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Living Transparency: The Development of Acces to Documents in the Council of the EU and its Democratic Implications

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English summary

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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 to 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

Maarten Hillebrandt (1984) is a postdoctoral researcher at the University of Bielefeld, where he participates in a project on Quantification, Administrative Capacity and Democracy (QUAD). This project, carried out by an international consortium of universities, studies the fundamental transformation from 'government by rules' to 'governance by numbers'. In particular, it considers the implications of quantification for our understanding of the nature of public services and for wider debates about citizenship and democracy.

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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