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Transparency in the EU Council of Ministers: An Institutional Analysis

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Abstract: *The development of access to documents and open meetings provisions by the Council of Ministers of the European Union shows an interesting pattern: before 1992 no formal transparency provisions existed, between 1992 and 2006 formal transparency provisions dramatically increased, and since 2006 this increase has come to a halt. This paper aims to enhance our understanding of these shifts by conducting a historical institutional analysis of policy change. As explanatory factors, we consider the preferences and power resources of Member States, as well as external catalysts and social structures. We conclude that the current revision deadlock is more stable than the situation before 1992 because now the pro-transparency coalition and transparency-sceptic Council majority have entrenched their positions. Nevertheless, and in spite of Council entrenchment, we expect that Council transparency will continue to develop in the longer term, under the pressure of increasingly influential outside actors, particularly the European Parliament.*

I Introduction

Before 1992, the Council of Ministers was known as a secretive, diplomacy-based, decision-making institution.¹ Sometimes, decisions remained wholly unpublicised, and citizens had no right of access to documents. Since then, a process of change was brought about in the Council's transparency policies, significantly expanding access to documents and meetings.² This resulted in the adoption in 2001 of Regulation 1049 on

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¹ D. Stasavage, 'Does Transparency Make a Difference? The Example of the European Council of Ministers', in Hood and Heald (eds) *Transparency: The Key to Better Governance?*, (Oxford University Press, 2006), at 166; L.J. Brinkhorst, 'Transparency in the European Union', (1999) 22 *Fordham International Law Journal* 128, 128, 132; D. Curtin and H. Meijers, 'The Principle of Open Government in Schengen and the European Union: Democratic Retrogression?' (1995) 32 *Common Market Law Review* 391, 392–393.

² D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (Oxford University Press, 2009), at 217.

the public's right of access to documents, both administrative and legislative, and caused an 'inexorable rise' of documentary transparency.^{3,4} The increase in Council transparency was presented as a necessary development to balance the Council's growing role as a supranational legislative and executive power.

In the light of its pre-1992 track record of secrecy, the 'transparency shift' that took place in the Council is remarkable. At the date of its introduction, most Member States had hardly any experience and little affinity with transparency. Today, the Council has arguably become more transparent than many of its Member States. Given the diplomatic culture that traditionally characterised the Council, and the reluctance of Member States to open up its deliberations, the question of how this important development can be explained remains to be answered.

In recent years, however, a retrenchment has taken place in the Council. This began in 2007 when the Commission investigated the possibilities to revise Regulation 1049/2001, and culminated in 2008 in the strategic choice to follow a so-called recast procedure. This procedure is designed to avoid the proliferation of isolated amending acts, and allows for the repeal and replacement of the entire legal act. The choice of this legislative technique for a regulation that has never been amended since its adoption is remarkable from a legal point of view; arguably, it was chosen by the Commission to limit the ambitious revision plans foreseen by the European Parliament (EP) in particular.

Being 'far from a "marginal" political dossier,' the recast of Regulation 1049/2001 has attracted considerable political attention.⁵ With the coming into force of the Lisbon Treaty, a central objective of the ongoing revision procedure has become to align the regulation with its requirements;⁶ however, certain Member States have used it to re-evaluate the status quo and to advocate a revised law that gives greater weight to other values, such as privacy and effective decision making. A Council minority, led by Sweden, does not tolerate a reform outcome that 'rolls back' the existing arrangements.⁷ With two groups of Member States advocating change in opposite directions, the process has stagnated and eventually led to a deadlock. An attempt by

³ F. Maiani, J.P. Pasquier and M. Villeneuve, '“Less Is More”? The Commission Proposal on Access to Documents and the Proper Limits of Transparency', (2011) IDHEAP Working Paper, 4–7.

⁴ This is not to argue that today Council transparency has become comprehensive. However, a wide consensus exists in the literature that it has increased considerably between 1992 and today, cf G.J. Brandsma, 'Hidden Parliamentary Power: Informal Information-Sharing between EU Institutions from Agenda-Setting to Execution', (2011) paper presented at the UACES conference, 7 September 2011, Cambridge; P. Settembri, 'Transparency and the EU Legislator: “Let He Who Is Without Sin Cast the First Stone”', (2005) 43 *Journal of Common Market Studies* 637, 651; S. van Bijsterveld, 'Transparency in the European Union: A Crucial Link in Shaping the New Social Contract between the Citizen and the EU', (2004) *Transparency in Europe II, Proceedings of Conference Hosted by the Netherlands during its Chairmanship of the EU Council*, 25 and 26 November 2004, 17, 27.

⁵ T. Heremans, 'Public Access to Documents: Jurisprudence between Principle and Practice (Between Jurisprudence and Recast)', (2011) Egmont Royal Institute for International Relations Working Paper 50, 3; Maiani *et al.* n 4 *supra*, 6–7; I. Harden, 'The Revision of Regulation 1049/2001 on Public Access to Documents', (2009) 15(2) *European Public Law* 239.

⁶ T. Heremans, *ibid.*, at 11.

⁷ Wobbing Europe (2008), 'EU: Swedish government announces fight against rolling back of EU-wob', <http://www.wobsite.be/news/eu-swedish-government-announces-fight-against-rolling-back-eu-wob>, 20 May 2008 (accessed 26 September 2010).

the 2012 Danish presidency to reconcile the two positions was defeated by vocal opposition from the pro-transparent Member States.

The development over time of Council transparency policies *vis-à-vis* the public can be divided into three periods: no transparency rights before 1992, increasing transparency rights between 1992 and 2006, and a deadlock in the period thereafter. This evolution from a stable situation of formal secrecy to an increase in access to documents and then back to stasis raises a number of questions. Why was transparency not an issue before 1992? Why did the Council, against many odds, transform itself from a largely secretive institution into a more transparent institution between 1992 and 2006? Finally, what causes the prolonged deadlock?

This paper seeks to address these three questions through the lens of an institutional analysis of policy change and policy stability. Institutional theory aims to contribute to our understanding of the workings of the Council in general and its transparency policies in particular. Our framework takes the Member States and the Council as separate actors, and we investigate their preferences and (power) resources while paying attention to the catalysts of change and social structures that shape the Council's interaction with supranational institutional actors, such as the EP, the Commission and the Court of Justice (ECJ). We realise that a sophisticated understanding of these dynamics also requires an analysis of the role of non-state actors at the national and supranational level, such as corporate lobbyists, non-governmental organisations (NGOs), etc.;⁸ however, such an analysis is beyond the scope of this paper. Nonetheless, we believe that this omission has only limited consequences for our analysis as formal powers to adopt and interpret rules on transparency policies reside exclusively with the Council, the EP and the ECJ. The present study should be regarded as contributing to our understanding of policy changes by focusing on the dynamics of intergovernmentalism in the EU context. Further work is needed to understand the role of non-state actors in these policy changes and policy stabilities.

The paper proceeds as follows. First, a conceptual framework of transparency is developed as an ideal type of the main arguments of transparency advocates and sceptics. Subsequently, the Council transparency policy process is analysed through the study of a large number of policy documents concerning the positions put forward by four exemplary Member States and the Council.⁹ This longitudinal analysis is broken down into the period before the 1992 Maastricht Treaty, when no formal

⁸ H.C.H. Hofmann and A. Türk, 'The Development of Integrated Administration in the EU and its Consequences', (2007) 13 *European Law Journal* 253, 261–262.

⁹ The empirical analysis is based on 238 primary documents (mainly policy documents) derived from Freedom of Information (FOI) requests in four countries and with the Council, 55 secondary documents (mainly media reports) from over ten countries, and 9 interviews held with experts and Member State representatives. Positions produced by the Council and Member States are included as primary documents. This includes documents submitted by Member States to the Council, internal memoranda, email contact with the researcher, statements in the news media, press communiqués, speeches by state representatives, internal Council documents, and common standpoints. A total of 238 documents were analysed. The numbers of documents for the Council and per Member States are Council (116), Sweden (43), the Netherlands (57), UK (17) and France (5). References to and commentaries upon the Council debate are included as secondary documents. This includes news reports, descriptive academic literature, public statements of non-Council actors (EP, Commission, European Ombudsman (hereafter Ombudsman), NGOs). In total, around 60 secondary documents from over 10 countries were looked at. Between January 2011 and January 2012, nine interviews were conducted with national, supranational and non-state actors involved in the Council transparency policy process. Details about the interviews are provided in the Appendix.

transparency provisions were in place; the period between 1992 and 2006, which saw the adoption of increasingly elaborate and binding transparency provisions; and finally, the ensuing deadlock. The paper concludes by discussing likely future developments in Council transparency.

II Three Dimensions of Transparency Policies

In recent years, transparency in governance has attracted increasing attention among various academic disciplines.¹⁰ The worldwide proliferation of transparency provisions in administration has led to an interesting debate on the nature of transparency, and its pros and cons in the context of the EU. This debate has developed along three central dimensions that may be described as the definitional, the ethical and the implemental. A careful consideration of these three dimensions allows them to be applied as a benchmark in an empirical analysis of Council transparency.

The *definitional dimension* asks the question: what is transparency? In abstraction, transparency has been described simply as ‘making the invisible visible,’ implying that phenomena are not self-evidently transparent; instead, an agent is needed to create transparency.¹¹ Moreover, it will also inherently be directed towards something, and as such we can speak of the ‘transparency of. . .’¹² This paper focuses on government transparency policies, which is here defined as rules enabling the public to monitor processes taking place in a public body.

An important part of the debate focuses on what transparency entails and what not.¹³ Transparency advocates tend to favour a broad scope for transparency. Wide access to documents is the backbone; this entails all documents, all the time, by any feasible means, with few exceptions that are interpreted restrictively. Transparency sceptics see it as a form of government communication. Government decides what kinds of documents are (not) to be made available, and they do so only after the decision-making process has ended, taking into account an array of broadly construed exceptions to the principle.

The *ethical dimension* is probably the oldest and most contested area of the transparency debate. It deals with the question why we should (not) have transparency.¹⁴ Transparency is expected to contribute to a large range of desiderata, such as democracy, legitimacy, accountability and trust. In the context of the EU, it has been associated with good governance and the development of a new ideal of transnational democracy.¹⁵ Transparency advocates are commonly misinterpreted as viewing

¹⁰ A. Meijer, D. Curtin and M. Hillebrandt, ‘Open Government: Connecting Vision and Voice’, (2012) 78 *International Review of Administrative Sciences* 10.

¹¹ M. Strathern, ‘The Tyranny of Transparency’, (2000) 26 *British Educational Research Journal* 309, 309.

¹² A. Fung, M. Graham and D. Weil, *Full Disclosure: The Perils and Promise of Transparency* (Cambridge University Press, 2007), at 39.

¹³ Meijer *et al.*, n 11 *supra*; M. Pasquier and J.-P. Villeneuve, ‘Organizational Barriers to Transparency: A Typology and Analysis of Organizational Behaviour Tending to Prevent or Restrict Access to Information’, (2007) 73 *International Review of Administrative Sciences* 147.

¹⁴ T. Beck Jorgensen and B. Bozeman ‘Public Values: An Inventory’, (2007) 39 *Administration and Society* 354; A. Florini, ‘The End of Secrecy’, (1998) 111 Summer, *Foreign Policy* 50; H. Tsoukas, ‘The Tyranny of Light’, (1997) 29 *Futures* 827.

¹⁵ M. Smith, ‘Developing Administrative Principles in the EU: A Foundational Model of Legitimacy?’, (2012) 18 *European Law Journal* 269; H. Addink, ‘Principles of Good Governance, Lessons from Administrative Law’, in D.M. Curtin and R. Wessel (eds), *Good Governance and the European Union. Reflections on Concepts, Institutions and Substance* (Intersentia, 2005), at 21; S. van Bijsterveld, n 5 *supra*.

Table 1. Pro-Transparent and Transparency-Sceptic Views on Council Transparency Policies

	Pro-transparency view	Transparency-sceptic view
Definitional dimension What is transparency?	Broad scope: transparency as general access to documents	Narrow scope: transparency as targeted government communication
Ethical dimension Why should we (not) have transparency?	Citizen focus: transparency should empower citizens	Institution focus: transparency should not endanger the institution
Implemental dimension How is transparency best put into practice?	Broad application: focus on required organisational changes to make transparency work	Narrow application: focus on consideration and avoidance of perverse effects

transparency solely as an end in itself.¹⁶ However, it is true that while transparency sceptics identify serious tradeoffs between transparency and other public values, advocates see such relations as less problematic.¹⁷ Critics identify inherent tensions between transparency and privacy, effective decision making, national autonomy, and efficient administration, which leads to arguments that administrations must strive for optimal rather than maximal transparency.¹⁸

Finally, there is the *implemental dimension*: how is transparency best put into practice? Researchers have focused on empirical assessments of its effects in the light of political, legal and organisational considerations.¹⁹ Others have investigated the empirical relation between transparency and public values, such as trust and accountability.²⁰ The debate focuses on whether and to what extent organisations need to adapt to make transparency provisions succeed. Advocates argue for a broad application of transparency and the need for a ‘culture shift.’ In contrast, sceptics advocate a limited, ‘realistic’ application with more attention for perverse effects and costs.

Table 1 provides a conceptual overview of both pro-transparency and transparency-sceptic views along the three dimensions.

This analytical frame is used to analyse the Council’s transparency policies, allowing us to establish (the advocacy of) change or stability over time. Which types of arguments were brought forward in the debates? Are policies aligned with the arguments of transparency advocates or those of the sceptics? Did the debate favour the ethical dimension over the implemental dimension? Up until now, explanations of the emergence of the transparency paradigm have been based primarily on anecdotal evidence. A systematic, longitudinal study of Council transparency policies facilitates a more profound understanding of the manner in which the revision process became deadlocked over a number of years.

¹⁶ T. Heremans, n 6 *supra*, 12–13.

¹⁷ S.G. van Grimmelikhuijsen, ‘Transparency and Trust: An Experimental Study of Online Disclosure and Trust in Government’, (2012) PhD thesis, Utrecht University, 69–75.

¹⁸ T. Heremans, n 6 *supra*, 89–90.

¹⁹ Respectively, D. Naurin, ‘Dressed for Politics: Why Increasing Transparency in the European Union Will Not Make Lobbyists Behave Any Better than They Already Do’, (2004) 90 *Göteborg Studies in Politics*; S. Prechal and M. de Leeuw, ‘Dimensions of Transparency: The Building Blocks for a New Legal Principle?’, (2007) 0 *Review of European Administrative Law* 51; M. Pasquier and J.-P. Villeneuve, n 14 *supra*.

²⁰ S.G. van Grimmelikhuijsen, n 18 *supra*; J.A. Fox, ‘The Uncertain Relationship between Transparency and Accountability’, (2007) 17 *Development in Practice* 663.

III An Institutional Explanation of Evolving Council Transparency

In order to explain developments in Council transparency policies, institutional theory is taken as the analytical starting point. March and Olsen emphasise that institutional theory characterises politics in a more integrative fashion than rational actor models.²¹ Central is the question of how processes of change and stasis in institutional settings can be explained against the background of historically constructed identities and sets of (informal) rules for interaction. This applies well to the Council's transparency policies, where periods of stability have alternated with periods of change. Different strands of institutional theory have emphasised the ways in which regulative, normative and cognitive patterns help explain developments in institutional contexts.²² These approaches, despite laying different accents, often complement each other well.²³ We build upon various institutional approaches to develop a theoretical framework that focuses on actor preferences and power on the one hand and catalysts on the other. This approach will be used to develop propositions regarding the development and stasis of the transparency policies of the Council.

A Preferences and Power

For any change to be considered, actors require preferences. Our institutional approach takes as a starting point that 'public policies [. . .] can be conceptualized in the same manner as belief systems, ie as sets of value priorities and causal assumptions about how to realize them.'²⁴ Consequently, beliefs both motivate and justify preferences. Convergent preferences, moreover, are seen as a major determinant of coalition formation.

Actors derive power from the relevant resources that they can apply to promote their preferences. This may entail hard voting power or soft persuasive power. Persuasive argumentation is employed to alter voting behaviour. Actors may persuade others by demonstrating particular expertise or a high willingness to invest time and effort. Additionally, institutional arrangements provide actors with differential resources to alter the outcome of the policy process. In the Council context, the presidency and voting weight are highlighted as particularly impactful arrangements.²⁵

Preferences and power must be understood as having evolved over time in a long process of nation building resulting in specific administrative cultures.²⁶ In the Council context, several indicators suggest that policy beliefs are derived from the national

²¹ J.G. March and P. Olsen, 'Institutional Perspectives on Political Institutions', (1996) 9 *Governance* 248.

²² B. Laffan, 'The European Union Polity: A Union of Regulative, Normative and Cognitive Pillars', (2011) 8 *Journal of European Public Policy* 709.

²³ P.A. Hall and R.C.R. Taylor, 'Political Science and the Three New Institutionalisms', (1996), paper presented at the MPIFG Scientific Board's meeting, 9 May 1996, 22; P. John, *Analysing Public Policy* (Continuum, 1998); M. Hill, *The Public Policy Process* (Pearson, 4th edn, 2005), 77 *et seq.*

²⁴ P. Sabatier, 'An Advocacy Coalition Framework of Policy Change and the Role of Policy-Oriented Learning Therein', (1988) 21 *Policy Sciences* 129, 131.

²⁵ B. Laffan, n 23 *supra*, 717; J.P. Aus, 'The Mechanisms of Consensus: Coming to Agreement on Community Asylum Policy', in D. Naurin and H. Wallace (eds), *Unveiling the Council of the European Union: Games Governments Play in Brussels* (Palgrave Macmillan, 2009), at 99, 99–103; B. Bjurulf and O. Elgström, 'Negotiating Transparency: The Role of Institutions', (2004) 42(2) *Journal of Common Market Studies* 249, 263–265.

²⁶ K.M. Henderson, 'Characterizing American Public Administration: The Concept of Administrative Culture', (2004) 17 *International Journal of Public Sector Management* 234; F. Anechiarico, 'Administrative Culture and Civil Society', (1998) 30 *Administration and Society* 13.

historical context, creating the parameters within which they interpret or act upon Council policies.²⁷ An example may be found in Sweden, where the principle of *offentlighet* (openness or transparency) is a source of social pride, vested in an administrative culture with a long-standing history.²⁸

This paper uses France, the Netherlands, Sweden and the UK as a proxy to the wider Council debate. Indicators of strong policy preferences and accompanying salience suggest that these four countries represent the spectrum of positions in the transparency debate fairly accurately, and that they are more active in this policy field than most other Member States.²⁹

In terms of power, it must be noted that throughout the period under consideration, the coalition of pro-transparency countries formed a minority. Although consensus behaviour and minority blocking power may explain why, particularly during the current deadlock, transparency did not *decrease*, the question of how the pro-transparency minority was able to proactively promote transparency policies remains.³⁰ An explanation is sought in persuasive power, and particularly the way in which the issue of transparency has been represented. Representation in policy making has long been recognised as a form of power in its own right.³¹ In the case of policy areas with strong moral undertones, such as transparency, coalitions may use their arguments as a stick with which to beat their opponents. It is likely that particularly pro-transparent countries were best able to use persuasive power, which is reflected in the notable shift from no transparency to extensive transparency.

B External Catalysts

Preference and power appear to provide a strong explanation for the distribution of positions; however, beyond a point of minimal development, they explain stasis better than policy change. Once actors are familiar with each other's preferences, and a balance of power is established, stasis is likely to ensue. Policy change requires something that disrupts 'business as usual.'³² Events external to the policy debate may

²⁷ eg T. Bunyan, 'Secrecy and openness in the European Union—the on-going struggle for freedom of information' (2002) <http://www.statewatch.org/secret/freeinfo> (accessed 15 April 2011); R.W. Davis, 'Public Access to Community Documents: A Fundamental Human Right?', (1999) 3 *European Integration Online Papers (EiOP)* at 1–2; C. Grønbech-Jensen, 'The Scandinavian Tradition of Open Government and the European Union: Problems of Compatibility?', (1998) 5 *Journal of European Public Policy* 185; P.A. Hall and R.C.R. Taylor, n 24 *supra*, 10.

²⁸ C. Grønbech-Jensen, *ibid.*, at 14.

²⁹ For our analysis, countries were selected that were all high in terms of salience (attention for transparency) and most different in their preferences (in favour or against transparency). Salience was measured in terms of the number of legal interventions and the references in the academic literature. Preferences were measured through the percentage of legal interventions on the applicant's side and votes in favour of wider disclosure (over the period 2001–2010). On the basis of these criteria, Sweden and the Netherlands were selected as transparency advocates, and the UK and France as most exemplary sceptics.

³⁰ J.P. Aus, 'The Mechanisms of Consensus: Coming to Agreement on Community Asylum Policy', in D. Naurin and H. Wallace (eds), *Unveiling the Council of the European Union: Games Governments Play in Brussels* (Palgrave Macmillan, 2009), at 99, 99–100.

³¹ S. Princen, *Agenda-Setting in the European Union* (Palgrave Macmillan, 2009), at 22; D. Stone, *Policy Paradox: The Art of Political Decision Making* (Norton, 2002 (1988)), at 32–34, P. Sabatier, 'The Advocacy Coalition Framework: Revisions and Relevance for Europe', (1998) 5 *Journal of European Public Policy* 98, 104–105.

³² T. Christiansen and S. Vanhooacker, 'At a Critical Juncture? Change and Continuity in the Institutional Development of the Council Secretariat', (2008) 31 *West European Politics* 751, 754.

catalyse a breakthrough and cause a policy to overcome stasis. Such external events may take place inside the institutional setting, for example when a change occurs in the composition of the governing system, or outside of it, when particular societal developments prove to have an impact on policy making.³³

One Council event that could act as an important catalyst is the accession of new Member States. A proliferation of conflicting belief systems increases the likelihood that new perspectives are introduced, and that the dominant perspective is challenged. For example, Sweden's accession to the EU marked the introduction in the Council of a committed transparency advocate, possibly altering the course of decision making.

Events outside of the institutions may also catalyse changes in transparency policies by altering the policy beliefs of the Council and its members. Frequently, policy changes in response to societal developments. One such external development is the rise of information technologies (IT). With new digital techniques of communication, more ways of conceiving transparency policies become imaginable.³⁴ Moreover, IT facilitates citizens' ability to monitor administrations online, enabling the rapid identification of shortcomings and pointed campaigning.³⁵ Crisis situations are another type of event with a potential impact on policy making. The wave of highly visible terrorist attacks at the beginning of the century, beginning with those of 11 September 2001, presented such a crisis situation.³⁶ Various civil rights and freedoms were curbed with a view to preventing further attacks. Transparency may be regarded as such a civil right, and the EU as a protector of public security.

C Social Structures

In contrast to catalysts, a number of 'stable factors' may be expected to provide the parameters within which a policy area is embedded: social structures. Social structures act as it were, as anti-catalysts.³⁷ Institutional theory hypothesises that constitutional structures (such as the European treaties) and fundamental social structures (such as habitual inter-institutional interaction) that provide the normative framework in which policy making occurs are rigid and extremely slow to change.³⁸ The framework of the treaties and inter-institutional relations would tend to stabilise transparency provisions after a policy is decided on.

However, the literature on EU transparency generally comes to the opposite conclusion. A frequently noted characteristic of the EU is its dynamic constitutional context, which leads its social structures to be considerably less rigid than those in national contexts.³⁹ Observers have held that frequent treaty changes, in fact, tend to accelerate policy development; others, in turn, point at vast differences in preference among the institutions when it comes to transparency

³³ F.L. Cook, J. Barabas and B.I. Page, 'Invoking Public Opinion: Policy Elites and Social Security', (2002) 66 *Public Opinion Quarterly* 235, 237–238.

³⁴ A.J. Meijer, 'Understanding Modern Transparency', (2009) 75 *International Review of Administrative Sciences* 255, 260.

³⁵ D. Curtin, n 3 *supra*, 218.

³⁶ T. Birkland, '“The World Changed Today”: Agenda-Setting and Policy Change in the Wake of the September 11 Terrorist Attacks', (2004) 21 *Review of Policy Research* 179, 187.

³⁷ B. Laffan, n 23 *supra*, 711–717; P. Sabatier, n 25 *supra*, 135–136.

³⁸ P. Sabatier, n 32 *supra*, 102.

³⁹ D. Curtin, n 3 *supra*.

dossier.⁴⁰ Rather than taking aspects of social structure such as treaties and inter-institutional relations for granted as anti-catalysts, they should, on the contrary, not be overlooked as potential *catalysts* of change.

IV Analysis of Member State and Council Documents⁴¹

A Before 1992: Stable Secrecy

In the period before the Maastricht Treaty, transparency did not feature on the Council agenda. The EP was the first of the institutions to attempt to put it on the agenda. On two occasions (1984, 1988), it called for 'legislation on openness of government.'⁴² However, no rules obliged the Council to respond, and it ignored these efforts and resolutions. Up until the 1991 Intergovernmental Conference (IGC), the dominant norm of diplomacy prevented transparency from becoming a formal policy issue inside the Council. Insiders frequently pointed to the fact that the institution had 'always been in practice a very open place for journalists who know their way around.'⁴³ The institutions were not used to citizens as such demanding information.⁴⁴ In 1991, as the IGC began that would lead to the Maastricht Treaty, only three of the Council's then twelve members had public access laws older than ten years, whereas five had no such laws at all.⁴⁵

Before the IGC, preference-based coalitions were, therefore, largely absent in the area of transparency. This renders the question of power resources obsolete since these are only employed where actors discern policy issues and have preferences about them: 'no agenda attention for an issue is the best guarantee that the status quo will be maintained.'⁴⁶

A catalyst for the introduction of transparency provisions seemed equally absent: despite the EP's calls for more openness, the Council worked under a consensus-based *modus operandi* that was widely accepted among its members, meaning that Council legislation followed the norms of diplomatic negotiations. However, two countries with a national transparency tradition, the Netherlands and Denmark, considered that the manner in which the Council was evolving, both in law and in practices as a supranational (legislative) actor in a political union, required more democratic legitimation than was hitherto the case when its role could be considered only in intergovernmental terms. The 1991 IGC and the Dutch presidency placed this issue squarely on the agenda.

⁴⁰ D. Curtin, 'The Role of Judge-made Law and EU Supranational Government: A Bumpy Road from Secrecy to Translucence', in E. Spaventa *et al.* (eds), *Empowerment and Disempowerment of the EU Citizen* (Hart Publishing, 2012), at 101; S. Luitwieler, 'The Black Box of the Nice Treaty Negotiations: The Influence of the Dutch Cabinet', (2009) PhD thesis, Erasmus University Rotterdam, 21–22; I. Harden, n 6 *supra*.

⁴¹ References in this section remain limited to quotations and the most important sources. Full details of documentary evidence can be obtained from the authors.

⁴² D. Curtin and H. Meijers, n 2 *supra*, 417.

⁴³ N. Schwaiger, 'The Council, the Media and the Public at Large', in M. Bond (ed), *Europe, Parliament and the Media* (Federal Trust, 2003), at 133, 133.

⁴⁴ Interviews 3, 4, 5.

⁴⁵ H.R. Kranenburg and W. Voermans, 'Access to Information in the European Union: A Comparative Analysis of Member State Legislation' in *Transparency in Europe II* (2004), *Proceedings of Conference Hosted by the Netherlands during its Chairmanship of the EU Council*, 25 and 26 November 2004, at 161.

⁴⁶ S. Princen, n 32 *supra*, 1.

B After 1992: Increase in Formal Transparency

a) From Maastricht to Amsterdam

The first Council member to express a preference for increasing European transparency was the Netherlands. In January 1991, it proposed a specific treaty amendment. The Netherlands was just concluding a revision process of its own law on administrative openness as it assumed the presidency in July of that year. A preference based on national policy, power based on expertise derived from 12 years of legislative experience and the presidency, and a catalyst in the treaty negotiations converged in the Netherlands. Although a treaty article on transparency lacked sufficient support, a compromise gave the presidency a token victory.⁴⁷ Declaration 17, attached to the Maastricht Treaty, highlights the need for transparency to strengthen the EU's 'democratic nature' and 'the public's confidence,' and pledged to investigate appropriate measures to enhance transparency.

Only the Netherlands and Denmark were committed to developing a substantial transparency regime. The UK, for example, preferred to avoid outright references to open government and to 'consider each case as it arose.'⁴⁸ It took a second catalyst in the shape of electoral revolt to turn the declaration into an actual policy issue. In June 1992, the Danish electorate rejected the Maastricht Treaty in a referendum, sending transparency 'to the top of the agenda.'⁴⁹ The incoming UK presidency felt 'a natural reluctance [. . .] to complicate the daily business of the Council by opening it up to public scrutiny,'⁵⁰ but was under pressure to take action.⁵¹

The UK's 1992 presidency provided it with the power to influence the definitional dimension of EU transparency. In two European Council declarations, the Council put forward a commitment to opening up the Community through a mixture of information provision and document disclosure. In line with the UK presidency's position, these declarations defined the transparency issue as one of communication, rather than access. Council Decision 731/1993 on public access to Council documents reflected this attitude by incorporating ample (discretionary and compulsory) provisions for non-disclosure.⁵² It favoured 'transparency as far as possible' under conditions of strict control. Disclosure decisions required unanimity, public meetings were highly staged, and policies remained limited to semi-formal internal rules, such as Council Conclusions, Decisions, Rules of Procedure and the Code of Conduct.

From the start of the transparency debate, the Netherlands criticised this 'restrictive—and therefore for leaders safe—[transparency] regime.'⁵³ Soon after the adoption of Decision 731/93, it advocated a liberal approach using several power resources, such as voting against non-disclosure, insisting on the right to discuss transparency matters at the ministerial level whenever it saw fit, and challenging in

⁴⁷ Interview 1.

⁴⁸ L. van Poelgeest, 'Secrecy and the Right of Access to Information in Europe', in B. de Graaff and J. Jonker (eds), *The Optimum Formula for a Foreign Policy Documents Series: Proceedings of the Second Conference of Editors of Diplomatic Documents*, 16 and 17 January 1992 (Institute of Netherlands History, 1992), at 121, 125.

⁴⁹ *Le Monde Économique*, 'From Maastricht to Amsterdam: the Union inches towards transparency', 14 November 2000.

⁵⁰ UK Delegation in Brussels, Openness: menu of suggestions, 20 October 1992.

⁵¹ Interviews 3, 4, 5.

⁵² OJ L340/43, 20 December 1993.

⁵³ Netherlands, *Algemene Raad*, 6 December 1993.

court (in 1994) the Council's decision to implement transparency provisions under its internal rules of procedure rather than in fully fledged legislation. Nevertheless, the power of the pro-transparency voice in the Council remained overall marginal, reinforced by the court's rejection of the Dutch objections.

This changed when Sweden, along with Finland, joined the EU in 1995, marking a strong catalytic event. The Nordics 'rather naturally talked to each other,' and along with the Netherlands they soon formed an advocacy coalition pushing for more transparency.⁵⁴ Upon accession, Sweden sought strategic and diplomatic ways to facilitate the emergence of transparency using preferences and persuasive power derived from centuries of transparency practices in its national context. Increasingly often, the 'Gang of Four'⁵⁵ formed voting blocks, coordinated policy stances and issued joint political statements. The pro-transparency coalition, thus, proactively shaped the agenda, giving more visibility to the subject of transparency.

Despite many Member States' reluctance to increase transparency, the pro-transparency coalition rarely met with coordinated counter-preferences. Indeed, the widely shared perception was that a minority advocacy coalition faced a diffuse Council majority. The attitude among transparency-sceptic Member States was that 'transparency and all that is for the birds, but if [the pro-transparent members] want it, they can have it.'⁵⁶

Throughout the 1990s, France assumed a defensive role in the transparency policy process, arguing that too much openness hampered the Member States' ability to reach agreement in internal Council negotiations. Occasionally, it blocked disclosures that were in themselves harmless, but might set an undesirable precedent, even if this meant it was in the minority. The data suggest that national elections also catalysed change with respect to Council members' attitude towards transparency. Such influence was generally circumscribed by national administrative culture (eg successive Nordic governments have favoured increasing European transparency irrespective of political colour), yet occasionally it led to surprising breakthroughs, as with Labour's rise to power in the UK.⁵⁷ After 1997, the UK government relaxed its stance on EU transparency, giving the pro-transparency coalition more leeway during the 1996–1997 IGC and the period after. Later, Prime Minister Blair, tested by the UK Freedom of Information Act, retreated from his liberal position to become a staunch transparency sceptic.

The pro-transparency coalition's preferences gained real weight for the first time during the 1996–1997 IGC. The coalition had a number of power resources at their disposal. Sweden used its expertise to advocate wide access to documents, as well as the introduction of a register of documents. The 1997 Dutch presidency kept this issue at the top of its agenda. Finally, both Sweden and the Netherlands relied on the emerging—often progressive—case-law by the Court of Justice on the interpretation and application of the existing access provisions to argue that codification would be a logical next step. As a result, transparency was given a legal basis in the Treaty of Amsterdam. Article 255 TEU provided that a fully fledged access to documents law was to be established within two years. According to one observer, the accession of

⁵⁴ Interview 6.

⁵⁵ Interview 3, 4, 5.

⁵⁶ Interview 6.

⁵⁷ Interviews 1, 9.

Sweden and Finland provided the external catalyst that made the difference between Maastricht and Amsterdam, and achieved this binding legal treaty provision.⁵⁸

b) Casting and Recasting Regulation 1049/2001

Another central catalyst was the emergence and use of the new possibilities in IT. In 1997, the Council website was launched. The 1998 UK presidency continued this trend with a digital register that went online on 1 January 1999, displaying a selected list of Council documents. This register facilitated a standardisation of procedures enabling a vast increase in the flow of documents. By April 2001, it contained an extensive list of documents, while documents to which public access had already been granted plus certain other categories of documents were made digitally available in full. The emergence of IT, thus, rapidly changed the access to documents playing field by expanding both the definitional and the implemental dimensions of transparency.

Under the incoming French presidency in 2000, Council Decision 731/1993 was undermined by an unexpected event.⁵⁹ During the summer recess, Council General Secretary Solana used the written procedure to pass a decision facilitating a 'blanket exclusion' of documents containing classified information from the access to documents regime to enable a strategic document exchange with the North Atlantic Treaty Organization. It was adopted after a qualified majority of Member States voted in favour. However, the Nordic countries and the Netherlands protested severely, issuing a joint public statement of disapproval. The EP was equally vociferous and even commenced legal proceedings, which however were later withdrawn as part of a package deal on parliamentary access to secret Council documents.⁶⁰

The pro-transparency coalition hoped for a strong access to documents law and made it clear that the ongoing negotiations could not be circumscribed by the (so-called) Solana Decision. In January 2001, the negotiations entered the last months before the official deadline laid down in the Amsterdam Treaty. 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, pressurising negotiating parties to honour the commitment made in the Treaty. The Swedes presented both the EP and sceptical Member States with a 'hard deal'.⁶¹ Regulation 1049/2001 was passed slightly after the deadline, on 30 May 2001.⁶²

While French and British concerns with the potential impact of the new legislation were tempered by relatively restrictive provisions for mandatory and optional exceptions, the adoption of Regulation 1049/2001 unmistakably shifted the access to documents policy in the direction advocated by Sweden and the Netherlands. This entailed public access, in principle, to all documents held by the institutions and at any time during the decision-making process. Although it left open substantial legal ambiguity, a strong consensus existed within the Council to depoliticise the matter and let it develop further in practice.⁶³

⁵⁸ Interview 7.

⁵⁹ T. Bunyan, n 28 *supra*, ch. 6.

⁶⁰ G. Rosén, 'Can you Keep a Secret? How the European Parliament Got Access to Sensitive Documents in the Area of Security and Defence' (2011) ARENA Working Paper (13), 17.

⁶¹ B. Bjurulf and O. Elgström, n 25 *supra*.

⁶² OJ L145/43 31 May 2001.

⁶³ Interview 7.

Paradoxically, the decision to depoliticise the transparency debate, thus, resulted in the further development of transparency arrangements within the existing framework. Alongside the adoption of Regulation 1049/2001, the institutions agreed that its scope should extend to all other bodies created by the legislator. Furthermore, the institutions began to emphasise ongoing administrative improvements, inter-institutional cooperation and information policies. In 2001 alone, the Solana Decision was repealed (and the EP dropped its court case), a high-level, inter-institutional committee was set up, and a code of transparency and good administrative behaviour was drafted. Court case-law indicated that partial disclosures were possible and desirable, while proactive automatic online disclosure of certain categories of documents, such as agendas and voting records, started.

These small but significant steps after May 2001 were accepted by the Member States within the Council since they were deemed to derive logically from the commonly agreed framework of Regulation 1049/2001, even when they largely reflected the pro-transparency coalition's implemental wishes. Both the catalyst of the new regulation and the persuasive argument for 'rationalising' transparency made a strong mark on this institutionalisation. The forthcoming 2004 'big bang' enlargement provided a further catalyst. A larger EU would require more transparent decision making to safeguard both legitimacy and effectiveness. For some time after the implementation of Regulation 1049/2001, the pro-transparency coalition, thus, had many opportunities to promote their progressive views with regard to the ethical and implemental dimensions of transparency.

Not only internal advocacy and exogenous developments had the effect of promoting further transparency. Upon the introduction of Council transparency and during the two subsequent decades, a number of shifts took place in the EU's social structures, with a demonstrable impact on the way in which transparency policies developed. To begin with, four treaties were adopted, three of which (Maastricht, Amsterdam, Lisbon) altered the legal and political parameters of Council transparency policies.⁶⁴ Due to their frequent amendment, EU treaties can hardly be considered stable parameters of the transparency policy. Instead, (ongoing) treaty amendment processes can be regarded as a type of institutional catalyst.

Changing social structures in the EU meant that the Council in its internal negotiations increasingly had to anticipate the preferences of other institutions. The strengthened role of the EP that resulted from the Maastricht and the Amsterdam Treaties, for example, meant that it could increasingly successfully exert political pressure on the Council. Given its oversight task, its preferences naturally lay on the side of further transparency and institutionalisation of transparency policies,⁶⁵ although it has been observed that increased inter-institutional oversight does not necessarily serve the purpose of *public* access.⁶⁶ During the negotiations leading up to Regulation 1049/2001, the EP for the first time acted as a co-legislator with direct influence on the Council's internal transparency rules.

Furthermore, the many legal ambiguities in the general phrasing of Regulation 1049/2001 heralded a period of relatively intensive litigation, enhancing in this area

⁶⁴ F. Maiani *et al.*, n 4 *supra*, 5.

⁶⁵ Interview 7, 9.

⁶⁶ Interview 8.

the phenomenon of ‘judge-made law.’⁶⁷ A number of cases stand out in terms of the effect on the ability of the Council to keep its preparatory decision making a secret.

In *Turco* (2008), an Italian Member of the European Parliament (MEP) sued the Council when it refused him access to legal advice provided from the Council’s legal service. The ECJ ruled against the Council by granting, in principle, public access to documents submitted to the institutions by Member States, as well as to legal advice to the Council by its own legal service. This meant that their disclosure could no longer be considered *a priori* excluded, an interpretation that the UK and France opposed as they alleged that this undermined both their national interests and the effectiveness of Council negotiations.

More recently, the *Access Info Europe* (AIE) case (2011) overturned the refusal to disclose Member State positions during legislative preparation. AIE, a transparency advocacy organisation, requested access to the minutes of Council working party meetings, with information on the position of Member States. When the Council granted only partial access to the document, blanking out the names of the Member States, AIE challenged this decision before the court. In March 2011, AIE won the case at first instance, suggesting a doctrinal shift with the coming into force of the Lisbon Treaty.⁶⁸ The Council, however, has appealed against the ruling in a case that is currently ongoing.

In recent years, the rhetoric and practices of the Council and its members have been used by outsiders (MEPs, NGOs and individuals) as a way to break open and expand transparency provisions using a variety of strategies and seeking recourse particularly in court action. Although the courts have had a mixed record of supporting litigating parties in favour of transparency in its attempt to ‘strike the right balance,’⁶⁹ the general opinion is that the case-law has contributed considerably to a broad interpretation of Regulation 1049/2001. Often, transparency-sceptic countries have had little control over such externally induced catalytic events as they occurred within the framework of pre-established rules, as interpreted by the courts in Luxembourg. They were, in particular, aggrieved by the Court’s ruling that access had to be granted, in some circumstances, to legal service opinions as part of the preparatory decision-making process.

Another example of the way in which the reconfiguration of social structures set in motion a chain of effects in the transparency policy process is found in the 2004 Constitutional Treaty, which provided the first (draft) treaty-level reference to open meetings, a rather underdeveloped category. In the aftermath of its rejection in the French and Dutch referendums in May 2005 open meetings began to be discussed as a serious policy option. Weeks after the referendums, Blair, speaking before the EP, reignited the idea of open debate about the future of European integration as a priority of the UK presidency. This raised hope among transparency advocates. When proposals for an open meetings regime were, however, not forthcoming, five MEPs representing all British political groups wrote an open letter to Blair, in which they called it ‘unacceptable that Europe’s most senior law-making body, the Council of Ministers, continues to meet behind closed doors. . . .’⁷⁰ The UK was further

⁶⁷ D. Curtin n 41 *supra*; D. Adamski, ‘How Wide Is “the Widest Possible”? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited’, (2009) 46 *Common Market Law Review* 521.

⁶⁸ D. Curtin, n 41 *supra*, 106 and 114–115.

⁶⁹ T. Heremans n 6 *supra*, 89.

⁷⁰ ‘Call for EU transparency’, *The Times*, 6 September 2005.

pressurised when the Ombudsman joined the chorus of critics, and during the last weeks of its presidency it proposed concrete measures to open up Coreper and Council meetings.

When the open meetings regime became formalised in the 2006 Overall Policy on Transparency, the UK's enthusiasm had already diminished considerably. Apart from the pro-transparency coalition, most Council members were 'more resigned to [the new measure] than enthusiastic about it.'⁷¹ Nevertheless, thanks to the incoming Finnish presidency, the Overall Policy on Transparency had a considerable impact, increasing the number of open senior-level meetings to 76%, from 17% in the previous term.⁷² Thus, the high-minded but abstract rhetoric of the Constitutional Treaty and the initiatives of the UK presidency catalysed a real increase in open meetings.

C After 2006: Transparency Fatigue and Resistance

The 2006 Overall Policy on Transparency marked the Council's last expansion of transparency policies: a degree of 'transparency fatigue' began to be seen among Member States.⁷³ A series of external catalysts then provided a renewed opportunity for change in Council transparency laws. In 2007, the Commission opened a consultation procedure to receive input for the revision of Regulation 1049/2001, revealing stasis among the Council's members, and more widely, among the EU institutions. 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; this was considered inadmissible by the Council on procedural grounds,⁷⁴ an opinion that was echoed by the Commission after the EP formally adopted a revised report in December 2011.⁷⁵

In February 2012, however, the Council reluctantly restarted negotiations on a common position. In line with past practice, it categorically declined to disclose the content of these negotiations while the legislative process is ongoing.⁷⁶ In terms of preference and power, ample evidence exists that the Member State preferences continue to be largely informed by their administrative cultures. However, the divide that previously marked the policy debate became even more polarised under the revision procedure. The progressive clarification of Regulation 1049/2001 by the courts has rendered it more difficult for a Council majority to accept this regulation as a starting point.

The argumentative style and content, voting patterns, and court interventions of a number of Council members confirm the continuing existence of a minority

⁷¹ J. Quatremer, 'Fog in the Channel', http://bruxelles.blogs.liberation.fr/coulisses/2006/06/brouillard_sur_.html, 13 June 2006 (accessed 6 December 2010).

⁷² Finland Prime Minister's Office, 'Openness of Council sessions increased during Finland's EU Presidency', Press Release 25 January 2007.

⁷³ Interview 1.

⁷⁴ Council, Note on Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (recast), <http://www.statewatch.org/news/2009/may/eu-access-reg-council-table-7791-09.pdf>, 20 March 2009 (accessed 17 November 2011).

⁷⁵ Wobbling Europe, Cannot be accepted, says Commissioner after EU-transparency vote, <http://www.wobbling.eu/news/%E2%80%9Dcannot-be-accepted%E2%80%9D-says-commissioner-after-eu-transparency-vote> (accessed 12 January 2012).

⁷⁶ D. Curtin, n 41 *supra*, 124; Access Info Europe, 'The Secret State of EU Transparency Reforms', Report, 21 March 2011.

pro-transparency coalition. This group includes the Netherlands, while Sweden is its most active and visible champion. It insists that the revision should 'lead to increased openness and nothing else.'⁷⁷ The pro-transparency coalition finds sustained and persistent support from an EP majority, the Ombudsman and civil society.⁷⁸

Previous to the current recast procedure, a transparency-sceptic coalition was harder to discern for outsiders. This may be due either to the fact that since this position was shared by a majority, there was less need to form alliances, or because no Member State dared to publicly oppose increasing transparency. Nonetheless, a trend reversal is discernible in recent years; particularly after the *Turco* judgement, a Council majority has resorted to a more restrictive interpretation of Regulation 1049/2001. Member States, such as France and the UK, already sceptical about transparency, have become dissatisfied with the rhetorical promise, it clearly not having 'delivered the goods' of trust and democratic legitimacy.⁷⁹ At the same time, they have shown increasing sensitivity to the perceived tradeoffs of transparency as opposed to its potential contribution to democracy.⁸⁰ Transparency-sceptic Council members again 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.

In response, pro-transparency countries, with Sweden in the lead, have begun to attach increasingly lengthy statements to their counter-votes against non-disclosures in order to stress that the *Turco* judgement is non-negotiable. Recently, however, Denmark's handling of the negotiations under its 2012 presidency puts to question the degree of alignment within the pro-transparency coalition. As internal negotiations on the revision progressed, the Danish presidency was increasingly openly criticised by Sweden and Finland for its restrictive approach to transparency, which placated too much the Commission and the Council majority but alienated the EP.

The Danish manoeuvring during its presidency may cause a shift in coalition alignment. The pro-transparency minority is likely to rely increasingly on the EP's pivotal role in bringing about change to the access regulation (co-legislative, 'hard' power). Recently, Sweden's minister of justice, Beatrice Ask, remarked: 'If Sweden and other pro-transparent countries are overruled in the Council, we will have to put our trust to the EP. [. . .] I assume the Parliament stands firm on [its endeavour towards more openness].'⁸¹ The pro-transparency Council minority, moreover, enjoys the public support of an active supranational community of pro-transparency organisations. A revised access regulation that excludes the consent of the pro-transparency minority would, therefore, come at a high price in terms of public legitimacy (persuasive, 'soft' power).

Finally, the impact of catalysts on the policy shows clear change over time. While in the early years it was, in particular, events outside of the institutions that altered the course of the transparency policy process, the Amsterdam Treaty (1998) and the adoption of Regulation 1049/2001 opened the door to considerable change in the Council's inter-institutional relations with regard to transparency. From *internally*

⁷⁷ C. Malmström, Minister for EU Affairs, Speech at the Finnish delegation, 11 December 2008.

⁷⁸ Interview 6.

⁷⁹ Interview 6.

⁸⁰ T. Heremans, n 6 *supra*; Interview 1.

⁸¹ Wobbling Europe, Presidency criticised: Even worse than the Commission, <http://www.wobbling.eu/news/presidency-criticised-%E2%80%99Deven-worse-commission%E2%80%9D> (accessed 4 July 2012).

regulated 'transparency as communication,' the policy has shifted in the direction of 'transparency as access,'⁸² as enforced not only by the pro-transparent Member States but also by external actors, such as the EP, the Court of Justice and the Ombudsman.

The above analysis lends itself to speculation about the future of transparency policies in the Council. One possibility is that stasis ensues. Policy preferences continue to be divergent, and all actors have sufficient resources to block any unwanted outcome. Actors are unwilling to compromise, and given that legislation is already in place, the status quo is preferred to any of the change options. The revision procedure is deemed an insufficient catalyst for change. This scenario of stasis constitutes the path of compromise, but it will prove hard to maintain due to changing social structures within the EU.

In another possible scenario, change is obstructed by the polarisation of preferences. The permissive atmosphere from which the pro-transparency coalition long derived its power has declined, although the steady institutionalisation of Council policies means that it has the means to defend the status quo. In particular, changes in the social structures over the past decades have led to a supranational bias. More than before, Council members are dependent on the position of actors such as the EP, the ECJ and the Ombudsman. Due to changes contained in the Lisbon Treaty, this makes it less unlikely that Council transparency policies will continue to develop. However, such change is expected to be increasingly shaped by supranational institutional actors.

V Conclusion: Transparency in a Deadlock?

Over the past two decades, the Council has implemented multifaceted transparency policies. Starting from a situation of no formal provisions before 1992, pro-transparent Member States succeeded between 1992 and 2006 in bringing about considerable change in the direction of more openness. In the subsequent period, particularly after the Commission presented a proposal for a recast of the access to documents legislation, a deadlock has resulted over the appropriate implementation of transparency anno 2012. This paper has sought to explain developments in each period as the policy developed further. The institutional perspective that we have employed to this end facilitates the tale of transparency at three analytical levels—that of classical policy struggle (*preferences and power*), of influences introduced from the outside (*catalysts*) and of the EU's institutional fluidity (*social structures*)—and the linkage among these levels. Our research's central findings are summarised in Table 2.

In the period before 1992, no transparency policy was in place in the Council. Preferences in favour of such a policy were non-existent inside the Council, while calls of the EP for more transparency were ignored. No power resources were allocated towards transparency's implementation. However, the 1991 IGC on treaty change provided a catalyst for its emergence. The Netherlands emerged as a transparency advocate and used the power of its presidency to obtain a (minimal) reference to the principle in a declaration attached to the Maastricht Treaty.

In the period between 1992 and 2006, the Council began translating its high-minded transparency rhetoric—relating it to such values as legitimacy, democracy and accountability—into a working definition that allowed for two competing

⁸² C. Grønbech-Jensen, n 28 *supra*, 187.

Table 2. *Change and Stasis in Council Transparency: Central Findings*

	Stable level of transparency before 1992	Increase in transparency between 1992 and 2006	Stable level of transparency after 2006
Preferences and power	<ul style="list-style-type: none"> — no evidence of strong preferences until 1991 IGC — no use of power resources until 1991 Dutch presidency — 1991 IGC 	<ul style="list-style-type: none"> — formation pro-transparency coalition — presidencies — indifferent attitude of Council majority — accession of Sweden (and Finland) — change of government UK — emergence of IT — treaty revisions — legislative negotiations with EP — Court review of 1049/2001 — public pressure MEPs — growing legal/institutional role of EP and the Court 	<ul style="list-style-type: none"> — emergence of coordinated transparency-sceptic majority — procedural rules recast — vocal minority of pro-transparency countries — recast procedure
Catalysts			
Social structures	<ul style="list-style-type: none"> — weak constitutional basis EP, resolutions ignored — uncontested traditional diplomatic working method Council 		<ul style="list-style-type: none"> — transparency provisions Lisbon treaty — conservative Commission recast proposal — large EP majority in favour of progressive reform

interpretations: one of transparency as targeted government communication, the other of transparency premised upon wide public access to documents. A mixture of those definitions was implemented in the Council's policies; however, a preference developed towards the latter, at the expense of the former. Change was brought about by the accession of Sweden in 1995, the growing use of technologies for information management and disclosure, and shifts in inter-institutional relations. The preference-based, pro-transparency coalition that emerged after 1995 derived its power from expertise, presidencies and moral arguments, and was able to use those catalysts to its advantage. Both power resources and catalysts aided the coalition's position in negotiations on primary legislation, while in secondary legislation it received the backing of the transparency-friendly EP. From semi-formal, internal provisions (1993), transparency was promoted to treaty status (1998), to eventually become legislated into access to documents rules (2001), and arrangements for regular public deliberations (2006). This broadened the scope and breadth of Council transparency considerably.

During the period of steady growth, the pro-transparency minority benefited from the often indifferent attitude of the Council majority. Although this majority remained sceptical of transparency and wary of its negative consequences, it did not organise itself into a coherent coalition, which lent the 'Gang of Four' (Sweden, Finland, Denmark, the Netherlands) some leeway. In the period after 2001, this tolerance gradually eroded, when European actors such as the EP, the Court and the Ombudsman, using formal and informal institutional methods, began to exert real influence on Council transparency. Especially some recent cases (*Turco* (2008) and *AIE* (2011)) were resisted by a Council majority.

A telling indication of the trend reversal in the period after 2006 is provided by the changing attitude of Sweden and the Netherlands. Under the recast procedure, these countries became defenders of the status quo of transparency policies against a rolling back. This position is a far cry from the beginning of the policy, when the Netherlands radically opposed the Council policy, even resorting to legal activism in 1994 and on subsequent occasions. The UK, whose preferences were reasonably well reflected in Council policy during the early 1990s, has more recently begun to position itself against the case-law impacting on Council transparency.

What expectations for the future can we formulate on the basis of this analysis? In recent years, different views on transparency policies have proved unbridgeable. In one view, transparency is seen as the widest possible access, with few exceptions and little discretion. In the other view, transparency amounts to targeted communications, with more space for discretion if transparency encroaches on one of a number of widely defined exceptions. Within the Council, this means that the influence of a pro-transparency coalition has been waning *vis-à-vis* that of the transparency-sceptic majority; this is also evidenced by the failed attempts of two of its members (Sweden in 2009 and Denmark in 2012) to broker an agreement acceptable to a Council majority.

However, within the EU, the Council as a supranational actor is not an island. Increasingly often, it has to take into account the views of supranational actors, such as the Ombudsman, the European courts, and particularly in the legislative process, the EP, which has consequences even for its internal transparency policies. While within the Council tolerance towards transparency is declining, and a majority has formed in favour of a more conservative policy, the role and influence of the EP as a champion of EU transparency have grown over time. Council decision making takes place within a context of ongoing dynamic constitutionalisation of the EU. In this

context, the EU's social structures are transformed at a speed that is unmatched by any situation at national levels. Gradually, transparency has become a high stake in an inter-institutional battle on oversight and a public right to know, which impacts upon the very nature of the Council's operating method.

A break of the deadlock is not to be expected in the short term. In the long run, future change will likely be triggered by supranational actors outside of the Council, rather than intergovernmental actors inside of it. Specifically, two aspects might be of increasing importance in explaining the further development of Council transparency: social structures (such as EP prerogatives, the Lisbon Treaty and court interpretation of existing provisions) and catalytic events, which are, in these times of economic crisis, highly salient but as of yet difficult to predict.

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Appendix

Table A1. Interviews

Name	Organisation	Date of interview
1. Tony Bunyan	Statewatch (NGO)	28 January 2011
2. Anonymous	Member State delegation, Brussels	18 February 2011
3. Minna Immonnen*	Council General Secretariat, Access to Documents and Legislative Transparency Unit	18 February 2011
4. Wolf Sieberichs*	Council General Secretariat, Access to Documents and Legislative Transparency Unit	18 February 2011
5. Jakob Thomsen*	Council General Secretariat, Access to Documents and Legislative Transparency Unit	18 February 2011
6. Ian Harden	Secretary General, European Ombudsman's office	28 November 2011
7. Marc Maes	European Commission, Head of Transparency, Stakeholders and External Organisations Relations Unit	11 January 2012
8. Herke Kranenborg	European Data Protection Supervisor	11 January 2012
9. Michael Cashman	European Parliament, Rapporteur Regulation 1049/2001	11 January 2012

*Joint interview.