2005), point 1; Respondents #43, #64
126 Protocol 14 attached to IGC (2007b), article 1
127 Respondents #42, #45
128 Puettter (2006), p. 80
129 Respondents #29, #45

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to documents in the Ecofin Council. Above all, it brought a vast increase in meeting activity and document flows:

[The volume of documents] increased. Absolutely. During the crisis it was hysterical.\textsuperscript{130}

Many of the discussed subjects were highly sensitive. In certain circumstances, decision makers made sure that certain debates would not find their way into documents. For example, this was the case in 2012, when contingency plans were discussed for further developments of the sovereign debt crisis:

Yes, of course Brussels worked on certain ‘what if’ scenarios […] and ‘what do we do with Greece?’ And naturally that was extraordinarily sensitive, you would probably find no, or very little documents [of these discussions]. Which was of great importance to other vulnerable member states.\textsuperscript{131}

In line with this development, the accessibility of ministerial-level Ecofin agendas and outcomes of procedures on the document register also experienced a temporary gap.\textsuperscript{132}

At the same time that the EMU’s insulated bodies came to play an ever-more prominent role in the decision-making process, the number of document and information leaks to the press increased notably.\textsuperscript{133} This seemingly paradoxical situation is explained by the Ecofin Council’s crisis management, particularly where it concerned the Eurozone. On the one hand, decision makers relied heavily on problem-solving through informal EMU structure that was already in place. On the other hand, this regime led to increasing dividedness under the dual pressures of market speculation and strong internal political differences. A clear consequence of the former was that Ecofin decision makers in the EFC, EWG and Eurogroup all had considerably more meetings. In the case of the EFC, the meeting regime was even stepped up to almost daily conference calls while the informal Ecofin Council transformed itself into a breakfast meeting preceding each formal ministerial Ecofin meeting, lasting considerably longer than the formal meetings succeeding them.\textsuperscript{134} This resulted in the frequent internal circulation of documents that were declared non-public on legally unclear grounds:

Around 2012, I did see ‘strictly confidential’ EFC documents about ‘Managing the crisis’, which put ideas on the table about how to move on with the crisis. […] These were sent only to members, so I received them from a member. But there was no formal [classification] label, nor a formal internal policy [delimiting access].\textsuperscript{135}

\textsuperscript{130} Respondent #29
\textsuperscript{131} Respondent #50
\textsuperscript{132} This was particularly the case in 2011 and 2012.
\textsuperscript{133} Respondents #29, #43, #46
\textsuperscript{134} Respondents #29, #42, #43, #45, #48, #50; Puetter (2014), p. 164, 193; EU Ecofin official cited in Puetter (2014), p. 172
\textsuperscript{135} Respondent #50, also #64
The combination of irregular document classification and confidentiality had as a consequence that member states would not circulate the documents pertaining to these bodies through the regular governmental communication network as would be the case for legislative procedures. All members of the EFC and its subcommittees would be asked to sign a statement of confidentiality to this end. Furthermore, even though all participants, including the Commission and secretariats would take minutes, such minutes were said formally not to exist. The EFC secretariat, which served both the EFC and the EWG, allegedly also had an underdeveloped archiving system. The casual nature of EFC document management during the crisis was confirmed by a Court of Auditors investigation which found that the EFC secretariat had lost several documents related to the Greek support programme.

The EFC secretariat’s informal document handling caused friction with the working methods of the Council secretariat. The Council secretariat took a line of registering and storing EFC and Eurogroup documents systematically (by day and by meeting), but not formally, unless they were officially submitted to the Council:

[W]e don’t handle these documents officially. We also did not try, because either we handle them officially, and ignore our confidentiality rules, or we apply our confidentiality rules and handling these documents will become a nightmare.

Notwithstanding the political and market risks of decisional transparency under the spectre of economic decline, the Eurogroup calculated that a lack of communication would be interpreted as a sign of indecision. As a result, Eurogroup communication in fact increased during the crisis, through more regular press conferences and the publication of more elaborate information including summaries of its meetings on a dedicated website. However, the public statements both of the Ecofin Council and the Eurogroup were carefully crafted. Furthermore, all information offered by the Eurogroup on its website was presented in flat text, in order to avoid an access to documents precedent. One respondent in the Council secretariat expressed the tension between the meticulously guarded policy of informality in the face of the Eurogroup’s increasing organisational formalisation:

[Statements by the Eurogroup [...] are published, by our colleagues, our communication colleagues, here in the house. [...] Let’s say, if people would want to push to formalize this
process further, I would say okay, let’s take these statements -they are public anyway, there is nothing secret in them- and let’s include them in the [Council] register.145

At the height of the crisis, the pace of events also meant that the Ecofin Council’s ‘satellite’ bodies played an unusual role in the adoption of crisis measures, be it legislative, non-legislative, or even outside of the European Treaties. In a short timeframe, the sovereign debt crisis led to the adoption of a considerable body of legislation.146 Legislative packages such as the Six-Pack (2011), the Two-Pack (2013), and the Banking Union (2013) formed the centrepiece of the Ecofin Council’s response to the crisis.147

The manner in which the crisis legislation was adopted was rather atypical compared to the Council’s ordinary handling of legislative dossiers. The EFC and EWG, institutionally foreseen as advisory and preparatory bodies without a legislative function, became deeply involved in the Ecofin Council’s legislative debates, often even before the Commission submitted a formal legislative proposal.148 Similarly, the informal Ecofin Council meetings would be conducted on the basis of a confidential agenda that included legislative items, contradicting the Council’s internal rules on open legislative debates.149 The decision to involve the ‘satellite’ bodies and “basically, to ignore Commission and Council rules”, at least in spirit, was due to the legislation’s political sensitivity, combined with a strong sense of urgency.150 The Banking Union provides an example of the irregular manner in which some legislative acts were drafted during the crisis:

The preparation of the SSM regulation [part of the Banking Union] in Ecofin was something that happened in the Euro Working Group, then it was in a Council working group, then it went to Coreper, but was also discussed in the EFC, to single out what the two, three most politically pertinent questions were, then again Coreper and Ecofin.151

Unorthodox involvement of the ‘satellite’ bodies also occurred at more advanced stages of the legislative process. For example, in the case of the Single Resolution Mechanism,152 Eurogroup president Dijsselbloem participated in the trilogue negotiations with the EP at the invitation of the acting Greek Council Presidency.153 The deliberative process ahead of the Commission’s tabling of the actual legislative text is equally telling. The Single Supervisory

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145 Respondent #42
146 According to one estimate, 56 legislative acts related to financial markets were passed in three and a half years, compared to roughly two per year before the crisis. The bulk of legislative work took place in 2011 and 2012. (Respondents #45, #47)
147 Respondents #29, #45
148 Respondents #43, #45, #47, #50
149 Council (2006), article 8 and its replacing act, Council (2009), article 7(1)
150 Respondent #42
151 Respondent #43, also #46
152 Along with the Single Supervisory Mechanism (SSM) adopted in October 2013, the Single Resolution Mechanism (SRM), adopted in July 2014, formed the Banking Union. The Banking Union formed the EU’s new regulatory regime for the European banking system which was developed in response to the financial crisis in which a number of very large banks defaulted.
153 Respondent #50
Mechanism process for example was kick-started at a “meeting that never took place” at a Paris airport, gathering a select company of central figures including members of the cabinet of European Council president Herman Van Rompuy, EMU and Euro Commissioner Olli Rehn, ECB president Mario Draghi, EFC president Thomas Wieser and a number of finance ministers. This informal meeting prepared the ground for a Euro Summit in June 2012, at which the outlines for the Banking Union were laid down in a set of conclusions, drafted by the EWG together with the Summit sherpas. The conclusions were then elaborated by the EFC, after which the Commission drafted a proposal on the basis of the emerging consensus.

Evidently, very little of the above-described preparatory processes would be laid down in formal, publicly accessible documents in the sense of Regulation 1049/01, as much of the substance discussed was presented in so-called meeting documents or circulated confidentially and informally among the ministers or EFC/EWG members. The legislative outlines precooked by the EFC carried considerable weight, as the EFC/EWG delegates, often being junior only to the heads of state or government and finance ministers, were able to negotiate relatively free from consultation: “They are the capital mandates”. This considerably shortened the debates of the Ecofin working party counsellors and Coreper II ambassadors, who received their instructions from the capital city-based decision makers that were involved in both arenas, and decreased opportunities for stakeholder access and participation. Although Coreper ensured that its institutional prerogative of granting approval was at all times formally respected, in many cases its role was reduced to that of a ‘rubber stamping machine’.

The various crisis measures, whether legislative or non-legislative, created a situation that widened differences between the Ecofin’s members to the detriment of formal transparency. For example, new legal instruments such as the Macroeconomic Imbalance Procedure (MIP) had a disproportionate impact on the southern member states with vulnerable economies. Although the MIP formally left national sovereignty and responsibility over budgetary and economic policies intact, its focus on surveillance and detailed and far-reaching preventive parameters caused these countries to be more cautious in their public communication:

[The set of new economic surveillance rules] makes it more effective, that's for sure [...]. I don’t know if it’s more transparent. For instance, [...] it’s bad for a member state to be told

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154 See footnote 152 above
155 Respondents #43, #45, #64
156 Respondents #24, #43, #50
157 Respondent #43. Naturally, they were not free from national constitutional constraints. On this point, see EUI (2015)
158 Respondents #29, #43, #44, #46, #47, #62. Although outside stakeholders have sought informal access to Ecofin information, they tended to focus on the regular Council preparatory bodies and on the EP, leaving ‘satellite’ bodies aside (Respondent #62).
159 Respondents #45, #43
160 Respondents #29, #46, #48, #49, #50
by Europe to change its budget, presentationally they want to be seen doing it themselves. Therefore, transparency would be very bad. You can’t enforce the Eurozone compact with too much transparency.\(^{161}\)

Member states were further divided by the introduction of a plethora of new intergovernmental organs and instruments with mixed memberships.\(^{162}\) While this is not the place to enter into the details of the (post-)crisis economic and financial governance architecture,\(^{163}\) it is important in the context of this case study to note that these developments were by and large agreed in closed sessions of the ‘satellite’ bodies and the Euro Summit, under the prevalent norm of confidential informality. Significantly, the Board of Governors of the ESM were the members of the Eurogroup, while various (alternate) members of the EFC were appointed on its Board of Directors.\(^{164}\)

Decisions taken in the context of the various new organs and instruments were highly sensitive politically, societally, and for markets.\(^{165}\) For example, repeated talks concerning the conditions for Greece’s several bailout packages were surrounded by more severe disagreements between member states, intense market speculation, media attention, and widely expressed societal discontent than had previously been the case in EMU governance.\(^{166}\) The fact that decision makers were acutely attuned to the potential risk involved in disclosure of certain internal discussions seems to have gone some way in tempering the resort to document or information leaking.\(^{167}\) Still, under strong electoral pressures, leaking increased. This was particularly the case in the Eurogroup, but also in the EFC.\(^{168}\)

\[T]he stakes were higher and, to put it simply, interest from the media in what was being cooked up was of course also higher. So it was a two-way street.\(^{169}\)

You might publish a long debate in [national newspaper] about the tax wedge, but of course that won’t excite anyone in [country]. But when you say that those damned Greeks will again need all this money next year to pay for their bills, matters are of course different.\(^{170}\)

\(^{161}\) Respondent #47

\(^{162}\) Namely, under EU law, the Eurozone (18 members) and the Banking Union (June/October 2014, 21 fully participating members) and outside of EU law, the EFSF/ESM (May 2010/July 2011, 18 contracting parties) and the TSCG or ‘Fiscal Compact Treaty’ (January 2012, 25 signatories). All figures represent numbers as they stood on 31 December 2014, which is the cut-off point of this study.


\(^{164}\) Respondent #64. On a side note, the ESM, being an institution outside of EU law, is not bound by Regulation 1049/01, and appears to be unresponsive to public requests for access to information. Cf. CEO (2014).

\(^{165}\) Respondents #29, #43, #50

\(^{166}\) Respondents #43, #45, #50

\(^{167}\) Respondents #29, #43, #46

\(^{168}\) Respondents #43, #45, #50, #64

\(^{169}\) Respondent #50, also #45

\(^{170}\) Respondent #45, also #43, #50
CHAPTER 8

The fear of pre-emptive legislative negotiations has increased further since a change in the QMV formula, foreseen in the Lisbon Treaty, and has meant that per 1 November 2014, the Eurozone member states form a QMV block within the Ecofin Council.\(^\text{171}\) This has caused the non-Eurozone Council members to plead for strict respect of the institutional division of labour,\(^\text{172}\) and to make use of all possible information channels, both informally among Council colleagues and outside of it, through leaks and media reports.\(^\text{173}\) In practice, many of the crisis measures were discussed in the EWG, or even more restrictively, between the largest member states within the Eurozone:\(^\text{174}\)

One piece of legislation, about the EBA, was for every member state, so for 27, now 28. There were some attempts at the Eurogroup to agree on something and report: look, take it or leave it. It was also the case at the EWG. [...] Some member states – it is no secret, the UK particularly – are sensitive [that they might] discuss something that is important for [them] as well.\(^\text{175}\)

In response, some member states have shown a greater readiness to defect from the Council’s ranks vis-à-vis outsiders, by sending strong signals to the public, ahead of meetings, concerning the state of play and their preferred way forward. However, this is also considered a risky strategy that may backfire on decision makers, both through their peers and their national audience.\(^\text{176}\) Moreover, close cooperation with the EP and outside stakeholders in legislative dossiers was generally regarded as an indicator of political isolation.\(^\text{177}\)

Throughout the second period, the role of the EP proved to be minimal.\(^\text{178}\) Its Economic and Monetary Affairs committee held frequent meetings concerning the EU’s economic governance and crisis management, in which the issue of the transparency deficit featured prominently.\(^\text{179}\) However, this criticism had a negligible impact:

I would dare to go as far as to say that the majority of the ministers are perfectly oblivious to this discussion.\(^\text{180}\)

Only in the legislative process, where it acted as a co-legislator, was the EP able to exert a degree of pressure to alter the institutional balance.\(^\text{181}\) For example, the Six-Pack introduced a

\(^{171}\) IGC (2007a), article 16(4)). Although a transitory measure stipulates that until 31 March 2017, member states may request to vote in accordance with the old vote counting system Protocol 36 attached to the Lisbon Treaty, Title II, article 3(2).

\(^{172}\) Respondents #46, #47, #64

\(^{173}\) Respondents #44, #47

\(^{174}\) Respondents #50, #64

\(^{175}\) Respondent #44

\(^{176}\) Respondents #42, #50, #46, #64

\(^{177}\) Respondents #47, #62, #29

\(^{178}\) See section 8.2 above

\(^{179}\) EP (2014); Respondents #29, #42, #45, #50

\(^{180}\) Respondent #45, also #64

\(^{181}\) Respondents #50, #46; Crum (2013), p. 618
regular parliamentary debate with the Council Presidency and Eurogroup president, as well as, optionally, national finance ministers.\textsuperscript{182}

More recently, the Commission has expressed its desire to steer economic decision making away from the crisis mode and turn it into “business as usual”.\textsuperscript{183} This would include normal powers of oversight for the EP, deeper involvement of national parliaments, and above all, “greater transparency about who decides what and when”.\textsuperscript{184} The ascribing, for the first time, of a formal obligation to the Eurogroup in the Two-Pack\textsuperscript{185} may go some way towards the development of public access to its documents as well as the flanking instrument of parliamentary oversight.\textsuperscript{186} Nevertheless, repeated refusals of finance ministers to appear before the EP suggest that this accountability mechanism has not yet been taken fully seriously.\textsuperscript{187} More promising were reporting obligations imposed on certain governments by their national parliaments.\textsuperscript{188} For example, after a landmark judgment of the German federal constitutional court, the German government became obliged to submit certain well-delineated types of information to its own parliament.\textsuperscript{189} However, these national parliaments predominantly scrutinise the role of Ecofin members from the perspective of national interests:

One thing, I think, is solving the European problem. But the second question is, who foots the bill? And then the reflex is always: as little as possible me.\textsuperscript{190}

In summary, two central trends can be discerned in the development of the access to Ecofin documents policy under Regulation 1049/01. First, the overall functioning of the regular access to documents procedure, both at an administrative and judicial level, improved markedly. At the same time, such improvement remained limited to uncontroversial areas of policy making, leaving documents related to the EMU largely outside of the light of transparency. Second, a gradual process of ‘formalisation of informality’ began to gather pace among the Ecofin Council’s ‘satellite’ bodies which challenged conventional distinctions between formal transparency rules and informal transparency norms.\textsuperscript{191} This translated into the further enshrinement of informality and/or confidentiality principles in the (quasi-formal) working methods of bodies such as the EPC, EFC, EWG, and Eurogroup, and the reliance on various instruments restricting access to their documents. The Eurozone sovereign debt

\textsuperscript{182} European Parliament and Council (2011), article 1(3) and (4); Respondents #48, #49
\textsuperscript{183} Cited in Leino and Salminen (2013b), p. 866
\textsuperscript{184} Commission (2015a), p. 17
\textsuperscript{185} European Parliament and Council (2013), article 15
\textsuperscript{186} Respondent #42
\textsuperscript{187} Respondent #45
\textsuperscript{188} EUI (2015); Leino and Salminen (2013a), pp. 461-2
\textsuperscript{189} Case 2 BvR 1390/12 of the GFCC, Gauweiler and others v Bundestag, 18 March 2014, para C(.i)(2)(dd); Respondents #43, #50; also Jaros (2012); Leino and Salminen (2015), p. 4
\textsuperscript{190} Respondent #45
\textsuperscript{191} See also the description by the former Finnish finance minister and one-time Eurogroup chair Sauli Niinistö as “formalising the work informally”, cited in Puetter (2006), p. 117.
Table 8.2: Access to documents policy in the Ecofin Council, developments December 2001-2014

<table>
<thead>
<tr>
<th>Development</th>
<th>Formal rules</th>
<th>Implementation</th>
<th>Informal norms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall improvement in functioning of access to documents procedure in uncontroversial areas</td>
<td>- Case law concerning ‘excusable error’ on applicant’s side (Pitsiorlas II)</td>
<td>- Increase in passive and proactive transparency</td>
<td>- More resort to ‘satellite’ bodies</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- From 2014: Publication summaries of Eurogroup meeting</td>
<td>- More informal circulation of sensitive information</td>
</tr>
<tr>
<td></td>
<td></td>
<td>But: - Sensitive/‘satellite’ documents not registered</td>
<td>- Avoidance of singling out individual member states</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- 2011-2012: Decline in accessibility Ecofin agendas</td>
<td></td>
</tr>
<tr>
<td>Gradual ‘formalisation of informality’ of Ecofin ‘satellite’ bodies</td>
<td>- Rule of confidentiality enshrined for most ‘satellite’ bodies</td>
<td>- Access to agendas and minutes systematically refused</td>
<td>- Limited internal distribution of document</td>
</tr>
<tr>
<td></td>
<td>- Protocol 14 attached to the Lisbon Treaty declaring the informality of the Eurogroup</td>
<td>- Members of EFC and EWG made to sign confidentiality statement</td>
<td>- Informal statements of confidentiality/informality</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- ‘Do not formally exist’</td>
<td>- Agendas and minutes ‘do not formally exist’</td>
</tr>
</tbody>
</table>

Crisis that erupted after 2007 increased the role of the ‘satellite’ bodies and thereby tended to exacerbate the impact of their routine secrecy. Both developments are shown in Table 8.2.

8.5 Analysis: Change and continuity over time

In light of the guiding empirical questions, how must the dynamics underlying the development of Ecofin Council transparency be characterised? Determinant of the Ecofin Council throughout the entire period analysed in this case study has been the bifurcation of its decision making into two modes of operation. On the one hand, financial policy making relied on the ‘traditional’ formal structures of the Council and the community method more broadly. On the other hand, economic and monetary policy making developed within an informal, new, and experimental governance structure that operated largely alongside the Ecofin Council. While the former mode clearly fell within the scope of the Council’s formal access to documents rules, this was not the case for the latter.

The total exclusion of the EMU ‘satellite’ bodies was initially defended on the basis of the ‘authorship rule’ according to which the access rules only applied to documents drawn up by the Council. As the legal basis for access to documents changed from an internal Council decision to Regulation 1049/01, this exclusion became less apparent but was kept intact. The ‘satellite’ bodies applied either an argument of informality, confidentiality, or both. A central

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192 Chapter 5, section 4
role in this regard was played by the EFC chair and his secretariat as well as the Eurogroup president, who facilitated and managed the work of the EFC, the EWG and the Eurogroup. Thus, in legal or non-legal ways, the bodies associated with the EMU pushed increasingly towards an institutionalisation of informality.

Such informality was also applied within the Ecofin Council whenever ministers discussed EMU-related matters, through the institution of regular informal Council meetings that were, again, placed outside of the formal Council structures, including those governing access to documents. This bifurcation barely attracted the attention of Council decision makers, who were content with compensating the resultant drop in transparency with the staging of periodic public debates.

In those Ecofin areas that fell outside of the EMU’s informal governance structure on the contrary, the implementation of access to documents policy improved steadily. Due to a growing public interest in Ecofin documents on the one hand and policy activism among the Council’s pro-transparency members on the other, relatively high levels of passive and –into the new millennium– proactive disclosure were achieved. However, the register generally reported far lower numbers as well as unrealistic access rates where EMU-related documents were concerned. Meanwhile, access requests for these documents, which might have driven the access rate down, were very limited. Important in this respect is the fact that, due to the insulated nature of decision making in the EFC and EWG, few outsiders were aware of the (types of) documents that circulated in these bodies. EMU governance generally included only a limited number of officials in the (Eurozone) members’ finance ministries, while the EFC and EWG were served by their own, equally insulated secretariats. This lack of visibility and inclusiveness further complicated the filing of access requests to these documents. It also impeded the Council secretariat’s capacity to bring these bodies’ document drafting, handling, and circulation in line with its own practices. The opacity deriving from this complexity also formed the leitmotif in the single set of Council access cases in this policy area, Pitsiorlas I-III. Although Mr Pitsiorlas first brought a case at the beginning of 2000, it required a court order and an appeal which together took him nearly three and a half years to obtain, before the court ruled to protect his standing as an applicant in view of the excusable procedural error which had arisen from the Ecofin Council’s opaque decision making. The court later refrained from ruling on the institutional locus of the EFC which might have clarified the right of access to documents to the latter’s documents. The role of the courts in shaping the access to Ecofin documents remained marginal as a result.

In the 1990s, the EMU’s three-stage introduction also meant a step-wise institutionalisation of its informal governance structures. In this sense, the gradual introduction of EMU ‘satellite’ bodies naturally followed, up until the introduction of the euro, the unfolding scope of EMU activity, after which the further fine-tuning of economic policy coordination continued. This allowed the expanding application of the access to documents rules to coexist with informal EMU decision making after its central bodies were put in place. It was not until the financial crisis reached the EU (2007) that the balance shifted. Due to the rather strictly enforced insulation and informality of the EFC, EWG and
Eurogroup decision making, this shift is not directly apparent from the data. Yet during this period, the ‘satellite’ bodies came to play a major role in the management of the crisis, which included legislation designed to restore trust by combating the perceived origins of the crisis. As a result, a large part of the legislative negotiations that would usually take place inside the Ecofin Council’s preparatory bodies were pre-empted by the EFC, the EWG, and the Eurogroup, creating a significant transparency gap in the legislative process that tested the boundaries of the access rules at best, or went beyond them at worst.

The process of crisis management set in motion a host of transparency-related issues, the long-term consequences of which are still hard to foresee. Nonetheless, some contours may already be discerned.

First, the outputs of the crisis response have created several new decision-making forums that divide the member states along various fault lines. This means that the ‘regular’ decision-making forums are increasingly challenged by bodies that facilitate closer economic convergence, and consequently, privilege information flows between selective groups of member states over the free flow of confidential policy information between all of the EU’s member states. The increasing prominence of Eurogroup and Troika decision making, which is underlined by the creation of new bodies such as the ESM, and procedures such as the Six-Pack and Two-Pack associated with it, has put the normal division of labour between the Ecofin Council and the EFC under pressure. This has led to an increase in policy leaks and public defection from the Council’s policy line among member states. This makes it more difficult to uphold the ‘satellite’ bodies’ strict insistence on informal or confidential decision making.

Second, the new instruments of economic surveillance have increased the number of routine activities that take place inside these bodies, the documentation of which in practice lies wholly beyond the reach of the public. This creates a paradoxical situation by which economic policy formally remains largely a prerogative of the member states, but which creates highly formalised procedures and produces hundreds of regular meetings hours and an unknown amount of documents per year that do not formally exist ‘as Council documents’.

Third, the EP’s recently-acquired information and dialogue prerogatives relating to the Ecofin Council’s economic governance agenda may over time come to play a role in the creation of flanking measures to compensate for limited access to documents in this policy area. Throughout the period covered by this case study, the EP did not play a role of importance in the development of Ecofin transparency due to its very limited institutional prerogatives in this area. It was only with the Lisbon Treaty that the EP gained certain co-legislative functions in this area. Over the coming years, it will become clear whether its co-legislative task can play a role in rendering the Council’s economic governance more transparent. Table 8.3 summarises the factors that are most important in explaining the development of the Ecofin Council’s access to documents policy.
### Table 8.3: Explanatory factors in the development of access to documents in the Ecofin Council

<table>
<thead>
<tr>
<th>Stable factors</th>
<th>Changing factors</th>
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<tbody>
<tr>
<td><strong>Actors</strong></td>
<td></td>
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<tr>
<td>- Limited policy entrepreneurship</td>
<td>- Introduction of various specialist bodies and actors (EFC/EWG secretariat/president, Eurogroup (president) (1998 and after)</td>
</tr>
<tr>
<td>- Presidency or Council secretariat</td>
<td>- Growing role EFC, EWG, Eurogroup (2007 and after)</td>
</tr>
<tr>
<td>- Limited influence EP</td>
<td>- Proliferation of decision-making forums including only limited number of Ecofin Council members (EFSF/ESM, Fiscal Compact, Banking Union) (2010 and after)</td>
</tr>
<tr>
<td>- Limited influence courts</td>
<td>- Introduction of various specialist bodies and actors (EFC/EWG secretariat/president, Eurogroup (president) (1998 and after)</td>
</tr>
<tr>
<td>- Limited influence non-institutional actors</td>
<td>- Growing role EFC, EWG, Eurogroup (2007 and after)</td>
</tr>
<tr>
<td><strong>Preferences</strong></td>
<td></td>
</tr>
<tr>
<td>- Reliance on insulated and informal decision making in EMU-related matters, largely beyond the reach of access to documents policy</td>
<td>- Drive towards institutionalisation of Ecofin Council’s main informal decision-making structures: EFC, EWG, Eurogroup (1999)</td>
</tr>
<tr>
<td>- Drive towards institutionalisation of Ecofin Council’s main informal decision-making structures: EFC, EWG, Eurogroup (1999)</td>
<td>- Crisis management through package of largely confidentially agreed legislative and non-legislative measures (2008)</td>
</tr>
<tr>
<td><strong>Resources</strong></td>
<td></td>
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<tr>
<td>- Separate administrative structure for EMU-related governance bodies with its own document management system</td>
<td>- Protection of standing before courts (2003)</td>
</tr>
<tr>
<td>- Limited impact of access to courts</td>
<td>- Financial and economic crisis (2007)</td>
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<tr>
<td><strong>Exogenous factors</strong></td>
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### 8.6 Conclusion: The paradox of institutionalised informality

From an early stage in the Council’s access to documents policy, access to Ecofin documents has been conceived as being divisible into two categories that structured its understanding of transparency. Documents falling within the first category concerning financial and fiscal matters were handled in accordance with the Council access rules as usual. By contrast, documents falling within the second category concerning economic and monetary policy were generally speaking not to be accessible to the public. This distinction was underlined by a separate institutional architecture for the EMU, which decisively shaped the constellation of actors, preferences and resources relevant to access to documents policy. New specialist bodies and elite officials were introduced that revolved as ‘satellites’ around the Ecofin Council, acting on the basis of the dual principles of insulation and informality. This led to a situation in which the proceedings of these various bodies were considered to fall legally outside of the Council’s initial access regime (Decision 731/93) whereas after December 2001, when Regulation 1049/01 entered into force, a body of internally adopted ‘soft law’ sought to ensure the continued non-application (at least de facto) of this legislative act.

The bifurcation between EMU decision making and other decision making also resulted in the marginalisation of certain outside actors. For example, the EP had no formal role in EMU decision making and was unsuccessful in creating greater access to Council documents in this area. Similarly, outside stakeholders, such as lobbyists, were able to gain a
degree of informal access to legislative documents, but were kept wholly outside of EMU
decision making. Finally, while particularly in the final years the informal document
arrangements caused certain difficulties for the Council secretariat in fulfilling its transparency
obligations, these concerns did not lead to significant changes in access to documents policy.

In the years after the entry into force of Regulation 1049/01, the EMU’s complex and
opaque technocratic governance model led to ever-more institutionalised informal decision
making.\(^{193}\) In the case of the Eurogroup, this went to the point where the informal modus
operandi was legally laid down in a Protocol attached to the 2009 Lisbon Treaty. The far-
reaching insistence on informality in the EMU’s economic governance was underpinned by a
consensus among member states on two arguments. First, apart from a set of framework
rules laid down in the Stability and Growth Pact, economic policy was considered to lie
within the province of national competence, meaning that member states were generally
reluctant to acknowledge any specific EU competences, including access to documents.
Second, policy makers insisted on the potentially harmful effects of disclosures on economic
performance of the Eurozone and the EU as a whole. This simultaneous insistence on what
seem to be two mutually exclusive arguments reveals the paradox underlying the Ecofin’s
system of institutionalised informality: procedurally, it denied EU-level formality, whereas
substantively, it relied on a considerable number of legal instruments. These principles
however appear legally superfluous, as there is nothing in Regulation 1049/01 that suggests
its scope is limited only to areas in which the EU has competence.

When, in 2007, the global financial crisis occurred and spilled over into the EU, the
Ecofin Council’s system of insulated and informal decision making was put to its most
strenuous test thus far. The EMU’s crisis response was marked by even more reliance on
insulated and informal decision making. The Ecofin Council’s ‘satellite’ bodies increasingly
became a ‘usurper’ of the former’s legally prescribed institutional prerogatives, which
importantly included these in the legislative sphere. The ‘satellite’ bodies are emerging from
the crisis reinforced in several ways. This trend is unlikely be reversed in the short term, since
further formal integration of EMU decision making is not considered feasible.\(^{194}\) The newly
strengthened role of the Eurogroup, the EFC, and the EWG may thus lastingly pre-empt
much of the ‘formal’ Ecofin Council’s decision making at the expense of a more regularised
form of access to documents.


\(^{194}\) Crum (2013), p. 624
Chapter 9
Access to Documents in the Foreign Affairs Council: An Exceptionalist Consensus

Classification is a specific process [...]. You can be transparent to a very satisfactory degree, if your attitude is open, explanatory, available, et cetera, but maybe you are not going to be able to give the whole document, because the document belongs to everybody, and there is not an agreement.¹

9.1 Introduction
In this chapter, I consider the case of access to documents in the Foreign Affairs Council (hereinafter, FAC).² In the selection of most different cases that form part of this dissertation, the FAC was included on the basis of its relatively secluded decision-making style, enshrined in the Maastricht Treaty and subsequent treaties, which leads to the expectation that outside actors’ influence on FAC decision-making processes was limited compared to other Council formations. This divergence in institutional set-up makes the FAC a suitable case to establish to what extent the horizontal access to documents dynamics are generalisable throughout the Council, or whether policy-specific factors exist that have a competing influence on the manner in which access to documents policy plays out in the FAC.

The FAC is also a case that traditionally ‘raises flags’ when it comes to the issue of transparency. Foreign policy in general has long been typified as a problematic, or in more forgiving language, exceptional terrain for democratic control, with the executive claiming a wider prerogative to act confidentially and discretely.³ In certain instances, such policy discretion may well be necessary for the executive to effectively represent the polity’s interests in the international sphere.⁴ Inevitably, a larger proportion of information in this policy area will be sensitive, resulting in more limited access in numerical terms. As the

¹ Respondent #56
² In 1992, foreign affairs decision making was spread out over two formations: General Affairs and External Relations – External Relations Part (GAERC) and Development (DevCo). For reasons of legibility, all of the Council’s foreign policy making activities are here referred to under the current name of Foreign Affairs Council (FAC).
³ Hyde-Price (2002), pp. 55-6
⁴ Curtin (2012b), p. 460; Colaresi (2014)
opening quote of this chapter shows, in a large part of the Council’s foreign policy the
tendency towards confidentiality is even stronger because often-controversial proposals
require unanimity before a formal decision is reached.

The case study offers evidence of an ‘exceptionalist consensus’ among member states
that influenced access to FAC documents policy from the outset. However, at the turn of the
century, the ‘exceptionalist consensus’ was subject to highly contested reform. A new
settlement was subsequently found that addressed the most important concerns of the
Council majority and minority, as well as the EP. This settlement paved the way for a
consolidation of the FAC’s policy exceptionalism which soon led the advance of access to
documents to reach a ‘ceiling’. In the final years covered by this case study, the ‘exceptionalist
consensus’ came under increasing pressure from external actors, bringing up questions over
its future tenability.

The chapter proceeds as follows. Section 9.2 sketches the institutional context of access
to FAC documents by describing the most relevant institutional characteristics of FAC
decision making between 1992 and 2014. The subsequent analysis of the FAC’s developing
access to documents policy is broken into two time periods, with section 9.3 covering the
years before and under the first access to documents decision (Decision 731/93, 1992-2001),
and section 9.4 covering the years under the legislative act that replaced it (Regulation
1049/01, December 2001-2014).5 For each period, a process-tracing analysis is applied to
explore which institutional factors best explain the most important developments in access to
documents policy within this Council formation. Section 9.5 synthesises the findings by
comparing explanatory factors across time, and placing the within-case empirical analysis of
developments into the general theoretical framework that was set out in chapter 4. Section
9.6 concludes.

9.2 Institutional context
The period of the 1990s marked a gradual build-up of a foreign policy architecture in the
Council and a concomitant growth in foreign policy activity, which began with the
establishment of the Common Foreign and Security Policy (CFSP) in the 1992 Maastricht
Treaty.6 The fact that the TEU excluded the EP and the court from the CFSP, as well as the
requirement of unanimity in all but a few well-circumscribed situations, meant that the
blocking power of individual member states or coalitions of member states in the CFSP was
particularly strong compared to other policy areas.7

During the first years of the 1990s, CFSP (and more widely, FAC) decision making
remained relatively limited. This changed with the Amsterdam Treaty, which expanded the
number of CFSP tasks, established a High Representative (HR) for the CFSP who took up

5 The division into two historical periods is made in order to enhance readability and facilitate comparison
over time, see also Chapter 5, section 4.
6 IGC (1992a), Title V; W. Wallace (2005), pp. 435-8; Respondent #22
7 IGC (1997a), article 23; Respondent #22
office during the second half of 1999, and introduced limited oversight rights for the EP in the EU’s negotiation of international agreements. Moreover, the TEU’s incorporation of the so-called ‘Petersberg Tasks’ brought about a steady rapprochement with the Western European Union (WEU), and thereby, closer cooperation with NATO. These developments signalled the Council’s increasing ambitions in the area of defence and security, and thereby, a growing need for a stable security of information (SI) regime. It also united in one person the triple role of Secretary-General of the Council and High Representative of the CFSP and the WEU. Before the Amsterdam Treaty, the CFSP was driven by an informal group of senior national officials (the Political Committee, or PoCo for short). While formally subordinated to the Coreper, the PoCo directly advised the ministers on CFSP matters. The Amsterdam Treaty formalised the PoCo into the Political and Security Committee (PSC), which began operating early in 2000 and was increasingly staffed by ambassadors. A Military Committee and Military Staff were set up in parallel. These major changes introduced new powerful actors, bodies, and activities into FAC decision making, thereby altering the structure of incentives and preferences.

The Lisbon Treaty again introduced a number of important institutional changes. It separated the function of Council Secretary-General and High Representative. The latter was turned into a Vice-Commissioner post at the head of a newly established European External Action Service (EEAS). The new High Representative and her EEAS representatives soon took over the chair of the rotating Presidency for a majority of FAC bodies, including FAC ministerial meetings, the PSC, and CFSP preparatory bodies. The new step meant in practice that most central coordinating and agenda-setting powers were carried over to the EEAS, at the expense of the Presidency and the Council secretariat. The latter maintained only its organisational function of facilitating meetings and circulating documents received from the EEAS and the member states. The EEAS quickly turned into the ‘hub’ of CFSP decision making. This is also evidenced by the HR’s seat in the European Council, which allows her to bypass both the ambassadors in Coreper and the foreign ministers in crisis situations. Finally, the Lisbon Treaty again expanded the EP’s role in the EU’s negotiation of international agreements, particularly with regard to its information rights throughout the course of negotiations.

8 Respectively IGC (1997a) articles 11 and 18(3); IGC (1997b), article 300(2)
9 IGC (1997a), article 17(1); WEU (1992)
10 Reichard (2013), p. 328
12 IGC (1997a), article 25; Council (2001a), Respondent #22
13 Reichard (2013), pp. 64-5
14 IGC (2007a), article 27
15 Council (2009); Vanhoonacker and Pomorska (2014), p. 1317
16 Respondents #22, #39
17 IGC (2007a), article 15(2); Respondents #39, #40, #56
18 IGC (2007c) article 218(6) and (10)
CHAPTER 9

Having set out the FAC’s developing institutional architecture, I will now turn to its access to documents developments and their explanation before and after the entry into force of Regulation 1049/01.

9.3 1992-2001: Two policies under construction

The area of foreign policy and the public’s right of access to documents always made an unlikely match. As at the national level, a certain presumption of exceptionalism existed among foreign policy actors. Indeed, this ‘exceptionalist consensus’ was entrenched in the access rules, and subsequently confirmed and elaborated by the EU courts. However, during the years before Regulation 1049/01 entered into force, the foreign affairs policy area was also going through a process of institutional construction. This brought with it a rearrangement of actors and bodies, and as a consequence, of its access to documents policy in this area. The introduction in particular of classified information rules was the subject of major controversy among the member states and the EP. However, by the end of 2001, as Regulation 1049/01 entered into force, the main points of disagreement were again settled in a ‘grand bargain’.

9.3.1 The exceptionalist consensus in foreign policy

In the first period under consideration, the debate on access to documents had initially a relatively limited salience in the area of the FAC. Similar to the national level, the institutional context foresaw in a limited role for transparency and potential transparency actors such as the parliament and the courts. The first formal rules enabling or restricting public access to FAC documents were those of the Council’s first general access rules (Decision 731/93).\(^{19}\) This decision framed the FAC-related refusal ground of ‘the protection of international relations’ as a mandatory exception, as opposed to the protection of decision making, which was discretionary.\(^{20}\) This reflected the general outlook in the Council, which could be described as an ‘exceptionalist consensus’ around foreign policy transparency:

\[
\ldots\text{As you know, external relations make up one of the exceptions [to the access rules \ldots].}\]

\[
\text{The dealings of the EU in the area of external relations are a sensitive question, just like at the member state level.}\] ^{21}

The ‘exceptionalist consensus’ is apparent when confirmatory applications for FAC documents between 1994 and 2001 are considered.\(^{22}\) There we find that during this period, decisions leading to full or partial access were considerably lower than the Council average (50% for FAC appeals, and 69% for the Council average). Unsurprisingly, the ‘international relations’ exception was relied on considerably more often (66%) than the Council average.

\(^{19}\) Council (1993b); cf. Chapter 6, section 2.1
\(^{20}\) Council (1993b), respectively articles 4(1), first indent and 4(2); cf. Chapter 6, section 2
\(^{21}\) Respondent #38
\(^{22}\) Full information concerning the confirmatory applications data can be found in Chapter 5 and in Appendix 4.
(38%) to justify (partial) refusals. This is not to say that outcome of the consensus went uncontested. On the contrary, member state countervoting had a considerably higher incidence than the Council average (respectively 70% and 52%). Indeed, in a number of instances, the decision regarding a confirmatory application for FAC documents barely attained the required simple majority. The driving force behind these protest votes were the same member states that were active in the wider transparency debate. Five member states (Sweden, Denmark, the Netherlands and Finland, as well as the United Kingdom) formed a block in favour of wider access, while two member states (France and Spain) repeatedly expressed their opposition to this line. However, their opposition was mainly centred on what they considered to be a too narrow interpretation of an exception ground that they considered generally justified.

A major conflict occurred when applicant Heidi Hautala, a Finnish MEP, brought a case before the CFI to seek annulment of the Council’s refusal to grant her access to a document on the Common Foreign and Security (CFSP) policy. When the Council contested the court’s right to adjudicate over the matter on the basis of a treaty provision excluding court jurisdiction in CFSP matters, this cast France, which shared this view and intervened in support of the Council, against Finland and Sweden, who intervened in favour of Hautala and advocated both jurisdiction and an annulment of the access refusal. Upon appeal, when Denmark and the United Kingdom joined in support of Hautala, and Spain in support of the Council, the number of interveners further rose to a high 6 out of 15 member states.

Hautala offered the CFI the opportunity to unequivocally assert its jurisdiction over access to CFSP documents. Contrary to the Council’s arguments, the CFI found that, following the Svenska Journalistförbundet case law and in absence of any specific provision to the contrary, the court had jurisdiction to decide all access cases irrespective of their content. It thereby normalised the interpretation of the access rules in the CFSP context, in favour of the position of the applicant and the Council’s pro-transparency coalition. At the same time, it was also in Hautala that the CFI for the first time proclaimed the limited review criteria that continued to be applied thereafter to all access cases where a mandatory exception ground was at stake. The courts left the Council wide discretion in determining the appropriateness of refusing access by interpreting its right of judicial review in the narrowest possible sense. Their reluctance to intervene too deeply was possibly enhanced by the sensitivity underlying jurisdictional question. The fact that Hautala eventually won the

23 See Appendix 6
24 Case T-14/98 Hautala v Council (‘Hautala I’), 19 July 1999, see also Chapter 6, section 2.2
25 IGC (1992a), article 1; at the time of the court action, IGC (1997a), article 46
26 Sweden (1998)
27 Case C-353/99P Council v Hautala (‘Hautala II’), 6 December 2001
28 Hautala II, para 42. On Svenska Journalistförbundet, see Chapter 6, section 2.2
29 The CFI’s judgment was upheld upon appeal by the ECJ.
30 On the ‘limited review’ criteria propounded in Hautala I, see Chapter 6, section 2.2
Before proceeding to the presentation of the 1992 Protocol, it should not be forgotten that the Court in its judgment in the Case C-31/184 rejected the Commission’s claim that a ‘hands-off’ review of the Court’s own jurisdiction was not possible. The Court opened a path of ‘hands-off’ review that largely matched the Council’s ‘exceptionalist consensus’.  

Another element underpinning the exceptional status of foreign policy was the secured-communications network of Coreu (Correspondence Européenne). This inter-capital network was set up as early as 1973, during the European Political Cooperation (EPC), to facilitate the secure exchange of foreign policy-related information. However, document traffic began to rise in the early 1990s when the EPC was replaced by the CFSP, even after the Council-wide Extranet was set up for purposes of document distribution (Figure 9.1). The fact that two pro-transparency Council members, Denmark and the Netherlands, were involved in the network’s establishment and subsequent maintenance, attests to the Council’s strong commitment to an intergovernmental working method. The Coreu network thus served as a low-threshold instrument for information exchange outside of the Council’s formal organisational structure. “Something is only CFSP when member states decide so. So which documents fall within its reach is also dependent on their decision”.  

![Figure 9.1: Number of Coreu documents per year, 1992-2010](image)

*Source: Bicchi and Carta 2012, p. 471. Published figures only go up to 2010.*

After 1998, document traffic on the network was in fact so high that it represented a substantial volume of all FAC-related document traffic, possibly even larger than what was circulated via the Extranet. After the public document register went online in 1999, FAC

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31 On grounds of proportionality (para 87), see Chapter 6, section 2.2
33 Bicchi and Carta (2012), p. 471; Respondent #33
34 Bicchi and Carta (2012), pp. 467, 475-7
35 Respondent #36
36 Respondent #37
37 Respondent #27
documents became unquestionably easier to access. However, the existence of this parallel document exchange system clearly made it more difficult for (uninformed) outsiders to file access requests, as it would generally be nearly impossible for them to know of the existence of specific documents. This translated into a relatively poor performance in the registration and direct accessibility of FAC documents. Thus, we find that, although the rate of direct access to FAC documents on the register increased steadily from 40.5% in 1999 to 58.1% in 2001, many FAC documents were not listed on the register. For example, before the entry into force of Regulation 1049/01, the Political Security Committee and military bodies registered no documents at all, while very few Common Defence and Security Policy (CSDP) documents were entered on the register. Thus, although the annual FAC document registration rate increased considerably faster than the overall Council rate, this was purely due to a catch-up effect, in the sense that initial low figures tend to inflate subsequent grow rates. While part of this ‘captured’ disclosure would improve over time as the FAC improved its operational processes in the developing field of the CFSP, an ongoing reluctance to engage in public disclosure continued even after Regulation 1049/01 entered into force.

In the initial years under Decision 731/93, an ‘exceptionalist consensus’ emerged that was broadly supported and criticised mainly for the way in which it was implemented. Changes in the CFSP’s institutional architecture towards the end of the 1990s however introduced a parallel policy debate that proved far more divisive.

9.3.2 The exceptionalist consensus reconfigured
In the years leading up Regulation 1049/01, the institutional architecture of the CFSP was undergoing a vast expansion which strongly impacted on access to FAC documents policy. This affected the already-existing ‘exceptionalist consensus’, in the sense that pivotal Council actors began to advocate a greater sensitivity to the issue of classified information which, they argued, should be governed by a comprehensive security of information regime. The process of institutionalisation of the CFSP set in motion by the Maastricht Treaty amplified this change. It introduced new actors and bodies who did not necessarily have transparency-favourable preferences. Most important of these was the first High Representative (HR), Javier Solana, who entered into office during the second half of 1999. Solana brought with him the experience of NATO and its modus operandi, the organisation of which he had been

38 Respondent #63
39 FAC documents were circulated among varying constellations of decision makers, and registered and published in different ways, making it difficult to establish an accurate estimate of all FAC documents produced in any given year. Out of a list of all Council distribution codes, 19 codes were identified by a respondent as pertaining to FAC decision making (email correspondence with respondent #36, d.d. 25 March 2015). Another observer estimates the current number of distribution codes to stand at 34 (Lauwerier 2016, p. 8). A sample of distribution codes covering the full range of FAC activities were analysed for the years 1999 to 2002 and 2007, 2008, 2013, and 2014. Further information on the data and its collection can be found in Chapter 5, section 3.4, as well as in Appendix 4.
40 Comparing 1999 and 2002 figures, Council (2003); cf. Appendix 4
41 See below, section 9.4
Secretary-General (SG) directly before joining the Council.\textsuperscript{42} Within the Council, he was well-positioned to advocate closer cooperation between the EU and NATO, acting as he did in the triple-hatted role of Secretary-General of the Council and of the WEU, as well as High Representative of the CFSP.\textsuperscript{43}

Solana’s appointment introduced an active proponent of a strong security of information policy into the Council.\textsuperscript{44} He quickly developed into a powerful elite official, supported by a relatively small staff that acted at some distance from the rest of the Council secretariat on the basis of proactivity and informality.\textsuperscript{45} During their first years of existence, the bodies served by this staff published no documents on the register, insisting on the traditional modes of communication such as Coreu or unofficial memos.\textsuperscript{46} One of these bodies was the Political Security Committee (PSC).\textsuperscript{47} During the first years, member state representatives and Council officials still operated under the usual norms of informality. This included the issue of security, and document circulation within the PSC was characterised by a high degree of improvisation with little concern for formal procedures:

It was a transition period. At that time documents were flying in from everywhere. […] They were not even classified as meeting documents.\textsuperscript{48}

At the same time, an emerging awareness on the need for a strong security of information policy came squarely on the agenda, a development that Solana actively encouraged.\textsuperscript{49} The new decisional structure, with the High Representative and his team at the centre, was perceived as “really […] a new format”,\textsuperscript{50} and a revision of the existing document classification rules was deemed a necessary part of that reform.

The legal framework of access to documents in the area of foreign affairs cannot be properly understood without reference to the classification system.\textsuperscript{51} The first formal legal text concerning document classification in the Council context was Decision 24/95, adopted in March 1995.\textsuperscript{52} This Decision introduced three classification levels (applying the French

\begin{itemize}
\item \textsuperscript{42} Respondent #56
\item \textsuperscript{43} Respondent #22
\item \textsuperscript{44} Reichard (2013), p. 325. However, it must immediately be added that from the outset, HR Solana’s team developed an active communications policy that involved the publication of speeches, statements, and agenda items on a dedicated website. This website went offline at the end of 2014. Respondent #56; Council Secretariat (2015), d.d. 14 April 2015
\item \textsuperscript{45} Respondents #33 and #56
\item \textsuperscript{46} Respondent #56
\item \textsuperscript{47} This body replaced the informal ‘PoCo’ group, see above section 9.2.
\item \textsuperscript{48} Respondent #36
\item \textsuperscript{49} Respondent #56
\item \textsuperscript{50} Respondent #56
\item \textsuperscript{51} A second field of legal development concerns the European Parliament’s right of access to (classified) information. While parliamentary access is also important for obvious reasons, it was (and continues to be) legally and functionally distinct from the public’s right of access. This chapter therefore only discusses parliamentary access to the extent that it influenced the Council’s policy of public access to documents.
\item \textsuperscript{52} The following paragraphs provide a more detailed and case-specific analysis of an episode addressed in chapter 6, section 2.2.
\end{itemize}

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terminology: ‘restreint’, ‘confidentiel’ and ‘secret’) and kept classified documents within the scope of access to documents. For several years, these rules remained unaffected. This changed when the Council document register went online in 1999. Finland used its Presidency in the second half of that year to see through a decision to include references to all classified documents in the newly established public register, significantly enhancing the visibility of classified documents.

Only months later, in July 2000, this arrangement was again rolled back under the French Presidency. However, the measures related to classified documents passed during the French Presidency went further than the question of document registration. In a classification overhaul which came to be known as the ‘Solana Decision’ after its initiator, a number of major steps were taken with regard to the right of access to documents. Most significant of these was the complete exemption of classified documents from the access to documents rules. Moreover, the Decision introduced the so-called ‘orcon’ principle, according to which classified documents supplied by third parties could not be disclosed without the originator’s consent.

Solana’s proposal, it appears, was presented in a manner that allowed the measures to be passed with the least possible resistance. It was put forward in the middle of the summer, unannounced, and through the application of a two-week ‘written procedure’, meaning Decision 731/93 would be amended unless a simple majority manifested itself against the plan. While the new rules were to apply across the Council, it is apparent from both the context and the content of the reform that the changes were brought about with developments in the CFSP and CSDP in mind. For example, the Presidency cited haste because of pending access to CSDP document requests. It also transpired that the High Representative had already committed to a revision of the access to documents rules in place in an exchange of letters with NATO. The amended version of Decision 731/93 now included the new exception ground of “the security and defence of the Union or of one or more of its Member States, military or non-military crisis management”. In administrative terms, while confirmatory applications were usually decided on by the Working Party on Information (WPI), confirmatory applications for classified security and defence documents were to be handled by the appropriate CSDP body.

The events of July 2000 were condemned in the strongest language by a collective of pro-transparency member states, MEPs, and NGOs. This coalition particularly criticised the
total exclusion of classified documents from the access to documents rules.\textsuperscript{61} These protests however had no effect in the short run.\textsuperscript{62} The proposed changes, after all, had found the required majority, and as the UK government pointed out, the Council had no obligation to consult with the EP on the internal matter of access to documents.\textsuperscript{63} The coalition however was quick to detect the overhaul’s possible negative spill-over effects on the ongoing negotiations for the ‘Article 255 Regulation’ (the later Regulation 1049/01). Thus, in November 2000, the Netherlands, supported by Sweden and Finland, brought a case against the revised access decision to keep political pressure on the ongoing ‘Article 255 Regulation’ negotiations:

[W]e carried out [this court action] con amore and leaned in quite strongly. But then we withdrew it after the Regulation had been passed.\textsuperscript{64}

The EP, which cast the exclusion of classified documents from public access in the light of its ongoing negotiations concerning privileged access, also began proceedings in December after it became clear that an interinstitutional agreement (IIA) concerning privileged access to classified information was not forthcoming.\textsuperscript{65} Such access had been a long-standing demand of the EP.\textsuperscript{66} The pressure of court action had its influence on the negotiations. Whereas in August 2000, the UK government still assumed that the arrangements favoured by Solana would form the basis of the new Regulation, by November, it reported that the Council was “looking at a range of possible solutions”.\textsuperscript{67}

The incoming Swedish Presidency swiftly rolled back the block exclusion of classified documents in new internal security rules adopted in March 2001, which replaced the ‘Solana Decision’ and were explicitly “without prejudice to Article 255 of the Treaty”.\textsuperscript{68} However, a number of provisions, such as the ‘orcon’ principle, the possibility for bulk classification, and the fourth classification level in place, and special vetting arrangements of confirmatory applications for classified CSDP documents were retained. The decision to exclude reference to classified documents on this register was only partially restored: only documents bearing the lowest classification level (‘restreint’) were again listed on the register.\textsuperscript{69}

Over a period of 15 months, the relation between classified documents and access to documents was thus three times significantly revised in a tug-of-war between the pro-transparency Finnish and Swedish presidencies and the transparency-sceptic French Presidency and the HR. It may be noted that all underlying decisions obtained the required

\textsuperscript{61} Respondents #56, #63; International Herald Tribune (2000); Guardian (2000); Financial Times (2000)
\textsuperscript{63} UK (2000b)
\textsuperscript{64} Respondent #27
\textsuperscript{66} Rosén (2015), pp. 389-91
\textsuperscript{67} UK (2000a); UK (2000b)
\textsuperscript{68} Council (2001a), seventh recital. The new classification rules again centred specifically on the area of foreign policy, as evidenced by their third recital: “In practice, the major part of EU information classified CONFIDENTIEL UE and above will concern the Common Security and Defence Policy”.
\textsuperscript{69} Council (2001b); Council (2011b), I.2

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simple majority of Council members’ votes, suggesting a relative willingness among member states to follow Presidency proposals in this matter. The new political compromise of March 2001 was entrenched in the EU’s first legislative act on access to documents, Regulation 1049/01 which was adopted in May of that year.

Yet the access regulation also left many of the thorny issues undecided. In carefully worded language, it foresaw in the inclusion of classified information and refusal procedure in accordance with both the general exception rules listed in the Regulation, and the internally decided classification rules outside of the Regulation and with full respect for the orcon principle. The handling of classified documents thus remained subject to an exceptionalist legal regime, the legal subordination of which was not wholly apparent. Unsurprisingly, the outcome was thus met with a wide range of reactions. On the one hand, there was deep suspicion on the side of pro-transparency observers, who described the new arrangement as an “amended version of the Solana decision” or a “Russian doll” tucked away into the general access rules. After all, Regulation 1049/01 did not deal with the matter of classified information in a decisive manner but instead left the details to be decided in exactly the kind of internal Council secrecy framework that in 2000 had sparked off wide protest, and which upheld a number of the Solana Decision’s provisions. Others however described the notorious article 9 as a ‘necessary component’ of package deal: “They had to give the secrecy advocates something in order to save the general principles”.

The fact that the eventual outcome departed from the ‘Solana Decision’ by once again including classified documents in the scope of Regulation 1049/01 was in large part due to the involvement of the EP as a negotiating partner: this strengthened the Swedish’s Presidency’s role and forced a qualified majority in the Council to accept a ‘grand bargain’ that included the prospect of privileged parliamentary access to classified information in the short term.

From an early point in time, classified information developments in the Council had been critically followed by the EP. Initially, its insistence on a greater right of oversight in the relative new and emergent Union area of the CFSP found little resonance with the Council beyond some very general information rights foreseen in the Maastricht TEU. The court case initiated by Hautala MEP in 1998 therefore proceeded on the basis of a public, rather than a privileged right of access. At the same time, Hautala’s case was clearly facilitated by her institutional platform, as she first learned about the existence of the specific document (a CFSP report approved by the PoCo and distributed via Coreu) through the Council’s answers

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70 UK (2000a)
71 Reichard (2013), p. 340; Rosén (2015), p. 393; Respondents #31, #63; see also Chapter 6, section 2.3
72 European Parliament and Council (2001b), articles 9 and 4 and Council (2001a) respectively.
73 De Leeuw cited in Reichard (2013), p. 342
74 Respondent #17
75 Tallberg cited in Rosén (2015), p. 392
76 Respondent #25, see also Chapter 6, section 2.3
77 Rosén (2015), p. 389, see above section 9.2, particularly footnote 8
to her parliamentary question, and benefitted from the direct advice of both the European Ombudsman and a representative in the Finnish Brussels delegation. However, the case for wider rights of parliamentary oversight in the area of the CFSP only became truly entangled with access to documents policy when the EP saw opportunity to use its formal co-legislative role in the latter as a lever for the former.

By the end of May 2001 however, part of the terms of the package deal had still not been met. When negotiations over the interinstitutional agreement concerning privileged access broke down, the EP again went to court, this time to challenge the March security rules as a lever to force the Council back to the negotiating table. Towards the end of the period under consideration, the Council and the EP were close to finalising a deal on limited parliamentary access to sensitive foreign policy documents, in exchange for a withdrawal of the court case.

Although legally speaking, the changes to the classified information rules affected Council-wide access to documents, their impact was particularly felt in the area of foreign policy. This is apparent when two comparable cases involving classified documents from before and after the Solana overhaul are compared. In *Kuijer* (April 2000), the CFI ruled in favour of the applicant both with regard to his plea that the Council’s refusal justification had been below the standards of reason-giving and, with reference to *Hautala*, that it had failed to consider the possibility of providing partial access, leading to an annulment of the Council’s refusal decision. By contrast, in *Mattila I* (July 2001) the CFI dismissed the applicant’s action in its entirety, even going as far as to state that “partial access would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant”. One can only speculate on the influence of Council developments on the CFI’s rulings. However, it is likely that the ‘Solana Decision’ and subsequent rule-making developments had placed the issue of sensitive/classified documents clearly on the court’s radar.

Another consequence of the introduction of the new classification rules was the growing risk of overclassification of Council document. Although the extent of this (potential) problem is difficult to gauge, there are indications that the Council struggled with

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78 Respondent #63; EP (1997), p. 48  
79 EP (2001), point 6  
80 Rosén (2015), p. 393. This would result in interinstitutional agreement EP and Council (2002)  
81 See also Chapter 6, section 2.2  
83 *Kuijer*, paras 44-47  
84 *Kuijer*, para 60  
85 *Mattila I*, para 69. Mattila subsequently appealed the case, see section 9.4 below.
this issue.\textsuperscript{86} Overclassification as “face-saving secrecy”\textsuperscript{87} however also led to frequent breaches of the internal security rules:

Often I received restreint information via regular email. Then I would think: oh well, let’s get on with it. […] There needs to be fast communication so you need to be willing to pass over bumps and formalities.\textsuperscript{88}

In summary, during the first period under consideration here, the access to FAC documents policy saw two central developments. First, as the general Council access to documents policy was introduced, a consensus developed around the exceptionalism of the area of foreign policy, which built on a number of measures to limit the public’s access to FAC documents. Second, as the foreign policy activity began to expand due to developments in the CFSP, the ‘exceptionalist consensus’ was reconfigured. Eventually, in 2001, a revised version of the document classification rules was adopted as part of a ‘grand bargain’ package, leading to a new political consensus between the Council, the EP, and the EU courts. An overview of developments is provided in Table 9.1.

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\textbf{9.4 2001-2014: The ‘transparency ceiling’ of foreign policy}

After Regulation 1049/01 entered into force, access to FAC documents policy began a process of consolidation. The exceptionalist logic to the access rules was characterised by the entrenchment of the classified documents rules, a steady increase in classified information exchange agreements with third countries, and a ‘transparency ceiling’ in the disclosure of

\textsuperscript{86} Respondent #56; EUObserver (2012). A Council insider however has downplayed these concerns as exaggerated, see Galloway (2014), pp. 668-9.

\textsuperscript{87} EUObserver (2012)

\textsuperscript{88} Respondent #27
FAC documents. As FAC policy making became increasingly multi-lateral and focussed on counter-terrorism, the exceptionalist consensus also came under pressure. External actors such as third countries, the EP, and NGOs each in their own way exercised pressure on the FAC to grant wider access, while member states and the EEAS took measures to avoid the unwanted disclosure of sensitive information.

9.4.1 Consolidation of the exceptionalist consensus

As Regulation 1049/01 entered into force at the end of 2001, a formal legal landscape underpinning the ‘exceptionalist consensus’ concerning access to FAC documents was in place. In the following years, this consensus was further consolidated. This entailed a strong protection of classified information and relatively low levels of access to documents whether in its active or passive form, accompanied by low salience among member states and increasing rule entrenchment to protect this consensus.\textsuperscript{89}

The consolidation of a legal framework in support of ‘transparency exceptionalism’ built on the rules that were put in place in 2001. Besides the horizontally applicable Regulation 1049/01 with its foreign policy-specific provisions, this included the classification rules laid out in Council Decision 264/01 which would stay in place for the next ten years. Even when these rules were revised in 2011 and 2013,\textsuperscript{90} this remained largely without consequences for the right of access to documents. Though horizontally applicable, the classification rules overwhelmingly concerned documents produced in the CFSP.\textsuperscript{91} Decision 264/01 further foresaw the establishment of a member state-staffed security committee and security office, both of which were in place by the end of the year.\textsuperscript{92} The subsequent construction of a watertight security regime was overseen by top officials from Solana’s cabinet. The security office furnished a situation centre (sitcen), as well as central unit for document classification and declassification, the bureau d’informations classifiées (BIC).\textsuperscript{93} The new focus on security issues created a self-reinforcing dynamic:

\textit{It works as a cycle really. If there’s the awareness, there is the willingness to acquire the necessary tools, the IT to guarantee security, which again brings greater security consciousness. I think the emergence of a security culture has been the largest change over the past decade in the document management of the Council’s foreign policy.}\textsuperscript{94}

In July 2002, the Security Committee oversaw a further entrenchment of the classification rules. Although transparency-favouring Denmark had just assumed the Presidency, it had no agenda-setting role in this matter, as the committee was chaired by a delegate of the High

\textsuperscript{89} Respondents #40, #56; Galloway (2014)
\textsuperscript{90} Council (2011); Council (2013)
\textsuperscript{91} According to the Council (EP (2012)), and a Council official (Galloway (2014), pp. 674-5)
\textsuperscript{92} Council (2001b), annex, part II, section 1
\textsuperscript{93} Respondent #56
\textsuperscript{94} Respondent #41
Representative who had been one of the architects of the ‘Solana Decision’. A revision of the rules of procedure raised the bar for future changes to the Decision 264/01 to a qualified Council majority. This arrangement deviated from the general rule by which decisions on procedural matters, including the rules of procedure which formed the basis of the security rules, were adopted by a simple majority.

By the end of 2002, the Council met all of NATO’s security standards. A bilateral declaration with NATO on classified information exchange, in which it reaffirmed its commitment to interconnecting security arrangements was soon followed by the NATO-EU security of information agreement. This paved the way for subsequent third-party classified information agreements. With the proliferation of such agreements, the impact of the orcon principle on access to FAC documents policy also increased significantly. An internal memo of 2007 listed various new agreements, including with Ukraine, Turkey, and the UN. By 2014, around 20 such agreements were in place, which vastly increased the number and proportion of orcon-protected documents. A 2008 staff note from the secretariat provided guidelines for the handling of classified information, giving document authors the option of excluding online access or even reference to the document. The latter option was to be applied only “in exceptional cases”. Moreover, following the orcon principle, the Council was free to list third-party classified information where it had permission to do so. In reality, the Council listed only a fraction of the classified information that it produced or received. By one recent estimate, of all classified documents that could have been legally placed on the register since 2001, only in 11.3 per cent had this in fact occurred. It is likely that powerful intelligence partners, such as the United States, exercised a de facto veto over disclosures concerning documents to which it was a party:

Actually, the Americans to a large extent determine the degree of openness in Europe. Because if the Americans say: ‘Guys, we will keep this secret’, it will not be disclosed. End of story.

Others have argued that the implementation of the orcon principle is more nuanced, pointing out that disclosure of classified third party documents are subject to the “constitutional requirements, national laws and regulations” of the member states.

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95 Council (2001a), part II, section I, point 3; Council (2001c), p.3; Respondent #56
96 Council (2002b), article 24
97 Amsterdam TEC article 207, later TFEU article 240(3)
98 EU (2002b); EU (2003)
99 Council (2007)
100 Galloway (2014), p. 678
101 A rough estimate on the basis of Bunyan (2014, pp. 3-4) suggests that the proportion of third-state documents classified restreint might be as high as 80 per cent or more.
102 Council (2008), point 5
103 See Bunyan (2014), p. 1
104 Respondent #15, also #27
The newly emerged consensus was also underlined by the Council’s handling of requests for FAC-related documents. In confirmatory applications, the (partial) access rate remained relatively stable, and access refusals continued to rely heavily on mandatory exception grounds (81.6 per cent of all refusals). Member state dissent in confirmatory applications meanwhile plummeted. In the period between 2002 and 2014 it declined by 40 percentage points; considerably faster than the Council average of 10 percentage points. Furthermore, after the Hautala appeal, which judgment was rendered days after the entering into force of Regulation 1049/01, member states no longer intervened in access to FAC documents cases.106 These numbers indicate a waning interest among the pro-transparency minority during this period.107

New however was a growing interest among outsiders in the area of CFSP/CSDP. This was evidenced by a surge in the number of requests for classified documents related to this area, from 28.9 per cent in the first years to 57.3 per cent in the last.108 This was underlined by a thawing of the courts the access to documents case law in the area of foreign policy after the entry into force of Regulation 1049/01, in the sense that several judgments upheld, or resulted in, wider access.109

In some judgments the courts proved more rigid, leaving (the gist of) the Council’s refusal decision intact. For example, in WWF EPP (2007),110 concerning documents about WTO negotiations, the court reaffirmed that the Council was legitimately limited in the degree of detail it could provide to justify non-disclosure, in case this justification would undermine the interest protected in the first place.111 Curiously, when discussing the Council’s assertion that the requested meeting minutes did not exist, it established that the Council was held to minimal standards of record-keeping, passing over the opportunity to clarify what such standards would actually entail.112 In Besselink (2013),113 the document requested was a draft mandate for the Commission to commence negotiations on the EU’s accession to the European Convention for the Protection of Human Rights (ECHR). The court here followed the Kuijer I strategy114 of annulling part of the Council’s decision for having failed to consider the possibility of partial access. However, it rejected the applicant’s argument that the Council had breached the international relations exception115 or that refusal to disclose the document infringed his constitutional right to freedom of expression and information.116 Nevertheless, it may be argued that the EU courts stayed firmly within the

106 See section 9.3.1 above
107 Respondent #15; See also Appendix 6
111 WWF EPP, para 37
112 WWF EPP, paras 61-3
113 Case T-331/11, Besselink v Council, 12 September 2013
114 See section 9.3.2 above
115 Besselink, para 73
116 Besselink, para 39
doctrinal boundaries first set out in Hautala I: a ‘hands-off’ approach towards the Council’s application of mandatory exception grounds of the access regulation resulting in a limited, strictly procedural review.

With this new access-secrecy consensus in place, some movement also took place in the area of document registration. Certain bodies which had previously shunned the register, such as the CFSP-related Political Security Committee and the international trade-related Article 133 committee, now began to register (small numbers of) documents. Much however suggests that the registered documents were far from representative of the decision-making process. For example, the unlikely high percentage of Article 133 committee documents, consistently above 97 per cent, were directly accessible, is explained by the fact that most documents were simply not registered. The Article 133 committee, as well as its successor the Trade Policy Committee (TPC), tended to rely heavily on so-called ‘meeting documents’ (MDs) in its decision-making processes which were only informally registered by the secretariat and did not appear at all on the online register. The discretionary reliance on meeting documents appears to have been prevalent beyond the area of trade policy. For example, when the secretariat conducted an internal inventory of FAC documents in 2013, it emerged that meeting documents comprised 48% of all documents handled by it. Recently, the informal norm of using unofficial documents as the basis for FAC meetings has been assuaged somewhat by an informal rule by which preparatory bodies are expected to issue ‘tracking documents’ that list all MDs produced over a given period. However, these are merely used to improve the Council’s ‘institutional memory’, and are not placed on the online register.

In spite of some exceptions however, in general FAC bodies offer only very limited direct access to their documents. As a consequence, proactive FAC document disclosure soon reached a ‘transparency ceiling’. Between 2002 and 2007 a sharp, nearly fourfold increase occurred in the annual number of documents registered. This catch-up effect in terms of FAC document registration marked less of a transparency-enhancing development than it may seem. As it happened, while the numbers of registered FAC documents increased over time, the proportion of these documents that was directly accessible actually declined, starting at 66.3 per cent in 2002 and settling with a more than 10 point decrease at 55.4 per cent in 2014. In 10 out of the 13 years in this period (2002-2014), an increase in the number of registered documents corresponded to a decrease in the percentage that was directly accessible. In the year that the number of registered documents was highest (2011), the

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117 See section 9.3.1 above
118 See Appendix 4
119 Respondent #33; Council (2008), p.1
120 However, although the formal status of these documents is unclear, it appears that they can be requested, see Respondents #20, #32, #33, #36, #40, #63
121 Email correspondence with respondent #36
122 Respondent #32
123 Respondents #20, #33
124 Email correspondence with Council Secretariat, 2 June 2015
125 See Appendix 4
proactive access rate stood at 43.8 per cent, the second lowest rate of all measured years since 2000. This contrasted starkly with the overall percentage of directly accessible Council documents, which continued to rise until 2012 when it settled at around 75 per cent.\footnote{See also Chapter 6, section 3.1}

At the very time the ‘exceptionalist consensus’ in the Council was becoming firmly consolidated and entrenched, the EP, a traditional proponent of access to documents, stopped advocating greater transparency. This was largely because the misgivings it previously had were now largely addressed. After the conclusion of an interinstitutional agreement on access to classified CSDP information in November 2002, the EP withdrew its court action against Decision 264/01.\footnote{EP and Council (2002); Rosén (2014), p. 392} Thereafter, the EP’s own privileged access to CFSP information continued to expand through successive agreements.\footnote{EP (2003); EP and Council (2006a); EP (2010) and most recently, EP (2014)} All agreements concerned privileged access, leaving the formal legal scope of public access to documents unaffected. Indeed, parliamentary oversight had been the EP’s main concern from the start.\footnote{Rosén (2014), pp. 393–4} However, as becomes clear in the next section, subsequent developments meant that the EP, supported by the EU courts, would become increasingly critical of the ‘exceptionalist consensus’ as it stood.

9.4.2 The exceptionalist consensus under pressure

In the new century, the FAC’s position on access to documents policy was not only consolidated; it also came under increasing pressure. The EU’s search for a concerted response to exogenous events raised the political stakes of foreign policy cooperation for member states, which in turn affected their attitude to the circulation of documents.\footnote{Bicchi and Carta (2012), p. 470} But external actors also began to test the limits of transparency exceptionalism in the area of foreign policy. The result was a degree of fragmentation and disintegration, the effects of which are still difficult to oversee.

On 11 September 2001, four airplanes hijacked by the terrorist group al-Qaeda crashed into strategic targets on US territory, killing 2,996 people. ‘9/11’ reverberated across the world, including the EU and its foreign and security policy, where it brought about a surge in counter-terrorism activity. Certain counter-terrorism measures that were already underway were fast-tracked, while in the years after the attacks, the Political Security Committee, on behalf of the FAC, increasingly began to impose sanctions against individuals associated with terrorism.\footnote{Eckes (2009), p. 12; Zimmerman (2006), pp. 127–34} At the level of transparency rule-making, the events had a limited impact, as a strict security of information regime was already largely in place.\footnote{Respondents #33, #36} However, as EU institutional actors rallied around the counter-terrorism cause, it did influence how the existing rules were interpreted. This is apparent when we consider the Sison case law, in which
the EU courts arguably went beyond the CFSP’s original ‘exceptionalist consensus’ to protect FAC confidentiality.\textsuperscript{133}

Mr Sison, an EU resident of Philippine origin, had been targeted by a Council decision freezing funds and financial assets of a number of individuals suspected of financing terrorism. When Sison was denied public access to the documents related to this blacklisting decision, he brought three actions against the Council’s refusal to grant him access to documents. The CFI addressed them in a single judgment. Sison’s was one of a number of cases in which targeted individuals were offered very limited access to the justification by the Council of their listing, although he was the only one claiming a public right of access to the documents in question.\textsuperscript{134} The CFI pointed out that the fact that Regulation 1049/01 regulated public access to documents meant that it could not take the specific circumstances of an applicant into consideration.\textsuperscript{135} The fight against terrorism which was the larger context of the sanction clearly influenced the CFI in granting the Council considerable discretion in the justification of its international relations exception.\textsuperscript{136} The CFI reviewed very minimally the Council’s decision to refuse access to the underlying documents. It did not object to the brevity and general nature of the reasons provided by the Council.\textsuperscript{137} As two observers at the time argued:

On the whole, […] it seems that hardly any reasoning going into the substance was necessary on the Council’s part. Is the implication then not that a few magic phrases such as ‘fight against international terrorism’ and ‘involvement of third states’ will always do the trick?\textsuperscript{138}

When the CFI dismissed the application in its entirety, Sison appealed. In the appeal, AG Geelhoed supported the CFI’s judgment, emphasising the strong distinction between the mandatory exceptions under article 4(1) and the discretionary exceptions listed under article 4(2) and (3), finding that:

[As] the efficacy of policy in this area in many cases depends on confidentiality being observed, the Community institutions involved must have complete discretion in respect of determining whether one of the interests listed in Article 4(1) (a) [the public interest exception which includes the protection of international relations] could be undermined by disclosure of documents.\textsuperscript{139}

He continued by arguing in rather general terms (and in the absence of any detailed evidence from the Council’s side) that:

\textsuperscript{134} Eckes (2009), p. 4
\textsuperscript{135} \textit{Sison I}, para 54
\textsuperscript{136} \textit{Sison I}, para 60; EP and Council (2001b), article 4(1)(a), third indent
\textsuperscript{137} \textit{Sison I}, para 65
\textsuperscript{138} Heliskoski and Leino (2006), p. 756
\textsuperscript{139} AG (2006), para 30, italics added
It cannot be excluded that disclosure of the document requested [...] could have revealed
details on the fight against terrorism in a more general sense.\textsuperscript{140}

The ECJ, relying partially on the legislative history of Regulation 1049/01,\textsuperscript{141} arrived at the
same conclusion.\textsuperscript{142} When considering both the initial and the appeal judgment, what is
notable is that neither the CFI nor the ECJ systematically applied the \textit{Hautala} criteria for
limited review, which had previously been established as a constitutive element of the
‗exceptionalist consensus‘. This raised concerns of court permissiveness of arbitrariness in the
Council’s application of the international relations exception.

The greater consequences of the EU’s foreign policy stances were also becoming
apparent through third countries’ growing interest in the FAC’s decision-making processes.
For example, information leaks in discussions on targeted sanctions listings were suspected to
have occurred under the active pressure of Russia on individual member states:\textsuperscript{143}

For instance with sanctions we had real problems with leaking documents. It was
immediately in the news which names were put on the list proposed to Relex or Coreper to
decide upon. [...] Even] before the Coreper meetings you could read already in the Financial
Times or whatever, which names were [being] put forward.\textsuperscript{144}

Strategic leaking was felt to be facilitated by the proliferation of electronic devices in meeting
rooms, and clearly undermined the intended secrecy required for effective policy making.\textsuperscript{145}
In other areas of foreign policy, leaks occurred to exercise political pressure:\textsuperscript{146}

If you go to trade [...] for example, [...] strategic leaking] has become a policy instrument.\textsuperscript{147}

While the issue of leaking is periodically addressed by the chair, it remains a prevalent and
more or less accepted element of the policy process, as leakers are difficult to trace, and often
suspected to be based within member state delegations.\textsuperscript{148} Although respondents highlighted
that document leaking had always been around, its incidence appears to have gone up over
the past ten years. This may have been caused by the eastern enlargement of 2004, which
significantly expanded the ‗circle‘ of classified information partners, and led to a decline in
cohesion and mutual trust.\textsuperscript{149}

Over time, the growing risk of national intelligence being compromised at the
European level led to an increasing reluctance among member states to share their

\textsuperscript{140} AG (2006), para 52
\textsuperscript{141} \textit{Sison II}, para 37
\textsuperscript{142} \textit{Sison II}, para 107
\textsuperscript{143} Respondents #36, #39, #56
\textsuperscript{144} Respondent #36
\textsuperscript{145} Respondents #32, #33, #38, #41
\textsuperscript{146} Respondents, #32, #33, #40
\textsuperscript{147} Respondent #41
\textsuperscript{148} Respondents #32, #33
\textsuperscript{149} Respondent #41

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intelligence via the ordinary Council channels of communication, including the Coreu network. Resorting to restrictive document sharing, such as through numbered hard copies for the duration of a meeting, was believed to decrease leaking.\textsuperscript{150} In parallel, member states with sensitive intelligence began to revert to informal sharing among smaller groups of member states.\textsuperscript{151} Even where member states did share sensitive information for inspection, such as in cases where proposals for sanction listings require substantiating evidence, they rarely formally submitted these documents to the Council, or even allowed other member states to keep the documents.\textsuperscript{152} In fact, the amount of ‘hard intelligence’ that was formally circulated was minimal.\textsuperscript{153}

New institutional arrangements introduced after the entry into force of the Lisbon Treaty may have further facilitated the trend of informal and differential information exchanges. For example, since the High Representative (supported by the EEAS) became the formal chair of the Political Security Committee, a routine was developed by which a very summary draft agenda was formally submitted to the Council secretariat, while in parallel, the EEAS itself would submit an annotated agenda directly to the member states. This method prevented outsiders from having references to the documents underlying agenda items.\textsuperscript{154} Apart from that, member states have maintained regular informal contact with the EEAS in situations where they were reluctant to share information too broadly, or to test the waters before stating their official position.\textsuperscript{155} Equally, the EEAS has tended to consult selected larger states early on in the decision-making process.\textsuperscript{156}

The implicit member state hierarchy in CFSP decision making has put member states with smaller diplomatic and intelligence networks at a disadvantage. At the same time, there is an implicit understanding that the CFSP, being an ‘incipient’ field of decision making that works on a unanimity basis, relies on the willingness and support of all, and particularly the larger member states:\textsuperscript{157}

\begin{quote}
You know, France and Germany, UK also, Spain… [they are] important players in NATO and other international organisations. […] Big member states are also very much solo players. Even today we have this problem […] what is this common security and defence policy? Even now with a look at the Russian situation and the Ukrainian crisis… So there’s this division.\textsuperscript{158}
\end{quote}

\begin{quote}
Policy making in the CFSP is less committed. Something is only CFSP when member states decide it is. So which documents fall within that scope is also their decision.\textsuperscript{159}
\end{quote}

\textsuperscript{150} Respondents #27, #36, #57
\textsuperscript{151} Respondents #27, #33, #36
\textsuperscript{152} Respondent #33
\textsuperscript{153} Respondent #41
\textsuperscript{154} Respondent #36
\textsuperscript{155} Respondent #33
\textsuperscript{156} Respondent #36
\textsuperscript{157} Respondent #20, #32, cf. Zimmerman (2006), p. 130
\textsuperscript{158} Respondent #63
\textsuperscript{159} Respondent #37
The ‘realpolitik’ of several member states in a context of reluctant cooperation helps explain the dual trends of a consolidating security culture on the one hand, and an acceptance of the informalisation of document exchanges on the other. In this respect, FAC decision making in this area was likened to that in the UN Security Council.\[^{160}\]

The same dynamic however did not apply where the Council sought to enter into international agreements, either under the CFSP or other areas of foreign policy. Here, the basic paradigm of confidentiality has in recent years become challenged by a number of NGOs, member states, the EP, and the EU courts. This is not in the last place due to the growing treaty powers of the EP in this area.\[^{161}\] A new provision under TFEU article 218(6) now granted it the right of either consent or consultation in all international agreements except for those falling exclusively within the CFSP. Furthermore, in all international agreements whether non-CFSP or CFSP, a revised provision now entailed that the EP ‘shall be immediately and fully informed at all stages of the procedure’\[^{162}\]. Both the EP’s new right to be immediately, fully and completely informed about all international negotiations, and its power to vote any agreement down altered the dynamic of information exchange, especially after it became clear that the EP did not hesitate to use its powers when it was dissatisfied with an outcome.\[^{163}\]

In recent case law, the EU courts have shown themselves to be receptive to the EP’s pressure. In a number of ways, the *In ‘t Veld* case law\[^{164}\] formed the court’s most complex access to a FAC documents case in recent years, giving way to a rather transparency-friendly doctrinal development.\[^{165}\] Sophie in ‘t Veld, an MEP, was dissatisfied with the information that the EP received about the SWIFT/TFTP negotiations with the United States. Consequently, she decided to seek public access to an opinion by the Council’s legal service concerning the legal basis to be used for an EU-US agreement on the exchange of financial data to prevent and combat terrorism (the so-called Terrorist Finance Tracking Programme, or SWIFT/TFTP for short). The Council refused access on the basis of the exceptions protecting international relations and legal advice.

The court’s review of the Council’s refusal decision revealed its much more sympathetic attitude than in earlier FAC access cases. This change in position may have been due to the international agreement’s controversy, as well as the court’s support for strengthening the EP’s right of privileged access in CFSP-related international agreement in a controversial judgment handed down only days before the *In ‘t Veld* appeal judgment.\[^{166}\]

\[^{160}\] Respondent #38

\[^{161}\] Respondents #27, #34, #38

\[^{162}\] IGC (2007c), article 218(10), addition relative to the original IGC (1997b) article 300(2) italicised

\[^{163}\] As was the case, inter alia, in 2010 with the Terrorist Finance Tracking Programme (SWIFT/TFTP) and in 2012 with the Anti-Counterfeiting Trade Agreement (ACTA). Also Respondents #34, #38


\[^{165}\] Abazi and Hillebrandt (2015)

\[^{166}\] Case C-658/11, *Parliament v. Council (Mauritius)*, was delivered on 24 June 2014, 9 days before C-350/12 P, *In ‘t Veld.*
Although the court reviewed the Council’s justification of the former exception on the basis of the *Hautala* criteria, it interpreted this procedure more stringently than it had done up until then, by insisting that the harm which would be caused by disclosure must be “reasonably foreseeable and not purely hypothetical”, and that to this end, such foreseeable harm must be set out in a sufficiently concrete manner. This new interpretation once again narrowed the distinction between mandatory and discretionary exceptions, although the court officially left the *Hautala* criteria for limited review intact. With regard to the legal advice exception, the GC rejected the Council’s argument that a stringent review test established in earlier access to legal advice case law (*Turco*) did not apply in the present case because it did not relate to legislative activity as had been the case there. Instead, the GC reviewed the legal advice exception as it would have done in any other area of Council policy. This line was defended upon appeal by AG Sharpston:

> It [...] seems to me over-simplistic to say (for example) that legislative acts generically require a high level of transparency but that other [fields] require less.

The increasing stringency of review from *Sison* to *In ‘t Veld* was palpable when the CJEU insisted that in spite of the Council’s wide discretion to determine harm to the protected interest, it “remained obliged” to explain the risk of harm in sufficient detail.

Most recently, the issue of public access again resurfaced during the Transatlantic Trade and Investment Partnership (TTIP) negotiations. In June 2013, a year after the GC’s judgment in *In ‘t Veld*, the FAC debated the possibility of publishing the TTIP negotiating mandate, in response to public concern. The decision was eventually delegated to the Coreper, which maintained its classification level at ‘restreint’. According to common practice, a decision to declassify and publish a Council document would be taken on the basis of consensus, implying a lowest common denominator. However, public pressure continued to mount and in May 2014, a group of over 250 NGOs submitted a petition calling on the EU to increase transparency of the TTIP process. After the outgoing trade commissioner De Gucht joined the chorus of critics, in October 2014 the Council gave in. By then, the mandate had already been long leaked to the press.

In summary, two central trends stand out in the development of the access to FAC documents policy during the second period here under consideration. First, the FAC

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167 *Council v In ‘t Veld*, para 69
168 *Council v In ‘t Veld*, para 58
169 Abazi and Hillebrandt (2015), pp. 835-7
170 Joined cases C-39/05P and C-52/05P (appeal), *Turco and Sweden v Council*, 1 July 2008
172 AG (2014), para 97
173 *Council v In ‘t Veld*, para 64; Compare with AG Geelhoed’s statement above. Cf. Abazi and Hillebrandt (2015), p. 837
174 Respondent #20
175 Respondents #20, #56
176 AIE (2014)
177 Euractiv (2014)
consolidated the policy flowing out of the political consensus reached in 2001-2002. Second, as a result of an increasingly active EU foreign policy, the Council began to feel growing external pressure that challenged the ‘exceptionalist logic’. This led to what seemed the beginnings of a fragmentation and differentiation in the extent of access to documents depending on the policy subarea. Table 9.2 provides an overview of the most important developments.

Table 9.2: Access to documents policy in the FAC, developments December 2001-2014

<table>
<thead>
<tr>
<th>Development</th>
<th>Development</th>
<th>Indicator</th>
<th>Indicator</th>
<th>Indicator</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Formal rules</td>
<td>Implementation</td>
<td>Informal norms</td>
<td></td>
</tr>
<tr>
<td>Consolidation of the exceptionalist consensus</td>
<td>- Entrenchment of security and classification rules through new voting arrangements, third-party agreements, and administrative-level arrangements</td>
<td>- Below-average access rate and above-average frequency of mandatory exception grounds for confirmatory applications</td>
<td>- De facto veto third parties due to ‘orcon’ principle</td>
<td></td>
</tr>
<tr>
<td>Differentiation under increasing external pressure</td>
<td>- Difference in court review between area of counter-terrorism and international trade</td>
<td>- Strong increase confirmatory applications</td>
<td>- Parallel document circulation (e.g. double meeting agendas, in camera or bilateral document sharing)</td>
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</tr>
</tbody>
</table>

9.5 Analysis: Change and continuity over time

In light of the guiding empirical questions, how must the dynamics underlying the development of access to documents policy in the Foreign Affairs Council be characterised? In this policy area, from the outset a consensus existed around the presumption of exceptionalism: the idea that generally speaking, foreign policy making could not be transparent in the same way that other policy areas could. Over time, this ‘exceptionalist consensus’ was developed, revised, and most recently, challenged by a conjunction of actors in and around the Council. Thus, while access to FAC documents made an evident advance over time, this advance had a clear ‘ceiling’: a point at which access to documents became stunted by a permissive interpretation and implementation of the exception grounds in the formal rules and several transparency-constraining informal norms.

An important element of the ‘exceptionalist consensus’ in the FAC were the Council’s rules on document classification. Particularly in the two-year period around the turn of the century, these rules underwent important change. Whereas initially, reference to classified documents was to be made on the public register barring exceptional circumstances (1999), thereafter such documents were excluded altogether from the scope of access to documents (2000). Finally, the access rules were once again brought under the scope of the access rules,

178 Chapter 5, section 4
albeit in a very restrictive manner subject to stringent safeguards (2001). The dominant role, in this episode of reform, of Finland, France and Sweden stands out in particular, and is associated with their respective presidencies. In general, it may be concluded that the perceived salience of access to documents in the FAC declined notably from the first period under consideration to the second. After Regulation 1049/01 entered into force, the willingness of (coalitions of) member states to place related items on the agenda, intervene in court cases, and countervote or make statements in confirmatory applications all dropped considerably.

From 1999 onwards, the FAC’s decision-making architecture was expanded with a High Representative with his own dedicated staff, as well as several new CFSP bodies, among them the Political Security Committee that was predominantly staffed by member state officials of the ambassadorial rank. This altered arrangement introduced administrative elite officials who increasingly took over the role of setting the agenda with regard to procedural matters. This is apparent by such rule changes as the ‘Solana Decision’ (2000) and the establishment of the Security Committee which in 2002 entrenched the rules covering document classification. From 2002 onward, these actors were also responsible for brokering security of information agreements with third states. This meant that the so-called ‘orcon’ (originator consent) principle began to play an increasingly important role, as the Council handled ever-more third-state classified documents. These documents were only rarely disclosed, or even made visible on the online register, and it was held that powerful third-country partners held a de facto veto over disclosure of their own documents. In this light, it may be noted that the applicable voting rules, which at times were simple majority, at other times qualified majority, had only a limited impact, generally favouring transparency’s critics in the Council.

As the CFSP was expanding, other institutional actors entered the policy debate seeking to check the FAC’s power. In the area foreign policy, the EU courts were given plenty of opportunity (12 court cases) to interpret the access rules. At an early point, the CFI, later supported by the ECJ, asserted both the applicability of the access rules in the CFSP, as well as its jurisdiction therein. The courts thereby protected applicants’ access to the judicial review in CFSP access matters. However, they remained reluctant to apply strong judicial review in access to FAC documents cases, instead developing procedural criteria for limited review in Hautala. Thereafter, the courts’ adherence to the ‘Hautala criteria’ was variable. Whereas they were generally explicitly applied, in the Sison case law in the aftermath of the 9/11 attacks, the courts were rather hands-off, merely referring to the Hautala criteria in passing. Most recently, the Hautala criteria were given a more restrictive interpretation in the In ‘t Veld case law, where the court held that justification of a mandatory exception ground could not be purely hypothetical and should be couched in a sufficiently detailed argument explaining the ‘specific and actual’ risk in disclosure.

From the late 1990s onwards, the EP, too began to increasingly assert itself regarding the matter of access to FAC documents. In a ‘grand bargain’ deal involving Regulation 1049/01 and the document classification rules, the EP was able to secure modest privileged
access to classified CSDP information rights, which were thereafter gradually expanded. Treaty change also played its part in empowering the EP. Through the Amsterdam Treaty, the EP attained certain information rights in the area of international negotiations, which were expanded in the Lisbon Treaty. Of itself, the EP’s battle to strengthen parliamentary oversight in the foreign policy area had only a limited impact on the public’s access to documents. However, on two occasions, MEPs dissatisfied with the access to Council information received on the basis of their institutional platform, relied on the public access rules (Hautala I (1999) and II (2001); In’t Veld I (2012) and II (2014)), leading to the important doctrinal developments described above.

During the second period under consideration, the ‘exceptionalist consensus’ came under increasing pressure. Sparked by the chain of events that began with 9/11, the CFSP developed an increasingly active counter-terrorism and defence policy. This policy cooperation required more intensive information exchanges from particularly the larger member states with more elaborate intelligence capacities. However, in a post-enlargement EU, these pressures increasingly gave way to informal, idiosyncratic bilateral or ‘minilateral’ document exchanges outside of the formal document frameworks. The significant power of the larger member states in the decision-making process meant that other member states largely accepted these developments:

[M]ember states [have] a much stronger leverage within the Council working process […], because […] they can stop at any time. If there is no consensus, there is no consensus.179

The EEAS, which upon establishment (2009) became the epicentre of CFSP policy making, also quickly adopted this information exchange style. Together with the vast amount of orcon-covered third-party documents, this has led to an increasing number of documents whose existence evades the public eye.

Finally, as in other Council policy areas, the emergence of the internet towards the end of the 1990s facilitated monitoring of the decision-making process, aiding NGOs in their calls for greater transparency, such as in the case of the TTIP negotiations. The functioning of the online document register in the area of foreign policy was however significantly curtailed for three reasons. First, the parallel Coreu exchange network featured documents that would not regularly appear on the public register. When Coreu document traffic began to decline after 2005, much of the decline was probably absorbed by informal document exchanges. Second, from 2000, the Council sought to keep certain documents off the register. Initially, it did so by excluding classified documents from the scope of the access rules (‘Solana Decision’). When this decision was reversed, the Council adopted new internal rules that formally prohibited the registration of documents with high classification levels, and registered de facto only a negligible proportion of documents with lower classification levels. Third, registration of non-classified FAC documents soon hit a ‘ceiling’, whereby an increase in the

179 Respondent #41

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Table 9.3: Explanatory factors in the development of access to documents in the FAC

<table>
<thead>
<tr>
<th>Stable factors</th>
<th>Changing factors</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Actors</strong></td>
<td></td>
</tr>
<tr>
<td>- Strong influence courts</td>
<td>- Introduction of High Representative for CFSP (1999)</td>
</tr>
<tr>
<td>- Variable influence non-institutional actors: partner states and organisations (strong), NGOs (limited)</td>
<td>- Introduction of new decision-making bodies for the CFSP (PSC, Military Committee) (2000)</td>
</tr>
<tr>
<td></td>
<td>- Decreasing policy entrepreneurship Presidency (2001)</td>
</tr>
<tr>
<td></td>
<td>- Establishment of EEAS, increasingly central role (2009)</td>
</tr>
<tr>
<td><strong>Preferences</strong></td>
<td></td>
</tr>
<tr>
<td>- Exceptionalist consensus, constraining either scope or impact of access to documents rules</td>
<td>- Increasing reliance on and protection of third-party classified information (2000)</td>
</tr>
<tr>
<td></td>
<td>- Increasing protection of member state intelligence (2002)</td>
</tr>
<tr>
<td><strong>Resources</strong></td>
<td></td>
</tr>
<tr>
<td>- Recourse to judicial review</td>
<td>- Entrepreneurship administrative elite officials (1999)</td>
</tr>
<tr>
<td>- Voting rules favouring transparency’s critics</td>
<td>- Decreasing agenda-setting role Presidency (2001)</td>
</tr>
<tr>
<td></td>
<td>- Decreasing reliance on parallel document exchange system (Coreu) (2005)</td>
</tr>
<tr>
<td></td>
<td>- Strong decrease of countervoting in confirmatory applications (2002-2014)</td>
</tr>
<tr>
<td><strong>Exogenous factors</strong></td>
<td>- Introduction of HR for CFSP (1999)</td>
</tr>
<tr>
<td></td>
<td>- 9/11 attacks (2001)</td>
</tr>
<tr>
<td></td>
<td>- Establishment of EEAS (2009)</td>
</tr>
</tbody>
</table>

number of documents registered led to a proportionate decline in the rate of directly accessible documents.

All things considered, the ‘exceptionalist consensus’ that has characterised FAC decision making throughout, and that brings with it an inevitable degree of strain on the functioning of access to documents, is here to stay for the foreseeable future. Table 9.3 summarises the factors that are most important in explaining the development of the FAC’s access to documents policy.

9.6 Conclusion: A ‘natural exception’ to transparency

From the outset, access to documents policy in the FAC context was developed with the idea that foreign policy formed a ‘natural exception’ to transparency. This assumption followed practices at the national level, where the conduct of foreign policy was traditionally seen as an ‘executive prerogative’. Thus, Council members broadly embraced the ‘exceptionalist consensus’. This consensus was characterised by a special exception ground, limited court review of the Council’s invocation of this exception ground, structurally lower passive and active disclosure, and finally, a strong reliance on the parallel secured Coreu document network.
Chapter 9

Around the turn of the century, activity in the Common Foreign and Security Policy (CFSP) began to expand rapidly. This led to an overhaul of the document classification rules, the temporary exclusion of classified documents from the scope of the access rules, and the exclusion of certain categories of documents from the recently introduced online document register. These measures were all strongly contested by the pro-transparency minority, for whom the accommodation of classified information within the access regime was a highly salient subject. A new, middle ground settlement was eventually agreed that broadly satisfied the preferences of the Council majority and the High Representative on the one hand, and the Council minority and the EP on the other. The former sought strong guarantees that the Council kept control over the disclosure of shared intelligence. The latter in turn sought the inclusion of classified documents in the access regime and sufficient privileged parliamentary access respectively.

In the years that followed, the new consensus was further consolidated. The classification rules were entrenched, several classified information agreements with third countries were signed, and access to documents remained continually low. References to classified documents originating from third states as well as the FAC’s countless informal meeting documents (MDs) were even structurally kept off the register. Access through the online register soon reached a ‘transparency ceiling’: the more documents that were placed on the register, the lower the rate of direct access. All of this suggests that the FAC indeed succeeded at keeping tight control over documents disclosures. In doing so, it received broad support from the courts. Even when the courts occasionally expanded applicants’ access to documents by ensuring the FAC’s compliance with the access regime’s exception procedures, they were generally deferential to the FAC’s assessment of risk caused by potential disclosures.

The FAC’s policy engagement stepped up as the first decade of the twenty-first century unfolded, with the 9/11 attacks (2001) as an important trigger. The raised stakes of counter-terrorism policy, along with the EU’s ‘big bang enlargement’ (2004), posed an increasing challenge to the FAC’s ‘exceptionalist consensus’. It led to both policy-undermining developments such as third-country intrusion and document leaking, and increasingly assertive external actors, both institutional and non-institutional, that questioned the ‘exceptionalist consensus’ and demanded wider access. So far, the FAC and particularly its larger members have responded to these challenges by exchanging CFSP and CSDP-related information in particular with ever-greater caution and reserve. An exception is formed by the area of trade policy, where in recent years transparency, with the support of the EU courts, has made important advances.

At first sight, the development of access to documents policy in the FAC seems to make up an area in which transparency ‘just does not fit well’. Yet, upon closer inspection, the considerable contestation over policy change between 1999 and 2001, as well as the subsequent entrenchment of the ‘exceptionalist consensus’ suggests a more dynamic development by which efforts to create transparency were gradually ‘encapsulated’. This protective attitude is rendered problematic by the fact that FAC policy making leads to a
‘compound exceptionalism’ in the sense that the traditional notion of an executive prerogative at the national level is duplicated at the European level. It thereby attains a multilevel character, potentially creating accountability gaps. Arrangements for confidentiality are thus increasingly questioned and challenged by critical outsiders, who consider the current extent of confidentiality no longer feasible nor desirable. For the foreseeable future however, it the relatively robust ‘exceptionalist consensus’ in the FAC’s access to documents policy seems unlikely to be overturned.
PART III
COMPARISON AND CONCLUSION
Chapter 10
Access to Documents Across the Cases: Uniformity or Fragmentation?

10.1 Introduction
In the previous chapters, I traced the development of access to documents policy empirically, at a horizontal Council level (chapter 6) and at the level of three Council formations in charge of different policy areas (chapters 7-9). I considered this development along three interrelated dimensions: the formal rules, their implementation practices and the informal norms enabling or constraining them. Furthermore, in a process-tracing analysis, I identified the central institutional factors that explain this development.

In this chapter, I compare the empirical chapters’ findings to establish to what extent access to documents policy developed in a uniform or a fragmented manner across the Council. Earlier in this study, I put forward an explanatory framework with two competing accounts to this end. According to the first account, the development of the Council’s access to documents policy is characterised by an ‘advancing transparency effect’. This effect offers a single explanation of advancing access to documents policy that should hold across all policy areas with the same effect. In contrast to this is the second framework of a ‘captured transparency effect’. According to this account, the development of the Council’s access to documents policy is characterised instead by its fragmentation, meaning that the manner and extent to which access to documents is granted is explained by different, often detrimental, institutional factors depending on the policy area.

In reality, of course, mutually contradictory elements of general transparency-enhancing, and sector-specific constraining (or ‘super-enhancing’) forces may both be at play at the same time. Indeed, comparing the evidence from the three policy areas, a mixed dynamic is found. In the legislative sphere, access to documents developments in the Environment Council and the Economic and Financial Council largely followed the general traits of a Council-wide ‘advancing transparency effect’ (in the Foreign Affairs Council legislation is rarely passed). Moreover, in the non-legislative sphere, each of the policy areas developed access to documents according to its own specific captured transparency effect. Both effects were dynamic over time. Whereas the institutional factors underpinning

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1 See Chapter 4, section 4
legislative transparency led to growing cross-case similarity over time, those underpinning non-legislative transparency led to growing dissimilarity. As a consequence, the difference between access to documents policy in the legislative and non-legislative sphere grew apart over time.

The explanatory analysis is highlighted by three broad cross-case trends in the development of access to Council documents policy. First, while cross-case dissimilarity of the access to documents policy widened over time. A critical period in this regard were the years around the turn of the century (1999-2001), which to a large extent laid out the path for subsequent differentiation. Second, the standard for access to documents in legislative decision making as well as its implementation advanced over time, while access to non-legislative documents stayed behind. This resulted in a widening gap between the two categories of access, which contributed significantly to cross-case divergence. Third, various trends in the interpretation, implementation and informal norms of the access policy indicate a relative weakening of decisional transparency in the Ecofin Council and FAC. Starting a few years after the entry into force of Regulation 1049/01, this significantly impeded the expansion of particularly non-legislative transparency in these Council formations.

The structure of this chapter follows these three broad comparative trends, elaborating each in turn. First, in a longitudinal comparison, I demonstrate increasing cross-case divergence along all of the access policy’s dimensions. Thus, in multiple ways, the formal rules, implementation practices and informal norms governing access to documents in the different Council formations increasingly drifted apart over time (10.2). Second, I show how the development of legislative transparency took precedence, leading to a widening gap between access to legislative and non-legislative documents (section 10.3). Third, I offer evidence of various processes that led to a gradual weakening of non-legislative transparency with sector-specific characteristics (section 10.4). Thereafter, I bring the insights of these three trends together and place them in the light of the theoretical framework outlined in chapter 4. This results in a broad sketch of the development of the Council’s access to documents policy between 1992 and 2014 (section 10.5). Finally, I conclude (section 10.6).

### 10.2 Increasing cross-case divergence

The first trend concerns the access to documents policy’s notable dynamism over time. The finding of a growing dissimilarity in access to documents policy between the Environment Council, the Ecofin Council and the Foreign Affairs Council is significant. This dissimilarity sprang not only from the court’s progressive interpretation of the rules in case law, but also from anticipation of, and reactions to this jurisprudence. Judicial action thus prompted changes in the Council’s implementation of existing rules, and even the creation of new rules.

At the outset of the access to documents policy, the legal situation was still characterised by broad uniformity. From 1994, all of the policy cases were exclusively governed by the same legal instrument, Decision 731/93. The coalition of member states advocating wider openness was broadly consistent across policy areas (i.e., the ‘Gang of Four’
1. Access to Documents Across the Cases

and, less consistently, the United Kingdom). By 2014, the incumbent central access framework was interpreted and implemented in ways that rather diverged between these Council formations. Moreover, new rules had come into place that were exclusive to, or disproportionately impacted specific Council formations. Meanwhile, the ability of individual member states or coalitions of member states to steer the direction of the access to documents policy had decreased significantly. This meant that the pro-transparency coalition was not only unable to alter access to documents legislation, but was also almost completely unsuccessful in affecting the revision of lower-level internal rules and the access policy’s day-to-day implementation.

10.2.1 At first sight: Signs of similarity

At first sight, the considerable cross-case similarity could lead us to believe that access to documents policy actually developed in accordance with a Council-wide ‘advancing transparency effect’. A few examples demonstrate this point. Throughout time, all three Council formations remained firmly within the remit of Decision 731/93 (as of 1994), and later, Regulation 1049/01 (as of December 2001). Without interruption, these successive sets of rules provided the central legal access framework for each of these formations. Importantly, when in Hantala I (1999) the Council cast doubt on the access rules’ applicability to documents related to CFSP decision making, the CFI (and, upon appeal, the ECJ) made short shrift with this argument. Instead, it found that the access rules applied to all Council documents.²

The impact of the exogenous factor of technological development, which led to the introduction of the internet, also affected all cases. It enabled the creation of the Council’s online public register (1999), which applied without exception to all the Council’s documents. The register, together with the adoption of Regulation 1049/01 raised public awareness and increased the intensity of monitoring of the right of access to documents. Furthermore, across the three Council formations, the coalition advocating wider openness was broadly consistent with general trend on the transparency dossier.³ Although it lost any likely chance of a blocking minority in Council votes after the ‘big bang’ accession, this effect also applied horizontally across the board.⁴

Naturally, the legal instrument of Decision 731/93 also contained certain in-built differentials. For example, exception grounds such as ‘international relations’, ‘monetary stability’ and ‘the Community’s financial interests’ were clearly included with the specific policy areas of foreign affairs and economic and financial affairs in mind. This basic differentiation at the outset reflected Council preferences. Both in the areas of economic policy and foreign and security policy, member states were anxious to create the right conditions for more extensive European-level cooperation. This settlement of the exception grounds was based on the consensus among a large Council majority that, while the advance

² See Chapter 6, section 2.2 and Chapter 9, section 3.1
³ See Chapter 6, section 4.1
⁴ See Chapter 6, section 3.2

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of access to documents policy was largely tolerable, certain aspects of specific policy areas should remain protected. This perception represented a mixed picture: transparency was allowed to ‘catch up’ in these areas, it should naturally be constrained by the specific and differential needs of a given policy area.\footnote{See Chapter 4, section 4, Table 4.2}

Some substantial evidence thus exists of cross-case similarities or apparently ‘trivial’ dissimilarities. Yet this evidence offers only a very partial account of developments. Underneath seemingly Council-wide changes in the access to documents rules and practices, changes occurred with rather sector-specific antecedents and impacts. A growing dissimilarity between cases occurred in two ways. First, the EU courts adopted a progressively differentiated interpretation of exception grounds under the access rules. This led to anticipatory behaviour in the Council’s implementation of the access rules, with increasingly dissimilar effects across the three policy cases. Second, a number of exogenous institutional factors conspired to gradually complement the ‘central’ transparency debate with three separate debates concerning respectively measures to secure formal confidentiality, measures to secure informal confidentiality, and externally negotiated minimum standards of access. These debates took place within rather concrete policy contexts: respectively, the CFSP, the EMU, and environmental policy. Each of these intervened regarding access to documents policy in its area of focus, resulting in narrower (or in the case of the EnvCo, wider) de facto access to Council documents.

10.2.2 The courts’ jurisprudence: Cross-case consequences

At the turn of the century, an increasing differentiation emerged from the interpretation of the non-mandatory and mandatory exception grounds in the EU courts’ jurisprudence. While in-built differentiation was already apparent from the letter of the text in Decision 731/93,\footnote{Compare Appendix 5} it is important to note that the court unmistakably went relatively far in further shaping this differentiation. Previously, in the 1995 \textit{Carvel} case, the CFI strengthened the public right of access by introducing an ‘overriding public interest test’. This came to be known as the ‘space to think’ clause, a non-mandatory exception ground protecting the confidentiality of proceedings under article 4(2) of Decision 731/93.\footnote{See Chapter 6, section 2.2 and Chapter 9, section 3.1} However, the extent to which the court wished to differentiate between the non-mandatory and mandatory exception grounds only became fully apparent with \textit{Hautala} (1999) when it contrasted the ‘overriding public interest test’ with the criteria of a ‘limited review’ for mandatory exception grounds.\footnote{See Chapter 6, section 2.2}

Although the court’s distinction between a strict and a lenient application of the two categories of exception grounds may seem trivial, this was certainly not so regarding its impact on access to documents in practice. One reason is that the overriding public interest test in several cases tipped the balance in confirmatory application decisions, contributing to

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5 See Chapter 4, section 4, Table 4.2  
6 Compare Appendix 5  
7 See Chapter 6, section 2.2  
8 See Chapter 6, section 2.2 and Chapter 9, section 3.1
higher access rates in policy areas, such as the EnvCo, where the Council frequently relied on non-mandatory exception grounds. A second reason is that, from an early stage, the EU courts showed a far greater preparedness to accept thinly reasoned justifications of mandatory exception grounds than for non-mandatory exception grounds.\(^9\)

The introduction of the limited review thus provided an incentive structure for a clear differentiation in the administration of exception grounds in practice in the different policy cases (Figure 10.1). From the first period to the second period, the types of exception grounds invoked in different policy areas began to widen. In contrast with the overall Council trend and the EnvCo, the reliance on mandatory exceptions by the Ecofin Council and the FAC Council remained at a constant high. The reliance on non-mandatory exceptions grew considerably in policy areas with relatively more legislation (EnvCo and Ecofin Council), compared to the largely non-legislative FAC where it declined further. Although the access rate in confirmatory applications improved markedly in the EnvCo and the Ecofin Council, this trend was not present for the FAC. Complete non-disclosure by the FAC remained slightly above the 50 per cent mark. This is over double the proportion of the Ecofin Council.\(^10\)

The mandatory exception grounds thus threw up a considerable obstacle both at the administrative stage (lower disclosure rates) and at the judicial review stage (the doctrine of limited review) of access to documents requests. These obstacles still did not discourage a large number of applicants from seeking access and subsequent redress before the court. In the different policy formations, a wide range of actors, varying from MEPs (2), academics (3), an NGO (1), a blacklisted individual (1), and a civil servant (1) brought cases. The bulk of these cases were brought in the context of the FAC. Separating initial and appeal proceedings, 12 court rulings were handed down concerning refusals to grant access to FAC.

\(^9\) On this point, see also section 10.3 below
\(^10\) See Appendix 4
documents, compared to only 1 ruling for EnvCo documents and 3 rulings for Ecofin Council documents.\textsuperscript{11} The anomalously high number of court actions against access to FAC documents decisions must be viewed in the context of a consistently higher level of access applications and refusals in this area compared to the other two policy areas. Moreover, MEPs, ambitious in the area of foreign policy but with limited privileged information rights, also resorted twice to the public access regime to exert pressure on the FAC.\textsuperscript{12} As a counterweight to high FAC confidentiality, court actions were relatively successful. A total of 5 out of 7 litigants were given wider access through the courts’ interventions (though often with a delay of years). Although the courts rarely struck down a mandatory justification ground (this happened in only one case, as late as 2012),\textsuperscript{13} it found various other procedural grounds, such as a manifest failure to provide an individual assessment of each requested document, or failure to consider the possibility of granting partial access, to annul Council decisions refusing access.

In its role of ‘confidentiality gatekeeper’ in access to FAC documents cases, the court’s interventions were similar to access cases in other parts of the Council. Court litigation was fairly successful at expanding access to documents, with two-thirds of all cases leading to (partial) annulment of access refusals; this number increases to over three-quarters when only final rulings in appeal cases are counted. However, the impact of court rulings differed strongly among Council formations. In the EnvCo and the Ecofin Council, they had a far more limited impact than in the FAC, due to the low number of cases brought.

\textbf{10.2.3 A diversification of rules and implementation practices}

Around the turn of the century, the general Council access to documents debate began to be affected by a number of separate but related policy reforms that further fragmented the access to documents policy. One such reform related to the issue of document classification. The rules on classified documents predominantly impacted on the Common Foreign and Security Policy (CFSP) within the FAC, and more precisely, its defence policy component, the CSDP.\textsuperscript{14} Another reform occurred in the EMU, where informal policy coordination en marge of the Ecofin Council began to place many documents outside of the formal access framework. In different ways, both had the effect of decreasing the de facto number of accessible documents in these respective policy areas.

The reforms leading to new document classification rules and informality emerged out of a widely perceived need for a strong security of information policy and the desire to protect formal national competences in the area of economic policy respectively.\textsuperscript{15} These two

\begin{itemize}
  \item[11] It must be noted that one judgment covered both the EnvCo and the FAC, as the document requested pertained to the environmental dimensions of an international trade negotiation.
  \item[12] Namely Heidi Hautala MEP and Sophie in ‘t Veld MEP. Both initial judgments were (partially) favourable for the applicant MEPs and upheld upon appeal by the Council.
  \item[13] Namely, the ‘international relations’ justification in In ‘t Veld I (2012), upheld upon appeal in In ‘t Veld II (2014).
  \item[14] See Chapter 9, section 3.2
  \item[15] See respectively Chapter 9, section 3.2 and Chapter 8, section 3.2
\end{itemize}
Council priorities enjoyed broad support among the member states, and resulted in considerable changes in the decision-making architecture in the policy areas concerned. Preferences however diverged on the matter of these areas’ proper relation to access to documents. In the FAC, a strong policy debate took place until the interaction of classified documents and access to documents was finally settled in 2001, after which the issue’s salience among the member states declined. In the Ecofin Council on the contrary, the informality of much decision making meant that a large part of the documents remained out of the ambit of the Council’s access to documents rules altogether.

The above-mentioned reforms, while having a differential impact, were still part of a single set of formal rules. However, in one isolated but important instance, sector-specific formal access rules were also adopted, namely Regulation 1367/06 (2006) which sprang from the EU’s participation in the 1998 UN Aarhus Convention on access to environmental information. The Aarhus Convention emerged out of an exogenous (UN) policy regime where it was negotiated in relative isolation from the Council’s transparency policy debate. Yet once signed, it obliged the EU to adopt an implementing instrument. The result was a legal act that significantly expanded the potential reach of access to documents, however, with an influence that remained strictly limited to environmental policy. Moreover, the EU’s manner of implementing the convention continues to contradict the standard of access laid down in the Aarhus Convention.

Apart from developing along sector-specific lines, the early right to information rules in the area of environmental policy also made their mark on Decision 731/93 (1993). The exceptions in particular in this decision closely mimicked those in the sphere of environmental policy. However, what prompted the Commission and Council to copy part of these environmental transparency norms was not a clear pro-transparency agenda carried by a Council majority. Rather, the ‘legal transplant’ was the result of low salience combined with the Commission’s need of a familiar legal precedent. Moreover, the impact of the EnvCo’s legal access regime into the horizontal rules was limited and decreased over time. Limited, because several of the exception grounds that were non-mandatory under the environmental transparency regime were turned into mandatory exceptions under Decision 731/93. Decreasing, because Regulation 1049/01 expanded the number of legal refusal grounds, codifying the exception concerning ‘defence and military matters’ and expanding exceptions in the economic and monetary sphere.

The introduction, at the turn of the century, of three sector-specific reforms affecting access to documents policy is also manifested in the interaction between active and passive transparency. In line with what might be expected, the EnvCo and FAC reported respectively the highest and lowest disclosure rate in nearly all years, with the Ecofin Council staying firmly in the middle (Table 10.1). Across time, the accessibility of FAC documents on the register proved most anomalous, with a decline of 4 percentage points between the first (1999-

16 See section 10.4 below
17 See Chapter 7, section 3.1
18 European Parliament and Council (2001b), article 4(1)a, respectively third and fourth indent
Table 10.1: Proactive access rate per case, 1999-2014

<table>
<thead>
<tr>
<th>Year</th>
<th>Env</th>
<th>Ecofin</th>
<th>FA</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>43.9%</td>
<td>37.3%</td>
<td>40.6%</td>
</tr>
<tr>
<td>2000</td>
<td>56.9%</td>
<td>43.3%</td>
<td>44.8%</td>
</tr>
<tr>
<td>2001</td>
<td>73.1%</td>
<td>68.8%</td>
<td>58.1%</td>
</tr>
<tr>
<td>2002</td>
<td>83.3%</td>
<td>76.6%</td>
<td>66.3%</td>
</tr>
<tr>
<td>2003</td>
<td>86.3%</td>
<td>83.8%</td>
<td>64.8%</td>
</tr>
<tr>
<td>2004</td>
<td>87.5%</td>
<td>79.9%</td>
<td>60.8%</td>
</tr>
<tr>
<td>2005</td>
<td>93.1%</td>
<td>87.5%</td>
<td>57.8%</td>
</tr>
<tr>
<td>2006</td>
<td>90.2%</td>
<td>85.5%</td>
<td>60.2%</td>
</tr>
<tr>
<td>2007</td>
<td>90.9%</td>
<td>84.0%</td>
<td>56.5%</td>
</tr>
<tr>
<td>2008</td>
<td>91.4%</td>
<td>82.9%</td>
<td>58.9%</td>
</tr>
<tr>
<td>2009</td>
<td>85.1%</td>
<td>81.0%</td>
<td>45.6%</td>
</tr>
<tr>
<td>2010</td>
<td>84.3%</td>
<td>84.5%</td>
<td>43.7%</td>
</tr>
<tr>
<td>2011</td>
<td>86.9%</td>
<td>82.4%</td>
<td>43.8%</td>
</tr>
<tr>
<td>2012</td>
<td>80.0%</td>
<td>77.4%</td>
<td>45.2%</td>
</tr>
<tr>
<td>2013</td>
<td>70.2%</td>
<td>75.8%</td>
<td>48.6%</td>
</tr>
<tr>
<td>2014</td>
<td>83.2%</td>
<td>82.5%</td>
<td>55.4%</td>
</tr>
</tbody>
</table>

Source: data compiled from the Council register. The shade of a box reflects respectively the case with the highest (white), middle (grey), and lowest (black) access rate in any given year. Proactive disclosure only became possible from 2000, hence 1999 figures represent retroactive disclosure.  

2003) and last quarter-period (2011-2014). On the other side of the spectrum there were EnvCo documents. These directly demonstrated the highest rate of document disclosure, a rate that went up by 16 more percentage points over time. Direct disclosure of Ecofin documents started at a low rate but increased strongly by 23 percentage points. Around 2004 the differences began to grow wider. From that year, the bandwidth of proactive access stayed around 25-35 percentage points between the most and least transparency policy case, up from around 10-20 percentage points before 2004. 

Just as low access rates in confirmatory applications were related to an increase in the number of court cases, a connection also existed between access rates on the public register and the number of access requests. Where only limited direct access could be obtained but outside actors actively monitored the decision-making process, such as in the FAC, this led to an increase in access applications. In the EnvCo, which granted more generous direct access, as well as in the Ecofin Council, where informal documents such as those of the Eurogroup were not placed on the register and close monitoring was not prevalent, the rate of document requests grew much more slowly. Consequently, while the number of initial and confirmatory applications in both the EnvCo and Ecofin Council remained around the Council average over time, the FAC recorded consistently and significantly higher application rates.

In this section, I have provided a ‘tour d’horizon’ of the development of access to documents policy across cases. The chief conclusion of this overview is that differentiation

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19 Council Secretariat (2015); cf, Chapter 5, section 3.4
20 In each case, an average of the first quarter-period (four years) is compared with an average of the last quarter-period.
21 See section 10.2.2 above
increased over time across all dimensions of the access to documents policy. This is highlighted by two key processes. First of these is the courts’ doctrinal development of the ‘overriding public interest test’ (1995) and the ‘limited review’ (1999), and the responses this sparked off, namely an entrenchment of the reliance on mandatory exception in the Ecofin Council and the FAC, and the increasing judicialisation of access to documents requests in the FAC context. Second are the reform processes that occurred in each of the three cases, leading to sector-specific arrangements that interfered with the access to documents policy, mostly in a way that weakened it. Developments in the EnvCo stand out as an exception in this regard, with a special access regime that actually expanded the right of access.

10.3 The prioritisation of legislative transparency
A second trend relates to the gradual but clear expansion of rules governing access specifically to legislative documents. From an early stage of the general Council debate on access to documents, the development of transparency of legislative documents was given priority. This led to successive rule-making and judicial developments that increasingly strengthened the presumption of openness in the legislative sphere. Ever more-concrete and hard rules ensured immediate (or, in many cases, delayed) access to documents pertaining to legislative processes, and strong involvement of the pro-transparency coalition kept the enforcement of these rules high on the access to documents agenda. Although these stricter rules for legislative documents did not ensure total transparency of the legislative process, they nevertheless formed a clear contrast with the other side of the coin: access to non-legislative documents. Non-legislative decision making was frequently under a perceived presumption of exception from the right of access to documents. Access to non-legislative documents developed either along a formal or an informal exceptionalist regime. Both regimes had clear consequences for the functioning of access to documents policy, leading to a rather restrictive interpretation and/or implementation of the applicable rules. As a consequence, the access to documents rules had a much further-reaching impact in Council formations with a high proportion of legislative decision making, such as the EnvCo, than in formations where legislative activity was limited to a policy subarea and/or complementary to a non-legislative field of activity (Ecofin Council, FAC).

10.3.1 The leap in legislative transparency: Rule-making and court interpretation
Over time, the rules governing access to legislative documents advanced much further than those governing access to non-legislative documents. The drive towards greater legislative access was already incipient in the first access to documents rules that were adopted in 1993, dealing with publication of voting outcomes. Yet the development of legislative transparency

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22 See Chapter 6, section 2.2
only really gained traction when the member states agreed in the Amsterdam Treaty to a more advanced policy on access to legislative documents.\textsuperscript{23}

Among the pro-transparency coalition, the issue of access to legislative documents was seen as the front line of the ‘battle’ for greater transparency. This is visible, for example, in the likelihood of member states to intervene in court cases pertaining to legislative documents. Considering all access cases against the Council in which member states intervened, we find that member states intervened in 100 per cent of cases related to legislative documents, all of which were brought after 2001, and all of which were (upon appeal) fully successful for the applicant’s side.\textsuperscript{24} Access to non-legislative documents actions on the contrary were less successful, even when far more were brought. Member states were also clearly less interested in such cases, intervening in just 19 per cent of them. This figure declines further to 7 per cent when only cases after the entry into force of Regulation 1049/01 are counted.\textsuperscript{25} Around 57 per cent of cases against non-legislative access decisions were (partially) successful, although the rate rises slightly to around 71 per cent when only final rulings in appeal cases are counted.\textsuperscript{26}

The comparatively further advancement of the right of access to legislative documents not only correlated with the rate of member state interventions. Significantly, a correlation is also found between the type of decision-making process (legislative/non-legislative) and the exception ground invoked (mandatory/non-mandatory). In all of the cases related to legislative documents the Council pleaded for access refusal on the ground of non-mandatory exceptions. This stands in stark contrast with non-legislative access cases, where the Council pleaded non-mandatory exceptions grounds in only two cases (9\%), both of which it lost. In cases where the court did (partially) annul a refusal to grant access to non-legislative documents, it rarely found against the Council’s reliance on a mandatory exception ground. In fact, the GC’s decision in In ‘t Veld (2012) was the first time ever that the EU courts rejected the Council’s reliance on any mandatory exception ground.\textsuperscript{27}

The above comparison reveals a clear difference in the interpretation and perceived salience of legislative and non-legislative transparency before the court. Member states were far more likely to intervene in cases concerning access to legislative documents, while the EU courts were clearly more receptive to pleas for wider access in such cases. In spite of the plentiful opportunities that the EU courts were given to clarify the right of access to

\textsuperscript{23} Council (1993a), article 7(5); IGC (1997b), article 207(3)
\textsuperscript{24} As none of the court actions concerning legislative documents pertained to one of the case studies, I consider the full access to documents jurisprudence to which the Council was a party. Among these, the cases concerning access to legislative documents are case T-84/03, Turco I (2004); Joined cases C-39/05 P and C-52/05 P, Sweden and Turco (Turco II, 2008); case T233/09, Access Info Europe I (2011); and case C-280/11P, Access Info Europe II (2013)
\textsuperscript{25} Or 4 out of a total of 21 cases against the Council related to non-legislative documents for the total period. For judgments under Decision 731/93 the rate is 3 out of 7, for judgments under Regulation 1049/01, 1 out of 14.
\textsuperscript{26} Note that these figures come close to the two-thirds respectively three-quarters that were observed in the jurisprudence pertaining to the case studies (see also section 10.2.2 above). This full range of this jurisprudence dealt with access to non-legislative documents.
\textsuperscript{27} See Chapter 9, section 4.2
documents in various instances of non-legislative decision making, they were reluctant to go along with claims of overstretch of the mandatory exception grounds. It remains to be seen how far the courts will prove willing to continue down the path entered in the *In ’t Veld* litigation. By contrast, the case law on access to legislative Council documents, which was far more limited, had rather further-reaching consequences and a higher degree of clarity and finality. Here, the courts found that in principle legislative documents should be immediately and fully available to the public. Even when this interpretation of the rules has continued not to be fully implemented in practice, the point to highlight here is that the general drive to improve access to legislative documents has applied without distinction to all types of legislative decision making across the Council. The development of access to non-legislative documents, on the contrary, became increasingly sector-specific.

10.3.2 Legislative documents: Formal and informal spaces to think

Even where the rules governing access to legislative documents were the most developed, their advance was not total. Indeed, the rule of the widest possible access to legislative documents that was included in article 12(2) of Regulation 1049/01 quickly ran into conflict with the Council’s (informal) limits to openness. These limits were embodied in a stable and robust norm of consensus, according to which legislative negotiations in the Council occurred in accordance with diplomatic collegiality. This norm served a twofold purpose. On the one hand, member states agreed not to publicise each other’s positions on specific legislative dossiers to avoid undue exposure of particular member states’ positions throughout the negotiations and ultimately, to protect the efficiency of the legislative process inside the Council. On the other hand, member states were expected to close ranks vis-à-vis the EP in order to strengthen the Council’s position in interinstitutional legislative negotiations, again for reasons of efficiency.

Both objectives of the norm of consensus were subsumed by the Council under the idea of the ‘space to think’, and created obligations, formally or informally, for the member states and the Council. The formal ‘space to think’ was manifested as an exception grounds in Decision 731/93 and later, Regulation 1049/01, as well as under the duty of professional confidentiality laid down in the European Treaties. Moreover, in 2006, the handling of so-called ‘limite’ documents were laid down in internal guidelines. The non-classificatory label ‘limite’ could be applied to all documents to which access was not yet formally requested under the access regime. However it is exactly in this area where the label was most frequently applied (i.e. the legislative process) and where its legitimacy is most questionable, due to the democratic principle of open legislation. The informal ‘space to think’ consisted of two specific Council norms. The first of these was a gentlemen’s agreement in the Coreper

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28 See Chapter 6, section 3.1

29 Hillebrandt and Novak (2016)

30 Respectively Council (1993c), article 4(2); European Parliament and Council (2001b), article 4(3); IGC (2007c), article 339; previously IGC (1997b), article 284

31 Council (2006); Council (2011a)

32 See Chapter 6, section 3.1
(2002) by which legislative ‘state of play’ documents would be disclosed without reference to the identities of member states. Although this specific agreement was subsequently overturned in a court judgment, this happened only in 2011.\textsuperscript{33} Before this time, citizens were dependent on the willingness or national rules of individual Council members, factors which were highly variable between countries and across legislative dossiers. Moreover, even after the practice of redacting legislative documents was invalidated, the underlying norm remained very much alive across the Council, protected by the fact that the general access rules contained virtually no active duty on the Council’s side to draft particular documents in the course of a legislative process.\textsuperscript{34} The second informal space to think was embodied by the so-called trilogue negotiations. These informal small-committee negotiations between the EP and the Council became an increasingly prevalent element of the legislative process during the last decade here under consideration. Although trilogues were not specific to any policy area, they did of course require the EP’s involvement as a co-legislator, which was the case for the EnvCo and to a more limited extent the Ecofin Council, but not for the FAC.\textsuperscript{35} Trilogues constrained formal access to documents in multiple ways. For example, documents were initially not registered, and as soon as they began to be registered, not disclosed until the finalisation of the decision-making process. Furthermore, being informal, the negotiations were not documented beyond the four-column documents showing the parties’ negotiating positions.

All things considered, the development of access to legislative documents policy generally tended towards greater openness across the Council, beyond what the Council majority had initially foreseen. From the mid-1990s, member states were increasingly willing to accept wider access in this area. This willingness built on a widespread practice among member states to provide informal access to information through a national corporatist system of stakeholder dialogue. It led to increasingly detailed provisions on access to legislative documents in the formal rules and their interpretation by the courts. Even the ‘limite’ rules, which were meant to protect the efficiency of the legislative process in the face of transparency pressures had only a limited impact, as member states undermined them by continuing to share information with stakeholders. The trilogue meeting regime, which proved to be a more successful manifestation of the ‘space to think’ and which has wide support in the Council and the EP, has in recent years come under increasing scrutiny from the European Ombudsman, NGOs and some MEPs. The transparency of trilogues is therefore likely to become subject of reform in the foreseeable future. Despite these setbacks, the underlying norm of consensus has remained in place, affecting the Council members’ way of providing input, and drafting and circulating documents, to the detriment of the widest possible public access to legislative documents.

\textsuperscript{33} Namely, in Access Info Europe I, upheld upon appeal in Access Info Europe II (2013)
\textsuperscript{34} See Chapter 6, section 2.1
\textsuperscript{35} With the exception of the limited legislative subareas under the development and the common commercial policy.
10.3.3 Non-legislative documents: Idiosyncratic norms and practices

Against the Council-wide advances and obstacles governing the access rules are the multifarious experiences of non-legislative Council decision making. The question of what consequences the access rules denote for this ‘other side of the coin’ has become all the more pressing as the Council, over the past decades, began to spend “more time on non-legislative decision-making and policy debate than ever before.”36 The importance of non-legislative decision making stands in sharp contrast to the scant attention the Council pays to the question of transparency in this area of decision making. It results in an amalgam of document management norms and practices with varying consequences for the access rules. Although in certain instances non-transparency should be viewed as a by-product rather than as a direct motive, these norms and practices nonetheless act as a significant constraint on the public access to documents rules.

A broad distinction is found between formal and informal exceptionalist regimes with regard to access to documents. The formal exceptionalist regime is discerned in the FAC and, to a lesser extent, in the EnvCo with regard to negotiations in international forums. The informal exceptionalist regime emerged in the Ecofin Council’s EMU branch of decision making. The degree of formality with which exceptions to access to documents were created showed a clear overlap with the type of competence of the specific policy area under the European Treaties. Non-legislative decision making in the EnvCo was limited, and premised on an exclusive EU competence under the so-called doctrine of ‘parallel powers’. According to this doctrine, the EU’s competence to adopt international agreements flows logically from its exercise of internal competences enumerated in the European Treaties.37 FAC decision making in turn was largely premised on a special (non-legislative) competence in the area of CFSP.38 Ecofin non-legislative decision making, finally, concerned the economic aspects of the EMU, which were based on a coordinating competence.39

The fact that non-legislative decision making in the EnvCo and FAC was based on the traditional executive policy prerogatives of foreign policy and state security played a decisive role in the choice for a formal exceptionalist regime. As it mimicked the constitutional norm at national level, it was more readily accepted by actors both inside and outside of the Council. At the same time, the norm of confidentiality in EU foreign policy making came on top of that at the national level, creating a situation of ‘compound exceptionalism’. This created a problematic situation from the viewpoint of parliamentary

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36 Puettter (2014), p. 3
37 On the doctrine of parallel powers, see Case 22/70, Commission v Council (ERTA), 31 March 1971. Currently, the main EU competence in environmental policy derives from a shared competence with the member states to adopt legislative measures (IGC 2007c, article 2(2) and article 4(2)(e)), whereas its competence to adopt international agreements is laid down in IGC (2007c), article 3(2).
38 Currently laid down in IGC (2007c), article 2(4). Besides this, the FAC operates on the basis of an exclusive competence in the area of the common commercial policy and a complementing competence in the area of development policy (IGC 2007c, article 4(4)).
39 Currently laid down in IGC (2007c), articles 2(3) and 5. Besides this, the Ecofin Council operates on a shared competence to adopt legislation on the financial aspects of the internal market (IGC 2007c, article 4(2)(a)).
oversight: as member governments only had an accountability relation with their own national parliaments, oversight and control of the Council decision-making process was necessarily limited and fragmented.

Meanwhile, the EP started out with extremely limited rights of information and oversight. It was therefore no surprise that, when the policy area of foreign policy began to expand around the turn of the century, the EP soon stepped up its demand for extended oversight prerogatives in this policy area. The development of access to documents policy in this area must thus be viewed as part of a wider struggle for the EP’s rights of oversight. This reading is confirmed by several actions of the EP and its members. For example, the special information rights in the area of the CSDP that the EP was granted in 2002, and which were subsequently expanded, had become part of a package negotiation that included Regulation 1049/01. Moreover, when MEPs began court actions against Council refusals to grant access (*Hautala I* and *II, In ’t Veld I and II*), they sought to rely on the general access rules for the simple reason that instruments for privileged right of access were either absent or too blunt to be effective. In this sense, they must be viewed as part of a larger body of case law concerning parliamentary access to information that did not always converge with the public’s right of access to documents (*e.g.*, *Ecowas* and *Mauritius*). When eventually the Lisbon Treaty included more extensive rights for the EP to oversee the EU’s negotiation of international agreements, these rights were also extended to similar situations in the EnvCo.

The situation was rather different in the Ecofin Council. There, the ambiguous nature of the EU’s ‘coordinating competence’ contributed to a lack of clarity over the actual ‘level’ of EMU decision making, and constitutional standing of EMU decision-making bodies. As a consequence, decision makers resorted structurally to the sphere of informality. This decision-making mode, characterised by the absence of a formal (let alone public) document trail, remained uncontroversial as long as Eurozone (as well as, indirectly, the non-Eurozone) members were not exposed to financial risk. When the financial and economic crisis began, the basic conditions of this consensus were suddenly undermined. This crisis cast economically vulnerable member states against member states potentially exposed to financial risk. The risk of deepening crisis prompted a need for unified decision making at a time when interests and solution analyses were significantly more divergent than before the crisis. A series of confidentially negotiated measures and instruments, punctuated by document leaks and negotiation-by-proxy (via the press) ensued. The instruments thus adopted varied widely in their legal status, ranging from international treaties to co-legislative acts.

The relation between informal decision making and the public right of access to documents is a problematic one. There is nothing in Regulation 1049/01 to suggest that its scope is tied to areas of EU competence, or processes where a final decision is reached at EU level. Instead, they apply to all documents held by any EU institution, body, office or agency. However, the access to documents rules do not make provision for ‘informal’ documents. This democratically problematic situation was paralleled by EP oversight, which remained

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40 See Chapter 9, section 3.2
41 See Chapter 9, section 5
Access to Documents Across the Cases

extremely limited. For the largest part of the period covered by this study, neither the de jure nor the de facto conditions for EP involvement in EMU decision making were present. Instead, its informal and insulated nature meant that the EP remained largely excluded and the formal arrangements of oversight were only made around 2013. At present, it remains difficult to foresee whether new EP and national parliamentary information provisions will strengthen the previously weak powers of oversight.

In this section, I considered the bifurcation of access to legislative and non-legislative documents. As the evidence shows, a Council-wide advance in access to legislative documents took place over time. This advance was facilitated by continual advocacy by the pro-transparency member states, along with a supportive role for the European courts. Naturally, by the end of the period under consideration, the advance of access to legislative documents was still far from complete and final. The Council, for example, continued to structurally negotiate legislative texts with the EP in informal and non-transparent trilogue meetings, while internally, it frequently relied on the ‘limite’ document label for legislative procedures that were still ongoing. Still, the development of access to legislative policy clearly followed a pattern of ‘advancing transparency’. This stands in sharp contrast to the development of access to non-legislative documents policy. Here, a more fragmented, frequently transparency-resistant pattern emerged. A broad distinction in this regard can be made between formal and informal forms of exceptionalism. These types largely followed the type of competences on which a Council policy area was based. Where non-legislative decision making was premised on a clear competence (FAC, to a lesser extent EnvCo), exceptionalism tended to be formal. Where it was premised on a mere coordinating competence (Ecofin’s EMU), exceptionalism tended to be informal. Moreover, as the next section details, transparency’s ‘exceptionalisms’ expanded over time.

10.4 Weakening transparency

The growing difference between access to legislative and non-legislative documents was underpinned by the development, in the late 1990s, of sharply divergent decision-making modes in different Council formations. Specific reforms of the Council’s institutional architecture in support of Ecofin and FAC decision making posed an increasing obstacle to public access to documents. These reforms introduced new administrative elite actors with transparency-adverse preferences who introduced further measures to protect documents from becoming public and sometimes developed informal document management styles that circumvented obligations laid down in Regulation 1049/01. A number of years after the entry into force of Regulation 1049/01, a relative slowdown could be observed in the development of access to documents. The impact of transparency-weakening elements in the access to documents policy was most apparent in the emergent areas of non-legislative policy making in the Ecofin Council and the FAC (notably the EMU and CFSP) and were mainly motivated by competing policy-specific interests, such as creating stable governance, communicating with a single voice, and protecting the possibility of reaching decisions in the face of high
polarisation or low commitment incentives. Over time, the highly specific non-legislative
decision-making modes of the EMU and CFSP led to a slowdown of the implementation of
the access rules in terms of direct access. Access to documents via the online register reached
a ‘transparency ceiling’ that was most strongly discernible in the FAC.

10.4.1 A changing decision-making architecture: New actors and informality
The Ecofin and FAC areas of the EMU and the CFSP respectively both formed new policy
terrains that emerged in the post-Maastricht European decision-making order. Contrary to
the majority of policy areas in the Maastricht Treaty, the EMU and the CFSP did not adopt
the decision-making architecture typical of the ‘community method’. This architecture
presupposed a central role, besides the Council, for institutions such as the EP and the ECJ,
while inside the Council, it was governed by the Coreper supported by the Council
secretariat. Instead, a different, more intergovernmental decision-making architecture was
foreseen for the EMU and the CFSP, which was largely (though not exclusively) implemented through treaty-driven institutional reform. Even when such reform occurred entirely exogenous to the access to documents debate, it clearly altered the internal balance of
power in this debate by favouring particular actors or venues over others.

Between 1997 and 2001, the member states, gathered in the Intergovernmental
Conference, the European Council, or the Council established several new EMU and CFSP
decision-making bodies: the Eurogroup (1997), the EFC (1999), the PSC (2000), the Military
Committee (2000), the Security Committee (2001) and the EWG (2001). Similar bodies did
not appear in the EnvCo, where decision making continued to run through the regular chain
of Council preparatory bodies.

Each of the new bodies set up to serve the EMU or CFSP was tasked with a variety of
(non-legislative) activities, and was either given extensive autonomy over its own document
management, the handling of requests for access to their documents, or both. For example,
the EFC worked on the basis of a rule of confidentiality, whereas the Eurogroup and EWG
acted on the basis of insulation and informality. The Political Security Committee and
Military Committee in turn relied on a high degree of document classification, as well as the
right to decide decentrally on confirmatory applications to their own documents. Finally, the
Security Committee succeeded in entrenching the classification rules by changing the voting
rule from simple majority to QMV. The proliferation of these new decision making bodies
was not specific to any single policy area, but clearly related to the establishment of new
terrains of European non-legislative decision making.

The introduction of a new decision-making body was followed by the introduction of
a host of administrative elite actors. Between 1999 and 2005, the EFC (1999), the Military
Committee (2001), the Eurogroup (2004) and the EWG (2005) were given a permanent chair
appointed by consensus. Moreover, in 1999 the new office of a High Representative for the

42 See respectively Chapter 8, section 3.1 and Chapter 9, section 3.1
43 See Chapter 4, section 3.1

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CFSP, attached to that of Council Secretary-General, was introduced.\footnote{As of December 2009, the role of HR was decoupled from that of Council SG, and turned into a Commissioner post. See further Chapter 9, section 2} The High Representative became the chair of the Political Security Committee at ambassadorial, and the FAC at ministerial level. Within a year in office, he successfully proposed an overhaul in the classification rules. Moreover, the High Representative was instrumental in introducing the additional exception ground of ‘defence and military matters’ to the access rules in the 2000 ‘Solana Decision’, an exception ground that was retained in Regulation 1049/01 adopted less than a year later.\footnote{Regulation 1049/01 also expanded the exception ground related to the economic and monetary sphere, see article 4(1)a, respectively third and fourth indent.} Like the other new administrative or political elite actors, the HR/SG was given considerable room for coordinating informal, frequently undocumented decision making. By contrast, in the EnvCo no special administrative elite actors roles were introduced.

The new administrative elite actors of the EMU and the CFSP acquired far-reaching powers to facilitate decision making in areas that either required unanimity or consensus. Their central role in key decision-making bodies clearly affected the public’s access to documents. The EFC president and HR/SG for example had direct access to key decision makers in the national capitals, and ample possibilities to communicate in a manner in which formal documents played only a limited role. The HR/SG was further supported by his own secretariat which operated at arm’s length from both the Commission (of which it officially forms part) and the Council, operating under relatively loose and idiosyncratic procedures of document management. The cabinet of the HR/SG was more directly connected to the access to documents regime and could thus rely less directly on informality. Instead, it asserted closer control over the implementation of the access to documents policy.

From the beginning, the specific decision-making modes of the EMU and the CFSP created parallel decision-making chains. They were accompanied by norms of informality (Eurogroup, informal Ecofin Council, EWG) or internal rules of confidentiality (EFC, EPC, PSC), as well as alternative document distribution channels (EFC secretariat, Coreu network). These provisions decreased either the visibility of documents, their accessibility, or both. For example, classified documents could in principle be requested under the access rules. However, as they were only rarely included on the public register, most outsiders could not have knowledge of their existence. The convenience of this mechanism was thought by some to have led to occasional document overclassification. Another example, specific to the Ecofin Council, is provided by decision making in various Council ‘satellite’ bodies and sessions. These loci initially rendered many decisional documents out of the public’s reach due to the ‘authorship rule’ under Decision 731/93, which was in force until December 2001. Even thereafter, certain categories of documents remained out of the scope of the formal rules due to the informal nature of the bodies that produced them, most notably the Eurogroup.
The tension between informality and confidentiality on the one hand, and transparency on the other was far less apparent in the EnvCo. This Council formation did not use alternative distribution channels, and where informality existed, such as in informal Council meetings, external stakeholders had relatively good channels of participation and information. A multitude of environmental NGOs (‘ENGOs’) were closely involved in EU policy making from an early point. They were given privileged access to information, often through a structured stakeholder arrangement at the national level. By contrast, such close involvement of outside stakeholders was virtually absent in the FAC. Here, outside parties became stakeholders because they were personally affected by the EU classified information (EUCI). This could either be in the capacity of intelligence-sharer (e.g. NATO, the United States), or as the target of sanctions (e.g., terrorism suspects, Russian officials closely associated with the war in Ukraine). In the case of both categories, the Council’s preferences leaned towards secrecy. It had an interest in offering strong guarantees of non-disclosure where it concerned documents received from third parties, as well as in protecting the broad confidentiality of the decision-making process underlying sanction agreements. In the case of the Ecofin Council, no strong presence of external parties could be discerned.

The three-stage introduction of the EMU and the euro for a subset of EU member states created a broad demand for coordinating debates. In this area, the risks stemming from the common currency were shared, but the responsibility for economic policy remained at the national level. Consequently, a preference for informal and insulated but structured policy coordination emerged. The concern was frequently to present a unified policy line in order to create stability in the financial markets. During the crisis, this interest in exerting unity became even stronger but also harder to maintain, leading to increased information and document leaks. Gradually, the EMU was affected by a number of fault lines: between Eurozone and non-Eurozone members, between creditor and debtor states, and between those member states inside or outside of the various additional instruments and economic and financial decision-making arrangements. Although such conflicts also existed within the FAC, they were arguably less strong and less structural. In any event, the Eurozone members were locked into a long-term policy that required demonstrations of credible commitment and involved, as a last resort, coercive powers. This was different in the FAC, where policies developed either on an ad hoc, or a long-term consensual basis, requiring the forging of policy coalitions on a case by case basis. The resultant decision-making mode gave less occasion for information leaking.

Both in the case of the EMU and the CFSP, the stakes of policies (not) agreed on led to a strong reliance on confidentiality. However, whereas CFSP decision making always included the option of not adopting a common policy line, in the case of the EMU, above all the Eurozone, the imperative of acting, with all due risks of negative externalities (e.g. coercive budgetary decisions or considerable financial commitments) gradually increased. As a consequence, in both area of decision making, the Council adopted an attitude towards transparency that can described as ‘intergovernmental’, in the sense that responsible ministries in the national capital cities attempted to minimise public attention to decision
making. However, the method of avoiding document disclosure differed to the extent that in the case of the CFSP, it relied more extensively on the formal instrument of document classification than in the EMU, which relied instead on informal, self-imposed confidentiality.

10.4.2 Hitting the ‘transparency ceiling’
In spite of the transparency-weakening dynamic built into EMU and CFSP decision making, document registration on the public register initially showed clear signs of improvement after it became operational in 1999. This is well demonstrated when comparing trends in document registration over time per Council formation (Figure 10.2). In order to be able to compare annual registration rates across cases and with the Council total, the number of documents registered by each policy area is equalised for 1999 and 2004. This means that the lines do not represent real figures, but growth trends relative to the Council total that are directly comparable. Where a policy area is above the red line, the number of documents it registered grew faster than the Council average. Where it is below the red line, its document registration rate was below average.

Looking at the graph, it is immediately clear that in all policy areas, as well as in the Council as whole, a clear growth occurred in annual numbers of documents placed on the Council register. However, the extent of growth differed significantly for FAC documents. In the first years after 1999, growth of FAC document registration significantly outperformed that of the other policy areas and the Council total. When registered documents are equalised from 2004, it becomes apparent that this effect was only temporary: after 2004, the growth rate of FAC document registration clearly underperformed compared to other categories of Council documents. Meanwhile, EnvCo and Ecofin document registration remained closer to the overall Council trend, although the latter increased somewhat after 2010.

A possible explanation for changes in the number of registered documents would be that they are attributable to a corresponding growth or decline in decision-making activity (i.e., more meetings, more documents produced and registered). However, no solid evidence for such a relation is found. The timing at which the respective Council formations began to publish certain categories of documents provides a more plausible explanation. For example, while the Environment and Ecofin Councils began to make agendas and minutes of ministerial-level meetings directly available as of late 1999, the FAC only followed suit much later, at the end of 2002. Quite contrary to signifying a high rate of document registration, this suggests that the strength of the ‘catch-up effect’ may be explained by an initial reluctance to register documents. Initial non-disclosure leads to inflated growth figures when a body belatedly moves towards disclosure of non-sensitive documents. Indeed, entire categories of FAC documents were initially not placed on the register.

46 This is also the reason why no figures are provided in the y axis.
47 Documents on public register only became directly accessible in 2000 following technical revision. The observed availability of documents registered in 1999 is therefore necessarily retrospective. Nevertheless, even retrospectively, certain categories of documents were either not registered or made directly accessible, while others were.
48 See Appendix 4
**Figure 10.2: Document registration trends relative to Council total, 1999-2014**

Note: Figure represents relative trend lines rather than actual trend lines. Starting points of the case studies have been equalised to the Council total as of 1999 and as of 2004 to allow for direct comparison of their relative growth rates.

**Figure 10.3: Direct access rate per case, 1999-2014**

Note: Direct accessibility of documents was implemented as of 2000. 1999 figures therefore represent retrospective disclosure.
Cross-case trends in document registration however tell only part of the story. A richer picture emerges when registration figures are complemented by rates of direct access. We then find that, similar to the Council total, in all cases the direct access rate first increased sharply and strongly, to then decrease slowly and mildly (Figure 10.3). However, with this trend, too, the effect in the FAC was more pronounced: there the decrease came sooner and was considerably stronger (2003, and by roughly a third) than in the other cases or the Council total (between 2004-6 and by roughly a tenth to a quarter). This trend may be labelled a ‘transparency ceiling’ effect, which suggests that increasing pressure to improve transparency (more documents on the register) leads to a similar increase in transparency resistance (a smaller proportion of these documents is directly accessible). After 2006, such an effect was strongly present particularly in the FAC, and to a lesser extent in the part-legislative Ecofin Council (respectively a 10 and a 16 percentage point access gap between the year with the least and the most documents registered). In the almost entirely legislative EnCo, no comparable relation was found (Figure 10.4).

The early onset of the ‘transparency ceiling’ effect in the FAC may be in part attributed to exogenous societal factors. The aftermath of the 11 September 2001 attacks in the United States was a highly impactful societal event in the FAC’s access to documents policy. It led to a peak in correspondence via the inter-capital digital Coreu network in 2002, as well as a steep increase in the number of documents registered followed by a drop in the access rate from 2003. From around 2005, public access to FAC documents was increasingly prevented in informal manners, such as bilateral, or temporary document-sharing. This is evidenced by a sharp drop in the number of documents circulated through the Coreu network, a network that formally fell within the scope of the Council’s access to documents rules, leaving a gap that was likely compensated by bilateral document exchanges.\(^49\)

The Ecofin’s access to documents policy by contrast developed relatively evenly until the economic and financial crisis began to affect the Eurozone in 2007. The balance in the

\(^{49}\) See Chapter 9, section 4.2
division of labour between Ecofin central and ‘satellite’ bodies shifted towards the latter, with legislative debates increasingly taking place in the informal Ecofin Council, the Eurogroup, the EFC, and the EWG. This led to an increase in informal document handling in the latter years here under consideration. The fact that such informal documents remain invisible in the register data explains the relatively limited impact of the ‘transparency ceiling’ effect in the case of the Ecofin Council compared to the FAC.

The FAC’s ‘transparency ceiling’ effect may be seen as a manifestation of an exceptionalist logic in decision making by which the development of transparency was gradually ‘encapsulated’.\textsuperscript{50} It characterises a closely correlated inverse trend: the more documents that are placed on the public register, the less direct access is granted to these documents. As a consequence, transparency weakens. The effect is likely the internal backlash of efforts to provide demonstrable improvement in transparency, such as a high number of registered documents. As such, it presupposes a certain degree of formality that allows for a ‘regular’ implementation of the access rules. This might explain why it is more clearly present in the FAC, where many documents were normally registered, compared to the Ecofin Council, where many documents were kept off the register.

In the post-Maastricht policy areas of the EMU and the CFSP, which formed central components of respectively the Ecofin Council and the FAC, the decision-making architecture developed in a manner that undermined decisional transparency in various ways. A proliferation of new bodies and administrative elite actors relying on instruments of insulation, confidentiality, and informality, significantly affected access to documents policy by altering its rules, constraining their reach, or applying them in an increasingly restrictive manner. The precise manner in which transparency was undermined depended on the specific task-related and organisation-related arrangements in the respective Council formation.

Having described the three central trends in the development of the Council’s access to documents policy in the preceding three sections, I now turn to a discussion of the cross-case comparative findings.

\textbf{10.5 Discussion}

In this chapter, I have demonstrated how the development of access to documents policy across Council formations between 1992 and 2014 was characterised by three central trends. Each of these trends consists of changes along the three dimensions of access to documents policy: formal rules, implementation, and informal norms. According to the first trend, cross-case difference in access to documents policy increased over time. This is not only apparent from the legal development of the exception grounds and their interpretation in successive case law and the adoption of additional formal rules, but also from the growing differentiation in the application of exception grounds and direct access in practice. The

\textsuperscript{50} See Chapter 4, section 4

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second trend shows how the Council’s access to documents policy relating to legislative documents became increasingly differentiated from its policy concerning non-legislative documents. This trend is underpinned by an increasingly visible distinction made in case law, steps to formalise non-legislative exceptions to transparency in some policy areas, and a gradually developing informal norms of exceptionalism in others. The third trend concerns the relative weakening of transparency in certain areas of non-legislative decision making in recent years. Here, transparency-circumventing strategies are found in the implementation of the access rules with consistently low and decreasing passive and proactive access, and informal norms shielding internal information from outsiders.

How did institutional factors both inside and around the Council affect these developments in the access to documents policy? Earlier in this study I formulated an explanatory framework with two competing expectations in order to answer this question. According to the first expectation, the development of Council access policy is characterised by a general ‘advancing transparency effect’, in which a single set of factors caused an increase in transparency across the Council. By contrast, according to the second expectation, the development of Council access policy is characterised by a sector-specific ‘captured transparency effect’, in which factors unique to a Council formation caused ‘local’ (i.e., sector-specific) policy change.

The findings of this study lend partial support to both accounts. Whereas the ‘advancing transparency’ thesis explains relatively well the advance of access to documents in the sphere of Council legislative decision making, the ‘captured transparency’ thesis is better at explaining sector-specific differences in the non-legislative sphere. As a consequence of the growing differentiation between legislative and non-legislative access policy, path divergence began to emerge. This path divergence becomes apparent when comparing access to documents developments. First, this happened between predominantly legislative and non-legislative Council formations, and second, then between the non-legislative practices of different Council formations. Developments in the EnvCo were an outlier in this explanatory framework. The far-reaching development of access to documents policy seemed to reflect an ‘advancing transparency effect’. The underlying explanatory factors were however rather sector-specific. The special environmental access regime reflected a sector-specific effect that was, unusually, transparency-enhancing (Figure 10.5).

10.5.1 The ‘advancing transparency’ thesis and its limits
Evidence of an ‘advancing transparency effect’ is found in the expansion of Council-wide access rules, predominantly in relation to legislative decision making. This expansion was driven by a continuously present minority coalition of pro-transparency member states. In spite of its negligible voting power, this coalition demonstrated a strong and persistent preference for generous, Council-wide access rules. Successive EU enlargements had a Council-wide effect on this coalition. The coalition’s influence increased when Finland and

51 See Chapter 4, section 4
Chapter 10

Figure 10.5: Council access to documents policy: cross-case comparative trends

<table>
<thead>
<tr>
<th></th>
<th>Council-wide</th>
<th>Sector-specific</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enhancing</td>
<td></td>
<td>Non-legislative transparency (EnvCo)</td>
</tr>
<tr>
<td>Legislative</td>
<td></td>
<td></td>
</tr>
<tr>
<td>transparency</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Undermining</td>
<td>n/a</td>
<td>Non-legislative transparency (Ecofin Council, FAC)</td>
</tr>
</tbody>
</table>

Sweden joined the Council in 1995, and decreased when ten mostly Eastern European countries joined in 2004. Through policy advocacy and court interventions, the pro-transparency coalition sought to bring about a restrictive interpretation of the ‘space to think’ exception and a generous interpretation of access to legislative documents. Its preferences regarding legislative transparency became gradually entrenched in four ways which are mentioned here in chronological order. Constitutionally, the ‘Gang of Four’, led by the Dutch Presidency, succeeded in securing the incorporation of the principle of transparency in the 1997 Amsterdam Treaty.\(^{52}\) In terms of implementation, the 1998 UK Presidency introduced an online document register. At the rule-making level, the 2001 Swedish Presidency together with the EP succeeded in negotiating a relatively generous access law (Regulation 1049/01). Finally, at the judicial level a number of court interventions by pro-transparency member states contributed to further clarifying interpretations by the EU courts.

Altogether, relatively strong evidence is found for an advocacy-based ‘advancing transparency effect’ in the legislative sphere. This effect was of a dynamic nature: in progressive ruling-making, in the jurisprudence and in the implementation of proactive transparency, a mainstreaming tendency akin to a ‘transparency catch-up’ could be observed that aligned a legislative formation such as the Ecofin Council more closely with an already relatively open formation such as the EnvCo.

Nevertheless, the ‘advancing transparency’ thesis is circumscribed by a few important exceptions. Pivotaly, the advance of access to documents rule-making came to a standstill when the Council and EP entered into a review procedure of Regulation 1049/01 in 2008. The ensuing negotiation process has been in a deadlock ever since, demonstrating the limits to the ‘advancing transparency’ thesis. Equally important are instances in which the minority

\(^{52}\) IGC (1997a), article 1, IGC (1997b), articles 207(3) and 255
coalition’s preferences aligned with those of the Council majority in limiting transparency of the legislative process. This was the case with its stances on confidential trilogue negotiations and on the use of ‘limite’ documents, which were at least tacitly supportive. The generally transparency-favouring EP has likewise declined to criticise trilogue confidentiality. The fact that the EP has accepted the confidentiality of trilogues illustrates that it acted as a transparency advocate only inasmuch as this would serve its institutional interest.

In conclusion, Council-wide transparency is found to have ‘caught up’ in instances of legislative decision making. However, its reach was limited by a number of countermeasures, and has in recent years slowed down. Moreover, in contrast to what was expected, the role of the EP was ambivalent. While it generally advocated wider public access to Council documents, in recent years the EP has forsaken to do so with regard to legislative trilogue negotiations. Clearly transparency-enhancing factors were the role of the EU courts, as well as the exogenous development of the internet, which enabled a simpler, more far-reaching and more direct implementation of access to documents rules.

10.5.2 The ‘captured transparency’ thesis and its limits
Evidence of a sector-specific ‘captured transparency effect’ is more readily apparent in the non-legislative sphere. For example, the Ecofin Council demonstrates a strong tendency to organise its non-legislative decision making in informal decision-making bodies such as the EFC and the Eurogroup, that often functioned as ‘satellites’ to the formal Ecofin Council. Documents pertaining to these bodies tend to be circulated on the basis of informal norms of confidentiality. Meanwhile, monitoring of the decision-making process by outsiders is rather limited: outside stakeholders exert only limited pressure on the Ecofin Council to become more transparent. This was different in the (almost entirely) non-legislative FAC, where limits to the right of access were more formalised, and were subject to more frequent challenges.

The issue salience of transparency among the member states and EP was also variable for different non-legislative policy areas. This is demonstrated by the extent and manner of these actors’ involvement. In the FAC, a ‘policy battle’ was fought out over the emergent classification rules between the pro-transparency member states and the EP on the one hand and the Council majority on the other. After a settlement was reached that brought classified documents formally under the access rules and grants the EP privileged rights of access to classified CFSP information, the salience of the issue declined. Even after the 9/11 attacks, which brought about a stagnation in access to documents implementation, relatively little protest was apparent among the pro-transparency minority. In the Ecofin Council in turn, the informal decision-making method in non-legislative areas remains stable and virtually uncontested by both the member states and the EP throughout time. Several years into the financial and economic crisis (which caused a surge in informal decision making that remained largely outside of the reach of access to documents policy) the EP was given an oversight role in the area of EMU.\(^{53}\) In relation to Ecofin legislative documents however, the

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\(^{53}\) Namely, in the 2011 ‘Six-Pack’, see Chapter 8, section 4.3
pro-transparency coalition was far more vocal in its protest, as is evidenced by its strong inclination to vote against access refusals.

Certain institutional factors can be generalised to non-legislative transparency in more than one policy area. For example, from 1999 onwards, both in the EMU and the CFSP administrative elite actors (such as, respectively, the Eurogroup president and the High Representative) began to be introduced. They exercised a strong influence on access to documents policy. These actors capitalised on a widely shared sense of ‘transparency exceptionalism’ in these areas. This meant that, in spite of the fact that the access to documents rules did not a priori discriminate between legislative and non-legislative documents, the actors generally either assumed the trade-off between EMU/CFSP decision making and the principle of transparency would turn out in favour of the former, or argued that certain types of documents fell completely outside of the scope of the access rules. This sense of exceptionalism is strongly underlined by the fact that, after 1998, both the EMU and the CFSP obtained separate Council decision making architectures that relied in large part on document distribution channels (EFC secretariat/Coreu) that were different to the usual Council channels (Council secretariat/Extranet).

At the same time, the constitutional logic underlying non-legislative exceptionalism is not the same for both policy areas. Rather, it is more appropriate to speak of ‘exceptionalisms’. In the EMU, wide-spread non-transparency flowed out of competence delimitation designed to protect national policy prerogatives. This delimitation meant that Council economic policy is generally of a coordinating nature. Consequently, EMU decision makers adhered to a norm of informal exceptionalism. In the FAC by contrast, executive actors drew an analogy with the executives’ foreign policy prerogatives at the national level, which led them to invoke a norm of formal exceptionalism. As a consequence, the FAC gradually introduced both a strong security of information regime and a privileged parliamentary right of access to classified information. In subsequent case law, the norm of formal exceptionalism was broadly respected and protected by the EU courts in their balancing of Council secrecy against the right of access.

Finally, the development of EnvCo access to documents policy appears as an outlier to the explanatory account of stagnating non-legislative transparency undermined by sector-specific arrangements. Here, an international regime of enhanced transparency (the Aarhus Convention) emerged out of (sector-specific) prevalent preferences and NGO advocacy around the theme of environmental awareness and protection. This regime applied to all environmental decision-making documents, irrespective of the legislative/non-legislative dichotomy. While it is true that a type of formal exceptionalism was applied to the international aspects of EnvCo decision making (mainly related to international climate summits), no separate decision-making architecture emerged in this area. On balance, and in contrast to the Ecofin Council and the FAC, the EnvCo’s institutional context was therefore transparency-enhancing.

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54 In a number of well-delineated cases, the Treaties foresee in legislative measures; see Chapter 8.
In conclusion, change in the access to documents policy with regard to non-legislative decision making was dynamic over time, increasingly undermining the advance of access to documents policy, revealing a gradual ‘encapsulation’ of transparency. This is evidenced by the emergence and entrenchment of rules of document classification, informal decision-making methods, and the ‘transparency ceiling’ that halted the implementation of access to documents. On the other hand, sector-specific rules could also promote the right of access to documents, as is shown by the EU’s adoption of the ‘Aarhus regulation’. These cross-case differences demonstrate a growing fragmentation over time, driven by the idiosyncratic institutional arrangements of each Council formation.

Table 10.2: Access to documents in the Council: Similarities and differences across cases

<table>
<thead>
<tr>
<th>Similarities (Evidence of an advancing transparency effect)</th>
<th>Differences (Evidence of a captured transparency effect)</th>
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<tbody>
<tr>
<td><strong>Actors</strong></td>
<td></td>
</tr>
<tr>
<td>- Coalition of pro-transparency member states</td>
<td>- Involvement outside actors (EnvCo: high; NGOs and civil society groups; Ecofin: low; FAC: medium: third countries and affected parties of policies)</td>
</tr>
<tr>
<td>- New member states (1995 and 2004)</td>
<td>- Access-enhancing court involvement (FAC: high; EnvCo/Ecofin: low)</td>
</tr>
<tr>
<td>- Introduction of administrative elite actors (EMU/CFSP) (from 1999)</td>
<td>- Introduction of administrative elite actors (EMU/CFSP) (from 1999)</td>
</tr>
<tr>
<td>- Strong involvement EP (FAC) (from 1999)</td>
<td>- Involvement outside actors (EnvCo: high: NGOs and civil society groups; Ecofin: low; FAC: medium: third countries and affected parties of policies)</td>
</tr>
<tr>
<td><strong>Preferences</strong></td>
<td></td>
</tr>
<tr>
<td>- Council-wide scope of access rules</td>
<td>- Norm of exceptionalism, formal in CFSP, informal in EMU (FAC/Ecofin)</td>
</tr>
<tr>
<td>- Norm of consensus: ‘space to think’, exception grounds, trilogues (from 1995)</td>
<td>- Policy battles concerning additional access rules/informality/classification (EnvCo/Ecofin/FAC) (from 1998)</td>
</tr>
<tr>
<td>- Single constitutional logic legislative documents (from 2004)</td>
<td>- Multiple constitutional logics non-legislative documents (Ecofin/FAC) (from 1999)</td>
</tr>
<tr>
<td>- High member state intervention in access to legislative documents cases (from 2004)</td>
<td>- Declining salience access to documents policy issues among MS (FAC) (from 2001)</td>
</tr>
<tr>
<td></td>
<td>- Extent of issue disagreement (EnvCo: low/ Ecofin: high/FAC: decrease from 2001)</td>
</tr>
<tr>
<td><strong>Resources</strong></td>
<td></td>
</tr>
<tr>
<td>- Limited impact of voting weight</td>
<td>- Close monitoring of decision making process (EnvCo/FAC: high; Ecofin: low)</td>
</tr>
<tr>
<td>- Loss of blocking minority pro-transparency coalition (from 2004)</td>
<td>- High reliance on court action (FAC) (from 1999)</td>
</tr>
<tr>
<td><strong>Exogenous factors</strong></td>
<td></td>
</tr>
<tr>
<td>- Negative outcome Danish referendum on Maastricht Treaty (1992)</td>
<td>- Reliance on alternative document circulation channels (Ecofin/FAC)</td>
</tr>
<tr>
<td>- Accession Finland and Sweden (1995)</td>
<td>- External institutional dialogue environmental transparency (EnvCo) (from early 1990s)</td>
</tr>
<tr>
<td>- Subsequent treaty changes (Amsterdam, 1999; Lisbon, 2009)</td>
<td>- Financial and economic crisis (Ecofin) (from 2007)</td>
</tr>
</tbody>
</table>
Table 10.2 summarises the most important access to documents trends discerned in chapters 6-9, and elaborated in this chapter. As has become clear, the development of the Council’s access to documents policy displays features of both horizontal development characteristic of the general ‘advancing transparency effect’, and of divergent development characteristic of the policy-specific ‘captured transparency effect’. Generally, it may be concluded that those Council formations in which legislating was the central activity, such as the Environment Council, conformed most with the general Council development path. Formations in which the focus lay on non-legislative decision making, such as the Foreign Affairs Council (particularly the CFSP), and the Economic and Financial Affairs Council (particularly the EMU) were most divergent.

10.6 Conclusion
In this chapter, I compared the development of access to documents policy spanning two decades (1992-2014) between three Council formations: the Environment Council, the Economic and Financial Affairs Council, and the Foreign Affairs Council, and with the general pattern. Along with important similarities, I found considerable differences existing between these policy cases. Certain developments in the individual policy cases moreover diverged remarkably from Council-wide developments. Three main trends were identified. Over time a growing differentiation took place across the policy cases. This confirms the dynamic nature of the development of access to documents policy: not only did the policy change over time; it also changed in a different manner in each of the Council formations studied. The manner in which access to documents policy grew and developed as a function of its institutional context also demonstrates its ‘living’ character. The development of access to documents also split into two layers—access to legislative and access to non-legislative documents—that saw a growing differentiation over time. Whereas the question of legislative access received considerable attention and transparency in this area consequently advanced considerably, access to documents in non-legislative decision making lagged behind. This suggests that the growth of ‘living’ transparency has tended to depend on the extent to which it is nurtured. Third, a relative weakening of transparency occurred in non-legislative areas of the EMU (Ecofin Council) and the CFSP (FAC). Different strategies were developed to keep documents from these policy areas out of the reach of the public. It may consequently be concluded that the character of ‘living’ transparency is largely determined by the company it keeps.

Considering the antecedents of these trends, my findings partially confirm both the ‘advancing transparency effect’ thesis and the ‘captured transparency effect’ thesis: not only Council-wide, but also sector-specific factors exercised an influence on the development of access to documents in the three Council formations that were part of the comparative case study. Developments were largely horizontal when they concerned access to legislative
decision-making processes, and sector-specific where they concerned access to non-legislative decision-making processes. Legislative decision making in areas such as environmental or financial policy developed much in line with Council-wide access to documents policy, whereas economic policy coordination in the Ecofin Council and security and defence policy in the FAC saw a strongly sector-specific development of access to documents policy. The development of special disclosure rules in the EnvCo was most anomalous. Rather than limiting transparency, the Aarhus regulation ‘super-enhanced’ public access to documents, with disclosure rules that went beyond the general, Council-wide access rules.

The cross-case comparative findings pose a number of challenges to the existing perception of Council access to documents policy, as well as its effectiveness in enhancing the Council’s democratic legitimacy. In the concluding chapter, I highlight these challenges, by presenting the findings of this study in the context of the empirical and normative debates that underpin my central research question.
Chapter 11
Between Institutional Realities
and Democratic Ideals

11.1 Institutional dynamics, democratic implications
In the past chapters the historical development of Council transparency as a ‘living’ policy both at a general and a sectoral level has emerged.1 In this chapter, I return to the central research question that was posed in chapter 1. This research question broke down into two questions. The first, empirical question asked how institutional factors influenced the development of transparency policy in the Council between 1992 and 2014. The second, normative question asked how the transparency policy as it stands today should be assessed in view of its aim to strengthen democracy in the Council. The study concludes that the development of the Council’s transparency policy was fragmented, rather than uniform. The resulting policy fell short of its objective of strengthening democracy in multiple ways. These conclusions are further elaborated below.

Did those factors favouring wider transparency succeed in taking Council decision making out of the shadow? This study concludes that this was only partially the case. Across the Council, the legislative process became considerably more transparent, whether at the level of rules or their interpretation and implementation. Informally however, the traditional norm of consensus remained in place, obstructing a further advance of transparency. This obstacle has further increased in recent years by a growing tendency of the Council to engage the EP in secretive legislative negotiations, the so-called ‘trilogues’. Looking at non-legislative decision making, the picture becomes more complex. Sector-specific factors had a significant influence, mainly to the detriment of the advance of transparency policy. In the Foreign Affairs Council and Ecofin Council, the respective policy subareas of the CFSP and EMU made hardly any, or no progress at all, with regard to the development of transparency. In these areas, decision making remained where it was, or retreated into even more shadowy zones. In the Environment Council by contrast, transparency policy also developed in a largely sector-specific manner, however this development was, uniquely, transparency-enhancing.

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1 Respectively Chapter 6 and Chapters 7-9
The normative part of this study set out to evaluate the Council’s current access to documents policy, on the basis of a normative framework that contained evaluative de minimis criteria for transparency’s contribution to the proper functioning of European democracy. However, even on the basis of these minimal criteria of transparency for democracy in the Council, important shortcomings are found to exist. A persistent tendency to revert to different transparency-obstructing informal norms means that the Council is often negligent in its endeavours to ensure the functioning of the democratic processes of will formation, participation and accountability. This stems particularly from a preference for insulated decision making at a distance from the public, and a simultaneous reluctance to render the role and inputs of individual member states visible.

Both the explanatory and the normative conclusions relate to broader academic debates to which this study seeks to make a contribution. The first of these concerns the emergence of the global ‘transparency wave’ that was identified in chapter 4 as a potential driver of Council transparency. Over the past decades, several scholars have noted an advance of transparency regimes in international organisations and countries across the globe. Scholars critical of this account however have argued that institutional actors tend to limit the reach of transparency regimes where conflicting interests are at stake: in their view, decision makers are forced to work in a glass house. This study casts doubt on a central assertion underlying this critique, namely, that the development of transparency has gone too far. Instead, it finds that in the Council, the main advance of access to documents took place where it is normatively easiest to justify: in the legislative process. By contrast, the development of non-legislative documents has lagged far behind, and is carried out far less stringently.

The identification of distinctive development paths of legislative versus non-legislative transparency connects to the second debate, which is on the Council’s role in the European integration process. Over the past years, the Council has increasingly come to focus on what has been described as ‘executive dominance’ in European decision making. A retrenchment of intergovernmentalism is said to have taken place that culminated in ‘executive managerialism’ during the Eurozone crisis. The study also contributes to this debate by shedding light on the impact of such executive-driven intergovernmentalism on the idea of transparent governance. Although transparency did indeed advance considerably further in the ‘supranational’ mode of the (ordinary) legislative procedure than in modes of non-legislative decision making, the contrast is less extreme that it is sometimes made out to be. On some occasions, access to non-legislative documents advanced in spite of express Council resistance. Inversely, obstacles against transparency were also created in legislative processes. These findings challenge the accuracy of the frequent suggestion that secrecy in the EU is

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2 Chapter 4, section 2
3 Peters (2013); Michener (2011), see also Chapter 4, section 1 above
4 Roberts (2006); Meijer (2013); Pasquier and Villeneuve (2007)
5 Curtin (2014)
6 Bickerton et al. (2015); Joerges and Weimer (2013)
primarily caused by executive-driven intergovernmentalism in contrast to an idealised notion of the ‘community method’.

The concluding chapter proceeds as follows. The next section answers the explanatory part of the central research question in the light of the two competing accounts put forward in chapter 4. Section 11.3 answers the normative question on the basis of the normative framework developed in chapter 3, followed by a number of recommendations for improvement of the Council’s transparency policy in section 11.4. In section 11.5, the empirical and normative findings are placed in a larger picture through a discussion of their implications for macrotheoretical perspectives on the ‘transparency wave’ and the role and legitimacy of the Council in European decision making. Section 11.6 concludes.

11.2 Capturing transparency’s advance
Central to the empirical part of this study was the question, how institutional factors influenced the development of a transparency policy over time. This question was sparked by a curiosity about how the efforts of advocates for greater Council transparency had fared in reality. Did these advocates manage, as the Council claims, to take decision making out of the shadows? Or did they encounter obstacles to their efforts in specific policy areas? In the case of the legislative procedure, decision making across the Council was brought further (though not completely) into the light. In the case of non-legislative procedure, outcomes were variable per policy area, with decision making sometimes staying in the shadows (the FAC’s CFSP), sometimes being dragged further into the dark (the Ecofin Council’s EMU). In one exceptional case (that of EnvCo), sector-specific arrangements actually led non-legislative decision making to become more transparent.

11.2.1 Part advance, part retrogression
Between 1992, the year in which the Council first began discussing the possibility of introducing greater transparency in its decision making through a policy for access to documents, and 2014, the concluding year of this study, transparency went through a process of extensive development. Throughout this period, the Council was repeatedly subject to severe criticism by external observers. It is nonetheless important to acknowledge that in certain areas it also achieved significant progress. An advance of transparency is visible particularly with regard to the legislative component of the Council’s decision-making processes. The extent of growing access to legislative documents becomes apparent when the situation in 1992 is compared with that in 2014. In 1992, no formal access to documents rules were in place. The Council negotiated legislation behind closed doors on the basis of confidential documents, to reach a vote, the roll call of which was not published. By 2014, access to (legislative) documents was governed by a formal act adopted by the Council and the EP, which explicitly underlined its objective of creating transparency in the Council’s legislative procedure, a position which was strictly upheld by the EU courts. The Council deliberated and voted in public, records of which were made directly available to the public.
Together with other mandatorily disclosed documents such as minutes of legislative meetings and state of play documents, they were placed on an online register. Annually, ever-more documents were added to, and directly accessible on this register. Documents that were not actively disclosed were increasingly often requested by outsiders, and increasingly often, they gained access to (part of) these documents. Naturally, access to documents in the legislative sphere was far from complete, and important obstacles remain to be overcome. Yet over time, transparency was unmistakably increasing, irreversible, and irresistible.

The gradual advance in the Council of legislative transparency was the product of a number of institutional factors. Internally, a minority of transparency-favouring member states kept the issue of access to documents on the agenda, and repeatedly sought to negotiate the maximum attainable. This Council minority was supported by the EP which in 2001 helped it to negotiate a relatively generous access to documents law. Transparency-favouring institutional actors were supported by a vocal group of NGOs which mounted public pressure campaigns and monitored the functioning of the access regime by regularly filing access requests. After the entry into force of the access regulation, applicants filed a number of court cases regarding access to legislative documents. In all of these cases, the EU courts provided a broad interpretation of the public’s right of access. A number of external factors also played a pivotal role in furthering transparency. The emergence, in the mid-1990s, of the internet enabled the digital disclosure of documents via an online register, considerably improving the access policy’s effectiveness. Institutionally, the accession, in 1995, of two new member states, Finland and Sweden, added new clout to the Council pro-transparency coalition. Finally, societally, the growing discontent with the European project in a number of member states, most notably Denmark and France, in 1992 kick-started the member states’ hitherto purely rhetorical ambitions in the area of transparency.

Not all of the Council’s transparency policy advanced however over time. As this study shows, non-legislative decision making frequently operated under less-than-transparent standards. In formal and informal ways, the Council succeeded in creating ever-larger pockets of de facto secrecy. In most cases, these pockets emerged out of legal developments that occurred ‘under the radar’, beneath the formal access to documents framework. In the FAC, decision makers relied on the ‘consensus of exceptionalism’ to create a framework of formal rules that raised the barrier for outsiders to request access to classified information. Although these rules applied across the Council, they particularly affected documents pertaining to the CFSP. The rules foreclosed the registration of classified documents on the Council register, and required third-country originators of classified information the possibility to refuse access. In practice, these restrictions were applied over-broadly: only a fraction of classified documents were cited on the register, while the so-called ‘orcon’ principle lent third-country originators a de facto veto over disclosure of their documents. As a consequence, over time the FAC reached a ‘transparency ceiling’: a growing number of classified and third-country documents pertaining to the decision-making process in the FAC and other policy areas became nearly unknowable to the public, not only in their content, but even as to their

7 See section 11.2.2 below
existence, while disclosure stagnated. In the Ecofin Council, part of decision making became organised in a way that effectively disabled the access to documents framework. New EMU ‘satellite’ bodies were created that acted on the basis of confidentiality or informality and thereby placed their documents a priori outside of the reach of the access to documents rules. The EMU bodies’ norm of informality was explicitly laid down in several documents, varying from ‘soft law’ stipulating best practices, to internal Council decisions, to (a Protocol attached to) the Treaties. However, its impact as a de facto exception to the access to documents rules has remained fraught with legal tension and obscurity.

As was expected, the institutional factors driving the interruption of transparency in non-legislative decision making were different from those driving the advance of legislative transparency. Internally, the salience of the issue of non-legislative transparency among Council members was considerably lower than that of legislative transparency. Especially after member states had settled on the consequences of the FAC ‘consensus of exceptionalism’ for the right of access to documents, their preparedness to advocate wider transparency decreased. In the area of the EMU, transparency-favouring member states’ policy activism was muffled by their interest in protecting national competences in economic policy. Moreover, in both policy areas, preferences competing with the access to documents rules were actively propagated by newly appointed elite administrators such as the doubled-hatted Secretary-General/High Representative, the permanent Eurogroup president, and the EFC/EWG chairs. To this end, they employed various administrative prerogatives, which included the reliance on parallel structures for document distribution (respectively the ‘Coreu’ network and the EFC secretariat). Significantly, in these policy areas little evidence is found of the EP and the EU courts as transparency-advancing forces. Where the EP was involved in CFSP or EMU decision making, it prioritised its own (privileged and closed-door) rather than the public’s access to documents or information, while the EU courts were strikingly reticent in their interpretation of the access regulation in this area. Only recently have the courts begun to strengthen both the public’s and the EP’s access to documents pertaining to international negotiations. External factors were less significant in determining the public access to documents, but where they came into to the picture (‘9/11’ for the CFSP, the Eurozone crisis for the EMU), they amplified counter-transparency tendencies that were already in place. Particularly in the EMU, the mode of insulation and informality turned decision making into something of a ‘transparency black hole’ that even encroached on the legislative process.

In summary, this study concludes that the development of access to legislative documents was driven by Council-wide institutional factors that led to an ‘advancing transparency effect’, whereas the development of access to non-legislative documents was driven by sector-specific institutional factors that caused a ‘captured transparency effect’. This distinction grew more pronounced over time, which amplified differences between Council formations (such as the EnvCo) which were overwhelmingly involved in legislative activity and (parts of) other Council formations (e.g. the FAC and the Ecofin Council’s EMU) where the opposite was the case. This account of a part advancing, part retrogressive Council
transparency policy clearly demonstrates that differences between Council formations are not ‘set in stone’, but rather are dynamic, changing over time under the forces of an equally changing constellation of institutional factors.

11.2.2 Legislative and non-legislative transparency: No watertight delineation

The study’s finding of a development trajectory that is partly explained by an ‘advancing transparency effect’ and partly explained by a ‘captured transparency effect’ offers a useful structuring heuristic that significantly nuances previous findings regarding Council transparency. However, the two explanatory accounts also have their limits. Three major trends stand out in particular that deviate from the formulated expectations and which these accounts are unable to theoretically accommodate. The first is the persistence of a norm of consensus in the Council’s legislative process. This norm comes from the Council’s continuing resistance to the disclosure of internal differences during legislative negotiations, and has resulted in a growing set of instruments and practices such as the ‘limite’ document label, the delayed disclosure of legislative documents, and closed-circuit trilogue negotiations with the EP. Notable transparency advocates such as the ‘Gang of Four’ (Denmark, Finland, the Netherlands and Sweden) as well as the EP have declined to criticise trilogue confidentiality, while the Council as a whole has presented itself as hostile towards a recent enquiry in this direction by the European Ombudsman. Up until now, neither internal nor external factors have proved successful in challenging remaining significant pockets of secrecy in the Council’s role in the legislative process, although pressure from outside actors to this end appears to be mounting.

A second, pivotal anomaly has been the enduring deadlock in the recast procedure of Regulation 1049/01. Where the ‘advancing transparency’ thesis predicts an unstoppable increase in transparency that cannot be reversed, the troubled negotiations put this postulate severely to the test. Since 2008, the legislative institutions have made no progress, while several amendments that ‘roll back’ specific provisions in the access regulation have been tabled. These signs of a halting transparency illustrate that the advance of transparency in the legislative sphere is in fact far from complete.8

Third, the account of the sector-specific development of non-legislative transparency proved too limited in its conception of institutional factors, by assuming that preferences prevalent in specific policy areas would create obstacles to the advance of access to documents policy. However, evidence was also found of a development in the opposite direction: institutional factors unique to a single policy area can also be conducive to the development of (non-legislative) transparency. In the case of the EnvCo, particular transparency-enhancing factors were present in a way that could not be observed in the other policy areas. Here, a strongly involved field of civil society actors with far-reaching influence in the policy process conspired with an external institutional regime regulating environmental policy (the UN’s Aarhus negotiations) to create a powerful additional transparency obligation that went considerably beyond those of Regulation 1049/01. This demonstrates that sector-

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8 See section 11.3 below
specific institutional factors, beyond interrupting, can also be ‘super-enhancing’ for the development of a transparency policy.

Having highlighted the study’s main findings from the empirical analysis, I now turn to the evaluative findings, derived from its normative framework.

11.3 The Council’s negligent attitude towards democracy

The normative part of this study centred on the question how the Council’s current access to documents policy should be evaluated in the light of its aim to strengthen democracy in the Council.

Underlying this question is the presupposition, affirmed on multiple occasions by the EU, that transparency forms an essential component of democratic decision making. A normative framework was thus formulated which consists of three democratic processes in which transparency plays a role: will formation, participation, and accountability. Central to these processes is the idea that transparency helps to offer citizens the means to form and use their voice and to exercise political control. At the same time, theories of European democracy are diverse in their prescription as to how this relation should take shape in practice. In this study, I identify two democratic perspectives on the basis of a theoretical reading of the EU’s key constitutional texts. The first of these, the narrow perspective, adheres to an elections-centred notion of popular control. It contains de minimis criteria for the sustenance of the democratic processes. As a transparency policy operating below these criteria ceases to strengthen democracy, this study takes the narrow perspective as its evaluative benchmark. The second, broad perspective, builds on a participatory notion of citizen involvement. The role foreseen for citizens is more active and continuous in this perspective. As the Council is a democratic body where the electoral link between citizens and representatives is relatively weak, the broad perspective may form a useful complement to the narrow perspective. For this reason, where applicable the evaluation identifies additional measures of broad democracy, while the recommendations build this perspective to suggest improvements in Council transparency that serve to strengthen the democratic links between citizens and representatives.

Throughout the empirical chapters of this study, various shortcomings in the Council’s current access to documents policy from the perspective of democratic legitimacy were flagged. These could be clustered into three categories: the norm of consensus, informal governance, and formal exceptionalism without sufficient parliamentary oversight. The first of these relates to the Council’s protection of individual member states that bring problems to the table during (legislative) negotiations, by avoiding the unwanted disclosure of their dissent. The second relates to the routinisation of informal decision making to the extent that the access to documents regime is rendered ineffective. The third concerns the withdrawal of political information from democratic scrutiny without any possibility for a second-order

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9 See Chapter 3
10 See Chapter 3, section 3
form of (parliamentary) accountability. In this section, I address these shortcomings in view of the normative framework. Section 11.4 follows up with recommendations for improvement of the access rules, their interpretation and implementation, and flanking measures.

11.3.1 Will formation: Politics without public contestation

A key empirical finding of this study with serious normative implications is that the Council’s transparency policy, in the process of will formation, consistently favours a form of ‘politics without contestation’. By this is meant that the available information does not consistently allow citizens to discern fault lines of political disagreement among member states, as became apparent from legislative activities in the EnvCo and the Ecofin Council. Instead, the Council prefers to present itself to the outside as a collegial body that ‘delivers solutions’ (i.e., policy outputs).

As became apparent in Chapter 3, the democratic process of will formation requires that citizens have access to minimal information regarding on the one hand the policies that the EU proposes and passes and how they are justified as well as the inputs and justifications of their Council representatives. This requires access to both ‘objective’ decision-making information and ‘subjective’ narrative reflections. Transparency standards of non-legislative decision making are potentially less stringent where output is significantly less far-reaching than that of legislation, or where secrecy is a necessary element for the realisation of a policy objective. In such cases however, the Council must still disclose the decisional output and an explanation of this output, while such public access must be flanked by a parliamentary debate that is, at least potentially, unlimited and public. In the Council’s current access to documents policy, two tendencies are discerned that obstruct the possibility for citizens’ will formation not just from a broad perspective, but even from a narrow perspective on democratic legitimacy. One of these is prevalent in the legislative sphere, while the other occurs in the non-legislative sphere.

In the legislative sphere, an informal transparency-accommodating norm known as the ‘norm of consensus’ limits the transparency of member states’ policy inputs. It dictates that the Council and its representatives should seek to minimise the public display of internal dissent with a view to efficiently reaching policy agreement. This has led to the observance of three consensus-enhancing arrangements that fall short of supporting a narrow perspective on democratic will formation.

First, legislative documents are often drafted in a manner that makes it impossible to directly trace policy positions back to member states. This arrangement goes back to the 2002 Coreper ‘gentlemen’s agreement’, by which the Council agreed to suppress references to member states when disclosing documents containing proposals for amendments. Although the court struck down the substance of this agreement in Access Info Europe, the Council has

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11 Naturally, in practice the conditions of unlimited and public oversight are subject to practical limits and procedural exceptions. But it is the parliament itself which sets oversight priorities in the face of these limits and exceptions.
since then continued to rely on its document drafting discretion to exclude references to member states from legislative records. Thus, the Access Info Europe judgment merely shifted the problem of non-transparent member state positions from the access request phase to the drafting phase. Evidence from the EnvCo and the Ecofin Council furthermore indicates that where political differences are revealed, this happens in a highly controlled (on a case by case basis) or irregular manner (through leaks or informal privileged access).

Second, Council decision makers rely heavily on ‘limite’ documents in the legislative process. Yet, it is exactly in this area that the reliance on this document label is most questionable. Legally, the ‘limite’ label can potentially be applied to all documents to which access was not yet formally requested under the access regime, and which do not fall within the Council’s definition of legislative documents to be directly disclosed. However, this definition excludes pivotal documents such as state of play documents and working party minutes. The reliance on ‘limite’ documents in legislation appears to be somewhat variable per policy formation. For example, in the EnvCo, it is extremely prevalent, while comparatively less evidence of its prevalence was found in the Ecofin Council. As it is beyond dispute that working parties make up an integral part of the Council’s legislative process, the Council’s failure to directly disclose these bodies’ pivotal legislative documents is at odds with the idea, inherent in the narrow democratic perspective, that citizens should be able to follow the presentation of inputs as the legislative process is under way. The Council’s legal definition of legislative documents to be directly disclosed must therefore be considered too restrictive.

Third, the legislative process is characterised by the wide prevalence of confidential trilogue negotiations between the Council and the EP. The tendency to negotiate draft proposals in a small and secluded setting has emerged as a highly prevalent informal arrangement that carries wide support among both institutions. Nonetheless, the consequences of this informal constitutional norm are of such a scale that they seriously compromise the citizens’ ability to obtain an accurate and sufficiently detailed picture of the ongoing legislative process, particularly the criterion that inputs should be attributable to individual legislative actors (member states). Although the trilogue’s four-column documents are (like other ‘limite’ documents) usually disclosed after the adoption of the act, the insight they offer is insufficient to redeem this shortcoming, as the Council’s column merely represents the institution as a whole.

Compared to the Council’s legislative document trail, member states’ narrative reflections on legislative processes are more variable. Member states are free to publicise their own position on specific legislative drafts and these publications may provide some insight into policy preferences among different member states. However, as member states defending controversial positions are less inclined to publicise their position, and because of the norm of consensus, it frequently remains difficult to reconstruct conflicts between policy narratives from the available documents. For example, in the EnvCo, it was mainly member states united in the Green Growth Group that set the tone in publishing policy narratives,

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12 See Chapter 6, section 3.1
while in Eurozone governance legislation, narrative inputs were dominated by Northwestern-European creditor states. Furthermore, without full access to documents of the Council’s formal legislative sessions, citizens are unable to verify whether narrative reflections match actual policy inputs.

Regarding non-legislative decisions, even though the Council today generally provides public access to information that is minimally required from the narrow perspective of democratic legitimacy (i.e., decisional outputs and explanations of these outputs), its insulated decision-making modes form a considerable obstacle to sufficient parliamentary debate concerning its decision-making process. As was argued in Chapter 3, limitations to transparency should be accompanied by strong safeguards of parliamentary debate. In that respect, the current situation remains unsatisfactory. Due to the two-level nature of much non-legislative Council decision making a degree of confusion almost inevitably remains over the division of labour between the European and national parliaments. Wide discrepancies were moreover noted in the manner and extent of oversight by national parliaments.

Stunted information flows, caused by the Council’s reliance on the norm of informal governance and the rules regarding formal exceptionalism, further aggravate the parliaments’ role confusion. Frequently, European and national parliaments receive information at a late stage, in a very limited manner, or not at all. Particularly national parliaments may not always be well-informed about the types of documents that are drafted in the context of non-legislative decision-making procedures, a fact that is exacerbated by the Council’s routine tendency in some areas, such as the EMU, to work with informal documents. Even where national parliaments do have full access to the required documents, they may feel themselves under pressure to hold policy debates in closed session on issues that would otherwise have been debated in public. The EP, in its turn, is often undermined in its endeavour to act as a deliberative forum by the fact that it is given no, or a very limited procedural role in certain non-legislative policy areas where the Council (and thus the EU) exercises real political powers, such as in financial sanction listings under the CFSP. Moreover, as Council non-legislative policies are generally the product of non-transparent decision-making processes that are backed by parties from across the political spectrum, this makes it difficult for the EP to mobilise a European-level oppositional narrative against these policies.

In summary, the evaluative findings concerning the citizens’ will formation on Council decision making confirm that the current transparency policy does not live up to democratic standards under the narrow perspective. Depending on the decision-making mode and policy area at hand, different informal norms and formal rules in the transparency policy actively obstruct the possibility for citizens to learn about their representatives’ conflicting policy inputs and narratives. Recent high-publicity clashes between ministers, such as on the third Greece bailout and on the quota for the distribution of refugees (both in 2015) only serve to

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13 See Chapter 3, section 3
14 See Chapter 8, section 4.3, cf. COSAC (2010), Annex
15 See Chapter 9, section 4.2
demonstrate just how rare and non-institutionalised such confrontations of views still are in the Council.

11.3.2 Participation: Not in our backyard

The democratic process of participation serves as a way to bring citizens closer to the decision-making process, by actively involving them. At the very minimum, provisions for citizens’ participation are limited to voting in elections, as foreseen in the narrow democratic perspective. However, given the relative distance of democratic legitimacy from national elections to Council decision making, a strong argument would exist for providing greater possibilities for citizens to participate directly. Yet in the current situation, no Council transparency provisions are in place to specifically cater to participatory needs of citizens beyond their right to participate in the national elections that produce Council representatives. The types of transparency specifically required from the Council to this end (minimal information to competently participate in elections for Council representatives) coincide with those required for the processes of will formation and accountability, as do the transparency shortcomings related with these two processes.16

Beyond the institution of the Council, citizens and organisations wishing to participate in the (usually legislative) decision-making process are granted a venue with the Commission in the preparatory phase, as well as with individual member states, often in the capital cities. While the former type of participation falls outside of the scope of this study, the latter is included as it concerns Council members. A number of member states hold regular corporatist-type consultations with selected and/or sector-representative organisations (e.g. in the EnvCo), in which they may provide oral feedback on the general development of legislative dossiers. These participatory structures clearly go beyond the objectives of the Council transparency policy. When they are nevertheless evaluated by the same normative criteria, it emerges that these national participatory structures may have several transparency shortcomings. First, as governments are bound by the duty of professional secrecy and the norm of consensus, they cannot share ‘limite’ documents nor attribute differences of position to individual member states. Governments can therefore only provide participating citizens with a rather general description of the decision-making process, falling short of minimal contextual information required by citizens to participate competently. Second, in many situations, it remains unclear to citizens or groups what is done with the input that they provide. Third, access to national participatory structures is highly uneven to the extent that they cannot be said to follow a democratic principle. They are generally not open, remaining instead limited to privileged parties. Moreover, the opportunities and level of transparency around national-level participation on EU-related policy is highly skewed: while some member states have highly institutionalised and proceduralised forms of participation, others have no such tradition at all.

16 Respectively section 11.3.1 above, and section 11.3.3 below
In summary, this evaluation finds that the Council’s transparency policy falls short in facilitating the process participation under the narrow perspective, in the same way that the processes of will formation and accountability do (insufficient contextual information and attributability). The Council’s transparency policy does not contribute to the establishment of a broad form of democratic participation. Rather, the Council’s line appears to be that participation is good, but ‘not in our institution’. As a consequence, for those forms of participation that currently exist in and around the Council, the democratic legitimacy, specifically with regard to the issue of inclusiveness, cannot be guaranteed.

11.3.3 Accountability: Orphaned and shared

Whereas the public right of access to documents today covers a large proportion of documents held by the Council, these documents often do not reflect how decisions are reached. This is problematic from a democratic viewpoint, as the possibility for citizens to hold representatives to account begins with a sufficient level of decisional transparency. In the process of democratic accountability, the attribution of responsibility plays a central role: what did individual Council members bring to the decision-making table, how did they respond to other members’ input, and what conclusion did they draw from this exchange of views? These are central informational requirements for citizens to pass judgement on the actions of their elected representative. Again, the Council’s tendency to follow the informal norm of consensus or revert to informal governance or formal exceptionalism are significant obstacles for citizens to hold their representatives to account. These cause issues of democratic legitimacy under the narrow perspective, and a fortiori, under the broad perspective.

In terms of legislative decision making, the current access to documents policy falls short of a process of accountability under the narrow democratic perspective. In terms of transparency, the accountability gap is widened by the prevalent norm of consensus.\(^\text{17}\) First, although legislative documents are generally fully disclosed after the conclusion of the legislative dossier, the legislative document trail is subject to only limited procedural standards and in many instances documents fail to attribute specific inputs to individual member states. Moreover, the Council’s efforts to disclose such documents while the decision-making process is underway still fall far behind what is considered acceptable under a narrow perspective of democratic accountability. Particularly where certain legislative dossiers take several years to be finalised, an unacceptably long transparency lag emerges if the disclosure of pivotal documents is unnecessarily postponed. Currently, there are no safeguards to ensure that documents falling outside of the Council’s definition of ‘legislative documents’ are regularly made public, while current arrangement for document disclosure are insufficient to enable citizens to establish either the ‘full set’ of a given legislative document trail or its chronology.

\(^\text{17}\) See also section 11.3.1 above
Second, the method of reaching decisions through trilogue negotiations significantly reduces the accountability of representatives in the Council. When the Council Presidency enters the negotiations, it acts on the basis of a mandate formulated in closed session by the Coreper. The drafting process of this mandate remains wholly unrecorded for purposes of the Council’s document trail, while documents reflecting the negotiations themselves are insufficient for purposes of public accountability. After an agreement has been reached in trilogue, Council members, mindful of the norm of consensus, generally tend to vote in favour of the legislative proposal. Explanations of votes, moreover, are still relatively rare and succinct when they are provided. Put somewhat crudely, due to the limited transparency particularly in the late stages of the legislative process, everyone and thus no-one can be held directly responsible for the adopted act. Irrespective of the democratic perspective taken, shared responsibility is not enough: inputs in the decision-making process must be attributable to individual Council members.

It might be argued that national parliaments, acting as the Council members’ accountability forum in matters both legislative and non-legislative, may have an important role to play in enhancing legislative transparency. However, this route has an important limit and a shortcoming. The limit is that, as national governments are confronted with the EU duty of professional secrecy, they are under an obligation to ensure that their parliaments abide by this rule as well. As a consequence, national parliaments are prevented from discussing ‘limite’ documents in public sessions. Moreover, parliamentarians are formally barred from consulting outside experts on the content of these ‘limite’ documents, removing an important instrument for effective oversight. The shortcoming is that differences between national parliamentary prerogatives may lead to quite divergent levels of public scrutiny that do not necessarily comply with the principle of legislative transparency at the European level.

As regards non-legislative decision making, the current transparency provisions perpetuate important and systematic accountability gaps. In many cases, constitutional rules constrain the Council’s ability to reach non-legislative decisions. In those instances, non-legislative decision making has a European locus, reach and bindingness that is matched only by fully-fledged national structures of parliamentary accountability, oversight and responsiveness. This is illustrated well by the EMU system, in which the broad framing guidelines (and economic risks) stemming from the common currency are shared, but the democratic accountability (and political responsibility) for economic policy remain scattered at the national level where oversight, whether public or parliamentary, is highly variable. At the same time, the formal role of the EP remains extremely limited, undercutting both its role as a potential transparency-enhancing actor or, in lieu, as a closed-door accountability forum. For example, in the area of CFSP, the EP has a merely consultative role and rather limited instruments of ‘soft accountability’ through debate with CFSP representatives. In the area of the EMU, traditionally an area for legislative decision making, the EP’s means of control are equally feeble, while finance ministers have routinely refused to show up for EP debates.

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18 See Chapter 6, section 3.1
The current situation of scattered parliamentary accountability is further exacerbated by the fact that, in many areas of non-legislative decision making, Council members have constructed areas of formal ‘executive prerogative’ which are shielded from transparency, or spaces of informal, undocumented decision making. This results in a two-level system of secrecy that can be described as a ‘compound exceptionalism’ (routine non-transparency at both the national and the European level), where the general attitude in certain policy areas is that they ‘naturally’ form an exception to the EU’s principle of transparency. Besides the frequent application of document classification, this type of exceptionalism also results in several idiosyncratic informal norms. For example, EU document traffic becomes informalised as if it ‘does not exist’, is duplicated with on the one hand formally abridged and on the other hand informally annotated documents, or takes place via wholly intergovernmental channels without interference from the Council or any other EU organ. The current rules however provide no basis for such an exceptionalist attitude towards transparency: they do not contain lower standards of transparency for non-legislative documents, and require that the Council justifies every non-disclosure on a case-by-case basis.19 In several areas of Council non-legislative decision making including the EMU and the CFSP, this principle is routinely breached. Thus, the Council manages to effectively keep many, if not the majority, of non-legislative documents out of the reach of the access to documents rules and eventually, away from both public and parliamentary scrutiny.

Surveying the transparency policy’s role in strengthening the democratic process of accountability, it may be noticed that the Council’s efforts to create answerability largely occur at an institution level: representatives as a collective decide and justify their decisions. This level of transparency however clearly falls short of a narrow democratic perspective on accountability, by which the formal role of each representative must be attributable in detail. As a consequence, the already limited possibilities for citizens to “throw the scoundrels out” at election time are diminished even further, as they struggle to reconstruct the precise role of their national Council representatives.20

Having evaluated Council transparency as a living policy, it may be concluded that its normative promise of strengthening democracy remains unfulfilled in important ways. Instead, transparency serves a decision-making system that is in important ways negligent to the point of structurally falling short from a narrow perspective. This is mainly due to the ways in which the Council transparency policy tended to developed. In legislative decision making, the Council follows an informal norm of consensus; in non-legislative decision making, the Council then tends to structures of informal governance and then to a reliance of exceptionalism from transparency that is insufficiently offset by mechanisms of parliamentary oversight. In all of these cases, what appears to lie at the heart of the ‘transparency deficit’ is a reluctance among member states to engage in a truly parliamentary, open, and adversarial

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19 This is different in the case of Commission documents, where the EU courts have, in a string of judgments, established a so-called ‘general presumption’ against disclosure for several categories of documents.

20 Weiler (1999), p. 329
manner of decision making. Instead, the Council opts for politics without public contestation, decision making far from direct citizen involvement, and decisions that are no-one’s and everyone’s at the same time.

11.4 Recommendations for improvement

The conclusions drawn from the empirical and normative components of this study lead to a number of recommendations to repair the shortcomings in the Council’s access to documents policy. Some of these merely entail an adjustment of the interpretation or implementation of the existing access rules, while others would require the rules to be changed. Still others relate to flanking measures where a transparency-oriented approach to democratic decision making may not be feasible.

As became apparent throughout this chapter, the distinction between legislative and non-legislative decision making has come to play a central role in the way the Council approaches the question of transparency. The current legal framework for access to documents does not draw a particularly strong distinction between legislative and non-legislative documents. Yet the role of individual Council documents and the reasons for their (non-)disclosure differ per type of decision-making process. For example, in a non-legislative procedure pertaining to a military mission, the Council may well have good reasons to reach decisions behind closed doors, whereas in a non-legislative procedure pertaining to an international trade agreement, a different degree of confidentiality might be appropriate for yet different reasons. By contrast, for legislative procedures, legitimate reasons for confidentiality will virtually never exist. An access law that treats all documents equally without allowing for a consideration of their role in the decision-making process could thus be said to lack both in ‘normative realism’ (by setting normatively unfeasible standards and in constitutional depth (by failing to recognise that different types of documents have normatively different significance).

Bearing the claim to an ‘executive prerogative’ in mind without losing sight of the overarching principle of transparent government characterised by the norm of ‘open, unless’, the distinction between legislative and non-legislative documents is therefore useful as a guideline in the design of a mature access to documents policy. ‘On the ground’, living transparency is already shaped in a way that accommodates it within the ‘executive prerogative’ and its accompanying decision-making style. The challenge lies in integrating these areas of Council decision making into transparency policy in a manner that is at once democratically legitimate and intuitive and practicable. Without necessarily lowering the standard of transparency in non-legislative activity, a type of thinking about transparency which clearly differentiates between the dilemmas pertaining to legislative and non-legislative transparency may at once help to spell out more clearly some of the Council’s already existing tacit assumptions and create more realistic and suitable arrangements that better reflect the EU’s compound constitutional system of multiple decision-making modes (based on QMV, unanimity, or decentralised coordination). Such an approach to transparency has the
advantage of allowing a constitutional, rather than a judicialised and formalistic approach to questions of transparency.

This section however begins with a number of recommendations that apply to the access procedure as a whole. Following this study’s finding of cross-case differences in the handling of access requests, a first recommendation is to make more work of the creation of an incentive structure for officials to adhere to the principle of transparency. Although further research will be necessary to establish which incentives are likely to yield success, some early examples can already be thought of. In line with current Commission practice, the Council secretariat’s Transparency Unit can for example set other units, member states and (in the case of classified documents) third parties a hard deadline for the consideration of access requests, after which the Transparency Unit, the WPI, or Coreper make their own independent assessment concerning disclosure. Scoreboards could also be kept between DGs to encourage compliance and learning behaviour concerning the timeliness, refusal rate, and durability upon appeal of individual DG decisions in order to facilitate legally sound implementation. Second, as this study found, contesting the Council’s refusal to grant access through via the judicial route forms a costly endeavour, while the length of court proceedings in many instances defeats the purpose of the original access application. In order to improve the effectiveness of the access regime, the legislator could therefore consider giving the administrative appeal procedure after a confirmatory application more teeth by strengthening the powers of scrutiny of the European Ombudsman. Akin to the UK Information Commissioner, this would include the right to issue binding decisions in all or certain specifically delineated cases (such as access requests with an overriding public interest dimension).

11.4.1 Legislative transparency: Removing administrative and psychological barriers

Currently, citizens’ access to legislative documents is obstructed for both practical and intentional reasons. A number of steps can be taken to remove persisting administrative and psychological barriers, thereby improving the accessibility and quality of existing documents. A first task for the Council in this respect is to streamline record-keeping requirements. As became apparent from the case studies of the EnvCo and the Ecofin Council, different Council formations and different working parties can be seen to operate under divergent standards in this regard, while the quality and depth of information contained in documents is often experienced by outsiders as suboptimal. A more coherent practice could be achieved through the further application of formal standards for the legislative document trail. Such standards should be of high quality and would stipulate minimal requirements concerning documents to be drawn up and information to be included in these documents. As most legislative negotiations take place at the working party level, these working parties should begin to record their progress on the basis of a single template throughout the Council. This includes the mandatory production of agendas and minutes for the legislative part of each working party session. Other documents to be included are inputs submitted by member states and

An additional aspect here are inputs by lobby groups and NGOs, which should be formally declared. On this point, see Commissie Meijers (2015)
‘state of play’ documents. While such documents already exist, they should be drawn up at regular intervals, irrespective of the amount of progress made. The creation of such documents could go accompanied by a periodical mandatory public debate, at Coreper or ministerial level, on the state of the legislative dossier, which could go some way in improving ex durante processes of will formation and accountability. Such debates could for example be held twice every Presidency, or every fifth meeting, although other formulae are imaginable too.

Second, several outside respondents commented on the poor accessibility of legislative documents as an obstacle preventing ordinary citizens, or even themselves, from seeking access to documents more regularly. This is in large part due to the relatively inaccessible format of the Council’s current online document register, which presupposes a too high level of knowledge of the Council institution from persons interested in seeking access. This study therefore salutes the Council’s recent steps to develop a highly accessible legislative observatory with a view to enhancing transparency, and underlines that it should contain all relevant documents as well as meeting calendars and voting roll calls. For usability, it is essential that the future legislative observatory should integrate documents of all the legislative institutions.\(^{22}\) In line with the duty to disclose legislative documents directly, the legislative observatory should be updated in real time. In order to render decision making at the working party level more visible, the Council should consider expanding the list of documents to be made directly available to at least the state of play documents and possibly meeting minutes. With regard to the latter, records of plenary debates and committee debates in the legislatures of the member states may serve as an example. In time, the observatory could also incorporate documents in non-legislative decision-making procedures to replace the Council’s current online register in its entirety.

A third point to be addressed is the removal of unnecessary obstacles to legislative transparency. Several steps in this direction can be imagined. One would be an explicit prohibition on the conduct of legislative sessions outside of the legislative institutions. While such a prohibition already tacitly exists, formalising it may help to curb the temptation for member states to ‘precook’ legislative initiatives as this study found to have occurred in the informal/consultative bodies of the EWG or the EFC. Such a prohibition would not prevent the conduct of trilogue negotiations, which the Council has rightly argued form part of the legislative institutions’ procedural discretion.\(^ {23}\) Yet, as such negotiations form part of the legislative process, it is adamant that the Council and the EP formalise the trilogue process, applying the highest possible standards of transparency. Ex durante information should be offered on the Coreper mandate, outstanding issues to be negotiated, and the meeting agenda, while the process as a whole should be formally incorporated into the European Treaties.

\(^{22}\) This could link into the European Parliament Legislative Observatory: http://www.europarl.europa.eu/oeil/home/home.do

\(^{23}\) Council (2015b), para 7
A fourth and final step relates to the duty of professional secrecy which, the empirical part of this study found, considerably obfuscates the ambition of creating the widest possible access to legislative documents. A possible solution to this problem would be the adjustment of the Council’s internal guidelines concerning ‘limite’ documents (which is based on the duty of professional secrecy) so that this label could no longer be applied to documents categories listed for direct disclosure, in order to remove the duty of professional secrecy from the legislative sphere. Instead of allowing for the possibility of preventing direct access on the basis of documents’ ‘limite’ status, non-publication would have to be based on one of the exception grounds listed in article 4 of Regulation 1049/01. In any event, the Council must ensure that references to all ‘limite’ legislative documents are shown on the public register, as ‘limite’ documents are not a priori excluded from the right of public access on the basis of a request. The removal of the duty of professional secrecy would moreover not prevent member states from adopting national rules with a similar effect. In this way, the administrative-political chain of responsibility, characterised by the political primate, can still be upheld in accordance with national constitutional arrangements, without compromising the Council’s adherence to the principle of legislative transparency.

11.4.2 Non-legislative transparency: A stricter adherence to the letter and the spirit of the law

As regards non-legislative transparency, the situation is less straight-forward. Whereas improvements in the access rules over the past years have predominantly focussed on the legislative process, a central finding of this study is that the transparency of non-legislative Council decision making has stayed in the background. However, as became apparent from the case studies, transparency of non-legislative decision making would greatly benefit from a more consistent implementation of Regulation 1049/01, accompanied by stronger safeguards of parliamentary scrutiny.

A first observation from the case studies of the Ecofin Council and the FAC was the rather casual manner in which the non-legislative components of these Council formations implement transparency. A stricter implementation of the access rules that are already in place would therefore be a marked improvement. In this light, it is important to reiterate that non-legislative documents are not excluded from the right of access, and that access refusals must be reasoned on a document-by-document basis. The access rules further stipulate that all documents, including non-legislative documents, should in principle be cited on the public register. This includes the lower levels of classified documents, drawn up by the Council or with the permission of the document originator. Moreover, more should be done to shed light on the nature of classified documents produced. Thus, the annual report on access to documents could provide a breakdown of classified documents per Council formation, and

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24 The 2016 Dutch Presidency, mindful of the tension between professional secrecy and legislation, already took steps to reduce the number of limite documents and length of application of this label, thereby illustrating the feasibility of this route.

25 Especially Chapters 8 and 9
on the origin of classified documents (i.e., from the Council itself, from a member states, or from a third party).

Second, an important obstacle to a well-functioning right of access to non-legislative documents was found to be the informal nature of many documents, particularly in the unanimity-based or consensus-based bodies of the CFSP and the EMU. Any criterion that distinguishes between formal and informal documents finds no basis in Regulation 1049/01. Rather, as a rule, documents accompanying meetings taking place within the context of the EU always fall within the remit of the constitutional right of access to documents as mentioned in TFEU article 15(3). In this respect, it does not matter whether the said documents form part of a decision-making process leading to a formal outcome or not, or even whether the EU has competence in the policy area to which the document pertains. Whether the document was drawn up within a ‘satellite’ body that is not strictly considered to form a part of the Council is equally immaterial. Instead, with a view to the pending revision of Regulation 1049/01 to be aligned with TFEU article 15(3), such bodies should take immediate steps to implement their own access to documents policy, which includes de minimis record-keeping standards and the establishment of a public register. Whereas the EEAS has already implemented such a policy, other bodies such as the EFC or the Eurogroup should make a start.

Third, non-legislative transparency policy should at all times be flanked by a privileged right to information for parliament to exercise its prerogatives of oversight. In the case of the Council, non-legislative decision making may lead to the exercise of executive power either at European level, the national level, or both. The Council should grant generous access to documents to parliaments at the level where executive power is wielded. For the EP, this involves access to CFSP documents and answers to written questions (if necessary on a confidential basis), as well as EMU procedures inasmuch as they involve member states in a non-legislative capacity alongside the Commission. For national parliaments, many of which already have access to the Council Extranet database, this could entail presenting documents in a more accessible manner, for example by distinguishing clearly between legislative and non-legislative document trails. A more far-reaching measure would be to allow national parliamentarians to address their questions directly to the Council.

In this section, I have offered a number of recommendations for improvement of the Council’s access to documents policy, based on shortcomings observed in the empirical and normative parts of this study. While some recommendations, such as an insistence on a stricter adherence to the applicable rules in non-legislative decision making, require no additional rule-making, others, such as a proposal for an interinstitutional agreement between the Council and the EP to declare the duty of professional secrecy inapplicable in legislative procedures, do. Three types of recommendations were offered, namely: stricter observance of the formal rules in the spirit of the principle of transparency, removal of obstacles to the exercise of the formal rules, and finally, measures to strengthen the access framework.
11.5 Living transparency: Neither full sunshine nor pitch-darkness

The findings of this study contribute to two overarching debates in the fields of transparency theory and European integration theory. The first debate concerns the advent of transparency in public decision making and the way in which it has developed in recent times. Here, the research findings challenge facile assertions of an ‘advancing transparency effect’ characterised by a universal, unstoppable and irreversible change dynamic in transparency policies. The second debate centres on the claim that an ‘executive dominance’ in European decision making can be said to hamper the development of transparent, accountable and, eventually, democratic decision making. The present research on transparency that developed as a living phenomenon in the Council provides evidence that somewhat nuances these claims. This gives rise to careful optimism concerning the possibility of a gradually emergent European constitutional perspective on transparency that is sensitive to the decision-making mode at hand, and the role of parliaments in providing oversight. The section concludes by outlining avenues for further research flowing out of the research fields addressed by this study.

11.5.1 Has transparency gone too far?

For several years, the academic literature on government transparency has debated the causes and consequences of the ‘transparency wave’. A central premise of this literature, which this study investigated in the Council context, is that transparent public decision-making has redefined the relation between citizens and public authorities.26

The ‘transparency wave’ thesis has sparked off two types of responses. Certain scholars have highlighted the potential negative aspects and costs of advancing transparency. Other scholars however have cast doubt on the central premise of these ‘transparency sceptics’, namely, the claim that an ever-expanding transparency advance actually took place.

Transparency sceptics, in their critique of advancing transparency, rely on “the full catalogue of perversity, futility, and jeopardy arguments that change critics usually employ”,27 including possible negative impacts on decisional efficiency28 or citizens’ trust.29 Fukuyama criticises the ritualistic function of calls for transparency for damaging governability. He argues that:

> The obvious solution to this problem would be to roll-back some of the would-be democratizing reforms, […] but no-one dares suggest that what the country needs is a bit less participation and transparency.30

Fukuyama’s observations come in the context of the US ‘sunshine laws’. A similar argument however has been raised in other government contexts such as the EU.31

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26 See Chapter 1, section 2; also Peters (2013); Hood and Heald (2006)
27 Meijer et al. (2015), p. 3
28 Prat (2005); Stasavage (2005)
29 De Fine Licht (2011); Grimmelikhuijsen (2012)
30 Fukuyama (2014), p. 504
This transparency-sceptical account has also been criticised. Roberts, for example, has argued that the transparency advance is significantly tempered by “enclaves within government in which the ‘right to know’ has made little headway”.32 Michener, in an evaluation of FOI laws in Latin America, finds that even ten years after their introduction, “legacies of […] opacity still weigh heavily on most countries”.33

This study contributes to this debate by highlighting that, in the Council context, the ‘transparency wave’ has swept mainly through areas where an advance of transparency is normatively easiest to justify: the legislative procedure.34 Much of the criticism of transparency sceptics by contrast centres, explicitly or implicitly, on non-legislative areas of decision making. Even though transparency has made some advances in non-legislative areas of Council decision making, no evidence of a significant advancing transparency effect was found for these areas. On the contrary, certain areas of policy making continued to operate on the basis of a nearly routine secrecy.

This nuancing finding is further confirmed by the central institutional factors that were identified as contributing to the relative enhancement or stagnation of living Council transparency. Again, the study was far from finding the development of ‘blinding sunlight’. While it identified external pressure by transparency advocates coupled with litigation by access applicants as particularly transparency-enhancing factors, it also noted that in areas of non-legislative activity, this effect was almost completely offset by the introduction of well-resourced administrative elite actors, tasked with sector-specific objectives, who created insulated and informal ‘zones’ of decision making. In line with the findings of both Roberts and Pasquier and Villeneuve, Council actors in certain policy areas have rather successfully shielded themselves from calls for transparency by rule adaptation (through tailored exception grounds, sector-specific implementation norms and classification rules) and circumvention (non-execution of transparency rules and insulation and informalisation of decision making).35 Novel in this respect is the identification of a ‘transparency ceiling’, by which increasing pressures to offer demonstrable improvements in transparency (more documents on the register) lead to similarly increased transparency resistance (fewer documents are directly accessible). Future research could explore whether this effect also appears in other institutional contexts, and if so, under what circumstances and in what manifestations.

A final contribution concerns the context-dependent normative significance of (non-) transparency. Scholars focussing on institutional obstruction generally regard the

31 Heremans (2011); Wobbing Europe (2012)
32 Roberts (2006), pp. 18, 32-6
33 Michener (2015), p. 95. When comparing the two sides of the transparency debate, it may be noted that in their pleas for or against more transparency, both camps largely talk past each other. In fact, it would be more accurate to speak of two separate but interlinked debates. Whereas the transparency-sceptic camp strongly capitalises on the (increasingly) negative effects of transparency policies, its critics have rather emphasised the negative causes of these policies’ limited development.
34 One might also formulate this inversely: the absence of transparency is normatively hardest to justify in the legislative procedure.
35 Roberts (2005, 2006); Pasquier and Villeneuve (2007)
development of transparency policies through the lens of shortcomings, assuming an interest among public institutions in circumventing transparency rules either in letter or spirit. While in many instances, such an interest may be at the heart of confidentiality, in other instances, in other instances, the ‘transparency sceptics’ make a point that is worth considering: exceptions to transparency may be legitimate and necessary to achieve the central objectives of certain policies.\textsuperscript{36} For these policies, a single-mindedly critical attitude towards secrecy may come at the expense of a focus on flanking measures, most importantly indirect democratic control through parliamentary oversight. The findings of this research point at the complexity and variegation of claims to ‘transparency exceptionalism’ in non-legislative decision making, which each rely on a separate justificatory argument. This is even more the case in (quasi-)federal systems, where such decision making goes accompanied by two-level accountability structures. As a consequence, the justification of non-legislative confidentiality has thus far remained iterative and incomplete. To the author’s knowledge, so far no constitutional theory of non-legislative transparency has been developed which is capable of coherently integrating all manifestations of justified non-legislative non-transparency.

11.5.2 Does the EU’s current mode of integration undermine transparency?

The Maastricht Treaty signified a quantum leap in European integration by creating European-level decision-making structures for key areas of ‘high politics’: foreign policy, defence policy, economic and monetary policy, and justice and home affairs policy. A recent theoretical stream which describes itself as ‘new intergovernmentalism’ has highlighted the anomalous and (potentially) problematic nature of this turn in European integration. Its adherents argue that decision making in these areas has departed from the traditional route to European integration, as it has become dominated by intergovernmental arrangements at the expense of the traditional ‘supranational’ institutions.\textsuperscript{37} Their analysis shows interfaces with the work of other scholars who hold that the continual direct involvement of capital cities has led to an increasing ‘executive dominance’ of the European Council and Council, that in recent years has come to show traces of an ‘executive managerialism’.\textsuperscript{38} A common thread in both analyses of post-Maastricht decision making is the assertion that the observed executive, intergovernmental style of decision making is accompanied by a loss in transparency, as national leaders negotiate deals behind closed doors and at some distance from both parliaments and the public.\textsuperscript{39}

New intergovernmentalists and advocates of the view of an ‘executive turn’ also have their critics. Schimmelpfennig for example argues that indicators of the intergovernmental nature of decision making are used in an imprecise and inconsistent manner, and that the examples introduced by new intergovernmentalism are idiosyncratic and unrepresentative. The progressive mainstreaming of the ordinary legislative procedure that reached its apex in

\textsuperscript{36} Abazi (2015), pp. 60-2
\textsuperscript{37} Bickerton et. al (2015); Puetter (2014)
\textsuperscript{38} Curtin (2014); Joerges and Weimer (2013)
\textsuperscript{39} Hillebrandt and Novak (2016); Andersen and Burns (1996)
the 2009 Lisbon Treaty is seen as providing further evidence of a gradual \textit{supranationalisation} that appears to contradict the claim of increased intergovernmental dominance.\footnote{Schimmelpfennig (2015), p. 725; Costa (2011)}

This study presents evidence that supports a middle ground position between the transparency connotations of the intergovernmental and the supranational perspectives. One the one hand, a bifurcation in the development of Council transparency policy is found that supports the transparency critique of executive-driven intergovernmentalism. On the other hand, the opacity of executive-driven intergovernmental decision making is \textit{by comparison} not as extreme as it is sometimes made out to be.

In those components of the case studies that form part of what new intergovernmentalists identify as “new areas of EU activity”,\footnote{Bickerton et al. (2015), p. 2} namely the EMU and the CFSP, the transparency policy has clearly been less anchored. This has resulted in more shielded decision making that is the product of institutional innovations highlighted by new intergovernmentalism: the reliance on \textit{de novo} bodies, administrative elite actors, and informal decision-making forums. On the other hand, the findings also contradict the idea that EU secrecy is the unique product of executive-driven intergovernmentalisation. To begin with, although the Council has indeed generally tended to resist transparency advances, a dynamic of change occurred nonetheless. The Court of Justice as a counter-majoritarian institution played a pivotal role in bringing such change about. It did so by asserting its jurisdiction over matters of transparency in the CFSP against the Council majority’s will and by frequently striking down refusal decisions. But also European and certain national parliaments have at times successfully strengthened their informational controls over Council decision making. For example, in the area of the CFSP, the EP pursued an active agenda of securing the full implementation of its rights of scrutiny, including information rights and privileged access to classified documents in the area of the CFSP, where it has no formal decision-making role. In the area of the EMU, particularly the Finnish and German parliaments have demanded an ongoing and elaborate right of access to documents. Meanwhile, the Eurogroup has taken small steps to increase the transparency of its decision making as a consequence of mounting external pressure to do so.\footnote{Eurogroup (2016); Irish Times (2016); Transparency International (2016); Giegold (2016)}

A further nuancing element is the fact that, contrary to what new intergovernmentalism seems to suggest, Council resistance to expanding transparency has occurred in virtually all, rather than merely the new areas of EU activity. The Council has also routinely relied on mechanisms to limit the reach of transparency in the ordinary legislative procedure. In this sphere, a ‘space to think’ is created through elusive document drafting or temporarily withholding documents. The norm of consensus underlying these practices has significantly shielded member states from external criticism of their (possibly controversial or sensitive) contributions to Council debates, and might rather be characteristic of negotiations in federal systems. Finally, the opacity surrounding confidential trilogue negotiations, characterised by confidential mandate-drafting and a take-it-or-leave-it negotiation outcome,
may have led member states to endorse legislative outcomes that their parliaments would otherwise never have excepted. Although the extent of secrecy in this context is still more limited than in non-legislative areas such as the CFSP and EMU, it has nonetheless proven resilient in the face of expanding transparency legislation and litigation.

Although the focus of this study was solely on transparency in the Council context, there is evidence to suggest that a reliance on confidentiality in the EU is not solely or even predominantly a feature of intergovernmental decision making. In fact, a far larger part of access to documents litigation has taken place in response to access refusals in a supranational institution: the Commission. It is also exclusively in certain areas of Commission decision making that the EU courts have found a ‘general presumption’ against the right of access to exist. With its ‘blanket’ applicability to categories of documents, the general presumption is a rather radical legal doctrine that delimits access to Commission documents in a far more direct way than the EU courts have ever seen fit in the Council context. In recent years, the general presumption has been found to apply to a growing number of policy areas.\(^\text{43}\) Other supranational institutions, such as the EP and the Court, have also been criticised for the lack of transparency in (some of) their meetings.\(^\text{44}\) These observations go some way in nuancing the often implicit but regular critique concerning the transparency and legitimacy costs of developing forms of governance beyond the ‘community method’.

Nonetheless, on the basis of the present research, it may be argued that secrecy in non-legislative areas of Council (and European Council) decision making presents the EU with the unique challenge that is distinct from secrecy in the other institutions: routine insulated executive decision making in often highly complex institutional arrangements at a considerable distance from the public gaze. Transparency by itself cannot resolve the system’s democratic tensions. Thus, it is largely up to parliaments, both European and national, to strengthen their oversight of Council decision making, and thereby, the system’s democratic accountability.

### 11.6 Conclusion

Having developed over a period of more than two decades, one may wonder what the returns of access to documents policy are. Did the Council indeed manage to take its decision making out of the shadows? Did the transparency policy succeed in strengthening its democratic legitimacy? These questions matter because of the expectations that we have of transparency in its living form, and of the institution that implements it. After all, the attempt to marry democratic ideals with institutional realities lies at the heart of the Council’s transparency policy, yet it is a path that is fraught with difficulty. Raising the blinds from the Council’s windows, how does one ensure that decision makers do not retreat to the backrooms, far from the public’s gaze? And precisely how many open windows are needed to bring decision making into the light of transparency? This study suggests that the Council’s response to the

\(^\text{43}\) ECER (2014), p. 1

\(^\text{44}\) EUObserver (2014); Alemanno and Stefan (2014)
introduction of transparency has been more satisfactory in some areas than in others, and that important obstacles persist that interrupt its advance. Although some progress has undoubtedly taken place, at pivotal moments of the Council’s decision-making processes, both legislative and non-legislative, the tendency remains to protect ‘business as usual’. In contrast to what decision-makers sometimes suggest, the Council is thus hardly hindered by too much sunlight.

On the other hand, this dissertation also suggests that these inherent difficulties should not stop us from studying the design process of the Council’s living transparency policy with the objective of improving it to the best of our abilities. Against all odds and resistances, change, however slow, can take place, given a thorough understanding of the institutional realities underlying it, and a determination to align them with democratic ideals.

In this study, I have sought to do so in three ways. By clarifying the normative objectives of Council transparency, I have attempted to demonstrate its indispensable role for democracy. Through an empirical analysis of transparency developments, I have sought to sketch the prominence of the Council’s institutional context, in the process hopefully removing some of the prejudices regarding transparency of the decision-making process that exist both on the side of its sceptics and proponents. Finally, by placing the development process of access to documents policy in the context of debates concerning the Council’s alleged lack of democracy, I have searched for ways to further bridge the gap between the ideals and realities that underpin this policy. What this study indicates is that in a democratic system, transparency should serve as the norm. While certain exceptions to this norm are justifiable, they must leave key transparency criteria fundamental to democratic processes intact. Variations in the institutional design of the Council mean that it meets these criteria better in some policy areas than in others.

In conclusion, transparency policy as a living phenomenon is neither the result of some unstoppable and irreversible ‘deus ex machina’ that makes public decision-making impossible, or conversely, of some naive wishful thinking that is obstructed at will by cynical decision makers that thrive in the dark. Instead, ideals of transparency of democracy are real, and they come to life in real-life settings, through an institutional context in which power is scattered and where even the most powerful actors may have to accept the advance of democracy. By carefully and deliberately intervening in this context, a multitude of actors, ranging from minority member states and Council officials to the European Ombudsman and civil society, can gradually shape living transparency to contribute to this goal. Even when plenty of shadow persists, that should be a source of optimism for all.
Appendix 1: Full overview of documents analysed (chronological order)

This appendix includes rule-setting texts, policy documents produced by the European institutions, policy documents produced by the member states, policy documents produced by third states or organisations, and policy documents produced by civil society. All documents are on file with the author.

I Rule-setting texts (legislation, internal rules and IIAs)

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<th>No.</th>
<th>Author (Year)</th>
<th>Title/contents, date</th>
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<td>9.</td>
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<td>1871th Council meeting General Affairs, Code of conduct to the public access of the minutes and statements in the minutes of the Council acting as a legislator, 2 October 1995</td>
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<td>15.</td>
<td>Council (2001a)</td>
<td>Decision 264/01 adopting the Council's security regulations, 19 March 2001</td>
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<td>26. EFC secretariat (2005)</td>
<td>Addendum to the Working methods of the Eurogroup following the Eurogroup Working Group meeting of 1 July, 5 July 2005</td>
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<tr>
<td>33. EU member states (2011)</td>
<td>Agreement 2011/c 202/05 between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union, OJ C202/13</td>
<td></td>
</tr>
<tr>
<td>37. European</td>
<td>Interinstitutional Agreement (IIA) on budgetary discipline and sound financial</td>
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</table>
Appendix 1

<table>
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<tr>
<th>No.</th>
<th>Author</th>
<th>Title/contents, date</th>
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<tr>
<td>2.</td>
<td>Council (1995c)</td>
<td>1847th Council meeting General Affairs Presidency Conclusions, 29 May 1995</td>
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II Policy documents European institutions (including conclusions, declarations, reports and resolutions)
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<tr>
<td>4. Council (1996b)</td>
<td>1977th Council meeting, (General Affairs), Presidency Conclusions, 6 December 1996</td>
</tr>
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<td>7. Council (1998c)</td>
<td>2075th Council meeting, Justice and Home Affairs Presidency Conclusions, 19 March 1998</td>
</tr>
<tr>
<td>11. Council (1999b)</td>
<td>Public access to documents - Draft Council conclusions, 10 September 1999</td>
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<tr>
<td>12. Council (2000d)</td>
<td>Document 13710/1/00 REV 1, Presidency discussion paper on Proposal for a Directive on public access to environmental information, 6 December 2000</td>
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<td>24. Council (2014a)</td>
<td>Document 8622/1/14 REV 1, Note by the Council Secretariat, 13 May 2014</td>
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<td>26. Council (2014c)</td>
<td>Staff situation in DG-F at the CSG from 1 January 1980 to 1 January 2014, 9 September 2014</td>
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<td>34. European Court of Auditors (2016)</td>
<td>Special report No. 18/2015: Financial assistance provided to countries in difficulties, 26 January 2016</td>
</tr>
<tr>
<td>35. Economic Financial Committee (1999)</td>
<td>Improving on the working of the Euro-11 Group, 1 July 1999</td>
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<tr>
<td>36. EFC secretariat (undated a)</td>
<td>Confidentiality charter: Ensuring confidentiality in the work stream of the Eurogroup/ Eurogroup working group (undated, estimated drafting data 2004)</td>
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<td>37. EFC secretariat (undated b)</td>
<td>Declaration on confidentiality (template) (undated)</td>
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<td>38. EU (2002b)</td>
<td>EU-NATO Declaration on ESDP, 16 December 2002</td>
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<td>64. European Parliament</td>
<td>Conference of the Presidency, minutes, 28 June 2001</td>
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<tr>
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<td>65.</td>
<td>European Parliament (2003)</td>
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<td>68.</td>
<td>European Parliament (2010)</td>
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### III Policy documents member states

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<td>17. Netherlands Foreign Ministry (2015)</td>
<td>Comments made at the seminar in the context of the upcoming Dutch presidency concerning the EU access to documents law, <a href="http://www.minbuza.nl/ecer/agenda/2015/november/ecer-infobijeenkomst-nederlands-eu-voorzitterschap-2016-de-kurowob.html">http://www.minbuza.nl/ecer/agenda/2015/november/ecer-infobijeenkomst-nederlands-eu-voorzitterschap-2016-de-kurowob.html</a>, 9 November 2015 (last access 9 November 2015)</td>
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</tr>
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### IV Policy documents other states and organisations

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<td>7.</td>
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<td>Petersberg Declaration, Western European Union Council of Ministers, Bonn,</td>
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## V Policy documents civil society

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<tr>
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Appendix 2: Full overview of judicial proceedings analysed (chronological order)

I CFI / GC

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<th>No.</th>
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<td>T-14/98</td>
<td>Hautala v Council</td>
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<td>T-84/03</td>
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<td>12.</td>
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<td>Liga para Protecção da Natureza v Commission</td>
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<td>13.</td>
<td>T-59/09</td>
<td>Germany v Commission</td>
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<td>15.</td>
<td>T-331/11</td>
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II ECJ / CJEU

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<td>3.</td>
<td>C-193/01</td>
<td>Pitsiorlas v Council and ECB II (appeal)</td>
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<td>4.</td>
<td>C-353/01</td>
<td>Matilla v Council &amp; Commission II (appeal)</td>
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<td>5.</td>
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<td>Sison v Council II (appeal)</td>
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<td>Sweden v Commission (appeal)</td>
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<td>Joined: C-39/05P and C-52/05P</td>
<td>Sweden and Turco v Council (appeal)</td>
<td>1 July 2008</td>
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<td>9.</td>
<td>C-350/12P</td>
<td>Council v In ‘t Veld (appeal)</td>
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III Court Orders and dropped cases

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<td>3.</td>
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<td>4.</td>
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<td>ClientEarth v Council (court order)</td>
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<td>2.</td>
<td>C-193/01</td>
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<td>4.</td>
<td>C-266/05P</td>
<td>Sison v Council (appeal)</td>
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<td>5.</td>
<td>Joined: C-39/05P and C-52/05P</td>
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<td>C-350/12P</td>
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</table>
Appendix 3: Details concerning interviews

I Anonymised list of respondents

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<th>Interview number</th>
<th>Role interviewee</th>
<th>Case study</th>
<th>Date interview</th>
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<tr>
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<td>3.</td>
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<td>5.</td>
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<td>Senior member, European Ombudsman</td>
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<td>7.</td>
<td>Staff member, Commission</td>
<td>General</td>
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<td>8.</td>
<td>Staff member, European Data Protection Supervisor</td>
<td>General</td>
<td>11 January 2012</td>
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<tr>
<td>9.</td>
<td>Member of the European Parliament</td>
<td>General</td>
<td>11 January 2012</td>
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<td>10.</td>
<td>Senior member, NGO</td>
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<td>8 February 2012</td>
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<td>11.</td>
<td>Member, Brussels-based NGO</td>
<td>EnvCo</td>
<td>2 March 2012</td>
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<td>16.</td>
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<td>22.</td>
<td>Academic, specialist CFSP</td>
<td>FAC</td>
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<td>25.</td>
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<td>FAC</td>
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</table>
**II Interview questions**

*Role of documents in the policy area*

1. What procedures, formal or in practice, exist with regard to the drafting and circulation of documents in your policy area? Have these procedures changed during your time as a policy maker?

2. What does a typical document in your policy area look like in terms of originator and function? Have the overall volume and most common originators and types of document changed during your time as a policy maker?

*Attitude towards documents in the policy area*

3. Is the existence of policy documents, or the manner in which they are drafted, ever considered a risk in your policy area? If so, what risks are identified, and what measures are taken to contain them? Has this risk identification changed during your time as a policy maker?
4. What are the most commonly identified trade-offs between the right of public access to documents and policy making, and how is this trade-off being dealt with in your policy area?
Has this balancing act changed during your time as a policy maker?

5. Are there different perceptions between different policy makers over the issue of drafting and circulating documents in your policy areas? On what basis do you conclude there are (n’t)?
Have these different perceptions changed during your time as a policy maker?

Influence on document drafting and circulation in the policy area

6. Have certain actors (member states, the secretariat, outsiders) in this policy field sought to influence the manner in which documents are drafted and circulated in your policy area? If so, what means did they have at their disposal to exercise such influence? Has the influence of certain actors changed during your time as a policy maker?

7. In what way has the institutional context (Treaty changes, voting modalities, role of the EP) in your policy area changed the procedures and attitude towards the drafting and circulating of documents in your policy area? Has the institutional context changed during your time as a policy maker?

8. In what ways has the technological context changed the procedures and attitude towards the drafting and circulating of documents in your policy area? Has the technological context changed during your time as a policy maker?

9. In what ways has public and political opinion changed the procedures and attitude towards the drafting and circulating of documents in your policy area? Has public and political opinion changed during your time as a policy maker?

III Code book

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<td>^1. Formal rules</td>
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<td>This code refers to those rule-setting texts that impose obligations on the Council with regard to the public’s access to documents, and changes in these texts.</td>
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<tr>
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<td></td>
<td>It is applied when reference is made to specific texts containing rules that impact upon the public’s access to documents (e.g. Regulation 1049/01, classification rules, specific provisions in the rules of procedure)</td>
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<td>^2. Implementation of formal rules</td>
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<td>This code refers to the implementation in practice of formal access to documents rules that impose an obligation on the Council, and changes in this implementation.</td>
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<td>It is applied when reference is made to the manner in which the formal rules that impact upon the public’s access to documents are put into practice (e.g. related to trends in direct access, the design of the online register, types of applicants, or the designation of documents codes)</td>
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<tr>
<td>3</td>
<td></td>
<td>^3. Informal norms</td>
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<tr>
<td></td>
<td></td>
<td>This code refers to those rule-like but unwritten norms that emerge alongside formal rules and implementation practices regarding the public’s access to Council documents, and changes in these norms.</td>
</tr>
</tbody>
</table>
It is applied when reference is made to the manner in which Council insiders routinely cope with the public’s right of access to documents in ways that are not traceable to the formal rules and implementation practices governing this right (e.g., delaying the registration of documents, application of idiosyncratic documents codes, or the creation of parallel distribution channels).

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<td>Insider political actor (and role)</td>
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<tr>
<td>3.</td>
<td>Outsider institutional actor (and role)</td>
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<td>4.</td>
<td>Outsider non-institutional actor (and role)</td>
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<td>5.</td>
<td>Coalition type and activity</td>
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<th>Explanans: preferences</th>
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<tbody>
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<tr>
<td>2.</td>
<td>General: salience</td>
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</table>
### Appendix 3

| ↓3. | Policy-specific, task- and organization-based disagreements | This code refers to the most important divergences, between the identified most dominant actors, in preferences concerning "how to do" decision-making in a specific Council policy area of decision-making body that directly affect access to documents policy. It is applied when reference is made to specific differences of opinion between two or more (groups of) actors on task- and organization-oriented issues (e.g., the EP wants an annotated PSC agenda to be published and the Council says this body does not draft agendas, etc.) that are identified as relevant to access to documents policy. |
| ↓4. | Policy-specific: task- and organization-based parameters | This code refers to the degree to which access to documents preferences are shaped by Council policy- or body-specific norms that are either supported by a (tacit)consensus or written rules/arrangements. It is applied when reference is made to how "things are done" or what the rules/procedures are in a given Council policy area or decision-making body when such a reference does not explicitly formulate access to documents rules but is identified as relevant to access to documents policy (e.g., "we are all very concerned here that information should not get out before the decision is published", "we meet so often that much policy direction is conveyed orally", "the capitals keep a big finger in the pie", etc.). |

#### III Explanans: resources

| ↓1. | Political: chairing | This code refers to specific political resource of chairing a specific Council policy area or decision-making body to the extent that this affects access to documents policy. It is applied when reference is made to a specific instance in which the chair of a body influenced the access to documents policy. |
| ↓2. | Political: seeking publicity | This code refers to the specific political resource of seeking publicity for a Council policy or decision-making procedure to the extent that this affects access to documents policy. It is applied when reference is made to a specific instance or tendency among one or several actors to seek publicity in a manner that influenced/influences the access to documents policy. |
| ↓3. | Political: voting | This code refers to the specific political resource of seeking publicity for a Council policy or decision-making procedure to the extent that this affects access to documents policy. It is applied when reference is made to a specific instance or tendency among one or several actors to seek publicity in a manner that influenced/influences the access to documents policy. |
| ↓4. | Judicial: legal basis/legal standing | This code refers to specific judicial resources that may benefit some or all of the identified most dominant actors in their advancement of a specific access to documents preference. It is applied when reference is made to a legal provision, argument, basis, or standing (or lack thereof) that is identified as relevant to access to documents policy. |
| ↓5. | Material: money to litigate or campaign | This code refers to the impact that the material resource of money (or lack thereof) has on the identified most dominant actors in their advancement of a specific access to documents preference. It is applied when reference is made to concrete situations or actors for which |
### Appendix 3

<table>
<thead>
<tr>
<th>#6.</th>
<th>Material: specialist expertise</th>
<th>This code refers to the impact that the material resource of specialist expertise (or lack thereof) has on the identified most dominant actors in their advancement of a specific access to documents preference.</th>
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<td>This code refers to the impact that the material resource of specialist expertise (or lack thereof) has on the identified most dominant actors in their advancement of a specific access to documents preference.</td>
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<tr>
<td>7.</td>
<td>Administrative</td>
<td>This code refers to specific administrative resources that may benefit some or all of the identified most dominant actors in their advancement of a specific access to documents preference.</td>
</tr>
<tr>
<td>8.</td>
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<td>This code refers to the resource/ability of monitoring implementation of (part of) the Council's access to documents policy.</td>
</tr>
<tr>
<td>9.</td>
<td>Other: special institutional prerogative</td>
<td>This code refers to specific institutional prerogatives that may benefit certain most dominant actors in their advancement of a specific access to documents preference.</td>
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### IV Explanans: exogenous factors

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<td>This code refers to specific changes in the Council's access to documents policy's institutional and/or constitutional environment that affected the former.</td>
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<td>2.</td>
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<td>3.</td>
<td>Technological trend or event</td>
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Appendix 4: Details concerning disclosure statistics

I Passive disclosure

Statistics Council-wide

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<th>Year</th>
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<th>Confirmatory stage</th>
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<td>% of documents granted access*</td>
<td>% of requests granted full / partial access</td>
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<td>% Full</td>
<td>% Partial</td>
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<td>2006</td>
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<td>2007</td>
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<th>Average 2002-2014 (Regulation 1049/01)</th>
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<td>(Average of annual rates) (Average of annual rates)</td>
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Sources: Council annual reports on the implementation of the Council Decision on public access to Council documents (1998, 2003, 2008, 2013), own data. * Documents counted are only those falling within the Decision’s scope. ** *Before 2001, partial access did not exist. Data in this column indicate ‘access to some of the requested documents’. *** Due the entry into force of Regulation 1049/01, application figures for 2002 include those handled after 3 December 2001.
### Statistics case studies

**Initial applications as percentage of total**

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<th>Foreign Affairs Council</th>
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## Confirmatory applications as percentage of total

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Source: own data.

## Access rate confirmatory application

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Source: own data. *Before 2001, partial access did not exist. Data in this column indicate ‘access to some of the requested documents’.*
II Proactive disclosure

Statistics Council-wide

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Statistics case studies

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<th>Foreign Affairs Council</th>
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</tbody>
</table>

Source: Council register (http://www.consilium.europa.eu/register/en/content/int/?lang=en&typ=ADV). Searches were conducted using the following codes: Environment Council: (ENV); Ecofin Council (ECOFIN), Ad-Hoc Working Party Banking Supervision (BSM), Financial institutions (EF), General Financial Questions (FIN), Tax Questions (FISC), Capital Movements (MDC), Economic and Monetary Union (UEM), European Central Bank (BCE), European Economic Area (EEE) and European Free Trade Association (AELE); Foreign Affairs Council: CFSP (PESC), CSIP (COSDP, CSDP/PSDC), PSC (COPS, PSC DEC); Relex (RELEX); Art. 133 (OJ 133, TITULAIRES, STIS), development cooperation (DEVGEN).
Appendix 5: Changes in legal exception grounds over time

_Shrifting exception grounds: From Decision 731/93 to Regulation 1049/01_

<table>
<thead>
<tr>
<th>Type of exception</th>
<th>Decision 731/93</th>
<th>Regulation 1049/01</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mandatory</td>
<td>4(1) - the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations), - the protection of the individual and of privacy, - the protection of commercial and industrial secrecy, - the protection of the Community's financial interests, ... [below]</td>
<td>4(1) (a) the public interest as regards: - public security, - defence and military matters, - international relations, - the financial, monetary or economic policy of the Community or a Member State; (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.</td>
</tr>
<tr>
<td>Discretionary</td>
<td>n/a</td>
<td>4(2) - commercial interests of a natural or legal person, including intellectual property, - court proceedings and legal advice, - the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.</td>
</tr>
<tr>
<td>Discretionary</td>
<td>4(2) Access to a Council document may be refused in order to protect the confidentiality of the Council's proceedings.</td>
<td>4(3) Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.</td>
</tr>
<tr>
<td>Third-party</td>
<td>4(1) ...[above]</td>
<td>4(4) As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed. [semi-discretionary]</td>
</tr>
<tr>
<td>documents</td>
<td></td>
<td>4(5) A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement. [semi-discretionary]</td>
</tr>
<tr>
<td>Member state</td>
<td>4(5) A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement. [semi-discretionary]</td>
<td>documents</td>
</tr>
</tbody>
</table>

NB: Exception grounds that have moved from mandatory to discretionary, as well as new (arrangements for the application of) exception grounds have been italicised.
### Exception grounds under the various environmental and general access to documents regimes

<table>
<thead>
<tr>
<th>Directive</th>
<th>Decision 313/90 (access to environmental information at member state level, article 3(2))</th>
<th>Aarhus Convention, article 4(4)</th>
<th>Directive 4/2003, article 4(2)</th>
<th>Regulation 1049/01, article 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>- the confidentiality of the proceedings of public authorities, international relations and national defence [discretionary]</td>
<td>(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for by national law [discretionary]</td>
<td>(a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law [discretionary]</td>
<td>(3) Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process [discretionary]</td>
</tr>
<tr>
<td>1998</td>
<td>- to protect the confidentiality of the Council's proceedings [discretionary]</td>
<td>(b) International relations, national defence or public security [discretionary]</td>
<td>(b) international relations, public security or national defence [discretionary]</td>
<td>(3) (partial) the protection of: — public security, — defence and military matters, — international relations [mandatory]</td>
</tr>
<tr>
<td>2001</td>
<td>- (g) The protection of the environment where such confidentiality is provided for by law [discretionary]</td>
<td>(c) The course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature [discretionary]</td>
<td>(c) the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature [discretionary]</td>
<td>(2) (partial) the protection of: — court proceedings and legal advice, — the purpose of inspections, investigations and audits [discretionary]</td>
</tr>
<tr>
<td>2006</td>
<td>- (h) the protection of the environment to which such confidentiality relates, such as the breeding sites of rare species [discretionary]</td>
<td>(d) The confidentiality of commercial or industrial information where such confidentiality is protected for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy [discretionary]</td>
<td>(d) the confidentiality of commercial or industrial information where such confidentiality is protected for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy [discretionary]</td>
<td>(2) (partial) the protection of: — commercial interests of a natural or legal person, including intellectual property [partial] [discretionary]</td>
</tr>
<tr>
<td>2003</td>
<td>- (e) Intellectual property rights [discretionary]</td>
<td>(e) Intellectual property rights [discretionary]</td>
<td>(e) intellectual property rights [discretionary]</td>
<td></td>
</tr>
<tr>
<td>2006</td>
<td>- (f) The confidentiality of personal data and/or files [discretionary]</td>
<td>(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law [discretionary]</td>
<td>(f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law [discretionary]</td>
<td>(1) (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data [mandatory]</td>
</tr>
<tr>
<td>2006</td>
<td>- (g) The information relates, such as the breeding sites of rare species [discretionary]</td>
<td>(g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned [discretionary]</td>
<td>(g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned [discretionary]</td>
<td>As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed [semi-discretionary]</td>
</tr>
<tr>
<td>2006</td>
<td>- (h) The environment to which the information relates, such as the location of rare species [discretionary]</td>
<td>(h) the protection of the environment to which such information relates, such as the location of rare species [discretionary]</td>
<td>(h) the protection of the environment to which such information relates, such as the location of rare species [discretionary]</td>
<td></td>
</tr>
<tr>
<td>2006</td>
<td>- the protection of the Community's financial interests [mandatory]</td>
<td>-</td>
<td>-</td>
<td>(1)(a) (partial) — the financial, monetary or economic policy of the Community or a Member State [mandatory]</td>
</tr>
</tbody>
</table>
Appendix 6: Indicators of member state involvement

Dominant member states in Council access to documents policy, 1992-2014

<table>
<thead>
<tr>
<th></th>
<th>Court intervention (litigation)*</th>
<th>Countervotes in confirmatory application decisions **</th>
<th>Statements attached to confirmatory application decisions **</th>
<th>Central presidencies***</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>I</td>
<td>II</td>
<td>I</td>
<td>II</td>
</tr>
<tr>
<td>Denmark</td>
<td>2</td>
<td>4</td>
<td>42.4%</td>
<td>24.8%</td>
</tr>
<tr>
<td>Sweden</td>
<td>3</td>
<td>3(1)</td>
<td>28.1%</td>
<td>35.2%</td>
</tr>
<tr>
<td>Finland</td>
<td>1</td>
<td>3</td>
<td>14.3%</td>
<td>27.6%</td>
</tr>
<tr>
<td>Netherlands</td>
<td>2(2)</td>
<td>3</td>
<td>13.3%</td>
<td>11.7%</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>1</td>
<td>5</td>
<td>12.3%</td>
<td>0.7%</td>
</tr>
<tr>
<td>France</td>
<td>3</td>
<td>2</td>
<td>2.0%</td>
<td>2.8%</td>
</tr>
</tbody>
</table>

Data compiled by the author. I/II represent respectively the period before and after entry into force of Regulation 1049/01. * Out of a total of 10 court cases (period I) and 22 court cases (period II). ** % of total, 203 confirmatory applications (period I) and 145 confirmatory applications (period II). *** Presidencies in which important legal or political texts were adopted.

Member state attitudes and voting weight in environmental policy, 1990s

<table>
<thead>
<tr>
<th>Progressive</th>
<th>Centre</th>
<th>Conservative</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denmark</td>
<td>Austria</td>
<td>Greece</td>
</tr>
<tr>
<td>Finland</td>
<td>Belgium</td>
<td>Italy</td>
</tr>
<tr>
<td>Germany</td>
<td>France</td>
<td>Portugal</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Ireland</td>
<td>Spain</td>
</tr>
<tr>
<td>Sweden</td>
<td>Luxemburg</td>
<td></td>
</tr>
<tr>
<td>United Kingdom</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Name</th>
<th>Member states (#)</th>
<th>Activity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Green Growth Group</td>
<td>Belgium, Denmark,</td>
<td>Common positions, publications</td>
</tr>
<tr>
<td></td>
<td>Estonia, Finland,</td>
<td></td>
</tr>
<tr>
<td></td>
<td>France, Germany,</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Italy, Netherlands,</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Portugal, Slovenia,</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Spain, Sweden, United Kingdom (13)</td>
<td></td>
</tr>
<tr>
<td>Visegrad Group</td>
<td>Czech Republic, Hungary, Poland, Slovakia (4)</td>
<td>Common positions, legislative interventions</td>
</tr>
<tr>
<td></td>
<td>Denmark, Finland, Sweden (3)</td>
<td>Court interventions</td>
</tr>
</tbody>
</table>

Sources: GC, case T-29/08; GC, court order T-452/10; CJEU, court order C-573/11 P; Green Growth Group (2013, 2014); Visegrad Group (2009); respondents #11, #53
### Waning member state involvement in access to FAC documents policy, 1992-2014

<table>
<thead>
<tr>
<th></th>
<th>Court intervention *</th>
<th>Countervotes in confirmatory application decisions **</th>
<th>Statements attached to confirmatory application decisions **</th>
<th>Central presidencies***</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>I</td>
<td>II</td>
<td>I</td>
<td>II</td>
</tr>
<tr>
<td>Denmark</td>
<td>1 (+)</td>
<td>-</td>
<td>58%</td>
<td>8%</td>
</tr>
<tr>
<td>Finland</td>
<td>1 (+)</td>
<td>-</td>
<td>15%</td>
<td>6%</td>
</tr>
<tr>
<td>France</td>
<td>1 (-)</td>
<td>-</td>
<td>-</td>
<td>2%</td>
</tr>
<tr>
<td>Netherlands</td>
<td>-</td>
<td>-</td>
<td>15%</td>
<td>-</td>
</tr>
<tr>
<td>Spain</td>
<td>1 (-)</td>
<td>-</td>
<td>4%</td>
<td>2%</td>
</tr>
<tr>
<td>Sweden</td>
<td>1 (+)</td>
<td>-</td>
<td>31%</td>
<td>14%</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>1 (+)</td>
<td>-</td>
<td>23%</td>
<td>-</td>
</tr>
</tbody>
</table>

Data compiled by the author. I/II represent respectively the period before and after entry into force of Regulation 1049/01. * Out of a total of 3 court cases (period I) and 9 court cases (period II). (+) indicates intervention on applicant’s side, (-) on Council’s side. ** % of total, 203 confirmatory applications (period I) and 145 confirmatory applications (period II). *** Presidencies in which important legal or political texts were adopted.
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Respondent #36 (2015), email correspondence of 25 March 2015
Levende transparantie. De ontwikkeling van toegang tot documenten in de Raad van de EU en haar democratische implicaties

Hoofdstuk 1: De democratische belofte van transparantie

Binnen en rondom de Raad van de Europese Unie is iedereen het eens over de noodzaak van transparantie voor zijn democratisch functioneren. Vijfentwintig jaar na de introductie van een transparantiebeleid blijft de transparantiediscussie echter sterk verdeeld. Verschillende kanten zijn het oneens over de mate van transparantie die is bereikt. Eén vertoog, dat van ‘voortschrijdende transparantie’, concludeert dat de transparantie van de Raad aanzienlijk is verbeterd en grofweg voldoet aan democratische vereisten. Volgens dit vertoog maakt deze ontwikkeling onderdeel uit van een mondiale ‘transparantiegolf’ die in openbare besluitvormingsorganen over de hele wereld de openheid van besluitvormingsprocessen heeft verbeterd. Een tweede vertoog, dat van de ‘gevangen transparantie’, trekt dit narratief in twijfel. Dit vertoog is van mening dat de introductie van transparantie in de Raad grotendeels retorisch, vaak gefrustreerd, en daarmee sterk gefragmenteerd heeft plaatsgevonden. Beide vertogen worden ondersteund door beredeneerd bewijs. Dit bewijs is evenwel anekdotisch van aard en daarom niet doorslaggevend. Deze dissertatie stelt zich tot doel om de institutionele factoren die aan de ontwikkeling van het transparantiebeleid van de Raad ten grondslag liggen nader te beschouwen en daarmee vast te stellen welke van deze vertogen het bij het juiste eind heeft. Daarbij staat de volgende vraagstelling centraal:

Hoe hebben institutionele factoren de ontwikkeling van het transparantiebeleid van de Raad van de EU sinds zijn invoering in 1992 beïnvloed, en hoe dient dit beleid te worden geduid in het licht van zijn doel om de democratie in de Raad te versterken?

Uit deze vraagstelling spreekt het doel van deze studie om de aan het Raadstransparantiebeleid gerelateerde empirische en normatieve vraagstukken met elkaar te verbinden. In het bijzonder beoogt de studie om een antwoord te vinden op drie hiaten in de literatuur. Allereerst dient anekdotisch bewijs te worden vervangen door een gedetailleerde verkennig van veronderstelde causale mechanismen. Ten tweede beoogt de studie om selectieve bewijsvoering ter ondersteuning van een vooropgestelde positie te ontwikkelen door middel van diepgravend vergelijkend onderzoek van de ontwikkeling van transparantie door de Raad heen. Ten derde brengt de studie structuur aan in het verdeeld normatieve debat over Raadstransparantie door een concreet en gedetailleerd normatief kader te ontwikkelen dat te gebruiken is voor de evaluatie van de democratische rol die transparantie speelt binnen de Raadscontext. De dissertatie maakt gebruik van een multidisciplinaire aanpak waarin inzichten uit zowel het recht en de sociale wetenschappen worden toegepast op verscheidene bronnen. Vele van deze bronnen zijn voor deze studie voor het eerst verzameld en geanalyseerd. Er wordt gebruik gemaakt van een nieuw, gelaagd concept van overheidstransparantie. Dit concept draagt ertoe bij om transparantie-versterkend en -

**Deel I: Concepten and theorie**

**Hoofdstuk 2: Tussen droom en daad**

Door de jaren is het concept van transparantie in toenemende mate populair geworden en het roept sterke reacties op. De diverse manieren waarop het begrip wordt gebruikt leidt echter ook gemakkelijk tot misverstanden. Deze studie maakt een onderscheid tussen transparantie als een waarde (een ‘droom’) en als een beleid (een ‘daad’). De eerste is normatief van aard en richt zich tot transparantie in een geïdealiseerde vorm; de tweede betreft de empirische manifestatie van transparantie. Deze studie beoogt deze twee perspectieven op transparantie bij elkaar te brengen en daarmee het ‘normatieve realisme’ van het Raadstransparantiedebat te verhogen. Als een overheidswaarde sluit transparantie aan bij verscheidene andere publieke waarden. Zulke verbindingen kunnen worden geconceptualiseerd als clusters van synergetische waarden. In deze studie wordt transparantie geanalyseerd als een onderdeel van het democratische waardencluster. Binnen dit cluster ondersteunt het de waarden van wilformatie, participatie en verantwoording. Als overheidsbeleid bestaat transparantie uit verschillende soorten van formele regels die in de praktijk worden geïmplementeerd en waaromheen zich doorgaans regelversterkende of –verzwakkende informele normen ontwikkelen. Deze studie richt zich op toegang tot documenten als het centrale beleidskader van de Raad om transparantie te creëren.

**Hoofdstuk 3: Transparantie voor democratie: een normatief kader**

In overeenstemming met een in de EU-context veelgehoorde vooronderstelling is transparantie noodzakelijk om democratie in de Raad te versterken. De precieze manier waarop deze normatieve relatie functioneert blijft echter object van contestatie. De betekenis van democratie is terug te leiden tot zijn Oudgriekse wortels, waar het verwijst naar ‘volksbestuur’. Men kan spreken van democratisch bestuur wanneer een overheid regeert in naam van het volk (polis-legitimiteit), in hun gezamelijke belang (output-legitimiteit) en met hun inspraak (input-legitimiteit). Bij elk van deze legitimiteitsvormen vormt transparantie een vereiste. Europese constitutionele teksten zetten uiteen hoe democratische legitimiteit dient te worden ingebed in de institutionele context van de EU of, specifieker, van de Raad. Ze schrijven zowel representatieve als participatieve democratische modellen voor, die worden gedragen door regulmatige verkiezingen, publiek debat, en een vorm van burgerparticipatie. De transparantie binnen deze voorzieningen wordt gegarandeerd door democratische processen van wilformatie, participatie en verantwoording. Elk van deze processen vereist een specifieke vorm van transparantie van de Raad. Daarnaast is publiciteit (het ontvangen van overheidsinformatie door een extern publiek) vereist voor transparantie effectief kan zijn. De rol van transparantie binnen elk van de drie democratische processen kan worden vertaald.
naar vereisten in termen van toegang tot documenten. De tweeledigheid van de representatieve en participatieve modellen van de EU kan echter leiden tot zowel een eng als een breed perspectief op de Europese democratie. De keuze tussen deze twee perspectieven leidt weer tot verschillende vereisten in termen van toegang tot documenten. Aangezien het debat over enge en brede democratie nog lang niet beslecht is geeft dit hoofdstuk de toegang-tot-documentenvereisten voor democratische processen volgens beide perspectieven aan. De studie als geheel neemt de de minimis toegang-tot-documentenvereisten van het enge democratische perspectief als evaluatief uitgangspunt.

**Hoofdstuk 4: Het transparantiebeleid van de Raad: een verklarend kader**

Deze studie beschouwt transparantie als een levend beleid dat wordt gevormd in zijn institutionele context. In de Raadscontext bestaan verschillende empirische vertogen van de ontwikkeling van het toegang-tot-documentenbeleid. Aan de ene kant stelt de these van het ‘voortschrijdende transparantie-effect’ dat toegang tot documenten zich op een almaar groeiende, onweerstaanbare en onomkeerbare wijze heeft ontwikkeld. Aan de andere kant stelt de these van het ‘gevangen transparantie-effect’ dat toegang tot documenten grotendeels wordt gevormd door sector-specifieke factoren, en dat deze dynamiek leidt tot een gefragmenteerde ontwikkeling. Daarenboven neigt de eerste these ertoe om de factoren te benadrukken die transparantie-versterkend werken, terwijl de tweede these zich doorgaans juist richt op factoren die de ontwikkeling remmen. Deze studie neemt historisch institutionalisme als theoretisch uitgangspunt van waaruit de relatieve verklarende kracht van beide thesen wordt verkend. Op basis van de bestaande literatuur over transparantiebeleid wordt een verklarend kader ontwikkeld dat bestaat uit institutionele factoren die worden gecategoriseerd in actoren, preferenties en middelen waarvan vermoed wordt dat zij een invloed uitoefenen op de ontwikkeling van transparantiebeleid. Daarnaast kunnen institutionele factoren worden beïnvloed door exogene factoren die zich buiten de beleidscontext voordoen als gebeurtenissen of trends. Dit kader wordt vervolgens toegepast op de Raadscontext, waar verschillende mogelijke transparantie-versterkende en -remmende institutionele factoren worden geïdentificeerd. Hieruit komt naar voren dat de institutionele context van de Raad zowel door de tijd als langs beleidsterreinen dynamisch is, hetgeen suggereert dat de ontwikkeling van het toegang-tot-documentenbeleid van de Raad mogelijk gedifferentieerd heeft plaatsgevonden. Op basis van deze theoretische verkenning worden de thesen van het ‘voortschrijdende transparantie-effect’ en het ‘gevangen transparantie-effect’ nader uitgewerkt als contrasterende verklaringen. De studie beoogt de relatieve verklarende kracht van beide thesen te verkennen met betrekking tot de ontwikkeling van Raadstransparantie als een levend beleid.

**Deel II: Empirische analyse**

**Hoofdstuk 5: Onderzoeksdesign**

Op basis van het doel van deze studie om de langtermijns-ontwikkeling van het toegang-tot-documentenbeleid van de Raad waarbij gesteund wordt op relatief zwakke theoretische fundamenten wordt gekozen voor een longitudinaal interne en vergelijkende case study-
Nederlandse samenvatting


Hoofdstuk 6: Toegang tot documenten in de Raad: trends en vraagstukken

Dit hoofdstuk omvat de eerste fase van de empirische analyse. Het biedt een overzicht van de ontwikkeling van toegang tot documenten en de institutionele factoren die deze ontwikkeling op een algemeen Raadsniveau verklaren op basis van zowel bestaande literatuur en nieuwe data. De analyse toont een vrijwel ononderbroken toename van toegang tot documenten zowel op het niveau van formele regels als in de implementatie van deze regels. Dit wordt duidelijk geïllustreerd door de verandering van interne regels naar toegang-tot-documentenwetgeving, de introductie van een openbaar documentenregister en de daaropvolgende toename van proactieve openbaarmaking, en een corpus van jurisprudentie die het recht op toegang tot documenten breed, en uitzondering daarop eng interpreteert. Centrale actoren in deze analyse zijn de transparantiegezinde minderheid van Raadsleden en de Transparantie-eenheid van het Raadssecretariaat binnen de Raad, en daarbuiten het EP en de EU-gerechtshoven, ondersteund door de Europese Ombudsman en NGOs. Deze actoren pasten een verscheidenheid aan middelen toe om de traditionele preferentie voor diplomatiek georiënteerde beslotenheid binnen de Raad terug te dringen en om een breed, democratisch geïnspireerd toegang-tot-documentenbeleid te bevorderen. Daarin werden zij geholpen door een aantal exogene gebeurtenissen en trends waaronder de Deense verwerping van het Maastricht-referendum, de toetreding tot de EU van Finland en Zweden in 1995, en de toenemende mogelijkheden van IT. Deze analyse laat echter een aantal openstaande vragen onbeantwoord. Zoals is bijvoorbeeld de rol van bepaalde transparantiegezinde actoren in de Raadsbesluitvorming niet even groot door de hele Raad heen, terwijl van bepaalde sector-
specifieke actoren te verwachten valt dat ze juist transparantie-sceptisch zijn. De analyse is daarnaast vooral gericht op wetgevingstransparantie, terwijl sommige Raadsformaties zelden of nooit wetten aannemen. Dit zou op bepaalde beleidsterreinen kunnen leiden tot andere transparantiepreferenties en arrangementen. Tenslotte is valt niet uit te sluiten dat er buiten de door de analyse vermelde exogene factoren er nog andere, exogene factoren zijn opgetreden met een sector-specifieke invloed. Om vast te kunnen stellen hoe precies en correct het algemene verklarende kader van de ontwikkeling van het toegang-tot-documentenbeleid van de Raad is, dient zijn toepasbaarheid op verschillende beleidsterreinen te worden verkend. De studie doet dit in de tweede fase van het research design (hoofdstukken 7, 8 en 9), waarin het zwaartepunt wordt verlegd naar de invloed van sector-specifieke institutionele factoren in de ontwikkeling van het toegang-tot-documentenbeleid in drie Raadsformaties.

Hoofdstuk 7: Toegang tot documenten in de Milieuraad: de neergang van het corporatisme


Hoofdstuk 8: Toegang tot documenten in de Ecofinraad: de ongrijpbaarheid van informaliteit

De Raad voor Economische en Financiële Zaken (Ecofin) wordt hoofdzakelijk gekenmerkt door een tweedeling tussen financieel en belastingbeleid enerzijds en de Economische en Monetaire Unie (EMU) anderszijds. Terwijl het eerste zich voornamelijk richtte op het aannemen van wetten, hield het tweede zich bezig met de coördinatie van economisch beleid, waaronder de gemeenschappelijke munt die in 1997 het licht zag. Daartoe werd een complexe architectuur voor economisch governance opgetuigd dat bestond uit een toenemend aantal organen. Organen zoals het EFC, de EWG en de Eurogroep begonnen als ‘satellieten’ rond de Ecofinraad te draaien. Deze ‘satellietorganen’ functioneerden op basis van isolatie en (vaak…

**Hoofdstuk 9: Toegang tot documenten in de Raad voor Buitenlandse Zaken: een consensus van exceptionalisme**

een beperkte uitbreiding van de transparantie op het gebied van handelsbeleid tot resultaat, maar heeft ook geleid tot een terugslag onder lidstaten die vrezen voor de integriteit van hun geheime inlichtingen. In de nabije toekomst is het dan ook onwaarschijnlijk dat de relatief robuuste ‘exceptionalistische consensus’ van de Raad Buitenlandse Zaken zal kantelen.

**Deel III: Vergelijking and conclusie**

**Hoofdstuk 10: Toegang tot documenten door de casussen: uniformiteit of fragmentatie?**

Dit hoofdstuk vergelijkt de bevindingen van de empirische hoofdstukken. Centraal staat de vraag hoe de cases veranderden door de tijd en ten opzichte van elkaar, uitgaande van het idee dat dit gelijke dan wel op een verschillende manier kan zijn geweest. Buiten enkele basisonderzoeken ontwikkelden de cases zich door de tijd heen op een steeds verder uiteenlopende manier. Deze observatie heeft zowel betrekking op het regelgevend kader als op de interpretatie en implementatie daarvan. Door de tijd heen verkreeg de ontwikkeling van wetgevende transparantie voorrang. Deze ontwikkeling was verre van compleet, aangezien hij werd ingeperkt door de informele norm van consensus en de introductie van confidentiële trioloog-onderhandelingen met het EP. In de niet-wetgevende sfeer werd transparantie echter nog verder ingeperkt door formele en informele exceptionalistische regimes ten opzichte van toegang tot documenten. Het formele exceptionalistische regime bestond in de Raad Buitenlandse Zaken en, in mindere mate, in the Milieuraad. Het volgde het ‘executive privilege’ dat traditioneel op het nationaal niveau bestond en werd slechts zeer langzaam gevolgd door een parlementair informatie- en toezichtrecht voor het EP. In de EMU-tak van de Ecofinraad prevaleerde het informele exceptionalistische regime. Dit terrein kon niet steunen op een traditioneel executief privilege en trok zich derhalve terug in informele en geïsoleerde besluitvorming. Toen de financiële crisis uitbrak, raakten de informele organisaties van de Ecofinraad betrokken bij de voorbereiding van wetgeving, en begonnen leden overvloedig gevoelige informatie te lekken. Door de tijd heen bleef het toezicht van het EP pover. Minimale informatierechten werden pas jaren na aanvang van de crisis ingevoerd. Door de bank genomen verzwakte de niet-wetgevende transparantie mettertijd. De oorsprong van deze ontwikkeling ligt in de invoering, vanaf de laten jaren ’90, van een aantal nieuwe administratieve elite-actoren die paralele besluitvormingsketenen begonnen op te tuigen. Deze ontwikkeling vond plaats in de Raad Buitenlandse Zaken (GBVB) en in de Ecofinraad (EMU-‘satellietorganen’), maar niet in de Milieuraad. In deze laatste formatie nam de Raad zelfs deel aan een transparantie-versterkend instrument: het Verdrag van Aarhus. De informaliteit van de EMU-organen verklaart waarom de financiële crisis niet resulteerde in een sterke verslechtering van de openbaarmaking van documenten: documenten werden simpelweg niet geregistreerd. Dit was anders in de Raad Buitenlandse Zaken, waar de besluitvorming meer was geformaliseerd. In de periode na terroristische aanslagen van 9/11 op de Verenigde Staten bereikte de Raad Buitenlandse Zaken dan ook een ‘transparantieplafond’, hetgeen betekent dat wanneer het aantal geregistreerde documenten toenam, de openbaarmaking van deze documenten verhoudingsgewijs afnam. In conclusie vindt deze studie een gemengde ontwikkelingsdynamiek. Terwijl de ontwikkeling van wetgevende transparantie door de hele Raad heen een trend van ‘voortschrijdende transparantie’ volgde, was de ontwikkeling van niet-wetgevende transparantie meer
afhankelijk van het beleidsterrein. In de Milieuraad waren de institutionele factoren die ten grondslag lagen aan het transparantiebeleid voornamelijk transparantie-versterkend, terwijl in de Raad Buitenlandse Zaken en de Ecofinraad deze juist transparantie-remmend werkten.

**Hoofdstuk 11: Tussen institutionele realiteiten en democratische idealen**

Dit hoofdstuk beantwoordt de onderzoeksvraag, geeft aanbevelingen voor de verbetering van het toegang-tot-documentenbeleid van de Raad, en bespreekt de bijdrage van de studie aan de academische literatuur. De ontwikkeling van transparantie als een levend beleid was gefragmenteerd en nam deels toe en deels af. Wanneer de situatie in 1992 wordt vergeleken met die in 2014 is het duidelijk dat de transparantie van het wetgevingsproces door de hele Raad heen almaal groeiend, onweerstaanbaar en onomkeerbaar was. Dit in tegenstelling tot de sfeer van niet-wetgevende besluitvorming, waar de Raad steeds grotere ruimtes van geheimhouding creëerde in een proces dat grotendeels ‘onder de radar’ van het formele regelgevende kader plaatsvond. De scheidslijn tussen wetgevende en niet-wetgevende transparantie is echter niet waterdicht, maar wordt doorbroken door opvallende uitzonderingen. Deze uitzonderingen tonen de beperkte verklarende kracht van zowel de de these van het ‘voortschrijdende transparantie-effect’ als de these van het ‘gevangen transparantie-effect’. De normatieve evaluatie van het huidige toegang-tot-documentenbeleid van de Raad wordt gedenkmerkt door meerdere tekortkomingen die een nalatige houding van de Raad suggereren ten opzichte van de democratische kwesties. In zijn besluitvorming spreekt de Raad een voorkeur tentoon voor politiek vrij van contestatie. Hij probeert conflict buiten het blikveld van het brede publiek te houden, zoals wordt geïllustreerd door de norm van consensus. In de niet-wetgevende sfeer wordt contestatie binnen de Raad verder verborgen door gebrekkig parlementair toezicht en debat op het Europese niveau. De Raad zet geen steppen om participatie binnen zijn besluitvormingsproces te faciliteren. Participatie blijft dus beperkt tot nationale verkiezingen en enkele corporatistische consultatiestructuren die niet voldoen aan democratische standaarden. De Raad heeft de gewoonte om collectieve verantwoordelijkheid te nemen voor zijn besluiten. Hierdoor is het moeilijk voor buitenstaanders om de precieze inbreng van individuele leden te ontwaren, en daarmee, om hun vertegenwoordigers verantwoordelijk te houden. Tekortkomingen in de verantwoording worden verergerd door het feit dat besluiten op het Europese niveau soms slechts worden gekoppeld aan nationale verantwoordingsstructuren. Verantwoordingsproblemen treden verder op waar het executieve privilege leidt tot een ‘opeenstapeling’ van transparantie-exceptionalismes dat onvoldoende wordt ondervangen door parlementair toezicht op het Europese niveau. Op basis van de bevindingen van deze studie wordt een aantal aanbevelingen gedaan die zijn verdeeld in maatregelen ter verwijdering van bestuurlijke en psychologische barrières in de wetgevende sfeer, en stappen die moeten leiden tot een striktere toepassing van de letter en de geest van de wet in de niet-wetgevende sfeer. De studie draagt ook bij aan de academische literatuur over respectievelijk overheidstransparantie en executief intergouvernementalisme in en buiten de Raad. Met betrekking tot de eerste literatuur ontkracht deze studie beweringen dat transparantie ‘doorgeschoft is’. In de Raad is transparantie voornamelijk toegenomen op het terrein waar het normatief het makkelijkst is te rechtvaardigen, namelijk in de wetgevingsprocedure. In niet-wetgevende besluitvorming, het terrain waarop transparantiecritici doorgaans hun aandacht richten, is de ontwikkeling van transparantie juist aanzienlijk beperkter. Met betrekking tot de tweede literatuur nuanceren de
bevindingen van deze studie de kennelijk relatie tussen verregaande geslotenheid en geheimhouding en executief intergouvernmentalisme. Alhoewel niet-wetgevende besluitvorming duidelijk wordt gekenmerkt door transparantievermijding zijn er ook tekenen van beperkte verbetering. Daarenboven bestaat er ook uiteengebreide geslotenheid binnen typisch ‘supranationale’ procedures en organen, zoals de gewone wetgevingsprocedure en de Commissie. Dit geeft weer dat de onderbroken toename van EU-transparantie niet zonder meer kan worden beschouwd als een product van ‘nieuw intergouvernmentalisme’. Dit proefschrift eindigt met een voorzichtig optimistische toon. De verspreiding van transparantie voor democratie vereist ‘normatief realisme’, wat inhoudt dat zowel sceptici en voorstanders van transparantie hun vooroordelen over Raadsbesluitvorming dienen los te laten. Hoewel transparantie nog een lange weg te gaan heeft om te kunnen voldoen aan haar democratische belofte laat deze studie zien dat verandering wel mogelijk is. Door middel van geïnformeerde en nauwgezette interventies hebben actoren op verschillende momenten transparantie voor democratie weten te verbeteren op manieren die zelfs de machtigste actoren hadden te accepteren. Er is geen reden waar wij niet zouden pogen om voor te schrijden langs dit pad.
English summary

Living Transparency. The Development of Access to Documents in the Council of the EU and Its Democratic Implications

Chapter 1: The Democratic Promise of Transparency
In and around the Council of the European Union all agree on the need for transparency in order for it to function democratically. Twenty-five years after the introduction of a transparency policy however, the discussion on transparency remains deeply divided. Different sides disagree about the extent to which transparency has in fact been achieved. One account, that of ‘advancing transparency’, holds that Council transparency has increased considerably and approximates democratic standards. It holds that this development forms part of a global ‘transparency wave’ in which public bodies all over the world improved the openness of their decision-making processes. A second account, that of ‘captured transparency’, casts doubt on this narrative. It argues that the introduction of Council transparency has been largely rhetorical, often obstructed and consequently, fragmented. Both accounts are supported by reasoned evidence, yet this evidence is anecdotal and therefore inconclusive. This dissertation sets out to examine the institutional factors underlying the development of Council transparency policy in order to discover which account is correct. It does so on the basis of the following research question:

How have institutional factors influenced the development of a transparency policy in the Council of the EU since its inception in 1992, and how should this policy be evaluated in the light of its aim to strengthen democracy in the Council?

The research question manifests the study’s aim of connecting empirical and normative issues related to Council transparency policy. In particular, the study wants to address three gaps in the literature. First, it replaces anecdotal evidence by a detailed exploration of presupposed causal mechanisms. Second, it controls for cherry-picking of the evidence through in-depth comparison of the development of transparency across the Council. Third, it structures the divided normative debate about Council transparency by developing a concrete and detailed normative framework fit for evaluation of the democratic role of transparency in the Council context. The dissertation employs a multidisciplinary approach that applies insights from law and the social sciences to various data sources, many of which are newly collected and analysed. It builds on a novel, layered concept of government transparency which helps to lay bare transparency-advancing and transparency-interrupting factors and their relation to the Council’s modes of governance and the democratic deficit. From the new insights that this yields, the study draws concrete recommendations for improvement of existing policy. The study views Council transparency as a ‘living’ policy that is shaped by, and developed in its institutional context.
**Part I: Concepts and Theory**

**Chapter 2: Between Dream and Deed**

The concept of transparency has over the years become increasingly popular and elicits strong reactions. The diverse ways in which it is used also easily leads to misunderstandings. This study distinguishes between transparency as a value (a ‘dream’) and as a policy (a ‘deed’). The former is normatively oriented and focuses on transparency in an idealised form; the latter is concerned with the empirical manifestation of transparency. This study attempts to connect these two perspectives of transparency in order to enhance the ‘normative realism’ of the Council transparency debate. Transparency as a government value connects to various other public values. Such connections can be conceptualised as clusters of synergistic values. In this study, transparency is analysed as part of a cluster of democratic values, where it supports the values of will formation, participation, and accountability. Transparency as a government policy consists of various kinds of formal rules that are implemented in practice, and around which rule-strengthening or rule-weakening informal norms tend to develop. This study centres around access to documents as the Council’s central policy framework to create transparency.

**Chapter 3: Transparency for Democracy: A Normative Framework**

According to a common claim in the EU context, transparency is needed to strengthen democracy in the Council. The precise way in which this normative relation functions remains subject to contestation. The meaning of democracy is traced back to its Greek roots, where it refers to ‘people rule’. Democracy can be said to exist where government rules in name of the people (polity legitimacy), in their common interest (output legitimacy), and with their involvement (input legitimacy). In each of these instances, transparency forms a requirement for democratic legitimacy. European constitutional texts elaborate how democratic legitimacy is intended to be embedded in the EU’s, and more specifically, the Council’s institutional context. They propound both representative and participatory democratic models, which are supported by regular elections, public debate, and a modicum of citizen participation. The transparency in these provisions is guaranteed through democratic processes of will formation, participation and accountability. Each of these processes requires the Council to offer specific forms of transparency. Moreover, publicity (the reception of government information by an external public) is required for transparency to become effective. The role of transparency in each of the three democratic processes may be translated into requirements in terms of access to documents. However, the EU’s dual representative and participatory democratic models may give rise to both a narrow and a broad perspective of European democracy, which in turn lead to differing requirements for the level of access to documents. As the debate on narrow and broad democracy is still far from settled, this chapter enumerates in turn the requirements for democratic processes as understood by both perspectives, while the study as a whole takes the *de minimis* access to documents criteria of the narrow democratic perspective as its evaluative standard.
Chapter 4: Council Transparency Policy: An Explanatory Framework

This study views transparency as a living policy that is shaped in its institutional context. In the Council context, empirical accounts of the development of access to documents policy differ. On the one hand, the ‘advancing transparency effect’ thesis holds that it developed in an ever-increasing, irresistible and irreversible manner. On the other hand, the ‘captured transparency effect’ thesis holds that access to documents policy is largely shaped by sector-specific factors, a development dynamic which leads to a fragmented development. Moreover, whereas the former thesis tends to highlight the factors conducive to the advance of transparency, the latter generally focuses on factors that obstruct its development. This study takes historical institutionalism as the theoretical starting point from which the relative explanatory power of both accounts is explored. On the basis of the existing literature on transparency policies, an explanatory framework is developed that consists of institutional factors that are categorised into actors, preferences and resources that are likely to impact on the development of transparency policy. Furthermore, constellations of institutional factors may be influenced by exogenous factors which occur outside of the policy context as events or trends. This framework is then applied to the Council context, where several transparency-enabling and -constraining institutional factors are identified. As emerges, the institutional context of the Council is both dynamic over time and across policy areas that suggest the potentially differentiated development of Council access to documents policy. On the basis of this theoretical exploration, the ‘advancing transparency effect’ thesis and the ‘captured transparency effect’ thesis are set out as two contrasting explanations. This study seeks to explore the relative merits of both accounts for explaining the development of Council transparency as a living policy.

Part II: Empirical Analysis

Chapter 5: Research Design

On the basis of the study’s aim to study the long-term development of Council access to documents policy relying on relatively weakly developed theoretical foundations, a choice is made for a longitudinal within- and comparative case study design. On the basis of the theoretical framework, Council policy areas, operationalised as formal Council formations, are defined as cases. Three cases are selected following a most different case design, on the basis of three constitutional selection criteria that are considered to be of particular influence for potentially relevant institutional factors. The selected cases, the Environment Council, the Economic and Financial Council, and the Foreign Affairs Council are believed to make up a varied set representing respectively a ‘communitised’, ‘hybrid’ and ‘intergovernmentally oriented’ decision-making mode. The development of access to documents policy and its antecedents are studied on the basis of four types of data sources: rule-setting and policy documents related to access to documents in various Council formations, judicial proceedings concerning access to documents requests, 68 interviews with policy makers and inside and outside of the Council from four different policy areas, and quantitative data related to access to documents and relevant Council characteristics. These data are analysed in a multidisciplinary manner, combining mostly qualitative methods of interpretation from both
legal scholarship and the social sciences. Many of the data are newly collected and/or analysed. The within- and cross-case analysis is structured in three stages that are each guided by specific empirical research questions. At the first two stages, respectively the development of access to documents policy at respectively a general and a case-specific level are analysed over a period of 23 years (1992-2014) using within-case process tracing. At the third stage, findings of the three case studies are compared with each other and with the general account.

Chapter 6: Access to Documents in the Council: Trends and Puzzles

This chapter comprises the first stage of the empirical analysis. It provides an overview of the development of access to documents and the institutional factors explaining this development at the general Council level on the basis of existing literature and new data. The analysis shows a nearly uninterrupted advance of access to documents both at the level of formal rules and their implementation. This is notably evidenced by the move from internal rules to formal access legislation, the introduction of an public document register and subsequent rise in proactive disclosure, and a line of case law interpreting the right of access widely and exception to this right narrowly. Central actors in this account are a transparency-favouring minority of Council members and the Transparency Unit of the Council secretariat inside the Council, as well as the EP and the EU courts, supported by the European Ombudsman and NGOs as outside of it. These actors employed a variety of resources in order to fight back the Council’s traditional preference for diplomacy-based confidentiality and to advance their preference of a broad, democratically inspired access to documents policy. In doing so, they were helped by a number of exogenous events and trends such as the Danish no-vote in the Maastricht referendum, the 1995 accession of Finland and Sweden, and the growing possibilities of IT. This account however leaves a number of outstanding questions to be answered. For example, the role of several transparency-enhancing actors in Council decision making is not powerful across all policy areas, while certain sector-specific actors would be expected to be rather transparency-sceptic. The general account furthermore focuses particularly on legislative transparency, while some Council policy areas are hardly or never concerned with legislative decision making. This might result in alternative transparency preferences and arrangements in specific policy areas. Finally, while the account highlighted certain generalisable exogenous factors, it cannot exclude that other exogenous factors occurred that impacted only specific policy areas. In order to establish the precision and accuracy of the general explanatory account of the development Council access to documents policy, its applicability must thus explored in specific policy areas. The study does this in the second stage of the research design (chapters 7, 8 and 9), in which the focus is shifted to the role of policy-specific institutional factors in shaping the development of access to documents policy in three Council formations.

Chapter 7: Access to Documents in the Environment Council: The Decline of Corporatism

The Environment Council (EnvCo) has historically emerged as an intrinsic part of the ‘community method’. From the early years of the access to documents policy, environmental non-governmental organisations (ENGOs) were closely connected to the EnvCo’s decision-making process through a corporatist system of privileged access at the national level. Parallel to this, the idea of transparent decision making enjoyed relatively broad support among member states. As a consequence, the access rules were generously implemented but used
relatively little. In 1998, the EU signed up to an external access to environmental information regime, the Aarhus Convention; it was subsequently implemented in 2006. This _lex specialis_, which went beyond the general access to documents regime, demonstrated a certain sector-specific predisposition to transparency in the EnvCo. These transparency-enabling factors however were not unlimited. Particularly after the EP assumed a larger role in the legislative process, and after the EU enlargement, EnvCo decision making turned towards efficiency-enhancing measures that limited informal access to documents, such as frequent confidential trilogue negotiations and the extensive use of limite documents. This development increasingly put the former corporatist system of privileged access under pressure, which led ENGOs to diversify their information strategies. Although reliance on the formal access regime increased, it was not able to replace the corporatist system. As a consequence of this halfway house, the past years have witnessed an intensification of document leaks.

Chapter 8: Access to Documents in the Ecofin Council: The Elusiveness of Informality

The Economic and Financial Affairs (Ecofin) Council is predominantly characterised by the bifurcation between financial and tax policy on the one hand, and Economic and Monetary Union (EMU) on the other. While the former was geared towards the adoption of legislation, the latter was concerned with the coordination of economic policies, eventually around the common currency which was brought into life in 1997. To this end, a complex economic governance architecture consisting of a growing number of bodies was built up. Bodies such as the EFC, the EWG and the Eurogroup, began to revolve around the Ecofin Council like ‘satellites’. These ‘satellite’ bodies operated under extensive insulation and (often informal) norms of confidentiality, and were facilitated by elite officials with their own secretariat and idiosyncratic document management system. The ‘authorship rule’ in Decision 731/93 ensured that these bodies’ documents remained beyond the scope of the Council’s access regime. After Regulation 1049/01 entered into force, while access to documents in the legislative branch of the Ecofin Council made a notable advance, the EMU bodies continued to avoid the access regime through the far-reaching institutionalisation of informality. Throughout, this process enjoyed broad support among the member states, and it culminated in a formal protocol, attached to the Lisbon Treaty, which described the Eurogroup as an informal body. The EMU decision-making system was severely tested when the financial crisis erupted. In response, the Ecofin and Eurozone ministers stepped up the system of insulated and informal decision making, which on multiple occasions let to the encroachment of the EMU ‘satellite’ bodies into Ecofin prerogatives, including the drafting and negotiation of legislation. Throughout, neither the EP nor the EU courts played a significant role in the development of access to documents in this area. Whether Ecofin decision making post-crisis will steer towards normalised standards of public and parliamentary access to documents, or will instead linger in elusive informality, remains as of yet uncertain.

Chapter 9: Access to Documents in the Foreign Affairs Council: An Exceptionalist Consensus

The Foreign Affairs Council (FAC) is marked by a broad consensus on the ‘exceptional’ nature of its decision making, according to which access to documents must necessarily be limited due to the ‘executive prerogative’ in foreign policy. At first sight, the FAC may thus seem a case that ‘simply does not fit’ very well with transparency. Upon closer inspection however, significant differences are found on the legal implications of FAC exceptionalism,
particularly with regard to the envisaged interaction between the classification rules and the access rules. When the newly developing Common Foreign and Security Policy (CFSP) obtained its own High Representative in 1999, the conflict between the traditional Council transparency minority and the Council majority accelerated. A proposal by High Representative Solana to place classified documents outside of the access regime was adopted by the FAC, overruling the transparency minority. When the EP intervened, classified documents were once again brought back under the access rules, albeit subject to security rules laid down in a separate decision. This largely settled the internal transparency discussion and paved the way for the subsequent entrenchment of the secrecy regime. Strictly controlled disclosure practices eventually led access to documents in the FAC to hit a ‘ceiling’. The EU courts exercised a largely facilitating role in these developments. In a number judgments, they acted as a moderate corrective against undue secrecy, remaining however broadly deferential towards the FAC’s discretionary space to decide on exceptions to transparency. In recent years, the ‘exceptionalist consensus’ has come under renewed scrutiny by critical outsiders including MEPs and civil society groups. This has resulted in limited transparency advances in the area of trade policy, but has also led to a backlash of member states anxious to protect their intelligence. For the foreseeable future, the relatively robust ‘exceptionalist consensus’ in the FAC’s access to documents policy is therefore unlikely to be overturned.

**Part III: Comparison and Conclusion**

**Chapter 10: Access to Documents Across the Cases: Uniformity or Fragmentation?**

This chapter compares the findings of the empirical chapters. Central is the question how the cases changed over time and with respect to each other, where the development of access to documents policy could either have taken place in a similar or different manner. Beyond certain basic similarities, the cases developed in an increasingly dissimilar over time, both with regard to the content of the rule framework governing access and its interpretation and implementation. Over time, the development of legislative transparency began to take precedence. The advance of transparency in the legislative sphere was far from complete, being limited by the informal norm of consensus and the introduction of confidential trilogue negotiations with the EP. Yet in the non-legislative sphere, transparency was considerably more obstructed, either by formal or informal exceptionalist regimes with regard to access to documents. The formal exceptionalist regime existed in the FAC and, to a lesser extent, in the EnvCo. It mimicked the ‘executive prerogative’ that traditionally existed at the national level, and was only very slowly caught up by a parliamentary right of information and oversight for the EP. In the Ecofin Council’s EMU branch, the informal exceptionalist regime prevailed. This area could not rely on a traditional executive prerogative and consequently retreated into informal and insulated decision making. When the financial crisis erupted, the Ecofin Council’s informal bodies became involved in the preparation of legislation and its members began leaking sensitive information profusely. Oversight by the EP remained poor throughout, with minimal information rights being introduced only years after the crisis had begun. Overall, transparency in the non-legislative sphere weakened over time. The origin of this trend lies in the introduction, from the late 1990s, of a number of new administrative elite actors that began to operate parallel decision-making chains. These developments
occurred in the FAC (CFSP) and the Ecofin Council (EMU ‘satellite’ bodies), but not in the EnvCo. In the latter formation, the Council even participated in joining a transparency-enhancing instrument: the Aarhus Convention. The informality of the EMU bodies explains why the financial crisis did not result in a strong drop in document disclosure: documents were simply not registered. This was different in the FAC, where decision making was more formalised. In the aftermath of the 9/11 attacks in the United States, the FAC hit a ‘transparency ceiling’, meaning that as document registration went up, the rate of disclosure actually declined. In sum, the study finds a mixed development dynamic. Whereas the development of legislative transparency followed a Council-wide trend of ‘advancing transparency’, non-legislative transparency developed in a more sector-specific manner. Namely, in the EnvCo institutional factors underlying non-legislative decision making were predominantly transparency-enhancing, whereas in the FAC and the Ecofin Council, they were predominantly transparency-undermining.

Chapter 11: Between Institutional Realities and Democratic Ideals
This chapter answers the research question, offers recommendations for improvement of the Council’s access to documents policy, and discusses the contribution of the study to academic research. The development of transparency as a living policy was fragmented and showed part advance, part retrogression. Comparing the situation in 1992 with that in 2014, it emerges that in legislative decision making, transparency was unmistakably increasing, irreversible, and irresistible across the Council. By contrast, in non-legislative decision making, the Council created ever-larger pockets of secrecy in a process that occurred largely ‘under the radar’ of the formal access framework. The delineation between legislative and non-legislative transparency paths is however not watertight, but punctuated by notable exceptions, which reveal the limited explanatory power of both the ‘advancing transparency effect’ thesis and the ‘captured transparency effect’ thesis. The normative evaluation of the Council’s current access to documents policy is marked by several shortcomings that suggest the Council’s negligent attitude towards democratic issues. In its decision making, the Council has a preference for politics without contestation. It seeks to keep conflict hidden from public view, as is exemplified by the norm of consensus. Moreover, in the non-legislative sphere, contestation within the Council is further obfuscated by insufficient parliamentary oversight and debate at the European level. The Council makes no efforts to facilitate participation in its decision-making process. Participation thus remains limited to national elections, and some corporatist-type consultations by member states that fail to satisfy democratic standards of transparency. The Council tends to take collective responsibility for its decisions, making it hard for outsiders to discern the specific input of individual members, and thus, to hold their representatives to account. Accountability gaps are exacerbated by the fact that decisions at the European level are sometimes matched only by national structures of accountability. Accountability problems also emerge where the executive prerogative leads to a ‘compound exceptionalism’ to transparency that is insufficiently matched by parliamentary oversight at the European level. On the basis of the study’s findings, a number of recommendations are made that are divided into measures to remove administrative and psychological barriers in the legislative sphere, and steps that should lead to a stricter adherence to the letter and the spirit of the law in the non-legislative sphere. The study also contributes to the academic literature on government transparency and on executive-driven
intergovernmentalism in and beyond the Council. In relation to the first literature, the study supports the view that calls that transparency ‘has gone too far’ are exaggerated. In the Council, transparency has mainly advanced in the area where it is normatively easiest to justify, namely in legislative decision making. In non-legislative decision making, which is the area that many transparency critics have focused on, transparency advanced considerably less. In relation to the second literature, the findings of the study nuance the perceived relation between far-reaching opacity and secrecy and executive-driven intergovernmentalism. While non-legislative decision making has certainly been marked by extensive transparency-evasion, there are also signs of limited improvement. Moreover, wide confidentiality also persist in typically supranational procedures and bodies, such as the ordinary legislative procedure and the Commission. This illustrates that the stunted advance of EU transparency cannot be predominantly seen as the product of ‘new intergovernmentalism’. This dissertation ends on a carefully optimistic note. The advance of transparency for democracy requires ‘normative realism’, which means that both sceptics and proponents of transparency must shed some of their prejudices regarding Council decision making. While transparency still has a long way to advance in order to live up to its democratic promise, this study has shown that change is also possible. Through informed and deliberate interventions, actors have on multiple occasions succeeded at improving transparency for democracy in ways that even the most powerful actors have had to accept. There is no reason why we should not endeavour to continue down this path.
About the Author

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From 2012 through 2016, he worked as a PhD researcher at the Amsterdam Centre for European Law and Governance at the University of Amsterdam. During this time, he taught courses in European law, acted a co-editor of the Centre’s blog and co-authored the Centre’s multi-annual strategic research plan. In 2015, he was a visiting fellow at the Laboratoire d’analyse de la gouvernance et de l’action publique (LAGAPE) at the University of Lausanne and the Centre for European Research at Gothenburg University (CERGU).

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