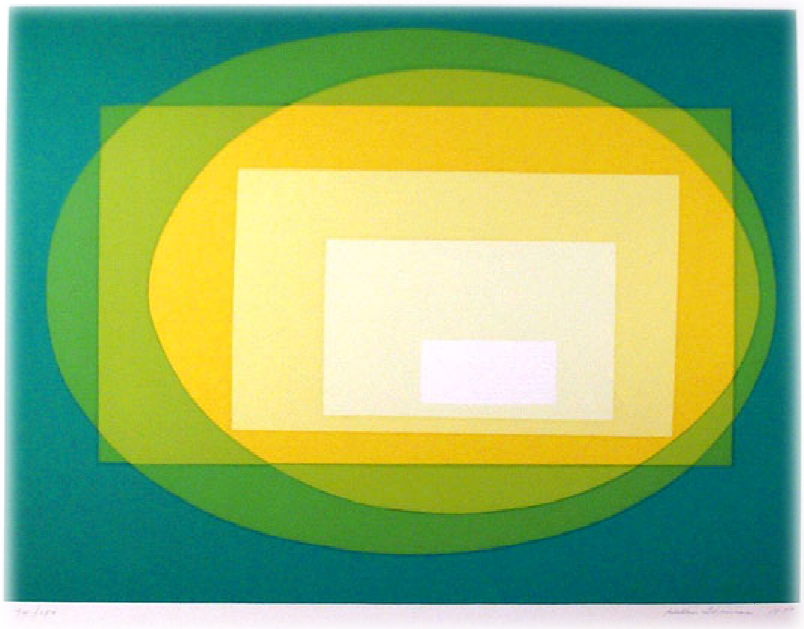
Opening up

The Council's changing discourse on transparency of the European Union



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Executive summary

Transparency has entered the scene in the European Union, but why?

Over the past two decades, transparency has made a rapid career as a concept of public administration. In many settings of governance around the world, it has become an instrument that is taken increasingly seriously. The European Union, too, has embraced the idea of openness, and established a transparency policy of its own. This initiative for this policy was taken in 1992, when a declaration concerning access to information was attached to the Maastricht Treaty. Since then, the Council of Ministers took the initiative in developing this policy further. Seventeen years later, as the Lisbon Treaty entered into force, a remarkable turn could be observed in the Council's attitude towards transparency. Nearly twenty years on, transparency is here to stay, and it is considered a central instrument of democratic European governance.

The changing attitude with regard to the idea of transparency is remarkable given the historical track record of the EU, and especially the Council. The way in which the Council operated before 1992 has been recurrently typified as closed and at some distance from the public, as is characteristic of international organisations in which the rules of diplomacy are dominant. The question therefore arises, how it is possible that the attitude of the Council took such a radical turn within a timeframe of under two decades.

When studying how the attitude of the Council toward transparency changed over time, the academic literature on transparency can inform us on the types of issues that have been connected to the concept. Three broad dimensions of questions can be discerned. The first, the definitional, is concerned with the "what question": what is transparency? The second, the implemental, raises questions over how transparency should be put into practice. The third, the ethical, is the most fundamental of the three dimensions. It asks the "why question": why should we have transparency? The debate over the objectives that transparency is supposed to fulfil relates closely to perceptions of public values, and thereby to the future of European governance.

Different explanations are possible for the emergence of transparency

The changing attitude of the Council towards transparency can be understood in terms of institutional logic. This means that the attitude which the Council has towards transparency is not the result of an objective assessment of transparency, but is instead determined by the specific way in which it thinks and operates. The Council's institutional logic materialises in the discourse and the practice that it develops in the transparency policy. In this research, a closer look is taken at the changing Council discourse between 1992 (Maastricht Treaty) and 2009 (Lisbon Treaty).

Change in the transparency discourse is looked at in three ways. First, the role of argumentation is studied. Various ideas, concepts, and categories that the Council presented allowed for action in certain directions, while excluding others. A close study of various documents enhances our understanding of change by revealing patterns in the Council's attitude.

The second way in which change is studied is by considering the various impact factors that the Council and its members connected to the debate on transparency. Events that took place inside and outside of the European institutions are considered as such explanatory factors. They provide the context in which the transparency debate operated and the environment that it was confronted with. These are, inter alia, the European institutions and civil society.

The third way of approaching the Council's changing institutional logic is by looking at the interaction of member states. The member states of the Council have very different administrative cultures that have been shaped over long periods of time. This means that these member states have divergent experiences with, and beliefs about transparency, which leads them to approach the Council transparency debate in different ways. A number of member states with a strong opinion about transparency engaged very actively in the policy debate, exchanging arguments and presenting proposals. In this way, these member states sought to influence the transparency policy of the Council. Change in this approach is explained by the relative success that member states had in their struggle over discursive dominance.

How good are institutional factors at explaining the Council's changing discourse?

While the Council started out with its transparency policy in 1992, it had no experience in this area, nor did many of its member states. Gradually, it developed a discourse that may be described as "directed transparency". This entailed that the Council recognised the need for more openness, but was only willing to be transparent if it was able to exercise full control over the ways in which this happened. This was characterised by its implementation of transparency provisions: public access to documents, for example, was granted to the public in 1993, but on the basis of a Council decision, which is an internal rule. A number of exceptions to the access rules granted wide discretionary powers for the Council to refuse access. In the field of deliberations, it was agreed that occasional meetings would be held in public. However, the content of such meetings were closely coordinated in advance, and it was made sure that no controversial items would be discussed.

Internal factors hardly made any impact on the policy at this time. The European institutions did not affect the Council discourse, and although the court established its jurisdiction to rule on the interpretation of the access to documents provisions, its impact was as of yet limited. The accession of Sweden, which took place in 1995, meant a lasting reconfiguration of the balance of administrative cultures, although its impact on implemental change began to be felt only a few years later. The importance of a transparency policy was connected to a desire to bring the EU closer to the experience of citizens. It was believed that transparency would be regarded as evidence of a democratic attitude, which would enhance the EU's legitimacy. This was seen as necessary after the Danish no-vote in a referendum on the TEU. The pressure from actors in civil society that ensued, however, was either criticised by the Council as an attempt to undermine the system, or as the result of its lack of experience in the early period of the transparency policy.

In the first years of the transparency policy, the discourse put forward by the United Kingdom was most influential in shaping the dominant discourse on transparency. It approached transparency as a way to better inform the citizen, and believed that this would bring the EU closer in their experience, and lead to greater trust. Although it held that information provision had to be done in a fair and equitable, rather than an artificial and staged manner, its concerns over the negative impact of transparency predominated. It therefore favoured strong protection of confidential negotiations, and wide discretion for the Council in other areas.

Although the transparency provisions in the Amsterdam Treaty can be explained well in the light of "directed transparency", they had a considerable impact on the further development of the transparency policy. The treaty stipulated that formal access to documents rules should be enacted within two years, and the Council made an advance by rationalising the practices that already existed. Rationalisation was understood in terms of making transparency more easily accessible as well as decreasing the administrative burden. The discourse of rationalising the transparency policy led the Council to agree to major expansion, not only in practical terms but also substantially. The Solana Decision of 2000 formed a notable exception to this progressive attitude. Through this decision, certain categories of documents were no longer accessible to the public. However, this was done with the understanding that the pending access to documents regulation would settle the matter definitely. Eventually, Regulation 1049/2001 on public access to documents in several respects marked a liberalisation when compared to the previous rules.

To a great extent, rationalising transparency took place in the light of the emergence of the internet and navigable databases. Such new information technologies were practical since they reduced the workload in this policy area, while at the same time making transparency rules easily dispensable to citizens across the EU. Such innovations were not considered threatening to any member state as they did not obviously overturn the discourse of "directed transparency". At the same time, the emergence of IT offered pro-transparent member states new opportunities to push for further expansion, arguing that it would be more effective and at the same time present a gesture of goodwill to the EP, with whom the Council was negotiating the new access to documents rules.

No evidence was found for the impact of counterterrorism measures. The Solana Decision preceded 9/11 by over a year, and was from the outset intended to be temporary. Moreover, it was prompted by an agreement with the NATO over the exchange of strategic military intelligence, rather than information on public security. Indeed, months before the 9/11 attacks, Regulation 1049/2001 squarely and lastingly re-established access of the public to, in principle, *all* documents held by the institutions.

During the period leading up to Regulation 1049, the discourse on rationalising transparency afforded Sweden and the Netherlands ample opportunities to push their pro-transparency discourse. This was further aided by the fact that Sweden held the presidency at the time when the access to documents negotiations were reaching their final stage. The Swedish and Dutch discourse was premised on the idea of transparency as a way for citizens to hold their government to account. This was closely connected to an ideal of participative citizenship, anti-corruption, and the need for accurate information to feed a

sphere of public deliberation. The pro-transparency discourse focussed on access to documents, holding that no documents should be a priori excluded, and that the public interest in disclosure should be established on a case by case base. This last element stood in contrast to the French position, which favoured the exclusion of certain categories of documents based on their classification. Differently from Sweden and the Netherlands, transparency was seen by France as a way to enrich a representative democracy, where governments derive their legitimacy to decide on good policy from periodical elections.

After the implementation of the new access to documents rules, a period of relative stability emerged as the transparency policy had found a workable modus operandi. The scope of access to documents was considerably widened and an attempt was made to give a liberal interpretation to 'the widest possible access'. However, ambiguity existed over the status of legal advice to the Council, and documents submitted by the member states, which the Council de facto allowed to be excluded. Rationalisation continued in the information policy, where cooperation with the Commission was stepped up and targeted internet activities, such as themed websites, gained further ground over paper publications. In 2005, the Council agreed to hold a larger number of its deliberations on legislation in public, which eventually led to the adoption of the Overall Policy on Transparency in 2006. This policy was again presented as a further step in the opening up of the Council. In 2007, a revision procedure was started in which the Council debated on a common position for a recast access to documents regulations. By 2009, access to legal advice and member state documents were no longer a priori excluded, which led the Council to resort more frequently to exception clauses such as the protection of deliberations.

During the years between 2001 and 2009, the formalisation of the transparency policy meant that the other institutions gained a greater grip over the Council discourse on transparency. The EP played a role in every major breakthrough towards more transparency, often using the instrument of a court case. The Ombudsman also stepped up his critical attitude towards transparency of the Council. This meant that the Netherlands and Sweden were now backed by both the rules and other actors in the interinstitutional context in their attempt to remove any lingering ambiguity in the transparency policy. At the same time, it came as a shock for the UK and France that some of the interests considered vital in their administrative cultures were being undermined. This led to the perception that the Council was losing grip over its own discourse, and that its transparency policy was being pushed around.

In the final years of the transparency policy, the pro-transparency coalition thus found itself in an awkward position. While it enjoyed the support of several EU actors outside of the Council, and saw its interpretation of the existing rules gradually prevail, support inside the Council eroded. The revision procedure of the access to documents regulation thus placed both sides in an embattled position. While the Netherlands and particularly Sweden were not willing to concede anything that they considered a "rolling back" of the current provisions, the UK and France saw it as an opportunity to break open the debate. This reconfiguration of positions is in itself evidence in favour of the argument that between 1992 and 2009, the Council discourse gradually shifted away from that of the UK and France, and towards that of Sweden and the Netherlands.

Conclusion: which change took place, and why?

Between 1992 and 2009, the Council's transparency discourse underwent considerable change. However, this change was uneven and showed a particular pattern. This becomes clear when change is traced through the three dimensions of transparency postulated above.

In terms of the definitional dimension, the Council discourse showed little change. The broad dimensions of transparency that were established in 1992 were relatively intact by 2009. Change only occurred where the emergence of IT created new categories, such as internet transparency, meta-data, and open data. Little evidence was found that the distinction between passive and active transparency was seen as a fundamentally definitional development. Rather, it was framed in terms of more or less transparency, making it an implemental question. Indeed, The dimension that changed most was the implemental. Although different policy positions often emerged out of differences between the member states in conception of transparency, and different expected objectives, such differences were nearly always fought out in debates on the best way in which to enact transparency. On the other hand, the ethical dimension changed least over time. This is perhaps an unsurprising conclusion, as the Council is foremost a policy making arena, and to a lesser extent a forum for broad political debate. However, the Council may see itself forced to address the ethical dimension in its transparency discourse more substantially over the coming years.

Several institutional factors played a role in change the Council discourse on transparency. Nevertheless, a number of these stand out as particularly important in explaining change. In the first place, the accession of Sweden in 1995 lastingly shifted the balance of discursive power in favour of expanding the scope of transparency. Secondly, the introduction of IT in the policy in 1998 provided new definitional categories, as well as new ways in which to implement transparency. Finally, when access to documents became formalised through Community law in 2001, other institutions began to exert increasing influence on the formal Council discourse through direct action and their support of the Council's pro-transparency coalition. This last conclusion, moreover, shows the growing constraints on the Council in formulating its own discourse on transparency.

Today, transparency is an instrument of public administration that can no longer be ignored. Nevertheless, the Council remains unclear about *why* this must be the case. Normative statements are lightly made, but often unsubstantial. Broadly, three strands of democratic theory can be discerned in administrative thinking about transparency: those of representative, deliberative, or participatory democracy. While transparency is central to the latter two, it is more peripheral in the first. Moreover, each of these theories cite numerous causal effects of transparency, which are often not empirically substantiated. In the context of the EU, research can play a role in testing such assumptions. Eventually, however, it is up to the Council to come up with a convincing discourse on the normative question of the role that transparency should play in European governance.

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It is said that a person's success is carried by his environment. From this thesis project I can establish at first hand that these are indeed true words. Although it will prove difficult to provide full transparency about everyone who in one way or another helped this project come to fruition, I would like to mention a number of people without whom this project would not have become what it is now, or would not even have become at all. My gratitude goes out to Albert Meijer and Deirdre Curtin, who have been critical but supportive of the theoretical and methodological twisting and turning that this research has entailed. Along with Gijs Jan Brandsma and Bettina Leufgen, they welcomed me with open arms into the Open Government in the EU research team, and got me wondering about the phenomenon of transparency in the first place. I look forward to returning after the summer for more coffee and debates.

The approach of discourse was new to me and to this research area. Erna Scholtes showed me the first steps and gave me the confidence that it can indeed lead to creative research and interesting findings. Francesca Snoeck Henkemans took an active interest in the ways I wanted to apply the discourse method, letting me experiment with it and providing useful feedback. Armin Cuyvers, Katja Heede, Maria Hellberg, Matilda Rotkirch, Martina Smedberg, Jakob Thomsen and Minna Immonen provided me with a deeper insight into the legal structures and workings of the European institutions, and particularly in the Council transparency policy. They patiently answered even the most basic questions that I put forward. So did all those who were interviewed for this research, and whose years of experience in the field were indispensible for me in opening up the "black box" of the Council transparency policy. Tony Bunyan and Trevor Hemmings provided with Council documents and information that would otherwise have been hard to get hold of, as did Helen Darbishire and Pam Bartlett. At crucial moments during the research process, conversations with Anchrit Wille and Mark Bovens sent me in the right direction when it came to placing the research in the right theoretical frame.

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Boxes, tables and figures

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Abbreviations

CADA	Commission d'Accès aux Documents Administratifs
CFI	Court of First Instance (after Lisbon: GC)
CFSP	Common Foreign and Security Policy
Coreper	Comité des représentants permanents
EC	European Commission
ECs	European Communities
ECSC	European Coal and Steel Community
EEC	European Economic Community
ECJ	European Court of Justice
EP	European Parliament
ETI	European Transparency Initiative
EU	European Union
Euratom	European
FOI	Freedom of Information
GC	General Court of the European Union (before Lisbon: CFI)
GS	General Secretariat of the Council of Ministers
IGC	Intergovernmental Conference
JHA	Justice and Home Affairs
MEP	Member of the European Parliament
NATO	North Atlantic Treaty Organisation
PIDA	United Kingdom Public Interest Disclosure Act
TEC	Amsterdam consolidated Treaty establishing the European Community
TEU	Maastricht Treaty on European Union
WOB	Wet Openbaarheid van Bestuur (Law on Administrative Openness)
WPI	Working Party on Information

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Introduction

> There is general agreement among theorists addressing the democratic legitimacy problems of the European Union that increased transparency is a must. [...] What is less clear in this discussion, is precisely *why* more transparency is needed. What is it, more specifically, that transparency is expected to do for the European Union?
> - D. Naurin, *Dressed for Politics* (2004), p. 11

1.1 What is the EU transparency policy and why study it?

All but obvious change

On Friday 7 February 1992, representatives from the twelve countries of the European Communities gathered in Maastricht to sign the Treaty on European Union. In many ways, the signing of the Maastricht Treaty marked an important moment: it established the European Union, introduced European citizenship, and broadened the field of cooperation. Furthermore, it marked the beginning of the European transparency policy.

The brand new European citizen at the time would have been excused for overlooking this last fact. A short declaration attached to the Treaty recommended that the Commission write a report on measures to improve public access to information; this hardly seemed the starting point for an ambitious initiative. Yet as it turned out, this Declaration 17 became the formal starting point of a policy that went through rapid expansion to include, after a period of less than two decades, extensive commitments in areas such as access to documents, open meetings, and a variety of information activities. How is this development possible?

Before 1992, the idea of making the European project transparent via an autonomous policy was virtually completely absent on the decision-making agenda (Birkinshaw 2006: 48-9, Settembri 2005: 639). Up until then, the role of transparency had been limited to a supportive role in the defendant's right to be heard (meaning the defendant needed access to the relevant files to prepare an effective defence), and an archiving law of the European institutions. Many observers have remarked upon the culture of technocracy and secrecy that pervaded the institutions (Flanagan 2007: 597, Lodge 2003: 99-100, Brinkhorst 1999: 128, 132), and it has been pointed out that interaction at the European level, especially in the Council of Ministers, mainly followed the protocol of diplomacy that characteristises many

international organisations (Curtin 2011: 4, Stasavage 2005: 2, Curtin and Meijers 1995: 392-3). Other observers have gone even further to speak of the original European project as 'a benevolent conspiracy by the elites' (Carvel in Moser 2001: 5) and an intergovernmental 'bargaining format that requires secrecy rather than transparency' (Beetham and Lord in Curtin 2009: 244). In 1991, even a reference to transparency was a hotly contested subject during the treaty negotiations, and no support base could be found for including it in the actual treaty text (Frost 2003: 95).

From the origins of the transparency policy in the 1992 Maastricht Treaty to the coming into force of the Lisbon Treaty nearly eighteen years later, the EU and its most diplomatic institution, the Council, thus underwent a considerable change in outlook. Increasingly, the Council let go of its closed attitude to propagate far-going transparency (Hüller 2007: 565-6, Lodge 2003: 95). Given the Council's track record before 1992, and the fact that the Council gradually became more transparent than even many of its member states, such change can hardly be called obvious.

And yet far-going change *did* take place. The policy of access to Council documents may serve as just one example of this fact. Compared to the earliest period of the access to documents regime (1994-5), the number of documents requested in 2008 and 2009 more than forty-threefolded to a total 19.174 documents, while the percentage of documents disclosed at the initial stage of request went up by nearly a quarter to 81.7 per cent. The large majority of these documents were disclosed in full, while all were directly made available on the internet (Council 1996, Council 2010b). The acces to documents regime was not singular in this respect. In several other areas, transparency of the Council was likewise expanded and standardised.

Clearly, such change could not be confined only to the field of practice. Expansion required the Council to repeatedly consider the nature, role, and practical sides of transparency. In fact, between 1992 and 2009, the formal Council rhetoric took a remarkable turn. By 2004, the European transparency scholar Naurin concluded that a widespread presumption in favour of transparency had emerged. In theories on European governance, transparency has come to be routinely referred to as a fundamental right and a principle of good governance (Addink 2005, Settembri 2005, Bijsterveld 2004). Moreover, Vesterdorf's remark that transparency should be seen as a lasting reality rather than a mere 'vogue word' seems to hold true as time passes (Vesterdorf 1999: 902). This discursive change is significant, since it is another way for member states to attain their goals. Given this recent and rapid rise to prominence of the concept of transparency in administrative thinking, and especially that of the EU, it is therefore valuable to consider what changes made the Council, its most secretive institution and instigator of the transparency policy, open up to the extent that it did.

Explaining change: what?

The change in the Council's discourse on transparency of the EU may thus be worthwhile to consider. However, what sort of discursive change should have our attention in this respect? After all, transparency is a concept that has been written on in many different contexts and with various purposes. In order to

track the most important transformations from a public administration point of view, the Council debate on transparency can be divided into three dimensions that stand central in the literature on transparency: the definitional, the implemental, and the ethical.

The first dimension, the definitional, looks at conceptualisations of transparency. How did the Council understand transparency? Was that mainly as access to documents, or something more multi-dimensional? Was it seen as a means to an end, or rather as an end in itself? And was it considered a self-imposed/proactive, a citizen-imposed/reactive, or rather a relational instrument combining both attitudes?

The second dimension deals with the way in which the Council believed transparency should be put into practice. This implemental question is mainly about inclusion and exclusion. When was transparency deemed useful or even necessary, and when was it considered an unnecessary luxury or even a threat? This question is, of course, closely related to definitions of transparency. Categorisation also plays an important role in decisions to have less or more transparency.

The third dimension, the ethical, brings together the definitional and the implemental to consider it in the light of justification. The central question in this theme is: why is transparency an issue to have a policy about? What good is it supposed to bring? And how important is transparency for the EU? An exploration of the ethical dimension of transparency connects to the wider debate on public values: what are they, and how do they relate to each other (Beck Jørgensen and Bozeman 2007: 371)? This brings us back to the fundamental question postulated by Naurin, which opened this chapter. As he argues, a serious consideration of the value that we attach to transparency, far from 'making the case for murky elitism', amounts to 'taking transparency seriously' (Naurin 2004: 13).

Explaining change: how?

The puzzle that the rise of transparency in the Council throws up is best described in terms of institutional change. After all, the central concern is how the role of transparency has changed over time in the institution of the EU where member states meet. Institutional theory provides a good starting point for studying change "through the eyes of the institutions". This is done using three perspectives. First, the Council discourse about transparency is studied over time. Second, change factors as understood by the Council members' are charted, and finally, the negotiation of preferred outcomes or, more starkly put, the struggle between various actors for dominance is addressed. These three approaches of the change question match the 'three new institutionalisms' put forward by Hall and Taylor: respectively, sociological, historical and rational choice institutionalism. Although they study the same object, they have different focal points and are well-suited to complement each other when approaching questions on institutional change. This research will therefore apply insights from all three of the 'new institutionalisms' (Hall and Taylor 1996: 5, 17-21).

In the sociological institutionalist perspective, the way in which the Council and its members approach transparency is seen as contingent on the 'institutional logic' with which they approach it

(Thornton and Ocasio 2008). This logic is often based on deeply seated cultural beliefs and values which inform both the way in which it talks and acts. Because of the way in which an institutional logic purposefully structures talk and action, they turn into *discourse* and *practice*. In the reading of sociological institutionalism, our understanding of the changing role of transparency in the Council is in the first place enhanced by a close analysis of the changing institutional logic. This logic, after all, provides the parameters for the Council's behaviour (Hajer and Laws 2006: 251-2, Roland 2004: 111-2).

The historical institutionalist perspective emphasises the influence of historical and contextual circumstances. Therefore, this approach has been especially interested in national trajectories, and the way in which they determine institutional outcomes. In this respect, this approach is compatible with the sociological institutionalist idea of "administrative culture". However, the historical approach is primarily interested in the routines and responses which develop out of this: an institutional logic is thus in the first place seen as a way to structure problems and responses, thereby reducing policy uncertainty. A detailed analysis of impact factors that is propagated, allowing for close reconstruction of the institutional actors' self-attributed meaning. This inductive approach stays close to the experiences of policy actors, thereby adding to the realism of the analysis (Hall and Taylor 1996: 5-10).

The perspective of rational choice institutionalism, finally, sees change in the transparency policy in the first place as a collective action problem. From the point of view of rational choice, institutions are mainly "arenas" in which actors interact strategically with a view to maximise their benefits (Hix 1998: 48-50). Framed in terms of rational choice, the Council's transparency policy is thus best understood as a game in which different preferences struggle for dominance. Such dominance, while eventually aiming to influence the distribution of resources, begins with the power to define (Stone 2002: 32-4). A strength of the rational choice approach is that, instead of conceptualising the Council as a stable, monolithic institution responding to external challenges, it recognises internal power dynamics as an inherent feature of the way in which decisions are arrived at. In other words: member states seek to exert power through linguistic means (Hall and Taylor 1996: 12-3).

Explaining change: why?

In under twenty years, transparency has entered the EU as a fully-fledged instrument of governance, and, it seems, durably so. This is a remarkable development; yet the fact in itself does not necessarily provide a justification for studying its appearance. After all, if transparency has already become widely accepted in the EU anyway, then why study its emergence? There are, however, a number of theoretical and societal reasons for doing so.

First, no structural research so far has been done on the impact factors that altered the Council's perception of transparency at key points of the policy debate. What caused this perception to emerge and to change? Although some ideas have been suggested in this respect, little structural knowledge exists up to now about how, and to what extent, certain impact factors were connected to the transparency policy.

A study of change factors perceived by Council members themselves will provide greater insight into where transparency has come from and, thereby, where it is supposed to bring us.

Like any policy, the Council's transparency policy has been continually exposed to contextual factors that have either acted to expand or delimit change. In a number of cases, factors have shaped the Council's thinking about transparency, and brought up a mixture of political, social and ethical confrontations. To know why transparency was called into being, any investigation must thus start at the origins. Were the contextual factors that impacted on the transparency policy variable, or were they structural? To what extent was their impact lasting?

Secondly, once the transparency policy got going, the Council began to develop a general attitude in the matter. This developing administrative thinking about transparency has acted as a 'cognitive script' based on which the Council put transparency into practice (Hall and Taylor 1996: 14). While Council practices and progressive steps in the policy (e.g. treaty negotiations, legislation, case law) have been recorded in various places, as of yet no structural study of the most salient attitudes of the Council members towards transparency has been carried out, let alone of how these have influenced the attitude of the Council.

Finally, the logic with which the Council approaches the question of transparency has an important bearing upon the way in which the EU conceptualises its relation to the citizen. Attempts to rethink the relationship between administration and citizen have the potential to fundamentally alter the nature of EU governance and democracy (De Fine Licht and Naurin 2010: 1, Hüller 2007: 563, Lodge 2003: 100, Brinkhorst 1999: 135). It is therefore important to get a grasp of where the Council places transparency in this relation, and to what extent the introduction of transparency has altered it.

Regarding the EU itself, transparency, as was briefly touched upon, relates to accountability and good governance, but also to matters such as effectiveness and external influence (Crombez 2003: 102-3). When looking at the citizen, transparency has been related to participation and democratic empowerment, but also to questions of privacy and public security (Eriksen and Fossum 2002: 404-6, Pozen 2010: 277). In the connection between the two, it has been argued that transparency increases legitimacy and trust, but also that it has introduced a new, uncertain model of democracy with potentially the opposite effects (Tsoukas 1997: 832-4, Fox 2007: 663). Over the past two decades, the ideal relation between the EU and the citizen has stood central in a dynamic debate. Transparency and its role has been one of the most prominent sites through which this debate materialised.

A longitudinal and detailed study such as the current can help to bridge these gaps in knowledge. It will increase our understanding of why the Council acts the way it does, and what practices are deemed appropriate in the light of the dominant understanding of transparency. Furthermore, by studying the interaction between member states, a clearer picture emerges over where agreement existed, which areas were most controversial, and how this interaction has changed the dominant understanding, or "logic", of the Council (Thornton and Ocasio 2008: 100-2). In other words: which ideas, concepts and categories of transparency existed among Council members, where were these derived from, and which were most successful in making the Council adopt their take on transparency?

1.2 Research question and sub questions

Between 1992 and 2009, the Council's dominant discourse on transparency is expected to have undergone considerable change. Using the dimensions of transparency and perspectives of institutional logic presented above as a starting point, this investigation sets out to analyse this change, using following research question:

How has the Council of Ministers' discourse on transparency of the EU changed over time?

where the time period under consideration will be that from 1992 (the coming into force of the Maastricht Treaty) until, and including, 2009 (the coming into force of the Lisbon Treaty).

A longitudinal study of the interaction of discourses in the Council will be applied to render the change process visible (Hajer 2006: 69). This model is guided by a number of theoretical and empirical sub questions. Research question and sub questions are listed in box 1.1.

Box 1.1: Overview of research question and sub questions

Research question

How has the Council of Ministers' discourse on transparency of the EU changed over time?

Sub questions

1. What is a discourse and how does it change?
2. Which discourses on transparency can be distinguished among Council members and how can the dominant discourse be characterised?
3. What were the most important impact factors in the discourses on transparency of the Council and its members?
4. How have the discourses of Council members been able to change the dominant discourse on transparency of the EU in the Council?

1.3 How to read this thesis

This research report aims to cover a considerable area and is therefore fairly lengthy. Here are a few recommendations for effective reading.

- For readers with very little time, an executive summary at the beginning of the report is included which contains the bare essentials of the research. Those readers who have only a little more time may, after reading this introduction, skip forward to chapter eight which ties together the empirical findings, and chapter nine with conclusions and discussion.

- Each chapter opens with a few italicised lines. These will help you decide whether the chapter is of interest for your purposes.

- Those readers interested in the scientific grounding of the research are recommended to read chapter two and three (theory and methods) and to consider at least appendices two and three (interviews and document analysis).

- Chapter four provides a rough guide to the institutional context of the Council. Those readers who are reasonably familiar with Council governance may skip this chapter.

- Those readers who are mainly interested in the historical context and environment of the EU's transparency policy are recommended to read the first section of chapters five, six and seven.

- Those readers who want to find out more about the origins of specific provisions in the Council's transparency policy are recommended to read section two of chapters five, six and seven.

- Those readers who have a special interest in the political interaction of member states in the transparency policy are recommended to read sections three and four of chapters five, six and seven.

In conclusion two final notes on style. In the analytical chapters (five, six and seven), which extensively refer to documentary source material, references have been moved to the end notes for the sake of readability. A full list of primary sources can furthermore be found in appendix I, while secondary source materials from media and policy documents are separately listed in the bibliography. Citation in single brackets ('…') refers to original texts, whilst double brackets ("…") pertain to terminology coined by the author.

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Theoretical framework

> To deconstruct a policy discourse and find that it is to be understood as the unintended consequence of an interplay of actions is one thing, more interesting is to observe how seemingly technical positions conceal normative commitments, yet more interesting still is to find out which categories exactly fulfilled this role, and which institutional arrangements allowed them to fulfill that role…
> – M.A. Hajer, *The Politics of Environmental Discourse* (2005), pp. 54-5

For a number of years now, researchers have had an interest in the role of transparency. In the context of the EU, research has looked at developments in policy-making in the area of government transparency. Relatively little attention however has been spent on the changes in attitude toward transparency among the EU's policy-makers, in spite of the fact that the study of such attitudes can help explain changes in its policies. In this chapter, an attempt is made to conceptualise the role of attitudes in shaping changes in the Council of Ministers. This is done using a model of institutional change based on the work of Hall and Taylor (1996) and Thornton and Ocasio (2008).

2.1 Transparency: definitions, implementation, and objectives

In recent years, the concept of transparency in governance has attracted increasing attention among various academic disciplines. An interesting and heated debate has emerged on the nature of transparency and its pros and cons (Meijer 2009: 256). This controversy over transparency is not new; in fact it has a long history (cf. Hood 2006, Stasavage 2004). After World War I, American president Woodrow Wilson, who believed that more openness in diplomacy could prevent the outbreak of a new war, spoke in favour of 'open covenants of peace, openly arrived at' (cited in Stasavage 2004: 668). His contemporary, the U.S. Supreme Court Justice Louis Brandeis was of the opinion that 'sunshine is the best of disinfectants' for administrations (cited in Etzioni 2010: 1).

This verdict was not universal throughout history. The German Chancellor Bismarck, for example, once famously remarked that laws, like sausage, are better not seen being made, lest they lose their respectability. Similarly, John Stuart Mill argued in the 1830s that Bentham's advocacy of extensive transparency would end up 'riveting the yoke of public opinion closer and closer round the necks of all public functionaries'. The French sociologist Alexis de Tocqueville agreed with this point of view

(Stasavage 2004: 672). Older strands of the transparency debate have been traced back to such thinkers as Hobbes in 1651 and Spinoza in the 1670s (Stasavage 2004: 672, Hood 2006: 7).

Throughout history, there have been passionate advocates of governmental openness on one side, and closedness and distance from society on the other. The historical transparency debate has therefore had a strongly normative flavour. Apart from the examples cited above, much further anecdotal evidence suggests that administrative thinking about transparency has been influential in determining the style of governance assumed by authorities throughout history (cf. Stasavage 2004, Curtin and Meijers 1995).

In recent times, the academic debate on transparency has resurged in response to the re-emergence of the concept in administration. In a meta-analysis of the transparency literature, Meijer et al. (2010) reported that almost all of the literature that they found under the header of 'transparency', 'openness' or a related term was produced over the last two decades. Three quarters of the publications co-opted in their corpus were produced during last decade. In a short timeframe, transparency has re-emerged as a subject of interest in many academic disciplines, among them public administration, politics, and law (Meijer et al. 2010: 9, 11).

Increasingly, the new literature on transparency has begun to focus on questions beyond the normative realm, taking a more active interest in conceptualisations and empirical applications. The involvement of various academic disciplines has led to a rich diversity of approaches. In broad terms, these have developed along the three dimensions that I briefly mentioned in the introduction: the definitional, the implemental, and the ethical. We will in turn address each of these in order to develop a meta-conceptual understanding of transparency.

First, there is the definitional dimension. Research in this dimension is primarily concerned with the question: what is transparency? This question has been addressed in a number of conceptualisations (e.g. Meijer et al. 2010, De Fine Licht and Naurin 2010, Pasquier and Villeneuve 2007, Héritier 2003). These have been put forward at different levels of theoretical abstraction and in relation to several specific research contexts. In a broad and general way, transparency has been described simply as 'making the invisible visible' (Strathern 2000: 390). This definition implies that it is not self-evident that phenomena become transparent; instead, an agent is needed to create transparency. However, the definition does not tell us what it is that is made visible. After all, if transparency is created, it will also inherently be directed towards something. In this sense, it is a "targeting" instrument, and as such we can speak of a "transparency of..." (Fung et al. 2007: 39).

To note that transparency is both created and directed is important for two reasons. In the first place, when studying the EU, it allows us to distinguish cases where the EU and its institutions are subjected to transparency from the markedly separate instances where the EU employs transparency as an instrument to be targeted at other actors. Here, transparency of the former kind has our interest, that is, 'the ability to look clearly through the windows of an institution' (Den Boer, 1998: 105). Hence, for the sake of disambiguation, the term transparency *of* the EU is preferred to transparency *in* the EU.

The second dimension is that of implementation. Here, the central question is: how is transparency put into practice? Research in this area has focussed on empirical assessments of transparency in the light

of theoretical conceptions. This has led transparency practices to be approached from various focal points. Political science, for example, has studied the effects of transparency on strategic behaviour and on negotiations (Prat 2005, Naurin 2004, Stasavage 2004). Legal studies, in turn, have focussed on transparency as a legal principle, and the types of exemptions that arise when it is balanced against other legal principles (Prechal and De Leeuw: 2007, Kranenborg 2006, Lodge 2003). In public administration, research has been interested in the types of organisational and cultural responses that transparency elicits (Meijer 2009, Brinkhorst 1999, Peterson 1995). Together, these various approaches to the implemental questions surrounding transparency have made it clear that a failure to acknowledge the differential settings in which transparency policies are introduced results in a misunderstanding of their impact, both in the meaning that they are given and in their practical functioning. Moreover, these studies show the implementation of transparency has both strategic and practical repercussions (Meijer et al. 2010: 17-8, Héritier 2003: 821-4).

The third dimension, the ethical, is probably the oldest and most contentious area of the transparency debate. It deals with the question: why should we (not) have transparency? This question transcends the implemental question in the sense that it is foremost oriented on normative preferences about public values (Beck Jorgensen and Bozeman 2007, Florini 2002, Dror 1999, Florini 1998, Tsoukas 1997). Transparency research has noted the growing prominence of transparency among administrations. The fact that over the past decades, the number of countries with freedom of information laws has steadily increased is but one indicator of this prominence (Roberts 2010: 1). In the context of the EU, scholars have associated transparency with good governance and the development of a new ideal of transnational democracy (Addink 2005, Bijsterveld 2004). Transparency seems to have captivated the imagination of institutions around the world. Its popularity has reached such heights that it led Hood to argue that "more transparent-than-thou' has [almost] become the secular equivalent of 'holier-than-thou' in modern debates over matters of organization and governance' (Hood: 2006: 9).

It is likely that the increased popularity of transparency is partially rhetorical. However, its increased prominence does imply a change among institutions in their attitude towards transparency. In the EU, this change dynamic seems to have caught on as well. Beginning in 1992, the EU started issuing periodical statements appraising self-imposed transparency (TEU 1992: declaration 17, TEC 1997: article 1, Charter of Fundamental Rights 2000: articles 41 and 42), while at the same time pursuing a transparency policy of its own.

It is therefore remarkable that relatively little research has focussed on the reasons for such changing attitudes. While the transparency literature has shown a growing sophistication over the past two decades, incorporating definitional, implemental and ethical dimensions, it is mostly contingent on academically developed thought and theory. In empirical research, attitudes to transparency are often taken as a given, or operationalised in fixed and narrow terms that do not account for change. As a result, a gap in the transparency literature continues to exist where it comes to understanding the conceptualisations and expectations of policy-making institutions themselves, and the ways in which these have changed.

A number of authors have made a beginning with theorising such attitudes and assumptions underlying the transparency policy of the EU, albeit on a loose, unstructured basis. Lodge, for example, has suggested that the EU committed itself so rapidly to transparency because of 'some politicians' beliefs that the EU had to be seen to be democratic and open at a time when the way in which it was seen and/or believed to make policy was depicted as at best opaque, and at worst verging on the devious' (2003: 96). Similarly, it has been put forward that transparency was seen by the European institutions as the remedy against the social discontent that began to emerge around the time of the Maastricht Treaty (Brinkhorst 1999: 132). Others authors have pointed at the distinct differences in national governmental culture that Council members bring with them (Davis 1999, Grønbech-Jensen 1998, Sabatier 1998: 103, Williams 1998).

Noting the rapid emergence of transparency in governance, and the assertion among observers that we are not dealing with a 'vogue word', or 'a fashionable expression that will not live to see the next year' (Vesterdorf 1999: 902, Bijsterveld 2004: 14), two observations thus stand out. The first is that member state attitudes towards transparency can be observed to be lastingly divergent. The second is that European governance, especially that of the Council, has traditionally been typified as diplomatic by nature, and secretive in practice (Curtin 2011: 4, Stasavage 2005: 2, Frost 2003: 93, Westlake cited in Bunyan 2002, ch. 1).

The question therefore emerges, how it is possible that the attitude of the Council of Ministers, traditionally the most diplomatic of the EU's institutions, and the forum where divergences in attitudes towards transparency are most visible, has changed so rapidly over a relatively short timeframe. A systematic longitudinal empirical analysis of the statements of EU actors can provide greater insight in the development of attitudes towards transparency. Has the transparency debate mainly focussed on ethical considerations, or did the implemental dimension play a greater role? A to what extent were definitions divergent between the various member states? To address such questions, a supportive theory is needed which accounts for policy change, giving space to the pluriformity of logics that member states apply, and a method which provides insight into the nature and role of such logics (Hajer 2006: 69). For that reason, the theory of discourse and the method of its analysis are proposed.

2.2 Policy discourses as a window to institutional logics

The linguistic turn

It is sometimes held that over the past decades, the social sciences have experienced a "linguistic turn". With this is meant that social scientists increasingly recognise that 'we can no longer assume that the universe contains meanings that are just 'there' to be construed by us in language', and that instead, 'language is […] a socially developed, though individually used attribute of human society, which creates our world' (Carver 2002: 50). In other words: through language, we give meaning to phenomena around us. This is possible, because the world around us is wrought with ambiguity, thus allowing for various competing interpretations (Hajer and Laws 2006: 251-2, Phillips and Jorgensen 2002: 143-4).

In politics, the role of language is pivotal. It can 'create signs and symbols that can shift power-balances and that can impact on institutions and policy-making' (Hajer 2006: 67). By laying emphasis on certain aspects of a phenomenon and omitting others, and through the choice of specific words and categories, a 'way of seeing' is put forward (ibid: 66, Phillips and Jorgensen 2006: 8-9, Stone 2002: 378). This way of seeing, or "frame" provides a way of seeing the world, rather than a true, objective, or neutral description of it (Carver 2002: 51, Hajer 2002: 62). In the case of transparency as a policy instrument, language is an especially powerful tool for meaning-giving, as it is a social idea that is highly contested and which exists only in abstraction. Three question arise in this context: where do policy-makers in the Council derive their attitudes towards this abstraction notion from, over what elements do these attitudes contest each other, and how does the outcome result in a collective approach?

The structure of attitudes: institutional logics

In the EU, policies are, fundamentally put, a compromise of the positions of member states. They are the parties authorised to vote in Council decisions. Member state positions are shaped by the beliefs, values and norms that they have towards these policies. It is generally held that such beliefs, values and norms are relatively coherent and stable (Sabatier 1988: 132). This stability is strengthened by the fact that certain dominant ideas become part of the institutional logic. With institutional logic is meant

> ...the socially constructed, historical patterns of material practices, assumptions, values, beliefs, and rules by which individuals produce and reproduce their material subsistence, organize time and space, and provide meaning to their social reality. (Thornton and Ocasio 1999 in Thornton and Ocasio 2008: 101)

Institutional logics therefore form a large construct arranging the way in which people from an institutional context think and speak in, and act and react to, the environment in which they find themselves. It is quite possible to observe such logics independently from individuals, as characteristics of institutions (Hajer 2005: 263-4).

In a classic overview of institutional approaches, Hall and Taylor (1996) usefully explore different approaches to the idea of institutional logic. They identify the emergence of three theoretical strands of research, which they describe as 'the three new institutionalisms'. While each of these strands focuses on the same phenomenon, namely the nature of change and continuity in institutions, they do so from a different perspective. While sociological institutionalism starts from the idea of meaning-giving through social processes, historical institutionalism takes the distinctiveness of institutional arrangements in specific contexts of time and space as its point of departure. Rational choice institutionalism, finally, sees institutional behaviour as driven by various games of collective action problems. The three approaches, though setting out from different starting points, often complement each other well (Hall and Taylor 1996). In this research, aspects from each of the three institutionalisms will be used in order to find an answer to the puzzle of changing attitudes to transparency. Table 2.1 shows how the different institutional

approaches provide different perspectives on the central dimensions of transparency. These perspectives are developed below.

Table 2.1: Dimensions of transparency according to the three 'new institutionalisms' (based on Hall and Taylor (1996))

	Definitional	**Implemental**	**Ethical**
Sociological institutionalism	The collective understanding of a social phenomenon.	The 'performance' of the collective understanding.	Transparency may provide social legitimacy.
Historical institutionalism	The justification of collective behaviour.	Rules and patterns making collective behaviour tangible.	Transparency is driven by impact factors.
Rational choice institutionalism	The dominant perception of a collective action problem.	The policy preferences of the most influential actor in the arena.	Transparency is the outcome of a policy game.

According to sociological institutionalists, the distinction between organisational and cultural life is in fact a false dichotomy. The choices that institutions make and the way in which they define the world around them are themselves determined by the culturally defined 'cognitive script' under which they operate. Institutional logics, in this sense, do not simply describe the world that surrounds them; instead they "construct" it out of a myriad of symbols, metaphors, ceremonies and other signs (Hall and Taylor 1996: 14-6). These find an expression in discourses and in practices, which in turn explain and enact the institutional logic.

In the context of the Council discourse on transparency, an expectation can be formulated about the amount of change among the three general dimensions of transparency. Administrative concepts are often introduced as 'political slogans', which subsequently take shape when the discussion erupts on how they should be implemented. Definitions, in the meanwhile, are frequently kept deliberately vague in order to enable progress in decision-making (Stone 2002: 157-62, Dror 1999: 62, Grønbech-Jensen 1998: 185-6). *Expectation 1 is therefore that while little change occurred along the ethical dimension, most change occurred along the implemental dimension. The definitional dimension, finally, is expected to stand in the middle, having changed little in terms of objectives, but much in terms of means.*

2.3 Impact factors in the Council transparency debate

Administrative culture

In the case of the transparency policy of the Council, a variety of institutional logics can be perceived at the level of member states. The particular logic with which a member state approaches a matter such as transparency of the EU is, according to Thornton and Ocasio (2008), dependent on which of its values it holds in this respect, its historical track record, and the assumptions and attitudes that spring out of these parameters. According to historical institutionalists, these provide the catalogue of strategic and moral

attitudes that a member state holds at its disposition. Such attitudes influence both the way in which a member state is prone to behave, and its interpretation of events that occur in and around the policy arena (Hall and Taylor 1996: 10).

Administrative culture, in this respect, is seen as an important source for tying the components of institutional logics together. A particular culture, when institutionalised, becomes a strongly directive force. 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 (Grønbech-Jensen 1998: 193).

Administrative cultures show us not only how member states adopt certain positions and strategies to attain those positions; they also provide an insight into the source from which these positions and strategies arise (Hajer and Laws 2006: 259). In other words, the ideas and rhetoric that member states put forward tell us more about their core values and type of logic. An institutional logic, therefore, beyond motivating action, also justifies it (Thornton and Ocasio 2008: 103). This also clarifies why policy-makers often go to great lengths to explain their position, rather than to simply pursue strategically whatever they consider institutionally logical. As Hajer puts it,

> the argument is not that there is no strategic behaviour as such (which would be an odd position to take for a political scientist anyway) but that political conflicts often *transcend* a simple conflict of interest. (Hajer 2006: 66)

Internal and external events

While an institutional logic shapes the social world, the reverse is also the case. Various factors in its context and environment feed into it. Such impact factors are internalised in the transparency debate through the influence that they have on the behaviour of the Council and its members. More particularly, references are often made to various internal (contextual) and external (environmental) events in the statements that are put forward to motive positions. While being "externalities", such impact factors therefore become significant to the policy debate to the extent that they are internalised by the Council or its members.

By way of an example, the position of the EP towards the Council debate on transparency is in principle external to it: MEPs may have an opinion on it but they are not a direct actors in the Council. The position of the EP begins to matter for the Council only when a Council actors acknowledges the reality and importance of its statements. Similarly, new technologies may have played an important role in the way transparency is perceived. However, we may only assume that this holds true for the Council debate if we can find corresponding evidence in the statements of the Council or its member states.

A first factor which impacts upon the transparency debate is, as I showed above, administrative culture. A second impact factor is found in developments that occur in and around the EU, which I will as a shorthand refer to as "events". In the first place, there are internal events. Factual counterevidence

introduced by opposing parties, or changes in the rules or relations between actors may pose such an obstacle that a discourse needs to respond to the challenge (Hajer and Laws 2006: 260).

A change in the systemic governing coalition (the accession of new member states in the EU) is an example of such an internal event. However, such a reconfiguration is only likely to have an impact to the extent that it alters significantly the balance of administrative cultures in the area of transparency (Hall and Taylor 1996: 10). This happened in 1995, when Sweden acceded the EU. *Expectation 2 is therefore that the accession of Sweden was the internal event with the largest impact on the transparency policy in the during the period under consideration.*

In the opposite direction, internal events can also be "uneventful" to the extent that they are recurrent and predictable. Even though frequent references may be made to such events, they are have no, or hardly any impact on a policy. It could be argued that, as relations between the institutions are well-established, relatively stable, and preceding the transparency policy, they will have had no remarkable impact the policy. In this reading, while institutions may have their individual attitudes towards transparency, these to form part of the predictable "background" of the Council debate, offering no additional stimuli for change. *Expectation 3 is therefore that the interinstitutional relations will have had no impact on changes in the transparency policy.*

Besides internal events, Sabatier points out that also external events should not be omitted when studying policy change. Besides relatively stable factors that change only very slowly, he also mentions a number of dynamic environmental change factors (Sabatier 1988: 136-7). Some of these may be expected to have had a direct impact on transparency discourses. Meijer (2009: 260), citing Oliver, points out that the emergence of information technologies may be such an external event that has the capability to shape and expand the uses of transparency in administration. Through the use of new digital techniques of communication, more ways of implementing transparency become imaginable. Moreover, IT allows citizens to identify shortcomings in the transparency policy through online monitoring, leading to pointed campaigning (Curtin 2009: 218). *The emergence of IT can thus be expected to have been the single most impacting external event (expectation 4).*

The wave of terrorist attacks at the beginning of the new century, beginning with those of 11 September 2001, are also expected to have left a mark on the logic about transparency. It is held that various civil rights and freedoms were curbed as a result of the fear for further attacks. Transparency may be regarded as such a civil right, and the EU as a protector of public safety. *Expectation 5 is thus that an intensification of counter-terrorism measures will have had a large curbing effect on the way in which transparency was regarded.*

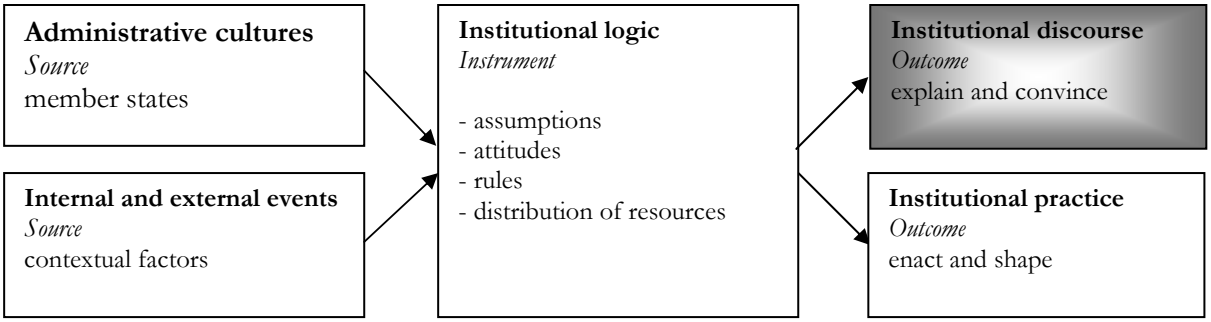
Impact factors thus provide a historical explanation for institutional change and continuity (Hall and Taylor 1996: 10). From the literature, a contextual scan, and an overview of major events, a list of likely impact factors is derived which is shown in table 2.2.

Table 2.2: Likely impact factors of influence in the transparency debate

Administrative cultures	Events internal to the policy arena	Events external to the policy arena
- high degree of centralisation - long tradition of open government - beliefs about the role of citizens in democracy - relation between policy makers and civil society	- accession of new member state - adoption of new Rules of Procedure - change of political colour of a member state government - presidency of any particular member state	- new possibilities in IT - intensification of counter-terrorism activities - pressure from non-EU partner countries - large and repeated requests for documents of civil rights activists

Member states will draw from their administrative culture, as well as internal and external events to convince others to see phenomena in the same way. To that end, they will develop a discourse that they consider plausible and reasonable enough to convince others. In a policy debate like that of the Council on transparency, an exchange of arguments takes place, based on cultural repertoires and various impact factors. A close analysis of this debate helps us understand 'how people disagree, compromise, and conclude more or less lasting agreements' (Thornton and Ocasio 2008: 102-3). Figure 2.1 visualises the sources and outcomes of institutional logics in a theoretical model.

Figure 2.1: Theoretical model of institutional logic. The outcome that this research investigates is highlighted.



Argumentative discourses

The situation described above, in which the different institutional logics and administrative cultures of member states meet and confront each other in the arena of the Council, brings us back to the "linguistic turn". After all, member states are put in a position where their administrative cultures must be translated into statements of position that can stand the test of an exchange of arguments (Hajer 2006: 72). Institutional logics are translated into 'causal stories' that are intended to bring order in a complex situation (Hajer and Laws 2006: 260). These causal stories enter into a competition that is in the first place intended to align practices as closely as possible with their own institutional logic.

However, in order to get a grip over Council practices, member states must first bring the dominant rhetoric in line with the main outlines of their institutional logic. To that end, they will both develop a sophisticated and convincing discourse around this logic, and seek to problematise opposing

discourses (Phillips and Jorgensen 2006: 151, Van Eemeren et al. 1993: 95). Discourse, in this use of the term, refers to a collection of statements made in particular social context of language exchange. Hajer's definition will be used here, as it is both clear and practically applicable for the purposes of this research:

> Discourse is […] a specific ensemble of ideas, concepts, and categories that are produced, reproduced and transformed in a particular set of practices and through which meaning is given to physical and social realities. (Hajer 2005: 44)

Through interaction with other discourses, then, a discourse attempts to shape perceptions about phenomena. By effecting change in the dominant discourse, the way in which the social world is perceived also changes (Phillips and Jorgensen 2006: 9). Nevertheless, discourses are argumentatively structured to fend off criticism. In a metaphor, they have been said to behave 'like a ball that constantly bounces backwards and forwards and constantly adapts to new challenges that are raised' (Hajer and Laws 2006: 260).

In order to be effective in this sense, discourses employ various strategies. Hajer, for example, discusses Billig's analysis of 'discursive styles': categorisation, particularisation, homogenisation, and heterogenisation. When concrete cases relevant to a phenomenon become object of discussion, discourses can choose to typify them as examples of a certain category (categorisation) or, in fact, emphasise their singularity and uniqueness (particularisation). The phenomenon itself can also be described as unproblematic and requiring no other approach than related phenomena (homogenisation), or, on the contrary, as a different type of problem that requires to be looked at in a new way, using separate categories (heterogenisation) (Hajer 2005: 54). These discursive strategies are used to both explain the attitude from which it springs, and to convince others that this logic is accurate and should be followed. Table 2.3 provides an overview of these styles, with likely examples from the transparency debate in the Council.

Table 2.3: Overview of discursive styles with likely examples from the transparency debate

Discursive style	**Example**
categorisation	Some areas of policy-making are better not made public. These areas should be excluded from the scope of transparency.
particularisation	Exceptions to transparency should be decided upon a case by case basis.
homogenisation	Transparency is an element of good governance and thereby constitutes an essential part of representative democracy.
heterogenisation	With the emergence of IT, we are seeing an unprecedented level of transparency, which may have many unforeseen consequences.

2.4 Power through policy discourses

The theory of institutional logic makes it possible to see how member states purposefully interpret and handle transparency. However, the theory of institutional logic cannot of itself explain how it is possible that the Council discourse on transparency has changed so rapidly over a relatively short timeframe. To make this explanation possible, it must first become clear how institutional logics are able to bring about change when they interact in the Council. To this end, approaches can fruitfully be incorporated from rational choice institutionalism (Hall and Taylor 1996: 10-3).

This study explicitly chooses for a linguistic approach when addressing the question of change. While figure 2.1 shows that institutional logics may also be approached via the study of practices, the choice to begin with discourse analysis has a number of merits. It may be noted that while the study of transparency (policy-making) has often focussed on material causes and effects, it has tended to overlook the rationale provided for transparency. Questions such as what problems transparency is perceived to solve (or cause), or in what cases and for what reasons it is considered (un)desirable, therewith remain unanswered. This "black box" of problem perception relates not only to the motivational grounds for policy development, but also to questions of power and influence (Hajer 2005: 42).

Over the past decades, therefore, the role of problem representation in policy-making has in the first place been recognised as a second form of power that exists next to the power to put policy into practice. Research in politics and policy has built on this premise, showing how discursive power relates to such issues as agenda-setting, strategic framing, and policy-learning (Princen 2009: 22, Stone 2002: 32-4, Sabatier 1998: 104-5, Bachrach and Baratz 1962: 948). Hence, the study of language in policy-making reveals the mechanisms of gate-keeping, problem definitions and changing attitudes in policy fields. Language can thus be seen as the vehicle of policy-making, and in certain policy arenas, actors have considerable stakes in both the spirit and the exact wording of policy.

Over and beyond the exercise of raw power through linguistic means, discourse is also pivotal for another reason. While a successful discourse is a source of influence for implementation (the *how*), it also provides insight into the perceptions that a member state has of a phenomenon (the *what*) and the importance that it attaches to certain solutions (the *why*). In other words, the discursive struggle provides insight into the implemental, definitional, and ethical grounds that are carried over from certain institutional logics into that of the Council (Hajer and Laws 2006: 261).

The language of the Council, or better said its discourse, can therefore be conceptualised as the stake in a series of games in which perceptions of transparency are being negotiated (Hall and Taylor 1996: 12-3). This conforms with a rational actor institutionalist perspective on change, in which the member states are the Council's formal agents of change (Chalmers et al. 2010: 67-75, Hix 1998:48-9, see also Stasavage 2004). Alternative logics may become institutionalised when a new discourse gains dominance; over time this influences the Council's own institutional logic, providing a strong explanation for its changing outlook (Thornton and Ocasio 2008: 102). Figure 2.2 clarifies the mechanism of interaction of discourses in the Council.

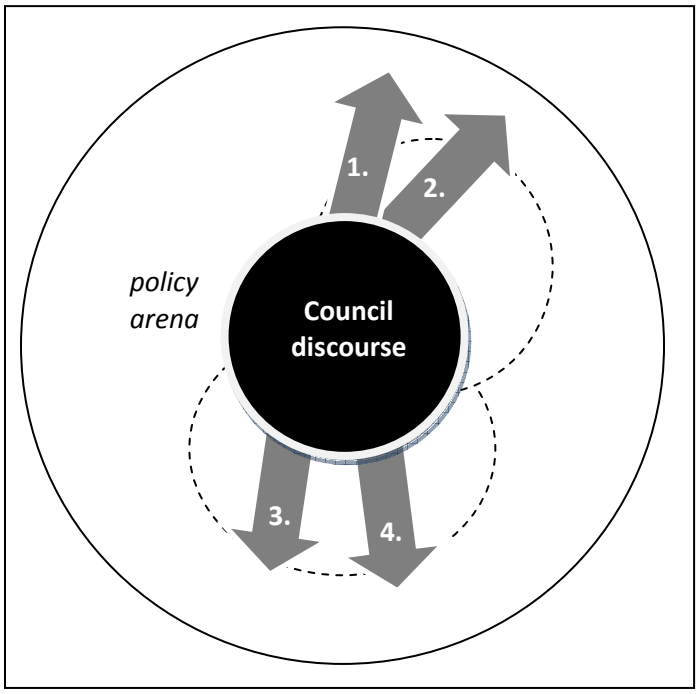


Figure 2.2: Mechanism of interaction of discourses in the Council transparency debate. Influential actors are marked and numbered in the grey arrows, while the dotted circles represent possible reconfigurations of the Council discourse.

In the Council transparency debate, a limited number of discourses exercise influence. These discourses guide the behaviour of the member states. For a small number of member states, however, the transparency policy is a highly salient area due to a strong administrative culture in this area.

France, the United Kingdom, the Netherlands and Sweden are recognised as such countries. Several factors indicate that these member states have been leading in shaping the Council discourse, putting forward exemplary discourses (see chapter three for details about case selection). According to the literature, France has a strongly transparency-sceptic attitude, while the same goes, to a lesser extent, for the UK. On the other side of the spectrum, the Netherlands has been described as a pro-transparent country, while this holds true to an even stronger degree for Sweden. *The final expectation (6) of this theoretical framework thus holds that while the Council discourse on transparency was primarily influenced by the discourses of the UK and especially France, it showed increasing divergence from these discourses, and convergence with the discourses of the Netherlands and especially Sweden.*

On the outset, a rational choice, policy game type of approach to change based on a discourse-analytical method must be qualified for two reasons. The first, fundamental reason, is that the theory of institutional logic provides a probabilistic, rather than a deterministic explanation of changes in language and practice (Thornton and Ocasio 2008: 106). Administrative culture and the impact of internal and external events provide *likely* explanations of the talk that an institution employs at a given occasion (Hajer 2005: 57). Institutions operate from a "logic of appropriateness", which means that they select the best course of action based on, and bound by, their assessment of the context, given their general attitude and past experiences (Levinson 1992: 97, Brown and Yule 1983: 35).

Secondly, while change in discourse may be seen as one "face" of power, the other, that of practice, is often regarded as a more real form of power. In order to make firmer statements about institutional logics, discourses should be connected to practices. This, however, falls outside of the scope of this study, and should be pursued in an additional study. To some extent, however, obvious discrepancies between discourse and practice will fall within the scope of this study, as they may themselves become the object of criticism in alternative discourses.

Table 2.4: Expectations derived from the theoretical model.

No.	Expectation	Change direction (--/-/none/+/++)	Type of explanation	Elaboration
1.	Least change in the Council discourse took place among the ethical dimension, and most among the implemental dimension. Change in the definitional dimension was moderate.	+/++	sociological (descriptive)	table 2.1
2.	The accession of Sweden was the internal event with the largest impact on the Council discourse.	++	historical (explanatory)	figure 2.1 table 2.2
3.	Interinstitutional relations had, as an internal event, no impact on the Council discourse.	none	historical (explanatory)	figure 2.1 table 2.2
4.	The emergence of IT was the external event with the largest impact on the Council discourse.	++	historical (explanatory)	figure 2.1 table 2.2
5.	The intensification counter-terrorism measures was an external event with a large impact on the Council discourse.	-	historical (explanatory)	figure 2.1 table 2.2
6.	Over time, the Council discourse moved away from the discourses of the UK and France, and towards the discourses of the Netherlands and Sweden.	++	rational choice (descriptive)	figure 2.2 table 2.2

Table 2.4 summarises the six expectations that have been formulated in this theoretical chapter. This report will now proceed as follows. In the following chapter, the meaning of discourse, and change in discourse, shall be worked out, as well as other methodological considerations. Chapter four provides a contextual sketch of the Council of Ministers. In chapters five, six and seven, the discourse of the Council, divided over three time periods, is characterised, after which an analysis shall attempt to uncover how a number of influential member states have been able to change this discourse. Chapter eight discusses the findings of the analysis, and conclude by answering the research question postulated in chapter one.

/3/

Methodology

In its methodology, this research makes extensive use of the concept of discourse. While the previous chapter placed the concept in its theoretical context, the current chapter will go into further detail on how discourse can be operationalised, and how changes in discourse can be analysed. Hajer's (2005) definition is used as a starting point for this. After proposing a breakdown of the period under investigation into three parts, and an instrument of analysis, the method of data collection and analysis are explained.

3.1 Analysis of policy discourses in the Council context

Central in answering this research's main question stands a reconstruction of discourses over the time period under investigation. In this section, I will go into more detail about the nature of such discourses, in order to establish how they fit into a qualitative method of analysis. I will start off by discussing the definition of discourse that will be used in this research. It is important to begin with a clear definition for two reasons. First, and quite generally, as the concept of "discourse" is used in this research not only as a theoretical concept but also as a methodological instrument, it must be clear from the outset how I operationalise it in order to avoid ambiguity about the scope of this research, as well as its findings. Secondly, as has been stressed in the literature, discourse has over recent years become a rather popular term, resulting in it being used 'indiscriminately' and in a 'vague' manner, sometimes without definition at all (Phillips and Jorgensen 2002: 1). In the previous chapter, I proposed Hajer's definition as the starting point for this investigation, since it is both clear and practical:

> Discourse is […] a specific ensemble of ideas, concepts, and categories that are produced, reproduced and transformed in a particular set of practices and through which meaning is given to physical and social realities. (Hajer 2005: 44)

Underlying this definition are a central assumption and a number of conditions that need to be fulfilled. The central assumption inherent in Hajer's, and in fact any, definition of discourse is the idea of relative coherence between the 'ideas, concepts, and categories' of which he speaks. It must thus be the case that when an actor puts forward statements about a topic on various occasions, the core assumptions

underlying them are relatively stable. Thus, it is assumed that while statements are made loosely and in different settings, a basic paradigm in thinking is what connects these statements, and eventually directs talk about policy. That is not to say that discourses cannot over time be challenged, or change; the question of how such change can be studied will be addressed in the next section. Nevertheless, in general it is held that the greater the coherence between statements put forward, the stronger the discourse.

A number of conditions need to be met for a discourse analysis to be meaningfully applied. First of all, it must be analytically possible to find clear distinctions in the statements of different actors, comprising clearly distinguishable discourses (Phillips and Jorgensen 2002: 143-4). At first glance, this may appear an arbitrary precondition. For how is it decided that certain statements are meaningfully distinct from each other, and others are not? Luckily, there are several ways in which this arbitrariness can be controlled for.

Firstly, in policy making, actors are likely to present coherent perceptions about the effectiveness, scope, impact, etcetera, of the policy topic about which they speak, which in this case is transparency (Sabatier 1988: 131-2, Sabatier 1998: 104). This relative coherence can exist because actors' attitudes are largely shaped by the logic of their institution, and because they are bound to their position by the public. However, in the present policy debate of transparency these arguments are not particularly convincing. First of all, it seems at any rate unsafe to assume that policy-makers' coherent attitudes cause them to put forward only coherent and unchanging policy initiatives. Secondly, since many of the statements under investigation were put forward behind closed doors, away from public opinion, delegates will likely have experienced little disciplining effect of their electorates.

A more convincing argument may be found in the effects of a clear distribution of positions that emerged at an early time within the policy debate of transparency known among policy-makers themselves. In a policy field that is highly contested by a number of key actors, discourses will be seen to diverge along certain lines of contention that assume a role of some importance in debates. When a policy debate is framed in bipolar terms of "for-against" (or "progressive-conservative", "experimental-cautious", or a similar divide), any significant deviation of an actor from a previous position will be quickly picked up by other actors, resulting either in appraisal and further development of a common position, or criticism and deadlock. This effect of clear distribution, which features prominently in the literature on the Council's transparency policy and was confirmed by a number of policy experts in reconnaissance interviews held at an early stage of the investigation, allows for the condition of clearly distinguishable discourses to be met.

A second condition is that statements must relate to 'social and physical phenomena'. In the policy debate under investigation, this is clearly the case. From the outset, the debate has focussed on modalities of making the EU, and more particularly, the institution of the Council, more transparent, as well as on the (side-)effects of these modalities. Transparency of the EU has thus been seen as an administrative instrument with possible consequences for EU governance, and therefore with a real social impact on the administration and society at large. Moreover, over time, as the Council's transparency policy became

structurally implemented, this resulted in the emergence of a physical dimension (e.g., an online public register, information material, personnel investment) which itself became part of the debate.

Third and finally, Hajer's definition mentions production and reproduction 'through an identifiable set of practices'. This condition too is met. The institution of the Council of Ministers has a role in the configuration of the EU which is legally laid down in detail, resulting in a highly formalised system of debating policy at various levels of a hierarchy of debating and decision-making. The intricacies of this decision-making context and their effect on the present analysis will be discussed in more detail in chapter four. For now, it suffices to say that the statements analysed are indeed put forward in a clearly identifiable field of practice which I will describe as the Council's policy arena. This term will be further explained in section 3.3.

In relation to the field of practice, it must further be pointed out that the unit of analysis are not the discourses of individuals, but those of the institution of the Council (being the explanandum), and the member states (being the explanans). Naturally, both Council and member states consist of a variety of individual actors with their own opinions about transparency. Nonetheless, it is still possible to analyse discourses at this aggregated level, since both types of institutions, in the context of Council decision-making, are expected to speak with a single voice. For example, when the transparency policy is being debated, delegates are expected to provide a single authoritative statement of position on behalf of their member state, while other institutions of the EU periodically require the Council to provide an authoritative common position. Although these positions may not be supported by all individuals that they speak for, their formality endows them with a discursive authority, making them "dominant". Hence, in the transparency policy debate, it is possible to speak of a "dominant discourse" of the Council. The following section will take a closer look at the mechanism of change in the dominant discourse.

3.2 Understanding changes in discourse

In the previous section I have held that while discourses are relative stable ensembles of statements, they are also subject to challenge and change. Understanding changes in the Council's dominant discourse on transparency of the EU between 1992 and 2009 is the central tenet of this research. Such change does not come about in a random and coincidental way. Throughout the period under investigation, member states have made statements and formulated arguments that do not easily go along with just one type of logic, but rather lay an emphasis on different aspects which they felt were most important in the ongoing debate, thereby seeking to influence its direction. Thus, member states exercised power through the strategic use of a discourse (Hajer and Laws 2006: 260).

In principle, a discourse itself is not inextricably linked to any particular actor. It may be embraced by varying constellations of actors, and have more or less influence over time. On the other hand, the decoupling of a discourse from its advocate is generally constrained by the institutional context and the administrative culture in which the actor operates. The dominance of any discourse is dependent on the extent to which it becomes formative for the policy thinking of the debate's central actors, and becomes

institutionalised in the talking and writing of the institution (Hajer 2006: 71). Thus, the more a member state's discourse forces others to change their position, succeeds in making them adopt its particular language, or manages to become enshrined in the institution's formal practices, the more it succeeds in imposing its institutional logic. This means that a discourse can be studied as both the cause and effect of change: while it seeks to influence, it is at the same time influenced by others. Here, the Council discourse will be solely approached as an *outcome* of change, which is caused by the input of member state discourses. While it may also be asked in what ways the Council discourse on transparency influenced its practices, or the discourses and practices of its members, such questions are beyond the scope of this study.

Based upon information derived from the literature and the reconnaissance interviews, the period under investigation is broken down into three parts (box 3.1). Ultimately, any division into time periods is arbitrary, while at the same time it marks the way in which the period as a whole is studied. However, there are certain reasons to hold that the division adopted is a contextually logical one. A choice was made to pick institutionally important moments as the analysis' starting point. All interviewees agreed that a number of treaties brought about important reconfigurations in the policy and its context. Likewise, the enactment of Regulation 1049/2001/EC marked a watershed moment in the Council's transparency debate.

Per time period, other considerations also played a role. For the first period, the declaration attached to the Maastricht Treaty is taken as a starting point, as it marked the EU's first formal recognition of transparency, or, more precisely, access to information. While a number of court cases during the 1990s had a considerable impact, they can be best seen as reactions to the first period of the access to documents regime. On the other hand, the recognition of transparency as a legal right in the Amsterdam Treaty considerably altered the character of the transparency policy.

The second great breakthrough was the enactment of Regulation 1049/2001. The period in between the Amsterdam Treaty and the regulation was generally experienced as one of transition, and it therefore made sense to view changes at the turn of the century in this context. This means that such events as the end of the 'paper era' (and the beginning of digitalisation), the Solana Decision, and the negotiations leading to the regulation were foremost interpreted as symptoms of transition, rather than watershed moments.

Finally, with the period after 1049, the policy attained a different, more institutionalised character. More recently, this institutionalised stability may change again under the revision of the regulation. However, at the time of writing, no breakthrough was yet reached. Therefore, only the first contours of change can be described. Likewise, little clarity exists as of yet about the extent to which the Lisbon Treaty might alter the course of the policy. The end of 2009, with its coming into force as the final important event, is therefore chosen as the end point of this investigation.

Box 3.1: division of EU transparency policy into three periods

1) from the conclusion of the Maastricht Treaty (1992) until the conclusion of the Amsterdam Treaty (1997)
2) from the post-Amsterdam period until the adoption of Regulation 1049/2001/EC on public access to documents of the institutions (May 2001)
3) from the post-1049 period until the coming into force of the Lisbon Treaty (December 2009)

The study of change in the Council discourse will be done in three stages. First of all, as the dominant discourse of the Council is frequently formally institutionalised, it is also relatively easy to identify. This is done through a language analysis of statements published by the Council when it speaks with a single voice.

At the second stage of the analysis, discourses are sought among members states. The core characteristics of these discourses are described, in which special attention is paid to the central administrative-cultural elements in these discourses. The impact of external as well as internal events is also taken into consideration. A central expectation is that member states will try to incorporate external events while trying to leave the basic premises of their discourse intact as much as possible. They do so by fitting in the event as exemplary of their discourse (an example would be a socialist party contending that the economic crisis is another sign that uncontrolled market capitalism is destructive), or anticipating critical questions of other participants (a liberal party contending that the free market is itself a good regulatory system, and that it was in fact non-compliance with the market rules that caused the economy to lapse into crisis) (Van Eemeren and Garssen 2010: 14). As this example already shows, certain events are not so readily incorporated into a member state's discourse. Thus, in some cases external events may reinforce a particular discourse, while in others, they force it into the defensive.

Another impact factor is sought in internal reconfigurations. This is, for example, sought in the accession of new member states, who have the potential to introduce new discourses. Notably, Sweden, with a long tradition of open government, acceded the EU in 1995. Other internal events of possible impact, such as the half-yearly presidency of any particular member state, are also taken into account. For example, the Netherlands and Sweden, both being self-declared transparency champions, were chair of the Council respectively when the Amsterdam Treaty was concluded, and when the first official legislation on access to documents materialised. It is therefore analysed whether the discourses of these two countries were better able to influence the content of these texts during their presidency.

Also in this phase of the analysis, the interplay of discourses is looked at. Discourses frequently challenge each other, and influence the perceptions of transparency among actors. In order to gain acceptance, member states putting forward a discourse may also need to accommodate to objections of potential allies (Sabatier 1988: 140). They will employ a "network" of stories, metaphors and presupposed analogies (Hajer and Laws 2006: 260) about transparency to convey the message of their discourse. Through such "networks of meaning", member states attempt to establish a stable connection between

transparency and other values. Among others, trust, accountability, participation, stability, human rights, and the education of publics have been mentioned in the literature (Florini 1998: 50-6, see also Beck Jorgensen and Bozeman 2007, for an elaboration on public values).

In the third and final step, the impact of member state discourses on the dominant discourse is analysed. It is expected that member state discourses with a high stake in this policy field strived most to maximise their influence on the formulation of the common position of the Council, which is arrived at by institutionalisation through the dominant discourse. The extent to which they succeeded in doing so is analysed in two ways. Firstly, the specific positions and proposals that member states put forward are compared to those that the Council eventually accepted. Secondly, the argumentative structures of the member states were compared to those that the Council used to support its policy. Where the Council co-opted may of a member state's proposals, and went along with its broad discursive construction of transparency, this member state will have been successful in influencing the Council discourse. A coding tree of propositions and arguments enables this analysis of discursive influence.

The dominant discourse is not always equally open to change. At key moments, member states may be afforded with more opportunity of institutionalising their discourse (Hajer 2006: 73). Such key moments may arise for example when a member state assumes the presidency of the Council (Chalmers 2010: 74) or when the initiative has been taken for legislative action or revision (e.g. Cini 2008: 746). As has been mentioned above, it must be recognised that a strife for discursive dominance can be expected to increase the more the member state considers it to be salient. This need for sufficient salience among actors has been taken into account in the case selection. The following section discusses the selection of member states of which the discursive positions are expected to be exemplary, after which data collection and analysis are operationalised.

3.3 Data collection and analysis

Case selection

An obstacle in the conduction of a longitudinal discourse analysis of the Council's transparency debate is the vastness of its potential data material. Covering 18 years, and from 12 member states in 1992 to 27 in 2009, large amounts of document material have been produced. These data are, moreover, very diverse and of varying qualitative density. Any discourse analysis of this policy field will therefore have to find a method to preselect the most relevant documents. An initial literature overview suggests that national transparency culture may be an especially salient factor (Peterson 1995, Grønbech-Jensen 1998, Sabatier 1998: 103, Davis 1999). As some observers point out, the various national administrations of member states have tended to diverge significantly in the way they deal with the issue of transparency. This may be related to established reputations, such as Sweden's oft-mentioned tradition of openness, or the UK's much criticised reflex of secrecy (Grønbech-Jensen 1998: 186, Davis 1999: II). As the study of 27 actors will be too large a data set to analyse, I will instead chart the (interacting) discourses of four selected Council actors. These are France, the UK, the Netherlands, and Sweden. These four countries are selected

because of their exemplary position with regard to EU transparency, and because of a high involvement in the Council's transparency debate.

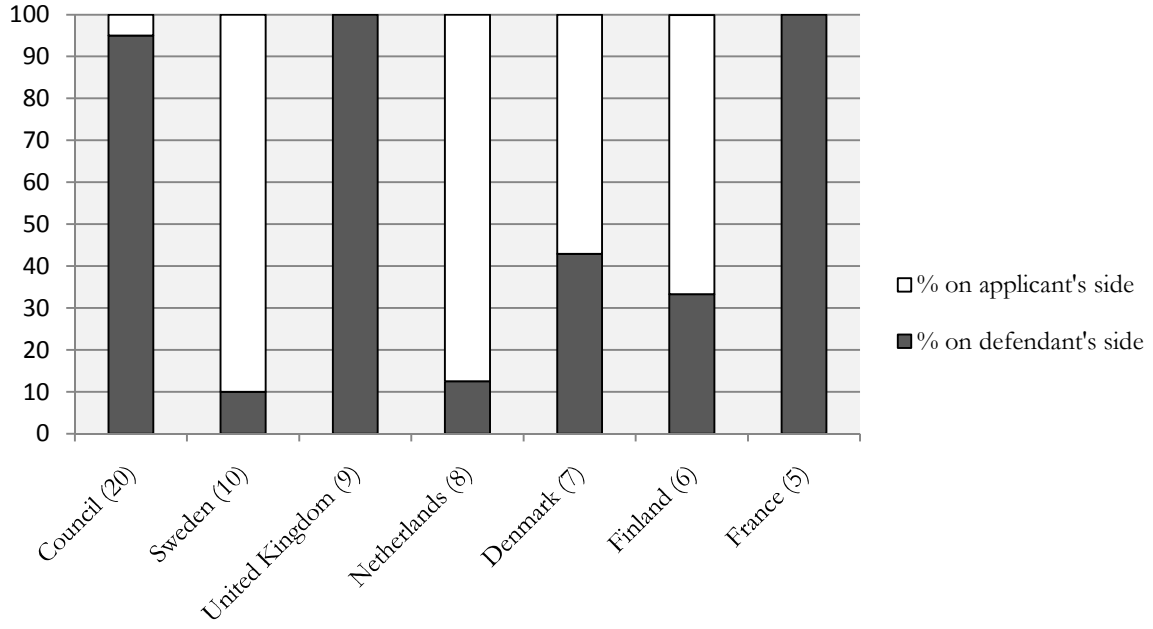
First of all, it has been remarked of France that it has tended towards a conservative, illiberal attitude on the issue of government transparency (Bunyan 2002: introduction). From leaked documents, France has come forward as having a quite cautious and wary attitude towards broad transparency rights. Moreover, as has been held, the French government, which had the initiative in the European project, operated with characteristic secrecy. As Jean Monnet, one of the project's founding fathers argued, '[i]t is the privilege of men of government to decide the public interest' (Monnet 1976: 355-6, author's translation). It has in this light been held that the strongly centralist tradition of the French state, and its influence on the European administration may help to explain the its closedness up until 1992 when it evolved into the EU (Szukala 2003, Muller 1992: 275-6).

The UK is included since it is generally considered to be a relatively transparency- as well as Euro-sceptic country. Commentators have repeatedly pointed out its hesitant position towards the open operation of its own government as well as that of the EU (Williams 1998: 258, Davis 1999: II). Davis in this light speaks of 'two cultural viewpoints', with the UK as one extreme example of closedness, and Sweden as a lightening example of liberal open government (Davis 1999: II and III).

Despite the strong moral undertones of his argument, the distinction is in broad lines supported by Grønbech-Jensen, who speaks of a Scandinavian tradition of open government, which, along with that of the Netherlands, has a strong potential of transforming the European debate (Grønbech-Jensen 1998: 186). Even before Sweden's accession to the EU, the Netherlands had on a number of occasions taken legal action against the Council's legislative opacity (Peterson 1995: 480).

Further evidence towards the high salience of the transparency debate among said member states is their involvement rate in the case law (as applicant, defendant, or intervener on behalf of either side). From an analysis of parties involved in 46 cases relating to transparency before the European Courts, it emerged that all selected member states were among the parties most frequently involved (figure 3.1). Notably, member states with a pro-transparency reputation are significantly often represented on the applicant's side, while the opposite holds true for the more transparency-conservative member states. In only one case cited in the table, the applicant sought less instead of more transparency, making this a relatively reliable indicator of salience and attitude.

Figure 3.1: Involvement in transparency cases before the Court of Justice, 1994-2009 (N=46)



There is, therefore, much that points at the existence of two camps in the transparency debate. On the other hand, evidence exists of convergence in attitudes between these camps as well. Lewis, for example, points out that the UK's introduction of a public interest disclosure act (PIDA) in the late 1990s was followed with much interest in the Netherlands (Lewis 2008: 497), while a respondent to a reconnaissance interview held that the Netherlands' active involvement in the transparency policy appeared to be on the decline in recent years.

Collection

For analysis, a large number of documents were sought in which the selected actors not only put forward their position, but also defend it with arguments and evidence material. A distinction was made between two arenas, the policy arena and the public arena. Documents of the policy arena are those that are drawn up in the context of the Council. These may include memoranda, instructions to member state delegations, draft legislation, and minutes to meetings. Documents of the public arena are of a more general nature. They relate to the ongoing Council debate but put forward positions for the public at large, including speeches, press statements, and quotes in newspaper articles.

All of the above-mentioned examples are treated as primary source material, meaning that a discourse analysis is carried out with them. In addition to the primary source material, additional documents were collected as secondary source material, providing a contextual picture of possibilities and constraints in a given time period (Phillips and Jorgensen 2006: 1 and 7, Brown and Yule 1983: 27). Table 3.1 shows the types of documents that were collected. A full list of primary sources included in the analysis is provided in Appendix I.

Table 3.1: Types of documents collected

	Policy arena	**Public arena**
Description	- institution and processes of the Council	- communication towards the public at large
Primary documents	- policy documents of member states - documents of the Council's common standpoints (dominant discourse)	- statements in the news media - press communiqués - speeches by state representatives
Secondary documents	- positions of the EP - academic literature - news reports	- news reports - public statements of non-Council actors

Between December 2010 and April 2011, FOI requests were submitted to the Council, and the selected member states. In the case of Council documents, searches on the online public register were carried out, using the generic term "transparency". Unfortunately, the Council register only goes back until 1999. On the documents retrieved through register searches and early FOI requests, the snowballing method was applied, meaning that any reference to other documents was tracked using additional FOI requests, until a comprehensive picture emerged.

In the case of Sweden and the Netherlands, closer coordination was established with the appropriate government departments in order to find the most relevant documents. Archive work was carried out at the Dutch Ministry of Foreign Affairs in March and April of 2011. While no response was received to my request for documents with the French government, a complaint was filed with the CADA, an independent watchdog authority, which was turned down. In the United Kingdom, an FOI request was filed with the Commonwealth and Foreign Office. The handling term for this request was renewed three times, resulting in a considerable handling term of 80 days. Eventually, access was granted only to a number of documents from the UK 1992 presidency. As a result, a very limited number of documents were obtained from France and the UK.

Finally, archive work was done in January at the London office of Statewatch, a civil rights organisation, while some policy documents were received from Access Info Europe, a Madrid-based transparency advocacy organisation. Table 3.2 provides an overview of the numbers of primary documents analysed per actor, per time period.

Table 3.2: Primary documents analysed per actor, per time period

	Council "Dominant discourse"	**Sweden**	**Netherlands**	**United Kingdom**	**France**
1992-1996	26	12	25	11	2
1997-2001	46	11	10	1	0
2002-2010	42	19	22	4	3
Total	*114*	*42*	*57*	*16*	*5*

Analysis

A qualitative content-analysis was carried out on the collected documents, using NVivo, a qualitative document analysis software tool. A coding tree was designed, consisting of four elements. The first elements coded for positions put forward by actors; the second element looked at arguments in support of those positions; the third element recorded references to internal and external events; the fourth element, finally, recorded certain contextual aspects of the document. Full details about the coding tree can be found in Appendix III. Where documents were drafted in another language than English, I made translations, unless the content warranted citation in the original language.

Validity/reliability

Qualitative research is a type of science that does not lend itself readily for guaranteeing reliability and validity. Nonetheless, steps must be taken to build them into the design. Eventually, considerations of reliability and validity serve to make the quality of the research more controllable.

Boeije points out that a degree of standardisation may be applied to enhance the reliability, which can be captured in terms of repeatability under similar circumstances (2005: 281). This standardisation must be attempted at the stage of data collection as well as during the analysis. In the phase of document collection, standardisation was attempted through a targeted keyword search of the Council register, as well as a the use of a uniform format when requesting documents from member states. In the case of Council documents, the reliability of the document search was further enhanced through an exhaustive (rather than selective) search for appropriate policy documents.

A variety of secondary sources were also selected. These included articles from the media, press statements from other institutions and member states, and the full body of case law in the area of transparency. Media sources were found in various archive dossiers, and were further sought from a selection of key European newspapers in relation to key events in the transparency policy in order to provide a representative sample of existing ideas and arguments. This sample was further expanded by the inclusion of empirical descriptions from a broad section of academic journal articles. The secondary material included a total of over fifty sources from more than ten countries.

Finally, at the stage of analysis, reliability was ensured through inclusion in the coding tree of categories that were phrased in general, unambiguous terms (such as: "practical arguments against

transparency" or "references to external events"). Where necessary, such categories were accompanied by an elaboration or hypothetical examples that might fall under any the particular category.

In terms of validity, qualitative research of the grounded theory tradition is in large part dependent on the perceptions of actors in the empirical field. The findings of the document analysis were therefore triangulated through the use of reconnaissance interviews and expert panels. Reconnaissance interviews are semi-structured conversations with actors with a professional overview of the policy field; the findings of such interviews should inform the initial steps of the discourse analysis, and normally cohere with its findings (Hajer 2006: 73). A list of interviewees and questions included in the semi-structured interviews can be found in Appendix II.

/4/

The institutional context of the Council of Ministers

The Council of Ministers first came into existence in the European Coal and Steel Community (ECSC) in the 1950s. Since then, the operation of this institution has changed considerably. Over the years, it has developed a number of distinct working practices that exercise a large influence on discussions that take place within it. In this chapter, I provide a broad outline of this institutional context,[1] an understanding of which will is pivotal when analysing Council discourses in the field of transparency (Levinson 1992, Van Eemeren and Garssen 2010).

4.1 The Council: bodies and functions

The hierarchy of decision-making

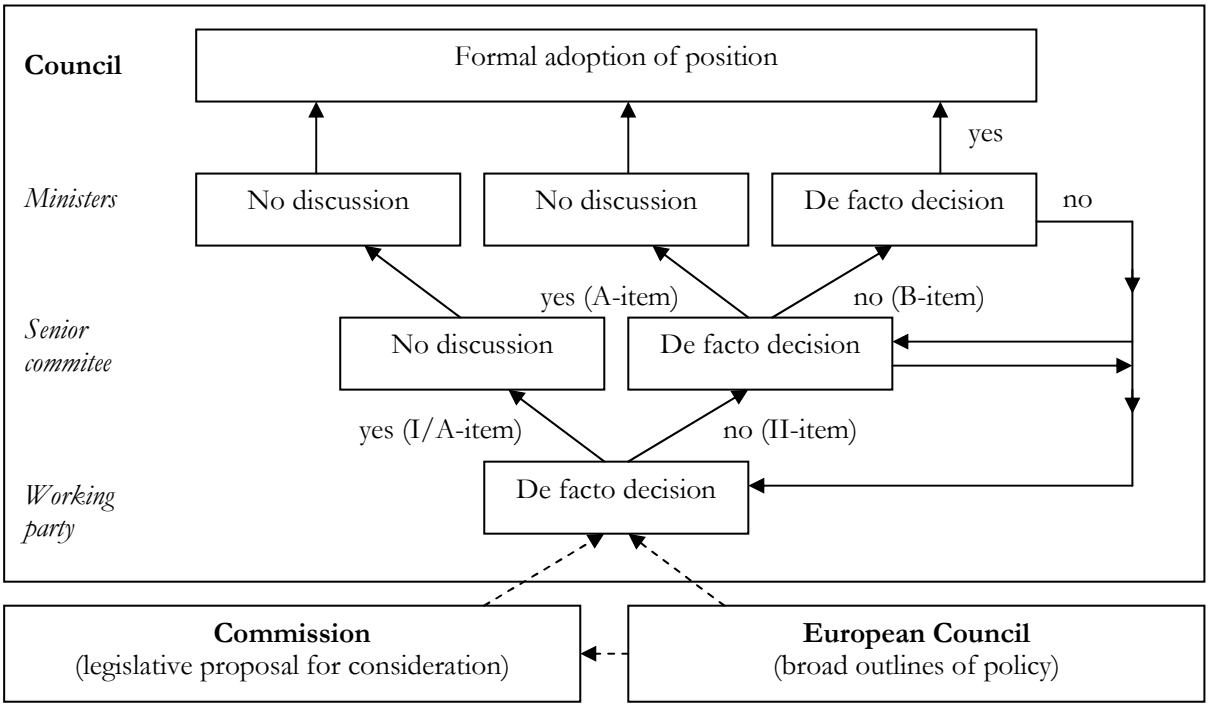
The Council of Ministers is the forum at which member states represent their stake in the EU, and stand in continual interaction with one another. It is the institution of the EU where member states can let their voice be heard most directly, and outline their opinion on the policies and priorities of the EU. The Council is made up of the ministers of the EU's member states who currently meet in ten different configurations (Council 2011). One time, the Council gathers all ministers of Foreign Affairs, while another time, all ministers of Agriculture and Fisheries meet. However, although political authority is vested in the ministers, the institution of the Council in fact comprises several bodies on different levels. Below the ministerial level, member states have delegations which function like embassies and are headed by an ambassador. The EU ambassadors meet in the Coreper (comité de representants permanents) while civil servants at the delegations maintain formal and informal contact on a day to day basis (Chalmers et al. 2010: 67-75).

Daily operational work and preparatory tasks at a lower level of the Council are taken care of by several working parties. Being responsible for almost 90 per cent of all meeting time during the past 20 years, these working parties form 'the Council's life blood' (Westlake and Galloway in Häge 2008: 27, 35). Working parties are called into being by decision of the ministers, and to various ends in all sorts of policy areas; the frequency of a working party's meetings depends on its specific tasks. Finally, another type of bodies consists of specialised high-ranking officials who report to the ministers. Due to their special status, these committees stand somewhere in between the working party level and the senior committee level. Informed insiders have held that in practice, such specialist committees report directly to the

ministers, bypassing the Coreper. However, no such formal right exists, and the input from these committees must be approved by the Coreper, even when this is a formality. Häge, in his account of the decision-making structures of the Council, therefore refers to 'all committees without the right to report directly to ministers' as working parties, mentioning specialist committees as 'senior working parties'. Finally, the Mertens, Antici, and Friends of the Presidency Groups consist of aides to the ambassadors and their deputies (Häge 2008: 24, 27).

According to one recent estimate, there are currently 158 working parties (Curtin 2011: 13). This is still a considerable decrease when compared to 2000, when 298 working parties were counted. Among the central reasons for this decrease was a continued effort to rationalise the system of decision-making (Häge 2008: 27). Rationalisation, as we will see, also played an important role in the transparency policy. However, between 1992 and 2009, only some ten working parties or less have had any relation to the transparency policy, and with differing degrees of involvement. The Working Party on Information (WPI) for example, handles the Council's formal response when confirmatory requests for access to documents are made and meets about once a month, although this may be stepped up when new legislation is prepared. The Antici Group, in turn, has a much more peripheral involvement, as it prepares the Coreper meetings. Although it comes together on a weekly basis, the transparency policy will not always come up. In general, decision-making is organised in such a way that the lower levels will try to resolve as many items as possible in order to relieve the workload of higher levels. This has been a long-standing trend since the Council's establishment in 1958 (Häge 2008: 35). Where lower levels in the Council hierarchy come to a de facto decision, this is passed on as an 'A-item' or an 'I/A-item'. Decisions that are substantively debated at the ministerial level, are called 'B-items'. The decision-making structure of the

Figure 4.1: The decision-making process of the Council (Adaptation from: Häge 2008: 17)



Council organisation is visualised in figure 4.1.

Representatives in the working parties, Coreper and delegations stand in close contact with their home governments and receive regular instructions. In this way, member state governments seek to control the considerable amount of policy that is formulated at the Council's lower levels (Princen 2009: 21). When studying member states' positions on policies, the ministerial level of the Council is therefore often not the most suitable point of departure. In these instances, discussions at lower levels, as well as instructions from the home ministries provide a greater insight into a member state's viewpoints on a particular policy than those at the ministerial level.

Finally, two bodies must be mentioned here that are not part of the Council but have such an important bearing on intergovernmental relations in the EU framework that their role cannot be omitted. In the first place, there is the European Council. This body consists of the heads of states or presidents of the member states. Only in 2009, with the coming into force of the Lisbon Treaty, its role in the EU was formalised. The European Council functions as an forum where the broad outlines of EU policy are formulated. It was also here that the subject of EU transparency first began to take shape.

Secondly, the European Council has the power to call into being Intergovernmental Conferences (IGCs). IGCs take place relatively infrequently: over the seventeen-year period under investigation in the research, five were held. Nonetheless, their influence is considerable, as they provide possibilities for treaty revision. The impact of IGCs on the transparency debate can therefore be said to have been considerable.

Table 4.1 below provides an overview of the hierarchy of policy formation in the Council which is described in this research as the policy arena, and those elements of it which are relevant for the EU's transparency policy. Upon closer inspection, a complex picture arises of the policy arena of the Council. Member states discuss policy matters of various levels of technical and political complexity in different constellations. A reconstruction of the Council discourse in any policy area must take account of this complexity. Statements at different levels, and at different stages of the decision-making process, carry distinct meanings; the institutional context sets the rules of the debate (Häge 2008: 37-8, cf Levinson 1992).

Other organisational arrangements

In addition to the Council's policy making platforms, other institutional arrangements are in place to facilitate its work. All the bodies of the Council are supported in their work by the General Secretariat (GS), which acts as the institution's civil service. It carries out on a day to day basis policies which are agreed upon by the member states, providing, inter alia, draft reply letters, legal advice, and translations of policy documents. Its role is essentially apolitical and supporting. In this discourse analysis, documents of the GS are considered part of the Council discourse, although the status of these documents is critically considered. Draft proposals, for example, are considered of lesser consequence than common positions that have been agreed upon by the Council members. Whether drafted by the presidency or the GS, all

Table 4.1: Hierarchical breakdown of the policy arena of the Council transparency policy

Level	**In this set**	**Description**
Intergovernmental Conference	Maastricht Amsterdam Nice Brussels (Convention) Lisbon	- treaty provisions - declarations attached to treaty
European Council	Birmingham Edinburgh Copenhagen Cardiff Feira Brussels	- European Council conclusions/ general statements of political direction
Council of Ministers	General Affairs Justice and Home Affairs	- legislation - decisions - Rules of Procedure - Codes of Conduct - conclusions
Senior Committees	Coreper I Coreper II	- follow-up on working parties' work - debates on details of formal legislation - communication with capital cities
Senior Working Parties	Antici Group Mertens Group Friends of the Presidency Group K4 Committee Cooperation Committee	- communication with legal service - policy drafts - confirmatory request
Working Parties	Working Group on Information Europol Working Group	

proposals are agreed on by a qualified majority of member states, the terms of which are set out in the TEC (Häge 2008: 21). Where there is evidence that at certain points in time the Secretariat may have overstepped its administrative role, assuming a political stance, such divergences are generally quickly corrected by the member states. Evidence of this interplay comes forward in the documents analysed. Evidence from previous research suggests that in general, member states are able to keep firm control over the policy agenda (Princen 2009: 161).

In spite of the GS's supporting role, the task of setting the agenda and developing longer term work plans into practice proves to be both a strategic and a political matter. Therefore, a presidency of the Council exists, which is held at turns by the member states for a half year term. The presidency decides on

a work programme for policy and chairs meetings. This is done on the basis of the unwritten but firm agreement that the presidency should act as a non-partisan neutral policy-broker. On the one hand, this may work as a constraining factor. For example, it was held in an interview that Sweden may in fact have been constrained by its role as president during important transparency negotiations (anonymous delegation civil servant, interview). On the whole, however, the evidence seems to point in the opposite direction, as the presidency has the power to steer and shape the agenda and, at times, to represent the Council in important negotiations (Chalmers et al. 2010: 74, Bjurulf and Elgström 2004: 263-5). In certain meetings, among them those of the WPI, the chair is shared between the presidency and the GS, where latter leads the meeting and draws conclusions, but the presidency has the floor to elaborate on substantive matters (Swedish delegation civil servant, email). During the period under investigation, the member states selected for this discourse analysis held the presidency two to three times each, an overview of which is provided in table 4.2.

Table 4.2: UK, French, Dutch and Swedish presidencies between 1992-2009

Country	**Period**
United Kingdom	July-December 1992
France	January-June 1995
Netherlands	January-June 1997
United Kingdom	January-June 1998
France	July-December 2000
Sweden	January-June 2001
Netherlands	July-December 2004
United Kingdom	July-December 2005
France	July-December 2008
Sweden	July-December 2009

The work of the Council is governed by its Rules of Procedure. These rules cover all kinds of practical arrangements as well aspects such as voting procedures and procedures on secrecy and transparency. The Rules of Procedure can be amended with a qualified majority. Between 1992 and 2009, this happened seven times.

4.2 The Council in an interinstitutional context

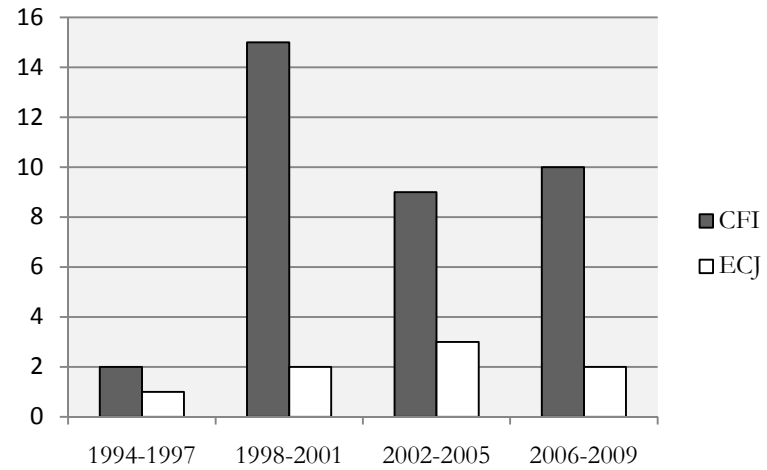
The EU's institutions

The Council is one of the EU's three central institutions, the others being the European Commission (hereinafter, EC) and the European Parliament (EP). While the former acts as an executive and the latter as a legislature, the situation of the Council is more complicated. In certain areas, the Council acts as a legislator, in others as a co-legislator in conjunction with the EP, and still in others as an executive.

Outside of the decision-making structure stand the Court of Justice and the European Council. The Court of Justice has been established to see to it 'that the law is observed in the interpretation and application of the Treaties' (Chalmers 2010: 143). It is composed of three courts: the Court of First Instance (CFI), which has been renamed the General Court (GC) under the Lisbon Treaty, the European Court of Justice (ECJ), and a specialised court, the European Civil Service Tribunal. The role of the Court has been limited to the interpretation of European legislation. In the transparency policy, formal legislation only came about with Regulation 1049 which was established in 2001. Initially, access to documents of the Council was based upon a 1993 Council Decision, which is an internal rule. However, the Court established jurisdiction based on the finding that also institutional rules were binding, and could be relied on pending formal legislation (Lodge 2003: 109). This had been established in a case brought against the Council in 1994, in which the Netherlands argued that access to documents could not be based upon internal rules and should have a firm legal basis. While the Netherlands lost this case, the Court assumed the right to establish a correct interpretation of said Decision (Peers 2002).

A growing body of case law has since emerged, with 46 court rulings on access to documents between 1994 and 2009 (Council 2010a). Figure 4.2 provides an overview of the spread of transparency cases during this period. It shows a spectacular increase in rulings when comparing the years 1994-1997 and the subsequent period (1998-2001). This is in part explained by the time lag that existed between the start of procedures and their conclusion, which in certain cases amounted to a number of years. The balance between CFI and ECJ rulings shows relative consistence over time, indicating that most cases were settled at first instance. The slightly smaller *N* when compared to figure 3.1 is explained by the fact that two cases filed in 2009 were still awaiting an outcome by the end of 2009. Historically, rulings of the Court of Justice have been observed to be of considerable influence on the direction of EU policy making. The case law suggests that, while the court has sought to protect the right of access to documents, it has done with a mixed record, ranging from legalistic to progressive interpretations (Chalmers 2010: 384-95). As we saw in the previous chapter, a number of member states therefore intervened frequently in order to influence the outcome of the ruling.

Figure 4.2: Spread of transparency case law over time and between the courts (N=44)



Second, there is the European Council. With the coming into force of the Lisbon Treaty, the European Council became a formally recognised institution of the EU. Before that, it was officially not a part of its institutional structure. However, it has been noted that the European Council has

traditionally taken up a coordinating role, setting the broad outlines for policy and formulating common positions in delicate political matters (Chalmers 2010: 75-80). Häge therefore incorporates it into the decision-making structure of the Council, supporting this choice with empirical evidence (Häge 2008: 26, 28, 103). As mentioned above, in the Council transparency policy, the European Council also played an overlapping role in resolving disputes and establishing general objectives. Exemplary of this interwovenness is the direct applicability of the Council access rules on the European Council (Council 2010a).

The role of the Council

The tasks and jurisdiction of the Council are set out in the Treaties. Between 1992 and 2009, this meant that policy-making was divided into three so-called pillars, each with its own legislative and executive procedures. Policy of the European Community was made under the first pillar. Here, the EC held a monopoly over the legislative initiative, while the EP held the widest legislative prerogative, often acting as a co-legislator with a right of amendment. This was also the case when a regulation on access to documents was being negotiated in 2000/2001. Under the second pillar, the Common Foreign and Security Policy (CFSP) took shape, while under the third pillar, decisions on Justice and Home Affairs (JHA) were taken. These two pillars have had a strongly intergovernmental flavour, and the EP and the Court of Justice had only a small role to play in them. In the debate on the transparency policy, the pillar system and its meaning for transparency laws and practices played an important role, the second and third pillar being characterised by greater secrecy and sensitivity among the member states.

In several respects, discourses on transparency in the Council were affected by interinstitutional arrangements. First, it was clear from the outset that transparency would be a matter of concern for all institutions, and that it would be guided by a single set of principles (albeit not necessarily with the same de facto interpretation or outcome). To coordinate the institutions' policies, interinstitutional agreements on access to documents, good governance, or good administrative behaviour were formulated. At the same time, legislation governing the institutions' role in transparency, even when not governed by a single legislative act, would be closely coordinated. This recurrently resulted in heated (and not very transparent) interinstitutional negotiations, in which the institutions would use their treaty prerogatives to bring about a dynamic of power and impasse. This interinstitutional "power play", as we shall see, not only had its bearing on inter- but also on intrainstitutional relations. Particularly the EP and the Court of Justice had such an influence on the Council debate that member states could not avoid them (or used them their benefit) in their formulation of positions and arguments on EU transparency (Bouwen 2007, Bjurulf and Elgström 2004, Peterson 1995). The institutional context in which the Council operates is a contextual factor with considerable prerogatives to constrain or effect change. When studying the discourse of the Council, the potential impact of context must be taken given full consideration.

/5/

The learning curve – from Maastricht to Amsterdam

This analysis begins where the emergence of a Council policy on transparency begins: around the beginning of 1992, with the adoption of the Maastricht Treaty (TEU). The arrival of a debate on transparency at the European level coincided with the birth of the EU. A transparency policy was developed out of a Declaration attached to the EU's formative treaty.

5.1 Policy context and environment before Maastricht up until Amsterdam

In order to understand the direct context in which transparency emerged in the EU, we must start a few months before 1992. During the second half of 1991, the Netherlands was holding the presidency of the European Economic Community, and the negotiations on the TEU were close to conclusion. The Dutch government, regarded as a champion of transparency from the beginning of this Council debate, had just concluded a revision of its national *Wet Openbaarheid van Bestuur* ('Law on Administrative Openness', known for short as WOB) in October. This law established a 'public interest in openness of information'[2] and regulated the public's access to the administration's documents. As it held the presidency, and with the treaty negotiations reaching their final stage, the Netherlands was keen to similarly see transparency implemented at the European level. The Dutch commitment to having it included in the Treaty, however, was not honoured by the other member states. Eventually, the Netherlands had to make do with an abstractly phrased declaration attached separately to the Treaty.[3] This was seen by observers as giving the Dutch presidency at least a token victory, when a majority of member states were unwilling to accept a more substantial proposal.[4]

Whether the dual emergence of the EU and transparency was purely coincidental is of course debatable.[5] Nevertheless, it appears that no strong sense of urgency or purpose existed when the Dutch made their proposal. Unlike the Dutch, and the Danes who supported them, most member states did not draw an automatic analogy between an expansion of the EU's decision-making or executive competences, and the need for more transparency.[6]

In fact, a call for open decision-making at the European level was seen as counter-cultural to the European Community up to that point. From its early days, it had operated as a diplomatic project of political elites overcoming disagreements and obstacles between them in a technocratic fashion, at a

distance from the electorate.[7] It has even been held that before 1993, when the first transparency rules were adopted, '[t]he cloak of secrecy was an essential part of the Council's methodology'.[8]

This legacy turned out to have a powerful impact into the early years of the transparency policy. It is exemplified by a quote from the then Council spokesman Norbert Schwaiger as late as 1996. As he argued:

> Compromise would be politically much tougher if all positions were open. With the hate that has consumed our continent, I sometimes feel it's too early for [a fully open debate]. We're not far enough along yet.[9]

At the outset of the transparency debate, member states also had limited experience with policy options such as citizens' participation and Freedom of Information (FOI). 7 of the then 12 member states had any national transparency legislation, while in 4 of those 7 countries, this legislation was younger than 10 years old.[10] Neither were the European Communities (ECs) familiar with a logic of openness. In the ECs, two legally affirmed instances of transparency existed prior to 1993. The first instance concerned the right to information in legal procedures to substantiate any party's right to be heard before the court. This right was established as a basic precondition for legal certainty. The second instance was a 1983 law on public access to the institutions' archives. This law stipulated, inter alia, a 30-year period of confidentiality for most documents, with the possibility of extension. Access to archive documents was regulated by the internal rules of the institution in question.[11]

It is therefore no exaggeration to hold that both member states and the EU were relatively inexperienced with transparency when the debate first emerged, and that a logic of openness was not widespread. Possibly it would have stayed at a treaty declaration and a few minor measures if it was not for a catalytic event: in June 1992, the Danish electorate rejected the Maastricht Treaty, sending shock waves among the European establishment. The Danish rejection was widely connected to the EU's opaqueness and distance from the citizenry, and sent transparency 'to the top of the agenda'.[12]

Promptly, a series of discussions followed at European Council meetings under the UK and Danish presidencies in Birmingham and Edinburgh (1992), and Copenhagen (1993). The Commission came forward as a new champion of transparency, informing the Council in December 1992 that it would no longer respond to requests for legislation deriving from informal meetings.[13]

In the meanwhile, civil society was not sitting still. Journalists associations from all the Nordic countries, all but one of which were not (yet) member states, were following the developments in the EU closely. In a joint communiqué, they demanded guarantees that national transparency laws would remain unaltered in the eventuality of an accession to the EU, thereby putting pressure on their governments not to deviate from their principled position.[14] Pressure also mounted upon the Dutch government. In a parliament-wide motion, MP Van Traa asked the government to resist 'with all possible means' that its democratic control over the intergovernmental pillars would be undermined.[15] By the end of 1993, things

came to a head. After intense negotiations, both the Council and the Commission adopted their own internal rules governing access of the public to their documents.

Yet when the Council may have thought that it had adequately accommodated the debate on transparency, a number of further challengers arose. In the Dutch press, the new access to documents rules were received with hostility.[16] Dissatisfied with the outcome of the negotiations, the Dutch government decided early 1994 to bring the Council before the Court, arguing that the access to documents rules should be grounded on a firmer legal basis, as formal legislation instead of a mere Council Decision.

In the same year, John Carvel, a journalist working for the English newspaper *The Guardian*, challenged the Council's refusal to grant access to a number of documents in another court case, arguing that no adequate reason for refusal had been given.[17] Upon request, the Danish and Dutch government intervened on *The Guardian*'s side.[18] While the Dutch government lost its case in 1996, Carvel won (1995), and the Council disclosed some of the documents, while motivating a continued refusal of others. The Court thereby upheld a "giving reasons requirement", forcing the Council to live up to the standard of making a balanced consideration of the public interest as the Decision stipulated.[19]

Another challenger from civil society was found in Tony Bunyan, a journalist and director of Statewatch, a civil rights NGO, who made continuous applications for documents in the sensitive policy field of Justice and Home Affairs (JHA). Statewatch's dissatisfaction with the Council's handling of its requests finally led Bunyan to file a number of complaints with the European Ombudsman in 1996.

Throughout the early period of the transparency policy, the Council was going through a learning curve, struggling to formulate a position that it considered satisfactory. A growing number of applications for documents caused varied worries. While some feared that the confidentiality of the Council's proceedings might be undermined, others argued that too much transparency might play into the hands of lobbyists, or that allowing wide access would cause an excessive administrative burden.[20]

The position of the Netherlands and Denmark was further enforced with the accession in 1995 of Sweden and Finland.[21] Together with the already active group of journalists and civil society actors, these countries increasingly began to form a front challenging the Council's policy, and seeking to have their national practices implemented.[22] The emergence of a new pro-transparency culture was directly underlined when the Swedish Association of Journalists brought the Council before the Court in another access to documents dispute, which would be ruled in its favour in 1998.[23]

Although the Council was making small strides towards implementing greater transparency in its operation, a sense of alarm at the prospect of a potential loss of control over its information streams caused it to behave in a conservative and controlling manner. For example, only years after the Council had started publishing the outcome of votes, this practice was codified.[24] Among pro-transparency groups and media, this attitude caused widespread scepticism. In a 1996 article covering recent developments, the Dutch newspaper *De Volkskrant*, complained:

> Transparency – transparent decision-making – has over the past years become the EU's new credo. Europe should become easier to understand for citizens and should come closer to them. Yet in spite of all beautiful words and promises, the ways of the European bureaucracy remain opaque.[25]

In a background article, the *Los Angeles Times* suggested that a historical transition might be taking place within the Council, while an observer featuring in the article held that 'Brussels needs to be taught to be open'.[26] The Council was going through a learning curve as it developed a discourse on transparency.

The most urgent thorn in the side of the pro-transparency coalition at this point was the continued absence of a proper legal framework of transparency, in which it would be recognised as a civil right and general principle of Community law. With the outcome of negotiations of a 1996 IGC materialising under its chairmanship, the Netherlands sought to make this a top priority on the agenda.[27] A growing awareness of the fact that the transparency question had to be dealt with more thoroughly, perhaps made even more urgent by the Ombudsman's own-initiative inquiry started in June 1996, made member states more willing than before to enshrine transparency into the revised treaty. In helping bring this step about, the coming into office of the more transparency-friendly Labour Party in the UK will only have helped.[28]

The period under consideration in this chapter therewith ends with transparency rising to the top of EU legislative hierarchy, that is, in several articles of the Amsterdam Treaty.[29] Incrementally, although at a rapid pace, transparency had turned from a curious institutional anomaly advocated by a small Council minority into a respectable right enshrined in a treaty. In the following section, I will consider the changes in the Council discourse that enabled this development.

5.2 From inexperience to "directed transparency"

Dealing with inexperience

The idea of transparency first entered the EU's rhetoric in Declaration 17 which was attached to the TEU. In a brief statement the IGC held 'that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration'. This position was not immediately translated into concrete policy. Instead, the Commission was asked to think of 'measures designed to improve public access to the information available to the institutions' and to report back by 1993.[30]

A citizen reading this declaration at the time may have noted that the declaration speaks of access to *information*, which does not necessarily include documents. On the other hand, references to democracy and trust gave the declaration a distinctly ideological undertone, suggesting that transparency was an intrinsically positive idea. Along the ethical dimension, the Council thus accorded transparency a central position.

The idea of transparency as inherently connected to democracy was continued later that year when the European Council met in Birmingham. There, heads of member states stressed 'as a community of democracies' their determination to 'make the Community more open'. In line with Declaration 17, the heads of state stressed that they would continue to look into 'ways [...] of opening up the Community's

institutions', inter alia by asking foreign ministers to propose initiatives and by welcoming the Commission's efforts to widen consultations and develop other transparency measures in the Community context.[31]

Transparency of the EU thus took off with the profession of high expectations and much brainstorming. The Council expected a trusting, better informed, and more involved public; all pro-democratic arguments in favour of bringing in more transparency. Expectations were somewhat qualified for the first time as propositions became more concrete. The first interest to be protected from transparency was the confidential operation of Council negotiations. To the provision of maximal information, for example, 'exceptions [were to be] made for cases where such information would damage the interests of the Member States, the Council, or the Community - e.g. negotiating mandates'.[32] Also at Edinburgh, the first categories of transparency were introduced. '"Open" debates' [*sic*] were meant to draw attention to major initiatives, voting records to be made public, information on the role and activities of the Council to be expanded, and legislation to be phrased more simply and clearly.

As for the last proposal, a delicacy of negotiations was also recognised in there. Nevertheless, in transparency of legislation, the protection of negotiation was clearly deemed subordinate. By June 1993 rules could thus be enacted which aimed 'to make Community legislation as clear, simple, concise and understandable as possible'.[33] Other areas however, such as the newly created pillar of JHA, were quickly and categorically shielded from openness based on a reversed trust argument.[34] A report in the Europol Working Group, for example, warned that 'If they cannot trust [the] protection [of confidentiality], originators will be reluctant to provide the intelligence Europol needs'.[35] Throughout the first years, the Council was learning in this new policy area on a case-by-case basis.

A discourse develops

Of capital importance for the expansion of the transparency policy were the access to documents rules. These were adopted in December 1993 through a Code of Conduct and amended Rules of Procedure, and provided the first real indication of the role that the Council saw for transparency. In an article on meetings, it was decided that these were covered by 'the obligation of professional secrecy', unless the Council were to decide otherwise by unanimity. That way, the door was kept open for more transparency, yet under the Council's conditions. Formal votes were henceforth to be published after the meeting. Member states could motivate their vote publicly, 'with due regard for these Rules of Procedure, legal certainty and the interests of the Council',[36] i.e., when other member states did not object, leaving member states in control to protect themselves from a possible loss of face in front of the European citizenry.

That same month, the Council clarified its position on public access to Council documents with the adoption of Decision 93/731/EC. Appraising 'the principle of allowing the public wide access to Council documents, as part of greater transparency in the Council's work', the Decision also held that this principle 'must however be subject to exceptions'. Disclosure *had to* be refused where it undermined the protection of the public interest, the individual and privacy, commercial and industrial secrecy, the

Community's financial interests, the confidentiality of a supplicant of information, and *could* if it undermined the confidentiality of the Council's proceedings. In such cases, 'the applicant shall […] be informed of the reasons for this intention [to refuse access] and that he has one month to make a confirmatory application for that position to be reconsidered'.[37]

In May 1995, Council Conclusions again engaged with the transparency question. In a by now common ritual, a 'determination to work towards greater transparency of its proceedings within the guidelines framed by the European Council' was reaffirmed, 'while maintaining the effectiveness of the decision-making process'. This implied that transparency, if implemented without control, might impede this effectiveness. For the first time, transparency was explicitly linked to the Council's role of legislator. "Legislative transparency" thereafter became the standard, hardly challenged in the Council context until today.

In an assessment of the publishing of outcomes of votes, the Council pointed out that it 'has never used the possibility of an exception provided for in its Rules of Procedure, nor does it intend doing so in the future'.[38] Later that year, the Council proposed further measures to widen its transparency, among them the publication of minutes, and the option to add statements to these minutes. In a somewhat warning tone, it was added that each member would be 'acting on his own responsibility' when disclosing statements.[39] This shows that the Council was periodically evaluating the implemental dimension of transparency, at times concluding that certain steps were overseeable, while others might have effects beyond control. Certain areas fell, as a matter of speaking, within the scope of "acceptable" or "controllable" transparency, whereas others had to be bounded by clear rules.

The first comprehensive report on the functioning of the access to documents Decision played an important role in this evaluative process. Among other things, it suggested that 'consideration might be given to the possibility of establishing a register of Council documents', that explicit reference to member states should be deleted from the documents 'so that the public may be given access to a greater number of documents without prejudice to negotiations', and that the press should be fully briefed prior to Council meetings. Such proposals could be seen as attempts to reconcile the principle of transparency with that of confidential deliberation.

In the area of requests for documents, the report drew a distinction between "system-testing" and "legitimate requests for access". It cited a single applicant who had been responsible for a third of all applications for documents, arguing that his was as a typical case of a manifestly excessive requests involving disproportionate costs. Perhaps, the report suggested, provisions should be made to refuse such requests, 'after examination of the reasons for the applicant's interest'.[40]

The Council made it continually clear that it was 'growing experience in an area that was new to it prior to the adoption of the Decision' and 'the ever-increasing number of applications for access to documents' which directed its transparency policy. In this light, a number of policy changes were adopted at the end of 1996. These included the possibility to extend the deadline of a formal reply to the applicant, the structural issuing of a bi-annual report, dealing with 'the question of applications covering a high number of documents', and an exploration of the possibilities of a public register.[41]

Conditional expansion

During the entire period from 1992 to 1996, the Council's discourse made a learning curve from inexperience towards closure of the policy. Starting from ideologically phrased but abstract ethical statements, the Council began to build implemental brakes into its discourse. Particularly the protection of negotiations played an important role in this careful discourse. Moreover, practical limits such as time, resources, and abuses of the system were seen an additional reason for reform. In references to the wider public, indignation could be sensed about citizens who abused the Council's good faith by testing the policy's limits, and about the press who allegedly misrepresented the facts of rulings of the Court in the area of transparency.[42] The proposals and rationale that the Council put forward towards 1996 were thus based on a willingness to be transparent, but in a controlled way. The Council sought a flexible kind of transparency that it would be able to "direct" when necessary.

Therefore, it may at first instance seem surprising that the further step was taken to enshrine transparency so prominently in the Amsterdam Treaty. However, when taking a closer look at the specific provisions, this step may yet be explainable in the light of a "directed transparency" policy.

In three articles and three declarations, transparency was placed in a context of open decision-making, access to documents and clear legislation. The first article of the TEC now read: 'This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken *as openly as possible and as closely as possible to the citizen*'.[43] From an early stage, subsidiarity had been a value that was closely associated with transparency; while 'as openly as possible' could be seen as a relative assertion, meaning of course as openly as the Council *itself* considered possible.

Already in the 1993 Council Decision on access to documents, limits to openness had been defined quite widely and with ample discretionary space. Now, when the treaty stipulated that a formal law of access was to come into existence within two years after its entry into force, an additional exit hatch was built in. In a declaration added to the treaty, it was agreed that a member state could ask the Commission or Council not to disclose documents originating from it. This put member states squarely in control of their own documents.[44]

It would be too strong to argue that the Council's discourse achieved full closure of the policy as transparency found its way into the treaty. Several court cases were at this time awaiting a ruling, the Ombudsman was investigating a number of complaints, and the TEC projected new ambitions into the future. Still, a discourse had come into maturity in which the Council, arguing for "transparency as far as possible", kept itself firmly in the director's seat.

5.3 The management of expectations

Different takes on transparency

The early period of the transparency policy in the Council was one of different expectations. Although the Council was bound to the pledge made in the Maastricht Declaration, not all member states were equally enthusiastic, or in it for transparency per se. A number of UK internal documents from the time of its

presidency[45] provide a vivid example of this. The UK's initial reaction to the transparency debate was wary: 'There is a natural reluctance in Whitehall to complicate the daily business of the Council by opening it up to public scrutiny'.[46] On the other hand, the UK government was well aware of the growing scepticism among European citizens, and believed that transparency was instrumental in addressing this scepticism: 'We must not allow this initiative to fade'.[47]

From the brainstorming that took place internally, it becomes apparent that the substance of transparency was quite new to the UK. This emerges from the constant conditionality used in the language with reference to the role and functions of transparency: 'I doubted', 'it was unlikely', '[n]or does it seem likely that', and 'I suspect', all part of a vocabulary of policy uncertainty.[48]

Still, the UK expressed clear preferences. At an early stage, the option of having the press present during negotiations on legislation was ruled out,[49] debates held in the open should have only general conclusions and should not discuss 'EP related questions',[50] and transparency 'should focus on […] legislative activities'.[51] On the other hand, the UK could accept the publication of minutes, votes on legislation, and statements by member states, as well as a host of Commission initiatives.[52]

From the beginning, the UK saw clear potential in stepping up transparency for the purpose of enhancing the EU's legitimacy. It therefore focussed on the role of the press, as 'they have the key role in explaining the Community to the public',[53] and spoke in general terms of an FOI act.[54] Transparency, according to the UK, could be the norm where it had added value, and would not harm negotiations. On the other hand, the UK wanted to avoid an all-too strategic outlook. A staged debate, it argued 'risks the sterility of the UN',[55] while inter-institutional coordination of information provision 'has a ring of Eastern Europe about it'.[56] In short, the UK favoured limited transparency measures with a view to bringing across the European message more effectively, while at the same time protecting the confidentiality of negotiations.

The discourse of the Netherlands had a more urgent sense of mission to it. Its main aim was to bring the EU's transparency policy in line with its own, and to that end it worked steadily towards 'an openness regime as generous as possible'.[57] The Dutch formed part of a small minority that favoured thorough transparency rules, and criticised the Council's tendency towards a 'restrictive – and therefore for leaders safe- regime'.[58] The Dutch government saw a second obstacle in its parliament, which demanded to be kept involved in decision-making in all pillars through access to the Council's documents. After a round of correspondence with embassies in the European capitals, the government came to the conclusion that this was a unique problem. In the UK, an informal deal had been struck between the government and the parliament, while in France, no tradition of parliamentary involvement in this area existed at all.[59]

The Dutch discourse at this time was one of strong indignation with the fact that its position was so isolated, in spite of all the lofty promises made to the public: '"Maastricht", which in any case already evoked mixed feelings with the European citizen, will not gain in popularity in this way'.[60] It soon went down a radical path of obstruction, considering it 'politically important that heads of state be confronted with the way in which the General Affairs Council has executed their conclusions'.[61] The Netherlands dug

in its heels and decided that 'steadily voting against' in order to protect its 'highly elevated position'[62] would be the best route to take.

At the meeting that was to vote on the new access to documents rules, the Dutch minister present gave vent to the Dutch frustrations: 'Chairman, with dismay, the Netherlands has had to see the way in which the discussion on the proposals here before us has drifted increasingly further away from that which had been agreed upon by the European Council'. He continued:

> I interpret the draft declaration for the minutes […] in such a way that the Dutch government will not be reprimanded for offering its documents to its parliament, even when that parliament devotes a [public] debate to [these documents].[63]

This concession was granted to the Netherlands, but no further result was achieved. The UK was aware of the Council's diminishing enthusiasm, yet had not acted to reverse this trend. The Dutch discourse thus represented a true counterposition to that of the Council. Its main objection with the adopted rules was their long and absolute list of grounds of refusal. It decided to start a court case against the legal basis on which the Decision had been taken, but realised that 'as long as the Court does not rule otherwise, [that Decision] constitutes the framework within which we must operate'.[64]

The emergence of a coalition

In the period after 1993, the Netherlands participated with tempered idealism, mainly fighting the policy on its own grounds. For example, the Dutch reaffirmed their right to discuss access to documents requests at the ministerial, rather than the working party level, whenever they saw fit,[65] and took the line, along with Denmark, to vote consistently against refusals of access when they were insufficiently motivated or failed to recognise the applicant's interests.[66]

However, when Denmark came up with new initiatives to push transparency forward, the Dutch wondered 'whether currently in the Council there is sufficient support base for initiating this discussion [and] to what extent the Danes are aware of this'.[67] Instead, the upcoming (1996) IGC was considered to be a more opportune moment.[68] When, in 1995, a Council statement of intention concerning the publication of minutes and statements in the minutes was proposed, the Netherlands voted in favour, because they considered it the maximally attainable for the moment.[69]

Not only the IGC gave the Netherlands hope for change in the transparency policy; another source of expectation were the new member states that had recently joined the Council: 'It is possible that, because of the accession of especially Sweden and Finland, the climate has improved in the Council for improving the openness regime'.[70]

Sweden had been following the unfolding Council discourse on transparency from the side line for years. The EU's notorious closedness was a cause for concern among interest groups, the Swedish government noted. For the moment, however, the government remained unmoved and argued simply that 'open government is not negotiable and that there is no reason to take it up as a topic in the [accession]

negotiations'.[71] In fact, Sweden was cautiously optimistic about the signals that it received from Brussels, which entailed 'such a clear reorientation of the European pre-accession tradition that one can speak of a breach of trends'. This confident attitude of Sweden before accession appears to have been strengthened by contact with the Danes, and it believed that the Danish rejection of the treaty had affected a 'cultural revolution'.[72] In its capacity of accession partner, Sweden submitted a statement to the Council that diplomatically set out its position:

> Sweden welcomes the development now taking place in the Community towards greater openness and transparency. Sweden notes that the measures now being discussed with the Community only concern public access to information available to its institutions and that there is no intention to harmonize the rules in the Member States on access to information.[73]

Sweden's optimistic tone was somewhat tempered when the access to documents rules came into place. Citing an article in the British paper the *Guardian*, which argued that Brussels had been captured by the 'British secrecy disease', an internal memorandum noted that '[t]he battle for greater transparency has only just begun'.[74]

The accession of Sweden

The first years of Swedish EU membership also form the latter years under consideration in this chapter. Sweden was, at this time, not yet fully able to leave its mark on the Council discourse. It did, however, successfully add an amendment to a Council Decision to the effect that 'the general rule for declarations shall be openness',[75] and furthermore sought to protect at least its national transparency practices by requesting the GS to consider all its statements to the Council minutes a priori open to the public,[76] thereby perhaps also intending to set an example.

In the Swedish discourse, two dynamics existed. While transparency was present in a self-evident manner, Sweden was still groping with the most strategic and diplomatic manner to carry this idea over into the Council discourse. In the running up to the IGC, it began to profile itself more explicitly as a "guide state". In a speech at a transparency seminar, a Swedish minister held that '[t]he mere fact that secrecy would facilitate the work of the authority or its co-operation with foreign authorities', in the Swedish view could 'never alone be a sufficient reason for secrecy'. She also argued that transparency facilitates public participation in the decision-making process, and that these ideas formed part of Sweden's two hundred year-old 'political and cultural heritage'.[77]

In a paper of early 1996, Sweden translated this logic into a position for the IGC. It argued that access to documents would be the most efficient way of achieving greater transparency. An important reason for having access to documents, the paper continued, was that the institutions' activities 'are conducted under the control and observation of the public', which would supposedly strengthen their democratic credentials and bar them from corrupt or other undesirable behaviour.[78] 'This knowledge contributes to make, inter alia, corruption a very small problem in Sweden'.[79] As it began to put forward

proposals concerning transparency, Sweden positioned itself as a senior partner with the know-how to implement an effective transparency policy in the EU.

From the little that is known of the French position throughout the first period, it appears that France was mainly concerned with controlling the damage that transparency might cause. During its presidency,[80] the question of access to Europol documents was discussed. At that time, France proposed to follow 'the lowest common denominator' so that 'no Member State should be obliged to amend its national law'.[81] It appears here that France, like Sweden, brought in the national sovereignty argument, but to the opposite effect.

Another instructive statement from France is found in a leaked draft note from the Coreper. Discussing a confirmatory application from Mr Bunyan in 1995, France put forward that, although the current requests were substantially harmless, it would 'be difficult to refuse [...] access [to more problematic documents] on account of the precedent principle'.[82] In the literature on policy framing, this has been called a "slippery slope argument", which is described as 'the last refuge of conservative defendants of the status quo' (Brock in Stone 2002: 152). Insufficient documents were available to fully confirm this premise. However, it is evident that in the early period France could hardly be called a proponent of transparency.

5.4 Impact of member state discourses during this period

In the years between 1992 and 1997, it appears that the UK was most effective in formulating the dominant transparency discourse in the Council. Much of its argumentation was intended to show how transparency might undermine the negotiating process; this cautious approach was, as I have shown in paragraph 5.2, broadly taken over by the Council in its access to documents rules and subsequent Conclusions.

The fact that the UK was willing to carry transparency forward resulted in a proactive attitude. Combined with its presidency at an early stage of the transparency debate, this provided it with good opportunities to shape the way in which the implemental dimension was approached. While the UK was in no hurry to see any particular measure implemented, the publication of votes, minutes, and statements decided upon in 1995 was something that the UK would already have conceded in 1992.

On the other hand, the UK was not the only member state of influence. Much of the argumentation along the ethical dimension put forward by the Council followed more closely that of the Netherlands and Sweden, remarkably even before the latter entered the EU. In combination with the cautious language about protection of negotiations and interests, these idealistic statements at times sounded like hollow rhetoric. This became a point of criticism both inside the policy arena (by the Netherlands) and outside it (in several newspaper articles), however, to no avail.

The Dutch discourse during the first period was, in terms of implemental influence, overwhelmingly unsuccessful. From an early stage, the Netherlands found itself in a relatively isolated position, which in result caused it to assume an obstructive, "junior" discourse. The disproportionately

high rate of statements of objection are evidence of this counterposition.[83] The fact that the Netherlands chose the path of (threatening with) a court case shows at once how far away the Dutch position stood from the Council majority, and how much importance the Netherlands attached to this matter.

It must also be observed how, in a move towards more constructive opposition, the Dutch discourse increasingly began to use legal argumentation in order to break open and reinterpret the implemented provisions. This allowed the Netherlands to argue the policy in the desired direction, albeit very gradually, and only a little. The resentment that this caused is subtly exemplified by an instruction that the Dutch WPI representative received upon the court judgement in the Carvel case: '*Without succumbing to triumphalism*, you could welcome the CFI's ruling in the Carvel case'.[84]

Unfortunately, no material was available from the Dutch presidency during the first half of 1997. However, this material would likely have noted the change effects of the Swedish accession, and the UK's change of cabinet. Sweden, a country with a long tradition in transparency, put itself forward as an experienced, "senior" partner in this policy area. Initially, it took a relaxed position to its deviations from the Council majority. This is exemplified by a statement attached to a confirmatory request reply, in which Sweden held that it 'accepts the draft reply', although 'some further documents could have been released'.[85]

In the running up to the 1996 IGC, Sweden began to present its ideas more clearly, which exposed its distance from the Council majority. At the same time, its emphasis on access to documents as a main element in the definition of transparency was honoured in the TEC, which announced the coming into force of a formal legal base. In this respect, its pro-transparency discourse was able to exploit the Council method of eventually codifying transparency provisions after a period of trying and testing more informal methods. In spite of its distance from the Council majority, Sweden thus became a successful broker for transparency during the IGC.

While it appears from the little material that was available from France that its discourse was mainly focussed on "controlling damage" that resulted from the new transparency initiatives, the Netherlands and Sweden increasingly began to single out and problematise certain of their aspects. The Netherlands particularised requests for documents, arguing that every refusal needed to be individually and thoroughly motivated. Both Sweden and the Netherlands criticised the pro-active, "directed" nature of Council transparency, arguing that transparency should also afford possibilities to monitor the administration in ways that citizens themselves saw fit. The Council would have to come to terms with the permanent presence of 'the public eye'.[86] As the Amsterdam Treaty was signed, the minority group in the Council seemed to be gaining momentum.

/6/

Legal consolidation – from treaty article to regulation

At the end of the period under consideration in the last chapter, transparency found its way into several articles of the Amsterdam Treaty, becoming a general principle of EU institutional law. The Amsterdam Treaty gave a considerable impetus to the transparency policy. This chapter discusses the discursive shift that eventually led the Council to accept its first fully-fledged legislation on access to documents.

6.1 Policy context and environment at the turn of the century

It may seem unsurprising that the period under consideration in this chapter (1997-2001) began with considerable optimism among the pro-transparency coalition of member states, activists, and observers.[87] Under article 255 of the Treaty, a two-year deadline had been put in place to come to a fully-fledged access to documents-law. Long before the Treaty even entered into force (1 May 1999), representatives from the three institutions had already set up an informal working group to this end.[88]

Around the same time, the academic field also began to take up a more active interest in the EU's transparency policy. In the final years of the century, there was a marked rise in publications on transparency, not infrequently in relation to developments in the EU.[89] The increasing sophistication of this literature highlighted some of the persistent definitional misunderstandings between the member states. Grønbech-Jensen for example noted that while some held that transparency could be brought about through communication, others saw it as a right of access. Moreover, he pointed out that it was not always clear what stage of the decision-making process actors were referring to when speaking of transparency.[90] In another 1998 article, European Ombudsman Söderman posed this as a potential threat: 'The entire world is in favour of "transparency", yet, though being very popular, the term risks no longer having a precise meaning'.[91]

Still, the transparency policy pushed forward, paying only limited heed to such refined conceptual debates. Under the UK presidency, the first talks began about creating greater openness in the third pillar (JHA). On 1 January 1999, the Council became the first of the institutions to launch a public register of its documents on the internet. Initially, the register did no more than simply list (most of) the documents held by the Council. By 2001 however, all previously requested documents, as well as certain categories automatically published, could be downloaded directly from the register.

In that same year, the Santer Commission collectively resigned under mounting pressure after a report by a Committee of Independent Experts accused one of its members of corruption. In the ensuing public debate, a direct connection was made to the secrecy characterising the Commission's operations.[92]

When by the end of 1999 a draft version of the transparency legislation was leaked, outrage within civil society mounted. The draft proposed a reversal of the "transparent, unless" principle into a general rule of non-disclosure unless good reasons existed for disclosure. Advocates had already started campaigning for thorough transparency legislation, organising a transparency conference on the EP premises in April 1999.[93] The fact that the Commission seemed to be seriously considering the leaked proposal only confirmed their fears that the new legislation might in fact mean a rolling back, rather than an advancement of rights.[94]

At the same time, a connection was made by some politicians and advocates between the pending enlargement of the EU on the one hand, and the need for a more transparent institutional structure and an accompanying expansion of rights on the other. This line of argument came forward in the Charter of Fundamental Rights (2000) and the Laeken Declaration (2001).[95]

In the meanwhile the Council continued to be involved in disputes over the limits of the public's right to know. In the single most important court case of this period, MEP Hautala from Finland began proceedings against the Council's blanket refusal of access to a sensitive report on arms trade. In 1999, the Court ruled in her favour, arguing that the Council was obliged to honour its principle of the widest possible access by granting partial access. This judgement was upheld in 2001; a ruling which, *Le Monde* considered,

> may appear very theoretical and modest, but should nevertheless be welcomed as progress in European democracy at a time when the 'European machine' is accused of being technocratic, impenetrable and remote from the public.[96]

In the middle of the summer, as France assumed the presidency, a decision on secrecy of certain documents was quickly passed by the Coreper. This internal rule, which came to be known as the Solana Decision after the new Secretary-General who put it forward, considerably curbed the scope of the Council Decision on access to documents of 1993 which was still in place pending new legislation. Allegedly, when the proposal was presented in the WPI, the delegates of Sweden and Finland walked out in protest.[97]

Still, the Decision was formally passed in August, and was justified on grounds of protection of strategic information shared with NATO, and the fact that the Decision would only have temporary effect and would soon be replaced by the pending access to documents law. Widespread indignation within and beyond the institutions ensued.[98] In two separate cases, the EP and the Netherlands, backed by Sweden and Finland, referred the matter to the Court, arguing that the Council had overstepped its prerogatives laid out in the Treaties.[99] However, the latter case was eventually withdrawn under political pressure. The

Ombudsman criticised the Decision's vague phrasing which enabled the Council to cover entire fields of documents with blanked exclusions.[100]

Sweden thus inherited a mixed bag of circumstances when it took over the presidency of France on 1 January 2001. It had to oversee a legislative debate that was highly embattled, both between certain member states and between the Council and the EP. Moreover, Sweden was constrained in its ambition by the unwritten agreement that the presidency of the Council is supposed to act as a neutral mediator.[101] Yet the deadline laid out in the treaty fell within its term of presidency, and Sweden was determined to come to a result that was acceptable to all parties. The Swedish ambassador's familiarity with the dossier and personal involvement in a series of inter-institutional "trilogue meetings" were eventually instrumental in arriving at a result only weeks after the deadline had expired.[102] On 30 May 2001, Regulation 1049/2001 was finally accepted.

Although the EU, nine years after the transparency debate erupted, now finally had its first official access to documents relations, no unequivocal praise was heeped upon the institutions. In fact a number of civil society organisations, led by Statewatch, had sent out a last-minute open letter calling upon MEPs to vote against the proposal.[103] Certain academics subsequently criticised the Regulation's imbalance between high-minded rhetoric of democratisation (along the ethical dimension) and the narrow translation of this rhetoric into policy (along the implemental dimension).[104] Among the pro-transparency Council minority however, the Regulation was heralded as a success, given the coalition's limited room for manoeuvre.[105]

6.2 The rationalisation of transparency

A relaxing attitude towards change

The coming of the Amsterdam Treaty marked the kick-off for a proactive period in the Council's transparency policy. This renewed attention for transparency was quite deliberate: soon after the signing of the Treaty, the European Council instructed that 'rapid implementation of the new provisions on openness in the Treaty of Amsterdam' should take place.[106] In the first place, this was realised through the formalisation of certain already existing aspects: the principle that the Union should be as open as possible (art. 1), the duty to publish and motivate voting behaviour (art. 207), and the promotion of access to documents from a Council Decision to a fully-fledged Directive or Regulation (art. 255). Secondly, a number of additional provisions opened up new perspectives.

Coming 1998, two new initiatives were started up: transparency in the field of Justice and Home Affairs (JHA) and the implementation of a public register. It was the first time that the Council related transparency in JHA in a systematic way, and many of the initiatives involved a limited catching-up with transparency in the Community pillar: making available meeting dates and agendas of several JHA working parties, publishing the proposals taken up and decisions taken by the Council, and stepping up the flow of information on JHA.[107] The Council had now begun to allow transparency to systematically spill over

from one pillar to the next, a significant step towards recognition of the policy's applicability across the board in decision-making matters.

The new uses of the internet, however, occupied a far greater part of the Council's attention. The Council opened its own website around 1997,[108] while a feasibility study concerning an online register of documents was presented in January 1998. The possibility of setting up a register was, as mentioned in the previous chapter, already suggested in 1996. Under the proposal, the register would enable 'any citizen to identify the reference number of a Council document while not preventing the Council from refusing to release it'.[109] In March, the Council gave its approval to this plan, although contrary to the WPI's suggestion, for the moment only unclassified documents were to appear on the register.[110] As of 1 January 1999, the register was online.

Although the possibilities for wide dissemination through new information technologies had been mentioned as early as 1992,[111] progress in such technologies took this insight to a new level. All citizens connected to the internet could now easily access documents, it was noted.[112] In the first month alone, around 5.000 persons made around 1.340 consultations a day;[113] a continually steep rise in the number of applications for documents was the result.[114]

Contrary to what might be expected based on earlier complaints on the burden of the policy's workload, however, this did not seem to concern the Council at all. 'As expected', the periodical evaluation simply stated, 'the creation of the public register resulted in a substantial increase in requests for documents'.[115] The online access to documents policy was deemed a 'useful and efficient instrument in aid of transparency'[116] and internet activities were soon expanded by adding classified documents to the register ('provided that the Council's interests are safeguarded'), making available documents to which access had already been granted, and the setting up of an interinstitutional website.[117] This way, access could be broadened, 'avoiding excessive bureaucracy': IT seemed to kill two birds with one stone.[118]

Stepping up the information policy

Simultaneously, the Council began to develop a vision on information that was quite distinct from access to documents. It was held that with the upcoming enlargement in view, the EU had to make a greater effort 'to bring Europe closer to its citizens'.[119] It was believed that tailor-made information material would enhance both the involvement of general and specialised audiences at their own level.[120] Several seminars were organised to develop a coherent vision in this matter. The information policy grew within a discourse in which European democracy, the principle of government close to the people, and accountability were all interwoven. An example of this attitude was provided by an information campaign to get citizens to participate in the upcoming elections for the EP. The EU's legitimacy was an important stake in this campaign.[121] The growing policy in information dissemination eventually meant that the Council felt it was necessary to set up a separate information unit next to the access to documents unit.[122]

Another initiative was taken in the area of clear legislation. At an early stage, it had already been pointed out as an element of the transparency policy. At the end of 1998, an interinstitutional agreement

was signed which stressed that all legislation should be 'transparent and readily understandable by the public and economic operators'.[123]

In short, in the last years of the century, the transparency policy received a considerable boost. Within a short timeframe, a large number of initiatives were launched in several fields, all of which were linked back to transparency. The Council somewhat relaxed its earlier defensive tone to assume a more distant, professional attitude, a discursive change which was particularly notable in the area of access to documents. When it came to implemental matters, the Council's especially sought to make the policy more efficient and rational.

On the other hand, the "rationalisation of transparency" did not entail a full turn away from the Council's earlier model of "directed transparency". What it did mean was that the directive tone was relaxed and formalised in standardised procedures, often with allusions to the growing possibilities of IT. At the same time, argumentation for non-disclosure was, likely also under the pressure of a number of court rulings, refined. For example, when a request for Europol documents was made, the Council could point out that it had no legal capacity to grant access to these documents;[124] and complaints about the secretive nature of Council deliberations were responded to by the Council's efforts to refuse as few documents as possible under the "protection of negotiations" clause.[125]

One step backward, two steps forward

A decision that was argumentatively less in line with the discourse of rationalising transparency was the Solana Decision, taken in the summer of 2000. It meant the return of the "blanket exclusion": henceforth, documents labelled "top secret", "secret", "confidential" or "restricted" would be excluded in advance from the access to document rules' scope. Suddenly, these categories that had already existed attained an elevated implemental importance as the wide scope of the 1993 Decision was rolled back. It was argued that this was necessary because of commitments made to NATO about cooperation in crisis situations.[126] The sudden deviation from the discourse that the Council had cultivated over the past years may in part be explained by the fact that the soon-to-be-implemented access to documents legislation would in any case overrule earlier decisions on access to documents.

Talks on the new transparency legislation had been under way for a considerable amount of time, yet it was not until December 2000 that the Council first formulated a common position to be put forward in negotiations with the other institutions. Inter alia, this statement stressed the Treaty as a base for 'provisions relating to transparency, access to documents and the fight against fraud', pledged the future legislation's applicability in all of the three pillars, and suggested a balance of interests test in disclosure decisions, with special treatment for documents with a sensitive content. It furthermore argued that the legislation would enhance the institutions' legitimacy, accountability and effectiveness by allowing citizens to participate more effectively. Finally, the statement reaffirmed that the legislation did not aim to harmonise existing national legislation.[127]

In January, a proposal was drafted for a Council Decision to make certain categories automatically available. This proposal stood in direct connection to the pending access to documents law, and made reference to the proven success of the internet in making the EU more transparent.[128] 'Provided that they are clearly not covered by any of the exceptions laid down in Article 4 of Council Decision 93/731/EC', documents should be directly made accessible via the online register.[129] This proposal formed a clear, albeit limited, example of what could be called the "transparent, unless" mentality. A decision to this end was adopted early April, weeks before the access to documents law. Its objective was to make available 'as many documents as possible […] via the internet'.[130]

As the deadline approached, negotiations came to a head. The Council's proposal for the access to documents law began to assume more of an air of compromise. By now it had become clear that the law was to take the form of a regulation, and that it was to expand the scope formulated by the 1993 Decision. Delegated powers, for example, were now explicitly included.[131]

The end result, which was numbered Regulation 1049/2001/EC, reflected a wide array of ideological and instrumental assumptions along the ethical dimension. It would, among other things, 'improve transparency of the decision-making process', strengthen democracy and respect for fundamental rights, grant citizens better possibilities to participate, enhance the administration's legitimacy, effectiveness and accountability, and improve good administrative practices. The other side of the wager was that each of the institutions had a duty to protect its security provisions. Member states had a duty of loyal cooperation and would have to consult with the appropriate institution before disclosing any document. The protection of internal deliberation and negotiations again found their way into the Regulation as possible grounds for non-disclosure.

The discourse of the Regulation, along with that of the April Council Decision, reflected a rationalised and liberalised attitude towards the question of access to documents and a move away from the often convulsive "directed transparency" that had typified the 1990s of the policy. At the same time, as much as some of the high-sounding objectives formulated in the new legislation had to still withstand the test of practice, so did the Council hold on to the equally untested premise that the Council's work would deteriorate if its negotiation and member state documents could not be protected. Nearly ten years after the transparency policy started, this paradox underlying the Council discourse was again revitalised.

6.3 The confrontation of expectations

Technology-induced possibilities

The first years of the transparency debate, as well as the negotiations for the Amsterdam Treaty, had made member states more knowledgeable of each other's positions. Now that member states knew better what to expect of one another, this changed the tone of their discourse. The Netherlands changed its radical rhetoric to assume a more senior, conciliatory discourse in favour of transparency, while Sweden was now coming forward as its main champion. The UK's discourse continued to be driven by the idea that transparency was mainly there to "explain" the EU to people, although the incumbent government was, to

this end, willing to go further with opening up. Again, the little that is known of the French discourse, all of it indirectly, points towards it favouring strong protection of Council practices, using document categorisation of confidentiality in order to decide on the (non-)disclosure of documents. These attitudes were reflected in a survey of voting behaviour in confirmatory requests for access to documents in 2000: of the countries under consideration in this study, Sweden most often opposed non-disclosure decisions (83% of times), followed at some distance by the Netherlands (29%), then the UK (20%), while France never opposed non-disclosure.[132]

The JHA reforms were an initiative of the UK during its presidency,[133] and seemed mainly motivated to better inform citizens as well as to 'dispel accusations of secrecy'. The proposed initiatives strongly leaned towards information provision in the form of progress reports, publications to improve the public's understanding of JHA, and one press briefing per presidency. The latter was seen as a trade-off between the Council's effective operation and the public's right to know the general direction of negotiations. Elsewhere in the proposal, this trade-off seemed less apparent. For example, where the UK argued that 'early publication […] might give a misleading impression of which ideas were likely to progress, so causing needless controversy', this implies that the untimely disclosure of information would in fact not aid, but obfuscate transparency.[134]

The UK presidency was very positive about the publication of information using the internet, which it held would enhance public debate. In the Dutch and Swedish discourses, the technological side did not play a role as such. The Netherlands, instead, saw it as another site of contention (pun not intended) in its quest for the widest possible, content-based transparency. 'Enclosure in the register does not entail that the document is publicly accessible', it was noted. 'To the opinion of the NL however [the Council] must strive after a register that is as exhaustive as possible'.[135]

The emergence of online transparency suddenly made the role of so-called meta-data –document titles and numbers on the register– more acute. The Dutch feared that the vaguely formulated exceptions in the Council conclusions would be used for categorical non-disclosure of such meta-data. On the whole, they considered a case-by-case, content-based approach to access an important condition for the expansion of transparency, giving it much attention. Sweden, in turn, pointed at other ways in which transparency should be expanded, such as partial disclosure. Their main concern was to shield Swedish national transparency legislation as much as possible from the pending regulation. It also considered that the duty of loyalty as formulated by the Commission could not be accepted.[136] The Dutch, in a document discussing the immediate future of the EU, pointed at the enlargement and the 'recent interinstitutional crisis' (presumably referring to the EP's manoeuvre leading to the fall of the Santer Commission) to argue for a more flexible, democratic, transparent, and accountable governance style.[137] In this way, member states were preparing for the upcoming negotiations, going over their general attitude and central positions.

Pro-transparency's successful negotiations

Controversy was stirred among the pro-transparency camp when the Solana Decision was presented. Although put forward by Secretary-General Solana, the incumbent French presidency[138] was known to support the solution of blanket exclusions in order to avoid sensitive disclosures.[139] The Netherlands considered that it could not but oppose even a temporary categorical approach to exclusion, as it wanted to be consistent in its advocacy of a content-based approach with the upcoming negotiations of the access regulation.[140] Soon after, the Nordic member states and the Netherlands issued a statement of disapproval:

> Denmark, the Netherlands, Finland and Sweden are of the opinion that the confidentiality of Council documents in the Common Foreign and Security Policy (CFSP) can be guaranteed without the a priori exclusion from the scope of Council Decisions concerning the public's access to Council documents and the public register of Council documents.
>
> Denmark, the Netherlands, Finland and Sweden maintain that the changes that have now been accepted by the Council concerning the public's access to Council documents and the public register of Council documents do not preview the future instruments for the implementation of article 255 of the TEC.[141]

Only days before, the Netherlands had requested the term 'a priori' to replace the original 'total', indicating that it was very careful to pick its words in order to get the right message across.[142]

The declaration sent out a strong signal to exceptionalise and isolate the adopted Decision in the wider context of defining and implementing transparency. It furthermore provided a first concerted action of the pro-transparency coalition in the Council. With the deadline stipulated in article 255 of the TEC (1 May 2001) approaching, member states began to find each other in their advocacy or opposition. Sweden, for example, expected support from the Netherlands, while the Netherlands placed the UK somewhere in between the pro-transparency camp and 'a large number of the southern member states'.[143] During the Swedish presidency,[144] both Sweden and the Netherlands noted at different times that proposals were severely criticised by the Mediterranean countries and Germany, whilst being lauded by the Nordic countries and the Netherlands.[145]

The initiative to come to a common starting position was taken by the French presidency. Nevertheless, the common position remained vaguely on a number of contentious points. The French attempt to include a treatment of documents per category could therefore be bent in the opposite direction from what it had advocated: from automatic exclusion of "sensitive" categories to automatic inclusion of "uncontroversial" categories. The definitional distinction that pro-transparency countries made between passive and active transparency was thus opportunistically turned into an implemental question. The fact that the category-based approach was maintained was subsequently even used as an argument to undercut French criticism, and presented as a conciliatory gesture to the EP.[146] Throughout

the negotiations, the Swedish presidency, as the Council's representative in interinstitutional negotiations, used the EP as an argument for further-going compromise.[147]

As for the scope of the law, Sweden and the Netherlands argued that it should cover all decision-making in the EU. Inter alia, access would be widened by including some internal working material and documents related to the Århus convention on environmental information.[148] Furthermore, the Netherlands focussed much of its efforts on the inclusion of a balance test based on the content of the document.[149] Sweden referred the law's objective back to article 255, which stated that the widest possible access to documents of the institutions should be granted. It therefore advocated legislation in the shape of a Directive, which applies only to the institutions, instead of a Regulation, with general application.[150] Sweden forcefully objected that the inclusion of obligations for the member states had no legal basis, maintaining that it 'would never have agreed' to the inclusion of such obligations in the TEC.[151] On the other hand, it did accept that some principle of cooperation might have to be included.[152]

A discrepancy existed between Sweden and the Netherlands over the status of documents submitted by third parties. While Sweden considered 'originator control' to be 'unacceptable', the Netherlands felt that such a principle would match their wishes well.[153]

Although the negotiations on the access to documents law did not alter the fundamental direction that the member states favoured, they considerably altered their argumentation to this end. The Dutch discourse began to pay more attention to the positions of other member states and the EP, and stepped up its use of legal and strategic arguments. Sweden continued to use idealistic and fundamental argumentation, connecting access to documents to an informed and participative public, the fight against corruption, and the modernity of European democracy.[154] Simultaneously, it confronted some of the counterarguments head-on by holding that security was often *not* at stake, and that the Council should not settle for less than the "widest possible access". Remarkably, this turned Sweden into the more radical of the two partners, in spite of it holding the presidency.

Unfortunately, little is known about the discourses put forward by France or the UK during the negotiations. In any case, the Netherlands further cultivated its role of transparency broker, while Sweden increasingly began to showcase its administrative-cultural baggage.

6.4 Impact of member state discourses during this period

In many ways, the current chapter marks a period of change in the transparency policy. Sweden and the Netherlands, as part of a coalition of pro-transparent member states, were increasingly able to get their definitional and implemental message across, thereby approximating the dominant discourse to a considerable extent. Both in its general tone as in the measures proposed, Sweden and the Netherlands were rather successful in influencing the Council discourse at a time when many initiatives unfolded.

This period also marked the end of what an interviewee described as 'the paper era':[155] the output of paper documents and information began to be overshadowed by digital equivalents with the emergence of the Council website and register. This drastically changed the landscape of transparency. The UK saw

new possibilities for stepping up the Council's information policy, which had been its preferential take on Council transparency from the beginning. The British discourse began to show a more liberal attitude: information could also include things such as the meeting calendar, lists of proposals, progress reports, and meeting agendas. Again, the UK took a forward position in providing most information when it would not directly reveal what went on during negotiations. The confidentiality of negotiations was, and continued to be, a fundamental principle for the UK. On the whole, there is no evidence to suggest that the UK was negatively disposed towards the growing information policy.

The Netherlands in its turn mainly saw the new category of digital transparency as another locus to defend its general position of broadening the scope of transparency, particularly the access to documents. At first, this entailed a position on meta-data (document titles and numbers). The Netherlands consistently opposed any a priori division of such data into categories to be treated differentially; instead it saw all Council documents in principle as a "homogenous" group, and argued in a second step that in all cases, access to documents should be judged by the content, while meta-data on documents should only be excluded if even knowledge of the document's existence would be harmful ("particularisation").

The Netherlands, in short, advocated a case by case "transparent, unless" principle. Whereas the Council initially embraced disclosure of meta-data based on document category, after a period of testing the register, it went along with the Dutch line of reasoning. Eventually, the Council even went along with the Swedish and Dutch argumentation that documents should be made available online after access had been granted once, in order to make the transparency policy less burdensome and bureaucratic.

The categorical exclusion debate however continued to linger, especially in relation to security matters. Although no French documents were available on this topic, Dutch documents suggest that France laid a considerable emphasis on the role of blanket exclusionary categories. During the French presidency, the Solana Decision again made categorisation of documents decisive in decisions on disclosure. This had a dual effect in the longer run. On the one hand, Sweden and the Netherlands used the argument of categorisation to advocate the automatic disclosure of documents, thereby turning the French argumentation around. On the other hand, in a milder form, categorical exclusion did become an element of Regulation 1049/2001. That regulation set out certain categories of exemptions, such as the privacy and integrity of individuals and public security, that made non-disclosure obligatory.

Thus, although none of the member states fundamentally opposed a categorical approach to the disclosure question, their stances towards such categories diverged widely, and were pragmatically enacted in implemental discussions. While categorisation at the generic level (per pillar of decision-making, or per document label) did not make it into the Regulation, more room for manoeuvre existed in the categorisation of grounds for exemption. Here, the discourses of member states could be traced on a scale of openness: while France presumably advocated the widest range of obligatory exemptions, even favouring ex post transparency,[156] the UK mainly argued that the security of the EU and confidentiality of negotiations should not be compromised. For the Netherlands, there was some more stretch in the extent to which negotiations could be made transparent. Still, the Dutch did support 'originator control' of documents submitted to the Council by third parties. Sweden, finally, proposed the most liberal stance on

issues such as public security ("often not at stake"), privacy of the individual ("does not count for individuals in public roles"), and third party documents ("submissions to the institutions are in the public domain"). Eventually, a compromise was reached on the latter, in which originating parties would be consulted to assess whether any of the pre-established grounds for non-disclosure applied.

While Sweden and the Netherlands were successful in overturning generic-level categorisation in favour of a wide scope of application (including decision-making at lower levels and even delegated powers), a more conservative stance was taken on obligatory exemptions. The conditional exemption for the protection of negotiations that made its way into the final text may have been less than the UK had hoped for, given its continuous discourse on the protection of the protection of negotiations. Sweden also had to give something up. Its vocal defence of the sovereignty of its own transparency regime was undermined by the access to documents legislation assuming the form of a regulation with general application, rather than a directive applying only to the institutions. Moreover, a duty of loyal cooperation was imposed on the side of the member states.

At the end of the second period, the balance could be made. The French attempts to slow this process and maintain some of the 1993 Decision's elements were able to leave their mark, although the legacy of the Solana Decision quickly disappeared. The UK's discourse managed to narrow transparency in the sphere of deliberation and negotiation, focussing instead on new means of spreading information. All things considered, however, the transparency policy of the Council had moved mostly in the direction advocated by the Netherlands and Sweden. While all gained some and lost some, the end result was that some gained a little more than others.

/7/

Pushed around – from modus operandi to interinstitutional impasse

The new regulation on public access to documents settled a long-standing matter in the transparency policy. In the years after it came into force, the Council developed a modus operandi that was built upon the progressive discourse of rationalising transparency, but which was sufficiently ambiguous to be acceptable for all member states. Gradually, however, the Council was confronted with the full consequences of its discourse as interference from the other institutions increased. When the Commission started the revision process for Regulation 1049/2001 in 2007, the Council discourse again come under fire, and impasse ensued.

7.1 Policy context and environment up until the Lisbon Treaty

After a stormy period leading up to the new access to documents regulation, the EU now moved swiftly on with business. An interinstitutional committee on transparency was set up, and by June 2002, public registers were also online for the Commission and the EP. With satisfaction, the Commission first annual report noted a growing number of documents available online.[157] Nevertheless, the de facto working of the register continued to be subject of criticism, with a critical observer estimating as late as 2011 that only around 10 per cent of Commission documents are registered, while an even smaller number is granted access to.[158]

The transparency policy thereafter entered a calm period. At the end of 2004, the Dutch government organised for the second time a 'Transparency in Europe Conference', under its presidency theme of "communicating Europe". The EU by that time had entered a period of reflection on its values and on possibilities of broadening its democratic base, which had lead to the signing of a Constitutional Treaty in Rome only weeks before the conference. In the Constitutional Treaty, transparency was presented as a principle consisting of three elements: the open conduct of institutional tasks (through the provision of information), open meetings, and access to documents.[159]

The fate of the Constitutional Treaty is, of course, a known story. In the self-declared institutional crisis that followed its rejection by the French and Dutch electorates in 2005, the distance of the institutions from the citizens, as well as their lack of openness were once again seen as main reasons. A

transparency competition between the institutions ensued for which the slogan could have been 'more-transparent-than-thou'.[160]

The Commission began work on a European Transparency Initiative (ETI). The ETI presented a series of initiatives with a tree-fold purpose: making visible the Commission's financial streams, regulating the access of lobbyists, and implementing an ethical code for EU civil servants.[161]

At around the same time, a German law student, discontent with the secretiveness surrounding the Council's operations, filed a formal complaint with the European Ombudsman. Simultaneously, the student found a listening ear with a number MEPs who were quite willing to criticise the Council in this matter.[162] Early September, five British MEPs representing all British political groups wrote an open letter to prime minister 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…'.[163] They urged the UK to use its presidency to bring an end to this 'medieval' practice, stating that apart from the EU, only North Korea and Cuba continued to pass laws in secret.[164]

This media-genic intervention proved highly effective, for soon the Council, under the UK presidency, was debating the possibility of holding open meetings more frequently. Although no formal decision was arrived at in 2005, the Austrian presidency, in search for a success to add to its thin agenda, took over the initiative which eventually led the Council to adopt an Overall Policy on Transparency in June 2006.[165] This Policy in fact went further than all alternatives presented by the UK in 2005 by making all first-pillar deliberations open to the public, unless the Council would decide otherwise. The incoming (pro-transparency) Finnish presidency swiftly commenced with implementation, announcing at the end of its term that a total of 76% of meetings had been held in the open, compared to 17% in the previous term.[166]

The Overall Policy on Transparency indeed was the single largest development in the Council's transparency policy since Regulation 1049 of 2001. It got a wide, though mixed, reception in the media. *Die Welt* called it a 'minor revolution', though it cited tempered expectations among actors in Brussels (Die Welt 2006). The *Frankfurter Allgemeine Zeitung* mainly mocked the boringness of the meetings, suggesting that the substantive decision would continue to be taken behind closed doors: '...is it just as boring in the Council of Ministers when really important issues are on the table?'.[167] Others views varied from listing the possible downsides of transparency, to expressions of hope that in the future the other pillars and Council-related meetings might also be held in the open.[168] What also did not go unnoticed was the last-minute U-turn in the UK's position. Yet, according to a blogger for *Libération*, the UK was not the only member state which found the consequences of the transparency rhetoric hard to swallow:

> 'The British have woken up a bit late on this one,' commented [one] irate diplomat [...]. 'What is their real problem with the proposal? If they intend to take it to the wire in the European Council, they may well find they have allies, because most of the Member States, apart from the Scandinavian countries, have been more resigned to transparency than enthusiastic about it.'[169]

Transparency's more radical advocates were able to reveal the limits of the institutions' transparency-mindedness. In 2007, Sweden's attitude with regard to freedom of information again clashed with that of the EU when the Commission sent Stockholm a warning after it had illegitemately granted access to a confidential strategic document forwarded by a third party.[170] Some months later, Dutch MEP Van Buitenen leaked a confidential committee summary on payment abuses among MEP assistants, thereby embarrassing the EP.[171]

A new round of debate was brought about by the revision of Regulation 1049/2001. As part of the ETI, and upon request of the EP, the Commission began this procedure in April 2007 by publishing a Green Paper. Progressive experience with the online registers, applications for access to documents, and new case law from the European Courts were seen to warrant such a revision. Moreover, in 2006 the UN Århus Convention on Access to Information in Environmental Matters had been transposed into EU law. It was now suggested that the two regulations could be merged.[172]

When a year later the Commission put forward its first proposal for the revised regulation, the process became quickly entrenched. The Swedish government made its scepticism over the proposal publicly known, stating that it was confident it could find allies among the newer member states for a more rigorous access to documents law. Statewatch also expressed its disappointment, arguing, with reference to a metaphor used in 1999 by the then European Ombudsman, that with the Commission's proposal Europe would be 'back in the age of the dinosaurs'.[173]

The French presidency during the second half of 2008 began with a surprising judgement from the ECJ. This ruling had something of a prehistory. In 2003, Italian MEP Turco had brought a case before the Court in which he argued that access to advice from the Council's legal service should be granted in the public interest. When the Court ruled to the contrary, he appealed, together with the Swedish government. To the surprise and dismay of many member states, in 2008 the ECJ set aside the earlier Court ruling and put Sweden and Turco in the right. This caused great controversy and uncertainty among member states.[174]

The Turco ruling put further strain on the already difficult negotiations. In January 2009 the EP passed a resolution in which it sought to take the lead in transparency, calling for the establishment of a single EU documents portal and a European Year of Transparency.[175] In March, EP rapporteur Cashman presented a report on the Commission proposal, suggesting inter alia a new classification scheme, the elimination of a member state veto against disclosure, and a number of exceptions for documents held by the EP and its members. Although the EP approved the report, in an unusual manoeuvre no formal legislative resolution was passed. This, it claimed, was to do with the upcoming elections, yet the EP also wanted to await the more favourable circumstances of the incoming Swedish presidency. European Ombudsman Diamandouros welcomed the EP's step.[176]

The course of the revision procedure was now getting exceedingly chaotic. With the EP refusing to formally end its first reading, with the incoming "biased" presidency of Sweden, with a newly elected EP in the summer and newly appointed Commission in the autumn, and finally with the entry into force of the Lisbon Treaty, success before the end of 2009 was all but guaranteed. In order to get a better picture

of the ongoing process, Access Info Europe, a civil rights organisation, had sought at the end of 2008 to chart the positions of member states in the ongoing negotiations. When the Council refused to disclose the specific positions of the member states in the requested documents, it decided to challenge the Council's refusal to disclose this information before the Court.[177] Recently, in March 2011, Access Info Europe won the case at first instance; the Council soon decided to appeal against this Court ruling.

Debates on the future of the transparency policy were thus effectively put on hold during the Swedish presidency, even more so since action on the economic crisis and an international climate conference in Copenhagen (December 2009) demanded its full attention. A report on the Swedish presidency's accomplishments makes no mention at all of the ongoing legislative revision process.[178]

The final event falling within this research's scope is the online publication in October 2009 of the entire archive of legislative and cultural documents going back to 1952. The archive counted some 12 million pages and cost the Commission €2.5 million to scan.[179] At an earlier stage of the transparency policy, this might have been hailed as a great step forward. Yet with the negotiations on the revision of Regulation 1049/2001 still unfinished, the event likely appeared a footnote in the Council's transparency debate.

7.2 Declining elasticity

A common framework

In the aftermath of the adoption of the new regulation on access to documents, the Council still fully embraced the rhetoric of rationalising transparency. A European Council report on preparations for the upcoming enlargement of the Union reiterated the policy's accomplishments over the past years: an internet-accessible register through which a growing number of documents could be directly accessed, improvements in the quality of drafting of legislation, and efforts to make public debates more interesting.[180] Such measures, it was pointed out, 'simplified' transparency for citizens.[181] Another report that appeared in June 2001 discussed the importance for the EU of increasing and the democratic legitimacy and transparency in the near future. It was suggested that treaty amendment might be necessary, and to that end a broad debate was launched. As the process of soul-seeking ensued, it was deemed necessary to bring the Union closer to its citizens by 'maintaining the greatest possible openness throughout the process'. The functioning of such openness was felt to be of such importance that it should be constantly monitored.[182]

The discourse on rationalisation of the transparency policy was well suited to the process of reform and enlargement that occupied the EU around the time. Through progressive and adaptive change, the line of argument went, transparency could connect the Union to its citizens and allow them to participate, in the act enforcing its democratic legitimacy. In a first step, measures should be taken to allow for the full implementation of Regulation 1049/2001/EC, such as repealing the anomaly of the Solana Decision.[183] At the same time, in decisions on access to documents taken in WPI, the Council continued to grant member states full discretion in their right to prevent the disclosure of their positions.[184] This proved to

be a vestige of "directed transparency" that was hard to overcome as it touched directly on national sovereignty.

Later that year, the transparency agenda for expansion received another impulse, this time with a twist. In 1998, the EU had entered in the UN Århus Convention on public access to environmental information. In preparation of the Convention's transposition into Community law, the Council adopted a common position in the matter. The Århus Convention was unusual in several respects: it posed an obligation in the sphere of transparency that came from a source that was both external to the institutions and the member states, its purpose was restricted to a single policy area, while on the other hand its scope was not restricted to legislative transparency alone. The argument of participative democracy through transparency that had already been used in general terms was now seen as a crucial element in the environmental policy:

> Increased public access to environmental information and the dissemination of such information contributes to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.[185]

In practical terms, the active dissemination of such information through electronic means was considered to be the best way to operate this new focus area of transparency.

In December 2001, the General Affairs Council discussed work on the information policy. Whether the attention spent on the meaning of the Århus Convention for the EU was the direct catalyst is unclear. Probably, the debate on the future and expansion of the EU also contributed to the perceived need to improve information provisions. What is sure, however, is that the information policy was seen as a way to address each of these areas. The Council recalled the spirit of the Birmingham European Council of 1992, which had already proposed interinstitutional coordination of information provision. Only this time, audiovisual means and the internet were chosen as instruments that deserved priority.[186] Clearly, the Council felt that rationalisation through the use information technology and interinstitutional cooperation had not yet reached its limits.

An information handbook of the Council from around the same time, intended for the broad public, set out to summarise the transparency policy's central elements. Ministerial press briefings, access to documents, the publication of minutes and statements added to the minutes, as well as of votes in the Council's decision-making process, open debates on the presidency's work programme, group visits to the Council premises, and a public library and archives: indeed the Council's transparency policy had grown considerably over the years.[187]

From the handbook, it becomes clear that the parts of the transparency policy that were most discussed, and therefore developed, were the provisions on information and access to documents. Lagging behind was the area of meetings, of which relatively few were open. However, while the Council, for the moment, showed no intentions to hold more legislative meetings in the open, it did mention the

possibility (albeit only with unanimous permission) to publish votes that were not related to legislative procedures. As I pointed out in chapter five, transparency had from an early stage been confined to the decision-making process. The way in which the transposition of the Århus Convention was discussed, as well as the reference in the handbook, indicated that this delimitation might no longer be self-evident.

Legal controversies

In 2003, the first annual report appeared on the working of Regulation 1049/2001 in the Council.[188] The Council concluded that good progress had been made. The provision that each of the institutions was to establish a register of documents, it noted, had been forstalled by years. Coordination between the institutions had also improved, and any institution was now consulted as a matter of course if it had drafted a document in order to decide whether it could be disclosed.

In the period after the enactment of Regulation 1049/2001, steps were also taken to further uniformalise the administrative side of transparency. In 2002, an instruction was sent around to all civil servants of the GS, in which they were explained how to register a document, as well as how to balance the principle of access against the prejudice to decision-making. Yet the instruction remained elusive about how these criteria were to be applied. Under 'the state of the dossier', for example, civil servants were asked: 'has agreement already been reached within the Council or one of its preparatory bodies on the act to be adopted? Or is the dossier still under discussion?' without it being made clear whether this meant if running dossiers were therewith automatically excluded.[189]

An important legal question which stirred some controversy was that of the status of legal advice. Although the 2003 report made no reference to the Italian MEP Turco, its expansive argumentation in favour of the protection of legal advice was likely included in response to the Court case that he filed earlier that year. The Council argued that 'it is in the public interest that the Council should have access to independent legal advice', and that legal certainty and stability would be threatened if this advice could no longer be provided privately. This contrasted with Turco's position, who argued that he should receive access to the legal advice of the Council because it was in the public interest. Turco's argument now challenged a type of exemption that had heretofore been considered uncontroversial, eventually forcing the Council to accept that legal advice was not untouchable under the existing rules.

The second large legal question which the Council was ambiguous about was the status of member state documents. In some cases, these were considered to be third party documents, while in others, member states were seen to be acting as Council members. The Council made explicit efforts to minimise the number of non-disclosures under the former category.[190] Under the latter category, the full content of documents was published, except references to the member states so that no position could be directly traced back.[191]

This precise and somewhat far-fetched legal distinction was needed by the Council to navigate between several political and legal concerns. On the one hand, in cases where member states, acting as third parties, would request any of their documents not to be disclosed, the Council would, under the

rules, still be bound to perform a balance test. While the Council likely wanted to minimise the number of disclosures against the member states' will, systematic discretionary non-disclosure of member state documents might provoke a legal challenge (which eventually happened, in 2005). In the case of member states acting as Council members, the Council was in turn bound by the Court judgement in the Hautala case of 2001, which stipulated that partial access to documents must be granted where possible, in cases where exceptions to access applied to a document. Thus, the Council was increasingly tied into legalistic and intricate argumentation in order to maintain the existing balance.

Expansion of the open meetings regime

Earlier in this paragraph, I mentioned how the Council's position on open meetings had been relatively underdeveloped when compared to other areas of the transparency policy. This changed in 2005 when the issue came up anew. In December of that year, the Council adopted new conclusions on 'improving openness and transparency'. A number of Council meetings were to become structurally open per direct. Among them were presentations by the Commission, final deliberation on legislative proposals under the co-decision procedures (where the EP also acted as a legislator), and debates on non-legislative topics, when the presidency deemed them 'important issues affecting the interests of the Union and its citizens'.[192] The widest possible access would be given to these open meetings by broadcasting them on the Council website in all Community languages.[193]

As had happened on earlier occasions in the transparency policy, the Council position on open meetings was formalised after a half year time-lag in an Overall Policy on Transparency. Although its procedures were 'already open to a very large extent', the policy confirmed the decision to hold all legislative deliberations in the co-decision procedure in public, as well as meetings on other topics of importance. Furthermore, Council meetings in all formations on work programmes and other long-term plans were henceforth to be held in the open as well. Only in individual cases could the Council or Coreper decide not to meet in public.[194]

The rationale that was provided for the new policy used the "traditional" arguments. The measures were taken, it was held, '[s]ince the Council is the Union's main decision-making institution, and shares power of co-decision with the European Parliament for most of the Union's legislative acts'.[195] Direct, unmediated transparency would raise the involvement of citizens in the EU and was seen as 'a pre-requisite for increasing their trust and confidence in the European Union'.[196]

Democracy, transparency, effectiveness, trust, accountability – all were mentioned in quick succession as parts of a well-established story,[197] yet lacking theoretical refinement, eliciting the interpretation that this story was mainly used as a kind of rhetorical routine. The European Council, in July 2006, once again stated a 'commitment to a Union that delivers the concrete results citizens expect, in order to strengthen confidence and trust'. These were words that would not do bad in a political campaigning brochure, but that hardly invited the reader to see an elaborate theoretical position.

Reaching the limits of political goodwill

Later in 2006, the Århus Convention was transposed into a regulation. Although the process of revision of Regulation 1049/2001 started soon after, the EP's prolonged first reading meant that the Council was slow to formulate a common position of its own.[198] The fact that the revision of the transparency regulation makes up a dossier that is both in progress and sensitive is likely to be another reason for the limited amount of documents available.

The available material from the last years of the policy therefore mainly provides an insight in the implementation of the provisions already in place, and are of a rather legal and technical nature. In one incidence of a confirmatory request for access to documents, for example, the Council withdrew its objections because exceptions no longer applied. This means that exemptions were treated as a dynamic factor.[199] In other instances, the Council protected the boundaries of Regulation 1049/2001, for example by pointing out that it could not grant privileged access of sensitive documents to specialist groups such as MEPs or academic researchers, because of the 'ergo omnes' principle ("access to one means access to all").[200] Instances of refusal upheld in this period cover the whole spectrum, including international negotiations, positions of member states in negotiations, documents that were leaked but never officially disclosed, and public security against terrorist attack.[201]

An annual report of progress from 2009 listed further progress made in the automatic disclosure of certain categories of documents. The list had considerably expanded since 2001, and now included categories such as draft common positions and A-point documents to be voted on at the ministerial level. It further affirmed the new consensus on partial access as consisting of

> granting access to the content of the preparatory documents while these are still being discussed, removing only the references to names of delegations. Interested parties can thus follow the progress of discussions without the institution's decision-making process being undermined.[202]

The report also addressed the Court's judgement in the Turco case. Legal advice, the Council noted, was now explictly included in the remit of Regulation 1049/2001, and any refused disclosure must be motivated in detail. Nevertheless, the sensitive nature of legal advice was still cited in 12.5% of partial refusals in 2008. The Council continued to have difficulty to fully come to terms with the change that the Turco judgement had enforced.[203]

In conclusion, it proves hard to characterise the Council discourse during the third period under consideration in this research. In some respects, it appears that the Council was gradually losing the initiative in the transparency policy. In the years immediately following the adoption of Regulation 1049/2001 the Council saw further expansion under the principle of "rationalising transparency". Yet increasingly, the Council became a passive recipient of change, meanwhile operating the existing provisions and further standardising its administrative and technical discourse which involved mainly the development of legalistic and practical argumentation. After the Overall Policy on Transparency had been decided on, the Århus Convention, the Turco case, and the EP's slow progress in its first reading became

the determining change factors of the policy, thereby incidentally slowing the substantive Council debate. Emerging challenges in favour of transparency of non-legislative areas, of legal advice, and of the positions of member states also undermined the last vestiges of "directed transparency". While this delimited the possibilities of the Council to put forward its own coherent discourse on transparency, it also affected the tone of the member state discourses. In the next section, I will discuss how the interplay of member state discourses in the Council was affected.

7.3 The polarisation of expectations

Defence of the existing model

Around the time of the regulation on access to documents, the discourse on rationalisation had established a considerable support base. For some time, the discourse that had brought about Regulation 1049/2001 seemed to provide a workable modus operandi. The UK, previously wary when it came to the disclosure of certain categories of documents, now spoke in favour of a liberal implementation. For example, in cases of a partial release, it wanted it to be visible for the public which parts had been blanked out. The interinstitutional committee on access to documents that was to be set up, had to consist of senior figures.[204] In this way, interinstitutional cooperation would receive the clout it needed to work. The Netherlands was favourably disposed towards the general instructions that were put down for civil servants to help them make decisions in requests for access.[205] In a review memorandum on the enactment process of Regulation 1049/2001, Sweden pointed out that it had prepared its presidency for years, frequently meeting with experts and interest groups in the period between 1995 and 2000. It pledged to continue 'to further improve the rules and practices regarding disclosure of the Union' in the spirit of its national model.[206] In the meanwhile, France began to use the new exemption rules to block public access to certain of its notes.[207]

Conflict arose when Turco MEP was denied access to a number of legal advices to the Council; this soon turned out to be fundamental. The pro-transparency minority group opposed the draft reply letter.[208] The Netherlands pointed out that legal advice could not be excluded a priori from the scope of the regulation:

> NL concludes that this article, contrary to what the Legal Service believes, exclusively leaves the possibility for *a request* not to disclose a document to the public, and not that a member state can demand that de facto no access can be granted (de facto a right of veto).[209]

In spite of the fact that the pro-transparency coalition felt that the Council was not living up to its own rules, the reply received a majority and was sent to Turco. In spite of this fundamental difference of opinion, the Netherlands continued to use the conciliatory tone of a policy broker in the transparency conference that it organised during its presidency.[210] Only days after Turco lost his case before the CFI in November 2004, Minister for European Affairs Atzo Nicolaï gleefully contended that 'our views on transparency had the chance to slowly grow towards each other. As a result, we can now say that we gave

birth to a European notion of transparency'. Nicolaï, in an apparent attempt to present transparency as an opportunity in the ongoing national debates on the Constitutional Treaty, also held that transparency could make people better appreciate the EU, and that it should be seen as a 'function of democracy'.[211]

A year later, it was the UK presidency[212] that gave the transparency debate a new impetus. The UK pointed out that new steps were becoming necessary the issue of transparency continued to be 'under close scrutiny' from the EP and the media. The Netherlands agreed with this reading, albeit presumably less grudgingly than the UK. In addition, the Dutch pointed out that the Ombudsman had recently criticised the Council, and that its own national parliament was also increasing pressure. Citing a speech by Blair before the EP in June of that year in an internal memo, it expressed good hopes that the UK would pick this matter up during its presidency.[213]

Towards the end of its term, the UK did indeed come with a list of possible measures for expanding open deliberations. Under the first proposal, all deliberative meetings of a legislative nature –or, alternatively, only those under the co-decision procedure – would be open to the public, unless the Council would decide otherwise. This would, the UK pointed out, require a change in the Rules of Procedure. Under the second proposal, the number of meetings would be expanded as much as possible within the scope of the existing rules. The Council could in this case pledge to hold a minimum number of meetings in public. Furthermore, options could be explored for practical improvements, such as broadcasting public meetings on the internet.[214]

When the Council turned out to go for the second alternative (expansion within the current Rules of Procedure), Sweden and the Netherlands attached the following statement to the Council conclusions:

> The Netherlands and Sweden welcome as a first step the practical measures to improve openness and transparency of the Council's formal sessions. Sweden and the Netherlands underline the need to go beyond these practical measures to fully meet the demands for increased transparency from both EU and national institutions and from citizens. These demands could be met by making all stages of the Council deliberations on legislative acts open to the public as a general rule.[215]

These two pro-transparency countries, while agreeing that transparency should be expanded within the framework of the legislative process, thus asked the Council not to do half work. This became apparent from the statement's choice of words: demands should be 'fully' met; 'all stages' of deliberations should be open; and this should be a 'general rule'. Unfortunately, how the selected member states responded to the Overall Policy on Transparency that was adopted in the summer of 2006 could not be retrieved.

Rifts in the consensus

In 2007, the Commission began to explore the possibilities for reform. Member states were asked to answer a list of questions relating to potential points for reform. Their written responses give an impression of attitudes at the time. In the case of France, a fairly complete response provides a rare

opportunity for the reconstruction of its position. Even though this position was not accompanied by any comprehensive argumentation, it is still worthwhile to analyse it in some detail.

After appraising 'the positive results already achieved in previous years and the satisfactory balancing point between transparency and the protection of legitimate interests', France presented a number of recommendations. These were mostly practical improvements to the policy's online activities, such as a clear site-map for the Europa web portal, RSS feeds for important information per theme, and easier retrieval of documents in the register. From these proposals spoke a desire to rationalise transparency through more efficient use of IT as well as connecting provisions better to the needs of its users. On the other hand, all these suggestions for improving (and thereby expanding) transparency related to elements of the transparency policy that were already long in operation and widely accepted. None of the French proposals for expansion sought to go beyond the existing legal and practical framework, thereby staying close to the status quo.

As the French document mainly provided positions, and hardly any rationale, it remains difficult to estimate to what extent the French discourse full-heartedly embraced existing practices. Yet a closer look at the substantive (rather than practical) proposals that France presented at this time suggests that its ideas about the role of transparency were less progressive than the dominant Council position. In terms of the use of exemptions, France favoured tighter rules. For example, it wanted to make a test of all documents against Regulation 45/2001 on the protection of private data the standard procedure. In the years thereafter, the protection of privacy would continue to be a matter of importance for France.[216] When it came to protection of the negotiation process, transparency of the anti-dumping and anti-subsidy committees was opposed, because France feared that it would encourage lobbying and influence the outcome of an otherwise frank debate.[217]

The fact that France singled out two specific committees for a blanket exemption revealed a continued attitude of putting the Council in the "director's seat", at liberty to select specific policy areas or decision-making forums for exclusion is it saw fit. After all, negotiations could be vulnerable to lobbying in other committees as well, yet these were not mentioned by France for categorical exclusion. The discourse of "directed transparency" was, as I mentioned in chapter five, leading in the Council in the middle of the 1990s.

A final set of French proposals concerned legal distinctions in the policy. These related, for example, to types of demands for access. France favoured clear rules on making an explicit distinction between professional groups and the broad public, and on dealing with excessive or spurious demands. While the topic of privileged access had not yet caused large debate before, "abusive use" of transparency had been brought up as a separate category in the Council's discourse over ten years earlier. It remains unclear whether France at this time referred to the administrative burden, or to malignant intentions of the applicant. Finally, France wanted to better define 'the events before and after which exceptions would or would not apply'. This may refer mainly to the exception ground of the protection of decision-making, and could point towards a standardised exclusion from disclosure of ongoing dossiers.

The French discourse thus formed a curious combination of status-quo, progressive *and* regressive elements. While it declared its broad contentment with the existing practices, it suggested expansive measures of a practical nature, while its substantive proposals showed some fit with the Council's previous discourse of "directed transparency". It is, however, difficult to establish whether the French discourse in the last years can better be seen as reactive, trying to maintain (or even develop) the status quo, or whether it showed a better fit with the discourse of "directed transparency".

The UK response also combined elements of progressiveness and the will to control. It presented itself as a consistent supporter of greater transparency, and called for caution in reform of the regulation lest it 'jeopardise the effective functioning of the EU'. Consistent with its earlier position, the UK laid an emphasis on information in connection with citizen participation, which it considered important for 'the functioning of democratic institutions'. To this end, it proposed that an online newsletter be set up, and that consultation exercises could be advertised via the networks of NGOs. Such creative measures, the UK held, were needed in order to benefit more than just 'existing interest groups' such as lobbyists. The inclusion of the Århus Convention in the new access to documents regulation was supported on the basis that it would make information activities more consistent. Another topic that was brought up in this light was the need, with the growth of technological development, to arrive at separate rules for commercial re-use of information and data.

As before, the UK also argued for a strong set of exemptions. It held, for example, that transparency could threaten security or the protection of the individual. 'When personal data is held by a public institution', the UK held, 'the citizen has a right to expect that that information will be protected'. The UK also complained about an instance where the EU's websites displayed information that should have been protected on grounds of national security. It furthermore felt that member state documents submitted to the EU should be protected by placing them under national freedom of information regimes. Where subsidiarity once went hand in hand with bringing information closer to citizens, it was now an argument to take documents out of the sphere of the EU's transparency policy. In a move similar to France, the UK singled out the Maritime Security Committee as a forum that should fall 'under the blanket exemption'. Again, grounds of refusal were considered sufficient to prefer a priori exclusion to a case by case consideration. Finally, the UK considered that in certain cases, resources would be better spent on other things, thereby reintroducing, with France, the "abusive use" category:

> The resources of the institutions are limited, and it must be borne in mind that there is an opportunity cost in dealing with excessive or improper requests; the resources used in dealing with these requests preclude the institutions from fulfilling other functions, such as enforcement.[218]

The responses from the Netherlands and Sweden in a number of instances clearly opposed the general attitude of France and the UK. Both countries focussed more on access to documents than on information. The Netherlands gave it a special mention as part of the transparency policy,[219] while Sweden now advocated the extension of access to documents to, 'without exception, all the Union's institutions,

agencies and bodies'.[220] The countries were also wary of connecting the access to documents rule with the privacy protection rules. The Netherlands argued that 'Regulation (EC) No 1049/2001 and Regulation (EC) No 45/2001 serve different purposes', while Sweden concluded that '[a]ccess to [...] documents [...] can thus not be regulated or limited other than through the Regulation'. Sweden also felt that the reformed regulation was to be the only set of rules on access, and that therefore it should be harmonised with the Århus Convention.

The Dutch response could largely be seen as a continuation of the position put forward seven years earlier. It repeated its insistence that access to documents must follow a strict case by case assessment of exceptions, and that categorical exclusion could therefore not be the case. Furthermore, it recognised the fact that some requests might be 'aimed at preventing the organisation from functioning effectively'. However, it counterposed that the institutions in their turn should avoid rejecting 'legitimate but difficult, extensive and timeconsuming requests'.[221]

Sweden, on the other hand, went further than the last time. It attacked rules about professional secrecy in relation to access as unacceptable, thereby narrowing the space for closed negotiations. Moreover, it criticised the interpretation that, under the existing rules, the reasons cited by member states for refusing access to their own EU-related documents did not have to be tested by the institutions. In relation to the pending judgement in its joint appeal in the Turco case, Sweden put forward that 'it cannot have been the intention for all legal advice to be kept confidential'. Finally, Sweden also engaged with the discussion on new definitions of 'documents' afforded by technological developments such as database information. It argued that this could be used to expand the scope of the regulation by including information that 'can be made available to the institution through normal operating processes'.[222]

An end to productive ambiguity

The statement of positions made it clear that the member states drew quite different conclusions from six years of Regulation 1049/2001. Whereas France and the UK mainly saw possibilities in practical improvements to the information policy, meanwhile seeking to narrow the Regulation's scope, the Netherlands and Sweden were content with the current provisions, or even sought to expand them.[223] The reform process thus highlighted differences, inducing polarisation. This sense of discourses drifting apart was further advanced when Cecilia Malmström, Swedish Minister and former MEP, stated in a speech previewing its presidency:

> My interest has certainly not diminished now that I am a Member of the Swedish government, and I can assure you that I will continue to do my utmost in order to ensure that the revision of the Regulation will lead to increased openness and nothing else.[224]

In 2009, the Netherlands and Sweden repeatedly voted against refusal of access to legal advice, citing the Council's failure to incorporate the 2008 Turco judgement in its consideration.[225] Especially Sweden

stepped up its campaign by taking a hard line in the statements accompanying its many countervotes, and allying with the EP in a hearing on best practices in the member states in the field of transparency.[226]

In March 2009, as the Netherlands noted that many transparency cases were being considered at the European courts,[227] a UK government delegation testified before a House of Lords select committee. The delegation admitted that the potential ratification of the Lisbon Treaty, as well as technological progress definitely necessitated reform of the access to documents rules. Its concern had furthermore been raised over the fact that the court had upheld the view that member states had no veto over their own documents submitted to the institutions. The UK opposed this judgement, feeling that such documents should fall under national legislation. The 'heart of the issue', the government representatives held, was 'the balance to be struck between the principle of transparency and at the same time the good functioning of the administrations and the legislature'. The transparency-efficiency trade-off was therewith revived.[228]

The Netherlands noted that so far, the only conclusion to be drawn was that the Council parties were highly divided on the reform question.[229] In the debate, the court rulings on legal advice and member state documents led member states to very different conclusions, while other elements in the current Regulation, such as the case by case principle, were again called into question.[230] "Directed transparency" increasingly confronted rationalised the pro-transparency camp. The Swedish presidency[231] did not bring the breakthrough that was hoped for. Mutual expectations of the reform, were well known, but they were also too embattled to lead to acceptable results. Apart from a workshop on clear legal language, Sweden could make little contribution to the ongoing reform debate.[232]

The analysis of member state discourses thus ends with a stalemate situation. The increasingly institutionalised setting in which the policy operated meant that member increasingly engaged in legal and practical aspects of the debate. This even went for Sweden, whose positions had heretofore leaned strongly on pro-democratic and participation argumentation. More often than before, its discourse confronted directly what it considered improper invocations of the exceptions. The UK, in turn, returned to the use of legal and security concerns in the reform round, and again began emphasising the need for a 'space to think, reflect and negotiate'.[233] These various concerns came together in a trade-off between the effectiveness of the Council's work and of the public's right to know. The Netherlands sought to maintain the modus operandi that had existed during the first years of Regulation 1049/2001.They broadly recognised that such a trade-off existed, but placed the balance at a different point, more towards transparency. France finally had gone along with the discourse as it had developed over the years for a long time, but continued to see disclosure as a primarily threatening act: it could undermine the privacy of individuals, play into the hands of commercial interests, or obstruct the deliberative process.

7.4 Impact of member state discourses during this period

The third and final period under consideration in this chapter is to large extent characterised by institutional closure, and the calling into question of that closure. The coming into force of Regulation 1049/2001, combined with a primary focus on administrative improvements, interinstitutional cooperation, and the information policy, served the emergence of a modus operandi that a majority could work with, in spite of the fact that, to a considerable extent, 1049/2001 reflected the pro-transparency coalition's wishes. This working method was also aided by the fact that ambiguities over the role of legal advice and member state-originated documents gave considerable leeway for deviation from the discourse of maximal openness propagated by the Netherlands and, to an even larger extent, Sweden. This ambiguity was gradually removed in a number of Court cases, of which the Sweden and Turco appeal in 2008 stands out.[234] As legal closure ensued, the Council discourse, confronted with its own earlier commitments, was increasingly pushed into the direction of the pro-transparency coalition.

After 1049/2001 had been implemented, the Council discourse became every time thinner and more administrative of nature, marking a notable slackening when compared to the period around the turn of the century. The Overall Policy on Transparency, put forward by the UK, marked an important step, but was mainly implemented as a gesture to calm external pressure. Particularly the EP made its mark by seeking publicity to pressurise the Council. This again played into the hands of Sweden and the Netherlands, which saw further elements of the transparency policy develop. In the case of Sweden, full openness with minimal exceptions was the discursive end point, while the Netherlands, partially under pressure of its parliament, aimed for a more liberal interpretation of the existing exception clauses. It seems as though the Council, including the UK which had presented the proposal, was grudgingly accepting the consequences of what had been set in motion before, but with little discursive support.

The start of the revision period of Revision 1049/2001 marked a watershed in this period. The French and British discourses were herewith afforded a chance to break open the consensus that had come into existence during the past years. Although again little material was available for France, it is known of the UK that it continued to oppose the inclusion of legal advice and member state-oriented documents as liable to the regular disclosure tests under 1049/2001, even after the Court ruled that this should be the case. This opposition represented a feeling that the constant expansion of transparency had perhaps gone too far, and needed rethinking in a reformed regulation. Policy consensus had led to a degree of stability, and continued to exist because of its high degree of institutional closure. Its discourse, however, was now broken down by the polarisation that was caused by two factors.

The first factor came from the wider EU framework. To a large extent, the transparency policy had entered a situation in which the Council's position was now shaped by factors largely beyond its control: Court rulings, the uncooperative posture of the EP in the revision procedure, and the fact that the Commission, too, had become a formal party to the Regulation. The second factor represented the other side of the legislative revision: it provided opportunities to call into question elements of the policy over

which the Council had gradually lost control. It thus afforded new possibilities to reintroduce (elements of) the discourse of "directed transparency".

This limbo situation also had its effect on the daily operations under the existing rules. It delimited the impact of the Sweden and Turco case, as a majority favoured an increasingly careful discretionary interpretation of the public's access to legal advice and Council negotiations. This was to the detriment of the pro-transparency coalition and especially Sweden, whose discourse was again pushed into a more radical position. Sweden therefore began to attach increasingly lengthy statements to its countervotes to stress that the Sweden and Turco judgement was not negotiable. The end of the "productive ambiguity", that had tempered the pro-transparency coalition's grip over the policy and enabled a modus operandi, now caused the Council majority to regain as much discursive control as was attainable within the existing framework.

Revision also meant that member state discourses were able to reinterpret the past developments of the policy, and to sketch a different future scenario based on this new reading. In some discourses, this gave space to a limited reintroduction of "directed transparency". The UK for example capitalised again on the "trade-off thought". This entailed the idea that transparency is in itself a good instrument, but that in some cases it undermines the effectiveness of the EU. Transparency, the UK considered, must thus be implemented in a controlled manner, taking into serious consideration the possible negative impact for the EU. Elements to be taken into account were the protection of internal deliberation and negotiations with external parties, the potential of "abusive use" of the policy, and the use of resources in this policy area. Room needed to exist which was safe from transparency, which is what the UK called the 'space to think'.

In the case of France, possibly adverse effects were an important reason to call for caution in the same way that the UK did, however, the little evidence available suggests that its reasoning had a distinct flavour. According to France, increased transparency would not always serve the public interest, but would rather play into the hands of private interests. Through the use of transparency measures, external parties pretending to represent the public interest could influence the decision-making process in an undesirable manner. The public interest, in this line of reasoning, was vested in the Council itself. After all, Council members were agents of the citizenry in the democratic member states. The French ambivalence about the role that transparency should play was therefore much more fundamental than that of the UK.[235]

In the case of the pro-transparency coalition, the central tenet was a protection of the status quo. This translated into a discourse which on the hand appraised the legal rights to openness that the EU had come to guarantee, and which on the other sought to prevent, at any cost, a "rolling back". For Sweden, maximal openness of the EU was the principle that should be leading in any situation. Sweden continued to present itself, both based on its national heritage and its international track record, as "transparency's advocate in the Council". The Netherlands, finally, went along further with the British discourse of trade-off, but considered that the balance should lie more on the side of transparency. The main principles of the current transparency policy should be upheld, so that citizens would also be able to get access where

the Council was not offering it proactively. The case by case principle and the a priori inclusion of all areas were considered central in this respect.

At this stage, discourses were formulating what they considered to be the most suitable future role for the transparency policy. In the meanwhile, Sweden and the Netherlands were attempting with difficulty to uphold the relatively transparency-friendly Council discourse.

/8/

Tying things together: an analysis of change

Chapters five, six and seven provided a detailed discussion of the changes that the transparency policy of the Council underwent. This chapter ties this analysis together by going back to the research question. An answer is provided along the theoretical lines set out in chapters one and two: sociological, rational choice, and historical interpretations are given to the Council's changing discourse. Special attention is thereby paid to the definitional, implemental and ethical dimensions of transparency.

8.1 Changes in institutional thinking

In the previous three chapters, an overview of changes in the Council discourse on transparency of the EU has been provided. This has been done by attempting to interpret and characterise a large number of Council statements over time on making the EU transparent. In order to account for this change, two aspects were taken into consideration. First, impact factors were looked at. Such factors consisted of events internal and external to the EU and administrative-cultural references. Second, discourses of member states with a high interest and exemplary position in this policy area were analysed. This was done in order to establish which discourses were best able to influence the Council's dominant discourse, and in which ways. These three approaches help to answer the central question postulated in chapter one, which was, how the Council of Ministers' discourse on transparency of the EU has changed over time. This section will establish the change that took place, making use of the first approach.

The central theoretical premise of this research is that the changing Council discourse on transparency reflects a change in its institutional logic. Traditionally, the Council was marked by the secrecy and closedness that was typical for a logic of diplomatic exchanges. We therefore analysed how the Council discourse was transformed by subtle reconfigurations in the constellation of ideas, concepts and categories about transparency and openness. Between 1992 and 2009, this discourse was far from static, changing from hesitant and limited transparency to relatively standardised and far-reaching (though certainly not comprehensive) openness in a number of areas. Before this result could be reached, the Council discourse passed through a number of stages.

The first major shift that took place in the Council's discourse was from inexperience towards "directed transparency". During the first years, the Council developed a strategy in which initiatives were framed in such a way that it would be able to maintain maximal control over their consequences. A

transparency policy in name, and with some of its central instruments such as access to documents rules and an information policy, the Council discourse kept to a rather conservative tone, in which the protection of the decision-making process played a central role. At the same time, high-minded ideological statements accompanied every expansive step in the transparency policy. After an initial period of brainstorming and investigating the possibilities, the discourse began to address questions of implementation. On several occasions during years before Amsterdam, the Council entered into new commitments. Yet, it was slow to formalise these, and it tried to make sure that none of the promises made would compromise its right to withhold the disclosure of documents or information in sensitive areas. Likewise, the only meetings that were held in the open were contingent on strict guidelines that turned them into staged events. Most of the Council's measures at this time took the form of legally non-binding Council conclusions. It was not until the Amsterdam Treaty that transparency formally made it into the EU's institutional framework.

A change in discourse does not have to entail a total renunciation of earlier positions. More often, as I argued above, it entails a subtle reconfiguration of the elements of which it is made up. Changing contextual circumstances can also force an actor to reconsider its discourse. All of these factors hold true in the Council's discursive shift from "directed transparency" to the "rationalisation of transparency". The transparency measures stipulated in the new treaty, as well as the emergence of the internet gave the policy a new impetus that mainly focussed on making existing provisions more efficient and user-friendly. The internet opened new perspectives for providing transparency while keeping control over what would be disclosed. At the same time, rationalisation pushed the boundaries of controlled transparency, as it suggested a process that was never finished and could always be carried forward. Gradually, the technological possibilities that were first used to practically improve "directed transparency" began to outgrow that discourse and to lead to expansion.

Rationalisation formed a progressive turn in the Council discourse that successfully employed a combination of practical and ideological arguments in favour of expanding transparency. For example, the upcoming enlargement of the EU and a wish to present tangible evidence of respect for democratic principles were seen as reasons for more transparency. This translated into the formalisation of access to documents and the automatic disclosure of certain categories of documents, as well as to additional investment in the information policy. In doing so, the Council further committed itself to the spirit of opening up, resulting in a spiral new of measures. Attempts were made to minimise the number of non-disclosures of member state documents and eventually, a regime of open Coreper and ministerial meetings materialised in the Overall Policy on Transparency. This last policy marked the completion of the "open, unless" principle, at least at the final stages of the decision-making process. Important exceptions remained, as before, the protection of the decision-making process and of international relations, public security, and the integrity of the individual.

The formalising effect of rationalisation also had other results. As transparency now had a steady legal base and a growing body of case law, the Council discourse began to use more legal and strategic argumentation. This could be seen as an indication of the growing institutionalisation of transparency in

the EU, marked by a stabilisation of the policy and the development of routines. An effect in the reversed direction was that the Council's "ownership" of its own discourse declined. The EP and civil society, at times making use of the European Court, successfully used the Council's own discourse of rationalisation to push it in the direction of further openness. While the growth of outside interference can be seen as the normalisation of this policy area, it also marked an attempt to break down any of the space for "directed transparency" that still existed in the Council's discourse.

The *first expectation* which was postulated in chapter two went that discursive change in the three dimensions of transparency would not have changed in equal amounts over the period analysed. Change was expected to be least along the ethical dimension of transparency (the "why"), whereas the implemental dimension (the "how") was expected to have changed most. The definitional dimension (the "what"), in line with this, was expected to have changed little in terms of the objectives, but much in terms of the means of transparency.

As for the ethical dimension, compared to 1992, justificatory arguments in 2009 were hardly different. Transparency was consistently argued to increase trust, bring the Union closer to citizens, inform the citizen, thereby strengthening participation, and to form an exponent of democracy. On the other hand, transparency was seen as one side of the wager, to be balanced against other legitimate interests. Although halfway through period transparency started its career as a legal principle of EU law, this hardly changed the existing interpretation.

The implemental dimension stood in sharp contrast to this. The Council discourse on implementation was marked by upward progression. Almost as a constant, each subsequent measure gave more space to the implementation of transparency. For example, starting with limited disclosure of a limited area of documents from a limited number of bodies, through paper means and on request, the Council discourse ended up advocating liberal, if necessary partial disclosure of all areas of EU documents from almost all EU bodies, always digitally, and sometimes proactively published on its online register. Similar discursive developments occurred in the Council's information and open meetings policy, and to a lesser extent in its drafting of clear legislation rules. A notable exception to this trend toward openness was the Solana Decision of 2000, which rolled back the public's right to documents by introducing a priori exclusion of certain categories of documents. This outlier however was recognised from the outset as a temporary solution and lasted for around a year. Least changeable proved the grounds of refusal, the general delimitation of transparency to the decision-making process, and a contingency of the timing of disclosure on the sensitivity of the document at hand.

The definitional dimension, finally, proved relatively robust over time. Although Declaration 17 of the Maastricht Treaty spoke of 'access to information', this term was soon replaced as a central concept by 'transparency' or 'openness'. From an early stage, transparency was divided into the dimensions that it still contains today: access to documents, information, open meetings, and the drafting of clear legislation. These dimensions directed the objective of the transparency policy, which was to make decisions as openly and as closely as possible to the citizen. This definition of transparency helps to explain why other

stages of the policy cycle such as transparency of agenda-setting or implementation remained relatively underdiscussed.

Definitions were more changeable when new possibilities for implementation came along. Such possibilities were mainly brought up by technological developments: documents could now also be digital, and disclosure could happen via email or the online public register. The latter brought up the matter of metadata: descriptive data about the document. After 2007, information from databases became a topic of discussion on the header of official definitions of a document. Furthermore, growing experience also brought new definitional distinctions, such as those between mediated ("directed") and unmediated, or proactive and reactive transparency. The latter distinction, however, emerged mainly as a practical consideration along the implemental dimension of the debate. First, it was considered expedient to make disclosure a formality when harmless; after that, it was thought more practical to publish the meta-data of such harmless categories; and finally, proactive publication was deemed both politically opportune and rational given the considerable administrative burden on the one hand, and the limited impact of this move on decision-making on the other. In other words, proactive transparency developed gradually as the implemental dimension progressed.

Although expectation 1 thus turned out to be broadly accurate, this finding must be qualified by one observation. Not only the substance, but also the relative importance of the three dimensions for the Council's discourse changed over time. With each discursive shift, the various dimensions of transparency occupied a different degree of prominence. A broad shift was observed here from ethical towards implemental questions, with the scarce periodical re-emergence of definitional questions.

8.2 Impact factors in the Council discourse: changes and continuities

As any policy, the Council and member state discourses on transparency operated in, and were constrained by, various impact factors. For the Council, internal events (in the institutional context) and external events (in the institutional environment) were factors that provided both opportunities and constraints for the pro-transparency coalition or the conservative coalition. Apart from these events, the discourses of member states, were also conditioned by their administrative cultures. While the balance of administrative cultures in the Council debate could be generally considered as a constant factor in the Council's institutional context, the accession of new member states could also mean the introduction of new administrative cultures, altering this balance. Where an administrative culture would be sufficiently outspoken on the matter of transparency, as was the case with Sweden, this could change the direction of the Council's discourse.

Expectation 2 was that the accession of Sweden would have been the most impactful internal event for the changing Council discourse. Sweden, which acceded the EU in 1995, had an important stake in a high degree of transparency of the EU. This it made clear even before accession, by presenting its national principle of *offentlighet* as non-negotiable. Upon accession, Sweden gradually began to present itself as the Council's foremost advocate of transparency. Recurrently emphasising its long history and tradition of

open government, as well as its track record in international advocacy in this area, Sweden made it clear that this was an important and central element of its administrative culture. In the first instance, the pro-transparency coalition thereby gained a strong and reliable partner. Gradually, Sweden emerged in this coalition as its main proponent.

In definitional terms, Sweden propagated extensive proactive disclosure, as well as lenient passive disclosure. In implemental terms, it argued for the widest possible openness, frequently downplaying potential counterarguments. In ethical terms, transparency was seen as an instrument to be used by citizens to monitor government and enrich a public debate, as part of a democracy in which an active attitude was expected of the citizenry. Around the period of the Amsterdam Treaty, Sweden's impact started to materialise in implemental terms. The negotiations on Regulation 1049/2001, the process leading to the Overall Policy on Transparency and the Turco case were all instances in which Sweden marked its presence. On the other hand, the definitional distinction between passive and active disclosure that Sweden propagated was of lesser impact. Rather, the scope of documents to be proactively disclosed became the stake in the implemental discussion on rationalisation. Finally, in ethical terms, the main source of Sweden's transparency advocacy, its impact was very small. This is because the high expectations and central place of government transparency which Sweden formulated had already been the Council's before Sweden acceded the EU. Overall, however, the reconfiguration of the balance of administrative cultures that the Swedish accession brought was recognised in documents from various parties, as well as in the interviews that were held. Moreover, it is clear that it had a lasting impact on change in the transparency policy.

Another internal factor that was looked at was the interinstitutional context (*expectation 3*). As the nature of relations between the institutions preceded the transparency policy, it was expected that they would have a degree of stability to them that neutralised any change impact on the transparency policy. While it is true that the positioning of the EP and the Commission featured as fairly stable factors in Council statements, the policy saw an increasing involvement of the other institutions, which fed into the Council debate that the member states had among themselves.

Particularly the EP was regarded as becoming increasingly activistic in its advocacy of transparency. In its attempt to direct the course of the policy, it sought alliances with both the Netherlands and Sweden. From around 2001 onwards, pressure from the EP was therefore often presented as a reason to expand the transparency policy. To a large extent, the EP used its political clout to get across its moral appeal that the Council ethical language should be matched by an equally far-reaching implemental attitude. It was only during its first reading in the revision procedure of regulation 1049/2001 that the EP opened a serious debate on the definitional meaning of the term "document". How this debate feeds into the Council discourse is beyond the scope of this investigation.

Similarly, the presence of the Ombudsman in Council discourses began to grow following its 1998 report on transparency. Growing institutionalisation was an important reason for these interinstitutional criticasters, as it provided them, so to speak, with a toehold in the Council debate. Through institutionalisation, MEPs were able to challenge the Council's formal position before the court, while

negotiations provided them with a leverage that Council members were forced to take into account. The changing interinstitutional context eventually lead to a situation in which the Council was no longer in full control of its own discourse, and some of its members might have began to feel "pushed around". However, being eventually an indirect factor of influence, the Council was aware of the fact that the other Institution's leverage over its discourse had its limits. The interinstitutional impasse that began in 2009 and lasts up until this moment is evidence of this fact, and fits with the 'authoritarian temptation' that Curtin points out may still have survived in the Council from earlier times (Curtin 2009: 244-5).

Expectation 3, on the absence of an interinstitutional impact on the transparency policy, therefore turns out to be incorrect. Instead of remaining stable, the interinstitutional context changed through the emerging institutionalisation of the transparency policy. Expectation 2, on the other hand, is confirmed. More than any other internal event between 1992 and 2009, the accession of Sweden was experienced as an event of major consequence.

Expectations were also formulated in relation to external factors. Here, the most important impact factor was expected to be the emergence of information technology (*expectation 4*). Another factor with considerable, albeit lesser impact was sought in the wave of counter-terrorist measures that accompanied the War on Terror (*expectation 5*).

The emergence of IT indeed had a considerable impact on the transparency debate, but its impact was practical, rather than normative. In the first place, the emergence of the internet and databases changed the terms of debate over of the implementation of transparency. It did so by providing new definitional categories (such as digital transparency, meta-data, information websites, open data), as well as new sites of contention over implementation. Furthermore, as we saw above, the new context of IT played an important role in the discursive shift from "directed transparency" towards rationalising transparency. For example, the "paper era" of access to documents came to an end, while automation increased. However, the transformational impact of IT on ethical considerations was limited, and where it occurred, implicit.

Counter-terrorism and accompanying arguments for the protection of public security as a response to the War on Terror were marked by their absence from the transparency debate. Regulation 1049/2001 entered into force less than three months after 9/11 as was planned, and no proposals or argumentation were found in favour of a rolling back, or qualification of the right to access. The Solana Decision was a protective measure whose argumentation came closest to expectation 5, yet does not accurately match the prescription of a counter-terrorist measure. First, it was proposed in July 2000, well over a year before the War on Terror was launched. Second, it was an explicitily temporary measure, pending a formal regulation on access to documents. And third, most importantly, it concerned the exchange of strategic information between international organisations, following in the first place the argumentation of protection of international relations, rather than public security.

Expectation 5 therefore appears to be incorrect. Expectation 4 is correct only if no other external impact factor was larger. Although this is a qualitative assessment to be made, there are strong arguments to argue that this is the case. While the impact of NATO relations strongly curbed transparency, it was

temporary by nature unlike the impact of IT. Another external factor of impact was advocacy from civil society, coming from NGOs and the press. Its impact was to make the transparency policy more visible and symbolically charged by singling out the irony of a lack of transparency about transparency. However, its impact was limited to publicity, often in delimited cases and causing little structural change or attention in the Council's discourse. Without wanting to downplay civil society as a factor of impact, it appears justified to conclude the larger structural impact of the emergence of IT.

As shown above, historical institutionalist explanations of the EU's developing transparency policy can be fruitfully applied to uncover the path that lead the EU to where it is now. Remarkable is the fact that the EU started off with an institutional logic that in most ways ran counter to a culture of openness. As the transparency policy emerged in 1992, the Council was completely inexperienced in this area; so were most of its member states. A close assessment of context and environment such as the current investigation shows that a fully fledged transparency policy was hardly an inevitable outcome, but rather the result of purposeful behaviour that took place along the way. This conclusions seems strengthened by the fact that certain impact factors featured recurrently in the Council and member states' own discourses, emphasising their perceived role as change agents.

Finally, the analysis provides evidence for the emergence of a new and apparently lasting path in which transparency features as a central dimension of European democracy. In this sense, a real discursive shift seems to have taken place between 1992 and 2009. Where at first instance the Council seemed to treat transparency as one of the paraphernalia of European democracy, rather than one of its truly constitutive elements, eventually, the Council adopted the latter position.

To a large extent, it appears that the transparency policy set in motion a process of which it was unable to oversee the consequences. This was mainly due to the way in which transparency entered the Council as a politically charged concept. Being closely associated with democracy and subsidiarity, no member state wanted to be seen to fundamentally oppose it. The need for transparency, therefore, went unquestioned from the very beginning in any substantial discourse, and no discourse ever sought to challenge the fundamental premise that transparency formed an element of democracy. However, the evidence to conclude that we can thus speak of a path of "ever-increasing transparency" is thinner. In the first place, because it seems illogical that the expansion of transparency would not eventually hit some limit either conceptually, or practically. Secondly, because the support base for such a dominant discourse may well be suffering from erosion. In the following section, we will see why this could be the case.

8.3 Discursive power in the Council's transparency policy

A central premise of this research report is that the struggle over the Council discourse is as much a political process worth considering as the struggle over Council practices. In the transparency debate, the member states that were studied sought to align the Council's institutional logic with their own attitudes towards transparency. To this end, they used discourse as an instrument with which to influence the Council discourse. As the theoretical model presented in chapter two clarified, discourses not only explain

an institutional logic, they also seek to *convince* others of its rightness. In this sense, the use of discourse also has a strategic component to it. After all, in the act of convincing, member states seek to exert power through linguistic means.

In this analysis, the impact of discursive power was studied in several ways. The positions and argumentation were analysed separately for each of the selected member states. In this process, special attention was paid to the formation of discourse coalitions, evidence of which was found in cross-references and joint initiatives. While the general attitude of the member states proved fairly stable, the force and structure of argumentation was observed to undergo change over time. The analysis therefore tried to clarify the main changes in the member state discourses. In the debate on the transparency policy that the member states had between them, the central aspects of disagreement were singled out. Finally, it was determined which of the member state discourses were most successful in influencing the dominant Council discourse. In advance, it was expected that the dominant discourse would increasingly diverge from the discourses of the UK and France, while it would show convergence with those of the Netherlands and Sweden (*expectation 6*).

In advance, a note of caution must be made on the reliability of the conclusions drawn. In the case of the Netherlands and Sweden, a sufficiently large amount of documentary material was available, with a good spread over the period under investigation. In the case of the UK, material was mostly available on the early and the final years. With France, the scarcity of material was most apparent. To some extent, the small amount of UK and French documents for analysis could be complemented by references in documents from the other member states, secondary souce material, and interviews. However, it must be noted that these provide only indirect routes to uncovering the British and French discourses. Conclusions drawn for the UK and especially France must thus be interpreted with appropriate caution. On the whole, the imbalance of primary source material may lead to an overrepresentation of pro-transparency discourses when compared to the influence of transparency-sceptic discourses.

That said, strong evidence was found for a number of trends. To begin with, a pro-transparency coalition was observed which remained stable over time. This coalition, of which the Netherlands was a part, formed a minority in the Council. Due to successive accessions of new member states the core group of the pro-transparency coalition grew in number, however remaining stable in proportion to the also growing Council. From 2 out of 12 members in 1992 (the Netherlands and Denmark), the pro-transparency coalition grew to 5 out 27 in 2009 (the former plus Sweden, Finland and Slovenia). From the documents analysed, it emerged that administrative culture indeed did play a central role in the spread of member state attitudes. This was especially the case for Sweden, which repeatedly referred to its history, traditions, values, and international reputation in this area, but also for the UK which felt a 'natural reluctance' towards opening up. A final trend is that the Council discourse made an unmistakable shift away from those of the UK and France, and towards those of the Netherlands and Sweden. Although this indicates that the pro-transparency coalition has been "winning" over time, the previous section will have made it clear that this would not have been possible without the increasing "backbench" support that it experienced from factors both internal and external to the policy debate.

In the early years, the Dutch discourse failed to exert any notable influence on the dominant discourse, while the British discourse was highly successful. The Netherlands, considering itself the centre of the pro-transparency discourse, approached the transparency question from a strongly ethical angle. In its view, the commitments made in the Maastricht Treaty and subsequent European Councils warranted a strong and stable incorporation of transparency into the Council's democratic practices. Where the Netherlands connected transparency to "accountable democracy", the UK accorded transparency a more subservient role, as an instrument to better explain the EU, thereby bringing it closer to the citizen and removing any of their worries. In this logic, the role of transparency was seen in terms of "informational democracy", an attitude which was more in line with the dominant discourse of "directed transparency".

The UK laid a considerable emphasis on the potential harms of transparency for negotiations in the Council. The UK was supported by a comfortable Council majority in agreement with these concerns, which led to the possibility for member states to veto the disclosure of their own positions. While remaining sceptical of an all too mediated form of transparency, which it believed would be quickly unmasked as insincere, its caution over the potential negative consequences had the upper hand. It therefore participated proactively in the debate on how to implement transparency in ways that would be compatible with the trade-off thought. This led to a Council discourse that was perhaps more protective than the UK advocated, but was not incompatible with its central argumentation and objectives.

The limited (and often indirect) evidence of French thinking about transparency at the time indicates that it was mainly worried about how it could lead to demands for a type of transparency that it was not ready grant. In this light, it is likely that France favoured firm control for the Council over the exceptions against transparency, and particularly access to documents, although this could not be confirmed. The continual reference to grounds of exception formed an important means of achieving "directed transparency".

From the period after the accession of Sweden, the pro-transparency discourse began to have greater leverage. This began by the provisions that were included in the Amsterdam Treaty, paving the way for the development of transparency as a legal right, and a law on access to documents held by the institutions. The fact that the UK threw its weight behind these initiatives aided this development. In an interview, it was suggested that this was due to a new incoming government, which was more favourable predisposed towards openness. The incoming Labour government thus marked a notable internal event which shifted the UK's Council position. Nevertheless, the UK shift sprang mainly from a broadened interpretation to its already existing view of transparency as access to information, staying true to the administrative culture of cautious openness.

The emergence of various internet activities provided the Netherlands and Sweden with additional means to argue the Council discourse in their direction. The rationalisation of transparency that the Council came to adopt was marked by a spill-over from practical improvements to the substantial expansion that the Netherlands and Sweden advocated. In the first period, it thus provided a vehicle for change that was considered harmless, but brought the Council discourse closer in line with pro-

transparency's wishes. This effect was more successful as the Netherlands changed its radical rhetoric for a more conciliatory and strategic tone.

In terms of implementation of access to documents, disagreement existed on the role of categorisation of documents. As the presence of transparency grew, and with the negotiations on the access to documents regulation materialising, France became more vocal in its advocacy of a priori exclusion of certain categories of documents. This was compatible with the Solana Decision which was implemented during its 2000 presidency, and which drastically limited the scope of the 1993 Decision on access to documents. However, the French position was resisted by the pro-transparency coalition, which delimited the impact of a "categorical approach" and even reversed it to its advantage, which lead to the enactment of the automatic disclosure of certain categories of "harmless" documents. The discourse of rationalising transparency meant that the Netherlands and Sweden could exert much influence on change in the transparency policy, resulting, importantly, in the adoption Regulation 1049/2001. Compared to the earlier access to documents rules, this regulation had a considerably more liberal approach.

The rationalisation of transparency was a discourse that could operate by the grace of a constructive ambiguity that allowed the Council members to continue to protect what they saw as their vital interests. Among these were the possibility to refuse disclosure of their own documents submitted to the institutions, and the protection of negotiations, particularly through the exclusion of legal advice. In the years after the entering into force of Regulation 1049/2001, Sweden sought to overturn these exclusions, while the Netherlands favoured bringing them back to a minimum. The spill-over effect of discourse institutionalisation thereby gave the two countries further possibilities to influence the Council discourse through legal means. This became apparent in a number of court rulings which gave an expansive interpretation to the right of access. By 2008, when the court gave its judgement in the Turco case, most ambiguity had been removed in favour of the Swedish-Dutch interpretation of the provisions.

The increased influence of the pro-transparency coalition and the EP, however, also led to a growing unease with the UK and France. Even though the former had taken the initiative for the Overall Policy on Transparency during its 2005 presidency, it appears that it had done so mainly in response to external pressure, and favouring a limited opening up of Council deliberations. Soon after its initial steps in the direction of open meetings, the UK retreated to a position of caution, emphasising the potential harm on the negotiation process. As the Commission launched its revision procedure for Regulation 1049/2001 in 2007, it became clear that both the UK and France felt that in certain respects the transparency policy had overtaken them.

The emphasis that Sweden and the Netherlands laid on access to documents is not coincidental. Both considered it the central instrument of the transparency policy. This is in line with an "accountable democracy" approach to transparency, in which the citizen decides what he wants to know. The UK, which continued to see transparency foremost as "access to information", now felt that the room for negotiation was under threat. France also feared that increased access to the European institutions and their documents would in fact not serve the public interest, but private interests. The concerns it raised in the revision debate built on the attitude that it had held all along: transparency is a slippery slope with

many unforeseen risks. The later position put forward by France also suggests that it hesitated to see transparency as a constitutive element of democracy: democracy, rather, should be seen as something that is validated in the voting booth, and through the outcome of decisions. Nevertheless, again too little material was available to analyse how well-established this position was.

To conclude, ample evidence has been found to confirm expectation 6. Perhaps the most telling evidence is provided by the fact that Sweden and the Netherlands, by 2009, found themselves defending the status quo against a rolling back of the transparency policy. This position stands worlds apart from the beginning of the policy, when the Netherlands radically opposed the Council discourse, even resorting to legal action in 1994 (and on subsequent occasions). Nevertheless, as the previous section already pointed out, the trend towards increased openness showed signs of stagnation by 2009. It therefore remains to be seen whether the Council's commitment to opening up will continue to hold true during the coming years.

The findings of the six expectations formulated in chapter two are tabled below.

Table 8.1: Expectations and outcomes of the analysis

No.	Expectation	Conclusion	Actual change direction (--/-/none/+/++)
1.	Least change in the Council discourse took place among the ethical dimension, and most among the implemental dimension. Change in the definitional dimension was moderate.	confirmed	+/++
2.	The accession of Sweden was the internal event with the largest impact on the Council discourse.	confirmed	++
3.	Interinstitutional relations had, as an internal event, no impact on the Council discourse.	rejected	+
4.	The emergence of IT was the external event with the largest impact on the Council discourse.	confirmed	++
5.	The intensification counter-terrorism measures was an external event with a large impact on the Council discourse.	rejected	none
6.	Over time, the Council discourse moved away from the discourses of the UK and France, and towards the discourses of the Netherlands and Sweden.	confirmed	++

/9/

Conclusions and Discussion

Chapter eight tied together the findings of the discourse analysis. This chapter answers the research question posed in chapter one, to then go on by placing the conclusions in the perspective of European integration and democracy in a discussion. The chapter concludes by recommending possibilities for further research.

9.1 Conclusions

The central question in this research has been how the Council of Ministers' discourse on transparency of the EU has changed over time. This question has been answered in three ways. In the first place, I have sought to describe the shape of the change that took place, by analysing the explanandum of the Council discourse.

The analysis shows that the ethical framework underlying the Council's discourse hardly changed over time. Notions such as informing the citizen, stepping up European democracy, and enhancing subsidiarity, legitimacy and trust were central to the policy from the beginning to the end. Definitions changed only moderately. The breakdown of areas of transparency were set down at an early stage as access to information, access to documents, open meetings, and clear legal language, and remained that way. Transparency was, moreover, approached as legislative transparency, emphasising the citizen's right to know predominantly in the decision-making process. The emergence of IT introduced new definitional categories of dissemination: internet transparency as opposed to paper transparency, meta-data instead of data content, and recently, open data instead of reproduced data. The distinction between passive and active transparency, on the other hand, hardly featured as a matter of definition. Instead, the question of what to publish proactively remained an implemental question of practicality and opportuneness. Finally, the implemental dimension saw a large expansion through the diminishing importance of categories of exclusion, and emerging institutionalisation of categories of inclusion.

The process of opening up in the Council was caused by a number of impact factors. In the first place, a coalition of pro-transparency countries with an administrative culture of openness used several opportunities to advocate further openness. The accession of Sweden to the EU in 1995 was an event of particular impact. Through it, the pro-transparency coalition attained a dedicated member which subsequently stepped forward as its main champion on several occasions. Differently from what might have been expected, the interinstitutional context in which the Council transparency debate took place

was not stable over time. Instead, the growing legal institutionalisation of the transparency policy from 2001 onwards meant that the Ombudsman, and particularly the EP attained more grip over the Council discourse. Of course, the other institutions did not have an official role in the way in which the Council formulated its positions, yet their growing involvedness meant that the Council increasingly had to anticipate its presence. This might be evidence that the Council's transparency discourse is becoming less intergovernmental, to attain characteristics of an interinstitutional, or multi-level discursive struggle.

Events in the environment of the transparency policy (and external to the EU context) also had an impact on the Council discourse. Dissatisfied applicants for documents challenged the Council before the courts, at times forcing it to reconsider its position. News media in many countries followed the transparency debate closely and critically. Most impactful was the introduction of IT in the transparency policy. It introduced the means to make transparency more effective and accessible to a larger public, while at the same time lowering the threshold for transparency-sceptic member states to agree to further initiatives in this area. IT, in other words, allowed the pro-transparency coalition to present other member states with a broader menu of acceptable options. On the other hand, an external event which could have effected change in the opposite direction, the counter-terrorist measures which followed the attacks on the United States on 11 September 2001, had no impact on the Council transparency debate or its discourse.

The discursive struggle that characterised the transparency debate between 1992 and 2009 provided an important way for member states to put forward their policy preferences and influence the Council's perception of transparency and its role. The preferences of member states, it has been argued, were primarily determined by their administrative culture. A member state like Sweden with a long history of openness and a specific place for it in its national democratic model starkly contrasted a member state like France which operates under a strong, centralised executive and approached EU relations as a diplomatic exercise. Clearly, such views do not go along, and give way to alternative policy initiatives.

In the Council transparency debate, member states were able change perceptions, thereby exerting power through linguistic means. At an early stage of the Council's transparency policy, France and the United Kingdom were most successful at aligning the Council discourse with their administrative-cultural preferences and perceptions. Gradually, however, the Netherlands and Sweden succeeded in changing the Council discourse in the direction that they preferred. In doing so, they were aided by advocates of further transparency inside and outside of the European institutions. Moreover, they were successful in including external events to advance their position. In spite of representing a minority in the Council, the Netherlands and Sweden thus managed to get the dominant Council discourse on transparency on their side within the timeframe of under twenty years.

9.2 Discussion

Between 1992 and 2009, transparency of the EU made a remarkable advance in the discourse of the Council. As I have shown, change could not occur without (constructive) misunderstandings, reinterpretations, and several impact factors. Yet what will be the future role of transparency in the context of the EU? Will it eventually disappear like the shadow of the trust crisis that has dominated the EU over the past twenty years, as historical analogy suggests (Stasavage 2004: 695-6, see also Naurin 2004: 13)? Or will it lead to the permanent "glass house" that some awe and others see as a necessary precondition for a robust democracy (e.g. Tsoukas 1997, Dror 1999, Florini 2002, Bijsterveld 2004)?

The implicit message throughout this report has been that the issues of the past provide a roadmap for the future. Some of the main strands of argumentation and disagreements between those arguments, as we have seen, suggest possible future directions for transparency. On the other hand, a reconstruction of the debate also shows that there is ample room for improvement in the way the debate takes place. Central in this respect is the observation that, while ethical assumptions about the ends of transparency have been crucial in shaping the logic behind definition and implementation, the fundamental role of transparency in democracy has for the greater part remained unclear in the ambiguity of politics.

In an overwhelming majority of cases, the transparency debate centred around implementational questions, often leading to confrontations over what to include and what to exclude. Manifold categories thereby functioned as discursive armour: blanket approaches to groups of documents, types of exceptions to transparency and their "hardness", including the meaning and use of harm tests, origins of documents and the timing of their disclosure, and applicants of and the nature of their requests were some of the most recurrent categories to problematise or legitimise a particular implemental approach.

The emphasis on implemental questions, however, distracted from the larger question of the "why". This is characterised by the fact that definitional questions were almost never addressed head-on outside the pro-transparency coalition. Although remaining largely uncontroversial, definitions were therefore also often unclear. When talking about "opening up" for example, did this entail that the Council should come to the citizen with colourful brochures and thematised websites, or that the citizen decides what he wants to see? And how deep into the "glass house" would he be allowed to see, before transparency becomes intervention? In other words, does transparency mean proactive (directed) action, passive (responsive) disclosure, or something in between, and what is the connection with participation (Meijer et al. 2010)?

It is likely that the transparency debate will increasingly move beyond definitional and implemental questions to a more fundamental level, as divergences in expectation become more apparent. Simple questions such as why the EU should have transparency, and what is expected of it, have for the greater part been curiously absent from the Council discourse. Central, but implicit in the normative debate stood differing ideals of democracy. While a transparency-sceptic logic will have more affinity with transparency as the addition of vital information in a representative democracy, advocates of deliberative or

participatory democracy are inclined to place transparency much more centrally in the EU's framework of governance (Meijer et al. 2010: 5-7).

During the period under consideration, instead of addressing the relation between transparency and democracy frontally, the Council, in a kind of routinous reflex, developed an answer before the question could even be asked. This is mainly due to the fact that, as was pointed out above, transparency was a term that nobody wanted to be seen to be against. The result of this is that the most spectacular effects have been cited for transparency, without references to empirical reality. Similtaneously, such causal assumptions have gone equally untested in arguments why certain matters should *not* be made transparent. Recent research has started to address this hiatus, taking the various stages of the policy-cycle as a starting point (Héritier 2003, Leufgen 2012, forthcoming). At the same time, recent events such as the Wikileaks eposide and instances of government website hacking, may undermine the undividedly positive image of transparency in public and political perceptions.

Be as it may, everything indicates that EU transparency is here to stay, with or without a fundamental debate about the nature of EU democracy. Technology, in this respect, is likely to continue to act as a catalyst, to a large extent determining the shape of implementation. The emergence of open data provides another indication of this ongoing trend (Noveck 2009: 121-6, Meijer 2009: 265-6). Secondly, the interinstitutional dimension has become increasingly important with the institutionalisation of transparency. The growing impact of the EP on the Council's transparency debate must be seen in the broader context of interinstitutional control, which determines the shape of EU transparency in ways that are not always directly obvious to the outside (Curtin 2009: 233-7). Control mechanisms such as comitology, while perhaps enhancing transparency between the institutions, create corners and crevices that operate outside the gaze of the "public eye" (Brandsma 2010: 18). The way in which transparency measures affect interinstitutional relations is therefore likely to be a major determinant of overall transparency of the EU (Curtin 2009: 233-41).

9.3 Possibilities for further research

In this research, I have attempted to lay bare the mechanisms that allowed the Council discourse on transparency of the EU to make a major turn within a relatively short timeframe. Insight into the changing institutional logic of the Council, however, would be enhanced by a number of additional steps, the first of which I intend to pursue in further research.

While a discourse analysis allows, in many ways, a useful look inside the institutional logic of the Council in relation to transparency, our understanding would be greatly enhanced by a similar institutional analysis of change in the field of transparency *practice*. Discourse and practice can be regarded as two sides of the coin of institutional logic, where discourse determines the parameters of practice, and practice is interpreted in discourse. The nature of this relation should be further explored: does discourse really explain practice, and if so, how should this relation be described? Are transparency practices "constructed" in discourse, or is discourse mainly a means to defend those practices and "talk them

straight" through the use of "rhetoric"? Matching transparency discourses with practices could follow the same general pattern of investigation, using institutional theory. A sociological, historical and rational choice analysis of institutional change factors could provide further insight into the (in)congruence between these two sides of the Council's institutional logic. Such research would entail, inter alia, a close analysis of change in Council and national transparency practices.

The current analysis of change in a transparency discourse is highly contextual, being bound to intergovernmental Council dynamics and the relations of dependency between the European institutions. This makes it difficult to compare the change dynamics of transparency of the EU with those of other settings of governance. At the same time, applying the sui generis principle is inadequate if the aim is to place EU transparency in a broader context of governance. This problem could be fruitfully overcome by further analyses of change in attitudes towards transparency in international settings (international governance and financial institutions), national settings (national governments), and decentral settings (quangos, municipalities, single organisations). Has transparency in governance generally been seen as a threat, a challenge, or an opportunity? Particularly in European settings, such analyses would provide useful material for comparison with the current study. Institutional analyses of national debates on transparency could further develop our knowledge of imitation, divergence, and policy learning beyond institutional boundaries in the field of transparency.

Finally, I would recommend more research to deal explicitly with the counterforces of transparency. Many studies, the current included, suffer from structural bias in the sense that they focus on processes of opening up, while countervalues are thematically subordinated to this research interest. Though an important and lasting instrument of governance, transparency should not be turned into a holy cow that cannot be approached critically from new angles. The Wikileaks episode shows that in society, this is already happening. The role for the social scientist is to critically analyse and evaluate the ways in which it does.

Appendix I: Full list of documents analysed

Documents are alphabetically ordered per originating party, then listed in chronological order (dd/mm/yyyy). Subject headers are listed in the original language. When a subject header is not available, a description of content is provided.

Council

No.	Date	Subject header/ description of content
01.	03/02/1992	TEU, Declaration 17 on the right of access to information
02.	16/10/1992	European Council in Birmingham, Conclusions
03.	12/12/1992	European Council in Edinburgh, Conclusions
04.	08/06/1993	Council Resolution on the quality of drafting of Community legislation
05.	22/06/1993	European Council in Copenhagen, Conclusions
06.	25/10/1993	Interinstitutional declaration on democracy, transparency and subsidiarity
07.	10/11/1993	Group Horizontal Informatique, resultat de travaux (4 November 1993)
08.	03/12/1993	K4 Committee (17 and 18 November) Conclusions of meeting
09.	06/12/1993	Council Decision of 6 December adopting the Council's Rule sof Procedure
10.	06/12/1993	Code of conduct concerning public access to Council and Commissions documents
11.	20/12/1993	Councl Decision of 20 December on public access to Council documents
12.	07/04/1994	Comite de coordination institue par l'article K.4 du TUE – ordre du jour provisoire
13.	15/04/1994	K4 Committee, publication in the Official Journal of conventions signed before the TEU
14.	14/07/1994	K4 Committee, publication in the Official Journal of conventions signed before the TEU
15.	29/09/1994	K4 Committee, outcome of proceedings (21 and 22 September)
16.	29/05/1995	1847th Council meeting, Council conclusions on transparency of Council proceedings
17.	25/07/1995	K4 Committee, outcome of proceedings (4 July)
18.	02/10/1995	Code of conduct to the public access to the minutes and statements in the minutes
19.	11/10/1995	K4 Committee, outcome of proceedings (3 and 4 October)
20.	28/02/1996	K4 Committee, outcome of proceedings (27 and 28 February)
21.	14/05/1996	Draft Council act drawing up the Convention concerning the Eurodac system
22.	22/05/1996	K4 Committee, outcome of proceedings (13 and 14 May)
23.	01/07/1996	Initial report on the implementation of the Council Decision on public access
24.	30/10/1996	Europol Working Group, the confidentiality regulations of Europol
25.	06/12/1996	Review of Council Decision 93/731/EC on public access to Council documents
26.	14/12/1996	Council Decision of 6 December 1996 amending Decision 93/731/EC on public access
27.	18/03/1997	K4 Committee, publication in the Official Journal of conventions signed before the TEU
28.	02/10/1997	TEC, Amsterdam amendments (articles and declarations)
29.	15/01/1998	Working Party on Information, Public register of Council documents
30.	23/01/1998	Coreper, Public register of Council documents
31.	23/02/1998	Working Party on Information, Public register of Council documents
32.	06/03/1998	Coreper, Openness and Transparency in the activities of the Council, Title VI of TEU
33.	11/03/1998	Coreper, Public register of Council documents
34.	19/03/1998	2075th Council Meeting, Justice and Home Affairs, Minutes
35.	26/03/1998	Working Party on Information, Summary of Conclusions (20 February)
36.	19/06/1998	GS, Second report on the implementation of Council Decision 93/731/EC (1996-1997)
37.	19/06/1998	European Council in Cardiff, Conclusions
38.	29/06/1998	2111th Council Meeting, Public Access to Documents, Council Conclusions
39.	06/12/1998	Council, Openness and cooperation in the field of information activities about the EU
40.	22/12/1998	Interinstitutional agreement on the quality of drafting of Community legislation
41.	15/02/1999	Working Party on Information, Summary of Conclusions (5 February)
42.	07/06/1999	Working Party on Information, Summary of Conclusions (21 and 26 May)
43.	19/07/1999	GS, Report on the operation of the public register of Council documents
44.	11/10/1999	2206th Council meeting, General Affairs, Minutes
45.	29/10/1999	Coreper, Public access to documents, Draft Council decision
46.	06/12/1999	Council Decision 2000/23/EC
47.	07/12/1999	GS, An effective Council for an enlarged Union, Guidelines for reform
48.	10/05/2000	Working Party on Information, Access to Documents relating to the Schengen acquis
49.	24/05/2000	Working Party on Legal Data processing, Outcome of Proceedings (4 and 5 May)
50.	14/06/2000	European Council in Feira, Conclusions

51.	27/07/2000	Decision 2000/C239/01 on measures for the protection of classified information
52.	03/08/2000	Working Party on Information, I/A item note, Draft response to Ombudsman
53.	14/08/2000	Consolidated version of Council Decision of 6 December 1999 (2000/23/EC)
54.	23/08/2000	Consolidated version of Council Decision of 20 December 1999 (93/731/EC)
55.	19/09/2000	Working Party on Information, Public access to documents, Confirmatory Application
56.	07/12/2000	Charter of Fundamental Rights of the European Union
57.	22/12/2000	Coreper, Proposal for a Regulation regarding public access to documents
58.	22/12/2000	GS, Third report on the implementation of Council Decision 93/731/EC (1998-1999)
59.	12/01/2001	Coreper, Draft Council Decision on making certain categories of documents available
60.	31/01/2001	Working Party on Information, Outcome of Proceedings (12 January)
61.	12/02/2001	Working Party on Information, "I" Item note, Draft Council Decision
62.	26/03/2001	Corper, Preliminary draft reply to written question P-0504/01 by Chris Davies MEP
63.	09/04/2001	Council Decision on making certain categories of documents available (01/320/EC)
64.	22/05/2001	Draft Regulation regarding public access to documents
65.	30/05/2001	Regulation 1049/2001/EC regarding public access to documents
66.	07/06/2001	European Council, Preparing the Council for enlargement
67.	08/06/2001	European Council, Report on the debate on the future of the European Union
68.	18/06/2001	Draft conclusions on Openness, Transparency and Good Administrative Behaviour
69.	27/06/2001	Joint declaration relating to Regulation 1049/2001/EC
70.	09/07/2001	Draft conclusions of the Council on Openness and Transparency
71.	09/07/2001	Working Party on Information, Summary of Conclusions (8 June)
72.	31/10/2001	Common Position, a Directive on public access to environmental information
73.	10/12/2001	2397th Council Meeting, General Affairs, Minutes
74.	01/01/2002	GS, Information Handbook of the Council of the EU
75.	22/01/2002	Working Party on Information, Outcome of Proceedings (11 January)
76.	08/03/2002	1954éme reunion du Coreper, Compte rendu sommaire
77.	24/09/2002	SG, Staff Note, Access to documents, implementing rules
78.	14/05/2003	Draft annual report of the Council on the implementation of Regulation 1049/2001/EC
79.	22/09/2003	Council Regulation 1700/2003/EC amending Regulation 354/83/EEC (historical archives)
80.	22/03/2004	Council Decision (2004/338/EC) adopting the Council's Rules of Procedure
81.	01/12/2005	GS, Openness and transparency of Council proceedings, information sheet
82.	15/12/2005	Antici Group, Draft conclusions, Improving openness and transparency in the Council
83.	16/06/2006	GS, European Council 14-16 June, An overall policy on transparency, information sheet
84.	17/07/2006	European Council in Brussels, Conclusions
85.	06/09/2006	Regulation 1367/2006/EC, application of the provisions of the Aarhus Convention
86.	15/09/2006	Council Decision (2006/683/EC) adopting the Council's Rules of Procedure
87.	19/03/2008	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
88.	21/04/2008	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
89.	18/07/2008	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
90.	18/07/2008	Groep Voorlichting, nieuw antwoord op confirmatief verzoek 1/02 van de heer Turco
91.	15/09/2008	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
92.	22/09/2008	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
93.	07/10/2008	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
94.	07/10/2008	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
95.	31/10/2008	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
96.	17/12/2008	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
97.	19/02/2009	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
98.	20/02/2009	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
99.	03/04/2009	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
100	03/04/2009	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
101	21/04/2009	Draft annual report of the Council on the implementation of Regulation 1049/2001/EC
102	23/04/2009	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
103	23/04/2009	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
104	18/05/2009	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
105	05/06/2009	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
106	26/06/2009	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
107	03/09/2009	Proposal for a Regulation regarding public access to documents (recast)
108	14/09/2009	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
109	01/10/2009	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek

110	16/10/2009	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
111	09/11/2009	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
112	27/11/2009	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
113	01/12/2009	Council Decision (2009/937/EC) adopting the Council's Rules of Procedure
114	17/12/2009	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek
115	18/12/2009	Groep Voorlichting, Toegang van het publiek tot documenten, confirmatief verzoek

France

No.	Date	Subject header/ description of content
01.	14/02/1995	Presidency Note to Europol Working Party
02.	14/09/1995	Note from Coreper to Council, Access to documents – confirmatory application
03.	09/07/2001	Working Party on Information, Summary of Conclusions
04.	31/07/2007	Note des autorites Francaises, Livre Vert de la Commission européenne
05.	18/05/2009	De Groep Voorlichting, Toegang van het publiek tot documenten

Netherlands

No.	Date	Subject header/ description of content
01.	27/01/1993	Pv-lunch: openbaar gedeelte raad 1 februari 1993
02.	08/06/1993	Algemene Raad, toegang tot informatie (Euro-WOB)
03.	23/11/1993	Parlementaire betrokkenheid besluitvorming in Unie kader (Londen)
04.	23/11/1993	Parlementaire betrokkenheid en openbaarheid van ontwerp-besluiten JuBi-raad
05.	24/11/1993	Parlementaire betrokkenheid bij besluitvorming in unieverband (Parijs)
06.	30/11/1993	Coördinatie Commissie, Openbaarheid
07.	06/12/1993	Algemene Raad, Transparantiedossiers, Spreekpunten
08.	06/12/1993	Algemene Raad, Notitie/Instructies Openbaarheidsdossiers
09.	20/01/1994	EU/Toegang tot informatie, bestemd voor Kopenhagen
10.	16/05/1994	Algemene Raad, toegang publiek tot documenten Raad; spreekpunten
11.	13/06/1994	Algemene Raad, toegang tot informatie, spreekpunten
12.	12/07/1994	Coördinatie Commissie, toegang publiek tot documenten Raad
13.	11/09/1994	Gymnich-overleg, Diversen; transparantie (openbaarheid van bestuur)
14.	21/10/1994	Persbericht: Nederland steunt verzoek Guardian-journalist Carvel
15.	25/02/1995	Deens memorandum inzake transparantie
16.	07/03/1995	Algemene Raad, Transparantie en openheid, spreekpunten
17.	10/04/1995	Algemene Raad, Doorzichtigheid van de werkzaamheden in de Raad (Notitie)
18.	11/05/1995	Interne notitie Transparantie (het operationaliseren van de discussie)
19.	29/05/1995	Algemene Raad, Doorzichtigheid van de werkzaamheden van de Raad
20.	15/09/1995	Instructie t.b.v. groep-antici d.d. 18 september 1995
21.	19/09/1995	Instructie Transparantie van de werkzaamheden van de Raad
22.	26/09/1995	Coördinatie Commissie, Transparantie van de werkzaamheden van de Raad
23.	28/09/1995	Algemeen Overleg, Transparantie (analyse)
24.	02/10/1995	Algemene Raad, Transparantie van de werkzaamheden van de Raad (Notitie)
25.	09/11/1995	Instructie voor de Groep Informatie d.d. 13 november a.s.
26.	17/09/1999	Ontwerp raadsconclusies publieke toegang tot raadsdocumenten, instructies
27.	09/11/1999	Coreper, Toegang van het publiek tot documenten, instructie
28.	06/03/2000	IGC 2000 Contribution from the Dutch government
29.	25/07/2000	Coreper, Accès du public aux documents, documents PESD, instructies
30.	31/07/2000	Verklaring van de Deense, de Nederlandse, de Finse en de Zweedse delegatie
31.	07/09/2000	Herziening Raadsbesluit inzake openbare toegang tot documenten (Notitie)
32.	17/10/2000	Openbaarheid EU-documenten (concept-verordening/Raadsbesluit 14 augustus)
33.	01/02/2001	Coreper, Openbaarheid (art 255), instructie
34.	09/04/2001	Algemene Raad, Openbaarheid, spreekpunten
35.	19/06/2001	Openheid, transparantie en goed administratief gedrag
36.	22/01/2002	Working Party on Information, Outcome of Proceedings
37.	05/03/2002	Coreper, Toegang van het publiek tot documenten, instructie
38.	18/04/2002	Coreper, IIA openbaarmaking EVDB-stukken, instructie
39.	19/12/2002	Raad Justitie en Binnenlandse Zaken, confirmatief verzoek Maurizio Turco
40.	26/11/2004	Closing speech by Mr Atzo Nicolaï, Minister for European Affairs
41.	19/10/2005	Coreper, Transparantie, instructie

42.	20/12/2005	Declaration by the Netherlands and Sweden to be annexed to the minutes
43.	31/07/2007	Dutch government response to the Green Paper
44.	18/07/2008	Groep Voorlichting, confirmatief verzoek 09/c/01/08
45.	05/03/2009	Verslag Raadswerkgroep Informatie 5 maart 2009, herziening Eurowob
46.	02/04/2009	Verslag Raadswerkgroep Informatie 2 april 2009, herziening Eurowob
47.	03/04/2009	Groep Voorlichting, confirmatief verzoek 06/c/01/09
48.	21/04/2009	Inbreng voor vergadering Working Party on Information 21 april 2009
49.	21/04/2009	Verslag Raadswerkgroep Informatie 21 april 2009, herziening Eurowob
50.	23/04/2009	Groep Voorlichting, confirmatief verzoek 09/c/03/09
51.	14/05/2009	Inbreng voor vergadering Working Party on Information 14 mei 2009
52.	14/05/2009	Verslag Raadswerkgroep Informatie 14 mei 2009, herziening Eurowob
53.	26/06/2009	Groep Voorlichting, confirmatief verzoek 16/c/01/09
54.	10/09/2009	Verslag Raadswerkgroep Informatie 10 september 2009, Eurowob
55.	16/10/2009	Groep Voorlichting, confirmatief verzoek 22/c/01/09
56.	04/11/2009	Verslag Raadswerkgroep Informatie 4 november 2009, Eurowob
57.	18/12/2009	Groep Voorlichting, confirmatief verzoek 31/c/01/09

Sweden

No.	Date	Subject header/ description of content
01.	11/01/1993	Promemoria om den svenska offentlighetslagstiftningen och EG
02.	06/04/1993	Danmark räknar med fortsatt positiv process vid toppmötet ökad offentlighet
03.	28/07/1993	EG:s informationspolitik
04.	22/09/1993	Lars Anell to Niels Ersböll: "deklaration" röranda offentlighetsprincipen
05.	19/04/1994	Utriketsdepartmentet, Re Guardian om EU och offentlighetsprincipen
06.	22/05/1995	Utriketsdepartmentet, Re Journalistkrav om ökad öppenhet
07.	23/05/1995	Re Coreper II 23/5 – öppenhet i rådsarbetet; slututkast till GAC-slutsatser
08.	22/09/1995	Utriketsdepartmentet, Re Öppenhet i rådsarbetet
09.	13/10/1995	Re Öppenhet i rådsarbetet – Förslag till svenskt godkännande
10.	22/11/1995	Statement by Laila Freivalds, Seminar on Openness and Transparency in the EU
11.	03/07/1995	Swedish declaration (unofficial translation)
12.	14/03/1996	Swedish position concerning openness in the European Institutions
13.	14/03/2000	Förslag till Förordning om allmanhetens tillgång till handlingar
14.	01/11/2000	Fact sheet: The Swedish Approach to Access to Documents
15.	04/01/2001	Work programme of the Swedish Presidency for the ECOFIN Council
16.	10/01/2001	Ensuring uniform application of principles on access to documents from EU inst.
17.	31/01/2001	Utriketsdepartmentet, II-punkter - Förberedelse av diskussion den 6 februari
18.	14/02/2001	Förslag till Europaparlamentets och rådets förordning om allmänhetens tillgång
19.	07/03/2001	Utriketsdepartmentet, telefax – I Ståndpunkter
20.	03/04/2001	Gunnar Lund to Ben Bot: On the issue of access to documents
21.	24/04/2001	Förslag till Europaparlamentets och rådets förordning om allmänhetens tillgång
22.	01/07/2001	Results of the Swedish presidency
23.	28/09/2001	2370e zitting van de Raad – Justitie, Binnenlandse Zaken en Civiele Bescherming
24.	22/01/2002	Outcome of Proceedings of the Working Party on Information
25.	14/03/2002	Redogörelse för arbetet inför och under det svenska ordförandeskapet i EU
26.	19/12/2002	2477e zitting van de Raad – Justitie en Binnenlandse Zaken
27.	20/12/2005	Declaration by the Netherlands and Sweden to be annexed to the minutes
28.	03/07/2007	Faktapromemoria Grönbok om allmanhetens tillgång till EU-dokument
29.	06/07/2007	Views on the Commission's Green Paper on Public Access to Documents
30.	19/03/2008	Nota I/A punt (toegang tot documenten), Groep Voorlichting
31.	21/04/2008	Nota I/A punt (toegang tot documenten), Groep Voorlichting
32.	18/06/2008	Faktapromemoria EU:s öppenhetsförordning
33.	11/12/2008	Cecilia Malmström, Minister for EU Affairs, Speech at the Finnish delegation
34.	20/01/2009	Beatrice Ask, Minister for Justice, Speech for the EP and the Czech Parliament
35.	10/03/2009	Rapport från möte i rådsarbetgruppen för informationsgruppen i Bryssel
36.	06/04/2009	Rapport från möte i rådsarbetgruppen för informationsfrågor i Bryssel
37.	17/04/2009	Public statement on the Proposed amendments to the Public Access Regulation
38.	21/04/2009	Rapport från möte i rådsarbetgruppen för informationsfrågor i Bryssel
39.	14/05/2009	Rapport från möte i rådsarbetgruppen för informationsfrågor i Bryssel

40.	08/07/2009	Rapport från möte i rådsarbetgruppen för informationsfrågor i Bryssel
41.	08/08/2009	Public statement: Transparency and clear legal language in the EU
42.	10/09/2009	Rapport från möte i rådsarbetgruppen för informationsfrågor i Bryssel

United Kingdom

No.	Date	Subject header/ description of content
01.	20/10/1992	UKRep Brussels, Openness: menu of suggestions
02.	20/10/1992	Cabinet Office, Openness: draft list of Whitehall's ideas
03.	21/10/1992	Ministry of Agriculture, Fisheries and Food, Openness: addition to list
04.	22/10/1992	Briefing note on Openness
05.	22/10/1992	Follow-up to Birmingham European Council: Openness
06.	29/10/1992	Briefing note on Openness
07.	30/10/1992	Briefing note on Openness: Line to Take
08.	30/10/1992	Information on the role of the Council: Transparency on the Council's decisions
09.	02/11/1992	Birmingham follow-up: Openness and Subsidiarity
10.	02/11/1992	Birmingham follow up: Openness and Subsidiarity
11.	03/11/1992	Presidency Coordination Unit: Briefing note on Openness
12.	09/01/1998	Note from the presidency, Openness in JHA Business
13.	18/11/2005	Note from the presidency, Transparency in the Council
14.	24/07/2007	Submission from the United Kingdom to the European Commission
15.	18/03/2009	Access to EU Documents, hearing of House of Lords Select Committee on the EU
16.	17/12/2009	Nota I/A punt (toegang tot documenten), Groep Voorlichting

Appendix II: Expert interviews

List of experts interviewed

Name and function	Date
Mr. Tony Bunyan, director of Statewatch (UK-based NGO)	28/01/2011
Anonymous member of a member state delegation in Brussels	18/02/2011
Ms. Minna Immoinen, Transparency Directorate, Unit on Access to Documents and Legislative Transparency (Council General Secretariat – group interview)	18/02/2011
Mr. Wolf Sieberichs, Transparency Directorate, Unit on Access to Documents and Legislative Transparency (Council General Secretariat – group interview)	18/02/2011
Mr. Jakob Thomsen, Transparency Directorate, head of Unit on Access to Documents and Legislative Transparency (Council General Secretariat)	18/02/2011

Questions included in the semi-structured interviews

History of transparency in the Council

1. How would you describe the development of the Council's position on transparency between 1992 and 2010 (e.g. linear progressive, position entrenchment between member states, convergence)?

2. a. Out of the following list of key episodes, please consider for each the level of importance for changes in the (attitude towards) the Council's common position on transparency.

   - negotiations Maastricht Treaty
   - Birmingham European Council (1992)
   - Copenhagen European Council (1993)
   - Svenska Journalistforbundet v. Council
   - Netherlands v. Council
   -any member state presidency of the EU
   - negotiations Amsterdam Treaty
   - drafting of Regulation 1049/2001/EC
   - negotiations on reform of 1049/2001
   - any other key episode?

   b. Which of these would you consider the 5 (+/-) most important turning points?

Member States and cultures

3. a. Which member states do you consider of greatest importance in the policy field of institutional transparency/FOI?

   b. What reasons/evidence leads you to this conclusion?

4. To what extent do believe national administrative cultures influence a MS's position towards EU transparency?

5. What other motives do you believe influence the position of MS towards EU transparency?

Locus and mechanisms of Council as an institution

6. What are the main mechanisms governing the interaction between the Council's various arenas (Secretariat, PVs, Coreper I and II) which must be taken into account in this policy area?

7. What are the main mechanisms of the Council in responding to external drivers (e.g., other institutions, ECJ rulings, media publications, technological advancements) that must be taken into account in this policy area?

8. Do you think that the formation of a common position of the Council in the area of EU transparency can be credibly studied separately from the other EU institutions? What strengths/shortcomings do you foresee in such a study?

Methods

9. Do you believe a reconstruction derived through the close study of policy documents in the area of EU transparency will present a representative picture? What would you consider to be the shortcomings of such an approach?

10. [Explain the basics of discourse analysis.] Do you believe such a method may be fruitfully applied in this policy area? Why (not)?

11. a. What would you consider to be the most salient "stories" about transparency of the EU that are being employed in the Council?

    b. Have these stories changed much over the said time period? What are the reasons for this?

Appendix III: Coding tree

1. Positions –*what positions come forward from the documents?*

- 1.1 proposal/initiative

Access to documents/ access to information/ open meetings/ accessible and clear language
NB: positions may be conducive to, or limiting transparency.

-1.2 objection/concern

Seeks to challenge or overturn a proposed or dominant position.
NB: also pro-transparency actors may raise objections to a position.

-1.3 decision to investigate

No proposal yet made, but a commitment to furthering insight in a particular knowledge or political question.

2. Arguments –*what reasons do the documents give for adopted positions?*

- 2.1 ideological

2.1.1 For: e.g. more democratic/ related to legitimacy/ a sign of good governance/ closedness mainly due to prejudice and fear/ remove informal access /rules apply equally to all/ legislators should meet in the open

2.1.2 Against: e.g. politicians should have final control over what leaves the meeting room/ institutions should have privacy too/ the moment for democracy is at elections/ whoever is truly interested already finds informal channels for access/ rules apply equally to all/ private interests, not public interest is served/ efficiency and effectiveness are harmed

- 2.2. legal

2.2.1 For: e.g. the current interpretation is too legalistic/ interpretation does not conform to ECJ case law

2.2.2 Against: e.g. the current ECJ case law is not satisfactory/ the legal definition of "documents" is interpreted too broadly

2.3 operational

2.3.1 For: e.g. citizens and NGOs more informed/ involve external actors

2.3.2 Against: e.g. decision-makers will draft deliberately vague documents/ loss of institutional memory/ harm to fragile decision-making process

- 2.4 practical

2.4.1 For: e.g. the online register makes it easier to make available large amounts of documents/ distance is no longer an issue/ prevent leaking/ all departments equally bound by the law

2.4.2 Against: e.g. it is impossible to control who accesses online documents/ a MS's position may be misquoted or misinterpreted in minutes or draft memoranda/ top-down imposed transparency will cause resistance

- 2.5 security

2.5.1 For: e.g. it has not been clearly demonstrated that public security is threatened by disclosure

2.5.2 Against: e.g. disclosure will hamper fight against crime, security threatened, put individuals at risk, endanger military operations

- 2.6 other

2.6.1 For: e.g. more transparency despite nuances and differences

2.6.2 Against: e.g. interinstitutional power balance may be affected/ not every part of the policy cycle is equally suitable/ different institutions, different functions

3. Events – *in terms of trends and events, what issues are at play in position and argumentation?*

- 3.1 internal

Interistitutional events / new member states /presidency

- 3.2 external

e.g. developments in information technology/social outrage over political scandal

4. Context – *which contextual coordinates help to interpret what is being said?*

-4.1 actor: who says it?

- 4.1.1 Council
- 4.1.2 Sweden
- 4.1.3 the Netherlands
- 4.1.4 the United Kingdom
- 4.1.5 France
- 4.1.6 presidency

- 4.2 arena: where is it said?

- 4.2.1 Working Party
- 4.2.2 Coreper
- 4.2.3 Council
- 4.2.4 European Council
- 4.2.5 EU Courts
- 4.2.6 Public or press statement
- 4.2.7 National Government
- 4.2.8 Other

- 4.3 point of reference: what objective of the debate is the document contributing to?

- 4.3.1 Daily operation
- 4.3.2 Council Rules of Procedure
- 4.3.3 EU Legislation
- 4.3.4 EU Court case
- 4.3.5 National, political, electorial
- 4.3.6 Interinstitutional agreement
- 4.3.7 Unknown or Other

Notes

Chapter 4

(1) The institutional context that is described in this chapter dates from the period between 1992 and 2009. On 1 December, Lisbon Treaty came into force, structurally altering the EU's institutional arrangements. For a comprehensive overview of the current institutional context, see D. Chalmers, G. Davies and G. Monti (2010), *European Union Law* (Cambridge: CUP). For an initial analysis of the Treaty's impact on the transparency policy, see D. Curtin (2011), 'The Role of Judge Made Law and EU Supranational Government: Beyond Translucence?', paper presented at the First Global Conference on Transparency Research, 19 and 20 May 2011.

Chapter 5

(2) WOB 1991: art. 2.
(3) Frost 2003: 95, Monde Économie 2000.
(4) T. Bunyan, interview.
(5) Settembri 2005: 639.
(6) Bunyan 2002: ch. 1, LA Times 1996.
(7) Curtin 2011: 4, Frost 2003: 93.
(8) Westlake cited in Bunyan 2002, ch. 1.
(9) Schwaiger cited in LA Times 1996.
(10) Kranenborg and Voermans 2004, Öberg 1998: 1.
(11) Regulation EEC/Euratom 354/83.
(12) Monde Économie 2000, see also Curtin 2011: 4, Frost 2003: 95, Peterson 1995: 474, Council Access to Documents Unit, interview.
(13) Peterson 1995: 474.
(14) Pressens Samarbetsnämnd 1993.
(15) Tweede Kamer 1993.
(16) Volkskrant 1993.
(17) Guardian 1994a, Guardian 1994b.
(18) Letter Carvel 1994, Guardian 1994c.
(19) Stasavage 2005: 2.
(20) Monde Économie 2000, Council 1996: 3.3-4.
(21) Grønbech-Jensen 1998: 186.
(22) LA Times 1996, Volkskrant 1996b.
(23) Öberg 1998: 5.
(24) Monde Économie 2000.
(25) Volkskrant 1996a, author's translation.
(26) LA Times 1996.
(27) Volkskrant 1996a.
(28) T. Bunyan, interview.
(29) Bijsterveld 2004: 19.
(30) Treaty on European Union, 17. Declaration on the right of access to information, Maastricht, 7 February 1992.
(31) European Council in Birmingham, Presidency Conclusions, Birmingham, 16 October 1992.
(32) European Council in Edinburgh, Presidency Conclusions, Edinburgh, 12 December 1992.
(33) Council Resolution on the quality of drafting of Community legislation, 8 June 1993.
(34) Groupe Horizontal, Resultats des travaux (9925/93), 4 November 1993.
(35) Europol Working Group, Memo (11143/96), 30 October 1996.
(36) Council Decision adopting the Council's Rules of Procedure (93/662/EC), 6 December 1993.
(37) Council Decision on public access to Council documents (93/731/EC), 20 December 1993.
(38) 1847th Council meeting (General Affairs), Conclusions, 29 May 1995.
(39) 1871st Council Meeting, (General Affairs), Statements, 2 October 1995.
(40) Report on the implementation of the Council Decision on public access to Council documents, 1 July 1996.
(41) 1977th Council meeting, (General Affairs), Conclusions, 6 December 1996.
(42) Report on the implementation of the Council Decision on public access to Council documents, 1 July 1996.
(43) Consolidated Treaty establishing the European Community, Amsterdam, 2 October 1997, author's italics.
(44) Consolidated Treaty establishing the European Community, Amsterdam, 2 October 1997, 35. Declaration on article 191a(1) of the Treaty establishing the European Community.
(45) Second half of 1992.
(46) UKRep Brussels, Openness: menu of suggestions, 20 October 1992.
(47) Birmingham follow up: Openness and Subsidiarity, 2 November 1992.
(48) Ministry of Agriculture, Fisheries and Food, Openness: addition to list, 21 October 1992. Briefing note on Openness, 22 October 1992.
(49) UKRep Brussels, Openness: menu of suggestions, 20 October 1992.
(50) Briefing note on Openness, 22 October 1992.
(51) Birmingham follow-up: Openness and Subsidiarity, 2 November 1992.
(52) UKRep Brussels, Openness: menu of suggestions, 20 October 1992. Cabinet Office, Openness: draft list of Whitehall's ideas, 20 October 2010.
(53) Presidency Coordination Unit: Briefing note on Openness, 3 November 1992.

(54) Birmingham follow-up: Openness and Subsidiarity, 2 November 1992.
(55) Ministry of Agriculture, Fisheries and Food, Openness: addition to list, 21 October 1992. Briefing note on Openness, 22 October 1992.
(56) Presidency Coordination Unit: Briefing note on Openness, 3 November 1992.
(57) EU/Toegang tot informatie, bestemd voor Kopenhagen, 20 January 1994.
(58) Algemene Raad, Notitie/Instructies Openbaarheidsdossier, 6 December 1993.
(59) Parlementaire betrokkenheid besluitvorming in Unie kader (Londen), 23 November 1993. Parlementaire betrokkenheid besluitvorming in unieverband (Parijs), 24 November 1993. Algemene Raad, Notitie/Instructies Openbaarheidsdossier, 6 December 1993.
(60) Algemene Raad, Notitie/Instructies Openbaarheidsdossier, 6 December 1993.
(61) Algemene Raad, Notitie/Instructies Openbaarheidsdossier, 6 December 1993.
(62) Parlementaire betrokkenheid en openbaarheid van ontwerp-besluiten JuBi-raad, 23 November 1993.
(63) Algemene Raad, Transparantiedossiers, Spreekpunten, 6 December.
(64) Algemene Raad, toegang publiek tot documenten Raad; spreekpunten, 16 May 1994.
(65) Algemene Raad, toegang tot informatie, spreekpunten, 13 June 1994.
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